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File No: 450274

October 10, 2024

VIA EMAIL: Nikki.Parkinson@airdrie.ca & Appeals@airdrie.ca

ATTENTION: City of Airdrie Subdivision and Development Appeal Board

Dear Sirs and Madams:

RE: Appeal for cancelation of tenancy permit 52-12 at 2, 69 East Lake Cres (Block 2, Plan 8710742) – Merit Hearing Written Submission

[1] The following is the written submission of 1818622 Alberta Ltd. (the "**Appellant**") to the Subdivision and Development Appeal Board ("**SDAB**"). In particular, the herein written submission are regarding the merits of the appeal. It is submitted that the City of Airdrie Development Authority (the "**Development Authority**") did not have jurisdiction to "cancel" the Appellant's Development Permit, and even if it did have such jurisdiction, it lost jurisdiction due to a number of procedural fairness violations, including bias, and the decision was unreasonable.

[2] The Appellant's Development Permit was issued under the 2008 *Land Use Bylaw* B.24/2008 ("***Old LUB***") in 2012, not the 2016 *Land Use Bylaw* B-01/2016 ("***LUB***") which contains s.2.8.7(5) therein purporting to give jurisdiction to cancel the Appellant's Development Permit for breach of conditions. ***Old LUB*** has no like provision to s.2.8.7(5) permitting the Development Authority to unilaterally cancel the Appellant's Development Permit on the basis of a violation of a condition of the Development Permit. The Appellant has a vested right to the Development Permit under the law as it existed when issued in 2012 which is the ***Old LUB,*** and the Development Authority had no jurisdiction to retroactively apply s.2.8.7(5) of ***LUB*** to cancel a Development Permit issued under ***Old LUB*** for violation of a condition, as no such provision existed under ***Old LUB***: *Interpretation Act,* RSA 2000, c I-8, s.35(1)(c) & s.36(1)(c); *Re Teperman & Sons Ltd. and City of Toronto et al.,* 1975 CanLII 669 (ON CA) [**Tab 1**]; and *Pro-Man Construction v. DeBow,* 1998 ABQB 17, para. 65-70 [**Tab 2**].

[3] The Development Authority has no jurisdiction to determine if there was a "***violation*** *for failure to comply with the Development Permit conditions*" in s.2.8.7(5) of ***LUB***. At s.640(2)(c)(iii) of the ***Municipal Government Act*** it requires a land use bylaws to "***establish a method of making decisions on applications*** *for development permits and issuing development permits for any development, including …. **provision for processing an application for**, or issuing, **cancelling**, suspending or refusing to issue, **a development permit***". There is nothing in ***LUB*** regarding the

requirement for a "*method of makings decisions*", providing for the "*applications*" to cancel, or a "*provision for processing an application"* to cancel a Development Permit as s.640(2)(c)(iii) of the ***Municipal Government Act*** RSA 2000, c M-26 requires, other than that of Alberta Court of Justice in deciding same via a violation ticket under s.2.8.6. of ***LUB***. In particular, the Development Authority do not have any process set out in the ***LUB*** for there to be an application to cancel a development permit. The ***LUB*** is either:

> (i) Not in conformity with s.640(2)(c)(iii) of the ***Municipal Government Act*** in that it provides no process for an application to cancel a Development Permit on the basis that a violation of one of its conditions has occurred and thereafter determine if a violation has occurred, and therefore the decision to cancel is a nullity; or
>
> (ii) The process is that before Alberta Court of Justice regarding offences in s.557(a.4) of the ***Municipal Government Act*****,** being contravenes or not complying with "*a development permit or subdivision approval or a condition of a permit or approval under Part 17*". Either way, the Development Authority had no jurisdiction to, on its own volition and *ex parte*, decide to find a violation of the conditions of the Development Permit and cancel it. All of s.2.8 of ***LUB*** are the enforcement mechanisms as stated in s.7(i), and it's subsections (i) through (viii) in s.7 of the ***Municipal Government Act,*** which are governed under Part 13, Division 4, *Enforcement of Bylaws*, beginning at s.541 through to s.556, and therefore the decision to cancel is a nullity.

It was not intended by the Legislative Assembly of Alberta to permit municipalities to pass land use bylaws under s.640(2)(c)(iii) of the ***Municipal Government Act*** that permit the arbitrary *ex parte* "*canceling*" of a Development Permit by the Development for violation of a condition, let along for violation of a conditions of Development Permit issued in 2012, almost 12 years after it was issued, without any form of due process.

[4] The decision of the Development Authority to cancel the Development Permit was a nullity, as the decision of the Development Authority "***must*** *state whether an appeal lies to a subdivision and development appeal board or to the Land and Property Rights Tribunal*" and it did not, which is a mandatory statutory requirement under s.685(1.1) of the ***Municipal Government Act***: see ***Interpretation Act***, s.28(2)(d) "*In an enactment … "must" is to be construed as imperative*"; "*must*" being the same a "*shall*" in s.28(2)(f). In the result the decision of the Development Authority to cancel the Development Permit is a nullity, as it does not contain the imperative statement that s.685(1.1) of the ***Municipal Government Act*** requires: ***Trans-Canada Pipe Lines Ltd. v. Township of Macaulay,*** 1963 CanLII 319 (ON CA) [**Tab 3**]; and ***Alberta Securities Commission v Felgate***, 2022 ABCA 107 [**Tab 4**].

[5] There is no condition in the Appellant's Development Permit that could be subject to breach. The Development Authority relies on the following condition being breached to ground the cancellation under s.2.8.7(5) of ***LUB***:

> This approval applies to the site and uses as indicated on the application form and plans provided and approved. **Any changes require a new application.**

The argument of the Development Authority is that the Appellant's property being used for something declared by the Court of King's Bench to be beyond the scope of the Appellant's Development Permit, gives the Development Authority jurisdiction to revoke the Development Permit under s.2.8.7(5) of ***LUB*** as the Appellant breachd the condition of "*any changes require a new application*". The Development Authority is wrong. The Development Authority cannot use this condition in that way, as it's "**mere surplusage**" and unenforceable, because it simply declares the operation of the ***Municipal Government Act***, ***Old LUB*** and even ***LUB***. In particular, s.616(b)(iii) of the ***Municipal Government Act*** states that "*change of use*" constitutes a development, s.2-4(3) of ***Old LUB*** states "*A tenancy permit shall be obtained whenever a change of use or change in use intensity takes place, prior to the occupancy of a building or part of a building*", and s.1.1(3) and s.2.3.1(1) of *LUB* are the same effect. As the condition that the Development Authority seeks to enforce, is that any change of use requires a, application for a development permit, and that being the law at statute in any event, the phrase "*Any changes require a new application"* is mere surplusage and cannot form the basis of a breach under s.2.8.7(5) of ***LUB***: see ***Labour Relations Board (B.C.) v. Canada Safeway Ltd.*** [1953] 2 S.C.R. 46, para. 10 [**Tab 5**]; ***Perini Ltd. v. I.U.O.E., Local 870*** 1959 CarswellSask 36, para. 10-11 [**Tab 6**]; ***Wilfong, Re*** 1962 CarswellSask 9 (Sask. C.A.) [**Tab 7**]**;** and ***R. v. Brooks*** 2003 CarswellOnt 3730 [**Tab 8**].

[6] The Development Authority's decision to cancel the Development Permit was irreparably tainted by a reasonable apprehension of bias. The SDAB is bound to consider the bias of the Development Authirty as a ground to grant the appeal, and the hearing at the SDAB itself cannot remedy the matter: ***Stewart v. Lac Ste. Anne (County) Subdivision and Development Appeal Board***, 2006 ABCA 264, para. 17-29 [**Tab 9**] In particular, the Development Authority and its specific delegated decider in this matter, Gail R. Gibeau, provided evidence and submissions in support of the injunction that was sought against the Appellant in the Court of Kings Bench: see Affidavit of Brad Tomilson sworn January 8, 2024 and filed with the Court of King's Bench on January 9, 2023, at paragraphs 2-6 and Exhibit "A" therein [**Tab A]**. When the injunction application was lost on June 3, 2024, three days later Gail R. Gibeau, not getting the desired resulted before the Court, made a bias decision to cancel the Appellant's Development Permit. This was unquestionably not permitted, as no one can be the decider in their own cause**:** ***Roncarelli v. Duplessis***, [1959] S.C.R. 121 [**Tab 10**] and ***Cartwright v Rocky View County Subdivision and Development Appeal Board***, 2020 ABCA 408 [**Tab 11**]. The situation has been made worse by the submissions submitted by the Development Authority on October 10, 2024 as the submissions violate the appropriate role of the Development Authority before the SDAB: ***Springfield Capital Inc. v Grande Prairie (Subdivision and Development Appeal Board)***, 2018 ABCA 203, para. 19-20 [**Tab 12**]. Further, none of the Development Authority's submissions are relevant, just as the same submissions were not relevant before the Court of King's Bench as pointed out a number of times by the Justice. The only thing the Court of King's Bench found beyond the scope of the Development Permit, was that the Appellant was not charging a fee. If the Appellant charged a fee, there was no breach. The only relevant consideration at all is activity of the Appellant that was in breach. There is no breach for having dogs at the premises. Nor is there any breach arising from treatment or purported care of said dogs. None of that is relevant, and the Development Authority has gone beyond its role, and the SDAB will error in jurisdiction, if it gives any merit to the irrelevant submissions from the Development Authority.

[7] The Development Authority's decision under s.2.8.7(5) of ***LUB*** was entirely arbitrary. There is no statutory criteria for if there is a violation of a condition of a Development Permit regarding if:

a. The Development Authority should exercise their discretion under s. s.2.8.7(5); and
b. If the discretion is exercised, whether cancelation or suspension was appropriate.

For the same reason that Court of Kings' Bench did not grant the injunction, the Development Authority should not have cancelled the Development Permit under s. s.2.8.7(5) *LUB*. Further, there should be reason as to why the lesser intrusive means, a suspension, was not appropriate. Of note, there is no further evidence submitted beyond what was before the Court of King's Bench when it dismissed the injunction application and issued a declaration. There is no evidence that since the declaration that the Appellant has been in breach. What should have issued was a Stop Order regarding the activities of the Appellant that the Court of King's Bench found to be beyond the scope of the Development Permit, nothing more.

Yours very truly,

FOSTER LLP

Brendan M. Miller

Re Teperman & Sons Ltd. and
City of Toronto et al.

(1975), 7 O.R. (2d) 533

ONTARIO
COURT OF APPEAL
KELLY, JESSUP
and HOULDEN, JJ.A.
18TH FEBRUARY 1975

Municipal law -- Demolition permits -- Wreckers applying for demolition permits for several houses while some still occupied -- Whether entitled to issuance of permits -- Whether right to demolition superseded by Planning Amendment Act, 1974.

Planning legislation -- Demolition permits -- Wreckers applying for demolition permits for several houses while some still occupied -- Whether entitled to issuance of permits -- Whether right to demolition superseded by Planning Amendment Act, 1974.

Statutes -- Retroactivity -- Amending legislation empowering municipalities to pass by-laws creating areas of demolition control -- Demolition permit to be obtained from council -- Whether legislation retroactive so as to affect pre-existing rights to demolition -- Planning Act, s. 37a(6), (16).

The fact that some houses are still occupied by tenants who have refused to vacate the premises should not prevent the issuance of demolition permits, the applications for which comply in all respects with a building by-law passed pursuant to s. 38(1), para. 7 of the Planning Act, R.S.O. 1970, c. 349. Where the building commissioner of a municipality refuses to issue permits for that reason, mandamus may issue to compel him and the municipality to do so. Moreover, as soon as the proper

applications for such permits were submitted, the applicant's rights thereto crystallized and survived the subsequent enactment of s. 37a of the Planning Act by the Planning Amendment Act, 1974, c. 53, s. 6, which provides for the creation of areas of demolition control and pursuant to which the municipality passed a by-law of demolition control encompassing the applicant's property. That legislation is not retrospective by express words and in particular s-s. (6), which provides that where a building permit has been issued a demolition permit shall be issued, and s-s. (16), which provides that where a demolition permit is obtained under s. 37a no permit is required under a by-law passed under s. 38(1), para. 7, do not imply retroactivity.

APPEAL from the judgment of the Divisional Court, 5 O.R. (2d) 507, 50 D.L.R. (3d) 675, dismissing an application for mandamus directing the issuance of demolition permits and for declaratory relief.

J.E. Eberle, Q.C., and Julia Ryan, for applicant, appellant.

D.C. Lyons, Q.C., for respondents.

The judgment of the Court was delivered orally by

JESSUP, J.A.:-- On May 7, 1974, the applicant applied to the Building Commissioner of the City of Toronto pursuant to the building by-law (No. 300-68) for permits for the demolition of some 36 dwelling-houses on Quebec and Gothic Aves. in the City of Toronto on which the owners intended to construct apartment buildings in accordance with the zoning of the lands on which the buildings are located. The application complied in all respects with the by-law and was supported with all the requisite material. The Commissioner has withheld the issuance of permits on the grounds that some few of the dwelling-houses were still occupied.

Meanwhile, on June 28, 1974, the Planning Amendment Act, 1974 (Ont.), c. 53, came into force; it added [by s. 6] s. 37a to

the Planning Act, R.S.O. 1970, c. 349. That section provides that a council of a municipality may declare an area of demolition control and that thereafter there shall not be demolition of any residential property in the area without the issuance of a permit by council. The City of Toronto promptly declared the entire area of Toronto as an area of demolition control.

The Divisional Court, for reasons with which I agree, held that under the terms of the by-law, the circumstance that certain of the residential dwelling-houses were still occupied did not justify the refusal to issue demolition permits applied for. In the result, the Court held that the applicant had a right on May 7, 1974, to the demolition permits it applied for. However, with respect to that right, the Divisional Court in a careful judgment, the reasons of which were given by Mr. Justice Henry, said [5 O.R. (2d) 507 at pp. 516-7, 50 D.L.R. (3d) 675 at pp. 684-5:

> In the case at bar, Teperman had a right to the issue of the demolition permits on May 7, 1974. That right crystallized by its making the application. But the right to demolish the house was not created by the permit or the right to it; nor was it a property right. As we have said, the permit merely removes the restraint on the general right of an owner to dispose of a building on his land. (We here assume Teperman to be in the same position as the owner.) Thus, Teperman did not then acquire a particular right in the sense of the authorities and no particular right has been taken away by the enactment of section 37a and its implementing by-law. Teperman is in the same position as any other person who may be at liberty to demolish subject to any law that has been or may be enacted affecting that activity.

In my respectful opinion, there is no precedent in law for the principle which the Divisional Court there followed. In my view, the right which Teperman acquired on May 7, 1974, was an acquired or crystallized right, within the meaning of the authorities and one which accordingly survived subsequent legislation, in the absence in that legislation of express words or necessary implication for a retrospective effect.

With respect to the retrospective effect of s. 37a of the Planning Act, Mr. Justice Henry said in his reasons [at p. 518 O.R., p. 686 D.L.R.]:

> On this approach, the question is whether the Legislature intended to leave intact, and to allow to take effect any proceeding put in motion under the former provisions, namely, s. 7 of the building by-law. Again a distinction has been made as to the right to obtain the permit and the right to demolish the buildings.
>
> Legislature has put its mind to the possible interaction of s. 37a and prior provisions in municipal by-laws. For example, by s-s. (6) it is provided that subject to certain matters, the council shall on application issue a demolition permit where a building permit has been issued to erect a new building on the site of the residential property sought to be demolished. In that circumstance, there is an absolute right to obtain a permit from the council. Nothing is said about what is to happen if a demolition permit has previously been issued and we conclude that the Legislature did not intend to entrench it.
>
> Furthermore, s-s. (16) provides that where a permit to demolish residential properties is obtained under the new provision it is not necessary for the holder to obtain a permit from the Commissioner under the building by-law (which is a by-law under s. 38(1), para. 7). Here again, the interaction of the new section with the building by-law has been considered by the Legislature and the obtaining of a licence under the building by-law is made unnecessary.

In my respectful opinion, neither s-s. (6) nor s-s. (16) of s. 37a lead to the conclusion that a retrospective effect to the legislation is to be inferred. Indeed, at least with respect to s-s. (16), it is very arguable that exactly the opposite inference is to be drawn.

In my respectful submission, there is nothing in the legislation under consideration which by express words or

necessary implication abrogates the right acquired by the applicant on May 7, 1974.

In the result, the appeal must be allowed with costs. I would set aside the judgment of the Divisional Court and in its place order and adjudge that the applicant receive the relief set out in the notice of motion dated August 25, 1974, and further declaring that the provisions of s. 37a of the Planning Act are not applicable to the demolitions to be carried out pursuant to the permits ordered to be issued. The applicant will also have its costs below.

Appeal allowed.

Pro-Man Construction v. DeBow, 1998 ABQB 17

Date: 19980108
Action No. 8203-36622

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

Between:

PRO-MAN CONSTRUCTION

Plaintiff

- and -

LENNIE DeBOW AND MARTIN

Defendants

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE D. LEE

Application Heard: October 31st, 1997
Decision Rendered: January 8th, 1998

INDEX

NATURE OF THE APPEAL

[1] The Appellant, Pro-Man Construction ("Pro-Man"), appeals the decision of Master W. Breitkreuz dated the 28th day of February, 1997 dismissing the Plaintiff's action for failing to take a step for five years pursuant to Rule 244.1(1) of the Alberta Rules of Court. No Reasons for Judgment are available as there was no tape of the Master's Oral Reasons for the Order granted.

[2] The Statement of Claim in the within action was issued October 19, 1982. It states that the Defendant, on or about July 1, 1980, failed to honour an assignment, of which it allegedly had notice, entered into between the Plaintiff and two companies in connection with the Defendant's receipt of the sum of $500,000 from Alex and Jane Opalinski, purchasers of a building that the Plaintiff was constructing.

STEPS IN THE ACTION

[3] The steps taken in this Action are as follows:

(a) Statement of Claim filed October 19, 1982;

(b) Statement of Defence filed November 28, 1983;

(c) Affidavit of Documents of the Defendant filed December 20, 1983;

(d) Examinations for Discovery of Bruce Martin held January 11, 1984;

(e) Affidavit of Documents of the Plaintiff filed July 13, 1984;

(f) Examination for Discovery of Heinz Kaiser held August 14, 1989;

(g) Answers to Undertakings by Heinz Kaiser were provided by a letter dated November 25, 1991 from Geddes to Parlee, which correspondence was received December 3, 1991.

[4] On March 10, 1994, a Notice of Motion and Affidavit were filed on behalf of the Plaintiff seeking leave to take the next step. The application was scheduled to be heard April 11, 1994.

[5] The application was adjourned *sine die* at the request of counsel for the Defendant as Examinations on Affidavit of Joan Kaiser were requested.

[6] On January 20, 1997, a Notice of Motion and Affidavit were filed on behalf of the Defendant seeking to strike the action for want of prosecution pursuant to Rule 244.1(1) of the Alberta Rules of Court, also inelegantly known as the "drop-dead Rule".

[7] The Affidavit and Supplemental Affidavit of Malcolm Lennie filed in support of the application make no references to actual prejudice suffered by the Defendant in the prosecution of the defence of the action.

[8] In cross-examination on his Affidavit, Malcolm Lennie acknowledged that providing Answers to Undertakings was a "step to advance the action." [Examination of Undertakings of Malcolm Lennie, page 4, lines 13-21.]

[9] The Affidavit of Joan Kaiser, sworn in support of the application to take the next step, indicates that the next step in the action, contemplated by the Plaintiff, is to apply for an amendment to the Statement of Claim alleging a different transaction as the basis for the Plaintiff's cause of action (Exhibit "A" to the Supplemental Affidavit of Malcolm Lennie).

[10] Upon receipt of the Plaintiff's Notice of Motion with respect to the Plaintiff's application to take the next step, counsel for the Defendant advised counsel for the Plaintiff that he wished to examine Mrs. Kaiser on her Affidavit (Paragraph 2, Supplemental Affidavit of Malcolm Lennie).

[11] The application to take the next step was adjourned so that either Mrs. Kaiser could be produced to be examined on her Affidavit or, alternatively, an Affidavit could be obtained from Mr. Kaiser on the basis that he would have personal knowledge of the matters deposed to (paragraph 3, Supplemental Affidavit of Malcolm Lennie).

[12] Counsel for the Plaintiff wrote to the Defendant's counsel by letter dated June 29, 1994, concerning the examination of Mr. Kaiser. Counsel for the Defendant wrote to the Plaintiff's counsel on July 7, 1994, making it clear that they required an examination of Mr. Kaiser on his Affidavit, should such an Affidavit be forthcoming (Paragraph 4, Supplemental Affidavit of Malcolm Lennie).

[13] No Affidavit was ever received from Mr. Kaiser, and neither Mr. Kaiser nor Mrs. Kaiser was ever produced to be examined in support of the application. The application to take the next step was never proceeded with (Paragraph 5, Supplemental Affidavit of Malcolm Lennie).

[14] Nothing further was done to advance the within action following September 1, 1994, when it was no longer necessary to obtain an order to take the next step (Paragraph 6, Supplemental Affidavit of Malcolm Lennie).

[15] The Defendant applied for dismissal of the within action by Notice of Motion filed January 20, 1997; and sworn in support of the said application was the Affidavit of Malcolm Lennie and the Supplemental Affidavit of Malcolm Lennie.

[16] Mr. Lennie was examined on his Affidavit on February 18, 1997.

[17] Master Breitkreuz granted an Order dismissing the Plaintiff's action, pursuant to Rule 244.1(1) of the Alberta Rules of Court, on February 28, 1997.

[18] The Plaintiff filed a Notice of Appeal with respect to the said Order on May 29,1997.

OUTLINE OF THE PLAINTIFF'S, PRO-MAN CONSTRUCTION'S, ARGUMENT

[19] The Plaintiff submitted that the Alberta Court of Appeal decision of ***Petersen v. Kupnicki*** (1996), 44 Alta. L.R. (3d) 68 is directly on point and is the basis for an order refusing to grant the Defendant's application to strike the action for want of prosecution.

[20] The Plaintiff submitted that the application seeking leave to take the next step, is a step which materially advances the action. That application was filed prior to the expiration of five years

from the last step. It is therefore submitted that Rule 244.1(1) of the Alberta Rules of Court does not apply to this action.

[21] The Plaintiff submitted that the Alberta Court of Appeal decision in ***Hnatiuk v. Shaw***, [1996] A.J. No. 966 should be distinguished. In that action, the Plaintiff had not brought an application for leave to take the next step or any other application which materially advanced the action prior to the application to apply Rule 244.1(1). On facts before me, the Plaintiff had brought such an application, and the Plaintiff submits that therefore ***Hnatiuk v. Shaw*** can be distinguished on that basis.

[22] Things were done to materially advance the action in 1989, 1991, and 1994, and so there has simply been no delay of five years between those things, and so the five-year Rule has no application to the case at bar.

[23] Alternatively, if the last thing done which materially advanced the action was not in 1991, but was instead in August of 1989, that would be over five years before the "drop-dead Rule" came into effect. Thus, the Plaintiff would have found itself in the same "Catch-22" situation with respect to its leave to take the next step application as did the Plaintiff in ***Petersen, supra***. After the new Rules came in, it could only bring its leave application, but the five-year Rule would instead mandate the dismissal of the action.

[24] In filing and serving its original Notice of Motion and Affidavit for a leave to take the next step application in March of 1994, and by adjourning that motion by consent for cross-examination on the Affidavit to take place (which cross-examination never took place), a substantive right to have its leave to take the next application vested in the Plaintiff and crystallized, surviving the repeal of the old leave Rules. This is a right accrued purely under the old Rules, and is entirely independent of whether the "Leave to Take the Next Step" Application amounted to a thing which materially advanced the action under the new Rules.

[25] The "drop-dead Rule" is itself substantive law in that it strips any discretion from the Court in certain situations, interfering with the substantive right of a Plaintiff to have its action proceed in a Court. The "drop-dead Rule" is therefore *ultra vires* the Rules of Court as dealing with more than procedure, and should be struck as being of no force or effect.

[26] Finally, the Plaintiff submits that if the five-year Rule does not apply such that this action is mandatorily dismissed, the Plaintiff should be allowed to continue this action and, in effect, be given leave to take the next step, either on strict terms set forth by the Court or not.

ANALYSIS OF PLAINTIFF'S ARGUMENT

The Five-Year Rule Should Not Apply

A) No Five-Year Gap

[27] The Plaintiff's position is that, in 1994, a thing was done which materially advanced the action under Rule 244.1. If, in addition to this, the last thing which materially advanced the action was 1991, then there has been no delay of five years, and the five-year Rule has no application.

[28] In the context of the present argument, the Plaintiff's position is that, because its application was adjourned *sine die* at the request of the Defendant, for Examinations which never took place, the 1994 application should be regarded as a thing which materially advanced the action.

[29] Alternatively, or additionally, the Defendant should not be able to complain about all, or alternatively part, of the post-1994 period. Although the five-year Rule is mandatory in dismissing an action, a party must first apply under that Rule to strike an action. The Defendant should be estopped from applying on the basis of its conduct in and after 1994.

B) The Catch-22 Situation of ***Petersen***

[30] In the alternative, the Plaintiff submits that the case of ***Petersen v. Kupnicki, supra***, is directly on point. The only possible distinguishing feature is the Plaintiff's answering its own undertakings in 1991. But for those answers, and aside from the leave to take the next step application filed in 1994 as in ***Petersen***, this action would have been entirely dormant in the five years before the new delay Rules came into effect on September 1, 1994.

[31] The Plaintiff therefore submitted that, in fact, by acquiescing to the Defendant's request for an adjournment in 1994 of the Leave To Take The Next Step Application, the Plaintiff put itself into the same position as the Plaintiff in ***Petersen, supra***. That is, once the new Rules came in and the five-year "drop-dead" provisions were in place, five years had already elapsed since the last thing had occurred which materially advanced the action, aside from the filing of the Leave Application.

[32] Although there has been delay since 1994, the Plaintiff submitted that the activity in 1991, though not a "thing that materially advanced the action", offsets that delay and re-balances the equities of not invoking the five-year Rule to the Plaintiff's leave to take the next step application. Put another way, there is an arbitrary and unfair disadvantage to the Plaintiff if it would have been in a better position had it done absolutely nothing since 1989 in this action.

[33] Although ***Hnatiuk v. Shaw, supra,*** purports to follow the case of ***Richardson v. Honeywell*** (1996), 181 A.R. 247 (Alta.C.A.) as standing for the proposition that the five-year rule applies to both pre- and post-September 1, 1994 delay, the Plaintiff submits this is a misreading of ***Richardson v. Honeywell***.

[34] That case, also a memorandum of judgment delivered from the Bench, held that a leave to take the next step application was moot and unnecessary given the new Rules.

[35] The Plaintiff submits that given the crucial nature of a leave to take the next step application after September 1, 1994 in ***Petersen v. Kupnicki*** in preserving that action, such an application was hardly "moot" and, to that extent, ***Petersen v. Kupnicki*** effectively overruled what little precedential value ***Richardson v. Honeywell*** ever had.

[36] However, this might be a difficult direct proposition to establish since ***Petersen*** was decided approximately one month before ***Richardson***, and neither case directly refers to the other.

[37] Finally, in the Plaintiff's view, ***Hnatiuk v. Shaw*** stated that ***Petersen v. Kupnicki*** applied only where an Application for "Leave to Take the Next Step" was before the Court, and that is

the situation in the case at bar. Again, this is not a view I share based on my reading of ***Hnatiuk v. Shaw***.

[38] Also, the "Leave to Take the Next Step" Application in ***Petersen*** was brought forward after September 1, 1994 under the old Rules by specific agreement of the parties, which is a critical difference in the facts in the case at bar.

"VESTED RIGHTS" UNDER THE OLD RULES

[39] This argument of the Plaintiff's is independent of its first two arguments and does not relate to whether there was a thing done in 1991 to "materially advance the action", or whether the "Leave To Take The Next Step" Application filed in 1994 was a thing that materially advanced this action.

[40] Throughout its submissions, the Defendant argues that the case of ***Petersen v. Kupnicki*** is very much limited to its facts. The Plaintiff argues that the facts of ***Petersen v. Kupnicki*** are similar enough to the case at bar for ***Petersen*** to be on point.

[41] Moreover, the Plaintiff further submits that a plain reading of that case indicates that it is not only restricted in terms of its facts, but also was decided on the basis of limited or no argument on a wide range of issues affecting the application and validity of the five-year rule. As stated by the Court at page 73: "The fact situation here potentially involves the analysis of a wide range of issues. . .".

[42] Those issues were then listed, and a brief discussion followed. At page 74, the Court indicated that counsel conceded that the five-year Rule is procedural, not substantive, on the basis of a House of Lords decision on a rule distinguishable from the Alberta five-year Rule.

[43] On page 75, following this discussion, the Court held as follows:

> Despite the wide range of potential issues identified, it is unnecessary, in the circumstances of this case, to definitively resolve many of these issues and I decline to do so especially since the Court has not had the benefit of full argument on these points. Instead, in resolving this appeal, I have assumed, without deciding, the best possible position from the Kupnicki's [Respondent/Defendant] perspective, namely that the drop-dead Rule is procedural only; that on-going delay prior to September 1, 1994 may be counted for purposes of application of the Rule (subject to my comments about the non-retroactivity of this Rule) and that the repeal of the leave provisions is procedural only and does not interfere with any vested rights on Petersen's part. [Underlining mine]
>
> With these assumptions in mind, I turn to an analysis of the case.

[44] At most, in ***Petersen*** the assumption that the five-year rule is merely procedural and has retroactive effect is merely an assumption that may be made where no question of vested rights is raised and no challenge to the Rule itself is made.

[45] In ***Petersen*** there was no such discussion of "vested rights" or substantive rights, and no such challenge appears to have ever been made to the Rule itself, as it is being made in this case before me. Similarly, Rule 244.1 itself was not the subject of challenge in either ***Hnatiuk v. Shaw*** or ***Richardson v. Honeywell***.

STATUS OF THE ALBERTA RULES OF COURT AND WHETHER THEY HAVE STATUTORY FORCE

[46] The Alberta Rules of Court Regulation 390/68, as amended, are enacted under the ***Court of Queen's Bench Act***, R.S.A. 1980, c. C-29. The Court, in making Rules, exercises delegated administrative or subordinate legislative power, not judicial power: ***Ostrowski v. Saskatchewan***, [1993] 4 W.W.R. 441 at 449 (Sask.C.A.), and cases cited therein.

[47] If validated by the Legislature itself, the Rules at the time of validation assume statutory force: ***Paquin v. Gainers***, [1990] 2 W.W.R. 378 at 383 (Alta. C.A.).

[48] Without statutory validation, the Rules do not have statutory force: ***Hubbard v. Edmonton***, [1917] 3 W.W.R. 732 at 733 (Alta. S.C.A.D.).

[49] A validation of the Rules was given as of November 4, 1976 by 1976 c. 58 s. 6(4), which is found in the ***Judicature Act***, R.S.A. 1980 c. J-1, s. 47.

[50] The last statutory validation of the Rules was on June 18, 1997, s. 47 of the ***Judicature Act*** which provides:

> 47(1) In this section "Alberta Rules of Court" means the Alberta Rules of Court filed as Alberta Regulations 390/68 as amended prior to the commencement of this section.
>
> (2) The Alberta Rules of Court are validated notwithstanding that any provision in the Rules may affect substantive rights.

[51] The "leave to take the next step" rules date back, in one form or another, to the Rules of 1914, which were altered somewhat in 1994, and assumed their final form in the enactment of Regulation 390/68 and s.47 of the ***Judicature Act*** as of June 18, 1997.

WHETHER THE ALBERTA RULES OF COURT CAN AFFECT OR ALTER "SUBSTANTIVE" RIGHTS

[52] Any Rule in force at the date of a statutory confirmation which affects substantive law is not invalid for that reason: ***Stanley v. Jardine Estate***, [1952] 1 S.C.R. 260, and s. 47 of the ***Judicature Act***, ***supra***.

[53] Conversely, a Rule not confirmed by statute is confined to matters of procedure and not substantive law or rights: ***Hubbard v. Edmonton, supra***; ***In re Grosvenor Hotel London No. 2***, [1964] 3 All E.R. 354 (per Lord Denning, M.R.); ***Montreal Trust Company v. Pelkey*** (1970), 73 W.W.R. 7 (Man. C.A.); ***Ostrowski v. Saskatchewan, supra***; ***Circosta v. Lilly***, [1967] 1 O.R. 398 (C.A.); ***Schanz and Schanz v. Richards et al*** (1970), 72 W.W.R. 401 (Alta. Master).

[54] Therefore, the Plaintiff argues that the "leave to take the next step" rules would be *ultra vires* if they relate to substantive rights. If the new five-year Rule goes beyond matters of procedure and interferes with substantive rights, it would be *ultra vires* in the Plaintiff's view.

WHETHER THE RULES OF COURT AMENDMENTS CAN HAVE RETROACTIVE EFFECT

[55] An early discussion of the law of retrospectivity of statutes is contained in ***Upper Canada College v. Smith*** (1920), 61 S.C.R. 413. There is recognized an inherent injustice in construing statutes retroactively to affect parties whose behaviour was based upon the law at the time they acted, not upon the future law of which they could not have known. Thus, statutes (and regulations) are generally presumed not to be retroactive in their effects.

[56] This general rule has exceptions.

[57] Firstly, if the legislature clearly indicates the statute to be retroactive, it is retroactive.

[58] Secondly, the presumption of non-retroactivity does not apply to statutes that are merely procedural in nature and which do not affect substantive rights.

[59] Finally, a rather nebulous exception exists for statutes whose object is to remedy some evil for the protection of the public: ***Acme (Village) School District No. 2296 v. Steele Smith***, [1933] S.C.R. 47, in which a statute requiring an inspector's approval before a teacher could be given notice of termination was held to be retroactive.

[60] Courts, however, should apply this third exception sparingly in my view, as all statutes can be construed as remedial to some extent. Examples of this proposition can be found in ***Snider v. Smith et al*** (1988), 55 D.L.R. (4th) 211 (Alta. C.A.), and ***D.D.S. v. R.H.*** (1993), 141 A.R. 44 at para. 8 (Alta.C.A.).

[61] Further applications of these general legal principles are found in ***Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)***, [1977] 1 S.C.R. 271; ***Martin v. Perrie***, [1986] 1 S.C.R. 41; and ***Angus v. Sun Alliance Insurance Company***, [1988] 2 S.C.R. 256.

WHETHER THE REPEAL OF THE RULES DEALING WITH LEAVE TO TAKE THE NEXT STEP IS A "PROCEDURAL" CHANGE ONLY OR WHETHER IT IS "SUBSTANTIVE" AND INTERFERES WITH A "VESTED RIGHT"

[62] The Plaintiff argues that because of the statutory confirmation of 1976, the old leave to take the next step rules could be construed as affecting "substantive rights". Substantive rights can therefore, at least in theory, accrue or vest under them.

[63] The issue, however, is what constitutes a vested right and whether any rights did in fact vest upon the Plaintiff in the case at bar?

[64] The Plaintiff is not arguing the repeal of the old Rules to be *ultra vires,* but rather that to the extent that those Rules are substantive or affect or grant substantive rights, the repeal of those Rules must be interpreted not to remove those rights.

WHAT QUALIFIES AS A "VESTED RIGHT" (WHETHER UNDER THE *INTERPRETATION ACT*, R.S.A. 1980, C. I-7, OR AT COMMON LAW)

[65] *Black's Law Dictionary, Sixth Edition*, 1991, contains a definition of "vested rights" which is consistent with Canadian treatment of the subject. Paraphrasing briefly, these are rights which have completely and definitely accrued to a person under rules of law existing at the time such rights accrued. Thus, it would be unjust or inequitable to remove these arbitrarily. The right to present or future enjoyment is immediate and fixed, but is not dependent upon an uncertain event. Vested rights cannot be removed retrospectively.

[66] Black's definition of vested rights is consistent with the definition of vested rights at common law: ***D.D.S. v. R.H., supra***; ***Teperman & Sons Ltd. v. Toronto (City)*** (1975), 55 D.L.R. (3d) 653 (Ont.C.A.); ***Oshawa (City) v. 505191 Ontario Ltd.*** (1986), 14 O.A.C. 217 (C.A.); ***Beaton and Bryan v. Canada, Government of*** (1981), 37 N.R. 478 (Fed.C.A.).

[67] The ***Interpretation Act*** R.S.A. 1980 c.I-7, ss 31-33, deals with repeal and substitution of statutes, and arguably expands the common law. These sections state, in part, that when an enactment is repealed in whole or in part, the repeal does not affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed.

[68] Further, if an enactment is repealed and a new enactment is substituted for it, every proceeding commenced under the repealed enactment shall be continued under and in conformity with the new enactment so far as may be consistent with the new enactment.

[69] Of particular significance is s.31(1)(c) of the ***Interpretation Act, supra***, which states that a repeal of an enactment leaves intact not only accrued rights, but rights which are merely accruing under the former enactment. To vest before a repeal or amendment, therefore, a right need not have already accrued before the date of change of the enactment; only a process by which that right may vest must have been commenced.

[70] Section 31(1) of the ***Interpretation Act*** was noted and applied by Côté, J.A., in ***D.D.S. v. R.H., supra***, at paragraph 24, in giving "vested rights" a broad meaning with respect to limitation periods.

WHETHER THE FILING OF AN APPLICATION FOR LEAVE TO TAKE THE NEXT STEP CONSTITUTES A "VESTED RIGHT" AND WHETHER, IN THE CASE AT BAR, THAT RIGHT HAS CRYSTALLIZED TO THE POINT WHERE IT MERITS JUDICIAL PROTECTION

[71] The Plaintiff admits that, unlike in ***Petersen v. Kupnicki, supra***, there is no Court order which has (as yet) held that leave would have been granted under the old Rules.

[72] However, the simple filing of an application for a permit has been found to amount to a vesting and crystallization of a right to apply for mandamus for the permit to issue [***Teperman & Sons Ltd. v. Toronto (City), supra***].

[73] Serving notice of intention to enforce security and filing an action for the appointment of a receiver vested a right to have the Court consider the application without a stay procedure that was enacted before the matter came into Court in ***Bank of Nova Scotia v. Plastic & Allied Building Products Ltd.***, [1993] O.J. No. 2655 (Gen. Div.).

[74] In ***Petersen*** itself, the filing of an application for leave to take the next step was considered a "thing" which materially advanced the action in the circumstances of that action. The decision is silent, however, as to whether the filing of the application vested and crystallized a right in the Plaintiff to have the application heard.

[75] The Plaintiff's Notice of Motion and Affidavit herein were filed March 10, 1994, and were originally returnable April 11, 1994. The application was adjourned *sine die* at the request of counsel for the Defendant.

[76] The application was adjourned *sine die* so that the Defendant could cross-examine the deponent on the Affidavit filed in support of the application. No such cross-examination ever took place.

[77] The Plaintiff submits that too much is made of the fact that the "Leave to Take the Next Step" Application in this matter, until now, was not before the Courts.

[78] The Plaintiff submits that by that argument, the Plaintiff would have been better off proceeding on April 11, 1994, ignoring the Defendant's request for an adjournment to cross-examine on the Affidavit. The result would have been an adjournment for such a cross-examination to take place since such adjournments are granted virtually as a matter of right in this jurisdiction.

[79] The Plaintiff's position is therefore that its consent to adjourning the matter for the cross-examination to take place should put it in no worse a position than if it had not given the Defendant the courtesy of an adjournment by consent. Indeed, in this jurisdiction, consenting to an adjournment for cross-examination is the normal and economical option.

[80] The Plaintiff argues that it should not be punished for not pushing the matter into Court prematurely and agreeing to adjourn the matter. Furthermore, an agreement made in the context of an old legislative regime has been held to crystallize rights under the old legislation in ***Re Cadillac Fairview Corporation Ltd. and Allin et al*** (1979), 100 D.L.R. (3d) 344 (Ont.H.C.).

[81] As well, the fact that cross-examination never took place should estop the Defendant from relying on any subsequent delay in asserting that the Plaintiff's vested rights never crystallized with respect to the leave to take the next step application. After the adjournment, the Defendant failed to proceed until its January 20, 1997 Notice of Motion to strike the Action pursuant to Rule 244.1(1).

[82] As observed by Fraser C.J.A. in ***Petersen v. Kupnicki, supra,*** at page 76, paragraph 18, "Delay never has been, nor is it now, a one-way street." Any reference between counsel to another Affidavit that was never sworn in support of the application is, in the Plaintiff's position, irrelevant.

WHETHER THERE ARE ANY REASONS TO POSTPONE OR RESTRICT THE REPEAL OF THE "LEAVE" RULES EVEN IF THEY ARE "PROCEDURAL" ONLY

[83] As noted by Fraser C.J.A. in ***Petersen v. Kupnicki, supra***, at page 77, "courts have traditionally turned their face against the principle of the retroactive application of legislation, whether substantive or procedural in effect".

[84] ***R v. Ali***, [1980] 1 S.C.R. 221 is cited by the Plaintiff as holding that the presumption that procedural legislation applies retrospectively is just a presumption that can be overcome in the appropriate circumstances.

[85] The Plaintiff's position is that, even if the old Rules were procedural, there are two reasons to postpone or restrict the repeal of the old leave Rules. The first is found in the case of ***Robertson v. Wright*** (1958), 16 D.L.R. 364 (Sask. C.A.), which held that a statute that, while procedural in its character, affects vested rights adversely is to be construed as prospective, and therefore the same would be true for its repeal.

[86] The Plaintiff's second reason is independent of the issue of "vested rights", namely, that there was, on September 1, 1994, a period of just over five years since the last thing was done which materially advanced the action (aside from the Leave to Take the Next Step Application).

[87] Regardless of the issue of vested rights, that would put the Plaintiff into the same "Catch-22" situation as the Plaintiff in ***Petersen v. Kupnicki, supra***, as discussed on page 78 of that decision.

[88] In ***Petersen***, an assumption was made that, in fact, there was no substantive change to the law, and that instead of speaking in terms of "vested rights", the issue was whether the filing of the application was a thing that materially advanced the action.

[89] Simple principles of fairness and the ***Petersen*** decision itself dictate that the repeal of the old Rules should be delayed in such special circumstances where there was nothing the Plaintiff could do but bring its leave to take the next step application.

[90] The Plaintiff argues that if substantive rights did vest and crystallize in the Plaintiff to have the leave to take the next step application heard, then the issue of whether the filing of the next step application is a thing which materially advanced the action becomes irrelevant.

WHETHER THE "DROP-DEAD RULE" IS "PROCEDURAL" ONLY OR WHETHER IT IS "SUBSTANTIVE"

[91] The Rules of Court post-1976 cannot be substantive, but only procedural. If the five-year "drop-dead" Rule is substantive, it would therefore be *ultra vires* the Rules of Court and of no force or effect. Therefore, this argument is really about whether the "drop-dead Rule" is *ultra vires*.

[92] Indeed, it is the position of the Plaintiff that the "drop-dead Rule" is substantive and *ultra vires*.

[93] In ***Petersen*** counsel conceded that it was procedural; indeed, the Court of Appeal somewhat questioned that position and the authority on which that concession was made at pages 74 and 75. However, as there was no full analysis of this issue in the Court, the Court simply accepted the assumptions that were most damaging to the Plaintiff. Therefore, the Court did not consider whether the "drop-dead Rule" is *ultra vires*.

[94] In ***Petersen*** at page 74 the Court did hold that there is no discretionary element in the "drop-dead Rule": "Once the time limit has elapsed . . ., the Court must then dismiss the action. The Rule makes no provision for any residual discretion on the part of the Court to extend the time." A plain reading of the Rule confirms this.

[95] The Court went further, and asked the question (but did not answer) whether the absence of any judicial discretion makes the "drop-dead Rule" akin to a limitation period. The Court observed that limitation periods are substantive law according to the Supreme Court in ***Tolofsen v. Jensen***, [1994] 3 S.C.R. 1022.

[96] I agree that the "drop-dead Rule" is likely a limitation period, and hence it is a substantive rule.

[97] An early Alberta case is ***Paitson v. Rowan and Cuthill*** (1919), 15 Alta. L.R. 74 (S.C.A.D.). This case dealt with the interpretation of a rule stating that when one party gives notice of taxation and the other party has some costs which he is entitled to set off, the other party "shall" bring in a bill of such other costs within seven days of such notice or within such further time as the taxing officer may allow.

[98] In ***Paitson, supra***, the argument concerned whether a judge could extend that time where the taxing officer did not. It was concluded that there was such discretion in the Court, both because of a Rule similar to the modern Rule 548 and the Court's power to relieve against forfeitures. The Court noted, however, that the effect of the passage of time, whether it be years or days, is properly a matter of discretion, and that, at page 76, the Rule in question came very close to being substantive law.

[99] Even more on point is ***Smith v. Christie et al***, [1920] 3 W.W.R. 585 (Alta. S.C.A.D.). Rule 711 at the time stated that actions against any person for anything purporting to be done in pursuance of that person's duty as public officer had to be started within six months from the date the act was committed.

[100] Stuart J.A. observed as follows with respect to that Rule on page 588, but his comments may be equally applicable to the modern "drop-dead Rule":

> Indeed I have very little doubt at all that the Legislature never intended to delegate to a subordinate authority, viz. the Lieutenant Governor in Council the power to impose a limitation of time within which an individual may bring a particular complaint into Court and to destroy in effect his legal right entirely if he fails to seek enforcement within that time. A legal right which cannot be enforced in a Court of law approaches very closely, if not entirely, to a contradiction in terms.

[101] The only thing saving Rule 711 at the time was that it mirrored some statutory provisions which did not have the usual jurisdictional limits of the Rules of Court. The "drop-dead Rule", however, has no statutory basis and has not been confirmed by statute, except by the June 18, 1997 s.47 ***Judicature Act*** amendment.

[102] Although it did not deal with the Rules of Court, ***Rex v. Rivet***, [1944] W.W.R. 132 (Alta. C.A.) held that a statutory provision which limited the time to bring an appeal did, in fact, limit the very right to appeal, and hence was substantive.

[103] In 1993, the Saskatchewan Court of Appeal decided ***Ostrowski v. Saskatchewan (Beef Stabilization Board)***, [1993] 4 W.W.R. 441, ***supra***.

[104] In ***Ostrowski, supra***, a Rule which provided for a six-month time limit for bringing a certiorari application was struck as being *ultra vires*. The Court held that the Rule exceeded the scope of the rule-making power in that it stripped all discretion from the judge in the area of administrative remedies, was "grounded in the mere affluxion of time," was arbitrary in its deadline, and was hence substantive. There is a parallel here with the "drop-dead Rule", as it also strips any discretion from the judge in dealing with delay in litigation, and is grounded in the mere passage of time.

[105] Finally, in ***Montreal Trust Company v. Pelkey and Lusty*** (1970), 73 W.W.R. 7 (Man. C.A.), a five-judge panel was confronted by the argument that a provision in the Manitoba Rules dealing with delay was substantive as it stripped away discretion from the Court. The Chief Justice and the dissenting Justice accepted this argument; the remainder of the panel refrained from deciding the point.

[106] In ***Pelkey, supra***, at pages 14 to 18, the Chief Justice reviewed the status of the Rules of Court throughout Canada with respect to delay, and found that, except in Manitoba, all of them, including the Alberta leave to take the next step rules, were merely permissive, not mandatory. The Chief Justice's comments at pages 16 to 18 include the following:

> It is clear that the differences between Manitoba R. 284(1) and all the other Rules mentioned are great indeed. In the indicated circumstances, if a motion for dismissal is brought, R. 284A(1) mandatorily requires the termination of the plaintiff's substantive right to have his action brought to trial and adjudicated upon.
>
> . . .
>
> In all the other jurisdictions mentioned the Rule is permissive, not mandatory. I have found no jurisdiction in which this is not so. The discretion of the Court is unfettered, save for the fundamental Rule that it must be exercised judicially and for the purpose of doing justice.
>
> . . .
>
> Can it be said with any certainty that justice will be done by following the provisions of R. 284A? In my view the mandatory taking away of the court's discretion may in some cases lead to the opposite result. The purpose of the Rule is to make certain that legal proceedings are pursued with reasonable despatch, but the effect, in the specified circumstances, is to preclude the court from looking at any other circumstances, even though such other circumstances might substantially affect or even be decisive of what is required for essential justice to be done.
>
> . . .
>
> The conclusion to which I have come is that R. 284A(1), commendable though its purpose is, interferes with the substantive right of a plaintiff to have his action adjudicated upon by the court, and that it does so to a substantial degree and in a manner which in some instances may, by the elimination of judicial discretion, actually prevent essential justice from being done. I cannot believe that the legislature intended, by the language employed in s.101(1) of *The Queen's Bench Act*, to confer upon the judges the power to make such a Rule. In my view, therefore, R. 284A(1) is invalid.

CONCLUSIONS

I. *Hnatiuk v. Shaw*

[107] ***Hnatiuk v. Shaw***, ***supra***, an Alberta Court of Appeal decision, does have application in the present case to substantiate that, *prima facie*, delay existing both before and after the introduction of Rule 244.1(1) should be considered in determining whether five years have elapsed since the last thing that was done in the action which materially advanced the action, for the purposes of an application under Rule 244.1(1). That question was considered as an open question in ***Petersen v.***

Kupnicki, supra, filed October 7, 1996 and the subsequent case of ***Hnatiuk v. Shaw*** filed November 8, 1996 appears to have settled the point.

[108] In the present case, the last thing that was done, prior to January 20, 1997, the date of the application under Rule 244.1(1), with the exception of the Plaintiff's Notice of Motion and Affidavit in support of the application to take the next step, was the submission of Answers to Undertakings received December 3, 1991.

[109] Therefore, apart from the filing of the Plaintiff's Notice of Motion and Affidavit in March of 1994, the case falls squarely within ***Hnatiuk v. Shaw, supra***.

[110] One issue is, therefore, whether the filing of the Notice of Motion, in March of 1994, materially advanced this Action, in the circumstances of this case. If it did, then clearly Rule 244.1 does not apply. In my view, the Plaintiff's filing of the March 1994 Notice of Motion in the circumstances did not "materially advance" their Action.

II. *Petersen v. Kupnicki*

[111] A time-line comparison between the case at bar and ***Petersen v. Kupnicki*** follows:

Pro-Man v. Lennie, Debow & Martin	Petersen v. Kupnicki
Statement of Claim Filed - October 19, 1982	Statement of Claim Filed - January 10, 1986
Examinations for Discovery Conclude - August 14, 1989	Examination for Discovery Conclude - April 9, 1989
Answers to Undertaking - December 3, 1991	
Leave Application to take the Next Step - March 10, 1994	Leave Application to Take the Next Step - August 23, 1994
Leave Application Adjourned by Consent April 11, 1994	Leave Application Adjourned by Consent - August 31, 1994
R.244.1 Comes Into Effect - September 1, 1994	R.244.1 Comes Into Effect - September 1, 1994
R. 244.1 Application to Strike by Defendant - January 20, 1997	R.244.1 Application to Strike by Defendant - October 21, 1994

[112] Firstly, ***Petersen v. Kupnicki, supra,*** does not stand for the proposition that the filing of a Notice of Motion for an application to take the next step constitutes a thing which "materially advances the action", in all cases.

[113] Throughout the judgment, Chief Justice Fraser makes it clear that her reasons are tied particularly to the circumstances of that case and the particular unfairness, in the circumstances of that case, which would arise if the Court applied the "drop-dead Rule".

[114] In that case, the last step that had been taken in the action occurred on April 9, 1989. The Plaintiff's application to take the next step was filed August 23, 1994, that is, in excess of five years from the period of time when the last step had been taken.

[115] Also, it appears from paragraph 5 in ***Petersen, supra,*** that the application was not heard, by consent, until after September 1, 1994. Finally, it is clear that the application was, in fact, heard and granted in November of 1994.

[116] Further, it is clear, from a review of the case, that the Defendants took the position that the Plaintiff could not have proceeded with the action after September 1994, because of the elapse of five years prior to the last step. [Reference in this regard may be made to paragraphs 23, 24, 25, 26, 27 and 28 of the ***Petersen*** decision.]

[117] In paragraph 22 of ***Petersen,*** Chief Justice Fraser refers to the common law presumption that procedural legislation applies immediately, in general, not only to future acts but also to pending ones.

[118] She then goes on, however, to say, in paragraph 23, that in the circumstances of the case then before her, there was reason to defer the immediate application of the repeal of the leave Rules because, at the time the leave Rules were repealed, the plaintiff had an outstanding application for leave to take the next step, which had not yet been heard.

[119] She goes on to point out that, in the particular circumstances of the case, to apply the new Rule would put the plaintiff in "an untenable and unacceptable position" because, as stated in paragraph 24, she was precluded, by law, from taking any step in the action before the new delay Rules became effective and, as such, she had applied for leave to take the next step prior to the new Rules coming into effect.

[120] The application was not heard before the commencement date of the new Rules because, "Her counsel had consented to the leave application being adjourned to a date past the effective date of the new Rules on the assumption that the old Rules would continue to apply." This most important distinction does not apply to the facts in the case at bar.

[121] Chief Justice Fraser, in paragraph 25, refers to the fact that, if the Rules were given immediate effect, the application for leave would be redundant and the plaintiff would not have been entitled to an order to take the next step. However, the defendant's position was that the Court would be mandatorily required to strike the plaintiff's action under the drop-dead rule "on the basis that, even though Petersen could do nothing without leave before the new delay Rules came into effect and even though she had applied for leave before the new Rules came into effect, all this would count for nothing."

[122] That the defendants took the position that she could not have proceeded, after September 1, 1994, to do a thing which materially advanced her action, is stated in paragraph 26. In this regard, Chief Justice Fraser stated:

> I concede that in theory, there was nothing to prevent Petersen from doing some 'thing' to materially advance her action between the effective date of the new Rules, September 1, 1994 and the date of the Kupnickis' application to dismiss for want of prosecution on October 21, 1994. But even had Petersen done some 'thing' after September 1, 1994 to advance her action, it is clear from the Kupnickis' position on appeal that in their view, the five year drop-dead period would have already have expired since they urge the court to count forward from April 9, 1989 (the date of Petersen's examination for discovery) to some date after September 1, 1994. And of course, prior to that date, Petersen could have done nothing without securing the necessary leave to take the next step, all of which points out the inequities inherent in the immediate application of the repeal of the leave provisions.

[123] In paragraph 27, Chief Justice Fraser refers to the plaintiff's situation in that case as a "procedural and logistical quandary akin to a Catch 22 situation."

[124] She summarized her position by stating:

> In my view, it cannot have been intended that the repeal of the leave Rule should be given immediate effect where, as here, an application for leave was outstanding as of the effective date of the new delay Rules and, in addition, a defendant was attempting to rely on the failure to secure leave to take the next step (and other inaction) as justification for applying the drop-dead rule to on-going delay.

[125] In paragraph 28, Chief Justice Fraser stated:

> Where the combined effect of the immediate application of the repeal of the leave provisions and the drop-dead rule would cause an injustice or disadvantage a litigant in what the court considers to be an unfair or arbitrary way, it is appropriate to defer the application of the repeal of the leave provisions. To decline to deal with Petersen's application for leave on its merits would potentially cause an injustice to Petersen; that is, the striking of her action despite the fact that she had done what she was entitled to do to preserve that cause of action prior to adoption of the new delay Rules. Thus, given a choice between immediate application of the new Rules to Petersen's application for leave or survival of the old Rules dealing with leave to take the next step, I am satisfied that the old rules dealing with leave should continue to apply in these circumstances.

[126] The special circumstances referred to in ***Petersen v. Kupnicki, supra,*** are to be contrasted with the situation before the Court in the present case.

[127] While there was an outstanding application for leave to take the next step before the Court on September 1, 1994, in the present circumstances, that application could not have been proceeded with, nor would it have been necessary for it to have been proceeded with thereafter.

[128] If, in fact, the Plaintiff had proceeded with that application in September of 1994, the Court would simply have said that the application was moot because there was then no rule requiring an order to take the next step, nor, in the circumstances of this case, was there any impediment whatever to the Plaintiffs simply proceeding with its action.

[129] That situation continued from September 1, 1994 to the present, until the date the Defendant's Rule 244.1 Application is ruled upon by me.

[130] Further, while Chief Justice Fraser held in ***Petersen v. Kupnicki, supra***, that the Application to Take the Next Step was, in the circumstances of that case, a thing which "materially advanced the action", it is clear that such conclusion was reached because the application was perfected when the Master heard the application in November of 1994 and ultimately granted an order permitting the plaintiff to take the next step.

[131] In paragraph 32, Chief Justice Fraser states:

> There are two bases for treating the date of filing the application for leave as a 'thing' which materially advanced Petersen's action. I regard the court's order for leave to take the next step as confirming an entitlement that Petersen had as of the date of applying for leave. Since that application was made before the effective date of the drop-dead rule, the application coupled with the subsequent issuance of the order, which confirmed events as of that date, amounts to a 'thing' which materially advanced Petersen's action and thus, the five year rule would not be engaged.

[132] In paragraph 33, Chief Justice Fraser stated:

> Further, and in any event, in the context of this case, I regard Petersen's filing of an application for leave to take the next step, standing alone, as a 'thing' which materially advanced her action. The jurisprudence under the old Rules to the effect that applying for leave to take the next step did not itself constitute a 'step' made considerable sense. But the new Rules do not speak of 'steps' in the action but 'things' which materially advance the action. In the special circumstances of this case, I am satisfied that the mere filing of the application for leave to take the next step qualifies as a material advance of the Petersen's action. The fact is that at the time that the application was made, Petersen could do nothing without first securing an order allowing her to take the next step. She made that application before the new Rules came into effect. The importance of that application cannot be overstated. It is the basis upon which she eventually secured an order from the Master allowing her to take the next step in her action. To treat the drop-dead rule as engaged in these circumstances would be to ignore the legal significance of Petersen's application for leave.

[133] In the present circumstances, as indicated, no Order was obtained following September 1, 1994; and, as indicated, no Order could have been obtained following September 1, 1994, simply because a Court would not entertain an application for an order that would have no meaningful effect.

[134] This is particularly evident in circumstances where the action has been ongoing for almost 15 years and the events complained of occurred 17 years ago and in circumstances where it is proposed to, in essence, restart the action afresh with a new cause of action necessitating new production of documents and discoveries some 17 years after the events in question.

[135] As well, the delay in this case by the Plaintiff in pursuing its action has been pervasive throughout up to and including the Plaintiff's failure to pursue its outstanding Application for "Leave to Take the Next Step" prior to September 1, 1994, or as happened in ***Petersen***, to preserve its cause of action under the old Rules.

[136] I will now deal with the Plaintiff's additional arguments, namely:

I. that Rule 244.1 is *ultra vires* and, in any event, cannot affect the Plaintiff's allegedly vested substantive right to have its application for leave to take a new step decided under the rules as they read prior to September 1, 1994; alternatively

II. that the Plaintiff is in exactly the same position as the plaintiff in ***Petersen v. Kupnicki, supra***, and is entitled to have the fate of its action determined under the Rules as they read prior to September 1, 1994; and,

III. that, in any event, things have been done within the last five years which have materially advanced its action so Rule 244.1 does not apply.

III. Rule 244.1 Can Affect "Substantive" Rights Arising Out of the Plaintiff's Notice of Motion Filed in March of 1994

[137] The Plaintiff acknowledges that Rules in force at the date of statutory confirmation which affect substantive law are not invalid for that reason. As stated earlier, on June 18, 1997, section 2(3) of the ***Justice Statutes Amendment Act***, 1997, ***supra***, came into force and provided that section 47 of the ***Judicature Act***, ***supra***, was repealed and replaced by the following:

> 47 (1) In this section 'Alberta Rules of Court' means the Alberta Rules of Court, filed as Regulation 390/68 as amended prior to the commencement of this section.
>
> (2) The Alberta Rules of Court are validated notwithstanding that any provision in the Rules may affect substantive rights.

[138] The Plaintiff states that a provision which affects "substantive vested rights" should not be held to operate retroactively. However, the Court of Appeal, in ***Richardson v. Honeywell, supra,***

and ***Hnatiuk v. Shaw, supra,*** holds that a Court, in hearing an application under Rule 244.1, can take into account pre-September 1, 1994, delay.

[139] Presumably this is because doing so does not cause the Rule to operate retroactively, which would be the case if the Rule were held to apply to a five-year period which commenced and ended before September 1, 1994.

[140] Neither ***Richardson v. Honeywell*** nor ***Hnatiuk v. Shaw***, however, as previously noted, deal with Rule 244.1 in the context of an *ultra vires* challenge.

[141] The Plaintiff states that the ***Interpretation Act, supra,*** provides that every proceeding commenced under a repealed enactment should be continued in conformity with the new enactment so far as may be consistent with the new enactment. That is what has happened here. The Plaintiff was entitled to proceed with this action under the new Rule 244.1. The application of Rule 244.1 to the facts of this case is in keeping with the ***Richardson* and *Hnatiuk* cases, *supra*,** and does not retroactively affect vested rights of the Plaintiff.

[142] Indeed, while it is suggested that the Plaintiff acquired vested rights by filing the Notice of Motion in 1994, ***Petersen v. Kupnicki, supra,*** does not so generally hold except in the particular facts of that case.

[143] The Plaintiff has no substantive vested rights as a result of filing its March 1994, Notice of Motion and Affidavit.

[144] The Clerk's Office will accept a Notice of Motion and Affidavit for filing whether or not the filing party has a right to the relief claimed and whether or not the filing party even has a right to bring the application. The date of filing of the Notice of Motion may be relevant for the purposes of measuring time with respect to subsequent applications but only when such subsequent applications are heard and granted.

[145] The Plaintiff says that its application was adjourned *sine die* at the request of defence counsel and that this somehow has a bearing on the outcome of this matter. Defence counsel asked to examine the deponent, a right which the Plaintiff concedes is virtually automatic. That request was made prior to the application. However, no difference could result had that request been made in Chambers on the original return date of the application and the application adjourned as a result.

[146] The fact is that the Plaintiff never produced its deponent for Examination.

[147] Also the Plaintiff never proceeded with its application, presumably because, after September 1, 1994, there was no point in doing so.

[148] The Plaintiff states that the Defendants should be estopped from relying on delay following the adjournment and that "the ball was in the Defendant's court".

[149] The Defendants could not contact the Plaintiff's deponent and require her to be produced - she was an officer of the Plaintiff company. Secondly, the Defendants would not reschedule the Plaintiff's application in the face of the Plaintiff's failure to do so; and, most

importantly, once September 1, 1994, had passed, the "ball was in the Plaintiff's court" to proceed with its action without the necessity of the examination of the deponent, the application, or any order.

IV. Rule 244.1 Is Not *Ultra Vires* in its Effect on Allegedly "Substantive" Rights

[150] As noted above, as of June 18, 1997, section 47 of the ***Judicature Act, supra,*** provides:

> 47(1) In this section 'Alberta Rules of Court' means the Alberta Rules of Court, filed as Alberta Regulation 390/68 as amended prior to the commencement of this section.
>
> (2) The Alberta Rules of Court are validated notwithstanding that any provision in the Rules may affect substantive rights.

[151] It is clear that authority is vested in Superior Court judges to amend or create Rules of Court. Again, Rule 964 evidences this:

> 964. The judges of the Court of Queen's Bench and Court of Appeal are hereby authorized to alter and amend any Rules of Court or tariffs of costs or fees for the time being in force, or make additional Rules or tariffs.

The Plaintiff does not question this authority. It does, however, assert that there is no authority in the Rules Committee to affect substantive rights in so doing. In other words, any Rules created or amended which affect procedural rights only are sound, but those which vary substantive rights are *ultra vires*.

[152] This was certainly the case prior to statutory confirmation of the Rules. In ***Schanz* v. *Richards*** (1970), 72 W.W.R. 401 (Alta. S.C.), for instance, Rule 217(7)(b) it was found to be *ultra vires* to the extent that it effected changes in the substantive law of privilege.

[153] However, since that time, the Alberta Rules of Court have been statutorily confirmed on several occasions, and have been commented on in this regard in Report No. 15 of the Institute of Law Research and Reform, entitled "Validity of the Alberta Rules of Court". This Report, published in December of 1974, concluded that many of the Rules of Court arguably extended beyond mere practice and procedure such that they risked invalidity.

[154] Shortly thereafter, by the ***Attorney General Statutes Amendment Act***, 1976 c. 58 s. 6(4), the Rules were statutorily confirmed. Section 6(4) amended the ***Judicature Act***, R.S.A. 1970, c. 193, by adding the following section after section 39:

> 39.1 (1) In this section, "Alberta Rules of Court" means the Alberta Rules of Court, filed as Alberta Regulation 390/68 as amended prior to the commencement of this section.

> (2) The Alberta Rules of Court are hereby validate notwithstanding that any provision therein may affect substantive rights.

As previously noted, a statutory confirmation of similar wording was effected on June 18, 1997.

[155] Substantial case law illustrates the proposition that "a Rule changing substantive law is valid if the Rules have been confirmed by statute" (Stevenson and Côté, *Civil Procedure Guide*, 1996, Vol. 1, at 2 who cite ***Stanley* v. *Douglas*** [1952] 1 S.C.R. 260; ***Robitaille* v. *Vancouver Hockey Club*** (1981), 124 D.L.R. (3d) 228).

[156] This confirms my view that due to the statutory confirmation it received in June 18, 1997, Rule 244.1 is not invalid whether or not it affects "vested substantive rights".

[157] However, I note also how amendments to judicial review in civil matters, which now constitutes Part 56.1 of the Rules starting at Rule 753.1, were accomplished. As pointed out by Stevenson and Côté, in their *1992 Civil Procedure Guide*, Vol. 1, Part 56.1 was passed under the Court of Queen's Bench Amendment Act, 1987, c. 17, which states:

> (2) The Lieutenant Governor in Council may make regulations respecting judicial review in civil matters.

[158] Stevenson and Côté in their *Civil Procedure Guide*, *supra*, comment, at page 1566, that because Part 56.1 of the Rules was passed under this legislation, any question of whether it "went beyond the ordinary powers to make Rules on procedural matters" was circumvented:

> PART 56.1
> JUDICIAL REVIEW IN CIVIL MATTERS
>
> 753.01 In this Part, "person" includes a board, commission, tribunal or other body whose decision, act or omission is subject to judicial review, whether comprised of 1 person or of 2 or more persons acting together and whether or not styled by a collective title.
>
> [Alta. Reg. 457/87]

(<u>Stevenson and Côté Commentary</u>)

> New in 1987. Alberta's Court of Queen's Bench Amendment Act 1987 (Bill 10) added a specific power for the Lieutenant-Governor in Council to make regulations over judicial review in civil matters. Doubtless this new Part 56.1 was passed under it, thus removing any question as to whether it went beyond the ordinary powers to make Rules on procedural matters. These new Rules were recommended by the Alberta Institute of Law Research and Reform.

[159] With respect, one wonders then by which methods the Legislature and/or the Rules Committee chooses to effect changes to the Rules so as to deal with the argument that such changes are *ultra vires*.

[160] Nonetheless, I adopt the comments of Stevenson and Côté in their *Civil Procedure Guide, 1996*, at page 11, that "these distinctions [i.e. between substance and procedure] matter little where the Rules are statutorily validated, as in Alberta." Rule 244.1, substantive or not, has now been statutorily validated and therefore stands.

V. The Fate of the Plaintiff's Action is not Properly Decided Under the Old Rules as per *Petersen v. Kupnicki*

[161] This Plaintiff is not in a position analogous to that of the plaintiff in ***Petersen v. Kupnicki, supra***. After September 1, 1994 this Plaintiff no longer required leave to take a new step (as was required under the repealed rules). Neither was this Plaintiff on September 1, 1994 facing the new Rule 244.1 since the Defendant herein did not even file its Application under Rule 244.1 until January 1997.

[162] The Defendants, in this action, never took the position, as the defendants did in ***Petersen v. Kupnicki, supra***, that the Plaintiff could not proceed with its action, following September 1, 1994, without an Order. The Defendants did not apply on September 2, 1994, for an Order under Rule 244.1 alleging that the Answers to Undertakings in 1991 did not materially advance the action.

[163] The Plaintiff herein never preserved its cause of action under the old Rules as happened in ***Petersen***. This distinction in my view is critically important. At paragraph 24 of ***Petersen***, Chief Justice Fraser stated: "Her counsel (Petersen's) had consented to the leave application being adjourned to a date past the effective date of the new Rules on the assumption that the old Rules would continue to apply".

[164] This then eliminated the "Catch-22" situation that ***Petersen*** was in. The Plaintiff herein, Pro-Man, was never in a "Catch-22" situation as it could have simply continued its lawsuit up to when ever the Defendant successfully pursued a Rule 244.1 Application. Rule 244.1(1) reads:

> 244.1(1) Subject to Rule 244.2, where 5 or more years have expired from the time the last thing was done in an action that materially advances the action, the Court shall, on the motion of a party to the action, dismiss that portion or part of the action that relates to the party bringing the motion.

[165] This Rule, as I understand it, only applies if and when a Defendant brings a Motion under it. Until that was done, the Plaintiff herein could have proceed with its action. Chief Justice Fraser confirms this view in ***Petersen, supra,*** at paragraph 25:

> I concede that in theory, there was nothing to prevent Petersen from doing some "thing" to materially advance her action between the effective date of the new Rules, September 1, 1994 and the date of the Kupnickis' application to dismiss

> for want of prosecution on October 21, 1994. [Underlining mine] But even had Petersen done some "thing" after September 1, 1994 to advance her action, it is clear from Kupnickis' position on appeal that in their view, the five year drop-dead period would have already have expired since they urge the Court to count forward from April 9, 1989 (the date of Petersen's examination for discovery) to some date after September 1, 1994. And of course, prior to that date, Petersen could have done nothing without securing the necessary leave to take the next step, all of which points out the inequities herein in the immediate application of the repeal of the leave provisions.

[166] Of course the Defendant herein could only take the position described above by the Chief Justice if they were before the Court under their Rule 244.1(1) Application, which in this case did not take place until January 1997 with the Defendant's Motion herein **))** more than two years after the "drop-dead Rule" took effect. The Defendant's Application is finally heard on October 31, 1997 three years after the September 1, 1994 amendment and after the June 18, 1997 statutory amendment. This hardly, with respect, represents an "immediate application of the repeal of the leave provisions" as was described above in ***Petersen***.

VI. Nothing Has Been Done Within the Last Five Years Which Has "Materially" Advanced the Plaintiff's Action: Rule 244.1 Does Apply

[167] The one "thing" which the Plaintiff points to within the last five years that materially advanced its action is the March 1994 filing of its motion for leave to take a new step which was adjourned to allow the Defendants to cross-examine the Plaintiff's deponent on her Affidavit. However, the Plaintiff never produced its deponent to be cross-examined and the Plaintiff never brought its application back before the Court for hearing and decision, presumably because, after September 1, 1994, its application was redundant.

[168] The Plaintiff's abandoned or abortive application for leave to take a new step did nothing to materially advance this action. It was a nullity.

[169] Alternatively, the Plaintiff's application must be considered unsuccessful: ***Alberta v. Yellowhead Wood Products Inc.***, [1997] A.J. No. 939, ss 23, ***Dennison v. Devlin*** (1864), 11 Gr. 84, ***Dugdale v. Johnson*** (1845), 5 Hare. 92, 67 E.R. 841 and an unsuccessful application for leave to take a new step does not materially advance an action.

[170] To paraphrase the Plaintiff, the Plaintiff could circumvent the five-year Rule by taking out a Notice of Motion for an Order and then never proceeding with it, whether or not the supporting Affidavit was examined upon, thereby turning a set of abandoned applications into "an arsenal of successive things that materially advanced the action".

[171] If a plaintiff were to maintain successfully that an action is materially advanced by the plaintiff filing and serving but adjourning and never proceeding with a motion, the five year limitation in Rule 244.1 would be meaningless.

[172] Apart from any general rule, the Plaintiff's abandoned or abortive "unsuccessful" application for "leave to take a new step" is not a thing which "materially advanced this action".

[173] Alternatively, both the Plaintiff and the Defendant seem to agree that a step that "materially advanced" this Action was the Plaintiff's 1991 supplying of Answers to its Undertakings.

[174] In my view, supplying one's own undertaking answers in one's own lawsuit is generally not "a step that materially advances the action". Complying with an undertaking in one's own lawsuit is not an advancement of an Action.

[175] In ***Smith v. Alberta*** (1996), A.J. No. 563 Master Alberstat stated at paragraphs 9 and 11:

> If a plaintiff were to maintain successfully that an action of a plaintiff is materially advanced by the plaintiff fulfilling its own undertakings the five year limitation would have no meaning at all . . .
>
> Complying with an undertaking in your own lawsuit is not a material advancement of an action.

[176] My brother Hart J. recently agreed with Master Alberstat's view herein in ***Appleyard v. Reed***, [1997] A.J. No. 1067.

[177] Supporting the above proposition is the observation that a Plaintiff could circumvent the five-year Rule by delaying to answer one or more undertakings in a timely fashion, thereby turning a set of undertakings into an arsenal of successive "things that materially advance the action."

[178] ***Smith v. Alberta***, ***supra***, deals with piecemeal answers to undertakings, not a situation where all are answered at once. However, the same reasoning must apply to a Plaintiff answering all undertakings at once: if answers to undertakings are a "thing" materially advancing an action, a Plaintiff could hold back all answers to the undertakings until just under five years had elapsed and thereby, by its own delay, restart the five-year period.

[179] The last thing that could have materially advanced the Plaintiff's action herein occurred in 1989 when Examinations for Discovery concluded.

[180] After September 1, 1994 the Plaintiff no longer needed leave to take a new step in its action and; indeed, the Defendants never took the position that the Plaintiff could not move its action on to trial after September 1, 1994. Yet the Plaintiff did not proceed.

SUMMARY OF CONCLUSIONS

[181] Any Rule of Court which is merely procedural in nature thus would, most likely, be construed as being retroactive. Any Rule of Court which affects substantive rights would, aside from any issue of it being *ultra vires*, be presumed not to be retroactive in its effect.

[182] In my view, if the Alberta Rules of Court Committee cannot affect substantive rights by enacting rules, substantive rights could not be removed by repealing rules.

[183] In any event, substantive changes to legislation are presumed not to be retroactive. If rights vested under the old Rules, although the Rules Committee could remove those rules from further operation, they could not remove the rights which "vested" under the old Rules, either by deleting old Rules, enacting new Rules, or both.

[184] A key issue here is whether the Plaintiff has any rights which "vested" under the old Rules, rights which it would be inequitable or unjust to remove simply because of a change in legislation, and given the procedural nature of the Rules of Court, rights which the Rules may be unable to divest in any event. My view is that, in fact, the "drop-dead Rule" is a limitation period and hence a substantive rule.

[185] Intuitively, one may therefore conclude there is something amiss with the new Rule, and that the problem is that the new Rule is substantive, stripping away the Court's discretion to deal justly with issues of delay in litigation, perhaps because it is therefore either *ultra vires* or should not be applied retrospectively to interfere with vested rights in continued litigation or with the vested rights to apply for leave to take the next step.

[186] The ***Petersen*** "policy" or "equitable" reason or the "Catch-22" situation however is different, although the actual delay herein is much longer in this case in some respects.

[187] In the circumstances of this case, the delay which occurred prior to September 1, 1994, coupled with the delay which occurred following September 1994, is to be taken into account with respect to the application pursuant to Rule 244.1(1), in accordance with ***Hnatiuk v. Shaw***, as indicated earlier.

[188] The last step that materially advanced this Action was the 1989 Examination for Discoveries.

[189] In the circumstances of this case, there was no impediment to the Plaintiff's proceeding with the action after September 1, 1994 until the Defendant's Rule 244.1 Application herein is brought and then decided upon. The Plaintiff herein could simply have proceeded with its action after September 1, 1994 since no proceedings were ever even commenced by the Defendant until 1997. Until the Defendant filed a motion under Rule 244.1(1), the Plaintiff was not prevented from taking a step/steps to materially advance the action. The "drop-dead Rule" is not an absolute rule that takes effect automatically after five years of inactivity in an action.

[190] Unlike in ***Petersen***, there is no policy or equitable reason for the Court to withhold the application of the new delay rule present in the case at bar because a critical fact is different here. The Plaintiff herein never adjourned its "Leave to Take the Next Step" Application on the assumption that the old Rules would apply. In fact, the Plaintiff's Leave to Take the Next Step Application just simply faded away.

[191] The "Catch-22" situation in ***Petersen*** never caught the Plaintiff herein.

[192] Ultimately, the Plaintiff is responsible for pursuing its Statement of Claim. Arguments that somehow the Defendant failed to pursue the Plaintiff to pursue its action are perverse.

[193] In the result, Rule 244.1 is not invalid whether or not it affects "vested substantive rights" as per ***Hnatiuk v. Shaw, supra***.

[194] Further, even if the Plaintiff had a vested right in having its 1994 adjourned application for leave to take a new step decided under the pre-September 1, 1994 Rules, since June 18, 1997, Rule 244.1 has had the force of statute and can affect substantive rights thereafter.

[195] Had the Plaintiff applied for an Order to take the next step after September 1, 1994, as the plaintiff did in ***Petersen***, the Court would not have granted such an Order, firstly, because the Rule permitting the Order no longer existed and, secondly, because no such Order was necessary to permit the Plaintiff to proceed. In essence, as in ***Richardson v. Honeywell, supra***, the Court would have held that the application was moot.

[196] The rationale underlying the Court of Appeal's judgment in ***Petersen v. Kupnicki, supra***, does not save this Plaintiff from the effect of its failure to do anything after September 1, 1994 to advance its action.

DECISION

[197] On February 28, 1997, the Master dismissed the Plaintiff's action under Rule 244.1.

[198] This Court hereby dismisses this Appeal from the Master.

[199] Since the Plaintiff raised a number of important issues in this Appeal, some of which the Defendant must bear some responsibility for, and, further, because the law, in my view, presently remains somewhat unsettled in this area, there shall be no costs awarded to either party herein.

_____
J.C.Q.B.A.

Dated at Edmonton, Alberta,
this 8th day of January, 1998.

Counsel:

For the Plaintiff/Appellant Mr. D. Cavanagh
Mr. P. Kirman
Weir Bowen

For the Defendant/Respondent Mr. K. Bailey, Q.C.

Parlee McLaws

Trans-Canada Pipe Lines Ltd. v. Township of Macaulay

[1963] 2 O.R. 41

ONTARIO
Court of Appeal
MacKay, Kelly and McLennan JJ.A.
February 26, 1963

Assessment -- Court of Revision -- Jurisdiction -- Statutory requirement of notice of sittings of Court of Revision -- Failure to post deprives Court of jurisdiction -- Right of action challenging amendment of assessment roll by Court of Revision so acting without jurisdiction -- Whether barred by Assessment Act, s. 88.

Statutory requirements for the giving of notice of a judicial or quasi-judicial proceeding are fundamental to jurisdiction, and this proposition applies in respect to s. 72(5) of the Assessment Act, R.S.O. 1960, c. 23, which provides for the posting, in connection with sittings of the Court of Revision, of a list of all complainants on their own behalf against the assessor's return and a list of all complainants on account of the assessments of other persons (as permitted by s. 72(3)), stating the names of each, with a concise description of the matter complained against, together with an announcement of the time when the Court of Revision will be held. Section 72(5) is imperative, and failure to obey its deprives the Court of Revision of jurisdiction and, consequently, failure to appeal does not give validity to the Court's decision under s. 87(2); in the circumstances there was no decision from which an appeal would lie.

Held, by a majority, s. 88 is not a bar to a declaratory action by an assessed owner to restore an assessment roll it its condition before being altered by a Court of Revision which had no jurisdiction because of non-compliance with s. 72(5).

The time prescribed by s. 88(ib) could not begin to run in respect of a decision which was a nullity. Moreover, s. 88 relates to "an assessment", i.e. a valuation of an individual property, and does not apply to an action which concerns authority to make alterations in the assessment roll. Moreover, it was wrong to urge that the action of the Court of Revision could be corrected on appeal to the County Court Judge under s. 75. The question of jurisdiction of the Court of Revision was one of law outside of s. 75, and hence plaintiff would have no remedy under the appellate procedure of the Act.

Per MacKay, J.A., dissenting: Although the curative terms of s. 73 may be an answer to the irregularities in this case, it was unnecessary to rely on them because s. 88 barred plaintiff's action which was brought after the prescribed period. The proceedings taken to assess and collect taxes were not a nullity and had it not been for plaintiff's action the taxes would have been collected on the amended roll. If s. 88 did not apply, such an action could be brought long after all taxes had been collected and spent, and there would not be the finality which s. 88 was designed to produce.

[Re Bartelman et al. v. Timmins, [1949] 3 D.L.R. 464, [1848] O.W.N. 462; Town of Brampton v. Hutchinson, [1950] O.R. 491; Toronto v. Olympia Edward Recreation Club Ltd., [1955] 3 D.L.R. 641, [1955] S.C.R. 454; C. & E. Townsites Ltd. v. Wetaskiwin, 51 D.L.R. 252, 59 S.C.R. 578, [1920] 1 W.W.R. 438, refd to]

APPEAL by plaintiff from a judgment of Aylen, J., dismissing its action for declaratory and other relief in respect of an allegedly illegal amendment of an assessment roll. Reversed.

H.E. Manning, Q.C., for appellant.

G.H. Aiken, Q.C., for respondent.

E.R. Pepper, Q.C., for A.-G. Ont.

MACKAY, J.A. (dissenting): -- I have had the privilege of reading the reasons for judgment proposed by my brother McLennan. With the greatest respect for the views he has so ably expressed, I have come to the conclusion that the learned trial Judge was right in holding that the action is barred by s. 88 [am. 1960-61, c. 4, s. 13] of the Assessment Act, R.S.O. 1960, c. 23, and that the appeal should be dismissed.

The facts having been set out in my brother McLennan's judgment, I need refer only to some aspects of them.

One Robert Taylor filed a notice of appeal appealing all assessments in the municipality, except those fixed by law, on the ground that they were too high. This appeal was dealt with by the Court of Revision and their decision reducing all such assessments that were for more than $100 by 20% is the question in dispute in this action.

On direction of the chairman of the Court of Revision, the clerk, one Margaret Gibbs, amended the assessment roll by making a notation against each such assessment as shown on the roll reducing each by 20% and initialling the changes. There also appears on the roll, under the heading "Information by Clerk", roll revised by Court of Revision December 11 and 12, 1961, Margaret G. Gibbs". A sheet of paper (ex. 17 is a photostat copy) was pasted inside the assessment roll, bearing the notation "Court of Revision, corrected, revised and certified by the Court of Revision this 12th day of December, 1961, E. Bonnell, chairman, Court of Revision".

On January 8, 1962, the Court of Revision again met and passed the following resolution: "THAT this Court accept the assessment roll as revised for 1962."

There were errors on the part of both the clerk and the Court of Revision in the proceedings. The clerk failed to keep a record of the proceedings, as required by s. 67 of the Assessment Act; she failed to post a notice in a public place of all complaints, as required by s. 72(5).

On the Taylor appeal, the Court did not hear evidence as to the value of each individual property in respect of which Taylor had appealed. The evidence heard was general evidence to the effect that all the assessments were too high. Counsel for the appellant and at trial did not, however, take the position that by reason of these procedural errors the proceedings of the Court of Revision should be set aside in their entirety. In the Transcript of evidence, commencing at p. 97, the following appears:

> HIS LORDSHIP: How does this read? "For the purpose of this trial" -- this will please you, Mr. Manning, because I know how meticulous you like to be -- "for the purpose of this trial it is now agreed between counsel that the roll returned on November 1st was later properly adopted and the real and only issue to be decided is the later reduction"?
>
> MR. AIKEN: I'm sorry, My Lord. All the reductions were made, the specific reductions and the 20 per cent. reduction at the Court of Revision as we will indicate.
>
> HIS LORDSHIP: I thought the 20 per cent, reduction was made later?
>
> MR. AIKEN: Not according to the evidence.
>
> HIS LORDSHIP: That was on December the 12th?
>
> MR. AIKEN: Yes, My Lord. There were two days but there were two days on which the Court of Revision sat, the 11th and the 12th, and they finished their work on the 11th and they proceeded then until the 12th and it was on the 12th the twenty per cent. reduction was made.
>
> HIS LORDSHIP: See if this will cover it: "For the purpose of this trial it is agreed that the roll was properly adopted by the sittings of the Court of Revision held on December 11th and 12th, 1961, with the exception of the twenty per cent. reduction in all assessments, other than fixed assessments, the validity of which is challenged."

MR. AIKEN: As far as we are concerned. My Lord, that would simplify the issue.

MR. MANNING: I am not trying to say, My Lord, there wasn't a roll of the township for the year 1962. So long as it is clear that I do not concede that the adoption involves the approval of the twenty per cent. reduction, I am quite content with that statement.

HIS LORDSHIP: Let me read it to you again. "For the purpose of this trial it is agreed that the roll was properly adopted at the sittings of the Court of Revision held on December 11th and 12th, 1961, with the exception of a twenty per cent. reduction in all assessments, other than fixed assessments, the validity of which is now challenged."

MR. MANNING: That is acceptable to me, My Lord.

As in many rural municipalities, the clerk of the municipality was inexperienced, having been in office only two months. The members of the Court of Revision were untrained in legal procedure, and it may be that s. 73 of the Act is an effective answer to the irregularities complained of. The section is as follows:

73. The roll as finally revised and certified by the court of revision shall, subject to subsections 6 and 7 of section 57, be valid, and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, or any defect, error or misstatement in the notice required by section 48, or the omission to deliver or transmit such notice, provided that the provisions of this section in so far as they relate to the omission to deliver or transmit such notice do not apply to any person who has given the clerk of the municipality or assessment commissioner the notice provided for in subsection 4 of section 48.

In the case of C. & E. Townsites Ltd. v. City of Wetaskiwin, 51 D.L.R. 252, 59 S.C.R. 578, [1920] 1 W.W.R. 438, a case under the Alberta Assessment Act [Municipal Ordinance, C.O.N.W.T. 1898, c. 70], there were irregularities in the assessment roll.

The Act contained a curative provision somewhat similar in wording to s. 73 of the Ontario Act. I think the views expressed by Duff, J., as he then was, in that case could well be applied to the present case. At p. 261 D.L.R., pp. 290-1 S.C.R., pp. 446-7 W.W.R., he said:

> But it is one thing to say as regards a given state of facts: Here is no assessment -- here is no roll. It is another thing to say: Here are a roll de facto and an assessment de facto, but a roll and an assessment which because some essential requirement of the law has been neglected in preparing and effecting them are, from the point of view of the law, invalid.
>
> Secs. 134 and 136 both contemplate such departure from the provisions of the Act as would but for these sections make the assessment invalid. On this point, the meaning of the language is unmistakeable and the combined effect of these sections is that if the property is assessable and if the person is a taxable person, then an assessment which contains the elements of a de facto "assessment" within the meaning of sec. 134, may be appealed against and corrected by the Court of Revision, and that notwithstanding the departures from the requirements of the statute "in or with regard to the roll" such an assessment once the roll has passed the Court of Revision and been certified in the manner provided for, shall be valid.
>
> The lurking fallacy in the argument presented in support of the appeal resides in the confusion between an assessment inoperative in law because of the failure to observe some legal requirement and something which cannot be described as an "assessment" in fact, within the contemplation of sec. 134.

And again, at p. 262 D.L.R., p. 592 S.C.R., p. 448 W.W.R.:

> The argument pressed upon us by the appellant is that sec. 136 has no application where some requirements of the statutory procedure has been omitted or departed from and the requirement and omission or departure are of such a character

that in the absence of secs. 134, 135 and 136 the assessment must have been held to be of no legal validity. The argument proves too much. The result of its rigorous application would be to deprive of all effect the declaration in sec. 136 which makes the roll "valid" notwithstanding defects in it. Sec. 136 obviously contemplates proceedings which otherwise would be invalid; indeed all the enactments of the statute prescribing what is to be done in respect of the assessment roll, including those provisions which are alleged to have been disregarded in the assessments now in question, must be read subject to and qualified by the provisions of secs. 134, 135 and 136. I do not, however, think it necessary to base my decision in this case on the provisions of s. 73.

Assuming that the irregularities were such that the plaintiff would be entitled to succeed, if its action had been brought within the time limited by s. 88 [am. 1960-61, c. 4, s. 13] of the Assessment Act, I turn to the purpose and effect of this section, which reads as follows:

> 88. No action or other proceeding, except an action or other proceeding brought by or on behalf of a municipality for the collection of arrears of taxes, shall be brought in any court with respect to an assessment or taxes based thereon,
>
> (b) where a complaint with respect to the assessment is made to the court of revision, except within the time limited for appealing from the decision of the court of revision to the county court judge.

It seems to me that the factual situation after January 8th was this: There had been appeals heard by the Court of Revision, duly constituted, and dealt with by them. The roll was amended and was certified, as amended. Counsel for the respondent stated to the Court that tax notices had been sent out on the basis of the assessment roll as amended and that some ratepayers had paid their taxes. It is clear that had not the plaintiff's action been brought, the municipality would have collected all taxes on the basis of the amended roll. In these circumstances, how can it be said that the proceedings

were a nullity? They were irregular -- but would stand unless and until they were set aside by an action.

If s. 88 does not apply, then an action such as this could be brought long after all taxes had been collected and spent under an assessment being attacked.

The scheme of the Assessment Act has always been to place a fairly narrow time limit on appeals as to assessment so that in a reasonably short time after the assessor completes his work and returns the roll there will be finality to the roll and the municipality can proceed to collect the taxes necessary for the conduct of the affairs of the corporation.

Until the decisions in Quance v. Thomas A. Ivey & Sons Ltd., [1950] 3 D.L.R. 656, [1950] O.R. 397; Toronto v. 0lympia Edward Recreation Club Lid., [1955] 3 D.L.R. 641, [1955] S.C.R. 454, and other cases, questions of law as well as questions of value and of whether persons had been wrongfully placed upon or omitted from the roll had been dealt with and disposed of by the Court of Revision, the County Court Judge and the Municipal Board. The decisions in these Cases, however, there then being no time limit on the bringing of actions in regard to matters of assessment involving questions of law, resulted in there being no early finality to the settling of the assessment.

In my view, the purpose of s. 88, passed subsequent to these decisions, was to limit the time within which any action affecting assessment could be brought, and I think the language of that section is sufficiently wide and comprehensive to achieve that purpose.

This action is for relief in regard to a complaint to the Court of Revision with respect to an assessment and falls within the provisions of this section.

On this appeal counsel for the appellant relied strongly on the cases regarding tax sales in which the curative and limitation provisions of ss. 189 and 190 of the Assessment Act had been held not to apply. His submission was that those cases were analogous to the present case. I do not agree with

this submission. These sections by their terms do noy apply unless there are taxes owing in respect of the lands sold. I should also point out, although it cannot affect the interpretation to be given to the words of s. 88, that tax sales, once the tax deed has been given, are final in their effect, if not set aside within the time limit provided by the Act, whereas in actions such as the present, the assessment is for one year only, and therefore any injustice is temporary in that an error or injustice can be corrected by the parties concerned taking appropriate action in the succeeding year.

Counsel for the appellant also argued that s. 88 was ultra vires of the Provincial Legislature. I also reject this submission. The Provincial Legislature has plenary power over matters within its legislative competence under the British North America Act; therefore it is intra vires for the Province to pass an Act to limit the time within which actions may be brought or staying actions before the Court: Smith v. City of London (1909), 20 O.L.R. 123, and Beardmore v. City of Toronto (1910), 20 O.L.R. 165; affd, 21 O.L.R. 505.

I would therefore dismiss the appeal with costs.

KELLY, J.A., concurs with MCLENNAN, J.A.

MCLENNAN, J.A.: -- This is an appeal from the judgment of Aylen, J., dismissing the plaintiff's action. The plaintiff alleges that, pursuant to the directions of the Court of Revision, which had no jurisdiction to so direct, the clerk of the defendant municipality altered the assessment roll duly returned by the assessor reducing by 20% all assessments except fixed assessments and those under $100. The plaintiff asked for declaratory and other consequential relief. The plaintiff, for the purpose of transmitting natural gas, established a pipe line through the defendant municipality. Section 41 of the Assessment Act fixes the municipal assessment for such pipe lines throughout the Province.

The evidence discloses that in the years 1958, 1959 and 1960 the assessments of properties in the defendant municipality other than that of the plaintiff were exceedingly low and but a

fraction of the valuations which would have resulted from strict adherence to the Assessment Act and the application of standards contained in the Assessment Manual of the Department of Municipal Affairs. As a result the plaintiff paid in taxes substantially more than its proper share of the total taxes paid by all taxable persons in the defendant municipality.

A remedy for persons assessed who believe that other property owners are assessed at too low a figure is provided in s. 72(3) of the Assessment Act. In 1959 and in 1960 the plaintiff launched appeals against all other assessments in the defendant municipality under that section. While such appeals are conceded to have been defectively constituted, as a result of the appeals an assurance was given to the plaintiff by the council of the defendant that it would cause a reassessment to be made. A reassessment was made in 1961 for the taxation year 1962 and the assessment of properties other than the plaintiff's was doubled. With that assessment plaintiff has no quarrel. It is the alteration of the assessment roll by the clerk of the municipality which gives rise to this action.

The assessment roll for the year of 1962 was returned by the assessor to the clerk of the township on November 1, 1961, the time for completing the roll having been extended to that date by by-law. Forty-three ratepayers appealed their individual assessments to the Court of Revision and one Taylor, purported to appeal the assessment of all assessed owners other than those whose assessment was fixed. The names and addresses of the other owners whose assessments were appealed were not attached to the notice of appeal when it was delivered to the clerk and were not placed in the hands of the clerk until December 11, 1961.

The Court of Revision purported to hold its sittings on December 12, 1961. Six of the 43 individual appeals were disposed of by resolution either allowing the appeal and reducing the assessment or by confirming the assessment. On the hearing of the appeal by Taylor a petition was presented to the Court signed by a great number of ratepayers complaining of the increased assessment. Verbal representations were made to the like effect. There was no evidence or representations made

relating to individual properties. The members of the Court of Revision were in favour of reducing all assessments by 20%, except fixed assessments and assessments under $100 but including the six assessments which had already been dealt with. The clerk was verbally instructed to alter the assessment roll and subsequently did so. There was no record of any resolution or decision of the Court of Revision reducing the assessments by 20%. There were no sittings of the Court after December 12th. The Chairman of the Court of Revision at some date thereafter certified or purported to certify the roll as amended by the clerk and there was a resolution of the council of the defendant municipality dated December 15, 1961, which purported to reduce the assessments by 20%. It is common ground that this resolution had no legal effect. There was also placed in evidence a resolution of the Court of Revision dated January 8, 1962, accepting the assessment roll as altered for the year 1962.

In view of an agreement by counsel for the parties at the trial as to the real issue there is no question before this Court other than that contained in that agreement which is as follows:

> For the purpose of this trial it is agreed that the roll was properly adopted at the sittings of the court of revision held on December 11th. and 12th. 1961, with the exception of a 20 per cent. reduction in all assessments, other than fixed assessments, the validity of which is now challenged.

The plaintiff did not learn of the decision of the Court of Revision reducing the assessments until January 19, 1962. The writ in this action was issued on January 23, 1962.

On the hearing of the Taylor appeal the Court of Revision gave no consideration to individual properties. The statute contemplates, as the learned trial Judge said, "a careful and proper assessment of each property involved". The only record of the proceedings and decisions of the Court of Revision is on four separate slips of paper recording changes in the six appeals first dealt with. Section 67 of the Act requires that the clerk of the Court shall keep in a book a record of the

proceedings and decisions of the Court and requires the Chairman to certify that record. There was no record of any nature of the proceedings in the Taylor appeal or of the decision of the Court on that Appeal as required by s. 67. The evidence is that the Chairman, at the hearing, orally instructed the clerk to alter the assessment roll and the clerk subsequently did so.

(49]

Assuming that the Court of Revision had considered evidence upon which it could have made a decision on the question of value and therefore that its decision on that ground was unassailable and also assuming that the Taylor notice of appeal was a valid notice -- both these questions are open to very serious doubt -- the clerk of the defendant municipality did not comply with imperative statutory requirements as to the sittings of the Court of Revision.

Subsection (5) of s. 72 of the Assessment Act reads as follows:

> (5) The clerk of the municipality shall post up in some convenient and public place within the municipality or ward a list of all complainants, on their own behalf, against the assessor's return, and of all complainants on account of the assessment of other persons, stating the names of each, with a concise description of the matter complained against, together with an announcement of the time when the court will be held to hear the complaints.

The evidence is clear that the clerk of the municipality did not post any notice of any complaints against the assessor's return or of complaints on account of the assessment of others. Counsel for the respondent argued that the requirements in s-s. (5) were directory only and therefore the failure of the clerk to post the list was a mere irregularity which did not affect the jurisdiction of the Court of Revision. With this submission I am unable to agree. Section 72 is under the heading "Appeals to Court of Revision" [substituted by 1960-61, c. 4, s. 9]. The subject-matter of the complaints to the Court

of Revision are that an assessment is too high or too low or that the name of a person is wrongfully omitted from or placed upon the assessment roll. Complaints may be made about the complainant's own assessment, s-s. (1), or the assessment of another person, s-s. (3). Persons complaining and persons complained about must be served with notice of the sittings containing information as to the nature of the complaint, s-ss. (1), (3) and (11). There is nothing unusual about these provisions because the Court of Revision exercises judicial functions. It is significant that s-s. (5) requires the posting of a list containing the same information which the complainants and those complained about receive. The list is not in terms called a notice but it can serve no other purpose and in my opinion the posting of the list is designed to give notice to those persons whose assessment is not the subject-matter of a complaint but whose assessment and therefore liability to taxation may be affected by a decision of the Court of Revision. It must not be overlooked that any change in the assessment of one property must be reflected in some degree in the amount of taxes which every other person will have to pay. That is the situation in this action. The posting of the list containing the required information gives to all persons whose assessment is not the subject of an appeal but whose interest may be affected an opportunity to take such action as they may be advised. It would appear that such persons do not have the right to appear on an appeal to the Court of Revision under s-s. (16) of s. 72, but the right of appeal to the County Court Judge under s. 75 is not confined to parties to an appeal in the Court of Revision but is extended to any person assessed or any elector of the municipality.

It is clear that the assessment roll is not lightly to be altered or interfered with except as the result of a decision by one of the tribunals exercising appellate functions. This is apparent from the provisions of s-s. (6) of s. 72 which reads as follows:

> (6) No alteration shall be made in the roll unless under a complaint formally made according to the above provisions.

No authority is needed for the proposition that statutory

requirements for the giving of notice of a judicial or quasi-judicial proceeding are fundamental to jurisdiction. In my opinion s-s. (5) of s. 72 is an imperative requirement for the giving of notice for the purpose of insuring fair and equal assessment and just taxation. The provisions of the statute not having been complied with, it follows that the Court of Revision had no jurisdiction to make the decision to reduce the assessment or to direct the clerk to alter the roll and the alteration of the roll was unauthorized and illegal.

Counsel for the respondent submitted that as there was no appeal from the decision of the Court of Revision that s. 87(2) as enacted by 1960-61, c. 4, s. 12, had the effect of validating what was done. That section provides that a decision of a Court of Revision with regard to persons assessed at too high or low a figure is final and binding unless appealed in accordance with the provisions of the Act. If I am right in the conclusion that the Court of Revision had no jurisdiction the Taylor appeal was not disposed of and there was no decision by that Court. Section 87(2) cannot make valid that which never existed.

Counsel for the respondent relied on s. 88 of the Act as a bar to this action. That section reads as follows:

> 88. No action or other proceeding, except an action or other proceeding brought by or on behalf of a municipality, shall be brought in any court with respect to an assessment or taxes based thereon,
>
> (a) except within sixty days after the day upon which the roll is required by law to be returned, or within sixty days after the return of the roll, in case the roll is not returned within the time fixed for that purpose;
>
> (b) where a complaint with respect to the assessment is made to the court of revision, except within the time limited for appealing from the decision of the court of revision to the county court judge;
>
> (c) where an appeal is made from the decision of the court

of revision to the county court judge, except within the time limited for appealing from the decision of the county court judge to the Ontario Municipal Board; and

(d) where an appeal is made from the decision of the county court judge to the Ontario Municipal Board, except within fifteen days after the date of the decision of the Ontario Municipal Board;

provided, where an appeal is made to the Court of Appeal, no action or other proceeding shall be brought in any other court with respect to the assessment.

Counsel for the respondent relied upon cl. (b) as establishing the limitation period for commencing this action. His submission involved the assumption that the Taylor notice was "a complaint with respect to the assessment". If it was such a complaint, then the purported decision of the Court of Revision being a nullity is to be treated as non-existent and the time limited by cl. (b) never started to run.

There is another and more cogent reason why s. 88 does not apply to this action. The real issue involved is the jurisdiction of the Court of Revision, the decision of which is the only possible justification for the alteration of the assessment roll. The relief sought is the restoration of the roll to its condition before the alteration and the levying of taxes in accordance therewith. The issue and the relief sought bear a relation to the subject assessment in the sense that the assessment roll is part of the equipment and the Court of Revision is part of the process of assessment generally. Section 88 is limited in its application, not to actions or proceedings with respect to assessment generally, but with respect to "an assessment"; that is to say a valuation by the assessor of an individual property owned by a particular person. The words used in ss. 87 and 87a enacted in the Statutes of Ontario, 1960-61, c. 4, s. 12, support this view. These sections are as follows:

87(1) Upon a complaint or appeal with respect to an

assessment, the court of revision, county judge or the Ontario Municipal Board may review the assessment and, for the purpose of such review, has all the powers and functions of the assessor in making an assessment, determination or decision under this Act, and any such assessment, determination or decision made on review by the court of revision, county judge or the Ontario Municipal Board shall, except as provided in subsection 2, be deemed to be an assessment, determination or decision of the assessor and has the same force and effect.

(2) A decision of the court of revision, county judge or the Ontario Municipal Board with regard to persons alleged to be wrongfully placed upon or omitted from the roll or assessed at too high or too low a sum is final and binding unless appealed in accordance with the provisions of this Act.

(3) For greater certainty, it is hereby declared that the provisions of sections 72, 75 and 83 respecting appeals are intended to establish machinery for the review of an assessment for the purpose of ensuring the administrative integrity of the roll, and, except as provided in subsection 2, such provisions shall not be deemed to affect the right of any person to apply to a superior, county or district court for a judicial determination of any question relating to an assessment.

ORIGINATING NOTICES AND OTHER PROCEEDINGS

87a(1) The municipal corporation, the assessor, the assessment commissioner or any person assessed may apply by originating notice to the Supreme Court or to the county court of the county in which the assessment is made for the determination of any question relating to the assessment, except a question as to persons alleged to be wrongfully placed upon or omitted from the roll or assessed at too high or too low a sum.

(2) The persons to be served with notice under this section

shall be the persons assessed in respect of the property relating to the assessment, the assessment commissioner or, if none, the assessor and the clerk of the municipality affected by the assessment.

(3) No originating notice shall be commenced except within the times for commencing an action or other proceeding set forth in section 88.

It is to be observed that the phrase "with respect to an assessment" is used in s. 87(1) in describing the powers and functions of the Court of Revision, the County Court Judge and the Ontario Municipal Board on a complaint or appeal. The powers and functions are stated to be those of the assessor whose duties are to value property and name the persons to be assessed. Subsection (3) of s. 87 which purports to declare the purposes of the appellate procedure under ss. 72, 75 and 83 contains a significant proviso that those sections shall not affect the right to apply to a superior Court on questions "relating to an assessment".

Section 87a provides for summary procedure by way of originating notice for the determination of questions "relating to the assessment" which are expressly stated to be questions other than whether persons are assessed at too high or too low a figure or wrongfully omitted from or placed upon the roll. Subsection (3) of s. 87a imposes the same limitation of time for the use of this remedy as imposed by s. 88. If "relating to" and "with respect to" meant the same thing or rather if the wide meaning attributed to s. 88 contended for by counsel for the respondent were correct it would have been unnecessary to enact s-s. (3). It is to be observed that the summary remedy provided in s. 87a is to determine questions "relating to the assessment". It is not necessary to reach any conclusion as to use of the definite instead of the indefinite article in the section but it would appear that "the assessment" probably refers to the total of the individual assessments on the assessment roll and provides a remedy in such situtations as arose in Re Bartelman et al. v. Timmins, [1949] 3 D.L.R. 464, [1949] O.W.N. 462, where the entire roll was prepared in disregard of the principles set out in the Assessment Act.

In my opinion ss. 87 and 87a draw a distinction between that which relates to an assessment and that which is with respect to an assessment using the former phrase to denote questions where the issues arise in the field of assessment but where assessment is collateral to those issues and the latter phrase to denote issues where the question is in the narrower and factual field of fair value of particular property owned by an individual.

Neither a particular assessment nor any sum of individual assessments is in question in this action. It is not the decision of the Court of Revision that is in question but whether there was any decision at all. It is not whether properties were assessed as too high or low a figure but whether the clerk had any authority or justification to make alterations in the assessment roll.

The learned trial Judge was of the opinion that the action of the Court of Revision could have been easily corrected on appeal to the County Court Judge under s. 75. In this I think he erred. The question of the jurisdiction of the Court of Revision is a question of law. On an appeal under s. 75 the County Court Judge has no jurisdiction to deal with a question of law but is limited to the question of whether or not the values are too high or too low or whether persons are in fact wrongfully omitted from or placed upon the roll. Quance v. Thomas A. Ivey & Sons, Ltd., [1950] 3 D.L.R. 656, [1950] O.R. 297; Town of Brampton v. Hutchinson, [1950] O.R. 491; Toronto v. Olympia Edward Recreation Club Ltd., [1955] 3 D.L.R. 641, [1955] S.C.R. 454. Therefore the County Court Judge could under no circumstances grant the remedy which the plaintiff seeks in this action and the plaintiff would have no remedy in this case under the appellate procedure under the Assessment Act. While the learned trial Judge has found that in this case there was no fraud in the moral sense, if the construction which the appellant supports is placed on s. 88 it could be used as an instrument for a fraud in that as long as the fraud could be concealed until after the limitation period in s. 88, a person assessed would be deprived of any remedy. I cannot think that the intention of the Legislature in enacting s. 88

was to prevent persons from attacking proceedings either fraudulent in nature or without legal effect because of the failure by the authorities to obey commands of the Legislature.

Counsel for the respondent pointed out that the provisions of the Act relating to appeals from assessments and s. 88 were designed to achieve finality in assessment and taxation and to avoid the confusion necessarily resulting from changes in the assessment and the amount of tax after a lapse of time. No doubt this is so. It was so stated in the judgment of MacKay, J.A., in Agudath Isreal of Toronto v. Town of Orillia, 32 D.L.R. (2d) 81 at p. 85, [1962] O.R. 305 at p. 309, but finality of assessment is purchased at too high a price if it countenances complete disregard of imperative statutory duties designed to ensure fairness. It is to be observed that no questions were raised in the Agudath case similar to the questions in this case. Section 57(7) provides machinery for adjustments of assessment and taxes as a result of an order of a superior Court.

It was also said in argument that the appellant could have found out about the Taylor appeal by appropriate, inquiry. It may be that it could have done so but the appellant was entitled to assume that the defendant would carry out its obligations with respect to notice required by s. 72(5).

For these reasons the appeal will be allowed and the judgment at the trial will be set aside. The plaintiff is entitled to judgment as follows:

(1) A declaration that the resolution of the council of the defendant dated December 15, 1961, set out in para. 9 of the statement of claim is null and void;

(2) a declaration that the alterations of the assessment roll made by the clerk reducing all assessments in excess of $100 by 20% are null and void; and

(3) an order that such alterations be deleted from the assessment roll.

This disposition of the appeal makes it unnecessary to consider the question as to the constitutional validity of s. 88 raised by the appellant. I wish to acknowledge my gratitude to my brother Kelly for his generous assistance in preparing these reasons in the form of a memorandum and in many consultations.

The appellant is entitled to its costs of the trial and of the appeal against the respondent municipality.

Appeal allowed.
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In the Court of Appeal of Alberta

Citation: Alberta Securities Commission v Felgate, 2022 ABCA 107

Date: 20220323
Docket: 2001-0199AC
Registry: Calgary

Between:

Alberta Securities Commission

Respondent

- and -

Nicholas John Felgate

Appellant

The Court:

The Honourable Justice Frans Slatter
The Honourable Justice Ritu Khullar
The Honourable Justice Jolaine Antonio

Memorandum of Judgment of Justice Slatter and Justice Khullar
Concurring Memorandum of Judgment of Justice Antonio

Appeal from the Decision by
Alberta Securities Commission
Dated the 6th day of October 2020
(Re Felgate, 2020 ABASC 156)

Memorandum of Judgment
of Justice Slatter and Justice Khullar

[1] The appellant appeals his conviction for trading in securities in breach of a cease trade order. He does not dispute that he engaged in the underlying conduct, but he argues that the cease trade order was void and he was entitled to ignore it.

[2] The Alberta Securities Commission received information that caused it to believe that the appellant was raising money from the public in breach of the provisions of the *Securities Act*, RSA c. S-4. The Commission issued an *ex parte* interim cease trade order under s. 33(1) of the *Act*.

[3] *Ex parte* interim cease trade orders are in effect for 15 days, but they can be extended following a hearing:

> 33(4) Before the expiry of an interim order, the Commission or the Executive Director, as the case may be, may extend an interim order for a specified period of time, or until any proceeding initiated pursuant to this Act, including a trial in respect of an offence, is finally determined or otherwise concluded, if
>
> > (a) the Commission or the Executive Director provides the person or company named in that order with an opportunity to be heard, and
> >
> > (b) the Commission or the Executive Director considers that the length of time required to conduct a hearing, or a trial in respect of an offence, and to render a decision could be prejudicial to the public interest.

The Commission extended the order once to a specified date. It was extended it a second time and the appellant was subsequently charged with breaching the second extension order.

[4] The key terms of the second extension order issued after the hearing were:

> 6. The Commission, considering that length of time required to conduct a hearing, or a trial in respect of an offence, and to render a decision could be prejudicial to the public interest, orders under section 33(4) of the Act that the Interim Order is extended until any proceeding initiated pursuant to the Act, including a trial in respect of an offence, is finally determined or otherwise concluded.

At the time that this order was made, no proceedings had actually been initiated. The appellant argues that the Commission can only make an interim cease trade order that expires at the "conclusion of proceedings" after proceedings have actually been commenced. He does not dispute

that the Commission can issue cease trade orders prior to proceedings being initiated, but such orders must be for a "specified period of time".

[5] This issue is a pure question of statutory interpretation. The provision should be interpreted by discerning the legislative intent from examining the statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statutory scheme and objects. On a proper interpretation, s. 33(4) empowers the Commission to issue interim cease trade orders in the two situations that might exist:

(a) where proceedings have been initiated, the cease trade order could be in place for a specified period of time, or until the proceedings are concluded, or

(b) where proceedings have not been initiated, the cease trade order can be in place for a specified period of time.

This interpretation is consistent with the scheme of the statute. As the appellant points out, when proceedings have not been initiated, an order in force until those nonexistent proceedings have concluded could potentially be in effect in perpetuity. The statute is widely worded to empower the Commission, but it is not intended that the statutory wording would simply be tracked in specific orders.

[6] The appellant is accordingly correct in arguing that the order as issued was flawed. It was not appropriate for the Commission to simply track the empowering wording of the statute in the order. The appellant, however, had three remedies:

(a) He could have (but did not) make submissions about the proper form of the order at the hearing;

(b) He could have appealed the order to the Court of Appeal under s. 38; or

(c) He could at any time have applied it to vary or terminate the order under s. 214.

What the appellant was not entitled to do was to simply ignore the order and trade in securities as he wished: ***R. v Consolidated Maybrun Mines Ltd***, [1998] 1 SCR 706; ***R. v Al Klippert Ltd***, [1998] 1 SCR 737.

[7] Whether a collateral attack of an order is possible must be determined by reviewing the legislature's intention as to the appropriate forum for challenging the order. The relevant factors are: the wording of the statute under which the order was issued; the purpose of the legislation; the existence of a right of appeal; the kind of collateral attack in light of the expertise or *raison d'être* of the administrative appeal tribunal, and the penalty on a conviction for failing to comply with the order: ***Al Klippert*** at para. 13. The *Securities Act* is a statute designed to protect the public from economic losses through inappropriate financial market activities. The *Act* provides numerous effective remedies to someone who is subject to a cease trade order. The Legislature could not have intended that someone subject to a flawed cease trade order could simply continue to raise funds from the public without taking any steps to amend or terminate the order.

[8] The appellant relies on ***Carey v Laiken***, 2015 SCC 17 at para. 33, [2015] 2 SCR 79:

> 33 The first element is that the order alleged to have been breached "must state clearly and unequivocally what should and should not be done": . . . This requirement of clarity ensures that a party will not be found in contempt where an order is unclear: . . . An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning: . . . (Authorities omitted, emphasis added)

The appellant relies on the word "when" in this passage. In this case, however, there was never any doubt that the cease trade order purported to be in effect at the time the appellant traded in securities. There was no ambiguity in the order that provides a defence to him.

[9] The appellant argues that "collateral attack" is a new issue on appeal, but on this record it was always at the forefront. In any event the record is clear, and the appellant conceded that he would suffer no prejudice by its consideration on appeal.

[10] In summary, the order as drafted was flawed, but the appellant was not entitled to simply ignore it. The appeal is dismissed.

Appeal heard on March 11, 2022

Memorandum filed at Calgary, Alberta

this day of March 2022

Slatter J.A.

Khullar J.A.

Concurring Memorandum of Judgment of Justice Antonio

[11] I agree with my colleagues on the outcome of the appeal, but disagree on the interpretation of section 33(4) of the *Securities Act.* In my view, the Commission correctly interpreted the provision in the context of the *Act* and was entitled to extend its interim order until the conclusion of any proceeding initiated pursuant to the *Act*.

Commission's Reasons

[12] The interim order was extended pursuant to section 33(4) of the *Securities Act*. In its entirety, section 33 provides:

> **33(1)** Notwithstanding anything in this Act, where
>
> (a) this Act
>
> (i) permits the Commission or the Executive Director to make a decision after conducting a hearing or after giving a person or company an opportunity to have a hearing, or
>
> (ii) creates an offence,
>
> and
>
> (b) the Commission or the Executive Director considers that the length of time required to conduct a hearing, or a trial in respect of an offence, and to render a decision could be prejudicial to the public interest,
>
> the Commission or the Executive Director may make an interim order at any time with or without conducting a hearing on notice to a person or company against whom the order is sought.
>
> **(2)** If the Commission or the Executive Director makes an interim order under subsection (1) without conducting a hearing on notice to a person or company against whom the order is sought,
>
> (a) unless the order otherwise provides, the order takes effect immediately on being made,

(b) the order expires 15 days from the day that it takes effect, and

(c) the Commission or the Executive Director, as the case may be, shall send to each person or company named in the interim order

(i) a copy of the interim order,

(ii) any evidence admitted in support of the interim order, and

(iii) an accompanying notice of hearing in respect of the extension of the interim order pursuant to subsection (4), if applicable.

(3) If the Commission or the Executive Director makes an interim order under subsection (1) after conducting a hearing on notice to a person or company against whom the order is made, the order takes effect immediately and remains in effect

(a) for the period of time specified in the order, or

(b) until any proceeding initiated pursuant to this Act, including a trial in respect of an offence, is finally determined or otherwise concluded.

(4) Before the expiry of an interim order, the Commission or the Executive Director, as the case may be, may extend an interim order for a specified period of time, or until any proceeding initiated pursuant to this Act, including a trial in respect of an offence, is finally determined or otherwise concluded, if

(a) the Commission or the Executive Director provides the person or company named in that order with an opportunity to be heard, and

(b) the Commission or the Executive Director considers that the length of time required to conduct a hearing, or a trial in respect of an offence, and to render a decision could be prejudicial to the public interest.

[13] The Commission held the purpose of section 33 is to allow a panel to impose orders if Commission staff are able to provide *prima facie* proof the *Act* has been contravened and there is a significant risk that those subject to the order could cause prejudice to the public interest before a hearing is completed.

[14] Protective interim orders can be made at any time. The wording of section 33 does not restrict the duration of an interim order based on whether a proceeding has been commenced. A

proper interpretation of subsection 33(4) requires a harmonious reading with section 33(1)(b), which is the starting point for making interim orders. Although a proceeding had not been commenced, it was still appropriate for protective measures to be in place until any such proceeding were to be commenced and concluded. The Commission also noted that the appellant could have applied under section 214(1) to revoke or vary the interim order.

[15] The Commission found its interpretation was reinforced by the fact that section 33(4) sets out three preconditions to the extension of an interim order, and that those preconditions do not include a requirement that a hearing or trial has already been initiated.

[16] The Commission further held there was no improper delegation of power to Commission staff. Interim orders are not within staff control because pursuant to section 214, a Commission panel may revoke or vary any decisions including interim orders.

[17] The appellant submitted his interpretation was supported by the history of amendments to section 33. After a careful review of prior versions of the section, the Commission found no merit in this line of argument.

[18] The Commission concluded the extended interim order was valid and went on to find the appellant breached section 93 of the *Act* when he failed to comply with it.

Analysis

[19] The contentious portion of subsection 33(4) reads: "may extend an interim order for a specified period of time, or until any proceeding initiated pursuant to this *Act*, including a trial in respect of an offence, is finally determined or otherwise concluded". Viewed narrowly, the issue is the interpretation of the word "initiated". The appellant's interpretation is that the word is to be read as the equivalent of "has been initiated". The respondent's interpretation is that the word is to be read as the equivalent of "may be initiated". The words of the section alone will not resolve the issue.

[20] As the Supreme Court of Canada has recently and repeatedly stated, "statutory interpretation entails discerning legislative intent by examining statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statute's scheme and objects": *Michel v Graydon*, 2020 SCC 24 at para 21.

[21] The appellant's position that the provisions should be read as "has been initiated" is not supported by the purpose of the *Act* and would not be in harmony with related provisions.

[22] The *Act*'s main purpose is protective: it creates the Commission to protect investors and the public from misconduct: *Brosseau v Alberta Securities Commission*, [1989] 1 SCR 301 at 314; *EnCharis Community Housing and Service v Alberta Securities Commission*, 2019 ABCA 177 at para 30. This protective role, common to all securities commissions, must be recognized when assessing the way in which they perform their functions under their enabling legislation: *Brosseau* at 314.

[23] Other provisions of Act provide flexibility in ordering that certain conduct cease, even prior to initiation of proceedings. Subsection 33(1) empowers the Commission to issue interim orders to prevent the continuation of *prima facie* breaches "at any time" and "notwithstanding anything else" in the *Act*, when the Commission considers that the length of time required to conduct a hearing or a trial and render a decision could be prejudicial to the public interest. Before an interim order expires, the Commission, pursuant to subsection 33(4), may extend it until any proceeding initiated under the *Act* is finally determined or otherwise concluded.

[24] As the Commission noted, the legislature imposed certain preconditions to the extension of an interim order under section 33(4), but those preconditions do not include the prior commencement of a proceeding. The words "until any proceeding initiated ... is finally determined or otherwise concluded" define the point of expiry even in the absence of an extant proceeding before the Commission. Consistent with its protective role and the wording of the *Act*, the Commission has the power to make and to extend interim orders before the potential initiation of a proceeding.

[25] The appellant's theoretical concerns that an interim order could be in place indefinitely do not arise here. The appellant appears to have been represented by counsel throughout these proceedings and could have taken steps at any time to have the interim order revoked under section 214(1) or appealed under section 38. The scheme of the *Act* establishes this court as the proper forum in which to contest an order that was allegedly issued in error. An individual is not entitled to ignore an order on the basis that he believes it to be void. Such behaviour would undermine the *Act's* protective purpose and could expose individuals subject to the Commission's orders to additional jeopardy.

[26] This observation supports my colleagues' conclusion on collateral attack, with which I concur.

[27] In my view, the Commission did not err in interpreting section 33(4) of the *Securities Act* or in dismissing the nullity application. For this reason, and because the nullity argument was a collateral attack on the interim order, I agree the appeal should be dismissed.

Appeal heard on March 11, 2022

Memorandum filed at Calgary, Alberta
this day of March 2022.

Antonio J.A.

Appearances:

C. Pillar
P.A. Verschoote
for the Respondent

B.M. Miller
for the Appellant

1953 CarswellBC 177
Supreme Court of Canada

Labour Relations Board (B.C.) v. Canada Safeway Ltd.

1953 CarswellBC 177, [1953] 2 S.C.R. 46, [1953] 3 D.L.R. 641, 107 C.C.C. 75, 53 C.L.L.C. 15,058

The Labour Relations Board (B.C.) and Attorney General for The Province of British Columbia, Appellants and Canada Safeway Limited, Respondent

Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey and Cartwright JJ.

Judgment: February 24, 1953
Judgment: February 25, 1953
Judgment: February 26, 1953
Judgment: February 27, 1953
Judgment: June 8, 1953

Proceedings: On appeal from the British Columbia Court of Appeal

Counsel: *C.W. Brazier* and *R.J. McMaster* for the Retail, Wholesale and Department Store Union, Local No. 580, appellant.
L.H. Jackson for The Labour Relations Board (B.C.) and the Attorney General for British Columbia, appellants.
C.K. Guild, Q.C., for Canada Safeway Ltd., respondent.

The Chief Justice **(dissenting):**

1 For the reasons stated by the Honourable the Chief Justice of British Columbia I would dismiss the appeal with costs.

***Kerwin J.*:**

2 Pursuant to s-s. 1 of s. 10 of the *Industrial Conciliation and Arbitration Act* of British Columbia, R.S.B.C. 1948, c. 155, the appellant Union, a "labour organization" as therein defined, applied to the Labour Relations Board (British Columbia), established under the Act, for certification as the bargaining authority for those employees of the respondent Company employed as "office employees" (except department managers and outside salesmen), at the Company's distributing warehouses in Vancouver. So far as relevant, s-s. 1 of s. 10 is in these words: —

> 10. (1) A labour organization claiming to have as members in good standing a majority of employees in a unit that is appropriate for collective bargaining may apply to the Board to be certified as the bargaining authority for the unit in any of the following cases: —
>
> (*a*) Where no collective agreement is in force and no bargaining authority has been certified for the unit:

3 Subsection 1 of s. 12 enacts: —

> 12. (1) Where a labour organization applies for certification as the bargaining authority for a unit, the Board shall determine whether the unit is appropriate for collective bargaining, and the Board may, before certification, include additional employees in, or exclude employees from, the unit.

4 The Board determined that such employees "except those excluded by the Act and except those employed in the positions and in the classes of work listed on the back of this certificate" were a unit of employees appropriate for collective bargaining. On the back of the certificate appeared the following: —

Positions and classes of work excepted from the bargaining unit.

Managers;

Assistant Managers;

Managerial Secretaries;

Personnel Records;

Payroll Clerks;

Chief Accountant;

Accountant;

Supervisor of Comptometer Operators;

Supervisor of Power Machine Operators;

Pricing Department Clerk;

Advertising Clerk;

Bulletin Typist.

5 In the interpretation section of the Act, it is provided: —

Employee means a person employed by an employer to do skilled or unskilled manual, clerical, or technical work, but does not include: —

(*a*) A person employed in a confidential capacity or a person who has authority to employ or discharge employees:

(*b*) A person who participates in collective bargaining on behalf of an employer, or who participates in the consideration of an employer's labour policy:

(*c*) A person serving an indenture of apprenticeship under the "Apprenticeship Act":

(*d*) A person employed in domestic service, agriculture, horticulture, hunting or trapping:

6 An application for a writ of *certiorari* to the Chief Justice of the Supreme Court of British Columbia was heard as if a formal order had been issued by the Court and a return made by the Board. A question has been raised as to what should be considered generally as a return by a tribunal such as the Board but it need not be determined in the present case. The Court knows the Board's decision only from a copy of its certificate sent to the solicitor for the respondent, which was produced as an exhibit to an affidavit made by Mr. Theodore Smith on the respondent's behalf, and since it appears (and is admitted) that stapled thereto was a letter from the Registrar of the Board giving the reasons for the decision, I assume that in the present case the return includes not only the certificate but the reasons therefore. I further assume in favour of the respondent that under the particular circumstances we may look at the records of the respondent, which were also made an exhibit to the affidavit, and at the affidavit itself to show what happened before the Board, since the deponent was cross-examined on that affidavit and such cross-examination is part of these proceedings. I am satisfied that on this evidence the Board and the Chief Justice of the Supreme Court of British Columbia came to the right conclusion on the important question whether those office employees of the respondent who are comptometer operators and power machine operators are persons employed in a confidential capacity within the meaning of exclusion (*a*) in the definition of "employee". This conclusion is arrived at without reference to the provisions of s-s. 4 of s. 2: —

(4) If a question arises as to whether a person is an employee within the meaning of this Act, the question shall be determined by the Board, and the decision of the Board shall be final.

7 The Board's reasons as contained in the letter enclosing a copy of its certificate to the solicitor for the respondent are as follows: —

A prime question for the decision here is the interpretation of "a person employed in a confidential capacity", (S. 2(1), I.C.A. Act). The employer argues that, with a few exceptions, all of the B.C. zone office staff are employed in a confidential capacity. That is to say that those employees are handling matters which are of a confidential nature in regard to the affairs of the employer.

In the strict sense this view would appear to rule out such employees from any proposed bargaining unit within the scope of the *Industrial Conciliation and Arbitration Act*. Can the considerations really rest there? It seems obvious that many employees of most employers are "confidential" to some and to varying degree. Is not then a further consideration required as to the degree and capacity of the confidential employment met with in this application?

Modern business practice and the emergence of large office organizations require a broad approach to this problem if the *Industrial Conciliation and Arbitration Act* is to be reasonably interpreted. Obviously one, or a few persons, could not be expected to deal with the mass of intimate information required in today's management office organization. Thus, nearly all employees in such an office handle, or have access to, confidential information. The Board's view is then, that the primary question for study is: — does this type of employment make persons so employed persons employed in a confidential capacity according to the Act, and thus rule them out from appointing a bargaining authority to act on their behalf in respect of wages and working conditions?

Many excellent cases and facts, pro and con, were provided by counsel in hearings on this application. The Board's opinion, after study of these cases and facts, and in particular the case of *Ford Motor Company of Canada, Limited*, is that the question here resolves itself into a consideration of two classifications of employees which comprise the major portion of the staff employed, viz. — Comptometer Operators and Power Machine Operators.

It is the Board's opinion that while there is merit to the case presented by counsel for the employer, justification exists for the Board to grant certification for the unit applied for, less certain classifications. These latter are: (Then follows the list that appears on the back of the certificate).

The Board rules that certification will issue for a bargaining unit described as: all employees, less the aforementioned categories.

8 The Board accepted the statements as to what the operators did that appear in the respondent's records as explained by Mr. Smith but counsel for the respondent submitted the Board's reasons to a searching criticism. He pointed to the statement therein: — "Nearly all employees in such an office handle or have access to confidential information." Apparently, before the Board, counsel had used the word "handle" but I take it that by repeating the word, the Board did nothing more than adopt a convenient expression to cover the having access to confidential information. It was also pointed out that in the earlier part of its reasons the Board had stated that the respondent's argument that, with a few exceptions, all of the British Columbia zone office staff were employees in a confidential capacity would in the strict sense appear to rule out from any proposed bargaining unit within the scope of the Act all employees who were handling matters which were of a confidential nature in regard to the affairs of the employer. It was argued that this meant that while strict construction of the Act would, according to the Board, bring the operators within exception (*a*) to the definition of "employee", the Board gave some other construction not warranted by the provisions of the enactment. That is not the proper view to take of the reasons. The Board considered that the construction advanced on behalf of the respondent did not meet the proper test under the Act in relation to the operators in question, and with great respect to the members of the Court of Appeal who thought otherwise, I am of the same opinion.

9 Counsel for the respondent argued that those operators should be excluded as much as "Accountant; Supervisor of Comptometer Operators; Supervisor of Power Machine Operators;". I disagree because, in my view, the duties of accountants and supervisors comprise much more than tabulating on machines information from various sources. An employee who had access to outgoing mail, because he was in a position to read all that was going out, or one whose duties might be to open incoming mail, could be said to have access to confidential information. It is in the same way and only to the same extent that the same could be said of the operators. On the other hand, accountants and supervisors would not merely put down figures and have them totaled but would collate the information from these figures with a view of presenting it, and making recommendations, if necessary or advisable, in connection therewith to a superior employee. The fact that an employee had access to confidential information does not mean that he was "employed in a confidential capacity."

10 It has not been overlooked that in its certificate the Board excepts "those included by the Act". These words appear in the printed form prepared for the purpose and should have been stricken out. However, in view of the last paragraph of the Board's reasons, and also of the fact that the real dispute is as to the operators, the words may be taken as merely surplusage, or as referring to employees who might otherwise possibly fall within exceptions (*b*) and (*c*) in the definition of "employee". The Board's certificate cannot, therefore, be treated as meaningless.

11 The appeal should be allowed and the judgment of the Chief Justice of the Supreme Court restored. The appellant Union is entitled as against the respondent to its costs of the appeal to this Court and of the appeal to the Court of Appeal. There should be no costs for or against the Board or the Attorney General of British Columbia.

***Taschereau J.*:**

12 I believe that the learned Chief Justice of the Supreme Court of British Columbia was right in dismissing the application of the respondent for a writ of *certiorari*.

13 I am of the opinion that there was sufficient evidence to justify the Board to come to the conclusion that certain comptometer operators and power machine operators, were not employed in "a confidential capacity" within the meaning of the Act, and that by virtue of s. 2(4) of the Act, its decision is final and is not open to review.

14 I would allow the appeal and restore the order of the trial Judge, with costs here and in the court below.

***Rand J.*:**

15 The question in this controversy over the certification of a labour union in British Columbia as bargaining agent hinges on the interpretation to be given the exception, "a person employed in a confidential capacity". The company carries on a large system of grocery stores throughout the western provinces and it is with relation to the headquarters office staff in Vancouver of the British Columbia zone that the dispute arises. The persons concerned are twenty-four operators of comptometers, nine operators of power machines, six telephone operators and two duplicating machine operators.

16 Those in the first group are engaged in the preparation and assembly of all species of statistical and report material. What may be called the primary figures come to the central office from the warehouses, merchandising departments and retail stores in the zone, and are combined, consolidated or summarized in such detail and manner as the company requires. The data include all accounting particulars of the business done in each store, detailed to individual departments; the total operations of the zone in similar form and detail; and the usual statistical calculations in terms of unit volume, labour and return. In this matter appear, of course, prices, wages, bonuses, profits and other items that enter into the final result, elaborated in relation to warehouses, shops, service and all other activities of the business.

17 The power machines are used, among other things, to make out cheques to all employees except executives paid from the Vancouver office; for the preparation of the invoices of goods to the retail stores in the zone, of records showing cost prices, sale prices and profit margins throughout the zone, and of daily and quarterly reports of volume sales of individual commodities.

18 The duplicating machine operators reproduce the statistical returns already mentioned. They also distribute incoming and handle outgoing mail.

19 All of these employees are claimed to be within the exemption, but from the facts stated it is clear that the work done by them is simply the mechanical production of statements of the business, in more or less detail, and reduced to significant units. This is undoubtedly information which the company does not broadcast from the housetops; but the operators do nothing to or about it except to transcribe it on paper for the use of others. Their work is basically instrumental although there is some consolidation and even, it may be, of calculation by them for the results tabulated. The disability urged arises through their exposure to that information, and the taint is said to disqualify even the clerks who handle the mail.

20 This condition is present more or less in every business and an employee is under a legal duty as a term of his employment to treat all such matters as the exclusive concern of the proprietor. But the question under the statute is not to be determined by the test whether the employee has incidental access to this information; it is rather whether between the particular employee and the employer there exists a relation of a character that stands out from the generality of relations, and bears a special quality of confidence. In ordinary parlance, how can we say that a person skilled to operate a comptometer and employed primarily because of that skill, who is presumably so fully occupied with the particular work of transcribing or consolidating, that the figures in general would mean little to him, is by that exposure converted into an employee with a "confidential" relation? Between the management and the confidential employee there is an element of personal trust which permits some degree of "thinking aloud" on special matters: it may be on matters in relation to employees, competitors or the public or on proposed action of any sort or description; but that information is of a nature out of the ordinary and is kept within a strictly limited group. In many instances it is of the essence of the confidence that the information be not disclosed to any member of any group or body of the generality of employees.

21 There is nothing of that sort here. With a large office of upwards of thirty-five employees engaged in similar occupation, the matter which they work into reports, so far as it is known to one of them, is of common knowledge throughout the office; what, practically, could prevent these employees from discussing it among themselves? and if so, what could prevent them from spreading it abroad except their duty not to do so? They occupy no exceptional position in office organization. Most of them are, at the present time, members of the union, and the objection urged is not their being members but that the certification of the union to represent them would open the floodgates of exposure of the company's business chiefly to competitors. No such information would be used by any tribunal except by compelling the company to produce it or by permitting it to be disclosed by witnesses: but no evidence would be countenanced that had been obtained by a breach of duty. The feature a union would be interested in is the financial result of the business, and in this case that fact is published to the world. And what conceivable reason could there be to induce employees, because they happen to belong to a certified union, to pass this private information on to competitors of their own employer, the consequences of which could only be to their own injury?

22 There is an element of confidence between employer and all employees and an ascending scale up to those whose relation takes on the "confidential capacity". The point at which that is reached is a matter of judgment to be formed by weighing all the circumstances. For example, typewritten reports on advanced stages of atomic development where fundamental concepts may be expressed in communicable formulas might well today be classed as done by one in such a capacity; in engaging a person for such work, apart from the qualification as a competent operator and as a far more important consideration, integrity and the capacity for self-discipline and control would be decisive; but in twenty-five years from now all that information may be as common as the formulas of chemistry today. In this case, efficiency units are included in the secret category: but these business health tests are in general use and frequently ordinary items for arbitration between employer and employee. There is nothing special about them or their secrecy. The technician is chosen primarily for his professional or mechanical skill; in confidential employment, personal qualities take on greater importance and may be controlling. Here there is little beyond the relation sustained by the multitude in clerical work today; and the effects of a denial to this group of the privilege of being represented by a certified union must be taken into account in interpreting the statutory language. The task of evaluating all these considerations has been committed by the legislature to the Board; and so long as its judgment can be said to be consonant with a rational appreciation of the situation presented, the Court is without power to modify or set it aside.

23 I would, therefore, allow the appeal with costs in this Court and in the Court of Appeal and restore the order of Farris C.J.

Kellock J. **(dissenting):**

24 Under the provisions of s. 2(1) of the statute "employee" does not include

> a person employed in a confidential capacity.

25 By s-s. (4) of the same section, it is provided that

> If a question arises as to whether a person is an employee within the meaning of this Act, the question shall be determined by the Board, and the decision of the Board shall be final.

26 S. 58, s-s. (1) also provides that

> If a question arises under this Act as to whether: —
>
> > (*a*) A person is an employer or employee ... the Board shall decide the question, and its decision shall be final and conclusive for all the purposes of this Act except in respect of any matter that is before a Court.

27 As stated by Singleton L.J., in *Rex v. Northumberland Compensation Appeal Tribunal* [1] :

> Error on the face of the proceedings has always been recognised as one of the grounds for the issue of an order of *certiorari*.

28 The provisions of ss. 2(4) and 58(1) do not exclude the supervisory jurisdiction of the court with respect to such questions, as is explained by Lord Sumner in the *Nat Bell* case, [2] . The error alleged to be apparent on the face of the record in the case at bar is the view taken by the Board of the statutory definition of "employee". Although it is for the Board to determine whether or not a particular person is brought within the statutory definition, the Board may not misconstrue that definition.

29 The word "confidential" as it is used in the statute has, in my opinion, the sense of

> intrusted with the confidence of another or with his secret affairs or purposes,

see Black's Law Dictionary, 4th ed. 1952, p. 370.

30 The difference to my mind between a person employed in a confidential capacity and one not so employed is that, in the former case, for reasons, it may be, of convenience or necessity on the part of the employer in the conduct of his business or affairs, the employee is put in possession of matter which the employer regards, from his standpoint, as secret or private. In the case of a person engaged in business on a large scale, matters which are private or secret from his standpoint must of necessity be disclosed to varying numbers of employees, depending upon the volume and scope of the affairs in question. This necessity arises from the purely physical consideration of the employer being unable to keep these matters to himself, if his business or affairs are to be properly conducted.

31 The respondent, in the case at bar, operates a number of "chain" stores on a large scale and of necessity requires the assistance of a considerable number of employees in dealing with matters which it desires to keep private. It is quite true that the respondent is a public company and that its annual profits or losses are published, but, to take one example given by Mr. Guild on the argument, the profitableness or otherwise of an individual store is not ascertainable from such published statements, and it is obvious that the respondent would have the best of reasons for desiring to keep such information to itself and not available to its competitors. It is detailed information of this sort with which the disputed classes of employees dealt.

32 The view of the Board with respect to the meaning of the statutory definition is disclosed by its reasons as follows:

> A prime question for the decision here is the interpretation of "a person employed in a confidential capacity", (S. 2(1), I.C.A. Act). The employer argues that, with a few exceptions, all of the B.C. zone office staff are employed in a confidential capacity. This is to say that those employees are handling matters which are of a confidential nature in regard to the affairs of the employer.
>
> In the strict sense this view would appear to rule out such employees from any proposed bargaining unit within the scope of the *Industrial Conciliation and Arbitration Act*. Can the considerations really rest there? It seems obvious that many employees of most employers are "confidential" to some and to varying degree. Is not then a further consideration required as to the degree and capacity of the confidential employment met with in this application?
>
> Modern business practice and the emergence of large office organizations require a broad approach to this problem if the *Industrial Conciliation and Arbitration Act* is to be reasonably interpreted. Obviously one, or a few persons, could not be expected to deal with the mass of intimate information required in today's management office organization. Thus, nearly all employees in such an office handle, or have access to, confidential information. The Board's view is then, that the primary question for study is: — does this type of employment make persons so employed persons employed in a confidential capacity according to the Act, and thus rule them out from appointing a bargaining authority to act on their behalf in respect of wages and working conditions?

33 In my view the Board has stated, only to discard, the proper meaning of the statute, because of that very necessity that the conduct of large affairs enlarges the number of persons whom an employer must take into his confidence. For my part, I find nothing in the statute which justifies such a departure from the plain meaning of the language used by the legislature. I do not obtain any assistance from the consideration that confidential employees any more than employees who participate in management, may be members of a trade union under the statute. That is so but such employees are in neither case under the statute to be considered for the purposes of certification for collective bargaining. I adopt the language of the Chief Justice of British Columbia as follows:

> The two disputed classifications of employees, when consideration is given to the nature of their assigned tasks, and the material with which they work, are in my opinion "employed in a confidential capacity" within the meaning of the Act. In consequence the Board erred in law and exceeded its jurisdiction in deciding otherwise.

34 I think the conclusion of the court below is correct and would dismiss the appeal with costs.

The Judgment of Estey and Cartwright JJ. was delivered by *Cartwright J.*:

35 The relevant facts are stated in the reasons of other members of the Court. For the respondent it is argued that the decision of the appellant Board, that certain comptometer operators and power machine operators admittedly in the employ of the respondent, did not fall within the words "employed in a confidential capacity" so as to be excluded from the term "employee" as defined in s. 2(1) of the *Industrial Conciliation and Arbitration Act*, R.S.B.C. 1948 c. 155, was so opposed to the evidence that the inference is irresistible that the Board misconstrued the Statute, that there is therefore error in law apparent on the face of the proceedings and *certiorari* lies to quash the order.

36 I am in respectful agreement with the learned Chief Justice of the Supreme Court of British Columbia that, on the evidence before it, it was open to the Board to come to the conclusion that the operators in question were not in fact employed in such a capacity as to be excluded from the term "employees" within the meaning of the Act. In such circumstances, in my opinion, effect must be given to s. 2(4) of the Act which provides that this question shall be determined by the Board and that its decision shall be final; and I do not find it necessary to inquire whether I would have reached the same conclusion as did the Board had the responsibility of making such decision been committed to the courts.

37 I would dispose of the appeal as proposed by my brother Kerwin.

Appeal allowed with costs against the respondent in this Court and the Court below. No costs for or against the Board or the A.G. of B.C.

Solicitors of record:
L.H. Jackson, solicitor for the appellants the A.G. for B.C. and The Labour Relations Board.
R.J. McMaster, solicitor for the appellant union.
K.L. Yule, solicitor for the respondent.

Footnotes

1 [1952] 1 All E.R. 122 at 125.

2 [1922] 2 A.C. 128 at 159, 160.

1959 CarswellSask 36
Saskatchewan Court of Appeal

Perini Ltd. v. I.U.O.E., Local 870

1959 CarswellSask 36, 21 D.L.R. (2d) 266, 29 W.W.R. 576

Perini Limited (Applicant) v. International Union of Operating Engineers, Hoisting and Portable, Local No. 870 (Respondent)

Martin, C.J.S., Gordon, Procter, McNiven and Culliton, JJ.A.

Judgment: October 27, 1959

Counsel: *D. K. MacPherson*, for applicant.
L. H. McDonald, for Labour Relations Board.
G. J. D. Taylor and *C. Tallis*, for respondent.

***Martin, C.J.A.*:**

1 I agree.

***Gordon, J.A.*:**

2 I concur.

***Procter, J.A.*:**

3 I concur in the result, *hesitante*.

***McNiven, J.A.*:**

4 I agree.

***Culliton, J.A.*:**

5 This is an application by Perini Ltd. of Outlook, in the province of Saskatchewan, for an order that a writ of *certiorari* be issued for the return of a certain order of the labour relations board made on July 23, 1959, and that the order be quashed without the actual issue of a writ of *certiorari*.

6 The order made by the board was preceded by a statement that the board found that all the employees of Perini Ltd. employed in connection with the South Saskatchewan River dam project near Loreburn, in the province of Saskatchewan, except persons employed in a confidential capacity, supervisors, office staff, field engineering staff and general labourers, constitute an appropriate unit of employees for the purpose of bargaining collectively and that the applicant trade union represents a majority of employees in the appropriate unit. The board was, therefore, of the opinion that Perini Ltd. was required to bargain collectively with the applicant trade union and so ordered.

7 The application of Perini Ltd. for the writ of *certiorari* after citing the order of the labour relations board, stated the several grounds of the application. On the hearing all other grounds were abandoned by the applicant except the following: (1) That the labour relations board in making the aforesaid order was without jurisdiction by virtue of its having failed to exclude from the bargaining unit "any person having and regularly exercising authority to employ or discharge employees" in accordance with the said Act.

8 The definition of "employee" contained in sec. 2 of *The Trade Union Act*, RSS, 1953, ch. 259, is as follows:

> 2. (5) 'employee' means any person in the employment of an employer, except any person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity, and includes any person on strike or locked out in a current labour dispute who has not secured permanent employment elsewhere.

9 It was argued by counsel for the applicant that the order on its face contains an error in law in that the order failed to exclude "any person having and regularly exercising authority to employ or discharge employees." This argument was founded on the contention that "employee" as defined by *The Trade Union Act* excepts therefrom two classes of people, those regularly exercising authority to employ and discharge employees and those acting on behalf of management in a confidential capacity; that the board in its order by providing for exception of only the one class must be presumed to have intended that the order would apply to the other class and by so doing has made an order which, on its face, is contrary to the provisions of the Act.

10 If the order is to be construed as a statute would be construed, then there might be some merit to the applicant's argument. In my opinion the order is not to be so construed but must be interpreted in the light of the record and of the legislation under which it was made. Under *The Trade Union Act* the board clearly had jurisdiction to enter upon the inquiry and to make an order determining: (*a*) The appropriate unit of employees for the purpose of bargaining collectively; (*b*) The trade union that represented such employees; and (*c*) Requiring the employer to bargain collectively with that trade union. The board, too, if there was evidence, had the jurisdiction to decide, as a matter of fact, what employees or class of employees regularly exercise authority to employ or discharge employees: *Labour Relations Board (B.C.) and Atty.-Gen. for B.C. v. Canada Safeway Ltd.*, [1953] 2 S.C.R. 46, which reversed (1952-53) 7 W.W.R. (NS) 145.

11 By operation of the statute those persons employed in a confidential capacity or those regularly exercising the authority to employ or discharge employees are excluded from the bargaining unit. Similar provision is made in the corresponding British Columbia legislation. In the *Canada Safeway* case, *supra*, the order of the board provided that such employees "except those excluded by the Act" and those listed on the certificate were an appropriate unit for bargaining collectively. Kerwin, J., as he then was, stated that the words "except those excluded by the Act" should not have been included in the order and can be treated as surplusage. Similarly in this case the words "persons employed in a confidential capacity" may be treated as surplusage. When this is done, any basis there may have been to the applicant's argument disappears. There is nothing in the order or in the record to indicate in fact that the order was intended to apply to any class of employees excluded by the statute; nor was any evidence tendered by the applicant that would enable the court to so conclude. In the absence of such circumstances it cannot be said that the order contains on its face an error in law upon which *certiorari* proceedings can be founded. The application is dismissed with costs.

1962 CarswellSask 9
Saskatchewan Court of Appeal

Wilfong, Re

1962 CarswellSask 9, 32 D.L.R. (2d) 477, 37 W.W.R. 612, 37 C.R. 319

Re Wilfong

Cathcart (Applicant) Respondent v. Lowery (Informant, Petitioner) Appellant

Culliton, Woods and Brownridge, JJ.A.

Judgment: March 9, 1962

Counsel: *G. J. D. Taylor, Q.C.*, for appellant.
G. I. Averback, for respondent.

The judgment of the court was delivered by *Culliton, J.A.*:

1 This is an appeal from the judgment of Bence, C.J.Q.B. (1961-62) 36 W.W.R. 315, quashing, without the actual issuance of a wit of *certiori*, the committal order made by Carter, P.M. on February 17, 1961, under pt. I of *The Child Welfare Act*, RSS, 1953, ch. 239, in respect to the infant Clarence Joseph Wilfong. The grounds of appeal are that the learned chamber judge erred in holding that the respondent was entitled to relief by way of *certiorari* when there is a right of appeal under the Act; and, alternatively, if there was a right to proceed by way of *certiorari*, the learned chamber judge erred in holding that the magistrate exceeded her jurisdiction and should have held that the words complained of in the order, namely, "for a period of permanently" were mere surplusage and not fatal to the order.

2 A hearing or investigation was held before the magistrate pursuant to the provisions of pt. I of *The Child Welfare Act, supra*. The pertinent portions of sec. 13 of the Act read:

> 13. If on investigation the judge finds that the child is within any of the classes of children referred to in section 4 or section 42 he may:
>
> . . . . .
>
> (*b*) order that the child be committed to the minister for such specified temporary period not exceeding twelve months as in the circumstances he deems necessary; or
>
> (*c*) order that the child be committed to the minister.

3 Pursuant to the power conferred on the magistrate by the foregoing section, she made an order for committal, the material part of which is as follows:

> I hereby order that the said child be committed to the Minister of Social Welfare and Rehabilitation for a period of permanently from the 17th day of February, A.D. 1961.

4 On an application by way of *certiorari*, the learned chamber judge quashed the order on the ground that the magistrate had no jurisdiction under the Act to make an order for committal "for a period of permanently."

5 On the application before the learned chamber judge, learned counsel for the respondent argued that the application by way of *certiorari* should not be entertained as there was adequate provision for appeal under sec. 28 of the Act. The learned chamber judge rejected this argument and in doing so said:

> Under the authority of the Supreme Court of Canada in *Reg. v. Gerald X. (or G.S.)*, [1959] S.C.R. 638, 30 C.R. 230, 124 C.C.C. 71, reversing (1958) 25 W.W.R. 97, 121 C.C.C. 103, where it is shown that the court below has acted without jurisdiction, or in excess of jurisdiction, a writ of *certiorari* will be granted on the application of the aggrieved party *ex debito justitiae*.

6 With all respect, I do not think the principle adopted in *Reg. v. Gerald X. (or G.S.), supra*, is applicable to this case. The Supreme Court held in that case that where the court had acted without jurisdiction, or in excess of jurisdiction, the order, though discretionary, would be granted *ex debito justitiae*. In my view there is a great difference between the case where the court so acts, and the case where the court, acting within its jurisdiction, makes an order which may be bad in law: *Vide Rex v. Stafford JJ.*, [1940] 2 K.B. 33, 109 L.J.K.B. 584; and *Reg. v. Campbell*, [1956] 1 W.L.R. 622, [1956] 2 All ER 280. In the former case the right to proceed by way of *certiorari* is granted *ex debito justitae*, but in the latter, this is not necessarily so.

7 In the present case no one questioned the jurisdiction of the magistrate to enter upon the investigation or to make an order of committal. It is contended that the order made by the magistrate following the investigation is bad in law and that she thereby exceeded her jurisdiction.

8 Under sec. 28 of *The Child Welfare Act* provision is made for an appeal from an order for committal. This section reads:

> 28. — (1) Any person, including the director, aggrieved by any order or decision made by a judge under this Part may appeal to a judge of the Court of Queen's Bench in chambers and the procedure shall be the same as is or may be provided in the case of an appeal from a local master of the Court of Queen's Bench, and the judge appealed to shall have full discretion and power to receive further evidence upon questions of fact, such evidence to be either by oral examination by him, by affidavit or by deposition taken before an examiner or commissioner, or to direct and hold a hearing *de novo* before him and he shall have power to give any judgment and make any order which ought to have been made and to make such further or other order as the case may require or, by order directed to the judge of first instance, require him to make any order which the circumstances of the case require.

9 I think it is obvious from a reading of this section that adequate and ample provision has been made for appeal.

10 In this province the practice has been that when there is a right of appeal a *certiorari* should not be granted except under special circumstances: *Reg. ex rel Lotochinski v. Antonenko* (1961) 34 W.W.R. 286, 129 C.C.C. 429. The same general principle has been followed in other provinces: *Vide Re Spalding; Re Immigration Act* (1955) 16 W.W.R. 157, 22 C.R. 138, 112 C.C.C. 96; *Rex v. Paulowich*, [1940] 1 W.W.R. 537, 48 Man. R. 6, 73 C.C.C. 273, reversing [1939] 3 W.W.R. 223; and *Re Shaw Dairy Co. Ltd.*, [1938] O.W.N. 162. In my opinion no special circumstances were established in this case so as to justify the court granting a *certiorari* where there was a right of appeal as provided under sec. 28, and that the learned chamber judge erred in so doing.

11 Even if the remedy by way of *certiorari* were open to the applicant, I do not think the order should have been quashed. Under sec. 13 of the Act, one of two orders for committal may be made by the magistrate: An order for a specified temporary period not exceeding 12 months, or an order that the child be committed to the minister. If an order other than a temporary order is made, sec. 30 of the Act (amended 1961, ch. 37, sec. 2) provides:

> ... that the child shall be deemed to have been committed to the Minister until he is of the full age of twenty-one years ....

12 It is clear that the order made by the magistrate "for a period of permanently" is not one for temporary committal and by operation of the statute the committal period thereunder expires when the child attains the age of 21 years. Under these circumstances, while the words should not have been included in the order, they are meaningless and can be treated as mere surplusage: *Vide Perini Ltd. v. Int. Union of Operating Engineers, etc. Local 870* (1959) 29 W.W.R. 576; and *In re Canada Safeways Ltd. and Labour Relations Board*, [1953] 2 S.C.R. 46, 107 C.C.C. 75, reversing (1952-53) 7 W.W.R. (NS) 145, 105 C.C.C. 69.

13 The appeal will be allowed and the judgment of the learned chamber judge quashing the order of committal set aside. There will be no costs on either the application or the appeal.

2003 CarswellOnt 3730
Ontario Court of Justice

R. v. Brooks

2003 CarswellOnt 3730

Her Majesty the Queen v. Tessie Brooks

Fontana J.

Heard: May 23, 2003
Judgment: May 23, 2003
Docket: None given.

Counsel: *C. Girault*, for Crown
N. Boxall, for Accused

Table of Authorities
Statutes considered:
Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to
Criminal Code, R.S.C. 1985, c. C-46
s. 487.01 [en. 1993, c. 40, s. 15] — referred to

s. 487.01(3) [en. 1993, c. 40, s. 15] — considered

***Fontana J.*:**

1 With regard to the ruling on the motion in this case, at the outset of the trial, the defence brought a *Charter* motion. It was alleged, among other things, firstly, that the search warrant issued in this case was invalid and, secondly, that certain conditions precedent recited in the search warrant had, on the basis of the evidence, not been satisfied before the warrant was executed. It was decided that, rather than dealing with this by way of a separate discreet application at the beginning of the trial, that all of the evidence would be called and counsel would be free to examine and cross-examine on the *Charter* elements, as well as on the main body of the testimony.

2 The defence abandoned the first prong of its motion, indicating to the court that the search warrant was valid and that it would proceed only on the second argument. Accordingly, the court was asked not to review the information in support of the search warrant. I can only say that I have not looked at the information. The Crown wished to argue the point but I deferred it and the point remains undecided, that is to say, as to whether the Court should look at the information, in those circumstances. In any event, I have not seen the information, nor looked at it for purposes of this ruling.

3 The search warrant in this case is a curious one issued under the provisions of s. 487.01. It has been referred to as a "general search warrant", although that expression is, in my view, a misnomer. It is a special or an investigative search warrant. It is a warrant which permits the police to enter and search a dwelling, upon the satisfaction of the officer in charge that certain conditions precedent have been satisfied.

4 There were five conditions and the warrant itself was drafted by the Crown. One of the conditions requires that a controlled drug or substance be found either on the person of Tess Brooks or inside the car she was driving. No drug was found on her person and none was found inside the car, technically speaking. What the officers found, however, was drug wrapped in tinfoil,

a foot or two outside the car, which drug was spat out by a male who had been leaning inside the car talking to the accused moments earlier. The defence argued that this does not satisfy the conditions set out in the warrant.

5 At the conclusion of the evidence, I adjourned the case and called for written argument. I asked counsel to be prepared to argue, in addition to the issues specifically raised by the defence, whether or not the conditions precedent, as set out here, are either contemplated or authorized by s. 487.01(3). The subsection reads as we have had it recited to us in the course of argument.

6 Having reviewed the subsection and considered the arguments of counsel, including the wording of the subsection, I must arrive at the conclusion that the preconditions such as those set out and recited here are neither contemplated nor authorized by the section.

7 I say that for these reasons:

1. The subsection makes no reference to preconditions, conditions precedent, or anything suggesting that a certain confluence of events must occur before the warrant may be considered cloaked with sufficient force to be executed.

2. The subsection says that the warrant:

> shall contain such terms and conditions as the issuing judge considers advisable to ensure that any such search or seizure authorized by the warrant is reasonable.

In my view, the phrase "terms and conditions" refers not to obstacles which must be overcome before the warrant may be executed but, rather, terms and conditions which must be complied with in the course of the search and seizure in order to protect the dignity and privacy of the individual insofar as possible.

3. It cannot have been the intent of Parliament to put into place a procedure whereby the decision to breathe life into a search warrant, to make it efficacious and vital, is delegated to the control officer. That is what purports to happen here. While the judge issued the warrant, it was left to the control officer to determine if and when certain conditions precedent had been satisfied.

4. The subsection does permit the judge to issue a search warrant to be executed at a reasonable time in the future upon the happening of a certain event; for example, the arrival of say a controlled delivery of narcotics at a specific location. This is one of the purposes of a warrant issued under this subsection.

8 What the subsection does not purport to allow is the issuance of a warrant to search which is to remain dormant until the in futuro grounds for execution have been established as determined by the control officer. For these reasons, I must conclude that the terms and **conditions** precedent contained in this warrant are all **surplusage**, the observance of which is not vital to the execution of the warrant itself. In complying with the defence's request that I not look at the information. I am then left to rely upon the defence position that the warrant is otherwise valid, the search is valid and the motion is dismissed.

In the Court of Appeal of Alberta

Citation: Stewart v. Lac Ste. Anne (County) Subdivision and Development Appeal Board, 2006 ABCA 264

Date: 20060920
Docket: 0403-0251-AC
Registry: Edmonton

Between:

Duncan Stewart

Appellant

- and -

Subdivision and Development Appeal Board of Lac Ste. Anne County and Lac Ste. Anne County

Respondents

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Clifton O'Brien
The Honourable Madam Justice Doreen Sulyma

Reasons for Judgment of The Honourable Mr. Justice Berger
Concurred in by The Honourable Mr. Justice O'Brien
Concurred in by The Honourable Madam Justice Sulyma

Appeal from the Decision of
The Subdivision and Development Appeal Board of Lac Ste. Anne County
Dated the 27th day of July, 2004

Reasons for Judgment of
The Honourable Mr. Justice Berger

[1] This appeal requires the Court to consider whether alleged bias on the part of a member of a Development Authority and an alleged failure of that Authority to take all relevant factors into account prior to the issuance of a development permit, is cured by *de novo* appeal to the Subdivision and Development Appeal Board.

[2] The present appeal arises from a decision of the Subdivision and Development Appeal Board of Lac Ste. Anne County (the "SDAB") which upheld the issuance of a development permit by Lac Ste. Anne County Development Authority ("the Development Authority").

[3] The Appellant owns a lakefront property in the Summer Village of Val Quentin. The property backs onto a roadway within the municipal boundaries of the Summer Village. In 2003, the owner of the land on the other side of the roadway, which land is within the planning jurisdiction of Lac Ste. Anne County, applied for a development permit in relation to two commercial buildings. The permit was granted, and that decision was not appealed. (The Appellant tried to appeal but was out of time). In 2004, the owner applied for another development permit to increase the setback from the road of one building, and to change its commercial use from storage to a caretaker's residence.

[4] Before the Appellant's submissions at the hearing were concluded, County Councillor Wendy Snow, a member of the Development Authority, told the Appellant that she had already made up her mind. She subsequently voted in favour of issuing the permit.

[5] The development permit was approved and the Appellant appealed to the SDAB. At the SDAB hearing, several residents of the Summer Village testified that the proposed development would create a nuisance. The Appellant also argued that Councillor Snow was biased at the hearing before the Development Authority. In response, the Councillor "made clear what her job is" (A.B., Vol. II, p. 4): that is, "to only consider the interests of those residing in the County and not to take into account the views of those persons who live in the Summer Village." (Supp. A.B., p 106)

[6] The SDAB dismissed the appeal, concluding that:

> 1. "**No evidence** was heard by the Board that would require them to conclude that the Development Authority did not take all relevant factors with respect to the purposed development into account prior to the issuance of development permit DP066-2004."
>
> 2. "The Board received **no evidence** suggesting bias on the part of the Development Authority." [emphasis added]
>
> (A.B. Digest, Vol. I, F10)

[7] An application for leave to appeal to this Court was granted on two grounds:

> 1. Did the SDAB make a jurisdictional error in finding that it had received no evidence suggesting bias on the part of the Development Authority?
>
> 2. Did the SDAB make a jurisdictional error in finding it heard no evidence that would require it to conclude that the Development Authority did not take into account all relevant factors with respect to the proposed development prior to the issuance of the development permit?

APPLICABLE LEGISLATION

[8] Section 629 of the ***Municipal Government Act***, 2000 RSA c. M-26 reads as follows:

> "629 A subdivision and development appeal board
>
> (a) may, while carrying out its powers, duties and responsibilities, accept any oral or written evidence that it considers proper, whether admissible in a court of law or not, and is not bound by the laws of evidence applicable to judicial proceedings, and
>
> (b) must make and keep a record of its proceedings, which may be in the form of a summary of the evidence presented at a hearing.
>
> ...
>
> 685(1) If a development authority
>
> (a) fails or refuses to issue a development permit to a person,
>
> (b) issues a development permit subject to conditions, or
>
> (c) issues an order under section 645,
>
> the person applying for the permit or affected by the order under section 645 may appeal to the subdivision and development appeal board.
>
> ...
>
> 687(1) At a hearing under section 686, the subdivision and development appeal board must hear

(a) the appellant or any person acting on behalf of the appellant,

(b) the development authority from whose order, decision or development permit the appeal is made, or a person acting on behalf of the development authority,

(c) any other person who was given notice of the hearing and who wishes to be heard, or a person acting on behalf of that person, and

(d) any other person who claims to be affected by the order, decision or permit and that the subdivision and development appeal board agrees to hear, or a person acting on behalf of that person.

(2) The subdivision and development appeal board must give its decision in writing together with reasons for the decision within 15 days after concluding the hearing.

(3) In determining an appeal, the subdivision and development appeal board.

...

(c) may confirm, revoke or vary the order, decision or development permit or any condition attached to any of them or make or substitute an order, decision or permit of its own.

...

688(1) Despite section 506, an appeal lies to the Court of Appeal on a question of law or jurisdiction with respect to

(a) a decision of the subdivision and development appeal board, and

...

(3) On hearing the application and the representations of those persons who are, in the opinion of the judge, affected by the application, the judge may grant leave to appeal if the judge is of the opinion that the appeal involves a question of law of sufficient importance to merit a further appeal and has a reasonable chance of

success.

(4) If a judge grants leave to appeal, the judge may
...

(b) specify the questions of law or the questions of jurisdiction to be appealed, and

...

689(1) On the hearing of the appeal,

(a) no evidence other than the evidence that was submitted to the Municipal Government Board or the subdivision and development appeal board may be admitted, but the Court may draw any inferences

(i) that are not inconsistent with the facts expressly found by the Municipal Government Board or the subdivision and development appeal board, and

(ii) that are necessary for determining the question of law or the question of jurisdiction,

and

(b) the Court may confirm, vary, reverse or cancel the decision."

ANALYSIS

1. Is the hearing before the SDAB *de novo*?

[9] Pursuant to the ***Municipal Government Act***, a subdivision and development appeal board may in the discharge of its powers, duties and responsibilities, "accept any oral or written evidence that it considers proper." The SDAB is not bound by the laws of evidence applicable to judicial proceedings. Section 687(1) of the Act imposes a mandatory duty upon the SDAB to hear: the Appellant; the Development Authority from whose order, decision or development, the appeal is made; any other person who has given notice of the hearing and wishes to be heard; and any other person who claims to be affected by the order, decision or permit. In determining the appeal, the Subdivision and Development Appeal Board is authorized, pursuant to s. 687(3)(c), to "confirm, revoke or vary the order, decision or development permit . . . or make or substitute an order, decision or permit of its own."

[10] It follows that although the ***Municipal Government Act*** does not expressly state that the hearing before the SDAB is a hearing *de novo*, the statutory provisions point clearly to that conclusion.

[11] In addition, it is not uncommon for the evidence led at an SDAB hearing to differ from that adduced before the Development Authority. Persons who did not attend before the Development Authority, and who first became aware of a proposed development after a permit had been issued, will be heard for the first time. It follows that the submissions heard by the SDAB will not necessarily be the same as those heard by the Development Authority.

[12] Finally, a previous judgment of this Court supports the proposition that the hearing before the SDAB is de *novo*. In ***Edith Lake Service Ltd. v. Edmonton (City)*** (1982), 34 A.R. 390 at 396, this Court stated:

> "The proceedings before the Board would take the form of a hearing *de novo* and having regard to the broad statutory powers conferred upon it the Board's jurisdiction would permit it to consider and rule upon the merits of the decision made by the development officer, including allegations of any legal improprieties committed in reaching that decision. That is the Board's function. ..."

2. <u>Does the Subdivision and Development Appeal Board have jurisdiction to consider allegations of bias on the part of a member of the Development Authority?</u>
<u>Was there some evidence (as opposed to "no evidence") suggesting bias on the part of the Development Authority?</u>

[13] The record does not make clear how the issues of bias and alleged breach of procedural fairness were canvassed by the SDAB. What is clear is that counsel for the Appellant, in his enumeration of the grounds of appeal to the SDAB, alleged that:

> "Members on the Development Authority had made up their mind to approve the application prior to decision, participated in the decision and were thereby biased and rendered the decision illegal and void."
> (A.B., Vol. II, p. 101)

[14] That the SDAB considered the submission is beyond doubt. The Councillor said to be biased testified before the SDAB. The uncontradicted affidavit of the Appellant, in support of the application for leave to appeal to this Court, deposes as follows:

> "Submissions were being made to the Development Authority on my behalf by my legal counsel. At the meeting of the Development Authority on June 10, County Councillor Wendy Snow, who was serving as a member of the Development Authority, told me and my

> counsel that she had already made up her mind and that she fully supported the issuance of the Development Permit. Councillor Snow made this statement before my counsel finished making his submissions to the Development Authority and before the Development Authority announced its decision to issue the Development Permit. County Councillor Wendy Snow, as a member of the Development Authority, fully participated in the decision on the Development Permit and voted in favour of issuing the Development Permit." (Supplemental Appeal Book, p. 105)

[15] The Board's conclusion that it "received no evidence suggesting bias on the part of the Development Authority" (A.B. Digest, F10) confirms that the issue was before the Board and that the Board addressed it.

[16] In my opinion, mindful that the proceedings before the SDAB were not recorded, and that, accordingly, the record is incomplete, it is nonetheless apparent that there was **some evidence** before the Board suggesting bias on the part of the Development Authority. In my view, the Board's statement that it received "no evidence" suggesting bias, constitutes a misapprehension, the consequences of which are discussed more fully in the balance of this judgment.

3. <u>If made out, is an allegation of bias amounting to procedural unfairness sufficient to require the SDAB to remit the matter to the Development Authority for reconsideration?</u>

[17] Does the *de novo* nature of the hearing before the SDAB cure procedural unfairness (if established) in the first instance? Is the decision of the Development Authority, if tainted by procedural unfairness, of no moment?

[18] The Respondent submits that whether or not there was bias on the part of a voting member of the Development Authority is irrelevant to the merits of the hearing before the SDAB, and, accordingly, of no consequence on appeal to this Court. In a nutshell, the Respondent maintains that the *de novo* nature of the hearing before the SDAB is a complete answer to any allegation of procedural unfairness arising from bias on the part of the Development Authority. I do not agree.

[19] In ***Harelkin v. University of Regina***, [1979] 2 S.C.R. 561, the Supreme Court was asked to consider whether an administrative appeal was an adequate alternative remedy to the prerogative writs of *certiorari* and *mandamus*. The Court divided 4-3, the majority holding that a consideration of "the procedure on the appeal, the composition of the senate committee, its powers and the manner in which they were probably to be exercised by a body which was not a professional court of appeal and was not bound to act exactly as one nor likely to do so . . . the burden of a previous finding, expeditiousness and costs . . . [all] led to the conclusion that appellant's right of appeal . . . did provide him with an adequate alternative remedy." (at p. 564)

[20] Dickson, J. (as he then was) spoke for the dissenting judges. He distinguished between an

"error going to jurisdiction" and an "error within jurisdiction." (at p. 565) The failure to hold a fair hearing falls into the first category in which case *certiorari* may issue *ex debito justitiae*. He did not, however, rule out the possibility that a remedial body, exercising original jurisdiction, might have the capacity to provide an adequate remedy "even conceivably in cases of denial of natural justice" (at p. 612) He endorsed Professor de Smith's view in *Judicial Review of Administrative Action*, 3d. ed., (London: Stevens, 1973) at 210-211 that a full and fair *de novo* hearing might suffice. That said, he was of the view that in ***Harelkin*** an appeal was simply not a sufficient remedy for a failure to do justice in the first place.

[21] The Respondent says that the majority opinion in ***Harelkin*** stands for the proposition that the existence of an adequate alternative appellate remedy will invariably cure procedural unfairness. I disagree. Subsequent decisions have made clear that although the dissenting judgment in ***Harelkin*** did not carry the day, the underlying principles articulated by Dickson, J. have resonated in a number of cases which, unlike ***Harelkin***, did not involve recourse to the extraordinary prerogative remedies.

[22] In ***Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)***, [1992] 1 S.C.R. 623 at 645, Cory, J., on behalf of a unanimous court, stated:

> "... A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal. Procedural fairness is an essential aspect of any hearing before a tribunal. The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, is void. ..."

[23] This Court in ***Clayre v. Assn. of Professional Engineers, Geologists and Geophysicists of Alberta***, [2005] A.J. No. 118, determined that a Board breached its duty of fairness and that whether or not the Board would have reached the same conclusion as the tribunal beneath it, did not cure the breach, which could only be rectified by quashing the decision. Accordingly, the matter was remitted to the Board for determination. The Court held that "[w]hether or not the Appeal Board would have reached the same conclusion does not cure that breach." (at para. 11) Support for that position is found in the decision of the Supreme Court of Canada in ***Cardinal v. Kent Institution***, [1985] 2 S.C.R. 643 at 661:

> "... The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing."

[24] In the most recent edition of *Judicial Review of Administrative Action*, 5th ed., (London: Sweet & Maxwell, 1995), de Smith, Woolf and Jowell confirm that whether or not a subsequent

hearing can cure a breach of fairness in the initial hearing depends upon an assessment of whether fairness can be achieved through the second hearing. The text states, at pp. 489-490, para. 10-022:

> "The question of whether a decision vitiated by a breach of the rules of fairness can be made good by a subsequent hearing is closely related to the above discussion; and like the foregoing it does not admit of a single answer applicable to all situations in which the issue may arise. Whilst it is difficult to reconcile all the relevant cases, recent case law indicates that the courts are increasingly favouring an approach based in large part upon an assessment of whether, in all the circumstances of the hearing and appeal, the procedure as a whole satisfied the requirements of fairness. At one end of the spectrum, when provision is made by statute or by the rules of a voluntary association for a full re-hearing of the case by the original body (constituted differently where possible) or some other body vested with and exercising original jurisdiction, a court may readily conclude that a full and fair rehearing will cure any defect in the original decision. However, where the rehearing is appellate in nature, it becomes difficult to do more than to indicate the factors that are likely to be taken into consideration by a court in deciding whether the curative capacity of the appeal has ensured that the proceedings as a whole have reached an acceptable minimum level of fairness. Of particular importance are (i) the gravity of the error committed at first instance [the authors note that an original decision vitiated by bias will normally not be allowed to stand: ***Anderton v. Auckland City Council***, [1978] 1 N.Z.L.R. 657 at 700], (ii) the likelihood that the prejudicial effects of the error may also have permeated the rehearing, (iii) the seriousness of the consequences for the individual, (iv) the width of the powers of the appellate body and (v) whether the appellate decision is reached only on the basis of the material before the original tribunal or by way of rehearing *de novo*.
>
> (footnotes omitted)

See also the factors recited by Lamer, C.J. in ***Canadian Pacific Ltd. v. Matsqui Indian Band***, [1995] 1 S.C.R. 3 at 31:

> "These factors include: the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body (i.e., its investigatory, decision-making and remedial capacities). I do not believe that the category of factors should be closed, as it is for courts in particular circumstances to isolate and balance the factors which are relevant."

[25] Professor de Smith concludes, at p. 491, para. 10-024:

> "It would seem that these considerations may be relevant both to establishing whether a breach of the requirements of fairness has occurred and to the exercise by the court of its discretion to award particular forms of relief. **There may also be situations in which, although the provision of a right of appeal is not required, a court will be satisfied that nothing short of compliance with the requirements of procedural fairness at both stages will afford to the individual the standards of fairness demanded in the particular context**." (footnote omitted) [emphasis added]

[26] The latter emphasized passage reflects the view of Professor David J. Mullan, Essentials of Canadian Law, Administrative Law (Toronto: Irwin Law, 2001) at 230-231:

> "Of course, not all appeal bodies will have the capacity necessary to engage in a process that will accord the person appealing the previously denied benefit of the rules of procedural fairness. However, the actual outcome in cases such as *Harelkin* is unaffected provided the appeal body can entertain the appeal on the grounds of procedural unfairness and, without itself curing the defect, nonetheless remit it back to the first instance body for rehearing. Indeed, in many instances even where the appeal body has curative capacities, if that first instance body is not otherwise tainted (such as by way of a reasonable apprehension of bias), that may be the appropriate step to take. The applicant in that way is provided with a procedurally fair hearing where it should have taken place initially - at first instance, not on appeal. Nonetheless, on other occasions, countervailing considerations of administrative convenience may indicate that the appeal body should exercise its curative capacities rather than have the matter go back to the initial stage once again.
>
> As already indicated, however, when an appeal body purports to remedy or cure a lower level denial of procedural fairness, it is subject to certain obligations, one of which is not to repeat the procedural sins of the first instance tribunal and the other of which is to recognize that the tainted first instance decision can carry no substantive weight. ..."

[27] The SDAB was required to, and did, consider the allegation of bias. In doing so, however, the Board misapprehended and erroneously concluded that there was no evidence of bias. In this case, the disposition of the SDAB cannot stand. There must be a new hearing before the SDAB. The relevant inquiry is whether in the circumstances of this case a direction that the SDAB conduct a hearing *de novo* is an adequate remedy. Section 687(3)(c) of the ***Municipal Government Act*** confers upon the SDAB the authority to substitute a decision of its own. However, in my opinion, a

consideration of the five factors recited by de Smith favours a direction by this Court that should the SDAB conclude that the proceedings before the Development Authority were tainted by bias or apprehension of bias, the matter be returned to the Development Authority, differently constituted, for a fresh hearing. I would also direct the SDAB, when considering the allegation of bias, to take into account the affidavit of Duncan A. Stewart, Q.C., sworn on November 22, 2004, in support of the application for leave to appeal to this Court and such other evidence as the SDAB may consider appropriate.

[28] The gravity of the alleged error is sufficiently serious to warrant that result. The nature of the issue in dispute carries with it consequences of a serious nature for the Appellant should the ruling be adverse.

[29] Where the allegation is one of bias (or apprehension of bias), a duty to have acted fairly should not, in my opinion, be easily brushed aside by simply remitting the matter to the SDAB for a fresh hearing without more. A direction that the allegation of bias be considered and that, if made out, the matter be remitted to the Development Authority for a fresh hearing, is essential. Otherwise, the effect would be to relieve the Development Authority of its duty to conduct its affairs in a procedurally proper fashion.

[30] Rule 518(e) of the *Alberta Rules of Court* confers upon this Court the authority to give any judgment and make any order which ought to have been made and make such further or other order as the case may require. Accordingly, I would allow the appeal on this first ground. The matter is remitted to the SDAB to hear the matter afresh in accordance with the directions in this judgment.

[31] I do not reach the same conclusion with respect to the second ground of appeal. The use of adjacent lots must be considered by the Development Authority in assessing adverse impact from the proposed development. The Appellant relies on Councillor Snow's statement that she was not required to take into account the views of those persons residing in the Summer Village. The Appellant maintains that this equates with a failure to consider relevant factors. While that may be so (I need not decide), it is, in my opinion, an error "within jurisdiction" curable by a *de novo* hearing before the SDAB. No jurisdictional error results on this ground.

Appeal heard on March 7, 2006

Reasons filed at Edmonton, Alberta
this 20th day of September, 2006

Berger J.A.

As authorized by: O'Brien J.A.

As authorized by: Sulyma J.

Appearances:

M. Ignasiak
for the Appellant

W.W. Barclay
for the Respondents

FRANK RONCARELLI (*Plaintiff*) .....APPELLANT;

AND

THE HONOURABLE MAURICE DUPLESSIS (*Defendant*) ..... RESPONDENT.

1958
*Jun. 2, 3, 4, 5, 6
1959
Jan. 27

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Crown—Officers of the Crown—Powers and responsibilities—Prime Minister and Attorney-General—Quebec Liquor Commission—Cancellation of licence to sell liquor—Whether made at instigation of Prime Minister and Attorney-General—The Alcoholic Liquor Act, R.S.Q. 1941, c. 255—The Attorney-General's Department Act, R.S.Q. 1941, c. 46—The Executive Power Act, R.S.Q. 1941, c. 7.

Licences—Cancellation—Motives of cancellation—Done on instigation of Prime Minister and Attorney-General—Whether liability in damages—Whether notice under art. 88 of the Code of Civil Procedure required.

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux, Abbott, Martland and Judson JJ.

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The plaintiff, the proprietor of a restaurant in Montreal and the holder of a licence to sell intoxicating liquor, sued the defendant personally for damages arising out of the cancellation of his licence by the Quebec Liquor Commission. He alleged that the licence had been arbitrarily cancelled at the instigation of the defendant who, without legal powers in the matter, had given orders to the Commission to cancel it before its expiration. This was done, it was alleged, to punish the plaintiff, a member of the Witnesses of Jehovah, because he had acted as bailsman for a large number of members of his sect charged with the violation of municipal by-laws in connection with the distribution of literature. The trial judge gave judgment for the plaintiff for part of the damages claimed. The defendant appealed and the plaintiff, seeking an increase in the amount of damages, cross-appealed. The Court of Appeal dismissed the action and the cross-appeal.

Held (Taschereau, Cartwright and Fauteux JJ. dissenting): The action should be maintained and the amount awarded at trial should be increased by $25,000. By wrongfully and without legal justification causing the cancellation of the permit, the defendant became liable for damages under art. 1053 of the *Civil Code*.

Per Kerwin C.J.: The trial judge correctly decided that the defendant ordered the Commission to cancel the licence, and no satisfactory reason has been advanced for the Court of Appeal setting aside that finding of fact.

Per Kerwin C.J. and Locke and Martland JJ.: There was ample evidence to sustain the finding of the trial judge that the cancellation of the permit was the result of an order given by the defendant to the manager of the Commission. There was, therefore, a relationship of cause and effect between the defendant's acts and the cancellation of the permit.

The defendant was not acting in the exercise of any of his official powers. There was no authority in the *Attorney-General's Department Act*, the *Executive Power Act*, or the *Alcoholic Liquor Act* enabling the defendant to direct the cancellation of a permit under the *Alcoholic Liquor* Act. The intent and purpose of that Act placed complete control over the liquor traffic in the hands of an independent commission.

Cancellation of a permit by the Commission, at the request or upon the direction of a third party, as was done in this case, was not a proper and valid exercise of the powers conferred upon the Commission by s. 35 of the Act.

The defendant was not entitled to the protection provided by art. 88 of the *Code of Civil Procedure* since what he did was not "done by him in the exercise of his functions". To interfere with the administration of the Commission by causing the cancellation of a liquor permit was entirely outside his legal functions. It involved the exercise of powers which in law he did not possess at all. His position was not altered by the fact that he thought it was his right and duty to act as he did.

Per Rand J.: To deny or revoke a permit because a citizen exercises an unchallangeable right totally irrelevant to the sale of liquor in a restaurant is beyond the scope of the discretion conferred upon the Commission by the *Alcoholic Liquor Act*. What was done here was not competent to the Commission and *a fortiori* to the government or the defendant. The act of the defendant, through the instrumentality of the Commission, brought about a breach of an implied public statutory duty toward the plaintiff. There was no immunity in the defendant from an action for damages. He was under no duty in relation to the plaintiff and his act was an intrusion upon the functions of a statutory body. His liability was, therefore, engaged. There can be no question of good faith when an act is done with an improper intent and for a purpose alien to the very statute under which the act is purported to be done. There was no need for giving a notice of action as required by art. 88 of the *Code of Civil Procedure,* as the act done by the defendant was quite beyond the scope of any function or duty committed to him so far so that it was one done exclusively in a private capacity however much, in fact, the influence of public office and power may have carried over into it.

Per Abbott J.: The cancellation of the licence was made solely because of the plaintiff's association with the Witnesses of Jehovah and with the object and purpose of preventing him from continuing to furnish bail for members of that sect. This cancellation was made with the express authorization and upon the order of the defendant. In purporting to authorize and instruct the Commission to cancel the licence the defendant was acting, as he was bound to know, without any legal authority whatsoever. A public officer is responsible for acts done by him without legal justification. The defendant was not entitled to avail himself of the exceptional provision of art. 88 of the *Code of Civil Procedure* since the act complained of was not "done by him in the exercise of his functions" but was an act done when he had gone outside his functions to perform it. Before a public officer can be held to be acting "in the exercise of his functions" within the meaning of art. 88, it must be established that at the time he performed the act complained of such public officer had reasonable ground for believing that such act was within his legal authority to perform.

Per Taschereau J., *dissenting*: The action cannot succeed because the plaintiff did not give the notice required by art. 88 of the *Code of Civil Procedure* to the defendant who was a public officer performing his functions. The failure to fulfil this condition precedent was a total bar to the claim. That failure may be raised by exception to the form or in the written plea to the action, and the words "no judgment may be rendered" indicate that the Court may raise the point *propio motu*. Even if what was said by the defendant affected

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the decision taken by the Commission, the defendant remained, nevertheless, a public officer acting in the performance of his duties. He was surely a public officer, and it is clear that he did not act in his personal quality. It was as legal adviser of the Commission and also as a public officer entrusted with the task of preventing disorders and as protector of the peace in the province, that he was consulted. It was the Attorney-General, acting in the performance of his functions, who was required to give his directives to a governmental branch. It is a fallacious principle to hold that an error, committed by a public officer in doing an act connected with the object of his functions, strips that act of its official character and that its author must then be considered as having acted outside the scope of his duties.

Per Cartwright J., *dissenting*: The loss suffered by the plaintiff was *damnum sine injuria*. Whether the defendant directed or merely approved the cancellation of the licence, he cannot be answerable in damages since the act of the Commission in cancelling the licence was not an actionable wrong. The Courts below have found, on ample evidence, that the defendant and the manager of the Commission acted throughout in the honest belief that they were fulfilling their duty to the province. On the true construction of the *Alcoholic Liquor Act*, the Legislature, except in certain specified circumstances which are not present in the case at bar, has not laid down any rules as to the grounds on which the Commission may decide to cancel a permit; that decision is committed to the unfettered discretion of the Commission and its function in making the decision is administrative and not judicial or quasi-judicial. Consequently, the Commission was not bound to give the plaintiff an opportunity to be heard and the Court cannot be called upon to determine whether there existed sufficient grounds for its decision. Even if the function of the Commission was quasi-judicial and its order should be set aside for failure to hear the plaintiff, it is doubtful whether any action for damages would lie.

Per Fauteux J., *dissenting*: The right to exercise the discretion with respect to the cancellation of the permit, which under the *Alcoholic Liquor Act* was exclusively that of the Commission, was abdicated by it in favour of the defendant when he made the decision executed by the Commission. The cancellation being illegal, imputable to the defendant, and damageable for the plaintiff, the latter was entitled to succeed on an action under art. 1053 of the *Civil Code*.

As the notice required by art. 88 of the *Code of Civil Procedure* was not given, the action, however, could not be maintained. The failure to give notice, when it should be given, imports nullity and limits the very jurisdiction of the Court. In the present case, the defendant was entitled to the notice since the illegality reproached was committed "in the exercise of his functions". The meaning of this expression in art. 88 was not subject to the limitations attending expres-

sions more or less identical appearing in art. 1054 of the *Civil Code*. The latter article deals with responsibility whereas art. 88 deals with procedure. Article 88 has its source in s. 8 of *An Act for the Protection of Justices of the Peace,* Cons. Stat. L.C., c. 101, which provided that the officer "shall be entitled" to the protection of the statute although "he has exceeded his powers or jurisdiction, and has acted clearly contrary to law". That section peremptorily establishes that, in *pari materia,* a public officer was not considered as having ceased to act within the exercise of his functions by the sole fact that the act committed by him might constitute an abuse of power or excess of jurisdiction, or even a violation of the law. An illegality is assumed under art. 88. The jurisprudence of the province, which has been settled for many years, is to the effect that the incidence of good or bad faith has no bearing on the right to the notice.

The illegality committed by the defendant did not amount to an offence known under the penal law or a delict under art. 1053 of the *Civil Code*. He did not use his functions to commit this illegality. He did not commit it on the occasion of his functions, but committed it because of his functions. His good faith has not been doubted, and on this fact there was a concurrent finding in the Courts below.

APPEALS from two judgments of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Mackinnon J. Appeals allowed, Taschereau, Cartwright and Fauteux JJ. dissenting.

F. R. Scott and *A. L. Stein,* for the plaintiff, appellant.

L. E. Beaulieu, Q.C., and *L. Tremblay, Q.C.,* for the defendant, respondent.

THE CHIEF JUSTICE:—No satisfactory reason has been advanced for the Court of Queen's Bench (Appeal Side)[1] setting aside the finding of fact by the trial judge that the respondent ordered the Quebec Liquor Commission to cancel the appellant's licence. A reading of the testimony of the respondent and of the person constituting the commission at the relevant time satisfies me that the trial judge correctly decided the point. As to the other questions, I agree with Mr. Justice Martland.

The appeals should be allowed with costs here and below and judgment directed to be entered for the appellant against the respondent in the sum of $33,123.53 with interest from the date of the judgment of the Superior Court, together with the costs of the action.

[1] [1956] Que. Q.B. 447.

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TASCHEREAU J. (*dissenting*):—L'intimé est Premier Ministre et Procureur Général de la province de Québec, et il occupait ces hautes fonctions dans le temps où les faits qui ont donné naissance à ce litige se sont passés.

L'appelant, un restaurateur de la Cité de Montréal, et porteur d'un permis de la Commission des Liqueurs pour la vente des spiritueux, lui a réclamé personnellement devant la Cour supérieure la somme de $118,741 en dommages. Il a allégué dans son action qu'il est licencié depuis de nombreuses années, qu'il a toujours respecté les lois de la Province se rapportant à la vente des liqueurs alcooliques, que son restaurant avait une excellente réputation, et jouissait de la faveur d'une clientèle nombreuse et recherchée.

Il a allégué en outre qu'il faisait et fait encore partie de la secte religieuse des "Témoins de Jéhovah", et que parce qu'il se serait rendu caution pour quelque 390 de ses coreligionnaires, traduits devant les tribunaux correctionnels de Montréal et accusés de distribution de littérature, sans permis, l'intimé serait illégalement intervenu auprès du gérant de la Commission pour lui faire perdre son permis, qui d'ailleurs lui a été enlevé le 4 décembre 1946. Ce serait comme résultat de l'intervention injustifiée de l'intimé que l'appelant aurait été privé de son permis, et aurait ainsi souffert les dommages considérables qu'il réclame.

La Cour supérieure a maintenu l'action jusqu'à concurrence de $8,123.53, et la Cour du banc de la reine[1], M. le Juge Rinfret étant dissident, aurait pour divers motifs maintenu l'appel et rejeté l'action.

L'intimé a soulevé plusieurs moyens à l'encontre de cette réclamation, mais je n'en examinerai qu'un seul, car je crois qu'il est suffisant pour disposer du présent appel. Le *Code de procédure civile* de la province de Québec contient la disposition suivante:

Art. 88 C.P.—Nul officier public ou personne remplissant des fonctions ou *devoirs publics* ne peut être poursuivi pour dommages à raison d'un acte par lui fait *dans l'exercice de ses fonctions,* et *nul verdict ou jugement ne peut être rendu contre lui à moins qu'avis de cette poursuite* ne lui ait été donné au moins un mois avant l'émission de l'assignation.

Cet avis doit être par écrit; il doit exposer les causes de l'action, contenir l'indication des noms et de l'étude du procureur du demandeur ou de son agent et être signifié au défendeur personnellement ou à son domicile.

[1] [1956] Que. Q.B. 447.

Le défaut de donner cet avis peut être invoqué par le défendeur, soit au moyen d'une exception à la forme ou soit par plaidoyer au fond. *Charland v. Kay*[1]; *Corporation de la Paroisse de St-David v. Paquet*[2]; *Houde v. Benoit*[3].

Les termes mêmes employés par le législateur dans l'art. 88 C.P.C., *"nul jugement ne peut être rendu"* contre le défendeur, indiquent aussi que la Cour a le devoir de soulever d'office ce moyen, si le défendeur omet ou néglige de le faire par exception à la forme, ou dans son plaidoyer écrit. La signification de cet avis à un *officier public, remplissant des devoirs publics,* est une condition préalable, essentielle à la réussite d'une procédure judiciaire. S'il n'est pas donné, les tribunaux ne peuvent prononcer aucune condamnation en dommages. Or, dans le cas présent, il est admis qu'aucun avis n'a été donné.

Mais, c'est la prétention de l'appelant que l'intimé ne peut se prévaloir de ce moyen qui est une fin de non recevoir, car, les conseils ou avis qu'il aurait donnés et qui auraient été la cause déterminante de la perte de son permis, ne l'ont pas été en raison d'un acte posé par lui *dans l'exercice de ses fonctions.*

La preuve révèle que l'appelant était bien licencié de la Commission des Liqueurs depuis de nombreuses années, que la tenue de son restaurant était irréprochable, et que dans le cours du mois de décembre de l'année 1946, alors qu'il était toujours porteur de son permis, celui-ci lui a été enlevé parce qu'il se rendait caution pour plusieurs centaines de ses coreligionnaires, distributeurs de littérature que l'on croyait séditieuse.

C'était avant le jugement de cette Cour dans la cause de *Boucher v. Le Roi*[4], alors que la conviction était profondément ancrée parmi la population, que les "Témoins de Jéhovah" étaient des perturbateurs de la paix publique, des sources constantes de trouble et de désordre dans la Province. On jugeait leur mouvement dangereux, susceptible de soulever une partie de la population contre l'autre, et de provoquer de sérieuses agitations. On parlait même de conspiration séditieuse, et ce n'est sûrement pas sans

[1] (1933), 54 Que. K.B. 377. [2] (1937), 62 Que. K.B. 140.
[3] [1943] Que. K.B. 713.
[4] [1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.

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cause raisonnable, car cette opinion fut plus tard unanimement confirmée par cinq juges de la Cour du Banc de la Reine dans l'affaire *Boucher v. Le Roi*[1], et également par quatre juges dissidents devant cette Cour (*Boucher v. Le Roi* cité *supra*).

M. Archambault, alors gérant général de la Commission des Liqueurs, soupçonnait fortement que le "Frank Roncarelli" qui par ses cautionnements aidait financièrement ce mouvement qu'il croyait subversif, était détenteur d'un permis de restaurateur pour la vente de liqueurs alcooliques. Il pensait évidemment qu'il ne convenait pas que les bénéfices que Roncarelli retirait de son permis de la Commission, soient utilisés à servir la cause d'agitateurs religieux, dont les enseignements et les méthodes venaient en conflit avec les croyances populaires. Il en informa l'intimé, procureur général, qui en cette qualité est l'aviseur légal officiel de la province pour toutes les affaires juridiques.

Au cours d'une première conversation téléphonique, M. Archambault suggéra à l'intimé que le permis de Roncarelli lui soit enlevé, ce que d'ailleurs il avait personnellement le droit de faire, en vertu de l'art. 35 de la *Loi des Liqueurs*, qui est ainsi rédigé:

> 35.—La Commission peut *à sa discrétion* annuler un permis en tout temps.

Or, comme l'exécutif de la Commission des Liqueurs ne se compose que d'un gérant général qui était M. Archambault, cette discrétion reposait entièrement sur lui.

L'intimé lui suggéra la prudence, et lui proposa de s'enquérir avec certitude si le Roncarelli, détenteur de permis, était bien le même Roncarelli qui prodiguait ses cautionnements d'une façon si généreuse. Après enquête, l'affirmative ayant été établie, M. Archambault communiqua de nouveau avec l'intimé, et voici ce que nous dit M. Archambault dans son témoignage au sujet de ces conversations:

> Q. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?
>
> R. *Certainement,* ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, *et de mon intention d'annuler le privilège,* et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de

[1] [1949] Que. K.B. 238.

la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai appelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

Voici maintenant la version de l'intimé:

Probablement, à la suite du rapport que l'indicateur Y-3 a fait, le rapport qui est produit, M. le Juge Archambault m'a téléphoné et m'a dit: 'On est sûr, c'est cette personne-là.' Et comme dans l'intervalle j'avais étudié le problème et parcouru les statuts depuis l'institution de la Commission des Liqueurs et tous les amendements qui avaient eu lieu, et j'avais consulté, j'en suis arrivé à la conclusion qu'en mon âme et conscience, mon impérieux devoir c'était d'approuver la suggestion très au point du Juge et d'autoriser la cancellation d'un privilège que cet homme-là ne méritait pas, à mon sens, et dont il n'était pas digne.

Et:

Après avoir mûrement délibéré et conscient et sûr de faire mon devoir, j'ai dit à M. Archambault que j'approuvais sa suggestion d'annuler le permis, d'annuler le privilège.

Et, plus loin:

. . . j'ai dit au Juge Archambault que j'étais de son opinion, que je ne croyais pas que Roncarelli fût digne d'obtenir des privilèges de la province après son attitude que j'ai mentionnée tout à l'heure.
. . . et lorsque le Juge Archambault m'a dit, après vérification, que c'était la même personne, j'ai dit: 'Vous avez raison, ôtez le permis, ôtez le privilège.'

Quand on demande à l'intimé s'il a donné un ordre à M. Archambault, voici ce qu'il dit:

Non, je n'ai pas donné un ordre à M. Archambault, je viens de conter ce qui s'est passé.

Que le permis ait été enlevé à Roncarelli comme conséquence de la seule décision de M. Archambault, ce qu'il avait le droit de faire à sa discrétion, ou que cette discrétion ait été influencée par les paroles de l'intimé, n'a pas je crois d'effet décisif dans la détermination de la présente cause. Je demeure convaincu que même si les paroles de l'intimé ont pu avoir quelque influence sur la décision qui a été prise, ce dernier demeurait quand même un *officier public, agissant dans l'exercice de ses fonctions,* et qu'il était essentiel de lui donner l'avis requis par l'art. 88 C.P.C. L'absence de cet avis interdit aux tribunaux de prononcer aucune condamnation.

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Taschereau J.

L'intimé est sûrement un *officier public,* et il me semble clair qu'il n'a pas agi *en sa qualité personnelle.* C'est bien comme aviseur légal de la Commission des Liqueurs, et aussi comme *officier public* chargé de la prévention des troubles, et gardien de la paix dans la province, qu'il a été consulté. C'est le Procureur Général, agissant dans l'exercice de ses fonctions, qui a été requis de donner ses directives à une branche gouvernementale dont il est l'aviseur. Vide: *Loi concernant le Département du Procureur Général,* R.S.Q. 1941, c. 46, art. 3, *Loi des liqueurs alcooliques,* S.R.Q. 1941, c. 255, art 138.

Certains, à tort ou à raison, peuvent croire que l'intimé se soit trompé, en pensant qu'il devait, pour le maintien de la paix publique et la suppression de troubles existants, et qui menaçaient de se propager davantage, conseiller l'enlèvement du permis de l'appelant. Pour ma part, je ne puis admettre le fallacieux principe qu'une erreur commise par un *officier public,* en posant un acte qui se rattache cependant à l'objet de son mandat, enlève à cet acte son caractère officiel, et que l'auteur de ce même acte fautif cesse alors d'agir dans *l'exécution de ses fonctions.*

Parce que l'appelant ne s'est pas conformé aux exigences de l'art. 88 C.P.C., en ne donnant pas l'avis requis à l'intimé qui est un *officier public, agissant dans l'exercice de ses fonctions,* je crois que l'action ne peut réussir. Le défaut de remplir cette condition préalable, constitue une fin de non recevoir, qui me dispense d'examiner les autres aspects de cette cause.

Je crois donc que l'appel principal, de même que l'appel logé pour faire augmenter le montant accordé par le juge de première instance, doivent être rejetés avec dépens de toutes les Cours.

The judgment of Rand and Judson JJ. was delivered by

RAND J.:—The material facts from which my conclusion is drawn are these. The appellant was the proprietor of a restaurant in a busy section of Montreal which in 1946 through its transmission to him from his father had been continuously licensed for the sale of liquor for approximately 34 years; he is of good education and repute and the restaurant was of a superior class. On December 4 of that year, while his application for annual renewal was

before the Liquor Commission, the existing license was cancelled and his application for renewal rejected, to which was added a declaration by the respondent that no future license would ever issue to him. These primary facts took place in the following circumstances.

For some years the appellant had been an adherent of a rather militant Christian religious sect known as the Witnesses of Jehovah. Their ideology condemns the established church institutions and stresses the absolute and exclusive personal relation of the individual to the Deity without human intermediation or intervention.

The first impact of their proselytizing zeal upon the Roman Catholic church and community in Quebec, as might be expected, produced a violent reaction. Meetings were forcibly broken up, property damaged, individuals ordered out of communities, in one case out of the province, and generally, within the cities and towns, bitter controversy aroused. The work of the Witnesses was carried on both by word of mouth and by the distribution of printed matter, the latter including two periodicals known as "The Watch Tower" and "Awake", sold at a small price.

In 1945 the provincial authorities began to take steps to bring an end to what was considered insulting and offensive to the religious beliefs and feelings of the Roman Catholic population. Large scale arrests were made of young men and women, by whom the publications mentioned were being held out for sale, under local by-laws requiring a licence for peddling any kind of wares. Altogether almost one thousand of such charges were laid. The penalty involved in Montreal, where most of the arrests took place, was a fine of $40, and as the Witnesses disputed liability, bail was in all cases resorted to.

The appellant, being a person of some means, was accepted by the Recorder's Court as bail without question, and up to November 12, 1946, he had gone security in about 380 cases, some of the accused being involved in repeated offences. Up to this time there had been no suggestion of impropriety; the security of the appellant was taken as so satisfactory that at times, to avoid delay when he was absent from the city, recognizances were signed by him in blank and kept ready for completion by

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the Court officials. The reason for the accumulation of charges was the doubt that they could be sustained in law. Apparently the legal officers of Montreal, acting in concert with those of the Province, had come to an agreement with the attorney for the Witnesses to have a test case proceeded with. Pending that, however, there was no stoppage of the sale of the tracts and this became the annoying circumstance that produced the volume of proceedings.

On or about November 12 it was decided to require bail in cash for Witnesses so arrested and the sum set ranged from $100 to $300. No such bail was furnished by the appellant; his connection with giving security ended with this change of practice; and in the result, all of the charges in relation to which he had become surety were dismissed.

At no time did he take any part in the distribution of the tracts: he was an adherent of the group but nothing more. It was shown that he had leased to another member premises in Sherbrooke which were used as a hall for carrying on religious meetings: but it is unnecessary to do more than mention that fact to reject it as having no bearing on the issues raised. Beyond the giving of bail and being an adherent, the appellant is free from any relation that could be tortured into a badge of character pertinent to his fitness or unfitness to hold a liquor licence.

The mounting resistance that stopped the surety bail sought other means of crushing the propagandist invasion and among the circumstances looked into was the situation of the appellant. Admittedly an adherent, he was enabling these protagonists to be at large to carry on their campaign of publishing what they believed to be the Christian truth as revealed by the Bible; he was also the holder of a liquor licence, a "privilege" granted by the Province, the profits from which, as it was seen by the authorities, he was using to promote the disturbance of settled beliefs and arouse community disaffection generally. Following discussions between the then Mr. Archambault, as the personality of the Liquor Commission, and the chief prosecuting officer in Montreal, the former, on or about November 21, telephoned to the respondent, advised him of those facts, and queried what should be done. Mr. Duplessis answered that the matter was serious and that the identity of the

person furnishing bail and the liquor licensee should be put beyond doubt. A few days later, that identity being established through a private investigator, Mr. Archambault again communicated with the respondent and, as a result of what passed between them, the licence, as of December 4, 1946, was revoked.

In the meantime, about November 25, 1946, a blasting answer had come from the Witnesses. In an issue of one of the periodicals, under the heading "Quebec's Burning Hate", was a searing denunciation of what was alleged to be the savage persecution of Christian believers. Immediately instructions were sent out from the department of the Attorney-General ordering the confiscation of the issue and proceedings were taken against one Boucher charging him with publication of a seditious libel.

It is then wholly as a private citizen, an adherent of a religious group, holding a liquor licence and furnishing bail to arrested persons for no other purpose than to enable them to be released from detention pending the determination of the charges against them, and with no other relevant considerations to be taken into account, that he is involved in the issues of this controversy.

The complementary state of things is equally free from doubt. From the evidence of Mr. Duplessis and Mr. Archambault alone, it appears that the action taken by the latter as the general manager and sole member of the Commission was dictated by Mr. Duplessis as Attorney-General and Prime Minister of the province; that that step was taken as a means of bringing to a halt the activities of the Witnesses, to punish the appellant for the part he had played not only by revoking the existing licence but in declaring him barred from one "forever", and to warn others that they similarly would be stripped of provincial "privileges" if they persisted in any activity directly or indirectly related to the Witnesses and to the objectionable campaign. The respondent felt that action to be his duty, something which his conscience demanded of him; and as representing the provincial government his

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decision became automatically that of Mr. Archambault and the Commission. The following excerpts of evidence make this clear:

M. DUPLESSIS:

R. . . . Au mois de novembre 1946, M. Edouard Archambault, qui était alors le gérant général de la Commission des Liqueurs m'a appelé à Québec, téléphone longue distance de Montréal, et il m'a dit que Roncarelli qui multipliait les cautionnements à la Cour du Recorder d'une façon désordonnée, contribuant à paralyser les activités de la Police et à congestionner les tribunaux, que ce nommé Roncarelli détenait un privilège de la Commission des Liqueurs de Québec. De fait, Votre Seigneurie, un permis est un privilège, ce n'est pas un droit. L'article 35 de la Loi des Liqueurs alcooliques, paragraphe 1, a été édicté en 1921 par le statut II, Geo. V, chap. 24, qui déclare ceci:

"La Commission peut, à sa discrétion annuler le permis en tout temps."

* * *

"Je vais m'en informer et je vous le dirai." J'ai dit au Juge: "Dans l'intervalle, je vais examiner la question avec des officiers légaux, je vais y penser, je vais réfléchir et je vais voir ce que devrai faire." Quelques jours après, et pendant cet intervalle j'ai étudié le problème, j'ai étudié des dossiers, comme Procureur Général et comme Premier Ministre, quelques jours après le Juge Archambault, M. Edouard Archambault, m'a téléphoné pour me dire qu'il était certain que le Roncarelli en question, qui paralysait les activités de la Cour du Recorder qui accaparait dans une large mesure les services de la force constabulaire de Montréal, dont les journaux disaient avec raison qu'elle n'avait pas le nombre suffisant de policiers, était bien la personne qui détenait un permis. Je lui ai dit: "Dans ces circonstances, je considère que c'est mon devoir, comme Procureur Général et comme Premier Ministre, en conscience, dans l'exercice de mes fonctions officielles et pour remplir le mandat que le peuple m'avait confié et qu'il m'a renouvelé avec une immense majorité en 1948, après la cancellation du permis et après la poursuite intentée contre moi, j'ai cru que c'était mon devoir, en conscience, de dire au Juge que ce permis-là, le Gouvernement de Québec ne pouvait pas accorder un privilège à un individu comme Roncarelli qui tenait l'attitude qu'il tenait."

* * *

J'ai dit: "Il y a peut-être de pauvres personnes, de bonne foi, plus riches d'idéal que d'esprit, de jugement, ces personnes-là sont probablement à la merci de quelques-uns qui les exploitent, je vais donner une entrevue pour attirer l'attention de tout le monde sur l'article 69 du Code Criminel, qui déclare que les complices sont responsables au même titre que la personne qui a commis l'offense."

* * *

D. Vous n'avez pas reçu d'autres documents, c'est seulement les communications téléphoniques de M. le Juge Archambault?

R. Oui, certainement, un message du Juge Archambault, un autre téléphone au Juge Archambault, des examens de la situation, on en a même parlé au Conseil des Ministres, j'ai discuté le cas, j'ai consulté

des officiers en loi et en mon âme et conscience j'ai fait mon devoir comme Procureur Général, j'ai fait la seule chose qui s'imposait, si c'était à recommencer je ferais pareil.

D. Monsieur le Premier Ministre, le 8 février 1947, dans le journal *La Presse,* paraissait un article intitulé: "Roncarelli subit un second refus". Le sous-titre de cet article se lit comme suit: "L'honorable M. Duplessis refuse au restaurateur, protecteur des Témoins de Jéhovah, la permission de poursuivre la Commission des Liqueurs." Vous trouverez, monsieur le Premier Ministre, presque à la fin de ce rapport, les mots suivants:

> "C'est moi-même, à titre de Procureur Général, et de responsable de l'ordre dans cette province, qui ai donné l'ordre à la Commission des Liqueurs d'annuler son permis référant à Roncarelli."

Je vous demande, monsieur le Premier Ministre, si c'est un rapport exact de vos paroles à cette conférence de presse?

R. Ce que j'ai dit lors de la conférence de presse, c'est ce que je viens de déclarer. Je ne connaissais pas Roncarelli, je ne savais pas que Roncarelli avait un permis, . . . lorsqu'il a attiré mon attention sur la situation absolument anormale d'un homme bénéficiant d'un privilège de la province, et multipliant les actes de nature à paralyser les tribunaux de la province et la police municipale de Montréal, c'est là que j'ai approuvé sa suggestion et que j'ai dit, comme Procureur général . . .

LA COUR:—C'est une autre question que l'on vous pose, Monsieur le Premier Ministre. Voulez-vous relire la question. (La demande précédente est alors relue.)

R. Ce que j'ai dit à la presse, c'est ce que je viens de dire tout à l'heure. L'article tel que produit n'est pas conforme textuellement à ce que j'ai dit. Ce que j'ai dit, ce que je répète, c'est que le Juge Archambault, gérant de la Commission des Liqueurs m'a mis au fait d'une situation que j'ignorais et comme Procureur Général, pour accomplir mon devoir, j'ai dit au Juge Archambault que j'étais de son opinion, que je ne croyais pas que Roncarelli fut digne d'obtenir des privilèges de la province après son attitude que j'ai mentionnée tout à l'heure.

* * *

D. Les mots que je viens de vous lire tout à l'heure, c'est censé être textuellement les mots que vous avez donnés, parce que c'est précédé d'une indication d'un rapport textuel:

> "Nous n'avons fait qu'exercer en ce faisant un droit formel et incontestable, nous avons rempli un impérieux devoir. Le permis de Roncarelli a été annulé non pas temporairement mais bien pour toujours."

LE TÉMOIN:—Si j'ai dit cela?

L'AVOCAT:—Oui.

R. Oui. Le permis de Roncarelli a été annulé pour ce temps-là et pour toujours. Je l'ai dit et je considérais que c'était mon devoir et en mon âme et conscience j'aurais manqué à mon devoir si je ne l'avais pas fait.

D. Avec ces renseignements additionnels diriez-vous que les mots: "C'est moi-même, à titre de Procureur Général et de responsable de l'ordre dans cette province qui ai donné l'ordre à la Commission des Liqueurs d'annuler son permis." Diriez-vous que c'est exact?

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R. J'ai dit tout à l'heure ce qui en était. J'ai eu un téléphone de M. Archambault me mettant au courant de certains faits que j'ignorais au sujet de Roncarelli. Vérification, identification pour voir si c'était bien la même personne, étude, réflexion, consultation et décision d'approuver la suggestion du gérant de la Commission des Liqueurs d'annuler le privilège de Roncarelli.

* * *

LA COUR:

D. M. Stein veut savoir si vous avez donné un ordre à M. Archambault?

R. Non, je n'ai pas donné un ordre à M. Archambault, je viens de conter ce qui s'est passé. Le juge Archambault m'a mis au courant d'un fait que je ne connaissais pas, je ne connaissais pas les faits, c'est lui qui m'a mis au courant des faits. Je ne sais pas comment on peut appeler ça, quand le Procureur Général, qui est à la tête d'un département, parle à un officier, même à un officier supérieur, et qu'il émet une opinion, ce n'est pas directement un ordre, c'en est un sans l'être. Mais c'est à la suggestion du Juge Archambault, après qu'il eut porté à ma connaissance des faits que j'ignorais, que la décision a été prise.

* * *

D. Monsieur le Premier Ministre, excusez-moi si je répète encore la question, mais il me semble que vous n'avez pas répondu à la question que j'ai posée. Il paraît, non seulement dans ce journal, mais aussi dans d'autres journaux, et cela est répété exactement dans les même paroles, dans le *Montreal Star,* en anglais, dans la *Gazette,* en anglais, dans *Le Canada,* en français et aussi dans *La Patrie,* en français, textuellement les mêmes mots: "C'est moi-même, à titre de Procureur Géneral, chargé d'assurer le respect de l'ordre et le respect des citoyens paisibles qui ai donné à la Commission des Liqueurs, l'ordre d'annuler le permis." Je vous demande si c'est possible que vous ayez employé presque exactement ces mots en discutant l'affaire avec les journalistes, ce jour-là?

R. Lorsque les journalistes viennent au bureau pour avoir des entrevues, des fois les entrevues durent une demi-heure, des fois une heure, des fois une heure et demie; quels sont les termes exacts qui sont employés, on ne peut pas se souvenir exactement des termes. Mais la vérité vraie c'est ce que j'ai dit tout à l'heure, et c'est cela que j'ai dit aux journalistes, comme Premier Ministre et comme Procureur Général, je prends la responsabilité. Si j'avais dit au Juge Archambault: "Vous ne le ferez pas", il ne l'aurait probablement pas fait. Comme il me suggérait de le faire et qu'après réflexion et vérification je trouvais que c'était correct, que c'était conforme à mon devoir, j'ai approuvé et c'est toujours un ordre que l'on donne. Quand l'officier supérieur parle, c'est un ordre que l'on donne, même s'il accepte la suggestion de l'officier dans son département, c'est un ordre qu'il donne indirectement. Je ne me rappelle pas des expressions exactes, mais ce sont les faits.

* * *

D. Référant à l'article contenue dans la *Gazette* du 5 décembre, c'est-à-dire le jour suivant l'annulation du permis, vous trouvez là les mots en anglais:

"In statement to the press yesterday, the Premier recalled that: 'Two weeks ago, I pointed out that the Provincial Government had the firm intention to take the most rigorous and efficient measures possible to get rid of those who under the names of Witnesses of Jehovah, distribute circulars which in my opinion, are not only injurious for Quebec and its population, but which are of a very libellous and seditious character. The propaganda of the Witnesses of Jehovah cannot be tolerated and there are more than 400 of them now before the courts in Montreal, Quebec, Three Rivers and other centers.'

'A certain Mr. Roncarelli has supplied bail for hundreds of witnesses of Jehovah. The sympathy which this man has shown for the Witnesses, in such an evident, repeated and audacious manner, is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice.'"

D. Je vous demande, monsieur le Premier Ministre, si ce sont les paroles presque exactes ou exactes que vous avez dites à la conférence de presse?

R. Que j'ai dit ici: "A certain Mr. Roncarelli has supplied bail for hundreds of witnesses of Jehovah. The Sympathy which this man has shown for the Witnesses, in such an evident, repeated and audacious manner, is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice." Je l'ai dit et je considère que c'est vrai.

* * *

M. ARCHAMBAULT:

D. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?

R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai rappelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

In these circumstances, when the *de facto* power of the Executive over its appointees at will to such a statutory public function is exercised deliberately and intentionally to destroy the vital business interests of a citizen, is there legal redress by him against the person so acting? This calls for an examination of the statutory provisions governing the issue, renewal and revocation of liquor licences and the scope of authority entrusted by law to the Attorney-General and the government in relation to the administration of the Act.

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The liquor law is contained in R.S.Q. 1941, c. 255, entitled *An Act Respecting Alcoholic Liquor*. A Commission is created as a corporation, the only member of which is the general manager. By s. 5

> . The exercise of the functions, duties and powers of the Quebec Liquor Commission shall be vested in one person alone, named by the Lieutenant-Governor in Council, with the title of Manager. The remuneration of such person shall be determined by the Lieutenant-Governor in Council and be paid out of the revenues of the Liquor Commission. R.S. 1925, c. 37, s. 5; 1 Ed. VII (2), c. 14, ss. 1 and 5; 1 Geo. VI, c. 22, ss. 1 and 5.

The entire staff for carrying out the duties of the Commission are appointed by the general manager—here Mr. Archambault—who fixes salaries and assigns functions, the Lieutenant-Governor in Council reserving the right of approval of the salaries. Besides the general operation of buying and selling liquor throughout the province and doing all things necessary to that end, the Commission is authorized by s. 9 (e) to "grant, refuse or cancel permits for the sale of alcoholic liquors or other permits in regard thereto and to transfer the permit of any person deceased". By s. 12 suits against the general manager for acts done in the exercise of his duties require the authority of the Chief Justice of the province, and the Commission can be sued only with the consent of the Attorney-General. Every officer of the Commission is declared to be a public officer and by R.S.Q. 1941, c. 10, s. 2, holds office during pleasure. By s. 19 the Commission shall pay over to the Provincial Treasurer any moneys which the latter considers available and by s. 20 the Commission is to account to the Provincial Treasurer for its receipts, disbursements, assets and liabilities. Sections 30 and 32 provide for the issue of permits to sell; they are to be granted to individuals only, in their own names; by s. 34 the Commission "may refuse to grant any permit"; subs. (2) provides for permits in special cases of municipalities where prohibition of sale is revoked in whole or part by by-law; subs. (3) restricts or refuses the grant of permits in certain cities the Council of which so requests; but it is provided that

> . . . If the fyling of such by-law takes place after the Commission has granted a permit in such city or town, the Commission shall be unable to give effect to the request before the first of May next after the date of fyling.

Subsection (4) deals with a refusal to issue permits in small cities unless requested by a by-law, approved by a majority vote of the electors. By subs. (6) special power is given the Commission to grant permits to hotels in summer resorts for five months only notwithstanding that requests under subss. (2) and (4) are not made. Section 35 prescribes the expiration of every permit on April 30 of each year. Dealing with cancellation, the section provides that the "Commission may cancel any permit at its discretion". Besides the loss of the privilege and without the necessity of legal proceedings, cancellation entails loss of fees paid to obtain it and confiscation of the liquor in the possession of the holder and the receptacles containing it. If the cancellation is not followed by prosecution for an offence under the Act, compensation is provided for certain items of the forfeiture. Subsection (5) requires the Commission to cancel any permit made use of on behalf of a person other than the holder; s. 36 requires cancellation in specified cases. The sale of liquor is, by s. 42, forbidden to various persons. Section 148 places upon the Attorney-General the duty of

1. Assuring the observance of this Act and of the Alcoholic Liquor Possesion and Transportation Act (Chap. 256), and investigating, preventing and suppressing the infringements of such acts, in every way authorized thereby;
2. Conducting the suits or prosecutions for infringements of this Act or of the said Alcoholic Liquor Possession and Transportation Act. R.S. 1925, c. 37, s. 78a; 24 Geo. V, c. 17, s. 17.

The provisions of the statute, which may be supplemented by detailed regulations, furnish a code for the complete administration of the sale and distribution of alcoholic liquors directed by the Commission as a public service, for all legitimate purposes of the populace. It recognizes the association of wines and liquors as embellishments of food and its ritual and as an interest of the public. As put in Macbeth, the "sauce to meat is ceremony", and so we have restaurants, cafés, hotels and other places of serving food, specifically provided for in that association.

At the same time the issue of permits has a complementary interest in those so catering to the public. The continuance of the permit over the years, as in this case, not only recognizes its virtual ncessity to a superior class

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restaurant but also its indentification with the business carried on. The provisions for assignment of the permit are to this most pertinent and they were exemplified in the continuity of the business here. As its exercise continues, the economic life of the holder becomes progressively more deeply implicated with the privilege while at the same time his vocation becomes correspondingly dependent on it.

The field of licensed occupations and businesses of this nature is steadily becoming of greater concern to citizens generally. It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulation, would be free and legitimate, should be conducted with complete impartiality and integrity; and that the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute: the duty of a Commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the "discretion" of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.

To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred. There was here not only revocation of the existing permit but a declaration of a future, definitive disqualification of the appellant to obtain one: it was to be "forever". This purports to divest his citizenship status of its incident of membership in the class of those of the public to whom such a privilege could be extended. Under the statutory language here, that is not competent to the Commission and *a fortiori* to the government or the respondent: *McGillivray v. Kimber*[1]. There is here an administrative tribunal which, in certain respects, is to act in a judicial manner; and even on the view of the dissenting justices in *McGillivray,* there is liability: what could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the *Liquor Act*? Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry.

It may be difficult if not impossible in cases generally to demonstrate a breach of this public duty in the illegal purpose served; there may be no means, even if proceedings against the Commission were permitted by the Attorney-General, as here they were refused, of compelling the Commission to justify a refusal or revocation or to give reasons for its action; on these questions I make no observation; but in the case before us that difficulty is not present: the reasons are openly avowed.

The act of the respondent through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province. Whatever may be the immunity of the Commission or its member from an action for damages, there

[1] (1915), 52 S.C.R. 146, 26 D.L.R. 164.

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is none in the respondent. He was under no duty in relation to the appellant and his act was an instrusion upon the functions of a statutory body. The injury done by him was a fault engaging liability within the principles of the underlying public law of Quebec: *Mostyn v. Fabrigas*[1], and under art. 1053 of the *Civil Code*. That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure. An administration of licences on the highest level of fair and impartial treatment to all may be forced to follow the practice of "first come, first served", which makes the strictest observance of equal responsibility to all of even greater importance; at this stage of developing government it would be a danger of high consequence to tolerate such a departure from good faith in executing the legislative purpose. It should be added, however, that that principle is not, by this language, intended to be extended to ordinary governmental employment: with that we are not here concerned.

It was urged by Mr. Beaulieu that the respondent, as the incumbent of an office of state, so long as he was proceeding in "good faith", was free to act in a matter of this kind virtually as he pleased. The office of Attorney-General traditionally and by statute carries duties that relate to advising the Executive, including here, administrative bodies, enforcing the public law and directing the administration of justice. In any decision of the statutory body in this case, he had no part to play beyond giving advice on legal questions arising. In that role his action should have been limited to advice on the validity of a revocation for such a reason or purpose and what that advice should have been does not seem to me to admit of any doubt. To pass from this limited scope of action to

[1] 98 E.R. 1021.

that of bringing about a step by the Commission beyond the bounds prescribed by the legislature for its exclusive action converted what was done into his personal act.

"Good faith" in this context, applicable both to the respondent and the general manager, means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.

I mention, in order to make clear that it has not been overlooked, the decision of the House of Lords in *Allen v. Flood*[1], in which the principle was laid down that an act of an individual otherwise not actionable does not become so because of the motive or reason for doing it, even maliciously to injure, as distinguished from an act done by two or more persons. No contention was made in the present case based on agreed action by the respondent and Mr. Archambault. In *Allen v. Flood*, the actor was a labour leader and the victims non-union workmen who were lawfully dismissed by their employer to avoid a strike involving no breach of contract or law. Here the act done was in relation to a public administration affecting the rights of a citizen to enjoy a public privilege, and a duty implied by the statute toward the victim was violated. The existing permit was an interest for which the appellant was entitled to protection against any unauthorized interference, and the illegal destruction of which gave rise to a remedy for the damages suffered. In *Allen v. Flood* there were no such elements.

Nor is it necessary to examine the question whether on the basis of an improper revocation the appellant could have compelled the issue of a new permit or whether the purported revocation was a void act. The revocation was *de facto*, it was intended to end the privilege and to bring about the consequences that followed. As against the respondent, the appellant was entitled to treat the breach of duty as effecting a revocation and to elect for damages.

[1] [1898] A.C. 1.

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Mr. Scott argued further that even if the revocation were within the scope of discretion and not a breach of duty, the intervention of the respondent in so using the Commission was equally a fault. The proposition generalized is this: where, by a statute restricting the ordinary activities of citizens, a privilege is conferred by an administrative body, the continuance of that enjoyment is to be free from the influence of third persons on that body for the purpose only of injuring the privilege holder. It is the application to such a privilege of the proposition urged but rejected in *Allen v. Flood* in the case of a private employment. The grounds of distinction between the two cases have been pointed out; but for the reasons given consideration of this ground is unnecessary and I express no opinion for or against it.

A subsidiary defence was that notice of action had not been given as required by art. 88 C.C.P. This provides generally that, without such notice, no public officer or person fulfilling any public function or duty is liable in damages "by reason of any act done by him in the exercise of his functions". Was the act here, then, done by the respondent in the course of that exercise? The basis of the claim, as I have found it, is that the act was quite beyond the scope of any function or duty committed to him, so far so that it was one done exclusively in a private capacity, however much in fact the influence of public office and power may have carried over into it. It would be only through an assumption of a general overriding power of executive direction in statutory administrative matters that any colour of propriety in the act could be found. But such an assumption would be in direct conflict with fundamental postulates of our provincial as well as dominion government; and in the actual circumstances there is not a shadow of justification for it in the statutory language.

The damages suffered involved the vocation of the appellant within the province. Any attempt at a precise computation or estimate must assume probabilities in an area of uncertainty and risk. The situation is one which the Court should approach as a jury would, in a view of

its broad features; and in the best consideration I can give to them, the damages should be fixed at the sum of $25,000 plus that allowed by the trial court.

I would therefore allow the appeals, set aside the judgment of the Court of Queen's Bench and restore the judgment at trial modified by increasing the damages to the sum of $33,123.53. The appellant should have his costs in the Court of Queen's Bench and in this Court.

The judgment of Locke and Martland JJ. was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Court of Queen's Bench, Appeal Side, for the Province of Quebec[1], District of Montreal, rendered on April 12, 1956, overruling the judgment of the Superior Court rendered on May 2, 1951, under the terms of which the appellant had been awarded damages in the sum of $8,123.53 and costs.

The appellant had appealed from the judgment of the Superior Court in respect of the amount of damages awarded. This appeal was dismissed.

The facts which give rise to this appeal are as follows:

The appellant, on December 4, 1946, was the owner of a restaurant and café situated at 1429 Crescent Street in the City of Montreal. At that time he was the holder of a liquor permit, no. 68, granted to him on May 1, 1946, pursuant to the provisions of the *Alcoholic Liquor Act* of the Province of Quebec and which permitted the sale of alcoholic liquors in the restaurant and café. The permit was valid until April 30, 1947, subject to possible cancellation by the Quebec Liquor Commission (hereinafter sometimes referred to as "the Commission") in accordance with the provisions of s. 35 of that Act. The business operated by the appellant had been founded by his father in the year 1912 and it had been continuously licensed until December 4, 1946. The evidence is that prior to that date the appellant had complied with the requirements of the *Alcoholic Liquor Act* and had conducted a high-class restaurant business.

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The appellant was an adherent of the Witnesses of Jehovah. From some time in 1944 until November 12, 1946, he had, on numerous occasions, given security for Witnesses of Jehovah who had been prosecuted under City of Montreal By-laws numbered 270 and 1643 for minor offences of distributing, peddling and canvassing without a licence. The maximum penalty for these offences was a fine of $40 and costs, or imprisonment for 60 days. The total number of bonds furnished by the appellant was 390. These security bonds were accepted by the City attorney and the Recorder of the City of Montreal without remuneration to the appellant. None of the accused who had been bonded ever defaulted. Subsequently the appellant was released from these bonds at his own request and new security was furnished by others.

As a result of a change of procedure in the Recorder's Court in Montreal by the Attorney in Chief of that Court, the appellant was not accepted as a bondsman in any cases before that Court after November 12, 1946.

Up to November 12, 1946, the security bonds furnished by the appellant were accepted without question. These bonds were based upon the value of the appellant's immovable property containing the restaurant. The appellant did not give any security in any criminal case involving a charge of sedition.

About the 24th or 25th of November 1946 the pamphlet "Quebec's Burning Hate" began to be distributed in the Province of Quebec by the Witnesses of Jehovah. The Chief Crown Prosecutor in Montreal, then Mtre. Oscar Gagnon, K.C., decided that the distribution of this pamphlet should be prevented. There is no evidence that the appellant was at any time a distributor of this pamphlet and his restaurant and café in Montreal was not used for the distribution or storage of these pamphlets by himself or by anyone else. The appellant had ceased to be a bondsman before the distribution of this pamphlet in the Province of Quebec had commenced.

On November 25, 1946, a number of pamphlets was seized in a building in the City of Sherbrooke owned by the appellant and leased from him, as a place of worship, by Witnesses of Jehovah under the control of the local

minister Mr. Raymond Browning. There is no evidence that the appellant was in any way responsible for the activities of this congregation, or that he knew that the pamphlet "Quebec's Burning Hate" was in those premises.

In the course of his inquiries about the distribution of this pamphlet, Mr. Gagnon learned that the appellant had been giving bail in a large number of cases in the Recorder's Court and also that he was the holder of the liquor permit for his restaurant. These facts were brought by Mr. Gagnon to the attention of Mr. Edouard Archambault, then Chairman of the Quebec Liquor Commission and subsequently Chief Judge of the Court of Sessions of the Peace. Mr. Archambault then interviewed Recorder Paquette, who informed him that the appellant held a licence from the Quebec Liquor Commission; that he was furnishing bail in a large number of cases of infractions of municipal by-laws; that these were so numerous that a great part of the police of Montreal had been taken from their duties as a consequence and that his Court was congested by the large number of cases pending before it.

Subsequent to the receipt of this information, Mr Archambault communicated by telephone with the respondent. The discussion which took place on that occasion and on the occasion of a subsequent telephone call will be reviewed later. Following the two telephone conversations between Mr. Archambault and the respondent, Mr Archambault, as manager of the Quebec Liquor Commission, issued an order for the cancellation of the appellant's permit without any prior notice to the appellant. All the liquor in the possession of the appellant on his restaurant premises was seized and was taken into the custody of the Commission.

The appellant carried on his restaurant business without a liquor licence for a period of approximately six months, after which, finding that the business could not be thus operated profitably, he closed it down and later effected a sale of the premises.

The appellant commenced action against the respondent on June 3, 1947, claiming damages in the total sum of $118,741. He alleged that the respondent, without legal or statutory authority, had caused the cancellation of his liquor permit as an act of reprisal because of his having

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acted as surety or bondsman for the Witnesses of Jehovah in connection with the charges above mentioned. He alleged that the permit had been arbitrarily and unlawfully cancelled and that, as a result, he had sustained the damages claimed.

By his defence the respondent alleged that the Witnesses of Jehovah, in the years 1945 and 1946, had, with the consent and encouragement of the appellant, organized a propaganda campaign in the Province of Quebec, and particularly in the City of Montreal, where they had distributed pamphlets of a seditious character. The respondent referred to the fact that the appellant had acted as surety for a number of persons under arrest and thus permitted them to repeat their offences and to continue their campaign. He alleged that in his capacity as Attorney-General of the Province of Quebec, after becoming cognizant of the conduct of the appellant and of the fact that he held a permit issued by the Quebec Liquor Commission, he had decided, after careful reflection, that it was contrary to public order to permit the appellant to enjoy the benefit of the privileges of this permit and that he, the respondent, had recommended to the manager of the Quebec Liquor Commission the cancellation of that permit. It was alleged that the permit did not give any right, but constituted a privilege available only during the pleasure of the Commission. He alleged that in the matter he had acted in his quality of Prime Minister and Attorney-General of the Province of Quebec and, accordingly, could not incur any personal responsibility. He further pleaded the provisions of art. 88 of the *Code of Civil Procedure* and alleged that he had not received notice of the action as required by the provisions of that article.

The case came on for trial in the Superior Court before MacKinnon J., who made findings of fact and reached conclusions in law as follows:

1. that the respondent gave an order to the manager of the Commission, Mr. Archambault, to cancel the appellant's permit and that it was the respondent's order which was the determining factor in relation to the cancellation of that permit;

2. that the Commission had acted arbitrarily when it cancelled the permit and had disregarded the rules of reason and justice;

3. that the respondent had failed to show that, in law, he had any authority to interfere with the administration of the Commission, or to order it to cancel a permit;

4. that the respondent was not entitled to receive notice of the action pursuant to art. 88 of the *Code of Civil Procedure* because his acts which were complained of were not done in the exercise of his functions.

Damages were awarded in the total amount of $8,123.53.

From this judgment the respondent appealed. The appellant cross-appealed in respect of the matter of damages, asking for an award in an increased amount.

The respondent's appeal on the issue of liability was allowed and the appellant's appeal was dismissed. Rinfret J. dissented in respect of the allowance of the respondent's appeal.

Various reasons were given for the allowance of the appeal by the majority of the Court[1]. They may be summarized as follows:

Bissonnette J. reached the conclusion that, upon the evidence, the decision to cancel the permit had been made by Mr. Archambault before taking the respondent's advice. He also held that, according to the strict interpretation of the *Alcoholic Liquor Act*, the Commission was not obliged to justify before any Court the wisdom of its acts in cancelling a liquor permit.

Pratte J. allowed the appeal of the respondent on the first ground advanced by Bissonnette J., finding that there was no relationship of cause and effect as between the acts of the respondent and the cancellation of the permit because Mr. Archambault had already made his decision to cancel before consulting with the respondent.

Casey J. was of the same view with respect to this point. He also held that, although the discretion of the Commission to cancel a permit should not be exercised

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arbitrarily or capriciously, no individual has an inherent right to engage in the business regulated by the Act and the continuance of a permit was conditional upon the holder being of good moral character and a suitable person to exercise that privilege. In his view the chairman of the Commission had reasonable grounds for believing that the Witnesses of Jehovah were engaged in a campaign of libel and sedition and that the appellant, an active member of the sect, was participating in the group's activities. His view was that, in the light of this, the Commission could properly cancel the permit.

Martineau J., like the other majority judges in the Court, found that there was no relationship of cause and effect as between what the respondent had done and the cancellation of the permit, also holding that Mr. Archambault had decided to cancel it before communicating with the respondent. He was also of the view that a Minister of the Crown is not liable if, in the exercise of powers granted to him by law, he makes an erroneous decision upon reliable information. He also held that, while the Commission's discretion to cancel a permit was not absolute and had to be exercised in good faith, the discretion is not quasi-judicial but "quasi-illimited" and only restricted by the good faith of its officers. He was of the opinion that the good faith of both the respondent and Mr. Archambault could not be doubted. He found that no order to cancel the permit had been given by the respondent to Mr. Archambault. He also held that, even if an order had been given and had been the determining factor in procuring the cancellation of the permit, there would be no liability upon the respondent, in view of the appellant's participation in the propaganda of the Witnesses of Jehovah.

Rinfret J., who dissented and who would have dismissed the respondent's appeal, in general agreed with the conclusions reached by the trial judge.

In view of the foregoing, it appears that there are four main points which require to be considered in the present appeal, which are as follows:

1. Was there a relationship of cause and effect as between the respondent's acts and the cancellation of the appellant's permit?

2. If there was such a relationship, were the acts of the respondent justifiable on the ground that he acted in good faith in the exercise of his official functions as Attorney-General and Prime Minister of the Province of Quebec?

3. Was the cancellation of the appellant's permit a lawful act of the Commission, acting within the scope of its powers as defined in the *Alcoholic Liquor Act?*

4. Was the respondent entitled to the protection provided by art. 88 of the *Code of Civil Procedure*?

It is proposed to consider each of these points in the above sequence.

With respect to the first point, after reviewing the evidence, I am satisfied that there was ample evidence to sustain the finding of the trial judge that the cancellation of the appellant's permit was the result of instructions given by the respondent to the manager of the Commission.

Two telephone calls were made by Mr. Archambault to the respondent. According to the evidence of the respondent, Mr. Archambault telephoned him in November 1946 "et il m'a dit que Roncarelli qui multipliait les cautionnements à la Cour du Recorder d'une façon désordonnée, contribuant à paralyser les activités de la police et à congestionner les tribunaux, que ce nommé Roncarelli détenait un privilège de la Commission des Liqueurs de Québec."

In reply the respondent says that he said to Mr. Archambault:

> C'est une chose très grave, êtes-vous sûr qu'il s'agit de Roncarelli qui a un permis de la Commission des Liqueurs?

Mr. Archambault then replied that he would inform himself and would communicate with the respondent.

Some time after the first telephone conversation, and apparently about November 30 or December 1, 1946, Mr. Archambault again telephoned the respondent to say:

> qu'il était certain que le Roncarelli en question, qui paralysait les activités de la Cour du Recorder, qui accaparait dans une large mesure les services de la force constabulaire de Montréal, dont les journaux disaient avec raison qu'elle n'avait pas le nombre suffisant de policiers, était bien la personne qui détenait un permis.

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To this the respondent replied:

Dans ces circonstances, je considère que c'est mon devoir, comme Procureur Général et comme Premier Ministre, en conscience, dans l'exercice de mes fonctions officielles et pour remplir le mandat que le peuple m'avait confié et qu'il m'a renouvelé avec une immense majorité en 1948, après la cancellation du permis et après la poursuite intentée contre moi, j'ai cru que c'était mon devoir, en conscience, de dire au Juge que ce permis-là le Gouvernement de Québec ne pouvait pas accorder un privilège à un individu comme Roncarelli qui tenait l'attitude qu'il tenait.

The respondent further says that he told Mr. Archambault:

Vous avez raison, ôtez le permis, ôtez le privilège.

In February 1947 the respondent, in an interview with the press, stated that the appellant's permit had been cancelled on orders from him. His statement on this point appeared in a news dispatch to the Canadian Press from its Quebec correspondent:

It was I, as Attorney-General of the Province charged with the protection of good order, who gave the order to annul Frank Roncarelli's permit.

Mr. Duplessis said:

By so doing, not only have we exercised a right but we have fulfilled an imperious duty. The permit was cancelled not temporarily but definitely and for always.

It seems to me that the only reason Mr. Archambault could have had for telephoning the respondent in the first place, after his receipt of the information given by Mr. Gagnon and Recorder Paquette, was to obtain the respondent's direction as to what should be done. I find it difficult to accept the proposition that there was no relationship of cause and effect as between what the respondent said to Mr. Archambault and the cancellation of the permit. While it is true that in his evidence Mr. Archambault states that he had decided to cancel the permit on the day he received the written report from his secret agent Y3, dated November 30, 1946 (which was subsequent to the first telephone conversation), he goes on to say:

D. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?

R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler

le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai rappelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

I conclude from this evidence that any "decision" of Mr. Archambault's was at most tentative and would only be made effective if he received direction from the respondent to carry it out. I would doubt that, if the respondent had advised against the cancellation of the permit, Mr. Archambault's decision would have been implemented.

The respondent appears to have shared this view because in his evidence he states as follows:

Si j'avais dit au Juge Archambault: "Vous ne le ferez pas", il ne l'aurait probablement pas fait. Comme il me suggérait de le faire et qu'après réflexion et vérification je trouvais que c'était correct, que c'était conforme à mon devoir, j'ai approuvé et c'est toujours un ordre que l'on donne. Quand l'officier supérieur parle, c'est un ordre que l'on donne, même s'il accepte la suggestion de l'officier dans son département, c'est un ordre qu'il donne indirectement. Je ne me rapelle pas des expressions exactes, mais ce sont les faits.

I, therefore, agree with the learned trial judge that the cancellation of the appellant's permit was the result of an order given by the respondent.

The second point for consideration is as to whether the respondent's acts were justifiable as having been done in good faith in the exercise of his official function as Attorney-General and Prime Minister of the Province of Quebec.

In support of his contention that the respondent had so acted, we were referred by his counsel to the following statutory provisions:

THE ATTORNEY-GENERAL'S DEPARTMENT ACT,
R.S.Q. 1941, c. 46

* * *

3. The Attorney-General is the official legal adviser of the Lieutenant-Governor, and the legal member of the Executive Council of the Province of Quebec.

4. The duties of the Attorney-General are the following:

1. To see that the administration of public affairs is in accordance with the law;

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2. To exercise a general superintendence over all matters connected with the administration of justice in the Province.

5. The function and powers of the Attorney-General are the following:

1. He has the functions and powers which belong to the office of Attorney-General of England, respectively, by law or usage, insofar as the same are applicable to this Province, and also the functions and powers, which, up to the Union, belonged to such offices in the late Province of Canada, and which, under the provisions of the British North America Act, 1867, are within the powers of the Government of this Province;

2. He advises the heads of the several departments of the Government of the Province upon all matters of law concerning such departments, or arising in the administration thereof;

* * *

7. He is charged with superintending the administration or the execution, as the case may be, of the laws respecting police.

THE EXECUTIVE POWER ACT, R.S.Q. 1941, c. 7

* * *

5. The Lieutenant-Governor may appoint, under the Great Seal, from among the members of the Executive Council, the following officials, who shall remain in office during pleasure:

1. A Prime Minister who shall, ex-officio, be president of the Council.

THE ALCOHOLIC LIQUOR ACT, R.S.Q. 1941, c. 255

DIVISION XII

INVESTIGATION AND PROSECUTION OF OFFENCES

148. The Attorney-General shall be charged with:

1. Assuring the observance of this act and of the Alcoholic Liquor Possession and Transportation Act (Chap. 256), and investigating, preventing and suppressing the infringements of such acts, in every way authorized thereby;

2. Conducting the suits or prosecutions for infringements of this act or of the said Alcoholic Liquor Possession and Transportation Act.

I do not find, in any of these provisions, authority to enable the respondent, either as Attorney-General or Prime Minister, to direct the cancellation of a permit under the *Alcoholic Liquor Act*. On the contrary, the intent and purpose of that Act appears to be to place the complete control over the liquor traffic in Quebec in the hands of an independent commission. The only function of the Attorney-General under that statute is in relation to the assuring of the observance of its provisions. There is no evidence of any breach of that Act by the appellant.

However, it is further argued on behalf of the respondent that, as Attorney-General, in order to suppress or to prevent crimes and offences, "He may do so by instituting legal proceedings; he may do so by other methods." This amounts to a contention that he is free to use any methods he chooses; that, on suspicion of participation in what he thinks would be an offence, he may sentence a citizen to economic ruin without trial. This seems to me to be a very dangerous proposition and one which is completely alien to the legal concepts applicable to the administration of public office in Quebec, as well as in the other provinces of Canada.

In my view, the respondent was not acting in the exercise of any official powers which he possessed in doing what he did in this matter.

The third point to be considered is as to whether the appellant's permit was lawfully cancelled by the Commission under the provisions of the *Alcoholic Liquor Act*. Section 35 of that Act makes provision for the cancellation of a permit in the following terms:

> 35. 1. Whatever be the date of issue of any permit granted by the Commission, such permit shall expire on the 30th of April following, unless it be cancelled by the Commission before such date, or unless the date at which it must expire be prior to the 30th of April following.
>
> The Commission may cancel any permit at its discretion.

It is contended by the respondent, and with considerable force, that this provision gives to the Commission an unqualified administrative discretion as to the cancellation of a permit issued pursuant to that Act. Such a discretion, it is contended, is not subject to any review in the Courts.

The appellant contends that the Commission's statutory discretion is not absolute and is subject to legal restraint. He cites the statement of the law by Lord Halsbury in *Sharp v. Wakefield*[1]:

> An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: Rooke's Case; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

[1] [1891] A.C. 173 at 179.

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That was a case dealing with the discretionary powers of the licensing justices to refuse renewal of a licence for the sale of intoxicating liquors. This statement of the law was approved by Lord Greene M.R. in *Minister of National Revenue v. Wrights' Canadian Ropes, Limited*[1].

The appellant further contends that, in exercising this discretion, the rules of natural justice must be observed and points out that no notice of the intention of the Commission to cancel his permit was ever given to the appellant, nor was he given a chance to be heard by the Commission before the permit was cancelled.

With respect to this latter point, it would appear to be somewhat doubtful whether the appellant had a right to a personal hearing, in view of the judgment of Lord Radcliffe in *Nakkuda Ali v. Jayaratne*[2]. However, regardless of this, it is my view that the discretionary power to cancel a permit given to the Commission by the *Alcoholic Liquor Act* must be related to the administration and enforcement of that statute. It is not proper to exercise the power of cancellation for reasons which are unrelated to the carrying into effect of the intent and purpose of the Act. The association of the appellant with the Witnesses of Jehovah and his furnishing of bail for members of that sect, which were admitted to be the reasons for the cancellation of his permit and which were entirely lawful, had no relationship to the intent and purposes of the *Alcoholic Liquor Act*.

Furthermore, it should be borne in mind that the right of cancellation of a permit under that Act is a substantial power conferred upon what the statute contemplated as an independent commission. That power must be exercised solely by that corporation. It must not and cannot be exercised by any one else. The principle involved is stated by the Earl of Selborne in the following passage in his judgment in *Spackman v. Plumstead Board of Works*[3]:

> No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of

[1] [1947] A.C. 109 at 122. [2] [1951] A.C. 66.
[3] (1885), 10 App. Cas. 229 at 240.

some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice.

While the Earl of Selborne is here discussing the rules applicable to a quasi-judicial tribunal, that portion of his statement which requires such a tribunal to act honestly and impartially and not under the dictation of some other person or persons is, I think, equally applicable to the performance of an administrative function.

The same principle was applied in respect of the performance of an administrative function by Chief Justice Greenshields in *Jaillard v. City of Montreal*[1].

In the present case it is my view, for the reasons already given, that the power was not, in fact, exercised by the Commission, but was exercised by the respondent, acting through the manager of the Commission. Cancellation of a permit by the Commission at the request or upon the direction of a third party, whoever he may be, is not a proper and valid exercise of the power conferred upon the Commission by s. 35 of the Act. The Commission cannot abdicate its own functions and powers and act upon such direction.

Finally, there is the question as to the giving of notice of the action by the appellant to the respondent pursuant to art. 88 of the *Code of Civil Procedure,* which reads as follows:

ACTIONS AGAINST PUBLIC OFFICERS

88. No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgment be rendered against him, unless notice of such action has been given him at least one month before the issue of the writ of summons.

Such notice must be in writing; it must state the grounds of the action, and the name of the plaintiff's attorney or agent, and indicate his office; and must be served upon him personnally or at his domicile.

The contention of the respondent is that, as Attorney-General, he was a public official whose function was to maintain law and order in the Province; that he acted as he did in the intended exercise of that function and that

[1] (1934), 72 Que. S.C. 112.

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he is not deprived of the protection afforded by the article because he had exceeded the powers which, in law, he possessed.

The issue is as to whether those acts were "done by him in the exercise of his functions." For the reasons already given in dealing with the second of the four points under discussion, I do not think that it was a function either of the Prime Minister or of the Attorney-General to interfere with the administration of the Commission by causing the cancellation of a liquor permit. That was something entirely outside his legal functions. It involved the exercise of powers which, in law, he did not possess at all.

Is the position altered by the fact that apparently he thought it was his right and duty to act as he did? I do not think that it is. The question of whether or not his acts were done by him in the exercise of his functions is not to be determined on the basis of his own appreciation of those functions, but must be determined according to law. The respondent apparently assumed that he was justified in using any means he thought fit to deal with the situation which confronted him. In my view, when he deliberately elected to use means which were entirely outside his powers and were unlawful, he did not act in the exercise of his functions as a public official.

The principle which should be applied is stated by Lopes J. in *Agnew v. Jobson*[1]. That was an action for assault against a justice of the peace who had ordered a medical examination of the person of the plaintiff. There was no legal authority to make such an order, but it was admitted that the defendant bona fide believed that he had the authority to do that which he did. The defendant relied on absence of notice of the action as required by 11 & 12 Vic., c. 44. Section 8 of that Act provided that "no action shall be brought against any justice of the peace for anything done by him in the execution of his office" unless within six calendar months of the act complained of. Section 9, the one relied on by the defendant, provided that "no such action shall be commenced against any such justice" until a month after notice of action. Lopes J.

[1] (1877), 47 L.J.M.C. 67, 13 Cox C.C. 625.

held that "such justice" in s. 9 referred to a justice in execution of his office in s. 8. He held that s. 9 did not provide a defence to the defendant in these words (p. 68):

> I am of opinion tnat the defendant Jobson is not entitled to notice of action. There was a total absence of any authority to do the act, and although he acted bona fide, believing he had authority, there was nothing on which to ground the belief, no knowledge of any fact such a belief might be based on.

Similarly here there was nothing on which the respondent could found the belief that he was entitled to deprive the appellant of his liquor permit.

On the issue of liability, I have, for the foregoing reasons, reached the conclusion that the respondent, by acts not justifiable in law, wrongfully caused the cancellation of the appellant's permit and thus cause damage to the appellant. The respondent intentionally inflicted damage upon the appellant and, therefore, in the absence of lawful justification, which I do not find, he is liable to the appellant for the commission of a fault under art. 1053 of the *Civil Code*.

I now turn to the matter of damages.

The learned trial judge awarded damages to the appellant in the sum of $8,123.53, made up of $1,123.53 for loss of value of liquor seized by the Commission, $6,000 for loss of profits from the restaurant from December 4, 1946, the date of the cancellation of the permit, to May 1, 1947, the date when the permit would normally have expired, and $1,000 for damages to his personal reputation. No objection is taken by the appellant in respect of these awards, but he contends that he is also entitled to compensation under certain other heads of damage in respect of which no award was made by the learned trial judge. These are in respect of damage to the good will and reputation of his business, loss of property rights in his permit and loss of future profits for a period of at least one year from May 1, 1947. Damages in respect of these items were not allowed by the learned trial judge because of the fact that the appellant's permit was "only a temporary asset."

The appellant contends that, although his permit was not permanent, yet, in the light of the long history of his restaurant and the continuous renewals of the permit previously, he had a reasonable expectation of renewal in

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the future, had not the cancellation been effected in December 1946. He contends that the value of the good will of his business was substantially damaged by that cancellation.

His position on this point is supported by the reasoning of Duff J. (as he then was) in *McGillivray v. Kimber*[1]. That was an action claiming damages for the wrongful cancellation of the appellant's pilot's licence by the Sydney Pilotage Authority. At p. 163 he says:

> The statement of defence seems to proceed upon the theory that for the purpose of measuring legal responsibility the consequences of this dismissal came to an end with the expiry of the term and that I shall discuss; but for the present it is sufficient to repeat that the dismissal was an act which being not only calculated, but intended to prevent the appellant continuing the exercise of his calling had in fact this intended effect; and the respondents are consequently answerable in damages unless there was in law justification or excuse for what they did. Per Bowen L.J., Mogul S.S. Co. v. McGregor, 23 Q.B.D. 598.

The statement by Bowen L.J. to which he refers appears at p. 613 of the report and is also of significance in relation to the appellant's right of action in this case. It is as follows:

> Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse.

The evidence establishes that there was a substantial reduction in the value of the good will of the appellant's restaurant business as a result of what occurred, apart from the matter of any loss which might have resulted on the sale of the physical assets. It is difficult to assess this loss and there is not a great deal of evidence to assist in so doing. The appellant did file, as exhibits, income tax returns for the three years prior to 1946, which showed in those years a total net income from the business of $23,578.88. The profit-making possibilities of the business are certainly an item to be considered in determining the value of the good will.

However, in all the circumstances, the amount of these damages must be determined in a somewhat arbitrary fashion. I consider that $25,000 should be allowed as damages for the diminution of the value of the good will and for the loss of future profits.

[1] (1915), 52 S.C.R. 146, 26 D.L.R. 164.

I would allow both appeals, with costs here and below, and order the respondent to pay to the appellant damages in the total amount of $33,123.53, with interest from the date of the judgment in the Superior Court, and costs.

CARTWRIGHT J. (*dissenting*):—This appeal is from two judgments of the Court of Queen's Bench (Appeal Side) for the Province of Quebec[1], of which the first allowed an appeal from a judgment of MacKinnon J. and dismissed the appellant's action, and the second dismissed a cross-appeal asking that the damages awarded by the learned trial judge be increased.

The respondent is, and was at all relevant times, the Prime Minister and Attorney-General of the Province of Quebec.

The appellant on December 4, 1946, was the owner of an immovable property, known as 1429 Crescent Street in the City of Montreal, where he had for many years successfully carried on the business of a restaurant and cafe. He was the holder of liquor permit no. 68 granted to him on May 1, 1946, for the sale of alcoholic liquors in his restaurant and cafe pursuant to the provisions of the *Alcoholic Liquor Act,* R.S.Q. 1941, c. 255, hereinafter referred to as "the Act". This permit would normally have expired on April 30, 1947. The business carried on by the appellant had been founded by his father in 1912 and had been licensed uninterruptedly from that time until 1946. Prior to December 4, 1946, the appellant had complied with all the requirements of the Act and had carried on his restaurant business in conformity with the laws of the Province.

The appellant was at all relevant times a member of a sect known as "The Witnesses of Jehovah" and from some time in 1944 up to November 12, 1946, had on about 390 occasions, acted as bailsman for numbers of his co-religionists prosecuted under by-laws of the City of Montreal for distributing literature without a licence. None of those for whom he acted as bailsman defaulted in appearance, and all of them were ultimately discharged upon the by-laws under which they were charged being held to be invalid.

[1] [1956] Que. Q.B. 447.

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About the 24th or 25th of November 1946 members of the sect commenced distributing copies of a circular entitled "Quebec's burning hate for God and Christ and Freedom is the shame of all Canada". Copies of this circular are printed in the record, the English version being exhibit D7 and the French version exhibit D11. The then senior Crown Prosecutor in Montreal, Mtre Oscar Gagnon, formed the opinion that the circular was a seditious libel and that its distribution should be prevented. It results from the judgment of this Court in *Boucher v. The King*[1] that the learned Crown Prosecutor was in error in forming the opinion that the circular could be regarded as seditious. It, however, can hardly be denied that it was couched in terms which would outrage the feelings of the great majority of the inhabitants of the Province of Quebec; and the same may be said of a number of other documents circulated by the sect, copies of which form part of the record in the case at bar.

The evidence does not show that the appellant took part in the distribution of any of the circulars mentioned or that he was a leader or chief of the sect. He did not act as bailsman for any member of the sect charged in connection with the distribution of the circular, "Quebec's burning hate".

On November 25, 1946, pamphlets, including copies of "Quebec's burning hate" were seized in a building in the City of Sherbrooke owned by the appellant and leased by him to a congregation of Witnesses of Jehovah as a "Kingdom Hall" or place of worship. The appellant was not aware that the pamphlets were in this building.

From his investigations and the reports which he received M. Gagnon concluded that the distribution of the pamphlets "convergeait autour de M. Roncarelli ou de personnes qui étaient près de lui" and he so informed M. Edouard Archambault, the manager of the Quebec Liquor Commission. It may well be that M. Gagnon reached the conclusion mentioned on insufficient evidence. M. Gagnon also informed M. Archambault that the appellant had acted as bailsman for a great number of Witnesses of Jehovah.

[1] [1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.

On receiving this information from M. Gagnon, M. Archambault read the circular, "Quebec's burning hate" and had a conversation with M. Paquette, the Recorder-in-Chief at Montreal, who confirmed the statements as to the appellant furnishing bail.

At this point M. Archambault formed the opinion that he should cancel the permit held by the appellant, but before taking any action he telephoned the respondent at Quebec, told him what information he had received and that he proposed cancelling the permit. The respondent told him to be careful to make sure that the Roncarelli who had furnished bail was in fact the appellant. M. Archambault satisfied himself as to this through the report of an agent "Y3", in whom he had confidence, and thereupon, according to his uncontradicted evidence, decided to cancel the permit. The reasons which brought him to this decision were stated by him as follows:

D. Alors, à ce moment-là, vous aviez déjà décidé d'enlever cette licence?

R. Oui.

D. Vous basant, je suppose, sur les rapports que vous aviez déjà reçus de monsieur Oscar Gagnon et du recorder-en-chef Paquette que monsieur Roncarelli avait fourni des cautionnements?

R. Oui; et, à part de cela, de la littérature que j'avais lue.

D. Et le pamphlet auquel vous avez référé: "Quebec's Burning Hate"?

R. Oui, monsieur.

M. Archambault then telephoned the respondent. The substance of the two telephone conversations between M. Archambault and the respondent is summarized by the former as follows:

D. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?

R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai rappelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

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The evidence of the respondent is also that the suggestion of cancelling the permit was made by M. Archambault, and there is no evidence to the contrary.

There has been a difference of opinion in the Courts below as to whether what was said by the respondent to M. Archambault amounted to an order to cancel or merely to an "approbation énergique" of a decision already made. I do not find it necessary to choose between these conflicting views as I propose to assume for the purposes of this appeal that what was said by the respondent was so far a determining factor in the cancellation of the permit as to render him liable for the damages caused thereby to the appellant if the cancellation was an actionable wrong giving rise to a right of action for damages.

All of the Judges in the Courts below who have dealt with that aspect of the matter have concluded that the respondent acted throughout in the honest belief that he was fulfilling his duty to the Province, and this conclusion is supported by the evidence.

The opinion of M. Archambault and of the respondent appears to have been that a permit to sell liquor under the Act is a privilege in the gift of the Province which ought not to be given to, or allowed to continue to be enjoyed by, one who was actively supporting members of a group of persons who were engaged in a concerted campaign to vilify the Province and were persistently acting in contravention of existing by-laws. Once it is found, as I think it must be on the evidence, that this opinion was honestly entertained, I have reached the conclusion, for reasons that will appear, that the Court cannot inquire as to whether there was sufficient evidence to warrant its formation or as to whether it constituted a reasonable ground for cancellation of the permit.

The permit was cancelled on December 4, 1946, without any prior notice to the appellant and without his being given any opportunity to show cause why it ought not to be cancelled. It is clear that the appellant suffered substantial financial loss as a result of the cancellation.

In determining whether the cancellation of the permit in these circumstances was an actionable wrong on the part of the commission or of M. Archambault, its manager, it is necessary to consider the relevant provisions of the Act. These appear to me to be as follows:

S.5 A Commission is by this act created under the name of "The Quebec Liquor Commission", or "Commission des liqueurs de Québec", and shall constitute a corporation, vested with all the rights and powers belonging generally to corporations.

The exercise of the functions, duties and powers of the Quebec Liquor Commission shall be vested in one person alone, named by the Lieutenant-Governor in Council, with the title of manager. The remuneration of such person shall be determined by the Lieutenant-Governor in Council and be paid out of the revenues of the Liquor Commission.

* * *

S.9 The function, duties and powers of the Commission shall be the following:

* * *

d. To control the possession, sale and delivery of alcoholic liquor in accordance with the provisions of this act;

e. To grant, refuse, or cancel permits for the sale of alcoholic liquor or other permits in regard thereto, and to transfer the permit of any person deceased;

* * *

S.32 No permit shall be granted other than to an individual, and in his personal name.

The application for a permit may be made only by a British subject, must be signed by the applicant before witnesses, and must give his surname, Christian names, age, occupation, nationality and domicile, the kind of permit required and the place where it will be used, and must be accompanied by the amount of the duties payable upon the application for the permit. The applicant must furnish all additional information which the Commission may deem expedient to ask for.

If the permit is to be used for the benefit of a partnership or corporation, the application therefore must likewise be accompanied by a declaration to that effect, and duly signed by such partnership or corporation. In such case, the partnership or corporation shall be responsible for any fine and costs, to which the holder of the permit may be condemned; and the amount thereof may be recovered before any court having jurisdiction, without prejudice to imprisonment, if any.

All applications for permits must be addressed to the Commission before the 10th of January in each year, to take effect on the 1st of May in the same year.

* * *

S.34 1. The Commission may refuse to grant any permit.

2. The Commission must refuse to grant any permit for the sale of alcoholic liquor in any municipality where a prohibition by-law is in force.

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Subsections 2 to 6 of s. 34 enumerate special cases in which the Commission must refuse a permit.

S.35 1. Whatever be the date of issue of any permit granted by the Commission, such permit shall expire on the 30th day of April following, unless it be cancelled by the Commission before such date, or unless the date at which it must expire be prior to the 30th of April following.

The Commission may cancel any permit at its discretion.

2. Saving the provisions of subsection 4 of this section, the cancellation of a permit shall entail the loss of the privilege conferred by such permit, and of the duties paid to obtain it, and the seizure and confiscation by the Commission of the alcoholic liquor found in the possession of the holder thereof, and the receptacles containing it, without any judicial proceedings being required for such confiscation.

The cancellation of a permit shall be served by a bailiff leaving a duplicate of such order of cancellation, signed by three members of the Commission, with the holder of such permit or with any other reasonable person at his domicile or place of business.

The cancellation shall take effect as soon as the order is served.

* * *

S.35 4. If the cancellation of the permit be not preceded or followed by a conviction for any offence under this act committed by the holder of such permit while it was in force, the Commission shall remit to such holder.

a. Such part of the duties which such person has paid upon the granting of such permit, proportionate to the number of full calendar months still to run up to the 1st of May following;

b. The proceeds of every sale by the Commission, after the seizure and confiscation thereof, of beer having an alcoholic content of not more than four per cent, in weight, less ten per cent of such proceeds;

c. The value, as determined by the Commission, of the other alcoholic liquor seized and confiscated, less ten per cent of such value.

5. Save in the case where a permit is granted to an individual on behalf of a partnership or corporation, in accordance with section 32, the Commission must cancel every permit made use of on behalf of any person other than the holder.

S.36 The Commission must cancel a permit:

1. Upon the production of a final condemnation, rendered against the permit-holder, his agent or employee, for selling, in the establishment, alcoholic liquor manufactured illegally or purchased in violation of this act;

2. Upon the production of three final condemnations rendered against the permit-holder for violation of this act;

3. If it appears that the permit-holder has, without the Commission's authorization, transferred, sold, pledged, or otherwise alienated the rights conferred by the permit.

On a consideration of these sections and of the remainder of the Act I am unable to find that the Legislature has, either expressly or by necessary implication, laid down

any rules to guide the commission as to the circumstances under which it may refuse to grant a permit or may cancel a permit already granted. In my opinion the intention of the legislature, to be gathered from the whole Act, was to enumerate (i) certain cases in which the granting of a permit is forbidden, and (ii) certain cases in which the cancellation of a permit is mandatory, and, in all other cases to commit the decision as to whether a permit should be granted, refused or cancelled to the unfettered discretion of the commission. I conclude that the function of the commission in making that decision is administrative and not judicial or quasi-judicial. The submission of counsel for the respondent, made in the following words, appears to me to be well founded:

> Under the Statute, no one has a pre-existing right to obtain a permit, and the permit being granted under the condition that it may be cancelled at any time, and no cause of cancellation being mentioned and no form of procedure being indicated, the cancellation is a discretionary decision of a purely administrative character.

I accept as an accurate statement of the distinction between a judicial and an administrative tribunal that adopted by Masten J.A. in giving the judgment of the Court of Appeal for Ontario in *re Ashby et al*[1]:

> The distinction between a judicial tribunal and an administrative tribunal has been well pointed out by a learned writer in 49 Law Quarterly Review at pp. 106, 107 and 108:
>
> "A tribunal that dispenses justice, i.e. every judicial tribunal, is concerned with legal rights and liabilities, which means rights and liabilities conferred or imposed by 'law'; and 'law' means statute or long-settled principles. These legal rights and liabilities are treated by a judicial tribunal as pre-existing; such a tribunal professes merely to ascertain and give effect to them; it investigates the facts by hearing 'evidence' (as tested by long-settled rules), and it investigates the law by consulting precedents. Rights or liabilities so ascertained cannot, in theory, be refused recognition and enforcement, and no judicial tribunal claims the power of refusal.
>
> In contrast, non-judicial tribunals of the type called 'administrative' have invariably based their decisions and orders, not on legal rights and liabilities, but on policy and expediency.
>
> *Leeds (Corp.) v. Ryder* (1907) A.C. 420, at 423, 424, per Lord Loreburn L.C.; *Shell Co. of Australia v. Federal Commissioner of Taxation* (1931) A.C. 275, at 295; *Boulter v. Kent* JJ., (1897) A.C. 556, at 564.
>
> A judicial tribunal looks for some law to guide it; an 'administrative' tribunal, within its province, is a law unto itself."

[1] [1934] O.R. 421 at 428, 3 D.L.R. 565, 62 C.C.C. 132.

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In *re Ashby* the Court found that the statute there under consideration set up certain fixed standards and prescribed conditions on which persons might have their certificates revoked by the board, and accordingly held its function to be quasi-judicial; in the case at bar, on the contrary, no standards or conditions are indicated and I am forced to conclude that the Legislature intended the commission "to be a law unto itself".

If I am right in the view that in cancelling the permit M. Archambault was performing an administrative act in the exercise of an unfettered discretion given to him by the statute it would seem to follow that he was not bound to give the appellant an opportunity to be heard before deciding to cancel and that the Court cannot be called upon to determine whether there existed sufficient grounds for his decision. If authority is needed for this conclusion it may be found in the judgment of the Judicial Committee, delivered by Lord Radcliffe, in *Nakkuda Ali v. M. F. De S. Jayaratne*[1] and in the reasons of my brother Martland in *Calgary Power Limited et al v. Copithorne*[2]. The wisdom and desirability of conferring such a power upon an official without specifying the grounds upon which it is to be exercised are matters for the consideration of the Legislature not of the Court.

If, contrary to my conclusion, the function of the commission was quasi-judicial, it may well be that its decision to cancel the permit would be set aside by the Court for failure to observe the rules as to how such tribunals must proceed which are laid down in many authorities and are compendiously stated in the following passage in the judgment of the Earl of Selborne in *Spackman v. Plumstead Board of Works*[3]:

> No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by

[1] [1951] A.C. 66.
[2] [1959] S.C.R. 24, 16 D.L.R. (2d) 241.
[3] (1885), 10 App. Cas. 229 at 240.

law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice.

But even if it were assumed that the function of the commission was quasi-judicial and that its order cancelling the permit should be set aside for failure to observe the rules summarized in the passage quoted, I would be far from satisfied that any action for damages would lie.

If that question arose for decision it would be necessary to consider the judgments delivered in this Court in *McGillivray v. Kimber*[1], the cases cited in Halsbury, 2nd ed., vol. 26, pp. 284 and 285, in support of the following statement:

> Persons exercising such quasi-judicial powers . . . in the absence of fraud, collusion, or malice, are not liable to any civil action at the suit of any person aggrieved by their decisions . . .

and the judgment of Wilmot C.J., concurred in by Gould J. and Blackstone J., in *Bassett v. Godschall*[2]:

> The legislature hath intrusted the justices of peace with a discretionary power to grant or refuse licences for keeping inns and alehouses; if they abuse that power, or misbehave themselves in the execution of their office or authority, they are answerable criminally, by way of information, in B.R. I cannot think a justice of peace is answerable in an action to every individual who asks him for a licence to keep an inn or an alehouse, and he refuses to grant one; if he were so, there would be an end of the commission of the peace, for no man would act therein. Indeed he is answerable to the public if he misbehaves himself, and wilfully, knowingly and maliciously injures or oppresses the King's subjects, under colour of his office, and contrary to law: but he cannot be answerable to every individual, touching the matter in question, in an action. Every plaintiff in an action must have an antecedent right to bring it; the plaintiff here has no right to have a licence, unless the justices think proper to grant it, therefore he can have no right of action against the justices for refusing it.

For the above reasons I have reached the conclusion that the heavy financial loss undoubtedly suffered by the appellant was *damnum sine injuria*. The whole loss flowed directly from the cancellation of the permit which was an act of the commission authorized by law. I have formed this opinion entirely apart from any special statutory protection afforded to the commission or to its manager, M. Archambault, as, for example, by s. 12 of the Act.

[1] (1915), 52 S.C.R. 146, 26 D.L.R. 164.
[2] (1770), 3 Wils. 121 at 123, 95 E.R. 967.

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The case of *James v. Cowan*[1] relied upon by counsel for the appellant as supporting the existence of a right of action for damages seems to me to be clearly distinguishable. In that case the right of action asserted was for damages for the wrongful taking of the plaintiff's goods. The only justification put forward was an order held to be *ultra vires* and therefore void. It may be mentioned in passing that if, contrary to my view, the decision of the commission in the case at bar was made in the exercise of a judicial function, its failure to follow a rule of natural justice would appear to render the order voidable but not void; *Dimes v. Grand Junction Canal Proprietors*[2].

Having concluded that the act of the commission in cancelling the permit was not an actionable wrong, it appears to me to follow that the respondent cannot be answerable in damages for directing or approving, as the case may be, the doing of that act.

As it was put by Bissonnette J.[3]:

> D'où il découle, en saine logique, que si dans l'exercice de son pouvoir discrétionnaire, il (M. Archambault) ne commettait ni faute, ni illégalité, personne n'est justifié à chercher à atteindre, au delà de sa personne, un conseiller, voire un chef ou supérieur politique, pour le motif que sans la faute du premier, celle qu'on veut imputer au second ne peut exister.

On this branch of the matter, I should perhaps mention that there is, in the record, no room for any suggestion that the respondent coerced an unwilling Commission into making a decision contrary to the view of the latter as to what that decision should be.

For the above reasons it is my opinion that the appeal fails and it becomes unnecessary for me to consider the alternative defence as to lack of notice of action, based upon art. 88 of the *Code of Civil Procedure* or the question of the quantum of damages.

The appeal, as to both of the judgments of the Court of Queen's Bench, should be dismissed with costs.

[1] [1932] A.C. 542.
[2] (1852), 3 H.L. Cas. 759, 10 E.R. 301.
[3] [1956] Que. Q.B. 447 at 457.

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FAUTEUX J. (*dissenting*):—L'appelant se pourvoit à l'encontre de deux décisions majoritaires de la Cour du banc de la reine[1], dont la première infirme un jugement de la Cour supérieure condamnant l'intimé à lui payer une somme de $8,123.53 à titre de dommages-intérêts, et dont la seconde rejette l'appel logé par lui-même pour faire augmenter le quantum des dommages ainsi accordés.

Les faits donnant lieu à ce litige se situent dans le cadre des activités poursuivies dans la province de Québec, au cours particulièrement des années 1944, 1945 et 1946, par la secte des Témoins de Jéhovah. Ces activités prenaient forme d'assemblées, de distribution de circulaires, de pamphlets et de livres, et de sollicitation, dans les rues et à domicile. Dirigée ouvertement contre les pratiques des religions professées dans la province et, plus particulièrement, de la religion catholique, les enseignements de cette secte étaient diffusés dans un langage manifestement, sinon délibérément, insultant et, par suite, provoquèrent dans les cités et les villages où ils étaient propagés, des troubles à la paix publique. Il y eut bris d'assemblées, assauts de personnes et dommages à la propriété. De plus, et partageant l'opinion généralement acceptée que cette campagne provocatrice était l'œuvre de la licence et non de la liberté sous la loi, plusieurs autorités civiles refusaient d'accorder la protection recherchée par les membres de la secte ou adoptaient des moyens pour paralyser ces activités considérées comme une menace à la paix publique. L'intimé, comme Procureur Général, eut en son ministère, où des plaintes nombreuses affluèrent, tous les échos de cette situation. Devant les tribunaux, actions ou poursuites se multiplièrent. A Montréal, les arrestations pour distribution de littérature, sans permis, atteignirent et dépassèrent plusieurs centaines. Devant la Cour du Recorder, où furent traduits ceux qu'on accusait de violer le règlement municipal, on plaidait l'invalidité ou l'inapplication du règlement et attendant le prononcé d'un tribunal supérieur sur le bien-fondé de ces prétentions, on ajournait les causes. C'était l'appelant, l'un des membres de la secte, qui, dans la plupart de ces arrestations, à Montréal, fournissait le cautionnement garantissant la comparution des accusés. Une entente était même intervenue entre lui et les avocats

[1] [1956] Que. Q.B. 447.

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chargés des poursuites, suivant laquelle on le considérait en quelque sorte comme la caution officielle des membres de la secte. L'appelant continua d'agir comme caution jusqu'au 12 novembre 1946 alors que les autorités de la Cour du Recorder, s'inquiétant de la congestion du rôle des causes résultant de la progressive multiplication des arrestations, aussi bien que du fait que le temps de nombre de constables était absorbé par ces enquêtes et ces poursuites, au préjudice de leurs autres devoirs, tentèrent de décourager les activités de la secte en exigeant des cautionnements en argent et plus substantiels, soit de $100 à $300.

Deux semaines après cette décision, apparut dans la province une nouvelle publication de la secte, intitulée: "La haine ardente du Québec pour Dieu, le Christ et la liberté." Ce livre, publié en français, en anglais et en ukrainien, étant, dans les termes les plus provocateurs, une attaque dirigée particulièrement contre les pratiques religieuses de la majorité de la population et contre l'administration de la justice dans la province, fut soumis par la police à la considération de l'avocat en chef de la Couronne, à Montréal, Me Gagnon, c.r., lequel émit l'opinion que cette publication constituait, au sens de la loi criminelle, un libelle séditieux.

Ajoutons immédiatement que le mérite de cette opinion fut par la suite judiciairement considéré avec le résultat qui suit. Un certain Aimé Boucher, distributeur de ce livre dans le district judiciaire de St-Joseph de Beauce, fut accusé sous les articles 133, 134 et 318 du *Code Criminel* et fut trouvé coupable par un jury dont le verdict fut confirmé par une décision majoritaire de la Cour du banc du roi en appel[1]. Sur un pourvoi subséquent devant cinq des membres de cette Cour, une majorité, trouvant justifiés les griefs fondés sur l'adresse du juge au procès, mais étant d'opinion qu'il était loisible à un jury légalement dirigé de juger cette publication séditieuse, ordonna un nouveau procès. Sur une seconde audition du même appel,—cette fois devant les neuf Juges de cette Cour[2]—ces vues furent partagées par

[1] [1949] Que. K.B. 238.

[2] [1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.

quatre des membres de cette Cour. Les cinq autres, d'autre part, acquittèrent l'accusé, en déclarant en substance, suivant le sommaire fidèle du jugé, qu'en droit:

> Neither language calculated to promote feelings of ill-will and hostility between different classes of His Majesty's subjects nor criticizing the courts is seditious unless there is the intention to incite to violence or resistance to or defiance of constituted authority.

En somme, la majorité écarta, comme étant la loi en la matière, la définition de l'intention séditieuse, donnée à la page 94 de la 8e édition de Stephen's Digest of Criminal Law, dans la mesure où cette définition différait de la loi telle que précisée au sommaire ci-dessus. *Boucher v. His Majesty the King*[1]. Ainsi appert-il que l'opinion émise par le représentant du Procureur Général à Montréal lors de l'apparition de ce livre en fin de 1946, fut par la suite partagée par une majorité de tous les juges qui eurent à considérer la question mais rejetée par ce qui constitue, depuis 1951, le jugement de cette Cour sur la question.

Ayant donc formé l'opinion que cette publication constituait un libelle séditieux, Me Gagnon participa à l'enquête faite pour en rechercher les distributeurs et les traduire en justice. Vers le même temps, la police saisissait en la cité de Sherbrooke, un nombre considérable de pamphlets, livres, y compris le livre en question, dans un établissement appartenant à l'appelant et par lui loué aux membres de la secte. Un examen de la situation et du rôle joué par l'appelant dans les procédures mues devant la Cour du Recorder à Montréal, amena Me Gagnon à conclure à sa participation dans la distribution. Apprenant, en la même occasion, que ce dernier était propriétaire d'un restaurant et détenteur de permis de la Commission des Liqueurs pour y vendre des spiritueux, il communiqua les faits ci-dessus à M. Archambault, alors gérant général de la Commission des Liqueurs. Après avoir conféré avec le recorder en chef de la cité de Montréal et Me Gagnon, M. Archambault téléphona au Procureur Général pour lui faire part de ces agissements des membres de la secte, et de l'appelant en particulier, et de son intention d'annuler le permis en faveur de l'appelant. L'intimé demanda à M. Archambault de bien s'assurer que le détenteur du permis était bien la même personne qui, au dire de M. Archambault, "multipliait les cautionnements à la Cour du Recorder de façon désordonnée, contribuait à désorganiser les activités de la

[1] [1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.

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police et à congestionner les tribunaux". Et l'intimé ajouta:—"Dans l'intervalle, je vais examiner les questions avec des officiers légaux, je vais y penser, je vais réfléchir et je vais voir à ce que je devrai faire." M. Archambault vérifia l'identité de l'appelant et, de son côté, le Procureur Général étudia le problème, la *Loi de la Commission des Liqueurs* et ses amendements, discuta de la question au Conseil des Ministres et avec des officiers en loi de son ministère. Quelques jours plus tard, M. Archambault téléphona au Procureur Général confirmant l'identité du détenteur de permis et, témoigne M. Archambault, "là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission et son ordre de procéder".

A la suite de cette conversation téléphonique, le permis fut annulé et tous les spiritueux du restaurant furent confisqués. En raison de la perte d'opérations résultant de l'absence de permis, l'appelant, quelques mois plus tard, vendait ce restaurant, licencié pour vente de spiritueux depuis nombre d'années et exploité par son père, d'abord, et lui, par la suite. C'est alors que l'appelant institua la présente action en dommages contre l'intimé personnellement, invoquant en substance que, dans les circonstances, le fait de cette annulation constituait, suivant les dispositions de l'art. 1053 du *Code Civil,* un fait dommageable, illicite et imputable à l'intimé et, dès lors, donnant droit à réparation.

En défense, et en outre des moyens plaidés sur le mérite de l'action, l'intimé invoqua spécifiquement le défaut de l'appelant de s'être conformé aux prescriptions de l'art. 88 du *Code de procédure civile,* lequel conditionne impérativement l'exercice du droit d'action contre un officier public à la signification d'un avis d'au moins un mois avant l'émission de l'assignation.

Après considération attentive de la question et pour les motifs donnés ci-après, je suis arrivé à la conclusion que ce moyen est bien fondé. Il convient de dire, cependant, que n'eût été ce défaut de l'appelant, j'aurais, au mérite, conclu au bien-fondé de son action et ce, pour des raisons qu'il suffit, dans les circonstances, de résumer comme suit. Personne ne met en doute que le fait invoqué au soutien de l'action en dommages, c'est-à-dire l'annulation du permis, ait constitué un fait dommageable pour l'appelant. De

plus, et suivant la preuve au dossier, il est manifeste que ce fait est imputable, et exclusivement imputable, à l'intimé. Sans doute, lorsque le gérant général de la Commission des Liqueurs téléphona au Procureur Général pour le mettre au courant des faits ci-dessus, il lui indiqua au même temps son intention d'annuler le permis. Il y a loin, cependant, de l'indication d'une intention à la réalisation de cette intention; et à la vérité, dès cette première conversation téléphonique, c'est le Procureur Général qui prit l'entière responsabilité. Tel que déjà indiqué, il demanda à M. Archambault de vérifier l'identité de personne, l'avisant que, pendant ce temps-là, il étudierait le problème et verrait ce que lui devait faire. C'est d'ailleurs précisément pour décider de l'action à prendre qu'il examina la loi et discuta de l'affaire au Conseil des Ministres et avec ses officiers en loi. Lorsque, subséquemment, M. Archambault le rappela pour lui affirmer qu'il s'agissait de la même personne, "c'est là", dit le gérant général, que le Procureur Général "m'a autorisé, il m'a donné son consentement, son approbation, sa permission et son ordre de procéder". Le Juge de la Cour supérieure et tous les Juges de la Cour d'Appel n'ont jeté, et je crois avec raison, aucun doute sur la bonne foi du Procureur Général, pas plus qu'on n'en saurait avoir sur celle du gérant général de la Commission des Liqueurs. Ni l'un ni l'autre n'ont agi malicieusement. Mais, en témoignant que l'intimé l'avait autorisé, lui avait donné son consentement, son approbation, sa permission et son ordre de procéder, le gérant général de la Commission a bien indiqué, à mon avis, que, dans un esprit de subordination, il avait, dès la première conversation téléphonique, abdiqué, en faveur du Procureur Général s'en chargeant, le droit d'exercer la discrétion, qu'à l'exclusion de tous autres, il avait suivant l'esprit de la *Loi des Liqueurs Alcooliques*. Il a exécuté, mais non rendu, une décision arrêtée par le Procureur Général. D'ailleurs, ce dernier ne s'en est pas caché; il s'en est ouvert au public par la voix des journaux. En prenant lui-même cette décision, comme Premier Ministre et Procureur Général, il s'est arrogé un droit que lui nie virtuellement la *Loi des Liqueurs Alcooliques;* il a commis une illégalité. Dans l'espèce, l'annulation du permis est exclusivement imputable à l'intimé et précisément pour

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cette raison, constitue, dans les circonstances, un acte illicite donnant droit à l'appelant d'obtenir réparation pour les dommages lui en résultant.

L'article 88 du *Code de procédure civile.*—Cet article se lit comme suit:

> Nul officier public ou personne remplissant des fonctions ou devoirs publics ne peut être poursuivi pour dommages à raison d'un acte par lui fait dans l'exercice de ses fonctions, et nul verdict ou jugement ne peut être rendu contre lui, à moins qu'avis de cette poursuite ne lui ait été donné au moins un mois avant l'émission de l'assignation.
>
> Cet avis doit être par écrit; il doit exposer les causes de l'action, contenir l'indication des noms et de l'étude du procureur du demandeur ou de son agent et être signifié au défendeur personnellement ou à son domicile.

Vu la forme prohibitive de la disposition et la règle de droit édictée en l'art. 14 du *Code Civil,* le défaut de donner cet avis, lorsqu'il y a lieu de ce faire, emporte nullité. Cette règle de droit est ainsi exprimée:

> 14. Les lois prohibitives emportent nullité, quoiqu'elle n'y soit pas prononcée.

De plus, et en raison de la prescription que ". . .nul verdict ou jugement ne peut être rendu . . .", ce défaut limite la juridiction même du tribunal. Aussi bien, non seulement, comme il a été reconnu au jugement de première instance, ce défaut peut-il être soulevé dans les plaidoiries, mais la Cour elle-même doit agir *proprio motu* et se conformer à la prescription.

En l'espèce, il est admis qu'aucun avis ne fut donné au Procureur Général. L'intimé a plaidé spécifiquement ce moyen dans sa défense et il l'a invoqué tant en Cour supérieure et en Cour d'Appel que devant cette Cour. Le juge au procès en disposa dans les termes suivants, dont les soulignés sont siens:

> Defendant is not entitled to avail himself of this exceptional provision as the acts complained of were not "done by him in the exercise of his functions", but they were acts performed by him when he had gone outside his functions to perform them. They were not acts "in the exercise of" but "on the occasion of public duties". Defendant was outside his functions in the acts complained of.

En Cour d'Appel[1], seul le Juge dissident, M. le Juge Rinfret, se prononce sur la question. S'inspirant, je crois, de l'interprétation donnée par la jurisprudence à l'expression "dans

[1] [1956] Que. Q.B. 447.

l'exécution de ses fonctions", apparaissant à l'art. 1054 C.C. et plus particulièrement du critère indiqué dans *Plumb v. Cobden Flour Mills*[1], il prononce d'abord comme suit, sur le mérite même de l'action:

> L'action du défendeur, on l'a vu, ne peut pas être classifiée parmi les actes permis, par les statuts, au procureur général, ni au premier ministre; elle ne peut pas être considérée comme ayant été faite dans l'exercice ou dans l'exécution de ses fonctions comme telles; elle entre dans la catégorie des actes prohibés, des actes commis hors les limites des fonctions, et comme telle, elle engendre la responsabilité personnelle.

puis, précisant que l'art. 88 C.P.C. pose comme condition que le défendeur soit poursuivi "à raison d'un acte par lui fait dans l'exercice de ses fonctions", déclare que l'art. 88 n'a pas d'application en l'espèce.

Les juges de la majorité ont référé à ce moyen sans cependant s'y arrêter vu que dans leur opinion l'action, de toutes façons, était mal fondée.

D'où l'on voit que le droit de l'intimé à l'avis dépend uniquement, dans la présente cause, de la question de savoir si l'acte reproché a été fait par lui "dans l'exercice de ses fonctions" au sens qu'il faut donner à ces expressions dans le contexte de l'art. 88 C.P.C., et suivant l'esprit et la fin véritables de cet article.

L'article 1054 C.C. prescrit que les maîtres et les commettants sont responsables du dommage causé par leurs domestiques ou ouvriers *dans l'exécution des fonctions auxquelles ces derniers sont employés.* On est dès lors porté à donner aux expressions, plus ou moins identiques, apparaissant à l'art. 88 C.P.C., le même sens que donne la jurisprudence sur l'art. 1054 C.C. La règle d'interprétation visant la similarité des expressions n'établit qu'une présomption; cette présomption étant que les expressions similaires ont le même sens lorsqu'elles se trouvent,—ce qui n'est pas le cas en l'espèce,—dans une même loi. On accorde, d'ailleurs, peu de poids à cette présomption. Maxwell, On Interpretation of Statutes, 9e ed., p. 322 *et seq.* Les considérations présidant à l'établissement, la fin et la portée de l'art. 88 C.P.C., d'une part, et de l'art. 1054 C.C., d'autre part, sont totalement différentes. Sanctionnant la doctrine *Respondeat superior,* l'art. 1054 C.C. établit la responsabilité du commettant pour l'acte de son préposé, ce dernier étant considéré le continuateur de la personne juridique du

[1] [1914] A.C. 62.

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premier. L'intimé, agissant en sa qualité de Procureur Général, n'est le préposé de personne. Il n'a pas de commettant. La fonction qu'il exerce, il la tient de la loi. L'article 88 C.P.C. n'affecte en rien la question de responponsabilité. Il accorde, en ce qui concerne la procédure seulement, un traitement spécial au bénéfice des officiers publics en raison de la nature même de la fonction. Les motifs apportés par la jurisprudence pour limiter le champ de l'exercice des fonctions, quant à la responsabilité édictée en l'art. 1054 C.C., sont étrangers à ceux conduisant la Législature à donner, quant à la procédure seulement, une protection aux officiers publics. Aussi bien, et en toute déférence, je ne crois pas que la portée de cette protection soit assujettie aux limitations de la responsabilité frappant les dispositions de l'art. 1054 C.C. L'article 8 du c.101 des Statuts Refondus du Bas Canada, loi-source de l'art. 88 C.P.C., établit péremptoirement à mon avis que, *in pari materia,* un officier public n'est pas tenu comme ayant cessé d'agir dans l'exercice de ses fonctions du seul fait que l'acte reproché constitue un excès de pouvoir, ou de juridiction, ou une violation à la loi. La version française de cette loi n'étant pas en disponibilité, je cite de la version anglaise qu'on trouve dans *Consolidated Statutes, Lower Canada,* 1860, l'art. 8:

Protection to extend to the magistrate only etc., and in what cases to him.

8. The privileges and protection given by this Act, shall be given to such justice, officer or other person acting as aforesaid, only, and to no other person or persons whatever, and any such justice, officer and other person shall be entitled to such protection and privileges in all cases where he has acted *bona fide* in the execution of his duty, although in such act done, he has exceeded his powers or jurisdiction, and has acted clearly contrary to law.

L'article 88 C.P.C. assume que ceux au bénéfice desquels il est établi se sont rendus coupables d'une illégalité pour laquelle ils doivent répondre. Tout doute qu'on pourrait avoir sur le point est dissipé par le texte même de l'art. 429 C.P.C. lequel, pourvoyant à un changement de venue dans le cas du procès d'un officier public, édicte:

429. Dans toute poursuite en dommages contre un officier public, *à raison de quelque illégalité dans l'exécution de ses fonctions,* le juge peut ordonner que le procès ait lieu dans un autre district, s'il est démontré que la cause ne peut être instruite avec impartialité dans le district où l'action a été portée.

On doit donc se garder d'associer au droit à l'avis toute idée de justification pour l'acte reproché ou de déduire du seul fait que l'officier public doive au mérite d'être tenu personnellement responsable, qu'il ait perdu tout droit à l'avis. Dans *Beattey v. Kozak*[1], où la nécessité d'éviter cette confusion se présentait, une semblable observation est faite par notre collègue M. le Juge Rand. Il faut ajouter, cependant, que cette décision n'est d'aucune autre assistance sur la question qui nous intéresse; le litige portait, en droit, sur l'interprétation d'une loi différente et fut décidé en donnant effet à la jurisprudence d'un droit également différent sur l'incidence, en la matière, du rôle de la bonne foi.

L'incidence du rôle de la bonne foi de l'officier public dans la commission d'un acte reproché, en ce qui concerne la portée de l'art. 88 C.P.C., et non en ce qui a trait au mérite de l'action, a fait, dans la province de Québec, depuis le jour où la disposition fut établie par l'art. 22 du *Code de procédure civile* de 1867, dont les termes sont reproduits à l'art. 88 du Code de 1897, l'objet d'un conflit dans la jurisprudence. Suivant certains jugements, la bonne foi conditionnait le droit à l'avis et dès que la déclaration contenait une allégation de mauvaise foi, le défendeur se voyait privé du droit d'invoquer le défaut de l'avis, même si, au mérite, la preuve, révélant que cette allégation était mal fondée, on devait alors rejeter l'action parce que l'avis n'avait pas été donné. Suivant d'autres jugements, on tenait le droit à l'avis absolu dans tous les cas. La bonne foi, disait-on, en s'appuyant sur le principe sanctionné par l'art. 2202 C.C., est toujours présumée et cette présomption ne peut être écartée par une simple allégation mais par une preuve de mauvaise foi. On jugeait qu'une simple allégation aux plaidoiries ne pouvait virtuellement abroger le droit au bénéfice de l'art. 88. Considérant que cet article conditionnait l'exercice même du droit d'action, on décidait que ce droit d'action devait être nié *ab initio* et non à la fin du procès. Ce conflit n'existe plus. Depuis plus de vingt-cinq ans, la Cour d'Appel y a mis fin en décidant que l'incidence de la bonne ou de la mauvaise foi n'a aucune portée sur le droit à l'avis et que, dans tous les cas, il doit être donné. Acceptant les arguments déjà exprimés en ce sens, la Cour d'Appel s'est particulièrement basée sur la source

[1] [1958] S.C.R. 177 at 188, 13 D.L.R. (2d) 1, 120 C.C.C. 1.

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historique de cette disposition et sur la modification qui y fut apportée lors et par suite de son insertion au *Code de procédure civile*. Les sources de l'article sont indiquées dans *Dame Chaput v. Crépeau*[1] par M. le Juge Bruneau et les modifications faites à la situation antérieure par l'insertion de l'article dans le Code, afin d'en généraliser l'application à tous les officiers publics, sont indiquées dans cette jurisprudence définitivement arrêtée par la Cour d'Appel dans *Charland v. Kay*[2]; *Corporation de la Paroisse de St-David-de-l'Auberivière v. Paquette et autres*[3] et *Houde v. Benoît*[4].

En somme, et comme le note M. le Juge Hall dans *Corporation de la Paroisse de St-David-de-l'Auberivière v. Paquette et autres, supra,* l'art. 22 du *Code de procédure* de 1867, prédécesseur de l'art. 88 du Code de 1897, a sa source dans la *Loi pour la protection des juges de paix,* c.101 des Status Refondus du Bas Canada. Le premier article de cette loi prescrivait l'avis d'action, alors que dans les autres dispositions, d'autres privilèges étaient établis, y compris celui fixant la prescription à six mois. L'article 8 conditionnait le droit aux privilèges y accordés, à la bonne foi. Lors de la confection du *Code de procédure,* la disposition ayant trait à l'avis fut extraite de la loi pour devenir l'art. 22 du *Code de procédure* et être déclarée applicable à tous les officiers publics. Dans le procédé, cependant, on laissa la disposition touchant la bonne foi dans la *Loi pour la protection des juges de paix* et on évita de l'inclure dans l'art. 22 C.P.C. comme condition de l'opération de cet article. D'autres considérations, tel, par exemple, le changement apporté par la Législature, le 4 août 1929, à l'art. 195 C.P.C. par la Loi 19 George V, c. 81, ayant pour effet de prohiber toute ordonnance de preuve avant faire droit qui jusqu'alors réservait au mérite les questions soulevées par l'inscription en droit, militent en faveur de ces vues. C'est ce changement, je crois, qui a provoqué l'occasion amenant la Cour d'Appel à fixer définitivement la jurisprudence. Les motifs déjà mentionnés suffisent pour partager les vues exprimées par la Cour d'Appel dans les causes précitées et pour conclure, comme M. le Juge Dorion dans *Charland v. Kay, supra,* qu'il faut s'en tenir au texte de la loi et lui donner son effet.

[1] (1917), 57 Que. S.C. 443.
[2] (1933), 50 Que. K.B. 377.
[3] (1937), 62 Que. K.B. 143.
[4] [1943] Que. K.B. 713.

En assumant l'exercice d'un pouvoir discrétionnaire conféré au gérant général par la loi, l'intimé a commis une illégalité mais aucune offense connue de la loi pénale et aucun délit au sens de l'art. 1053 C.C. Il a fait ce qu'il n'avait pas le droit de faire, fermement et sincèrement convaincu, a-t-il affirmé sous serment, que non seulement il en avait le droit, mais qu'il y était tenu pour s'acquitter de ses responsabilités comme Procureur Général chargé de l'administration de la justice, du maintien de l'ordre et de la paix dans la province et de ses devoirs comme conseiller juridique du gouvernement de la province. Il n'a pas pris occasion de sa fonction pour commettre cette illégalité. Il ne l'a pas commise à l'occasion de l'exercice de ses fonctions. Il l'a commise à cause de ses fonctions. Sa bonne foi n'a pas été mise en doute, et sur ce fait, les Juges de la Cour d'Appel, qui ont considéré la question, sont d'acord avec le Juge de première instance. Suivant les décisions considérées par cette Cour dans *Beatty v. Kozak, supra,* on retient, sous un droit différent de celui de la province de Québec, l'incidence de la bonne foi lorsque celle-ci se fonde sur l'erreur de fait, ou sur l'erreur de fait et de droit à la fois, sinon uniquement sur l'erreur de droit, pour décider du caractère exculpatoire de l'illégalité commise, voire même du droit à l'avis. Exclusivement compétente à légiférer sur la procédure civile, la Législature de Québec, par l'art. 88 C.P.C., n'a pas voulu assujettir le droit à l'avis d'action à l'incidence de la bonne ou de la mauvaise foi. Dans les circonstances de cette cause, je suis d'opinion que l'illégalité commise par l'intimé l'a été dans l'exercice de ses fonctions et que, de plus, ce serait faire indirectement ce que l'art. 88 C.P.C. ne permet pas, suivant l'interprétation de la Cour d'Appel, que de s'appuyer sur la bonne ou la mauvaise foi, que ce soit au sens vulgaire ou technique du mot, pour conclure que l'intimé est sorti de l'exercice de ses fonctions, au sens qu'ont ces expressions dans l'art. 88 C.P.C., et qu'il ait perdu le droit à l'avis d'action.

Pour ces raisons, l'appelant aurait dû être débouté de son action. Je renverrais les appels avec dépens.

ABBOTT J.:—In his action appelant claimed from respondent the sum of $118,741 as damages alleged to have been sustained as a result of the cancellation of a licence or permit for the sale of alcoholic liquors held by appellant.

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The action was maintained by the learned trial judge to the extent of $8,123.53. From that judgment two appeals were taken, one by respondent asking that the action be dismissed in its entirety, the other by appellant asking that the amount allowed as damages be increased by an amount of $90,000. The Court of Queen's Bench[1] allowed the respondent's appeal, Rinfret J. dissenting, and dismissed the action. The appeal taken by appellant to increase the amount of the trial judgment was dismissed unanimously. The present appeals are from those two judgments.

The facts are these. On December 4, 1946, appellant was conducting a restaurant business in the City of Montreal, a business which he and his father and mother before him had been carrying on continuously for some thirty-four years prior to that date. The restaurant had been licensed for the sale of alcoholic beverages throughout the entire period.

In 1946 and for many years prior thereto, persons operating establishments of this kind and selling alcoholic beverages had been required to obtain a licence or permit under the *Alcoholic Liquor Act*, R.S.Q. 1941, c. 255. Unless granted for a shorter period, these were annual licences and expired on April 30 in each year. Moreover, s. 35, subs. 1., of the Act provides as follows:

> The Commission may cancel any permit at its discretion.

The Commission referred to is the "Quebec Liquor Commission" established as a corporation under the Act in question and, generally speaking, it has been entrusted by the Legislature with the responsibility of directing and administering the provincial monopoly of the sale and distribution of alcoholic beverages.

On December 4, 1946, without previous notice to the appellant, his licence to sell alcoholic beverages was cancelled by the Quebec Liquor Commission, and at about 2 p.m. on that date the stock of liquor on his premises was seized and removed. The licence was not restored and after operating for some months without such a licence, in 1947 appellant sold the restaurant and the building in which it was located.

[1] [1956] Que. Q.B. 447.

Appellant learned from press reports either in the afternoon of December 4 or early the following day, that his licence had been cancelled and the stock of liquor seized because he was an adherent of a religious sect or group known as the Witnesses of Jehovah. It soon became clear from statements made by the respondent to the press and confirmed by him at the trial as having been made by him, that the cancellation of the licence had been made because of the appellant's association with the sect in question and in order to prevent him from continuing to furnish bail for members of that sect summoned before the Recorder's Court on charges of contravening certain city by-laws respecting the distribution of printed material.

It might be added here that in December 1946 and for some time prior thereto the Witnesses of Jehovah appear to have been carrying on in the Montreal district and elsewhere in the Province of Quebec, an active campaign of meetings and the distribution of printed pamphlets and other like material of an offensive character to a great many people of most religious beliefs, and I have no doubt that at that time many people believed this material to be seditious.

The evidence is referred to in detail in the Courts below and I do not propose to do so here. I am satisfied from a consideration of this evidence: First: that the cancellation of the appellant's licence was made for the sole reason which I have mentioned and with the object and purpose to which I have referred; Second: that such cancellation was made with the express authorization and upon the order of the respondent; Third: that the determining cause of the cancellation was that order, and that the manager of the Quebec Liquor Commission would not have cancelled the licence without the order and authorization given by the respondent.

There can be no question as to the first point. It was conceded by respondent in his evidence at the trial and by his counsel at the hearing before us. As to the second and third points, I share the view of the learned trial judge and of Rinfret J. that both were clearly established.

The religious beliefs of the appellant and the fact that he acted as bondsman for members of the sect in question had no connection whatever with his obligations as the

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holder of a licence to sell alcoholic liquors. The cancellation of his licence upon this ground alone therefore was without any legal justification. Moreover, the religious beliefs of the appellant and his perfectly legal activities as a bondsman had nothing to do with the object and purposes of the *Alcoholic Liquor Act*, and the powers and responsibilities of the manager of the Quebec Liquor Commission are confined to the administration and enforcement of the provisions of the said Act. This may be one explanation of the latter's decision to consult the respondent before taking the action which he did to cancel appellant's licence.

At all events a careful reading of the evidence and a consideration of the surrounding circumstances has convinced me that without having received the authorization, direction, order, or "approbation énergique" of the respondent —however one chooses to describe it—the manager of the Quebec Liquor Commission would not have cancelled the licence.

The proposition that in Canada a member of the executive branch of government does not make the law but merely carries it out or administers it requires no citation of authority to support it. Similarly, I do not find it necessary to cite from the wealth of authority supporting the principle that a public officer is responsible for acts done by him without legal justification. I content myself with quoting the well known passage from Dicey's "Law of the Constitution", 9th ed., p. 193, where he says

> . . . every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person.

In the instant case, the respondent was given no statutory power to interfere in the administration or direction of the Quebec Liquor Commission although as Attorney-General of the Province the Commission and its officers could of course consult him for legal opinions and legal advice. The Commission is not a department of government in the

accepted sense of that term. Under the *Alcoholic Liquor Act* the Commission is an independent body with corporate status and with the powers and responsibilities conferred upon it by the Legislature. The Attorney-General is given no power under the said Act to intervene in the administration of the affairs of the Commission nor does the *Attorney-General's Department Act,* R.S.Q. 1941, c. 46, confer any such authority upon him.

I have no doubt that in taking the action which he did, the respondent was convinced that he was acting in what he conceived to be the best interests of the people of his province but this, of course, has no relevance to the issue of his responsibility in damages for any acts done in excess of his legal authority. I have no doubt also that respondent knew and was bound to know as Attorney-General that neither as Premier of the province nor as Attorney-General was he authorized in law to interfere with the administration of the Quebec Liquor Commission or to give an order or an authorization to any officer of that body to exercise a discretionary authority entrusted to such officer by the statute.

It follows, therefore, that in purporting to authorize and instruct the manager of the Quebec Liquor Commission to cancel appellant's licence, the respondent was acting without any legal authority whatsoever. Moreover, as I have said, I think respondent was bound to know that he was acting without such authority.

The respondent is therefore liable under art. 1053 of the *Civil Code* for the damages sustained by the appellant, by reason of the acts done by respondent in excess of his legal authority.

Respondent also contended that appellant's action must fail because no notice of such action was given under art. 88 of the *Code of Civil Procedure,* which reads as follows:

> 88. No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgment be rendered against him, unless notice of such action had been given him at least one month before the issue of the writ of summons.
>
> Such notice must be in writing; it must state the grounds of the action, and name of the plaintiff's attorney or agent, and indicate his office; and must be served upon him personally or at his domicile.

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None of the learned judges constituting the majority in the Court of Queen's Bench has given as a reason for dismissing appellant's action, the failure to give such notice. The learned trial judge and Rinfret J. held that respondent is not entitled to avail himself of this exceptional provision since the act complained of was not "done by him in the exercise of his functions" but was an act done by him when he had gone outside his functions to perform it. I am in agreement with their views and there is little I need add to what they have said on this point. In this connection, however, reference may usefully be made to the decision of the Court of Appeal in *Lachance v. Casault*[1]. In that case a bailiff had attempted to take possession of books and papers in the hands of a judicial guardian without preparing a procès-verbal of the articles seized, as called for by the order of the Court requiring the guardian to give up possession to the seizing creditor. When the bailiff's action was resisted by the guardian as being unauthorized, the bailiff caused the guardian to be arrested. The charge having been subsequently dismissed, the bailiff was sued in damages for false arrest and malicious prosecution. It was held that, even assuming such bailiff was a public officer within the meaning of art. 88 C.C.P., he was not entitled to notice under the said article since at the time the act complained of was committed, he was not "dans l'exercice légal de ses fonctions".

In my opinion before a public officer can be held to be acting "in the exercise of his functions", within the meaning of art. 88 C.C.P., it must be established that at the time he performed the act complained of such public officer had reasonable ground for believing that such act was within his legal authority to perform; *Asselin v. Davidson*[2]. In the instant case, as I have said, in my view the respondent was bound to know that the act complained of was beyond his legal authority.

[1] (1902), 12 Que. K.B. 179 at 202.
[2] (1914), 23 Que. K.B. 274 at 280.

I now deal with the second appeal asking that the amount awarded to appellant by the trial judge be increased by an amount of $90,000. This amount is claimed under three heads, namely:

Damages to goodwill and reputation of business	$50,000
Loss of property rights in liquor permit	$15,000
Loss of profits for a period of one year, May 1st, 1947 to May 1st, 1948	$25,000
	$90,000

The licence to sell alcoholic beverages was, of course, only an annual licence subject to revocation at any time and the renewal of which might have been properly refused for a variety of reasons. Nevertheless, in my view, appellant could reasonably expect that so long as he continued to observe the provisions of the *Alcoholic Liquor Act* his licence would be renewed from year to year, as in fact it had been for many years past.

There can be no doubt that cancellation of appellant's licence without legal justification resulted in a substantial reduction in the value of the goodwill and profit making possibilities of the restaurant business carried on by him at 1429 Crescent St., Montreal, and in a pecuniary loss to him for which in my opinion he is entitled to recover damages from respondent.

The restaurant business is probably no less hazardous than most other businesses, and damages of this sort are obviously difficult to assess, the amount being of necessity a more or less arbitrary one. The learned trial judge awarded appellant the sum of $6,000 as loss of profits for the period from December 4, 1946, to May 1, 1947, the date on which the licence would have expired, and this would appear to be supported by the evidence. I have reached the conclusion that the amount awarded to the appellant by the learned trial judge should be increased by an amount of $25,000, as damages for diminution in the value of the goodwill of the business and for loss of future profits.

In the result, therefore, I would allow both appeals with costs here and below, and modify the judgment at the trial by increasing the amount of the damages to $33,123.53 with interest from the date of the judgment in the Superior Court.

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Appeals allowed with costs, Taschereau, Cartwright *and* Fauteux J. J. *dissenting.*

Attorneys for the plaintiff, appellant: *A. L. Stein and F. R. Scott, Montreal.*

Attorneys for the defendant, respondent: *L. E. Beaulieu and Edouard Asselin, Montreal.*

In the Court of Appeal of Alberta

Citation: Cartwright v Rocky View County Subdivision and Development Appeal Board, 2020 ABCA 408

Date: 20201123
Docket: 1901-0285-AC
Registry: Calgary

Between:

Chloe Cartwright

Appellant

- and -

Rocky View County Subdivision and Development Appeal Board

Respondent

The Court:

The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Mr. Justice Thomas W. Wakeling

Memorandum of Judgment of the Honourable Mr. Justice McDonald and the Honourable Madam Justice Veldhuis

Memorandum of Judgment of the Honourable Mr. Justice Wakeling Concurring in the Result

Appeal from the Decision of
The Rocky View County Subdivision and Development Appeal Board
Dated the 22nd day of August, 2019
(2019-SDAB-037)

Memorandum of Judgment

The Majority:

Introduction

[1] The appellant, Chloe Cartwright appeals pursuant to section 688 of the *Municipal Government Act* (the *Act*) a decision of the Rocky View County Subdivision and Development Appeal Board (SDAB) which was rendered on August 22, 2019 (the Decision).

[2] In the Decision, the SDAB allowed an appeal from the May 28, 2019 decision of the Rocky View County Developmental Authority (Development Authority) to issue a development permit to Cartwright to allow her to develop certain lands owned by her.

[3] In addition, the appellant brings an application to adduce fresh evidence on the appeal.

[4] We allow the application for the admission for fresh evidence and we allow the appeal on the first ground. We dismiss the second ground of appeal.

Statement of Facts

[5] The appellant is a rural landowner in Rocky View County. In 2012, she filed an application to re-designate her land from Ranch and Farm to Business-Leisure and Recreation. In her application to the County, she indicated the entirety of her lands would be used for a golf course development. The County re-designated the land and, in 2013, approved the appellant's development permit for an 18-hole golf course, a clubhouse and lodge facility, a campground, and use of an existing structure as a maintenance building. The appellant later allowed this development permit to expire.

[6] In December 2018, the appellant applied for a new development permit. The application was circulated to 14 adjacent landowners. A development permit was approved by the Development Authority on May 28, 2019, subject to a host of conditions. The development permit allowed the appellant to develop a campground, a tourist building including accommodation, and relaxed the area's building height requirement. This development permit was appealed by three landowners, not all of whom were included within the circulation area. An appeal hearing was scheduled for June 26, 2019.

[7] The appeal of the appellant's development permit was the seventh matter on the SDAB's June 26, 2019 hearing list. Chairperson Kochan participated in the first six appeals. Prior to the commencement of the seventh appeal however, he announced his intended recusal and stated:

> Okay. Having the introductions before the municipal clerk reads in the nature of the appeal, I'm going to have to recuse myself because I've got a very close relative

> that is going to support the appeal. As well, I am going to withdraw. And I am going to speak on behalf of supporting the appeal as well.
>
> So with that, because of the fact that we don't have — we need an odd number, Mr. Hartley is going to step down as well. So we'll have a three member Board and Councillor Henn is going to assume the duties of the Chair. Good luck.

[8] The SDAB heard oral submissions on behalf of 13 parties, including Rocky View County administration, the appellant in this matter, and Kochan. Three letters in support of the appeal were also received. Kochan spoke on behalf of his daughter and his son-in-law, as well as on his own behalf "as a taxpayer". He was the final person to speak in support of the appeal.

[9] On August 22, 2019, the SDAB issued the Decision. It found that the proposed development did not comply with the land use policies of County Land Use *Bylaw* C-4841-97 (which had been amended with the appellant's 2012 re-designation) and would interfere with the amenities of the neighbourhood, as well as the use, enjoyment, or value of neighbouring parcels.

Appellant's Application to Adduce Fresh Evidence

[10] At the commencement of the appeal the appellant made an application to adduce fresh evidence, specifically the following:

- Affidavit of the appellant sworn October 30, 2019;
- Transcript of questioning of the appellant on her affidavit;
- Affidavit of Kochan sworn October 24, 2019; and
- Transcript of questioning of Kochan on his affidavit.

[11] The thrust of the appellant's application to adduce fresh evidence was to strengthen her argument of reasonable apprehension of bias and in particular Kochan's conduct. Much of what was contained in her affidavit was already on the public record.

[12] However, in paragraph 9 of her affidavit, the appellant deposed that prior to the commencement of the hearing before the SDAB she heard Kochan state "this is why we should never allow land re-designations to go through".

[13] In addition, there are portions of the transcript of oral questioning of Kochan on his affidavit that the appellant argues are pertinent, for example the following exchange:

> Q But you'd agree that being the chair of the board is a leadership position?

A It is.

Q Alright. And they choose you to do it?

A That's correct.

[14] Section 689(1) of the *Act* provides that upon hearing an appeal from the decision from a subdivision and development appeal board "no evidence other than the evidence submitted to the Municipal Government Board or the subdivision and development appeal board may be admitted...".

[15] However, it has been noted that a literal interpretation of that section would insulate some important errors of law from review on appeal, something that could not have been intended: *Sobeys West Inc v Edmonton (City)*, 2015 ABCA 32 at para 13 citing, *inter alia R v Northumberland Compensation Appeal Tribunal*, [1952] 1 KB 338 at p 354, [1952] 1 All ER 122 at pp 131-2. As a result, fresh evidence in support of allegations of a reasonable apprehension of bias discovered outside the hearing and which are not mentioned on the record, can be introduced on an application for fresh evidence: *Milner Power Inc v Alberta (Energy and Utilities Board)*, 2007 ABCA 265 at para 42.

[16] We feel that this is the case herein and accordingly we allow the application to adduce fresh evidence.

Grounds of Appeal

[17] Pursuant to the order of Madam Justice Rowbotham granted on November 28, 2019, the appellant was given permission to appeal the Decision on the following two grounds:

> a) Did the conduct of the appeal give rise to a reasonable apprehension of bias?
>
> b) To what extent can the Respondent [SDAB] consider "agriculture" regarding decisions with respect to a parcel that by way of site specific amendment to a *Land Use Bylaw* has been re-designated from "Agricultural Land" to another use such as "Business-Pleasure and Recreation"?

Standard of Review

[18] As there is a statutory right to appeal under the *Act*, the standards of review are those for general appellant matters: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. The standard of review with respect to reasonable apprehension of bias is correctness: *R v Quintero-Gelvez*, 2019 ABCA 17 at para 6; *R v Schmaltz*, 2015 ABCA 4 at paras 13-14.

Analysis

Reasonable Apprehension of Bias

[19] The test to determine whether an apprehension of bias has been established is whether an informed person, viewing the matter realistically and practically, would have a reasonable apprehension of bias. In the case of administrative tribunals, the context must be taken into account, including the role and function of the tribunal, the requirements of natural justice and institutional constraints faced by the administrative tribunal: *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at 394-395; *International Woodworkers of America, Local 2-69 v Consolidated Bathurst Packing Ltd,* [1990] 1 SCR 282 at 323-324: *Beier v Vermilion River (County) Subdivision and Development Appeal Board*, 2009 ABCA 338 at para 7.

[20] The basis for a reasonable apprehension of bias must be substantial and the matter should not be decided by a particularly sensitive or scrupulous person: *National Energy Board* at para 41. Both parties agree that the test from *National Energy Board* governs in this matter, but argue its application differently.

[21] The appellant submits that the issue of bias before this Court is so serious that only cases considering blatant and palpable political interference, like *Roncarelli v Duplessis*, [1959] SCR 121, are factually similar. In *Roncarelli*, the owner of a restaurant in Montreal had his liquor license revoked and his renewal application denied at the behest of the Attorney General and Premier of the province. The revocation was not an exercise of official or statutory power, but instead a discretionary decision used to punish Roncarelli, who had been known to provide bail to Jehovah's Witnesses arrested in connection with the sale of religious literature.

[22] The appellant also cites this Court's decision in *Hutterian Brethren Church of Starland v Starland (Municipal District)*, 1993 ABCA 76 at para 36, for the proposition that three categories of bias are typically recognized:

> (a) an opinion about the subject matter so strong as to produce fixed and unalterable conclusions;
>
> (b) any pecuniary bias, however slight;
>
> (c) personal bias either by association with a party or personal hostility to a party, where the test is real likelihood of bias and the appearance that justice is done.

[23] The respondent, meanwhile, relies on the Supreme Court of Canada's decision in *R v S(RD)*, [1997] 3 SCR 484. *S(RD)* provides that there are two objective elements to the test for reasonable apprehension of bias: first, the allegation must be made by a reasonable person who is

fully informed and possesses knowledge of all relevant circumstances; and second, the apprehension of bias itself must be reasonable in all the circumstances: *S(RD)* at paras 111-113. This test, the respondent submits, was recently applied in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at paras 21-26.

[24] The respondent argues that consideration of a reasonable apprehension of bias in this case must therefore include knowledge of *Rocky View County's Code of Conduct* (*Code of Conduct)*, as well as the *Act*, both of which permit the chairperson to act as he did. In the circumstances of this case, the respondent argues, Kochan properly recused himself, and was entitled to make representations to the board.

[25] As this Court recently stated in *Stubicar v Calgary (Subdivision and Development Appeal Board)*, 2019 ABCA 336, SDABs are adjudicative tribunals and the conduct of their members must not create a reasonable apprehension of bias regarding their decisions. This is a contextual assessment and takes into account the nature of the tribunal and the nature of the decision being made: *Stubicar* at para 25, citing *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 at para 63; *Beier* at para 7.

[26] In *Beier*, this Court noted that SDABs must exhibit a high degree of impartiality: *Beier* at para 6. The role and function of an SDAB "with respect to property rights is highly significant to the use of property.... They set and shape development in a community and may affect many property owners. It is trite law that justice must be seen to be done as well as being done": *Beier* at para 10.

[27] SDAB members have been known to declare a position, but often outside the context of hearing a specific matter. In *Beaverford v Thorhild (County) No 7*, 2013 ABCA 6, for example, this Court considered a situation where a county councillor, who had publicly advocated positions directly adverse to, or limiting of, gravel extraction developments, also took a key role in an SDAB panel deciding against a gravel development. The councillor's involvement was objected to, but the SDAB allowed him to participate.

[28] This Court noted that it is not automatically lethal to fairness or the creation of a reasonable apprehension of bias for there to be participation of a person in a tribunal where that person has previously expressed a relevant opinion. At paras 23-25, the Court explained that the context of the decision must be considered:

> [23] Therefore, the practicalities of local governance, as well as the legislative authority given to bodies of local governance, are to be kept in the front of the judicial mind when assessing whether there is a departure from the applicable contours of procedural fairness (including as to alleged bias or its reasonable apprehension). **The Court must also address itself to whether a collective body such as the SDAB is to be considered tainted as a group because of the participation of an elected councillor who has, when wearing his other hat,**

> **taken strong opinions on a matter of the nature under consideration.** On this, the respondent presses *McLaren v. Castlegar (City)*, 2011 BCCA 134, 27 Admin. L.R. (5th) 333 (B.C. C.A.) at paras 35 to 38, for the proposition that a tribunal "made up of elected politicians" could not be expected to "come to the hearing without some knowledge of the situation".
>
> **[24] Nevertheless, another of the practicalities of local governance is that it is not always necessary for a person who has acted as a strong advocate for a position directly related to the subject matter before the SDAB to participate in the matter, where other equally qualified participants in the SDAB hearing are available**. It was not disputed before this Court that the local SDAB had not run out of qualified participants. That factual reality is significant here. It means that there was no necessity for Croswell to have taken part in this SDAB hearing, that necessity concept being reflected in *Peters v. Strathcona (County) No. 20 (1989)*, 102 A.R. 241 (Alta. C.A.) at paras 6 to 8.
>
> [25] Would a reasonable person, knowledgeable of the facts, and having thought the matter through, conclude that Croswell had a settled opinion against developments such as the applicant's prior to SDAB hearing? **Since there is both an attitudinal and behavioural aspect to lack of impartiality, the Court would as part of the analysis consider whether a reasonable person could have confidence that Croswell would approach the matter with an open mind**.
>
> [Emphasis added]

[29] In *Beaverford* at para 23, this Court stated that "[a]lthough participation of a single person does not always taint a tribunal of size... a reasonable person could infer from the circumstances as a whole that Croswell had influence over the reasoning process of the SDAB panel as a whole. Under those circumstances, an apprehension of bias can be reasonably thought to arise from the participation of Croswell." This Court then went on to hold that the test for determining a reasonable apprehension of bias had been established. The decision was then quashed and the matter remitted back for a new hearing.

[30] While Kochan did not participate in the hearing as the councillor in *Beaverford* had, he made his position with respect to the appeal clearly known while he was still in the position of chairperson and he then advocated for the appeal thereafter.

[31] It is also worth noting that while Kochan chose to advocate for both himself and his family, there were likely other qualified people who could have done that in his stead, as in *Beaverford*. The SDAB had representations from more than a dozen community members to aid in making the Decision; there was no need for Kochan to behave in the manner that he did and to call into question the impartiality of the SDAB.

[32] The appellant essentially argues that Kochan's conduct tainted the entire proceedings before the SDAB. As this Court noted at paras 8-9 of *Mountain Creeks Ranch Inc v Yellowhead (County) Subdivision and Development Appeal Board*, 2006 ABCA 126, disqualification of one member of an administrative tribunal on the ground of a reasonable apprehension of bias may affect the whole proceeding:

> [8] The Supreme Court of Canada in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 239, 2003 SCC 45 at para. 2, held that allegations that a decision may be tainted by a reasonable apprehension of bias are to be dealt with as serious matters. Parties appearing before administrative tribunals or boards such as the SDAB are entitled to decision-makers who approach the matters before them free of interest. However, there is a presumption that tribunal members will act impartially in the absence of evidence to the contrary: Sara Blake, *Administrative Law in Canada*, 3d ed. (Markham, Ont.: Butterworths, 2001) at 106. The principle of impartiality is so fundamental to a fair hearing that if a single member of an administrative body is disqualified on the basis of bias or reasonable apprehension of bias, the whole proceeding is affected. As a result, the general rule is that the decision will be quashed, regardless of the fact that the biased member's vote may not have been a factor in the outcome: Frederick Laux, *Planning Law and Practice in Alberta*, 3d ed. (Edmonton: Juriliber, 2002) at §7.3(5).
>
> [9] A reasonable apprehension of bias arises where a reasonable person, knowledgeable of the facts of the situation, would conclude that it was likely that the decision maker would not decide fairly: *Wewaykum* at para. 60. The factors for determining if there is a reasonable apprehension of bias include asking whether the decision maker has a financial or personal interest in the outcome; a present or past link with either the party; earlier participation or knowledge of the litigation; or has expressed any sentiment or undertaken any activity illustrating bias: *Wewaykum* at para. 77.

[33] In *506221 Alberta Ltd v Parkland (County)*, 2008 ABCA 109, this Court held that where a county's manager of planning and development remained in the hearing room while the SDAB deliberated and decided an appeal, a reasonable apprehension of bias was founded. Citing *Hutterian Brethren*, this Court said that a "tribunal cannot seem to admit to its decision-making process one of the parties, or someone too closely connected with one of the parties": *506221* at para 13.

[34] The appellant need not show that bias actually impacted the Decision. In *Yukon Francophone*, the Supreme Court noted that the objective test for reasonable apprehension of bias is concerned with ensuring not only the reality, but the appearance, of a fair adjudicative process; impartial adjudication is important not only for ensuring fair process but maintaining public confidence: *Yukon Francophone* at paras 22-23. Justice must be done as well as being seen to be

done. The SDAB is semi-judicial in nature and a high degree of impartiality is required. This Court must ask, would a well-informed person viewing the matter realistically and practically and having obtained the necessary information, apprehend that it was more likely than not that the SDAB in this case did not decide fairly? On these facts the answer must be yes.

[35] Kochan acted appropriately in deciding to recuse himself in the hearing of the appellant's matter. However, he tainted his recusal by stating his position and informing all those present that he would be advocating in favour of the appeal – all the while still in his position as chairperson. A reasonable person, viewing the matter realistically and practically, would be concerned with the fairness of the proceedings and a reasonable apprehension of bias would thus exist. While his comments were brief, Kochan's conduct gave the impression he was wielding his influence with his fellow board members, while still in a position of power. According to section 33 of the *Code of Conduct*: "Members [of the SDAB] must not act or appear to act in order to benefit, financially or otherwise, themselves or their family, friends, associates, businesses, or otherwise". Not only was the *Code of Conduct* breached, but more importantly the actions of Kochan at common law created a reasonable apprehension of bias.

[36] The respondent contends that the Supreme Court of Canada's decision in *Mugesera v Canada (Minister of Citizenship and Immigration*), 2005 SCC 40, should protect the Decision. In *Mugesera*, Justice Abella recused herself from the hearing of a matter owing to her husband's affiliation with one of the parties. The Supreme Court of Canada held that the entire Court was not tainted simply as a result of Justice Abella's position.

[37] However, the facts of *Mugesera* are not identical to the facts of this case. Had Justice Abella stated, before recusing herself, that she was against the appeal, and then stepped down and took up argument against the matter before the Supreme Court of Canada, a reasonable person would think it more likely than not that the Court would not decide fairly. That would be the factual equivalent of this matter. While the respondent is correct that it is not automatic that the Court would find bias under the circumstances of this case, it is nonetheless open for us to do so.

[38] What is more, a plain and ordinary reading of the *Code of Conduct* indicates that Kochan should not have been permitted to advocate before the SDAB once he recused himself. Schedule B of the *Code of Conduct* addresses pecuniary interests. A Member has a pecuniary interest if the Member's Family could be monetarily affected by a matter. Schedule B of the *Code of Conduct* defines "A Member's Family" as "a Member's spouse or adult interdependent partner, the Member's children, the parents of the Member, and the parents of the Member's spouse or adult interdependent partner". Where a Member has a pecuniary interest, Section 5 of Schedule B of the *Code of Conduct* mandates that the Member:

1) Disclose the nature of the pecuniary interest to the Board or Committee;

2) Abstain from participating in the hearing of the matter;

> 3) Abstain from any discussion or voting on the matter; and
>
> 4) Be absent from the room in which the matter is being heard, **except to the extent that the Member is entitled to be heard before a Board or Committee as an appellant or a person affected by the matter before the Board or Committee.**
>
> [emphasis added]

[39] Kochan had a daughter who stood to be monetarily impacted by the appellant's development permit. He thus had a pecuniary interest and was subject to the four provisions above. A plain and ordinary reading of Schedule B does not aid Kochan in these circumstances. Kochan was required to disclose the nature of his interest, abstain from participating, discussing, and voting, and to leave the room, subject to being an appellant or a person affected.

[40] Under these circumstances Kochan was not an appellant and would therefore only be permitted to speak as a person affected. Simply put however every taxpayer in Rocky View County cannot possibly be considered a "person affected" as per section 687(1)(d) of the *Act*. Nor should Kochan be permitted to be a person affected simply by nature of being the father of an affected person; after all, being involved in a matter involving family is expressly prohibited by the pecuniary interest provisions of the *Code of Conduct*. Under the circumstances, Kochan should have disclosed the nature of the interest, abstained from participating in the hearing and discussion of the matter, and removed himself from the room. His daughter was entitled to represent herself and be heard on the matter, or to retain a more appropriate advocate.

[41] The respondent relies on s 687(1)(d) of the *Act* to argue that the board *must* hear from individuals in Kochan's position. That section provides:

> 687(1) At a hearing under section 686, the subdivision and development appeal board must hear
>
> > (d) any other person who claims to be affected by the order, decision or permit **and that the subdivision and development appeal board agrees to hear,** or a **person acting on behalf of that person.** [Emphasis added]

[42] This argument must fail for two reasons. First, it does not make logical sense that the *Code of Conduct* would attempt to protect against a reasonable apprehension of bias by requiring a board member to leave the room when a pecuniary interest exists (such as a familial connection), but that the *Act* would allow that same person to make representations to the board on behalf of a family member. The *Code of Conduct* was drafted under the *Act*, which has similar pecuniary interest provisions imbedded in it. Second, a logical reading of s 687(1)(d) indicates that the board can exercise discretion in determining from whom it hears. Were this discretion non-existent, the words "and that the subdivision and development appeal board agrees to hear" would cease to have meaning. The presence of discretion thus tempers the use of the word "must" in s 687(1).

[43] Kochan's conduct was contrary not only to the Rocky View County *Code of Conduct* and the *Act*, which prohibited him from being involved in the matter under their pecuniary interest provisions, but also under the common law doctrine of reasonable apprehension of bias. Had this matter directly affected Kochan – were his own property directly next door to the appellant's proposed development, for example – the considerations may have been different. However, on the facts of this case, Kochan's conduct, both in his position as chairperson and after his recusal, gave rise to a reasonable apprehension of bias.

[44] To conclude, for the reasons above, a reasonable apprehension of bias arose from Kochan's conduct. He, as chairperson, was an individual in a position of power and influence. He stated, while in his position as chairperson, that he supported the appeal. He then stepped down and, despite having a familial and pecuniary interest in the matter, argued in favour of the appeal. While there is no evidence of actual bias in the Decision, that is not the relevant determination. Under these circumstances, a reasonable apprehension of bias exists and the Decision cannot stand.

[45] We do not propose to deal with the argument of waiver since permission to appeal was not granted on that issue.

To What Extent Can The SDAB Consider "Agriculture" With Respect To Decision Regarding A Parcellate By Way Of Site Specific Amendment To A Land Use *Bylaw* Which Has Been Re-designated From "Agriculture Land" To Another Use Such as "Business-Leisure and Recreation"?

[46] The appellant argues that a number of those who supported the appeal against the issuance of her development permit, focused on an inappropriate factor, namely agriculture. The appellant's position, simply put is that since the Rocky View Council had passed the site-specific *Bylaw* amendment wherein her lands where changed from "Agriculture Land" to "Business-Leisure and Recreation", these individuals were in effect conducting a collateral attack on that *Bylaw* amendment.

[47] The respondent disputes the appellant's characterization that those who spoke in favour of the appeal were conducting a collateral attack. The respondent points out that the appellant remained obligated to apply for a development permit prior to commencing any development on her land.

[48] Particularly so, argues the respondent, since in this case the appellant's proposed development was a discretionary use: section 683 of the *Act*. As such, a discretionary use is a use for which an applicant has no automatic right to a permit. The SDAB may decline to issue a development permit for a discretionary use if, based on sound planning principles, the use is judged inappropriate in specific circumstances due to its adverse on new properties.

[49] This matter will be quickly disposed of in light of our proposed disposition of the appeal. In our opinion, merely referencing agricultural concerns as it impacts the property of others does

not in and of itself represent a collateral attack upon the *Bylaw* amendment. The SDAB did not err in considering these submissions.

[50] Accordingly, we dismiss this ground of appeal.

Conclusion

[51] In the result, the Decision is quashed and the matter is remitted back to an entirely differently constituted panel of the SDAB for rehearing. Furthermore, none of the members of the SDAB that were present on June 16, 2019 or August 7, 2019, are to sit on the re-hearing.

[52] If the appellant seeks costs, and the parties are unable to come to an agreement, she is to submit, within two weeks of the date of this Memorandum of Judgment, a written submission not to exceed five pages. After which the respondent will have two weeks following receipt of the appellant's submission to provide its written submissions, likewise not to exceed five pages.

Appeal heard on October 13, 2020

Memorandum filed at Calgary, Alberta
this 23rd day of November, 2020

McDonald J.A.

Veldhuis J.A.

Wakeling J.A. (concurring in the result):

I. Introduction

[53] This appeal[1] from a decision of the Rocky View County Subdivision and Development Appeal Board setting aside a conditional development permit the Rocky View County Development Authority granted to Chloe Cartwright presents an interesting perceived-bias issue that seldom arises in the common law world.

II. Questions Presented

A. Reasonable Apprehension of Bias

[54] On May 28, 2019, the Rocky View County Development Authority granted Ms. Cartwright a conditional development permit for a "Campground, Tourist and Tourism Uses/Facilities (Recreational)" project.[2]

[55] Three owners of adjacent lands appealed.[3]

[56] Before the Appeal Board commenced hearing the appeal – the seventh of the day – against the Cartwright conditional development permit, Don Kochan, the Appeal Board chair, stated that he would recuse himself and not hear the appeal. He announced that he wished to speak in favor

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[1] A single judge of this Court granted permission to appeal two questions of law: (1) Did the conduct of the appeal give rise to a reasonable apprehension of bias? (2) To what extent can the Respondent consider "agriculture" regarding decisions with respect to a parcel that by way of site specific amendment to a *Land Use Bylaw* has been redesignated from "Agricultural Land" to another use such as "Business Leisure and Recreation". Appeal Record F31. If a single judge of this Court grants permission to appeal, this Court is authorized to answer questions of law or jurisdiction arising from a decision of a subdivision and development appeal board. *Municipal Government Act*, R.S.A. 2000, c. M-25, s. 688(1). The Court has no jurisdiction to entertain questions of fact or mixed fact and law. The Court may answer the questions of law or jurisdiction set out in the permission-to-appeal order and any questions that are subsumed by these questions and are necessary to resolve the questions on which leave to appeal was expressly granted and, in addition, according to section 689(4) of the *Municipal Government Act*, to decide if the "only ground for appeal established is a defect in form or technical irregularity and that no substantial wrong or miscarriage of justice has occurred". See *Legacy, Inc. v. City of Red Deer*, 2018 ABCA 393, ¶¶ 108-11; 81 M.P.L.R. 5th 181 (chambers) ("The Court grants Legacy Inc. permission to appeal the following question of law: Did the Board err in concluding that the City of Red Deer's development authority had the authority to issue a stop order? … This question has two parts. … First, does s. 2(2) of the *Land Use Bylaw* only sanction a stop order if a development occurred after the *Land Use Bylaw* first governed the use of the land. … Second, must a stop order under s. 2(2) of the *Land Use Bylaw* be made within the period set out in s. 565 of the *Municipal Government Act* or some other period?") & *Thomas v. City of Edmonton*, 2016 ABCA 57, ¶ 62; 396 D.L.R. 4th 317, 343 ("Under s 689(4), this Court may decline to allow an appeal where the fairness of the process has not been unduly compromised despite a defect in form or technical irregularity").

[2] Appeal Record P6.

[3] Rocky View County Subdivision and Development Appeal Board, Development Appeal Decision, ¶ 8. Appeal Record F18.

of allowing the appeal on behalf of "a very close relative" and himself.[4] When the Appeal Board called upon Mr. Kochan to speak, he indicated that he spoke on behalf of his daughter and her husband, as well as the Robertsons, neighbors of his daughter, and himself as a taxpayer.[5]

[57] The Appeal Board allowed the appeal and set aside the Cartwright conditional development permit.

[58] At common law, an adjudicator must be impartial and perceived to be so.[6]

[59] An objective measure is used to evaluate the presence or absence of perceived bias.[7] Would a reasonable, right-minded and properly informed person, adopting a realistic and practical perspective, conclude on a balance of probabilities, that the adjudicator was not impartial?

[60] Would the notional reasonable observer conclude it is more likely than not that the Appeal Board could not hear the appeal impartially when the Appeal Board chair appeared before the Appeal Board on behalf of his daughter and son-in-law, their neighbors and himself, and urged the Appeal Board to allow the appeal?

[61] If the notional reasonable observer would conclude that the risk of partiality associated with Mr. Kochan's appearance before the Appeal Board is unacceptably high – exceeds a balance of probabilities – does either the *Municipal Government Act*[8] or the *Board and Committee Code of Conduct Bylaw*[9] authorize an Appeal Board member to appear before the Appeal Board as an unpaid advocate or on his or her own behalf as a taxpayer?

[62] A statute may alter the common law, including the common law's ban on partial adjudicators – if it employs clear text to that effect.

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[4] June 26, 2019 Hearing Transcript 5:13-17 ("I'm going to have to recuse myself because I've got a very close relative that is going to support the appeal. As well, I am going to withdraw. And I am going to speak on behalf of supporting the appeal as well").

[5] Id. 75:9-12 & 14-16.

[6] E.g., *Wewaykum Indian Band v. Canada*, 2003 SCC 45, ¶ 57; [2003] 2 S.C.R. 259, 287-88; *The Queen v. Gough*, [1993] A.C. 646, 659 (H.L.) per Lord Goff; *Webb v. The Queen*, [1994] HCA 30, ¶ 19; 181 C.L.R. 41, 55 per Mason, C.J. & McHugh, J. & *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 885 (2009) per Kennedy, J.

[7] E.g., *Yukon Francophone School Board v. Yukon Territory*, 2015 SCC 25, ¶ 21; [2015] 2 S.C.R. 282, 296.

[8] R.S.A. 2000, c. M-25.

[9] Bylaw C-7855-2018.

[63] Does the *Municipal Government Act*[10] clearly authorize the Appeal Board to hear from a current Appeal Board member appearing as an unpaid advocate for third parties and in his own right as a taxpayer?

[64] Does section 146.1(3) of the *Municipal Government Act* clearly authorize a municipality to pass a bylaw that abridges the standards of impartiality produced by the common law?

[65] Does Rocky View County's *Board and Committee Code of Conduct Bylaw*,[11] either expressly or by implication, authorize the Appeal Board to hear from a current Appeal Board member as an unpaid advocate for third parties and in his own right as a taxpayer?

[66] What is the effect of sections 18, 33, 34, and 37 and section 5(4) of Schedule B of the *Bylaw*? Section 18 directs Appeal Board members to "encourage public respect for the Rocky View County as an institution". Section 33 prohibits a board member from acting in order to benefit, financially or otherwise, the board member or his or her "family, friends, associates [or] businesses". Section 34 states that "[m]embers must be free from undue influence and approach decision-making with an open mind that is capable of persuasion". Section 37 prohibits an Appeal Board member from acting as a paid advocate before the Appeal Board. Section 5(4) of Schedule B authorizes an Appeal Board member who has recused him or herself from a matter because of a pecuniary interest to appear before the Appeal Board "as an appellant or a person affected by a matter before the Board".

[67] If the *Bylaw* authorizes the Appeal Board to hear from a current Appeal Board member as an unpaid advocate for a third party or on his own behalf as a taxpayer, is the *Bylaw ultra vires*?

[68] Did Ms. Cartwright waive her right to object in this Court about the perceived partiality of the Appeal Board because she failed to challenge before the Appeal Board its decision to allow Mr. Kochan to appear before it?

B. Substantive Legal Question

[69] The Appeal Board allowed the appeal and set aside the conditional Cartwright development permit. In three sentences, the Board referred to the evidence it considered "compelling" and announced its determination.[12]

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[10] R.S.A. 2000, c. M-25.

[11] Bylaw C-7855-2018.

[12] Rocky View County Subdivision and Development Appeal Board, Development Appeal Decision, ¶¶ 127-29. Appeal Record F26. Does this explanation constitute "reasons" under section 687(2) of the *Municipal Government Act*, R.S.A. 2000, c. M-25? See *Bergstrom v. Town of Beaumont*, 2016 ABCA 221, n. 27; 53 M.P.L.R. 5th 28, n. 27 (chambers) ("[the] Board should make an effort to express itself more fully. The devotion of more effort to the reasons component of the Board's decision would produce a more compelling explanation and reduce the likelihood that the

[70] Did the Appeal Board base its decision, in whole or in part, on an irrelevant consideration?

III. Brief Answers

A. Reasonable Apprehension of Bias

[71] A reasonable, right-minded and properly informed person adopting a realistic and practical perspective would conclude on a balance of probabilities that the Appeal Board was partial because Mr. Kochan, the Appeal Board chair, appeared as an advocate on behalf of his daughter and her husband and their neighbors and on his own behalf as a taxpayer. The Appeal Board chair's presence would be perceived to increase the risk of partiality to an unacceptable level – greater than 50.1%. It must be remembered that most members of subdivision and development appeal boards are not legally trained and are likely predisposed to the position a colleague is advancing before them. This is human nature.

[72] The notional reasonable observer would understand that it would be asking too much of an Appeal Board member to prohibit him or her from being a party to a proceeding before the Appeal Board if he or she was the holder of a development permit under appeal or as an appellant, if there is no other appellant in a position to articulate the Appeal Board member's concerns about a challenged development permit. If there is another appellant in a position to articulate the concerns of an Appeal Board member, the Appeal Board member should stand down as an appellant. In these two scenarios, a reasonable observer would accept that an Appeal Board member could appear before the Appeal Board and that the Appeal Board could still function impartially provided that an Appeal Board member retained counsel or someone else to appear for him or her. The personal appearance of an Appeal Board member would drive up the risk of partiality beyond the tipping point.

[73] The notional reasonable observer would appreciate that it would never be necessary for an Appeal Board member to appear before the Appeal Board. There are lawyers who can play this role. As well, on many occasions another community member could speak on behalf of the Appeal Board member if he or she was a respondent or a permitted appellant.

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losing party would seek permission to appeal") & *Town of Black Diamond v. 1058671 Alberta Inc.*, 2015 ABCA 169, n. 5; 37 M.P.L.R. 5th 175, n. 5 ("Compliance with the ... [section 680(3) of the *Municipal Government Act* obligation to give reasons] increases the likelihood that the parties will understand the Board's decision and provide some basis for meaningful appellate review. Merely saying that the Board has considered the evidence and the case law and had regard to the governing bylaw and the *Municipal Government Act* does not reveal the Board's thinking"). An adjudicator provides reasons for a decision if the contested text demonstrates that the adjudicator understood the issues presented for resolution and states the facts and the governing law the adjudicator relied on to support the selected disposition. See *South Bucks District Council v. Porter* (No. 2), [2004] UKHL 33, ¶ 35; [2004] 1 W.L.R. 1953, 1964 ("The reasons for decision ... must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. ... Decision letters must be read in a straightforward manner, recognizing that they are addressed to parties well aware of the issues involved and the arguments advanced").

[74] The *Municipal Government Act*[13] neither authorizes an appeal board to allow an appeal board member to appear before it as an advocate, or on his or her own behalf as a taxpayer, nor gives a municipality the power to pass a bylaw that has this effect.

[75] Rocky View County's *Board and Committee Code of Conduct Bylaw* does not authorize the Appeal Board to hear from Mr. Kochan.

[76] Section 34 of the *Board and Committee Code of Conduct Bylaw* is the critical provision. It declares that "[m]embers must be free from undue influence and approach decision-making with an open mind that is capable of persuasion".

[77] An Appeal Board member cannot do anything that unduly influences another Appeal Board member in making a decision. A personal appearance by a sitting Appeal Board member before the Appeal Board creates an unacceptable risk of partial adjudication by the panel of remaining Appeal Board members.

[78] Any part of a code of conduct passed by a municipality that has this effect is *ultra vires*.

[79] Ms. Cartwright did not waive her right to object to the procedure the Appeal Board adopted. While she was aware of the facts that substantiated her complaint of procedural impropriety, she was unaware of the legal effect of the known facts.

B. Substantive Issues

[80] Given my disposition of the first issue, I need not address the second question.

IV. Statement of Facts

[81] Ms. Cartwright owns approximately 150 acres in Rocky View County.[14]

[82] On November 6, 2012, the Council of Rocky View County redesignated Ms. Cartwright's property from "Ranch and Farm District" to "Business – Leisure and Recreation".[15]

[83] On May 14, 2013, the Rocky View County Development Authority issued a development permit to Ms. Cartwright for[16]

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[13] R.S.A. 2000, c. M-25.

[14] Rocky View County Bylaw C-7188-2012, Sch. A. Appeal Record F30.

[15] Id. F29. See Rocky View County Subdivision and Development Appeal Board, Development Appeal Decision, ¶¶ 12 & 65. Appeal Record F19 & F22.

[16] Affidavit of Chloe Cartwright sworn October 30, 2019 and filed October 31, 2019, exhibit B & Rocky View County Subdivision and Development Appeal Board, Development Appeal Decision, ¶ 67. Appeal Record F22.

> an 18 hole golf course … in general accordance with the approved Chinook Ridge Drawings as prepared by R.G.A. Design, as amended, to the satisfaction of the Development Authority and includes the following:
>
> - the construction of an 18 hole golf course;
> - the construction of a clubhouse lodge/facility approximately 1,600.00 sq. m. (17,222.26 sq. ft.);
> - the construction of a campground approximately 15 stalls;
> - the use of an existing Quonset as a maintenance building.

[84] Ms. Cartwright allowed the development permit to expire.[17]

[85] Many years later – December 21, 2018 – Ms. Cartwright submitted another development permit application to the Rocky View County Development Authority.[18]

[86] On May 28, 2019, the Rocky View County Development Authority granted Ms. Cartwright a conditional development permit for[19]

[17] Rocky View County Subdivision and Development Appeal Board, Development Appeal Decision, ¶ 67. Appeal Record F22.

[18] Id. ¶ 4. Appeal Record F11.

[19] Id. ¶ 7. Appeal Record F11.

a Campground, Tourist and Tourism Uses/Facilities (Recreational) … in accordance with the Site Plan as submitted with the application and includes:

i. Construction of a tourism/use facility, with a total gross area of 1,623.21 square metres (± 17,472 square feet) including Accommodation Units (16 rooms);

ii. Construction of 81 RV stalls;

iii. Ancillary Business Uses (ie. events, gatherings, etc.);

iv. Grading (as required).

2. That the maximum building height for the tourism use/facility (event center) is relaxed from 12.00 metres (39.37 feet) to ± 12.92 metres (± 42.37 feet).

[87] Three adjacent landowners filed appeals.[20]

[88] The appeal was scheduled to be heard June 26, 2019.[21]

[89] Notice of the appeal was given to nineteen adjacent landowners.[22]

[90] The Rocky View County Subdivision and Appeal Board heard six appeals on June 26, 2019 before it reached the appeal relating to Ms. Cartwright's conditional development permit.[23]

[91] Before the Appeal Board commenced hearing the seventh appeal of the day, Don Kochan, the Appeal Board chair, stated that he would not sit as an Appeal Board member hearing the next appeal.[24] He announced his intention to speak in favor of allowing the appeal on behalf of his daughter and himself.[25] I assume that his daughter did not pay him to do so.[26]

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[20] Id. ¶ 8. Appeal Record F44.

[21] Id. ¶ 2. Appeal Record F36.

[22] Id. ¶ 8. Appeal Record F44.

[23] Transcript of Oral Questioning of Don Kochan 7:21-22 & Respondent's Extracts of Key Evidence R29.

[24] June 26, 2019 Hearing Transcript 5:13-17 & Affidavit of Chloe Cartwright sworn October 30, 2019 and filed October 31, 2019, ¶ 10.

[25] Id.

[26] Mr. Kochan does not say this in his affidavit. Affidavit of Don Kochan sworn on October 24, 2019 and filed October 28, 2019.

[92] Mr. Kochan vacated the chair, another Appeal Board member assumed chair responsibilities, and the Appeal Board proceeded to hear the Cartwright conditional development permit appeal with three members.[27]

[93] The Appeal Board heard oral submissions from representatives of the Rocky View Development Authority, the appellants, four persons who supported the appeal, including Mr. Kochan, a transportation consultant hired by Ms. Cartwright, Ms. Cartwright, and a hydrogeologist Ms. Cartwright had retained.[28] According to the Appeal Board's decision, Mr. Kochan represented his daughter and her husband and their neighbors.[29]

[94] The Appeal Board reviewed three letters from persons supporting the appeal, including Mr. Kochan.[30]

[95] On August 22, 2019, the Appeal Board issued its decision.[31]

[96] The Appeal Board noted that Ms. Cartwright's conditional development permit is for a discretionary use[32] and not a permitted use under Rocky View County's *Land Use Bylaw*.[33]

[97] The Appeal Board allowed the appeal:[34]

> [127] The Board heard compelling evidence from the appellants that the size and scope of the proposed business enterprise will have an undue and negative impact on the surrounding lands.
>
> [128] The Board acknowledges that the existing rural infrastructure is not designed or upgraded to a level to support the proposed development.
>
> [129] The Board finds that the proposed development, in accordance with section 77 of the *Land Use Bylaw* and section 687 of the *Municipal Government Act*, does not comply with the land use policies of the current *Land Use Bylaw* and, if

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[27] June 26, 2019 Hearing Transcript 5:25-27. An appeal board should consist of an uneven number of members.

[28] Rocky View County Subdivision and Development Appeal Board, Development Appeal Decision, ¶ 9. Appeal Record F18-F19 & August 7, 2019 Hearing Transcript 26:4-5.

[29] Id. ¶ 54. Appeal Record F48.

[30] Id. ¶ 10. Appeal Record F45.

[31] Appeal Record F27.

[32] Rocky View County Subdivision and Development Appeal Board, Development Appeal Decision, ¶ 123. Appeal Record F26.

[33] Bylaw No. C-4841-97.

[34] Appeal Record F26.

> approved, would unduly interfere with the amenities of the neighbourhood, and would materially interfere with or affect the use, enjoyment or value of the neighbouring parcels of land.

[98] On September 23, 2019, Ms. Cartwright applied for permission to appeal the Appeal Board's August 22, 2019 decision to this Court.[35] She filed her own affidavit in support of her application. The Appeal Board filed the affidavit of Mr. Kochan in opposition. Both sides questioned the deponents.

[99] On November 28, 2019, Justice Rowbotham granted Ms. Cartwright permission to appeal the two questions of law set out above.[36]

[100] On December 9, 2019, Ms. Cartwright filed a notice of appeal.[37]

[101] On May 11, 2020, Ms. Cartwright applied for permission to adduce fresh evidence – the two affidavits filed in the leave-to-appeal application and the questioning on them.[38]

V. Applicable Statutory and Other Provisions

A. *Municipal Government Act*

[102] The relevant sections of the *Municipal Government Act*[39] are set out below:

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[35] The application named only the Appeal Board as a respondent. Section 688(5)(a) of the *Municipal Government Act* required the applicant to name the Appeal Board and the Rocky View County as respondents.

[36] Appeal Record F31.

[37] Appeal Record F33. The notice of appeal named only the Appeal Board as a respondent. Section 688(5)(a) of the *Municipal Government Act* required the appellant to name the Appeal Board and Rocky View County as respondents. This failure to comply with the statutory direction and the failure of Rocky View County to apply for status as a respondent left the Appeal Board in a difficult position.

[38] We are satisfied that the affidavits of Ms. Cartwright and Mr. Kochan, and the questioning arising, should be admitted. When a party applying for judicial review or appealing a decision of a statutory delegate alleges bias, there is, as a general rule, a need to file an affidavit setting out the relevant facts that support the bias allegation. *Bergstrom v. Town of Beaumont*, 2016 ABCA 221, ¶ 5; 53 M.P.L.R. 5th 28, 33 (chambers) ("Affidavit evidence may be used … in a permission to appeal application … to demonstrate that a subdivision and development appeal board did not conduct a fair hearing or was biased – conditions seldom disclosed by any work product of an adjudicator"). "It is, therefore, universally accepted that additional evidence may be brought forward to establish a breach of procedural fairness, including bias … . Typically, the evidence dealing with reasonable apprehension of bias is brought forward by affidavit". D. Jones & A. de Villars, Principles of Administrative Law 478 (7th ed. 2020). E.g., *Ringrose v. College of Physicians of the Province of Alberta*, [1977] 1 S.C.R. 814, 821 (the Court approved the filing of the Registrar's affidavit in response to the appellant's bias allegation).

[39] R.S.A. 2000, c. M-25.

145 A council may pass bylaws in relation to the following:

(a) the establishment and functions of council committees and other bodies;

(b) procedures to be followed by council, council committees and other bodies established by the council.

…

146.1(3) A council may, by bylaw, establish a code of conduct governing the conduct of members of council committees and other bodies established by the council who are not councillors.

…

(5) The Minister may make regulations[40]

(a) respecting matters that a code of conduct established under subsection (1) must address … .

…

686(3) The subdivision and development appeal board must give at least 5 days' notice in writing of the hearing

(a) to the appellant,

(b) to the development authority whose order, decision or development permit is the subject of the appeal, and

(c) to those owners required to be notified under the land use bylaw and any other person that the subdivision and development appeal board considers to be affected by the appeal and should be notified.

…

687(1) At a hearing under section 686, the subdivision and development appeal board must hear

(a) the appellant or any person acting on behalf of the appellant,

(b) the development authority from whose order, decision or development permit the appeal is made, or a person acting on behalf of the development authority,

(c) any other person who was given notice of the hearing and who wishes to be heard, or a person acting on behalf of that person, and

(d) any other person who claims to be affected by the order, decision or permit and that the subdivision and development appeal board agrees to hear, or a person acting on behalf of that person.

B. Rocky View County's *Board and Committee Code of Conduct Bylaw*

[103] The key parts of Rocky View County's *Board and Committee Code of Conduct Bylaw*[41] are set out below:

[40] We are not aware of any regulation passed under this paragraph. The *Subdivision and Development Appeal Board Regulation*, Alta. Reg. 195/2017 addresses, in part, the training programs that a member of a subdivision and development appeal board panel must complete. A ministerial order under this regulation sets out the training program for Subdivision and Development Appeal Board Members. The program includes administrative law principles regarding fairness, impartiality and bias ("II. TRAINING PROGRAM PRINCIPLES Fairness and impartiality. Transparency in the decision making process. Understanding and acting within the limits of the legislation and principles of administrative law and natural justice…. III. LEARNING OUTCOMES Understanding the basic principles of administrative law which apply to SDABs including the general duty of fairness and the rule against bias. … IV. MEMBER QUALIFICATIONS AND TRAINING Members shall have: … The ability to maintain impartiality, consider arguments, analyze issues and write or contribute to writing decisions. … VI. COURSE OUTLINE (INITIAL TRAINING PROGRAM) (5) ROLES AND RESPONSIBILITIES FOR MEMBERS … ii. Maintaining Impartiality"). Ministerial Order No. MSL:019/18, Appendix 2, 1-5 (May 16, 2018).

[41] Bylaw C-7855-2018.

18 Members must respect the bylaws, policies and procedures of Rocky View County and will encourage public respect for Rocky View County as an institution.

…

33 Members must not act or appear to act in order to benefit, financially or otherwise, themselves or their family, friends, associates, businesses or otherwise.

34 Members must be free from undue influence and approach decision-making with an open mind that is capable of persuasion.

…

36 Members must not use their authority or influence of their position for any purpose other than to exercise their official duties.

37 Members must not act as a paid agent to advocate on behalf of any individual, organization, or corporate entity before a Board or Committee.

…

Schedule 'B' – Pecuniary Interest Provisions.

…

2 A Member has a pecuniary interest in a matter if:

(1) The matter could monetarily affect the Member or an employer of the Member; or

(2) The Member knows or should know that the matter could monetarily affect the Member's Family.

…

4 A Member does not have a pecuniary interest by reason only of any interest:

(1) that the Member … may have as an elector, … [or] taxpayer … .

…

5 When a member has a pecuniary interest on a matter before a Board or Committee that member must:

(1) Disclose the nature of the pecuniary interest to the Board or Committee;

(2) Abstain from participating in the hearing of the matter;

(3) Abstain from any discussing or voting on the matter; and

(4) Be absent from the room in which the matter is being heard, except to the extent that the member is entitled to be heard before a Board or a Committee as an appellant or a person affected by the matter before the Board or Committee.

VI. Analysis

A. The Common Law Insists that Adjudicators Be Impartial and Perceived To Be Impartial

1. The Common Law Governs the Appeal Board

[104] "[P]ublic confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so".[42]

[105] This common law standard presumptively applies to the Appeal Board and its members.[43] The Appeal Board makes important decisions that affect the property rights of those who appear before it. Appeal Board members must be impartial and perceived to be so.

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[42] *Wewaykum Indian Band v. Canada*, 2003 SCC 45, ¶ 57; [2003] 2 S.C.R. 259, 287-88. See also *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, 391 (1976) ("there [must] be no lack of public confidence in the impartiality of adjudicative agencies"); *The Queen v. Gough*, [1993] A.C. 646, 659 (H.L.) per Lord Goff ("there is an overriding public interest that there should be confidence in the integrity of the administration of justice"); *Webb v. The Queen*, [1994] HCA 30, ¶ 9; 181 C.L.R. 41, 50 per Mason, C.J. & McHugh, J. ("the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice") & *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) per Kennedy, J. ("These codes [of judicial] conduct serve to maintain the integrity of the judiciary and the rule of law. The Conference of the Chief Justices has underscored that the codes are '[t]he principal safeguard against judicial campaign abuses' that threaten to imperil 'public confidence in the fairness and integrity of the nation's elected judges'. Brief for Conference of Chief Justices as *Amicus Curiae* ... . This is a vital state interest"). See also Judicial Group on Strengthening Judicial Integrity, The Bangalore Principles of Judicial Conduct 3 (2002) ("A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary").

[43] D. Jones & A. deVillars, Principles of Administrative Law 281 & 419 (7th ed. 2020) ("The duty to be fair ... now applies to every statutory delegate making decisions which affect the rights, privileges or interests of an individual ... . In Canada today, this includes a myriad of authorities ranging from the single delegate issuing dog licences, to major boards and tribunals wielding great power. ... The rule against bias ... applies to all statutory delegates whose decisions are required to meet the standards of procedural fairness"); G. Régimbald, Canadian Administrative Law 383 (2d ed. 2015) ("procedural fairness and the rules of natural justice require that decisions be made by an impartial decision maker based on the record before it, free from any reasonable apprehension of bias"); H. Wade & C. Forsyth,

[106] The public must believe that adjudicators are impartial – not biased[44] – and decide matters before them without regard to who the parties before them are, who represents the parties, and any other factor that does not bear on the merits of the dispute they have a legal duty to resolve.[45]

[107] It is not enough that adjudicators are actually impartial.[46]

2. An Objective Measure Identifies Partial Adjudicators

[108] An objective measure is the best way to ascertain the public's perception of adjudicator impartiality.[47] A disclaimer of bias by the judge will not satisfy the public.[48]

Administrative Law 393 (11th ed. 2014) ("Twentieth century judges have generally enforced the rule against bias in administrative proceedings no less strictly than their predecessors") & *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, 391 (1976) ("This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies"). See *Hutterian Brethren Church of Starland v. Municipal District of Starland No. 47*, 1993 ABCA 76; 135 A.R. 304 (the Court applied the common law bias rule to the development appeal board).

[44] Judicial Integrity Group, Commentary on the Bangalore Principles of Judicial Conduct 59 (2007) (United Nations) ("Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one side or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction"). See The Council of Chief Justices of Australia and New Zealand, Guide to Judicial Conduct 5 (3d ed. 2017) ("It is easy enough to state the broad indicia of impartiality in court – to be fair and even-handed, to be patient and attentive, and to avoid stepping into the arena or appearing to take sides").

[45] *Alberta Mortgage and Housing Corp. v. Alberta Union of Provincial Employees*, 2 P.S.E.R.B.R. 973 (1989) ("an adjudicator whose decisions are the product of rational thought processes acts in an impartial manner") & *The Queen v. Inner West London Coroner ex p. Dallaglio*, [1994] 4 All E.R. 139, 161 (C.A.) per Sir Thomas Bingham, M.R. ("The decision-maker should consciously shut out of his decision-making process any extraneous prejudice or predilection").

[46] *Wewaykum Indian Band v. Canada*, 2003 SCC 45, ¶ 67; [2003] 2 S.C.R. 259, 292 ("justice might not be seen to be done, even where it is undoubtedly done – that is, it envisions the possibility that a decision-maker may be totally impartial in circumstances which nevertheless create a reasonable apprehension of bias, requiring his or her disqualification").

[47] Canadian Judicial Council, Ethical Principles for Judges 27 (2004) ("The appearance of impartiality is to be assessed from the perspective of a reasonable, fair minded and informed person"); Code of Conduct for United States Judges 4 (effective March 12, 2019) Commentary Canon 2A ("An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that a judge's ... impartiality ... is impaired") & Judicial Integrity Group, Commentary on the Bangalore Principles of Judicial Conduct 57 (2007) (United Nations) ("The perception of impartiality is measured by the standard of a reasonable observer").

[48] *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009) per Kennedy, J. ("The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise, there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review") & *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.*, [2000] Q.B. 451, 472 (C.A. 1999) ("The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous

[109] Canada, like other common law jurisdictions, has adopted an objective yardstick.[49] Would a reasonable, right-minded and properly informed person, adopting a realistic and practical perspective, conclude, on a balance of probabilities, that the adjudicator was not impartial?[50]

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influences affecting his mind, and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists").

[49] E.g., *Yukon Francophone School Board v. Yukon Territory*, 2015 SCC 25, ¶ 21; [2015] 2 S.C.R. 282, 296 ("what would a reasonable, informed person think"); *The Queen v. S.*, [1997] 3 S.C.R. 484, 505 per L'Heureux-Dûbé & McLachlin, JJ. ("The presence or absence of an apprehension of bias is evaluated through the eyes of the reasonable, informed practical and realistic person who considers the matter in some detail ... . The person postulated is not a 'very sensitive or scrupulous' person, but rather a right-minded person familiar with the circumstances of the case"); *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, 394-95 (1976) ("the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. ... '[W]hat would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that … [the adjudicator], whether consciously or unconsciously, would not decide fairly' ... . The grounds for this apprehension must, however, be substantial"); *Porter v. Magill*, [2001] UKHL 67, ¶ 103; [2002] 2 A.C. 357, 494 per Lord Hope ("The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased"); *Johnson v. Johnson*, 2000 HCA 48, ¶ 12; 201 C.L.R. 488, 493 per Gleeson, C.J., Gaudron, McHugh, Gummow & Hayne, JJ. ("The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasize that the test is objective, is founded in the need for public confidence in the judiciary, and is not based merely upon the assessment by some judges of the capacity or performance of their colleagues"); *Webb v. The Queen*, [1994] HCA 30, ¶ 9; 181 C.L.R. 41, 50 per Mason, C.J. & McHugh, J. ("the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality"); Judiciary Hong Kong Special Administrative Region, Guide to Judicial Conduct 12 (October 2004) ("The perception of impartiality is measured by the standard of a reasonable, fair-minded and well-informed person") & *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 885 (2009) per Kennedy, J. ("Due process requires an objective inquiry into whether the [judicial election campaign] contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true'").

[50] *Wewaykum Indian Band v. Canada*, 2003 SCC 45, ¶ 66; [2003] 2 S.C.R. 259, 291 ("in cases where disqualification is argued, the relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was") (underlining in original); *The Queen v. S.*, [1997] 3 S.C.R. 484, 502 per L'Heureux-Dûbé & McLachlin, JJ. ("The test for reasonable apprehension of bias is that set out by de Granpré J. in *Committee for Justice and Liberty v. National Energy Board* ... . Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades") & *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, 394 (1976) ("The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would he think that it is more likely than not that ... [the adjudicator], whether consciously or unconsciously, would not decide fairly.'").

[110] The *process* adopted by an adjudicator[51] may affect the perceived partiality of the adjudicators.[52]

[111] This objective test eliminates the need for parties to pay pollsters to ask members of the public if they believe the judge is partial or impartial.[53] And it relieves courts of the obligation to adjudicate the reliability of polling results.

3. The Notional Reasonable Observer Takes Into Account Community Standards

[112] The notional reasonable observer, in assessing the conduct of the Appeal Board, would take into account generally accepted practices of courts[54] and other tribunals, particularly those in

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[51] Judicial Group on Strengthening Judicial Integrity, The Bangalore Principles of Judicial Conduct 3 (2002) ("Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made").

[52] See *The Queen v. Abdulkadir*, 2020 ABCA 214, ¶¶ 92-93 ("The trial judge [erred] ... when he denied Crown counsel the opportunity to present the facts and the law that supported his ... application. ... Justice requires the adjudicator to hear first and decide second"); *The Queen v. Jahn*, 1982 ABCA 97, ¶ 23; 35 A.R. 583, 592 ("The general rule ... is that a court is not at liberty to pronounce judgment until counsel have been afforded the opportunity to present argument"); *Borgel v. Paintearth Subdivision and Development Appeal Board*, 2020 ABCA 192, ¶ 44 ("Proceeding in this fashion constituted a breach of the duty of procedural fairness owed by the SDAB to the appellants. Even recognizing that the merits hearing would be limited in scope by virtue of s. 619 of the *MGA* to the extent that the SDAB determined that certain matters had already been addressed by the AUC, the appellants were deprived of the opportunity to make submissions on the remaining matters. Because of the bifurcated manner in which the appeal was structured, there was no reason for the appellants to have made such submissions at the preliminary hearing. In the absence of knowing what those submissions would have been, it cannot be said that they may not have been affected some aspects of the development permits that were the subject of the appeals") & *Stollery v. Greyhound Racing Control Board*, 128 C.L.R. 509, 517 (Austl. High Ct. 1972) (the High Court held that the Greyhound Racing Control Board erred when it allowed the Board member who accused Mr. Stollery of trying to bribe him to remain in the retiring room when other Board members decided the bribery charge, even though he did not participate in the deliberations: "In my opinion, the reasonable inference to be drawn by the reasonable bystander in that situation was that Mr. Smith was in a position to participate in the Board's deliberations and at least to influence the result of those deliberations adversely to the appellant").

[53] *Caperton v. A.T. Massey Coal. Co.*, 556 U.S. 868, 875 (2009) (the plaintiff commissioned a poll asking West Virginians if the defendant's tactics – bankrolling one of the appeal court judge's election campaign – stripped the elected judge of his capacity to render an impartial judgment in a case involving the defendant).

[54] *Watts v. Watts*, [2015] EWCA Civ 1297, ¶ 28 per Sales, LJ. ("The notional fair-minded and informed observer would know about the professional standards applicable to practising members of the Bar and to barristers who serve as part-time deputy judges and would understand that those standards are a part of legal culture in which ethical behavior is expected and high ethical standards are achieved") & *Taylor v. Laurence*, [2002] EWCA Civ 90, ¶ 61, [2002] 3 W.L.R. 640, 658 per Lord Woolf, C.J. ("The fact that the observer has to be 'fair-minded and informed' is important. The informed observer can be expected to be aware of the legal traditions and culture of this jurisdiction").

Alberta, and have a good grasp of how the process under review – the Appeal Board – functions in practice. [55]

[113] Do other adjudicative bodies regulate who may appear before the adjudicators? If so, how? Do they permit current decision makers to appear before them? If so, do they attach any conditions? Or do they prohibit this type of appearance?

[114] The law recognizes that the identity of a person who argues a case may affect the perceived impartiality of an adjudicator.

a. Courts and Professional Judges

[115] I am confident that no judge would hear a case argued by a close family member[56] – the judge's spouse, parent, sibling, child or grandchild, for example – and that the notional reasonable

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[55] *The Queen v. S.*, [1997] 3 S.C.R. 484, 508 per L'Heureux-Dûbé & McLachlin, JJ. ("The reasonable person is not only a member of the Canadian community, but also, more specifically, is a member of the local communities in which the case at issue arose (in this case, the Nova Scotia and Halifax communities). Such a person must be taken to possess knowledge of the local population and its racial dynamics, including the existence in the community of a history of widespread and systemic discrimination against black and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues ... . The reasonable person must be deemed to be cognizant of racism in Halifax, Nova Scotia"); *L/3 Communications / Spar Aerospace Ltd. v. International Ass'n of Machinists and Aerospace Workers, Northgate Lodge 1579*, 142 L.A.C. 4th 1, 19 (Wakeling, Q.C. 2005) ("The Supreme Court's judgment in *The Queen v. S.* ... provides very strong support for giving the hypothetical evaluator a working knowledge of labour relations and the key role dispute resolution discharges in workplaces where collective agreements play an important private ordering function. One must keep in mind that the persons whose confidence in the impartiality of adjudicators is crucial are those that regularly function in the labour relations community and are affected by decisions of labour arbitrators"); *Lawal v. Northern Spirit Ltd.*, [2003] UKHL 35, ¶ 21; [2004] 1 All E.R. 187, 196 (the Appellate Committee canvassed the practices of the criminal courts and a similar tribunal) & *Newsco Insider Ltd.'s Trade Mark Application*, [2018] R.P.C. 10, 472 (Appointed Person) ("It seems to me that the [characteristics of the tribunal's protocol] ... would be or become known to the notional fair-minded and informed observer on making reasonable enquiries. He or she might also viably be cognisant of practices in other tribunals like the ... [Employment Tribunal] and ... [Employment Appeal Tribunal]").

[56] E.g., *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, s. 202(1) ("The following situations, among others, may be considered serious reasons for questioning a judge's impartiality and for justifying the judge's recusation: (1) the judge being the spouse of ... the lawyer of one of the parties, or the judge ... being related ... to the lawyer of one of the parties, up to the fourth degree inclusively"); Judges' Council, Guide to Judicial Conduct 19 (March 2020) (England and Wales). ("A judicial officeholder should not sit on a case in which a member of his or her family [spouse or civil partner, parents, children, siblings, father - and mother-in-law, son - and daughter-in-law, and step-children] ... appears as an advocate"); The Council of Chief Justices of Australia and New Zealand, Guide to Judicial Conduct 15 (3d ed. 2017) ("Where the judge is in a relationship of first or second degree to counsel or the solicitor having actual conduct of the case, or the spouse or domestic partner of such counsel or solicitor, most judges would and should disqualify themselves"); High Court of New Zealand, Recusal Guidelines 2.2 (June 12, 2017) ("A judge should recuse himself or herself where a ... lawyer ... is a close relative or domestic partner of the judge"); 28 U.S.C. Judiciary and Judicial Procedure § 455(b)(5)(ii) ("[A judge should disqualify himself if the judge] or his spouse, or a person within the third degree of relationship [children, parents, grandchildren, grandparents, siblings, great grandchildren, nephews and nieces, great grandparents, and aunts and uncles] to either of them, or the spouse of such

observer would conclude that such a close relationship would disqualify a judge from hearing a case because of perceived partiality.

[116] It is less clear how the notional reasonable observer would respond if nonfamily relationships between the judge and counsel – former law partners, current and former counsel, good friends, and former judicial colleagues who appear as counsel, for example – are under review.

[117] The Canadian Judicial Council has stated that "[w]ith respect to the judge's former law partners, or associates … the traditional approach is to use a 'cooling off period', often established by local tradition at 2, 3 or 5 years and in any event at least as long as there is any indebtedness between the firm and the judge."[57]

[118] In some circumstances an existing solicitor-client relationship[58] or a prior solicitor-client relationship between the judge and counsel may lead to a reasonable apprehension of bias.[59]

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a person ... [i]s acting as a lawyer in the proceeding"); Judicial Integrity Group, Commentary on the Bangalore Principles of Judicial Conduct 92 (2007) ("A judge is ordinarily required to recused himself or herself if any member of the judge's family (including a fiancé or fiancée) has participated or has entered an appearance as counsel"); (United Nations) & Council of ASEAN Chief Justices, Model Principles of Judicial Conduct 4.3 (2018). https://cacj-ajp.org/model-principles-of-judicial-conduct. ("A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant").

[57] Ethical Principles for Judges 52 (2004).

[58] See *Carbone v. McMahon*, 2017 ABCA 384, ¶ 72; 28 Admin. L.R. 6th 136, 163-64 per Wakeling JA. ("If there is an ongoing file, a reasonable observer may be troubled by the fact that it is possible ... a positive outcome for the lawyer's client may cause the judge's lawyer to reduce his or her bill") *&* *Berry v. Berry*, 765 So. 2d 855, 857 (Fla. Dist. Ct. App. 2000) (the Court declared that a judge should have declined to hear a divorce matter because the non-moving party's lawyer also acted for the judge in his ongoing divorce proceedings). But see *Taylor v. Lawrence*, [2002] EWCA Civ 90, ¶ 69; [2002] 3 W.L.R. 640, 663 ("no fair-minded observer would reach the conclusion that a judge would so far forget or disregard the obligations imposed by his judicial oath as to allow himself, consciously or unconsciously, to be influenced by the fact that one of the parties before him was represented by solicitors [not the barrister who argued the case] with whom he was himself dealing on a wholly unrelated matter").

[59] *Carbone v. McMahon*, 2017 ABCA 384; 28 Admin. L.R. 6th 136 (the Court declared that a judge could not hear counsel who had previously acted for him under circumstances not known to the Court); *In re Howes*, 880 N.W. 2d 184, 200 (Iowa Sup. Ct. 2016) ("we conclude a reasonable person with knowledge of all the facts on July 25 [the date the judge signed an ex parte order in favor of the party represented by the lawyer who either recently or was still acting for the judge on a personal matter – a dispute with her former husband] might have had a reasonable basis for questioning Judge Howe's impartiality ... even if Judge Howes did not have an ongoing attorney-client relationship with Ms. Pauly on that date. ... When an attorney who contemporaneously represents or recently represented a judge in a personal matter appears before the judge in another case and the judge does not disclose that fact to the parties, the judge's impartiality might reasonably be questioned") *&* *Dodson v. Singing River Hospital System*, 839 So. 2d 533-34 (Miss. Sup. Ct. 2003) ("a reasonable person knowing all the circumstances here would have a reasonable doubt regarding Judge Harkey's impartiality in this case. James Heidelberg, a Colingo Williams partner, served as treasurer in Judge Harkey's election campaign. Another Colingo Williams lawyer served as attorney of record in the estate proceedings of Judge Harkey's mother. Other Colingo Williams lawyers represented Judge Harkey and his wife for

[119] There are no rules in Canada, of which I am aware, that regulate the conduct of lawyers who carry on active practices, part of which is to sit part-time as a member of a tribunal. I suspect that this is because most, if not all, lawyers would never contemplate doing so and it is not a problem anywhere in Canada.

[120] But it is an issue in New South Wales. Rule 101A(3) of the *Legal Profession Uniform Conduct (Barristers) Rules 2015*[60] prohibits a current part-time tribunal member from appearing before the tribunal of which he or she is a member or for a two-year period following the date the barrister ceased to be a tribunal member.

[121] What are the norms respecting the appearance of former judges before the courts?

[122] "In nearly every province there is a restriction on the ability of a [former] judge to appear in court as counsel".[61] Rule 117(b) of the *Rules of The Law Society of Alberta* makes it a condition of the reinstatement of a former judge as a member that "the member must not appear in chambers

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four years in a defective residential construction case. At no time was Judge Harkey or his wife charged for the services rendered in the residential construction case"). See also *University Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F. 3d 1331, 1341 (11th Cir. 2002) ("serving as the decision-maker in one action in which a colleague [co-counsel] in another action represents a party clearly poses the possibility of bias, and thus represents a potential conflict that a reasonable person would easily recognize").

[60] *Legal Profession Uniform Conduct (Barristers) Rules 2015*, r. 101A(3).("A barrister must refuse to accept or retain a brief or instructions to appear before a tribunal that does not sit in divisions or lists of matters to which its members are assigned if ... (a) the barrister is a full time, part time or sessional member of the tribunal, or (b) the appearance would occur less than 2 years after the barrister ceased to be a member of the tribunal").

[61] Pitel & Bortolin, "Revising Canada's Ethical Rules for Judges Returning to Practice", 34 Dalhousie L.J. 483, 486 (2011). See also Appleby & Blackham, "The Growing Imperative to Reform Ethical Regulation of Former Judges", 67 Int'l & Comp. L.Q. 505, 524 & 526 (2018) ("Like England and Wales, there is a loose convention in Australia that judges will not return to private practice upon retirement or, at least, that former judges will not appear before the court where they sat. ... In New Zealand, while there is a convention that judges will not return to practice, this has come under increasing strain since judges appointed after 1992 were moved to a defined contribution pension plan, where the judges themselves bear the risk of investment performance"). "Writing in 1993, Stevens noted that the Advisory Group on the Judiciary had observed that '[n]o member of the Higher Judiciary ha[d] returned to the Bar after retirement for nearly three-hundred years and they may no longer do so'". Clark, "Judicial Retirement and Return to Practice", 60 Cath. U. L. Rev. 841, 877 (2011). It is probably the case that a much larger portion of retired American judges return to practice than is the case in other common law jurisdictions. Clark, "Judicial Retirement and Return to Practice", 60 Cath. U.L. Rev. 841, 866-67 (2011) ("I compiled a list of all Article III judges [federally appointed judges] who had resigned [federally appointed judges have life tenure] between January 1, 1993 and December 31, 2010 and examined these judges' post-bench activities to determine the contemporary return-to-practice rate. Sixty-six percent of the 1993-2010 resignees – twenty-one of thirty-two – returned to practice. For retirees during this period, I found that 40.66% – thirty-seven of ninety-one – returned to practice. Combining the data, 47.15% – 58 of 123 – of Article III judges who resigned or retired between 1993 and 2010 returned to practice at some point following their bench service").

or in any court in Alberta as a barrister and solicitor without first obtaining the approval of the Benchers which may be given with or without conditions".[62]

[123] What restrictions must a lawyer whose appointment to the bench has been announced but has not taken effect observe? This is not a problem in Canadian jurisdictions with which I am familiar. But it is in Australia and New Zealand. The Council of Chief Justices of Australia and New Zealand addressed this question in its 2017 Guide to Judicial Conduct:[63] "It is generally accepted that, during this period, an appointee should not appear as counsel in the court to which he or she has been appointed or in a lower court or tribunal in the same hierarchy".

[124] Why are regulators consistently opposed to former or soon-to-be judges appearing as counsel before the courts?[64]

[125] The notional reasonable observer would conclude that the party represented by a former or soon-to-be judge might have an advantage because of the collegiality factor and that this condition undermines the impartiality doctrine.[65]

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[62] The Law Society of Alberta, *The Rules of the Law Society of Alberta* (June 26, 2020). For other post-retirement rules see Federation of Law Societies of Canada, Model Code of Professional Conduct, §7.7.1 (October 19, 2019) ("A judge who returns to practice after retiring, resigning or being removed from the bench must not, for a period of three years, unless the governing body approves on the basis of exceptional circumstances, appear as a lawyer before the court of which the former judge was a member or before any courts of inferior jurisdiction to that court or before any administrative board or tribunal over which that court exercised an appellate or judicial review jurisdiction in any province in which the judge exercised judicial functions"); *Legal Profession Uniform Conduct (Barristers) Rules 2015*, r. 101A(2) (New South Wales) ("A barrister must refuse to accept or retain a brief or instructions to appear before a court if: (a) the brief is to appear before a court: (i) of which the barrister is or was formerly a judge, or (ii) from which appeals lie to a court of which the barrister is or was formerly a judge, and (b) the appearance would occur less than 5 years after the barrister ceased to be a judge of the court") & International Association of Judicial Independence and World Peace, "Bologna and Milan Global Code of Judicial Ethics" (2015) ss. 9.3.2 ("Practice as a solicitor: A judge may have an active association with a firm of solicitors, whether as a partner, consultant, or in some other capacity") & 9.3.2.1 ("Preferably this will not be sooner than a year or so after retirement"). See also Canadian Judicial Council, Draft Ethical Principles for Judges 48 (November 20, 2019) ("A former judge could act as an arbitrator, mediator or commissioner. However, former judges should not appear as counsel before a court or in administrative or dispute resolution proceedings in Canada").

[63] Guide to Judicial Conduct 29 (3d ed. 2017).

[64] Pitel & Bortolin, "Revising Canada's Ethical Rules for Judges Returning to Practice", 34 Dalhousie L.J. 483, 524 (2011) ("A review of Canadian and American ethical rules and case law reveals no fewer than seven unique concerns associated with former judges returning to practice: undue influence over judges as the result of personal relationships; undue influence over judges and juries as the result of judicial reverence, conflicts of professional obligations, conflicts of personal interests, harm to the integrity of the administration of justice, the potential deception of the public regarding a lawyer's qualifications, and the potential for the appearance of impropriety").

[65] Appleby & Blackham, "The Growing Imperative To Reform Ethical Regulation of Former Judges", 67 Int'l Comp. L.Q. 505, 520-21 (2018) ("There are usually two impartiality-based concerns associated with return to practice. They reveal that judicial return to practice is both an issue to the conduct of former judges, and also implicates serving

[126] Needless to say, a sitting judge, if a party to a proceeding, should always appear by counsel.[66]

b. Statutory Delegates in Alberta

[127] Satisfied that the notional reasonable observer would be interested in reviewing any codes of conduct that reflect a general consensus in the community, I have selected codes of conduct that govern Alberta's Municipal Government Board[67] and the numerous subdivision and development appeal boards that have been established under section 627(1) of the *Municipal Government Act*.[68]

judges. The first concern is that a judge returning to practice may be given preferential treatment when appearing before the court by reason of their former position. ... The second concern is that serving judges, knowing they wish to return to practice once they resign or retire, may act in an improper, partial way while on the bench in an effort to curry favour with future employers") & The Law Society of Alberta, Code of Conduct, R. 5.1-3, Commentary 5(b) (June 26, 2020) ("A lawyer may at one time have had an association with a court ... in the role of a judge ... . The lawyer's subsequent appearance before the ... [court] as counsel may be improper because of actual or perceived collegiality with the current adjudicators, or because of a suspected 'reverse bias' that could operate to the detriment of the lawyer's client. The passage of time will in most cases mitigate these considerations, two years being a standard benchmark").

[66] Suppose a trial or an appeal judge is a defendant in a civil proceeding. The plaintiff alleges that the defendant has failed to pay the contract price for a home renovation. The judge must retain counsel in both the trial and appeal courts. The presence of counsel reduces the risk to an acceptably low level that the notional reasonable observer would conclude that the court is partial. The Canadian Judicial Council does not deal with this issue in its 2004 Ethical Principles for Judges or its 2019 Draft Ethical Principles for Judges. But the latter does state that a former judge should not appear in a representative capacity before any court. Canadian Judicial Council, Draft Ethical Principles for Judges 48 (2019). The explanation for this recommendation supports the notion that a sitting judge should not appear personally in court on his own behalf. England and Wales' 2020 Guide to Judicial Conduct also says little on the subject. The 2013 version of the Guide contained this passage: "The conditions of appointment to judicial office provide that judges accept appointment on the understanding that following the termination of their appointment they will not return to private practice as a barrister or a solicitor and will not provide services on whatever basis as an advocate in any court or tribunal in England and Wales or elsewhere, including any international court or tribunal in return for remuneration of any kind, or offer to provide legal advice to any person. The terms of appointment accept that a former judge may provide services as an independent arbitrator/mediator and may receive remuneration for lectures, talks or articles". Judiciary of England and Wales, Guide to Judicial Conduct 28 (March 2013). The Council of Chief Justices of Australia and New Zealand Guide to Judicial Conduct 33 (3d ed. 2017) opines that "[j]udges should be circumspect about becoming involved in personal litigation, even if the litigation is in another court. Good sense must prevail and although this does not mean that a judge should abandon the legitimate pursuit or defence of private interests, their protection needs to be conducted with great caution to avoid creating any impression that the judge is taking improper advantage of his or her position". Canon 4 of the Code of Conduct for United States Judges 13 (effective March 12, 2019) allows a judge to "act pro se".

[67] Code of Conduct and Ethics for the Municipal Government Board.

[68] Calgary Subdivision and Development Appeal Board Code of Conduct (approved July 24, 2012, amended March 18, 2016); Edmonton's Code of Ethics for Members of the Subdivision and Development Appeal Board (December 2006) ("Members [of the subdivision and development appeal board] ... [must c]onduct themselves in such a way as to endeavour to ensure that ... persons appearing before them receive a full and fair hearing and ... receive the knowledgeable and unbiased application of the laws of the Province of Alberta and the bylaws and policies of the City

[128] They reveal some important features.

[129] Sections 8.1 and 8.2 of Alberta's Code of Conduct and Ethics for the Municipal Government Board expressly prohibit its members from appearing as witnesses or advocates "before a panel composed of other members [of the Municipal Government Board] or before a municipal Assessment Review Board" and stipulate that any "member … who files a complaint, appeal or other application with the Board or with an Assessment Review Board must be represented by another person".

[130] The Calgary Subdivision and Development Appeal Board Code of Conduct declares the commitment of the Board to impartial adjudication. While the Calgary Code of Conduct does not expressly prohibit a Board member from appearing before it as an advocate for third parties, it does so by implication. Sections 7.2.6 and 7.2.8 are the applicable provisions:

> 7.2.6 A Board Member shall not act as a professional or legal consultant, directly or indirectly, in the preparation of a matter to be heard by the Board nor shall she or he assist an appellant, applicant, respondent, agent or affected party in the preparation of any material or argument to the Board.
>
> …
>
> 7.2.8 Board Members shall not engage in conduct that would exploit their position on the Board in any way.

[131] I fail to see how a Board member who appears as an advocate before the Board is not exploiting his position.

[132] The Calgary Code of Conduct does not contain a comparable provision to section 8.2 of the Municipal Government Board's Code of Conduct. But section 7.2.3(b) does contemplate that a Board member may be a party before the Board: "A Board Member shall not participate as a panel member on any hearings in which … (b) [t]he Board Member is an appellant or applicant as referred to in Part 17, Division 10, of the MGA". The provision does nothing more than prohibit a Board member sitting on a panel from hearing an appeal to which he or she is a party. I note that

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of Edmonton"). *The Appeal Boards Bylaw*, Bylaw No. 3619/2019, s. 19(1) (Red Deer) ("The Subdivision and Development Appeal Board will perform the functions and duties of a subdivision and development appeal board in accordance with the MGA"); *Procedure Bylaw*, Bylaw C-1299, s. 8.2 (Grande Prairie 2019) (a member of the subdivision and development appeal board must not participate in any appeal in which the member has a pecuniary interest); *Subdivision Development and Appeal Board Bylaw*, Bylaw 56-2017, s. 7 (Strathcona County) ("The Subdivision and Development Appeal Board will conduct itself in accordance with the *Municipal Government Act*, and County bylaws, policies and procedures"); *Code of Conduct Bylaw*, No. B-20/2017, s. 5.31 (Airdrie) ("[A] ... Board Member shall be free from bias with respect to any matter that requires a decision of ... a Board); *Council Code of Conduct Bylaw*, Bylaw 6125, s. 11.2 (Lethbridge 2018) ("No ... [member of City Council] shall act as a paid agent to advocate on behalf of any individual, organization or corporate identity before ... any ... body established by Council").

the Calgary Code of Conduct does not authorize a Board member to appear personally before the Board if he or she is party to an appeal. Sections 7.2.6 and 7.2.8 suggest that a Board member cannot appear personally before the Board and must retain counsel or someone else if he or she is a party.

[133] Edmonton's Code of Ethics is surprisingly brief. Nonetheless, it is clear that the Board members must "[a]pproach every Hearing with an open mind" and cannot "[u]se their position for private gain". These two values strongly suggest that an Edmonton Board member may not appear before the Board as an advocate and if a party to appeal, should retain counsel or someone else to act for them.

[134] Alberta Municipal Affairs has published a Subdivision and Development Appeal Board Training Guidebook.[69] It opines that "[a] … [subdivision and development appeal board] must ensure that it does not adopt procedures that align itself with or against one party, or that appear to align itself with or against one party".

[135] The notional reasonable observer would study these documents and consider some typical hypotheticals before forming an opinion on the issues that may confront an Appeal Board.

[136] Suppose County D's development authority issues a development permit to P, an Appeal Board member, to operate a pet grooming business from P's residence.[70] P's neighbors are up in arms. They anticipate that P's business will diminish the quality of life residents of the neighborhood currently enjoy and diminish property values. P's business will bring increased traffic, noise – from both increased traffic and barking dogs – and an accumulation of dog waste in the vicinity of P's business. Twenty of P's neighbors file appeals with County D's subdivision and development appeal board.

[137] How would the notional reasonable observer react if P defended his development permit and was a respondent? Would the notional reasonable observer accept that P could be a respondent? Yes. While the notional reasonable observer would be troubled by the potential harm associated with an Appeal Board member being a party before the Appeal Board, the notional reasonable observer would accept that it would be imposing too great a limitation on an Appeal Board member's rights as a citizen if he or she could not be a respondent and defend a challenged development permit. The observer would realize that no one else was in a position comparable to P's and that P could not rely on anyone else to defend his interests. But the notional observer would insist that P retain counsel or ask someone to speak for him. If counsel or someone else spoke for P this would reduce of perceived-bias risk below the cutoff point – 50.1%. If P appeared

[69] June 2018.

[70] See *Bergstrom v. Town of Beaumont*, 2016 ABCA 221; 53 M.P.L.R. 5th 28 (chambers).

personally, the notional reasonable observer would conclude that the risk factor exceeded the cutoff point.

[138] Suppose P is not an Appeal Board member. But R, P's next-door neighbor, is. Could R appeal P's development permit to the Appeal Board and appear before the Appeal Board to support the appeal and challenge P's development permit? Keep in mind that nineteen other neighbors have also appealed.

[139] How would the notional reasonable observer react? Again, the observer would be uncomfortable with the potential risk that an Appeal Board member's status as an appellant might unduly influence the other Appeal Board members hearing the appeal. The observer would also appreciate that in the first hypothetical the Appeal Board member did not invoke the jurisdiction of the Appeal Board, unlike the second hypothetical, where the Appeal Board member did as an appellant. The notional reasonable observer would also note that R's appearance before the Appeal Board is not necessary to ensure that R's objections to the grooming business are brought before the Appeal Board. There are nineteen other neighbors who have the same interests as R does and are likely to advance the arguments R would make. The notional observer would err on the side of caution and conclude that R should not appeal if others have already filed appeals and if R filed the first appeal, he should withdraw his appeal. In this scenario, the risk of perceived bias jumps to an unacceptable level.

[140] Suppose all P's neighbors except R have pets or are related to P and nobody appeals. Could R appeal? Yes. There would be no one else before the Appeal Board who would advance arguments in opposition to the pet-grooming development permit.

[141] But R must retain counsel or have someone else speak on R's behalf. R must not personally appear before the Appeal Board in any capacity. R's personal appearance would escalate to an unacceptable level the risk that the Appeal Board members hearing R's appeal would be partial.

[142] How would the notional reasonable observer process all this data?

4. The Notional Reasonable Observer's Conclusions

[143] If a former judge is effectively prohibited from appearing before the court on which he or she served, and which is staffed by professional judges, is it not obvious that a current member of the Appeal Board could never appear before the Appeal Board, most of the members of which are not lawyers?

[144] If Alberta's Code of Conduct and Ethics for the Municipal Government Board expressly prohibits its members from appearing before the Municipal Government Board, would it not make sense to apply a similar standard to Appeal Board members? Is there a compelling reason to distinguish the two boards?

[145] I am satisfied that the common law ban on perceived partial adjudicators precludes an Appeal Board member from personally appearing before the Appeal Board in any capacity[71] and an Appeal Board member may only be a party if he or she is the holder of a challenged development permit, or is an appellant, and only if there is no other appellant whose interests are substantially the same as those of the Appeal Board member. If an Appeal Board member may be a party, he or she must retain someone to represent him or her before the Appeal Board.

[146] This onerous standard will not cause the notional reasonable observer to be free of any concern about the partiality of an Appeal Board if an Appeal Board member is a party – either as an appellant or a respondent – but it will be sufficient to preclude the notional reasonable observer from concluding that it is more likely than not that the Appeal Board is partial.

[147] The notional reasonable observer would inevitably conclude that the appearance by an Appeal Board member in any capacity would probably undermine the impartiality of the other Appeal Board members. Given that the notional reasonable observer must have a good grasp of how the appeal process functions, the notional reasonable observer would know that most members of subdivision and development appeal boards are not lawyers[72] and probably do not have sufficient training to disregard irrelevant considerations when making decisions.[73] There is a very real risk that Appeal Board members will be influenced by the fact that a colleague is appearing before them and fail to decide the appeal based on the merits.[74] This is human nature.

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[71] This prohibition includes written submissions.

[72] Wakeling, "Frederick A. Laux, Q.C. Memorial Lecture", 55 Alta. L. Rev. 839, 844 & 845 (2018) (one-quarter of the members of the subdivision and development appeal boards in Edmonton and Calgary were lawyers; only nine percent of other selected boards were lawyers). Courts have taken judicial notice of the composition of statutory delegates. E.g., *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105, 1112 ("Members of the Board [of Governors] are drawn from all constituencies of the community. … Few, if any, of the members of the Board will be legally trained").

[73] *Alberta v. McGeady*, 2014 ABQB 104, ¶ 33; [2014] 7 W.W.R. 559, 575, aff'd, 2015 ABCA 54, leave to appeal ref'd, [2015] SCCA No. 91 ("The conduct of the Appeal Board demonstrates such disregard for fundamental legal principles that it can only be explained by the fact that its members are not legally trained. From the perspective of a person with legal training its conduct is incomprehensible"); *L/3 Communications / Spar Aerospace Ltd. v. International Ass'n of Machinists and Aerospace Workers, Northgate Lodge 1579*, 142 L.A.C. 4th 1, 20 (Wakeling, Q.C. 2005) ("a legal education imparts a mental discipline which allows a lawyer to categorize conditions as relevant or irrelevant depending on the issue under review and to ignore irrelevant considerations when making a decision") & *Johnson v. Johnson*, [2000] HCA 48, ¶ 12; 201 C.L.R. 488, 493 per Gleeson, C.J., McHugh, Gummow & Hayne, JJ ("two things need to be remembered: the observer is taken to be reasonable; and the person being observed is 'a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial'"]. We acknowledge that the Subdivision and Development Appeal Book Training Guidebook (June 2018) reminds those who read it that "[t]he ... [subdivision and development appeal board] must only take into account relevant considerations".

[74] *Hannam v. Bradford Corp.*, [1970] 1 W.L.R. 937, 946 (C.A.) per Widgery, L.J. ("when one is used to working with other people in a group or on a committee, there must be a built-in tendency to support the decision of that committee,

[148] Decisions of the Appellate Committee of the House of Lords and Scotland's Court of Session Inner House are consistent with these conclusions.

[149] In *Lawal v. Northern Spirit Ltd.*,[75] the House of Lords declared that the Employment Appeal Tribunal should not allow senior counsel who were part-time judges of the Employment Appeal Tribunal – consisting of judges and lay members – to argue cases before a panel of the Appeal Tribunal on which there is a lay member who had previously sat with counsel when he or she served as a part-time judge. Here is the essential component of the report of the Appellate Committee:[76]

> The principle to be applied is … whether a fair-minded and informed observer, having considered the given facts, would conclude that there was a real possibility that the tribunal was biased. Concretely, would such an observer consider that it was reasonably possible that the wing member may be subconsciously biased? The observer is likely to approach the matter on the basis that the lay members look to the judge for guidance on the law, and can be expected to develop a fairly close relationship of trust and confidence with the judge. The observer may also be credited with knowledge that a recorder [a part-time judge], who in a criminal case has sat with jurors, may not subsequently appear as counsel in a case in which one or more of those jurors serve. … But the observer is likely to regard the practice forbidding part-time judges in the employment tribunal [not the Employment Appeal Tribunal] from appearing as counsel before an employment tribunal which includes lay members with whom they had previously sat as very much in point. … The observer … is likely to take the view that the same principle ought to apply to the … [Employment Appeal Tribunal].

[150] The Appeal Committee was mindful of the fact that the "[t]he wing members are never lawyers and have no legal training".[77]

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even though one tries to fight against it") & *McGovern v. Ku-ring-gai Council*, [2008] NSWCA 209, ¶ 40; 251 A.L.R. 558, 565 per Spigelman, C.J. ("the independent observer might reasonably believe that the influence on the others of the person(s) who manifested bias of that character could well go beyond the usual process of internal debate. Accordingly, an independent observer could reasonably conclude that the entire collegiate body may not bring an impartial mind to the decision-making process").

[75] [2003] UKHL 35; [2004] 1 All E.R. 187. See also *Newsco Insider Ltd.'s Trade Mark Application*, [2018] R.P.C. 10, 472-73 ("I do not think that the Appointed Person tribunal could be said to be art. 6 of the [Convention for the Protection of Human Rights and Fundamental Freedoms] - compliant were it to adopt a rule that its members were free to appear as advocates for any party before the tribunal in the absence of the informed consent of the other party").

[76] *Lawal v. Northern Spirit Ltd.*, [2003] UKHL 35, ¶ 21; [2004] 1 All E.R. 187, 196.

[77] Id. at ¶ 13; [2004] 1 All E.R. at 192.

[151] The Scottish case, *Secretary of State for Work and Pensions v. Cunningham*,[78] dealt with an unusual problem experienced by the Social Security Appeal Tribunal. One of the witnesses, a medical doctor, was a former member of the Social Security Appeal Tribunal, who had sat with the chair during twenty-two sessions and the other member for fourteen sessions. On three sessions, the medical doctor sat with both of the members who heard the case in which he gave expert testimony. All these sessions were within two years of the hearing under review. Lord Marnoch, for the Court, held that "the relationship which might be expected to have developed between Dr. B. and two of the three members of the tribunal is such as would lead even the most informed observer to think that there was a real possibility of subconscious bias in favour of Dr. B.".[79]

B. The *Municipal Government Act* Does Not Clearly State that the Common Law Obligation on Adjudicators To Be Impartial Does Not Apply to Subdivision and Development Appeal Boards

[152] A statute may change the common law.[80] But a statute must clearly declare that its purpose is to do so. "[S]tatutes will not be interpreted as changing the common law unless they effect the change with clarity".[81]

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[78] 2005 1 S.C. 19 (2004).

[79] Id. 23.

[80] *Ocean Port Hotel Ltd. v. General Manager, Liquor Control and Licensing Branch*, 2001 SCC 52, ¶ 19; [2001] 2 S.C.R. 781, 792-93 ("absent a constitutional challenge, a statutory regime prevails over common law principles of natural justice"); *Brosseau v. Alberta Securities Comm.*, [1989] 1 S.C.R. 301, 310 ("Administrative tribunals are created for a variety of reasons and to respond to a variety of needs. ... In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislature"); *Township of Innisfil v. Township of Vespra*, [1981] 2 S.C.R. 145, 173 ("A court will require the clearest statutory direction ... to enable the executive branch of government to give binding policy direction to an administrative tribunal and to make such directions immune from challenge by cross-examination or otherwise by the objectors"); *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105, 1113 ("To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument") & *Ringrose v. College of Physicians and Surgeons*, [1977] 1 S.C.R. 814, 824 ("no reasonable apprehension of bias is to be entertained when the statute itself prescribes overlapping of functions"). See G. Régimbald, Canadian Administrative Law 386 (2d ed. 2015) ("the rule against bias, like any other rule of procedural fairness, may be ousted by statute"); F. Laux & G. Stewart-Palmer, Planning Law and Practice in Alberta 10-14 (looseleaf 4th ed. January 2019) ("At the time the institutional bias cases were decided, Parliament and provincial legislatures were sovereign creatures within their assigned powers and, as such, could quite lawfully set up a regime that, at common law, would have been viewed as contrary to the principles of natural justice and fair play. Since then, legislative sovereignty has been substantially diminished by the *Charter*") & R. Sullivan, Sullivan on the Construction of Statutes 537 (6th ed. 2014) ("It follows from the principle of legislative sovereignty that validly enacted legislation is paramount over the common law. Acting within its constitutionally defined jurisdiction, the legislature can change, add to or displace the common law as it thinks appropriate and the courts must give effect to that intention regardless of any reservations they might have concerning its wisdom").

[81] A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 318 (2012). See *Canada v. Khosa*, 2009 SCC 12, ¶ 50; [2009] 1 S.C.R. 339, 373 ("the legislature can by clear and explicit language oust the common law");

[153] The *Municipal Government Act*[82] has not clearly altered the common law as I have described its impact on the Appeal Board and its members.

[154] The *Municipal Government Act* provides no standards that govern the conduct of all members of an appeal board as adjudicators – what they must and must not do.[83]

Ocean Port Hotel Ltd. v. British Columbia, 2001 SCC 52, ¶ 22; [2001] 2 S.C.R. 781, 794 ("like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication"); *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 1077 ("in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law"); *The Queen v. Corbett*, [1988] 1 S.C.R. 670, 700-01 ("To admit such a discretion would be tantamount to holding that Parliament could not by clear legislative enactment alter the common law") & *Schiell v. Morrison*, [1930] 2 W.W.R. 737, 741 (Sask. C.A. 1930) ("if it is clear that it is the intention of the Legislature in passing a statute to abrogate the common law, [the common-law doctrine] … must give way, and the provisions of the statute must prevail"). See also *The Queen v. Secretary of State for the Home Department Ex p. Simms*, [1999] 3 All E.R. 400, 412 (H.L.) per Lord Hoffmann ("Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. … The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual") & *Resolution Chemicals Ltd. v. H Lundbeck A/S*, [2013] EWHC 3160 (Pat), ¶ 37, aff'd, [2013] EWCA Civ 1515 ("The right to a trial by an independent and impartial tribunal is a fundamental right which is guaranteed both at common law and by Article 6(1) of the European Convention on Human Rights").

[82] R.S.A. 2000, c. M-25.

[83] *Ocean Port Hotel Ltd. v. General Manager, Liquor Control and Licensing Branch*, 2001 SCC 52, ¶¶ 21 & 22; [2001] 2 S.C.R. 781, 793 & 794 ("Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with the principles of natural justice. … It is not open to a court to apply a common law rule in the face of a clear statutory direction [to the contrary]"); *The Queen v. Secretary of State for the Home Department ex rel. Citizens U.K.*, [2018] EWCA Civ 1812, ¶ 68; [2019] 1 All E.R. 416, 429 per Singh, L.J. ("the duty to act fairly or the requirements of procedural fairness (what in the past were called the rules of natural justice) will readily be implied into a statutory framework even when the legislation is silent and does not expressly require any particular procedure to be followed") & *Dover District Council v. Campaign to Protect Rural England (Kent)*, [2017] UKSC 79, ¶¶ 51 & 53-56; [2018] 2 All E.R. 121, 137 & 139 per Lord Carnwath ("Public authorities are under no general common law duty to give reasons for their decisions; but it is well-established that fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed … [Counsel for the Council] submitted that this decision should be 'treated with care', against the background of the government's decision in 2013 to abrogate the statutory duty to give reasons for grant of permission, planning law being a creature of statute … Although planning law is a creature of statute, the proper interpretation of the statute is underpinned by general principles, properly referred to as derived from the common law. *Doody* itself involved such an application of the common law principle of 'fairness' in a statutory context … In the application of the principle to planning decisions, I see no reason to distinguish between a Ministerial inquiry, and the less formal, but equally public, decision-making process of a local planning authority such as in this case. … The existence of a common law duty to disclose the reasons for a decision, supplementing the statutory rules, is not inconsistent with the abrogation in 2013 of the specific duty imposed by the former rules to give reasons for the grant of permission. … In circumstances where

[155] Section 172(1) requires a councillor who has a pecuniary interest in a matter before an appeal board on which the councillor sits to disclose the general nature of the pecuniary interest, abstain from voting, abstain from any discussion and leave the room.

[156] Section 687 does not. It simply identifies who the appeal board must hear, directs the appeal board to give reasons and lists the instruments which govern its deliberation.

[157] Section 146.1(3) allows a council to pass a bylaw establishing a code of conduct for subdivision and development appeal boards. It says nothing about the abridgement of the common law prohibition against partial adjudicators.

[158] This means that no municipality enacting a bylaw under section 146.1(3) may abridge in any way the common law prohibition against impartial adjudicators. A bylaw may pass a code of conduct more onerous than the common law but not less onerous. For example, a bylaw may state that an appeal board may not hear from a former appeal board member until a two-year cooling off period has expired. But a bylaw may not allow a sitting appeal board member to appear before an appeal board.

C. Rocky View County's *Board and Committee Code of Conduct Bylaw* Mandates an Impartial Appeal Board

[159] Does any part of Rocky View County's *Board and Committee Code of Conduct Bylaw*[84] diminish the vigor of the common law?

[160] The *Bylaw* unequivocally demonstrates the County's desire to have an Appeal Board that functions impartially[85] and discharges its duty in a manner that "will encourage public respect for Rocky View County as an institution".[86]

[161] Section 34 expressly declares that an Appeal Board must be impartial: "Members must be free from undue influence and approach decision-making with an open mind that is capable of persuasion".

[162] Other *Bylaw* provisions reinforce the fundamental message that Appeal Board members must be impartial.

[163] Section 37 stipulates that Appeal Board members "must not act as a paid agent to advocate on behalf of any individual, organization, or corporate entity before … [the Appeal Board]". This

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the objective [of transparency] is not achieved by other means, there should be no objection to the common law filling the gap").

[84] *Bylaw* C-7855-2018.

[85] Id. s. 34.

[86] Id. s. 18.

means that an Appeal Board member cannot demand or accept a fee for making oral or written submissions or both before the Appeal Board on behalf of anyone.

[164] And what is the rationale for section 37?

[165] Three-fold.

[166] First, the common law speaks against an Appeal Board member appearing before the Appeal Board. Rocky View Council had no jurisdiction under the *Municipal Government Act* to abridge the common law.

[167] Second, according to section 33 of the *Bylaw*, an Appeal Board member "must not act or appear to act in order to benefit, financially or otherwise, themselves". In other words, an Appeal Board member cannot use his or her status as an Appeal Board member for personal gain. It is obvious that the likelihood a person would be willing to pay an Appeal Board member – unless he or she was a lawyer – a fee for appearing before the Appeal Board if the potential advocate was not an Appeal Board member is very low, if not nonexistent.

[168] Third, an Appeal Board member who advocates on someone's behalf before the Appeal Board may unduly influence a fellow Appeal Board member. Section 34 of the *Bylaw* speaks against "undue influence".

[169] This fundamental thrust of the *Bylaw* accords with the demands of the common law doctrine prohibiting partial adjudicators.

[170] What is the significance of the fact that section 37 of the *Bylaw* does not proscribe an Appeal Board member appearing before the Appeal Board as an unpaid advocate? Is this an implicit statement that an Appeal Board member may appear before the Appeal Board as an unpaid advocate?

[171] No.

[172] First, Rocky View Council had no power to enact such a provision.[87]

[87] R. Sullivan, Sullivan on the Construction of Statutes 248 (6th ed. 2014) ("An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. ... The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature").

[173] Second, the *Bylaw* would have to clearly state that an Appeal Board member has the right to appear before the Appeal Board as an unpaid advocate because it is a blatant conflict with the common law doctrine against partial adjudicators.

[174] In the context of a bylaw that bans undue influence and promotes impartial decision making, any form of advocacy by an Appeal Board member before the Appeal Board is unacceptable. Justice Scalia and Professor Garner explain the importance of context:[88]

> The sign outside a restaurant "No dogs allowed" cannot be thought to mean that no other creatures are excluded – as if pet monkeys, potbellied pigs, and baby elephants might be quite welcome. Dogs are specifically addressed because they are animals that customers are most likely to bring in; nothing is implied about other animals.

[175] Suppose a shopping center posted a sign at its entrances prohibiting patrons from bringing pets with them. If a restaurant inside the shopping center posted a sign telling customers that dogs were not allowed on the premises, an observer could conclude that the restaurant's sign, in this context, was unnecessary – the important sign was the one at the entrance.

[176] This is the same situation under the *Bylaw*. The key message is delivered in section 34 – there is a ban on Appeal Board member conduct that unduly interferes with the ability of Appeal Board members to decide appeals impartially. There is no need for any express ban on paid or unpaid advocacy and the *Bylaw* does not state that an Appeal Board member may appear before the Appeal Board as an advocate.[89]

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[88] A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 107 (2012).

[89] *The Queen v. K.C. Irving Ltd.*, [1976] 2 S.C.R. 366, 370 (1975) (the Court held that an application for a time extension filed after the deadline for leave to appeal a *Criminal Code* matter to the Supreme Court had expired could be considered even though other *Criminal Code* provisions, unlike the one invoked, expressly stated that a time extension may be applied for before or after the expiration of the deadline: "Under rule 108 of this Court's Rules it is provided generally that time requirements may be abridged or enlarged upon such terms, if any, as the justice of the case may require notwithstanding that application is not made until after the expiration of the time appointed or allowed. I prefer to adopt this approach in assessing the language of ss. 618(1)(b), and 621(1)(b) and, in the result, I would hold that the Court or a Judge has jurisdiction to extend the time for applying for leave to appeal, notwithstanding that the motion for extension is not made within the prescribed twenty-one day period following the judgment sought to be appealed"); *Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board*, [1953] 2 S.C.R. 140, 157 per Kerwin & Estey, JJ. (the Court held that the Labour Relations Board could not revoke the union's status as a certified bargaining agent without notice having been given to the union just because some provisions expressly mandated notice and the provision the Board invoked did not: "since the Legislature must be presumed to know that notice is required by the general rule, it would be necessary for it to use explicit terms in order to absolve the Board from the necessity of giving [the union] notice") *& Turgeon v. Dominion Bank*, [1930] S.C.R. 67, 71 (the Court concluded that the Bank lawfully held an assignment of its borrower's fire insurance policies as a form of security, because it is captured by a general provision in *The Bank Act*, even though fire insurance policies were not amongst a list of described securities elsewhere in the Act: "One has to realize ... that sometimes unnecessary

[177] Third, a ban on unpaid advocacy is completely consistent with section 34 of the *Bylaw*.

[178] To summarize, the absence in the *Bylaw* of any statement prohibiting an Appeal Board member from acting as an unpaid advocate before the Appeal Board does not mean that the *Bylaw* sanctions the appearance of an Appeal Board member before the Appeal Board as an unpaid advocate.

[179] The *Bylaw's* implicit message, taking into account section 34 of the *Bylaw*, is that Appeal Board members must not serve as unpaid advocates. This is because the harm associated with an Appeal Board member acting as a paid advocate arises not solely from the fact that the Appeal Board member is paid to do so – having likely been chosen for this role on account of his or her position as a member of the Appeal Board and thus reaping financial gains as a result of that position – but also because the appearance of an Appeal Board member as an advocate undermines the impartiality of the sitting Appeal Board members. This prohibition both prevents a Board member from using his or her status as an Appeal Board member for a purpose other than his or her official duties and it safeguards the impartiality of the Appeal Board in its decision-making.

[180] This determination creates no hardship for the residents of Rocky View County.

[181] It would not be necessary for an Appeal Board member to appear as an advocate for anybody. There are skilled lawyers who specialize in development law and in routine matters most property owners can easily speak for themselves.

[182] I now turn to the next question.

[183] May an Appeal Board member be a party to a proceeding before the Appeal Board?

[184] Section 34 focuses the inquiry – will the party status of an Appeal Board member before the Appeal Board unduly influence the Appeal Board members hearing the appeal and jeopardize the impartiality of the sitting Appeal Board members?

[185] Schedule B of the *Bylaw* is the only part that addresses this issue.

[186] Section 5(4) of Schedule B states, in effect, that an Appeal Board member who has a pecuniary interest in a matter before the Appeal Board is entitled to appear before the Appeal Board "as an appellant or a person affected by the matter before the [Appeal] Board".[90]

[187] This provision supports the notion that an Appeal Board member may be a party if he or she has a pecuniary interest in a matter before the Board and is an appellant, the holder of a

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expressions are introduced, *ex abundanti cautela* ... to satisfy an insistent interest, without any thought of limiting the general provision; and so the axiom [*expressio unius est exclusio alterius*] is held not to be of universal application").

[90] Bylaw C-7855-2018, sch. B, s. 5(4).

challenged development permit or is otherwise affected by the matter before the Appeal Board. Section 4(1) of Schedule B provides that an Appeal Board member does not have a pecuniary interest in a matter just because he or she is an elector or a taxpayer.

[188] The common law doctrine does not allow an Appeal Board member to be a party unless he or she is the holder of a challenged development permit or is an appellant with an interest that no other appellant shares. In addition, if an Appeal Board member meets these criteria and may be a party, an Appeal Board member must retain counsel or another person to speak on his or her behalf before the Appeal Board.

[189] These principles govern and must be read as adding extra requirements that an Appeal Board member must meet before he or she can be a party to proceedings before the Appeal Board.

[190] To summarize, the *Bylaw* does not allow an Appeal Board member to personally appear before the Appeal Board in any capacity, either as an advocate, whether paid or unpaid, or in an Appeal Board member's capacity as a party. An Appeal Board member may be a party under two scenarios. First, an Appeal Board member may defend a challenged development permit. Second, an Appeal Board member may be an appellant if there is no other appellant who shares the same interests as the Appeal Board member and the Appeal Board member has a pecuniary interest in the matters before the Appeal Board. But in both of these cases, an Appeal Board member must retain counsel or someone else to speak on his or her behalf.

D. The Notional Reasonable Observer Would Conclude that the Appeal Board Chair's Appearance Before the Appeal Board as an Advocate and on His Own Behalf as a Taxpayer Created an Unacceptably High Risk that the Appeal Board Would Be Partial

[191] Mr. Kochan's appearance before the Appeal Board as an advocate on behalf of his daughter and son-in-law, and their neighbors, and on his own behalf as a taxpayer would cause the notional reasonable observer to conclude on a balance of probabilities that his appearance impaired the ability of the remaining Appeal Board members to impartially adjudicate the merits of the Cartwright conditional development permit.[91] The Appeal Board should not have allowed him to appear before it.

[192] Three facts make a bad situation worse.

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[91] *Bizon v. Bizon*, 2014 ABCA 174, ¶ 54; [2014] 7 W.W.R. 713, 738 per Wakeling, J.A. ("A jurist should not sit … [on] a case where [he or] she has a substantial connection with a person involved in the dispute") & *Locabail Ltd. v. Bayfield Properties Ltd.*, [2000] Q.B. 451, 480 (C.A. 1999) ("a real danger of bias might be well thought to arise … if the judge were closely acquainted with any member of the public involved in the case").

[193] First, Mr. Kochan sat with the Appeal Board members who decided the Cartwright matter on six appeals before the Cartwright matter came up. This prolonged period would heighten the impact of the collegiality factor on the notional reasonable observer.

[194] Second, Mr. Kochan was the chair of the Appeal Board. This heightens the risk that his presence before the Appeal Board imperiled the ability of the sitting members of the Appeal Board to hear the appeal impartially.[92] This is not a decisive factor though. Had Mr. Kochan been an ordinary Appeal Board member, the risk of partiality would still have exceeded 50.1%.

[195] Third, Mr. Kochan announced his intention to recuse himself while he was sitting with his colleagues. He should have informed the Appeal Board clerk as soon as he had decided not to sit so that he would never have been penciled in as an Appeal Board member. He knew two days earlier that he intended to recuse himself.[93] Again, this is not a decisive factor. Had Mr. Kochan made a timely recusal announcement, he still could not have done what he did.

[196] Mr. Kochan's withdrawal protocol could not have been more egregious.

E. Ms. Cartwright Did Not Waive Her Right To Object to the Procedure the Appeal Board Adopted

[197] The respondent argues that Ms. Cartwright waived the right to object to the process the Appeal Board adopted and cannot complain in this Court that the Appeal Board contravened the common law rule against perceived bias.

[198] Waiver has three components.[94]

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[92] See *Secretary of State for Work and Pensions v. Cunningham*, 2005 1 S.C. 19, 22 (Ct. Sess. 2004) ("There is also the distinction that in Lawal the barrister in question had formerly sat as chairman of the tribunal – an office which might be thought to carry particular influence").

[93] Transcript of Oral Questioning of Don Kochan on affidavit sworn October 24, 2019, at 6:20-26.

[94] H. Woolf, J. Jowell, C. Donnelly & I. Hare, De Smith's Judicial Review 572 (8th ed. 2018) ("In order for waiver to arise [in the course of proceedings], there must be both awareness of the right to challenge the adjudicator's decision and a clear and unequivocal act, which, with the required knowledge, amounts to waiver of the right"). For a discussion of waiver in contract law see *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, 500 ("Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them); *Clark v. West*, 86 N.E. 1 (N.Y. Ct. App. 1908) ("A waiver has been defined to be the intentional relinquishment of a known right. It is voluntary and implies an election to dispense with something of value, or forego some advantage which the party waiving it might at its option have demanded or insisted upon"); Black's Law Dictionary 1894 (11th ed. B. Garner ed.-in-chief 2019) ("The voluntary relinquishment or abandonment – express or implied – of a legal right or advantage ... . The party alleged to have waived a right must have both knowledge of the existing right and the intention of foregoing it") & Elkouri & Elkouri, How Arbitration Works 10.75 (8th ed. K. May ed.-in-chief 2016) ("Especially common in arbitration is that

[199] First, the party alleging waiver must establish on a balance of probabilities that the party alleged to have waived a right knew of the facts that would form the basis of the right allegedly waived and that the party alleged to have waived the right knew that he or she had the right alleged to have been waived.[95]

[200] Second, the party alleging waiver must establish on a balance of probabilities that the party alleged to have waived a right intended to give up the right alleged to have been waived.[96]

[201] Third, the party alleging waiver must establish that the party alleged to have waived a right waited an unreasonable length of time to announce an intention to rely on the right alleged to have been waived.

[202] I am satisfied that the respondent has failed to establish that Ms. Cartwright was aware that Mr. Kochan's appearance before the Appeal Board engaged the perceived bias common law doctrine. She said nothing before the Appeal Board that suggested she was alive to the issue and her affidavit filed in support of the permission-to-appeal application does not address the issue.

[203] I would have been surprised if a lay person would have been able to articulate why the Appeal Board erred when it allowed Mr. Kochan to speak as he did.[97] It must be noted that none of the three Appeal Board members who heard the appeal against Ms. Cartwright's conditional

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species of waiver known in law as 'acquiesence'. This term denotes a waiver that arises by tacit consent or by failure of a person for an unreasonable length of time to act on rights of which the person has full knowledge").

[95] E.g., *263657 Alberta Ltd. v. Banff Subdivision and Development Appeal Board*, 2003 ABCA 244, ¶ 28; 346 A.R. 236, 242 (chambers) (Wittmann, J.A. denied leave to appeal because the applicant had waived its right to contest the fairness of the statutory delegate's practice of allowing representatives of the Town of Banff to participate in *in camera* deliberations – the applicant was aware of this practice and never objected).

[96] See *Aalbers v. Aalbers*, 2013 SKCA 64, ¶ 81; 417 Sask. R. 69, 90 ("It is apparent from counsel's response to the trial judge's announcement of a professional relationship with ... [an expert witness], and his failure to pursue the matter then or the following day, that counsel was prepared to continue with the trial, relying on the trial judge's oath of impartiality") & *Cleveland Electric Illuminating Co. v. Utility Workers Local 270*, 440 F. 3d 809, 813-14 (6th Cir. 2006) ("Cleveland Electric submitted the question of arbitrability to the arbitrator for his determination, and we can find nothing in the record to indicate that Cleveland Electric wanted to reserve the question of arbitrability for the court. The district court found, and this court agrees, that Cleveland Electric waived the issue of who had the power to decide the arbitrability of the retirees' grievance by submitting the matter to arbitration 'without reservation'").

[97] *The King v. Essex Justices ex p. Perkins*, [1927] 2 K.B. 475, 489 (K.B. Div.) (the Court rejected the waiver argument because the applicant was not represented by counsel and did not understand that he could object on the ground that his wife's former solicitor – she sought support from her husband – was also the clerk to the lay justices: "It cannot be said that the applicant was fully cognizant of his right to take objection to the clerk to the justices acting as such, and, that being so, he did not waive that right by failing to exercise it"). See also H. Woolf, J. Jowell, C. Donnelly & I. Hare, De Smith's Judicial Review 572 (8th ed. 2018) ("A party may waive his objections to a decision-maker who would otherwise be disqualified on the ground of bias. Objection is generally deemed to have been waived if the party or his legal representative knew of the disqualification and acquiesced in the proceedings by failing to take objection at the earliest practicable opportunity. But there is no presumption of waiver ... if he was unrepresented by counsel and did not know of his right to object at the time").

development permit expressed any concern about hearing from Mr. Kochan.[98] And I am convinced that Mr. Kochan did not see any problems with what he did. If he had any concerns, he would have recused himself and not participated in the appeal. A lay person may react negatively to such a procedure but not understand why the process was wrong.[99]

[204] The respondent primarily relies on the fact that both the clerk and the chair of the Appeal Board as it was constituted when Ms. Cartwright's appeal was heard asked three times whether anyone objected to the composition of the Appeal Board and Ms. Cartwright did not object.[100]

[205] But this question does not address Ms. Cartwright's complaint. Ms. Cartwright's complaint does not focus on the composition of the Board. It, instead, asserts that the Appeal Board should not have allowed Mr. Kochan to address it on behalf of his daughter, his son-in-law, their neighbors and himself. Had Mr. Kochan simply recused himself and not participated in the hearing, Ms. Cartwright would have had nothing to complain about.

[206] Had the clerk and the chair asked if anybody objected to the Appeal Board hearing from the chair of the Appeal Board because this may compromise the Appeal Board's partiality, the waiver argument would have been much stronger.

VII. Conclusion

[207] The appeal is allowed.

[208] Exercising the Court's authority under section 689(2) of the *Municipal Government Act*,[101] I would cancel the Appeal Board's decision granting the appeal against Ms. Cartwright's

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[98] A member of a subdivision and development appeal board must complete a training program. *Subdivision and Development Appeal Board Regulation*, Alta. Reg. 195/2017, s. 2. The training includes administrative law principles regarding fairness, impartiality and bias ("II. TRAINING PROGRAM PRINCIPLES Fairness and impartiality. Transparency in the decision making process. Understanding and acting within the limits of the legislation and principles of administrative law and natural justice…. III. LEARNING OUTCOMES Understanding the basic principles of administrative law which apply to SDABs including the general duty of fairness and the rule against bias. … IV. MEMBER QUALIFICATIONS AND TRAINING Members shall have: … The ability to maintain impartiality, consider arguments, analyze issues and write or contribute to writing decisions. … VI. COURSE OUTLINE (INITIAL TRAINING PROGRAM) (5) ROLES AND RESPONSIBILITIES FOR MEMBERS … ii. Maintaining Impartiality"). Ministerial Order No. MSL:019/18, Appendix 2, 1-5 (May 16, 2018).

[99] *The King v. Essex Justices ex p. Perkins*, [1927] 2 K.B. 475, 489 (K.B. Div.) ("He knew the fact … that the clerk to the justices was a member of the firm which had acted for his wife. He goes on: 'I was not aware at the time that I could make an objection to his conducting the proceedings or advising the magistrates or retiring with them'").

[100] June 26, 2019 Hearing Transcript 6:18-20 & 8:12-14 & August 7, 2019 Hearing Transcript 4:3-5.

[101] R.S.A. 2000, c. M-25.

conditional development permit and refer the matter back to the Appeal Board to be heard by a panel consisting of none of the members who heard the appeal.[102]

Appeal heard on October 13, 2020

Memorandum filed at Calgary, Alberta
this 23rd day of November, 2020

Wakeling J.A.

[102] I understand that there are three or more current members of the Appeal Board who did not or were not initially assigned to sit on the panel on June 26 and August 7, 2019. See *Beier v. Subdivision and Development Appeal Board*, 2009 ABCA 338, ¶ 12; 62 M.P.L.R. 4th 118, 121 (the Court ordered a rehearing on account of a reasonable apprehension of bias "before a new panel").

Appearances:

B.M. Miller
for the Appellant

M. Cherkawsky / G.S. Fitch, Q.C.
for the Respondent

In the Court of Appeal of Alberta

Citation: Springfield Capital Inc. v Grande Prairie (Subdivision and Development Appeal Board), 2018 ABCA 203

Date: 20180525
Docket: 1803-0016-AC
Registry: Edmonton

Between:

Springfield Capital Inc.

Applicant

- and -

City of Grande Prairie Subdivision and Development Appeal Board and the City of Grande Prairie and Signature Support Services Society

Respondents

Reasons for Decision of
The Honourable Mr. Justice Frans Slatter

Application for Permission to Appeal

Reasons for Decision of
The Honourable Mr. Justice Frans Slatter

[1] The applicant seeks permission to appeal a decision of the Grande Prairie Subdivision and Development Appeal Board, which approved a permit to operate a recycling facility.

[2] Appeals to the Court of Appeal are only available on questions of law or jurisdiction. The test is set out in s. 688(3) of the *Municipal Government Act*, RSA 2000, c. M-26:

> (a) the proposed appeal involves a question of law;
> (b) the issue is of sufficient importance to merit a further appeal; and
> (c) the proposed appeal has a reasonable chance of success.

The test is discussed in cases like ***Yee v Leduc (County)***, 2016 ABCA 40 at paras. 9-11.

Background

[3] The lands in question are a part of the Gateway Shopping Centre, a large regional shopping centre in Grande Prairie. The lands are covered by the *Gateway Area Structure Plan*, which was adopted to enable the development of the quarter-section of land on which the Gateway Shopping Centre is located. The lands were originally zoned "C2" under the previous land use bylaw, and are now zoned Arterial Commercial (CA). "Recycling Depot" is a permitted use.

[4] The *Gateway Area Structure Plan Bylaw C-1216* recites that it evolved from an earlier *West Highway #2 Area Structure Plan*, which was never implemented but which contemplated multiple uses. The *Gateway Area Structure Plan* discusses the "Proposed Land Use Classifications":

> It has been stated that further to the present General Municipal Plan, mixed use is requested.
>
> In addition to catering to the shopping needs of the City of Grande Prairie and the region, it is proposed to develop a mixed use Regional Centre. It has long ago been recognized by City planners that different uses add life to developments and that each use helps the others, the residential helps the stores and the proximity of the stores makes the residential more desirable etc.

The *Gateway Area Structure Plan* then discusses, in narrative form, various uses, including retail, housing, hotels, truck stop, automobiles and pedestrians, and auto mall. The *Gateway Area Structure Plan* does not specifically impose zoning, or amend the zoning of the land under the *Land Use Bylaw*.

[5] The main issue on which permission to appeal is sought arises from "Figure 2" attached to the *Gateway Area Structure Plan*. It is a sketch of the shopping centre site, with various blocks of land designated for "proposed" uses such as "Retail", "Retail C2", "Major Retailer", "Residential", "Motel", "Truck Stop" and "Business/Commercial". Figure 2 is not referred to anywhere in the text of the *Gateway Area Structure Plan*. In particular, there is nothing in the *Gateway Area Structure Plan Bylaw* making mandatory the land uses shown on Figure 2. The applicant argues that the areas on Figure 2 marked as "retail" can only be used for retail purposes, and that a Recycling Depot is not allowed even if it is permitted under the CA zoning.

Appeals of Permitted Uses

[6] The respondent City argues, as a threshold issue, that no appeal is possible because a "Recycling Depot" is a permitted use. The City points to s. 685(3) of the *Municipal Government Act:*

> (3) Despite subsections (1) and (2), no appeal lies in respect of the issuance of a development permit for a permitted use unless the provisions of the land use bylaw were relaxed, varied or misinterpreted or the application for the development permit was deemed to be refused under section 683.1(8).

The City argues that since the provisions of the bylaw were not relaxed or varied, and they were not misinterpreted, there can be no appeal. This subsection does not completely close the door to appeals from permits for permitted uses, because it allows appeals in cases of "misinterpretation", which could cover many things. In context, the subsection mainly prevents appeals on the basis that the permitted use is somehow inappropriate or undesirable.

[7] The applicant's main argument is that the development permit might comply with the *Land Use Bylaw*, but it is inconsistent with Figure 2 of the *Gateway Area Structure Plan*. It points out that the SDAB is required under s. 687(3) to comply with statutory plans:

> (3) In determining an appeal, the subdivision and development appeal board . . .
>
> > (a.2) subject to section 638, must comply with any applicable statutory plans;
> >
> > (a.3) subject to clause (d), must comply with any land use bylaw in effect;

The applicant argues that if the SDAB fails to comply with the statutory plan, that would be a ground of appeal not foreclosed by s. 685(3). The City counters that binding authority confirms that in these circumstances the bylaw prevails and the statutory plan is "read down": ***Hartel Holdings v Calgary***, [1984] 1 SCR 337 and ***Spruce Grove (City) v Parkland (County)***, 2000 ABCA 199 at para. 18.

[8] ***Hartel Holdings*** concerned a provision that required the municipality to purchase lands it had "designated under a land use by-law" as parkland. The issue was whether a statutory plan showing the lands as future parkland was sufficient to trigger the requirement to purchase. While the context was different, the Court did suggest at p. 352 that "the land use bylaw rather than statutory plans [is] the primary implementation tool of the planning process". ***Hartel Holdings*** did not concern a development permit, and did not concern the inviolability of a "permitted use". It is not direct authority for the proposition that the SDAB need only comply with the land use bylaw, and can "read down" any applicable statutory plan, notwithstanding the imperative wording of clause 687(3)(a.2). "Reading down" may be appropriate where it is impossible to comply with both the statutory plan and the zoning bylaw. However, where compliance with both is possible a more natural interpretation would be that any developer must comply with all regulatory requirements in order to get a permit. A permit could not, however, be refused based on "use" if it was a "permitted use".

[9] Clauses 687(3)(a.2) and (a.3) were added to the *Act* in 2017. Their effect on the earlier case law is uncertain. Permission to appeal was not sought on this precise issue, and it is not necessary to resolve it in order to dispose of this application.

The Legal Effect of Figure 2 of the *Gateway Area Structure Plan*

[10] The main proposed ground of appeal is that even though the permit may comply with the *Land Use Bylaw*, it does not comply with the *Gateway Area Structure Plan Bylaw*. Even though a Recycling Depot is a permitted use under the CA zoning, the applicant argues that the areas on Figure 2 marked as "retail" can only be used for retail purposes, and that a Recycling Depot is not retail.

[11] The references in Figure 2 to "Retail C2" are a reference to the "C2" zoning found in the previous (now repealed) *Land Use Bylaw*. The C2 zoning has generally been replaced by the CA zoning, and there is no longer any legislative reference to "C2" zoning. Since the Gateway Shopping Centre is now zoned CA, the only reasonable interpretation of Figure 2 in the current context is that it should be read as referring to CA zoning. The only remaining issue is whether the references to "Retail" in Figure 2 are intended to displace all of the permitted uses in CA zoning, other than retail uses.

[12] The SDAB concluded that the *Gateway Area Structure Plan* did not preclude the development:

> 6. The Board considered the Appellant's submissions that the Gateway Area Structure Plan ("Gateway ASP") limits developments to retail businesses in this area. The Board considered that the Land Use Bylaw enacted by city council specifically provided that a Recycling Depot is a permitted use in this development. The Board also noted that the Land Use Bylaw specifically permitted many types of businesses other than retail operations in the Gateway Power Centre. The Board

> further concluded that the Gateway Area Structure Plan was a policy document and was intended to be conceptual in design. It was not intended to restrict developments that are permitted uses in the Land Use Bylaw.

Given the general nature of the narrative in the *Gateway Area Structure Plan*, the absence of any mandatory wording about the permitted uses, the absence of any indication that Figure 2 is intended to be a binding limitation on potential uses, and the specific provisions of the CA zoning, this reasoning does not disclose any obvious flaws.

[13] Under s. 640(2) of the *Act* zoning is to be dealt with in land use bylaws, which must "divide the municipality into districts" and, other than for direct control districts, "prescribe with respect to each district" permitted and discretionary uses. Area structure plans, on the other hand, are to provide "a framework for subsequent subdivision and development", with either general or specific "land uses proposed for the area": s. 633. The structure of the planning provisions of the *Act* therefore supports the concept that, in terms of uses at least, "the land use bylaw rather than statutory plans [is] the primary implementation tool of the planning process". This is consistent with the wording of Figure 2, which merely says that it sets out "proposed" uses.

[14] While it is true that Grande Prairie City Council adopted the *Gateway Area Structure Plan*, it subsequently went on to zone these lands as Arterial Commercial (CA). The argument that Figure 2, a general attachment to the *Gateway Area Structure Plan,* is intended to be the document that prescribes permitted and discretionary uses would turn the *Gateway Area Structure Plan* into a type of "direct control" zoning. The zoning would not be Arterial Commercial (CA) at all, but really "retail", or one of the other designations on Figure 2. If Council had intended that result, it is anomalous that it would impose the (apparently redundant) Arterial Commercial (CA) zoning on the site.

[15] It is also of significance that in 2016 an attempt was made to amend the Arterial Commercial (CA) zoning to change "Recycling Depot" from a permitted use to a discretionary use. That amendment was unanimously defeated by Council, confirming Council's view that this type of use is appropriate in the CA zoning, and that Figure 2 was not intended to restrict the permitted uses.

[16] The applicant argues that the full Court should determine whether the provisions of Figure 2 are merely "aspirational", reflecting broad policy objectives, or whether they are intended to be mandatory. Requiring permission to appeal from SDAB decisions recognizes a gatekeeping function. Grounds of appeal must be on questions of law or jurisdiction, and they must be of sufficient importance to warrant a further appeal. The prospects of success must be sufficient to justify a further appeal, which invokes the standard of review that would likely be applied. Deference would generally be extended to the SDAB on the interaction of various planning documents, and the interpretation of the details of statutory plans: ***McCauley Community League v Edmonton (City)***, 2012 ABCA 224 at paras. 20-3, 533 AR 319. The decision of the SDAB that Figure 2 was intended to be a policy document, and conceptual in design, is reasonable. When all

of these factors are considered, the interpretation and application of Figure 2 is not an issue of sufficient importance to warrant a further appeal. It is the type of local issue involving the suitability of a particular development on a specific site that is properly within the mandate of the SDAB.

The Definition of the Development

[17] The applicant also seeks permission to appeal on whether the proposed development is actually a "Recycling Depot". The facility in question redeems beverage containers on which a deposit has been paid. The applicant argues that it is a "Waste Management Facility", not a Recycling Depot, because it has a compactor that crushes the plastic bottles and cans to make them easier to ship. Whether this development is truly a Recycling Depot is a question within the mandate of the SDAB, and is at best a mixed question of fact and law on which permission to appeal is not possible or appropriate: ***McCauley Community League*** at para. 23.

Inappropriate Involvement of the Development Authority

[18] Finally, the applicant seeks permission to appeal on the basis that the SDAB "allowed egregious 'bootstrapping' by the development authority". By this the applicant means that the development authority's participation in the appeal exceeded the guidelines set in cases like ***Ontario v Ontario Power Generation***, 2015 SCC 44 at paras. 52ff, [2015] 3 SCR 147.

[19] When a development permit is appealed, the development authority must maintain an attitude of neutrality in order to preserve the integrity of the process. It is no answer that the development authority is given a right of audience under clause 687(1)(b), nor that the appeal might be *de novo*. The development authority is primarily there to explain the planning considerations underlying the decision, and should not actively advocate a result, at least where all the adverse parties are present and able to make their own representations. In this case, the applicant expresses legitimate concerns about the aggressive conduct of the development authority in arguing about the standing of some of the parties, whether they appeared at prior hearings, whether they were represented by counsel, and whether their concerns should be taken seriously.

[20] That being said, development authorities have a legitimate role to play at development appeals. As ***Ontario Power Generation*** states at para. 55: "Canadian tribunals occupy many different roles in the various context in which they operate". Development authorities generally do not give extensive reasons for granting permits; normally the permit would just be issued, with or without conditions. Their participation during development appeals is influenced by that, and an appropriate explanation of the reasons behind the granting of the permit is not objectionable. Further, development appeals are not just conflicts between various citizens. There is a significant public policy element in planning decisions, and the development officer is entitled to make representations to the SDAB on the impact that any particular development will have on the community.

[21] Controlling the representations it receives is primarily up to the SDAB. In this particular case, it does not appear that any of the challenged representations of the development authority had any impact on the ultimate decision. Its input on the specific issues that underlie this application for permission to appeal were within acceptable bounds. The participation of the development authority in this particular SDAB appeal does not raise issues that would justify a further appeal to the full Court.

Conclusion

[22] In conclusion, the applicant has failed to demonstrate an issue warranting permission to appeal, and the application is dismissed.

Application heard on May 23, 2018

Reasons filed at Edmonton, Alberta
this 25th day of May, 2018

Slatter J.A.

Appearances:

K.D. Wakefield, Q.C.
for the Applicant

R.G. McVey, Q.C. (No Appearance)
for the Respondent City of Grande Prairie Subdivision and Development Appeal Board

J.S. Grundberg and A. Gulamhusein
for the Respondent City of Grande Prairie

C.M. Headon
for the Respondent Signature Support Services Society

Form 49
[Rule 13.19]

C10574

Clerk's Stamp

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COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	CITY OF AIRDRIE
RESPONDENTS	TRINA ANN DEMERIA, 1818622 ALBERTA LTD. operating as DOG "E" DAYCARE and EJ RESCUE FOUNDATION
DOCUMENT	**SUPPLEMENTAL AFFIDAVIT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Field LLP 400 – 444, 7 Avenue SW Calgary, AB T2P 0X8 T: 587-747-3165 F: 403-264-7084 File No. 52649-2 Attention: Julie Shepherd

AFFIDAVIT OF BRAD TOMLINSON
Sworn on January 8, 2024

I, Brad Tomlinson, of the City of Airdrie, in the Province of Alberta, SWEAR AND SAY THAT:

1. I have personal knowledge of the matters hereinafter deposed to, except where stated to be based upon information and belief.

2. This affidavit is filed in conjunction with my Affidavit sworn December 21, 2023.

3. I conferred with Gail Gibeau, Team Leader of Current Planning for the City of Airdrie, who has over twenty years of experience as a Planner including the last seven years with the City of Airdrie, regarding this matter.

4. Ms. Gibeau has informed me that she agrees that EJ Rescue Foundation's operation on the site is in continuing violation of Airdrie's Land Use Bylaw as under the terms of the existing tenancy permit the site is only authorized for the occasional boarding of animals in connection with a "one stop pamper shop" for dogs.

5. A letter from Ms. Gibeau explaining her reasons and a copy of the tenancy permit application materials, the Airdrie planning staff report regarding the application, and the approval documents including the letter of conditions is attached hereto and marked as **Exhibit "A"** to this Affidavit.

6. I am authorized to interpret and enforce the Land Use Bylaw and I agree and adopt Ms. Gibeau's findings.

Requested Relief

7. I respectfully swear this application in support of an Order:

   a. directing the Respondents immediately refrain from using the site to operate EJ Rescue Foundation;

   b. directing that the use of the site by any persons be restricted to the conditional use authorized by the existing tenancy permit until such time as any new development permit with conditions is approved for the site;

   c. enhanced costs of this application.

SWORN BEFORE ME at the City of Calgary in the Province of Alberta, this 8th day of January 2024.

A Commissioner for Oaths in and for Alberta

Louisa P. McFarland
A Commissioner for Oaths
in and for the Province of Alberta
My commission expires June 26, 2024

Brad Tomlinson

EXHIBIT "A"

This is Exhibit "**A**" referred to in the Affidavit of Brad Tomlinson.

Sworn before me this 8th day of January, 2024.

A Commissioner for Oaths in and for Alberta

Louisa P. McFarland
A Commissioner for Oaths
In and for the Province of Alberta
My commission expires June 26, 2024

CITY of AIRDRIE
COMMUNITY & OPPORTUNITY

January 8, 2024

To Whom it May Concern,

I am the Team Leader of Current Planning at the City of Airdrie ("Airdrie"). I have over twenty years of experience as a Planner including the last seven years with the City of Airdrie.

I have reviewed our records with respect to the site located at 2, 69 East Lake Crescent NE in Airdrie, Alberta, legally described as Unit 2, Plan 8710742.

I confirm the submission of a Tenancy Permit ("TP") application, also recognized as a development permit, for the above site was submitted by Karen Sharpe and Kassandra O'Brien of Dog "E" Daycare Inc. The application was approved with conditions on September 17, 2012.

The first condition imposed per the letter of approval (Figure 1) states that "This approval applies to the site and uses as indicated on the application form and plans provided and approved. Any changes require a new application" [emphasis added].

The zoning for the site at the time of this application and currently is IB-2 Industrial Employment District, which has permitted and discretionary uses of land. A permitted use means a proposed use of land that is allowed in a specific land use district. A discretionary use means a proposed use of land that can be considered after due consideration by the Development Authority, being Airdrie.

In reviewing the application, a Staff Report (Figure 2) was prepared by Airdrie's Planning Department. Under the heading Discussion, it indicates that the application is for a kennel and doggie daycare that will "accommodate all sizes of dogs for a 'one stop pamper shop' grooming as well as overnight stays". It cites proposed hours of operation including morning pickup times for dogs which have stayed overnight. There is further reference to a "detailed letter" which has been submitted by Karen Sharpe and Kassandra O'Brien with the application and which outlines all services to be provided on site.

That letter which formed part of the application materials (Figure 3) states at the outset that "Dog 'E' Daycare will provide day/evening and *occasional* overnight care for every breed of dog ..." [emphasis added]. Furthermore, that Dog "E" Daycare will be a "one stop pamper stop" and that "[c]ustomers and their pets will be greeted and treated with the up most respect". In addition, that Dog "E" Daycare wants to "accommodate to the people in Airdrie and surrounding area" and seeks to open at 6:30 am and close at 6:00 pm to "...give our customers time to bring and pick up their dogs safely".

Genesis Place
800 East Lake Blvd NE
Airdrie, AB T4A 2K9
F: 403.948.0604

City Hall
400 Main Street SE
Airdrie, AB T4B 3C3
F: 403.948.6567

Tel: 403.948.8800
1.888.AIRDRIE
airdrie.ca

Parks/Public Works
23 East Lake Hill NE
Airdrie, AB T4A 2K3
F: 403.948.8403

Municipal Enforcement
2 Highland Park Way NE
Airdrie, AB T4A 0R1
F: 403.948.8618

The City reviewed the TP application under the former Airdrie Land Use Bylaw (B-09/2005) in effect at the time. In the IB-2 District, "Kennel" was listed as a discretionary use that could be considered. The City conditionally approved the use, being discretionary, and according to the plans provided. Condition 1 being that overnight stays would be occasional which was a narrowing of the "Kennel" use and which trumped the definition of "Kennel" in the Land Use Bylaw, which then allowed the "boarding of small animals for periods of greater than 24 hours ..." (Figure 4).

I have been informed by Brad Tomlinson, Peace Officer, that the site is being used to operate an animal rescue called EJ Rescue Foundation. Furthermore, that animals are regularly being boarded on the site, and offered for adoption or sale. This constitutes a substantial change in use and is not permitted within the conditions of the TP which still apply to the site and do not expire. The TP remained in effect after the site was sold to the new owners of Dog "E" Daycare which I understand now operate EJ Rescue Foundation out of the same site.

A new application for a Development Permit, which have replaced TPs as the development approval document, must be submitted to allow for this new use. I have reviewed our records and confirm that no new Development Permit application has been submitted. If such an application is made it will be reviewed pursuant to the current Land Use Bylaw (B-01/2016). Under the current Land Use Bylaw, in the IB-2 District, the boarding of animals may be considered as a discretionary use, under Animal Service Major, and would be subject to conditions. I note that the sale or adoption of animals is not listed as a discretionary use at all (Figure 5).

There is a process for applying for a new Development Permit which is set forth in sections 2.3 and 2.4 of the current Land Use Bylaw. If the application is approved, it still may be subject to conditions. An applicant can appeal a refusal of an application or appeal the conditions imposed on an approval to the Subdivision and Development Authority Board.

EJ Rescue Foundation's use of the site is not permitted under the terms of the TP and is a continuing violation of Airdrie's Land Use Bylaw. Pending the submission and approval of a new Development Permit, the site is not authorized for use of the boarding of animals that occurs on a more than occasional basis and which is not connected to the operation of a "one stop pamper shop".

Respectfully submitted,

Gail R. Gibeau RPP, MCIP
Team Leader, Current Planning
City of Airdrie

Phone: 403-948-8832
Email: planning@airdrie.ca

CITY of AIRDRIE
COMMUNITY & OPPORTUNITY

September 17, 2012

FIGURE 1

Karen Sharpe and Kassandra O'Brien
Dog "E" Daycare Inc
[redacted]

Dear Ms. Sharpe & Ms. O'Brien

Re: Tenancy Permit Application No. 52-12 (TP)
U2, Plan 8710742
2, 69 East Lake Crescent NE - Airdrie, Alberta
Dog kennel and Daycare

Your Tenancy Permit application for the above noted site was reviewed on September 17, .2012 At that time your application was approved and issued subject to the following conditions:

1. This approval applies to the site and uses as indicated on the application form and plans provided and approved. Any changes require a new application.

2. Five (5) parking stalls must be provided for this tenancy permit. These parking stalls must be marked (line painting) and maintained in accordance with the Land Use Bylaw.

Notifications:

- All other necessary permits and inspections are the responsibility of the applicant (including, but not limited to, Building Permits, Fire Approval) and shall be submitted to the City as required.

- This permit is approved with the understanding that there are no offsite effects.

- It is the owner's responsibility to determine whether the use approved by this Development Permit is, in fact, achievable or whether such use may be constrained or precluded by site conditions including constraints on use resulting from environmental conditions or legislation, or both.

Continued/.....

403.948.8800 1.888.AIRDRIE www.airdrie.ca

Genesis Place
800 East Lake Blvd NE
Airdrie, AB T4A 2K9
Fax: 403.948.0604

City Hall
400 Main Street SE
Airdrie, AB T4B 3C3
Fax: 403.948.6567

Parks
15 East Lake Hill NE
Airdrie, AB T4A 2K3
Fax: 403.948.3987

Fire Hall/
Municipal Enforcement
805 Main Street SW
Airdrie, AB T4B 3G1
Fax: 403.948.0619

Public Works
23 East Lake Hill NE
Airdrie, AB T2A 2K3
Fax: 403.948.8403

Please note that this approval pertains to site development only. Permits required under the Alberta Building Code and Fire Code will be required. Please contact the Building Department at 403-948-8832 and the Fire Department at 403-948-8880.

Should you have any questions regarding this matter, please do not hesitate to contact the undersigned at 403-948-8800.

Yours truly

Jamie Dugdale
Team Leader planning

Copy to: Emergency Services
Building Services

Encs: Approved Plans

FIGURE 2

PLANNING DEPARTMENT

STAFF REPORT

Subject:	Tenancy Permit No. 52-12
Date:	September 17, 2012

Introduction:

Karen Sharpe & Kassandra O'Brien has applied for a tenancy permit to occupy a bay located at 2, 69 East Lake Crescent NE. The proposed development will be for a kennel/ dog day care

Application Summary:

Applicant	Karen Sharpe and Kassandra O'Brien
Owner	1324627 Alberta Inc.
Legal Description	Unit 2 Condo Plan 8710742
Location	2, 69 East Lake Crescent NE
Proposed Use	Kennel
MDP Designation	Industrial
CASP/NSP	N/A
LUB District	IB-2 (Industrial Business Park Two District)
Discretionary Use Category	Section 6-3 (3) Kennel

Planning Considerations:

Parking	**Parking Requirements:** Kennel 1 stall per 46 m^2 GFA (209 m^2) = 5 stalls **Parking Provided:** The following are the parking restraints on site:

Bay	Business	Parking Stalls

		Required
1	Electrical & Instrumental Services	4
2	**Dog E Daycare**	**5**
3	Auto Lift repair sales, maintenance	3

Total Required – 12 Parking Stalls
Total Provided –12 Parking Stalls

All parking requirements are accommodated by the site.

There are no issues with parking.

Discussion:

Karen Sharpe and Kassandra O'Brien have applied for a tenancy permit for a kennel and doggie day care. They will accommodate all sizes of dogs for a "one stop pamper shop" grooming as well as overnight stays will be available. A detailed letter has been submitted with application of all services the will be available. Hours of operation will be Monday to Friday 6:30am till 6:00pm. Saturday 8:00am to 5:00pm and Sunday pick up for overnight dogs will be 10:00 am till 12:00pm and 4:00pm to 6:00pm. There will be 2 full time employees.

Recommendation:

Tenancy Permit No. 52-12 is approved subject to the following conditions:

Approved Plans	1.	This approval applies to the site and uses as indicated on the application form and plans provided and approved. Any changes require a new application.
	2.	A minimum of five (5) parking stalls must be marked and maintained at all times in accordance with the Land Use Bylaw.
Notations	•	All other necessary permits and inspections are the responsibility of the applicant (including, but not limited to, Building Permits, Fire Approval) and shall be submitted to the City as required.
	•	This permit is approved with the understanding that there are no offsite effects.
	•	It is the owner's responsibility to determine whether the

	use approved by this Development Permit is, in fact, achievable or whether such use may be constrained or precluded by site conditions including constraints on use resulting from environmental conditions or legislation, or both. • Compliance shall be maintained with the Municipal Government Act (Alberta) and the City of Airdrie Land Use Bylaw No. 09/2005 (copy available at City office), site and elevation plans, and this permit.

Jamie Dugdale
Team Leader Planning

Reviewed by: _____

CITY of AIRDRIE
COMMUNITY & OPPORTUNITY

Application for Development Permit
Tenancy Permit

(Please note: A Business License and Building Permit may also be required)

Applicant: Karen Sharpe, Kassandra O'Brien

Business Name: Dog "ES" Daycare Inc.

Mailing Address: [redacted]

City/Province: Airdrie, Alberta Postal Code [redacted]

Phone: bus 403-397-3236 cell [redacted] fax _____ e-mail: [redacted]

Registered Land Owner: _____
(if applicant is other than owner)

Mailing Address: _____

City/Province: _____ Postal Code: _____

Phone:(bus) _____ cell _____ fax _____ e-mail _____

Legal Description: Lot U2 Block _____ Registered Plan No. 871 0742

Address of proposed site: 69 east Lake Cres NE Airdrie, AB

Existing Use of Land/Building: N/A - Vacant -

Proposed Use of Land/Building: Dog daycare / Kennel

☑ I do hereby consent to the use of information included in this application for promotional purposes, news, research and/or educational purposes.

Name: Kassandra O'Brien Signature: [signature] Date: Sept 14/2012

The information on this form is collected under the authority of Section 33 of the Freedom of Information and Protection of Privacy Act and the Land Use Bylaw and is used solely for Planning, Economic Development and Assessment/Taxation purposes. Questions about collection of this information can be directed to the Planning & Development department at 400 Main Street SE, Airdrie, Alberta, T4B 3C3, telephone (403) 948-8848.

For Office Use Only

Permit Number: 52-12 Receipt Number: _____

PAID
SEP 14 2012
580256
CITY OF AIRDRIE

Approved By ☐ DO / ☐ SDAB Date: _____

Refused By ☐ DO / ☐ SDAB Date: _____

Issue Date: _____

See Reverse

DOG "E" DAYCARE INC.

Karen Sharpe and Kassandra O'Brien

Airdrie, Alberta

Dog "E" Daycare Inc will provide day/evening and occasional overnight care for every breed of dog. Safety for humans and dogs is our number one priority, customers will not come in contact with other dogs in our facility, and all dogs will be screened with thorough background checks before they will be granted access to our dog play rooms. Dogs that have existing or new aggressive behaviours will not be accepted in our facility for the safety of other dogs and staff.

The location we have chosen for Dog "E" Daycare is located in Airdrie, at 69 east lake crescent. The building is 2251 sq ft in total, with a 1440 sq ft fenced in outside area and a 955 sq ft indoor area for the "large breed" dogs (20 lb +). The fence is chain link, we will put "blinders" on the fence for safety of humans and dogs, "dogs on premises" warning signs will also be posted. There is a dog door located at the back of the bay; this will give the large dogs in our care access to our outside play/bathroom area. There is a door and bay door for human access to the outside area. Dogs will be supervised while in the play areas both inside and outside by staff and/or a mounted video camera that will be connected to a television located at the front desk. Dog waste will be picked up and put in a bin immediately. The waste will be removed from the premises weekly and disposed of accordingly, while it is being stored on the location it will be kept in an air tight smell free garbage bin that will be located outside, for hygiene reasons waste will not be stored inside the building. Environmentally and pet friendly chemicals will be used to disinfect floors daily. Environmentally and pet friendly chemicals will not be directly placed on the floor, the chemical will be mixed appropriately and safely with water in a "mop bucket" and all floors will be mopped daily. For safety reasons we have chosen not to use a hose to "hose down" our floors as we fear slips and ice build ups.

Small breed dogs will have their own location in the building, with a separate 255 sq ft room with a play structure built specifically for smaller breed dogs (20 lb -). Smaller breed dogs will also have access to an outdoor location, they will be 100% supervised while in outside play area for their own safety. This play area will be sectioned off in the "larger dog" area however smaller breeds will not come into contact with larger breeds at any moment for safety reasons. To prevent contact there will be a chain link hallway down the wall of the bay, there will be a swing gate that will either lock access to the chain link hallway or lock access to the dog door at the back of the bay. Larger dogs will be brought into the indoor play area and their access to the "dog door" will be locked, thus allowing smaller dogs to walk safely down the chain link hall and out the door, through the large breed play area and into a separate play area designed for smaller dogs. Smaller dogs will be on a leash until they have safely made it to their designated area.

The building is equipped with three bathrooms, one is located in the bay at the back there is a shower that will be turned into a floor accessible dog shower. Dog "E"

Daycare would like to accommodate to customers who are unable to bath their large breed dogs due to personal health issues or dog health issues. Through our research we have been unable to locate a bathing area that accommodates to large breed dogs with leg, joint, or health issues that may prevent the owner from safely and effectively cleaning/bathing their dog. There is also a bathroom located in the "smaller breed" room; this will also be altered to accommodate bathing smaller breed dogs. Bathing of dogs can either be done by the owner or by Dog "E" Daycare staff, all supplies (i.e.: shampoo, dog cologne/perfume, bows, towels, brushes) will be supplied by Dog "E" Daycare. Owners have the ability to bath their own dog if they choose, this will accommodate to injured dogs that need a bath, aggressive dogs, non socialized dogs, or for those who just want to bond and pamper their pet. Dog "E" Daycare staff will also bath dogs if chosen, this will accommodate to dogs before they leave a day of daycare, elderly customers who are unable to bath their dogs, and the busy customer. Customers who choose to bath their own large breed dogs will at no time come in contact with dogs currently in our care they will access the dog shower areas via chain link walk ways, this will accommodate to our customers who may have an aggressive dog, non socialized dog, or are uncomfortable around other dogs.

Dog "E" Daycare will be the one stop pamper shop, with a full 232 sq ft retail area located at the front of the shop, specifically for pets and their day to day love and comfort. Customers and their pets will be greeted and treated with the up most respect, the customer is always right; Customers will get undivided attention when it comes to discussing their pet as they know their pet better than any staff member at Dog "E" Daycare.

Dog "E" Daycare wants to accommodate to the people in Airdrie and surrounding areas, we feel that if we opened at 6:30 am and closed at 6:00pm it would give our customers time to bring and pick up their dogs safely. Pick up for weekend overnight stays would be on Sundays between 10-12:00 am and 4-6:00pm; this allows our customers an option on what would work best for them. Dog "E" Daycare will not be staffed 24 hours a day, staff will be there between 6:30 am and 6:00 pm, If there are over night stays staff will return at 8:00 pm and allow the overnight dogs 1 hour of play time. When staff is not on the premises ALL dogs will be kennelled appropriate to their individual needs and sizes, Dogs will be kennelled for their own safety. Directors of Dog "E" Daycare will have access to video surveillance of both dog areas to ensure the best safety for all overnight stays.

Directors Kassandra O'Brien and Karen Sharpe, know that what we have to offer in a business will provide a safe, fun environment for all dog owners in the Airdrie community, regardless of temperament, size, breed, or health restrictions, there will be something at our facility for each and every dog located in the community.

Kassandra O'Brien

Karen Sharpe

LAND TITLE CERTIFICATE

S

LINC	SHORT LEGAL	TITLE NUMBER
0013 735 379	8710742;2	081 091 719

LEGAL DESCRIPTION
CONDOMINIUM PLAN 8710742
UNIT 2
AND 3333 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

ESTATE: FEE SIMPLE
ATS REFERENCE: 4;29;27;10;NE

MUNICIPALITY: CITY OF AIRDRIE

REFERENCE NUMBER: 031 276 469

REGISTERED OWNER(S)

REGISTRATION	DATE(DMY)	DOCUMENT TYPE	VALUE	CONSIDERATION
081 091 719	11/03/2008	TRANSFER OF LAND	$275,000	$275,000

OWNERS

1324627 ALBERTA INC..
OF #600 5920 MACLEOD TRAIL S
CALGARY
ALBERTA T2H 0K2

ENCUMBRANCES, LIENS & INTERESTS

REGISTRATION NUMBER	DATE (D/M/Y)	PARTICULARS
771 147 064	20/10/1977	ZONING REGULATIONS SUBJECT TO CALGARY INTERNATIONAL AIRPORT ZONING REGULATIONS

(CONTINUED)

* ADDITIONAL REGISTRATIONS MAY BE SHOWN ON THE CONDOMINIUM ADDITIONAL PLAN SHEET

TOTAL INSTRUMENTS: 001

THE REGISTRAR OF TITLES CERTIFIES THIS TO BE AN ACCURATE REPRODUCTION OF THE CERTIFICATE OF TITLE REPRESENTED HEREIN THIS 11 DAY OF SEPTEMBER, 2012 AT 03:46 P.M.

ORDER NUMBER:22029487

CUSTOMER FILE NUMBER:

END OF CERTIFICATE

1324627 ALBERTA INC
128 Main Street North,
Airdrie, Alberta
(403) 660-5203

September 11, 2012

City of Airdrie

Attention: To Whom it May Concern

1324627 Alberta Inc., does hereby authorize Kassandra O'Brien and Karen Sharpe or Dog "E" Daycare Inc to proceed with their due diligence with the City of Airdrie for potential occupancy, as per our conditional lease agreement.

If you have any further questions or require additional information, please do not hesitate to contact us.

Regards,

Authorized Signing Officer
1324627 ALBERTA INC
Gordon Westwood

c.c. Kassandra O'Brien and Karen Sharpe

CITY of AIRDRIE
COMMUNITY & OPPORTUNITY

400 Main ST SE, Airdrie, AB T4B 3C3

PAYMENT RECEIPT

Receipt Number
10350256
GST Registration #
R10692996
Date
9/14/2012

Paid By K O'BRIEN/K SHARPE

Notes TENANCY PERMIT
69 EAST LAKE CR NE

Payment Type	Roll/Account No.	Description	Amount
General	31	DEVELOPMENT PERMIT	$250.00

Cash	$0.00
Cheque	$0.00
Cheque #	
Debit Card	$250.00
Other	$0.00

Subtotal	$250.00
Taxes	$0.00
Total	$250.00

CITY of AIRDRIE
COMMUNITY & OPPORTUNITY
Planning Quick Code

Code: 31
$ 250.00

Address / Notes:
69 East Lake Cres.
Kassie -
403-397-3236

SCHEDULE 'A 2'

FENCED REAR YARD - 1440 sq'

SHOP MEZZ - 160 sq'

TOTAL BAY
APPROX 2251 sq'

SHOP
APPROX
675 sq'

TENANTS INITIAL
KP

LANDLORD INITIAL
W

STORAGE

W/C

OPEN
AREA.
APPROX 280 sq' + W/C

HALL
APPROX
224 sq'

OPEN
AREA.
APPROX 340 sq'

KITCHEN
AREA.

W/C

BOARD ROOM
AREA.
APPROX 255 sq' + W/C

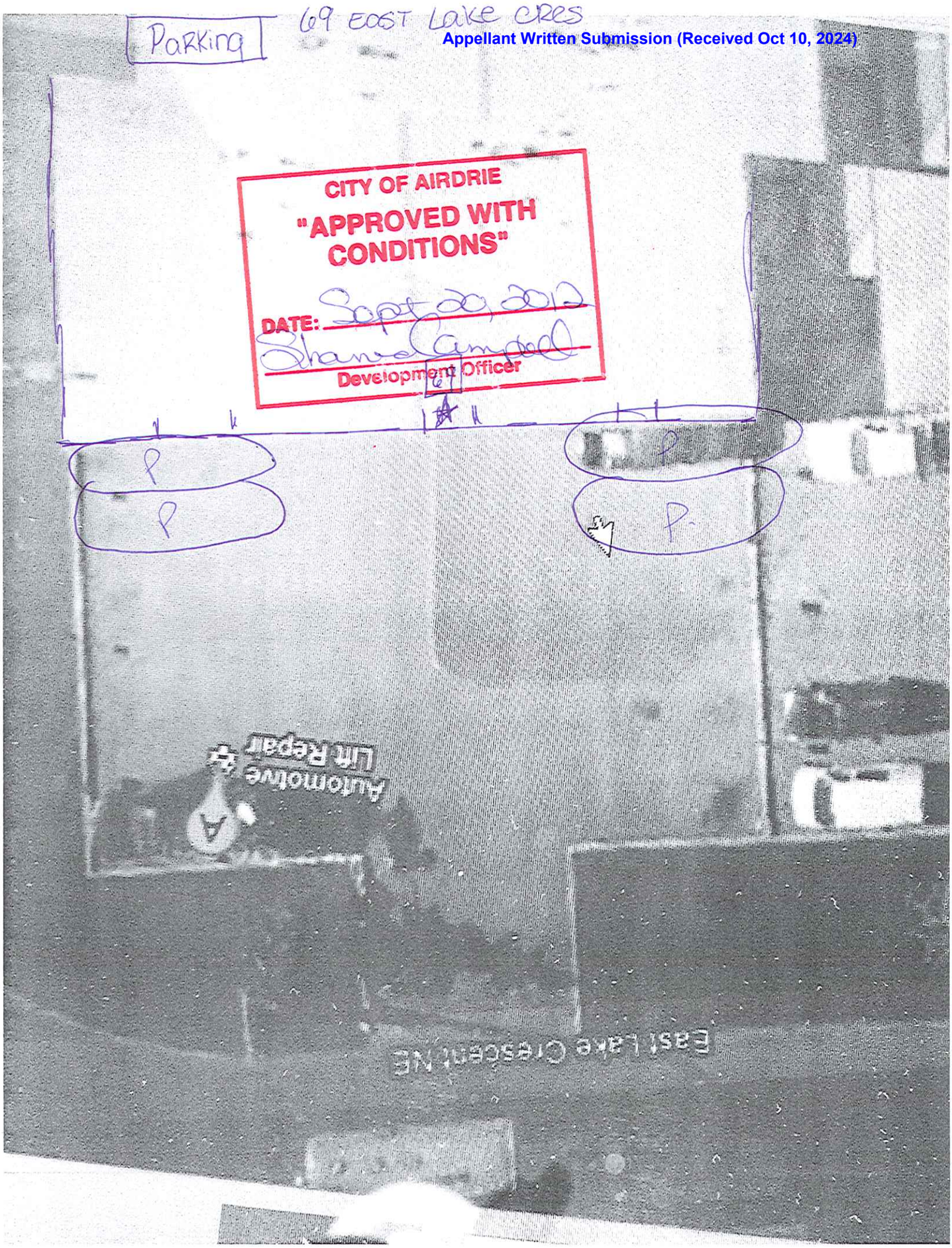
W/C

CITY OF AIRDRIE
"APPROVED WITH CONDITIONS"
DATE: Sept 20, 2024
Shannon Campbell
Development Officer

RECEPTION
AREA.
APPROX 176 sq' + HALL

OFFICE
APPROX 156 sq'

FRONT DOOR


Parking
69 EAST Lake CRES
CITY OF AIRDRIE
"APPROVED WITH CONDITIONS"
DATE: Sept 20, 2012
Development Officer
P
P
P
P
Automotive
Lift Repair
East Lake Crescent NE

PART SIX INDUSTRIAL

Section 6-3 Industrial Business Park Two District (IB-2)

(1) Purpose and Intent:

The purpose and intent of this District is to provide for light manufacturing, warehousing and service industrial uses that are carried on within the primary building and accessory buildings with limited outside storage. No industrial uses that are likely to become a nuisance by reason of the emission of odour, dust, smoke, gas, fumes, refuse matter, wastes, or water-carried waste; or by reason of vibration; or is likely to create a hazard to persons on the property, are to be carried on in this District.

(2) List of Permitted Uses:

Antenna Structures

(3) List of Discretionary Uses:

Accessory Uses
Adult Entertainment
Auction Establishment
Auto Body and Paint Shop
Automotive and Equipment Repair
Automotive Sales
Bottle Depots
Bus Depot
Business Support Services
Car Rental Facility
Car Wash
Cremation and Interment Facility
Drive Through
Equipment, Rental
Equipment, Rental and Sales (Heavy)
Equipment, Rental and Sales (Light)
Fitness Centre
Food and Beverage Processor – Class 1
Funeral Home
Garden Centre
Health Services
Hotel
Kennel
Laboratory

Manufactured Home Sales
Manufacturing – Class 1
Manufacturing – Class 2
Modular Home Sales
Offices
Public and Quasi Public Buildings, Utilities, Installations and Facilities
Radio and Television Studio
Recreation Facilities, Indoor
Recreation Facilities, Outdoor
Recreational Vehicle Sales
Religious Assembly
Restaurant – Minor
Retail Liquor Sales
Schools, Commercial
Service Station
Special Function Tent
Storage and Distribution Centre
Storage Facility
Storage Yard, Recreation Vehicles
Temporary Building
Veterinary Hospital

(4) General Requirements:

In addition to the general land use provisions contained in Sections 3-1 through 3-4 and 6-1 of this Bylaw, the provisions contained in Sections 6-3(5) through 6-3(8) below shall apply to every development in this District.

(5) Minimum Requirements:

(a) Area of site:

(i) Hotels and motels: 2230 square metres.

(ii) All other uses: 1860 square metres.

(b) Width of site: 30 metres.

(c) Front yard: 6 metres.

(d) Side yard: 1.2 metres, except:

(i) None when a firewall is provided and the material would normally require a minimum amount of maintenance, and

(ii) On a laneless site, one unobstructed side yard shall be a minimum of 6 metres excluding corner sites with an alternate rear access.

(e) Side yard (street side of a corner site): 3 metres.

(f) Rear yard: 6 metres.

(6) Maximum Limits:

(a) Height of buildings:

(i) Hotels and motels: 25 metres.

(ii) All other sites: 14 metres.

(7) Design Standards:

(a) The design and placement of buildings shall be the subject of Architectural Controls, designed by the developer in conjunction with the Approving Authority, that include, but are not limited to:

(i) Building design,

(ii) Building interface treatments,

(iii) Site lighting,

(iv) Outside storage,

(v) Landscaping, and

(vi) Pedestrian circulation.

(8) Other Requirements:

(a) Parking is to be provided in accordance with Section 3-2 of this Bylaw.

(b) Signs are regulated by Section 3-4 of this Bylaw.

(c) Additional general and special setbacks may be required in accordance with Section 3-1 of this Bylaw.

electrical equipment used that creates external noise, or visible and audible interference with home electronics equipment in adjacent dwellings; the Home Occupation shall employ no more than 1 additional person on-site other than a resident of the dwelling; home occupations shall be limited to those uses which do not interfere with the rights of other residents to the quiet enjoyment of the residential neighborhood and may include personal service business, instruction, and other similar domestic activities; the business shall not be visible from the exterior of the home;

Home Occupation, Office means a home occupation that has no clients coming to the residence, involves no delivery or storage of goods or supplies, no product is produced on site, no parking, noise or other impact on the neighbourhood and no renovations requiring a building permit, and shall not employ any person on-site other than a resident of the dwelling; the business shall not be visible from the exterior of the home;

Hospital means the use of a building established for the maintenance, observation, medical and dental care and supervision and skilled nursing care for persons afflicted with or suffering from sickness, disease or injury or for convalescent or chronically ill persons;

Hostel means the use of a building operated to provide temporary accommodation to transients for remuneration but does not include additional services such as room service;

Hotel means the use of a building for sleeping accommodations provided for a fee on a daily basis, accessible only through a central lobby with on site parking; the building may also contain accessory commercial, and food and beverage service uses;

Kennel means the use of a building or portion of a building, the primary purpose of which is the boarding of small animals for periods greater than 24 hours for a fee and does not include ***Pet Care, Veterinary Clinic*** or ***Veterinary Hospital,*** and that may provide for the incidental sale of products relating to the services provided by the use and may include outside enclosures, pens, runs or exercise areas;

Laboratory means the use of a building, or part of a building for scientific or technical work which may be hazardous, including research, quality control, testing, teaching or analysis; such work may involve the use of chemicals including dangerous goods, pathogens and harmful radiation, or processes including electrical or mechanical work which could be hazardous; the laboratory includes such support areas as instrument and preparation areas, laboratory stores and any offices attached or adjacent to the laboratory; has no clients coming to the facility and does not include ***Health Services*** as defined in this Bylaw;

Lodging Home means the use of a building where accommodation is provided for remuneration, with or without meals to four or more persons exclusive of the occupant and his immediate family on a month to month basis; does not include ***Residential Care, Special Care or Bed and Breakfast or Assisted Living Facility;***

Manufactured Home Park means a parcel of land under 1 title, which provides spaces for the long-term parking and occupancy of manufactured homes;

Manufactured Home Sales means the sale of manufactured homes;

Manufacturing, Class 1 means the use of a building where materials or

8.5.25 IB-2, Industrial Employment District and "Animal Major" Definition

Purpose and Intent
The purpose of this district is to accommodate areas of concentrated manufacturing, fabrication, and other industrial uses. Development in this district is intended to limit the scope of commercial developments, which are intended to be secondary in nature and may be incorporated to serve district employees.

Permitted Land Uses	Discretionary Land Uses
Business Support Service Data Centre Bylaw B-13/2021 Indoor Recreation, Limited Industrial Distribution Industrial Manufacturing & Operations Industrial Service & Sales Mobile Vendor Bylaw B-18/2022 Storage Facility, Indoor Vehicle Service, General Vehicle Service, Limited	Accessory Building Animal Service, Limited Animal Service, General Animal Service, Major Auctioning Service Cannabis Facility, Limited Bylaw B-62/2021 Entertainment, Adult Funeral Service, Limited Funeral Service, General Government Service Hotel[2] Bylaw B-04/2021 Indoor Recreation, General Industrial Agriculture & Production Industrial Manufacturing, Limited Bylaw B-13/2021 Microbrewery Office Recycling Depot Restaurant RV Sales & Service RV Storage Security Suite Storage Facility, Outdoor Storage Facility, Public Supportive Housing, General[2] Bylaw B-04/2021 Temporary Event Temporary Storage Urban Agriculture Bylaw B-42/2021 Vehicle Sales & Leasing Vehicle Service, Major

Note 1: All land uses are subject to general and use-specific regulations and standards provided in Parts 6 and 7 of this Bylaw.
Note 2: Limited specifically to Lot 3, Block 11, Plan 9813302 as shown on Diagram 9.

Bylaw B-04/2021

Site Dimensions	
Minimum Site Area	1,000m²
Minimum Site Width	24.0m
Minimum FAR	0.2

Maximum Floor Area	
Offices	2,500m² or 25% of a Multi-Unit Development, whichever is less
Restaurants	500m²
All Other Permitted Uses	N/A

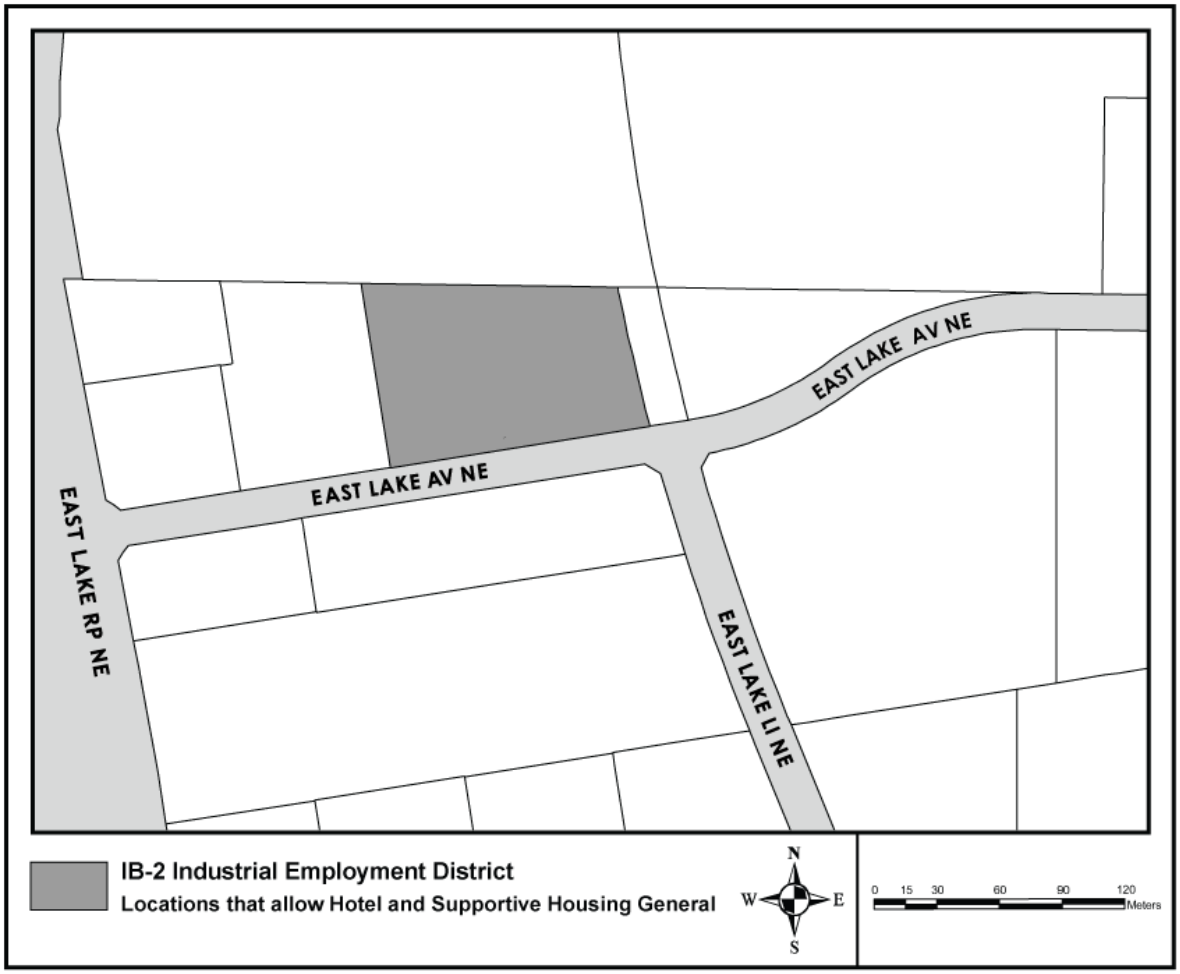
Required Setbacks	
Minimum Exterior Setback	6.0m
Minimum Interior Setback	At the discretion of the Development Authority
Min. Building Separation	2.0m

Massing and Coverage	
Maximum Building Height	18.5m
Maximum Building Coverage	70% of Site Area
Minimum Landscaping	5% of Site Area

All Other Discretionary Uses	At the discretion of the Development Authority

Development Standards
(1) Signs in this district shall be regulated in accordance with Table S.09

Diagram 9: Location for Hotel and General Supportive Housing Uses



Bylaw B-04/2021

Animal Service, Limited means:
A development where animals normally considered as domestic animals are washed, groomed, and/or trained, but the animals may not be boarded and the development must not have any outside enclosures, pens, runs or exercise areas. Typical uses include veterinary clinics and the retail sales of associated products.

Animal Service, General means:
A development for which the principal use is the treatment, day-care, or training of domestic animals in an indoor facility, and may include accessory outside enclosures, pens, runs or exercise areas, and the supplementary sale of associated products. Animals may not be boarded, except for the purposes of providing health care. Typical uses include veterinary hospitals, animal day-care facilities, and animal shelters.
Bylaw B-55/2021

Animal Service, Major means:
A development for which the principal use is the boarding, kenneling, or impoundment of domestic animals in a facility that includes outdoor enclosures, pens, runs and/or exercise areas and may include the supplementary sale of associated products. Typical uses include boarding and breeding kennels.