FURTHER TAKE NOTICE that if a hearing is requested, the Board is not bound by the proposed above noted action and has discretion, upon finding a contravention(s) of the enforceable provision(s), to make any order it deems appropriate under sections 112.3, 112.4 or 112.5 of the Act. THESL is entitled to be present at the hearing with or without counsel and to adduce evidence and make submissions. Should THESL fail to attend, the hearing may be conducted in its absence and THESL will not be entitled to any further notice in the proceeding.

In order to respond to this Notice and request a hearing, THESL must file 6 copies of their request with the Board Secretary at the following address:

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, Ontario M4P 1E4
Attention: Board Secretary

Email: Boardsec@oeb.gov.on.ca

Tel: 1-888-632-6273
Fax: 416-440-7656

If a hearing is requested, it will proceed before a Panel of the Board, at the offices of the Board (address listed above), on a date to be set by the Board.

DATED at Toronto, August 4, 2009.

Original signed by

Kirsten Walli
Board Secretary

EDA

The Voice Of Ontario's Electricity Distributors

August 26, 2009

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
Suite 2700
Toronto, ON M4P 1E4

Via RESS and by courier

Dear Ms. Walli:

Re: EB-2009-0308 Notice of Hearing on Order for Compliance against Toronto Hydro-Electric System Limited

The Electricity Distributors Association (EDA) is the voice of Ontario's electricity distributors.

The EDA has been monitoring the recent activities regarding the notice of intention to make an order to require Toronto Hydro to remedy the contravention of enforceable provisions regarding smart metering in new condominiums. The EDA understands that a notice of hearing and procedural order has been issued to Toronto Hydro indicating that the Board has determined to proceed with an oral hearing beginning September 24th. The EDA believes that the issues to be addressed at the oral hearing may set precedents for the electricity distribution sector in Ontario.

The EDA supports policies that retain the ability of distributors to include in their conditions of service, provisions to require individual suite smart metering in new condominiums. The EDA believes the issues addressed in the oral hearing may move beyond the interpretation of existing provisions and may involve policy issues, such as whether distributors should continue to have the ability to mandate smart meters in new condominiums. As a result, the EDA is requesting that the Board allow other parties, including the EDA, to participate in this potentially precedent setting oral hearing regarding smart metering in new condominiums.

Please note that correspondence to the EDA on this proceeding should be directed to the attention of Guru Kalyanraman (gkalyanraman@eda-on.ca) and Sharon Jarkiewicz (sjarkiewicz@eda-on.ca).

Yours truly,

"original signed"

Guru Kalyanraman
Policy Director, Conservation & Energy Management

Electricity Distributors Association
3700 Steeles Ave. W., Suite 1100, Vaughan, Ontario L4L 8K8 Tel 905.265.5300 1.800.668.9979 Fax 905.265.5301 email@eda-on.ca www.eda-on.ca

AIRD & BERLIS LLP

Barristers and Solicitors

Dennis M. O'Leary
Direct: 416.865.4711
E-mail: doleary@airdberlis.com

August 28, 2009

BY EMAIL AND BY COURIER

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: EB-2009-0308 – Compliance Order Proceeding against Toronto Hydro – Participation of Smart Sub-metering Working Group

We are counsel to members of the Smart Sub-metering Work Group ("SSMWG") which consists of the following entities: Carma Industries Inc., Enbridge Electric Connections Inc., Hydro Connection Inc., Intellimeter Canada Inc., Provident Energy Management Inc., Stratacon Inc., and Wyse Meter Solutions. Each of the members of the SSMWG is licensed by the Ontario Energy Board ("OEB", or the "Board") as a smart sub-metering service provider ("SSM Provider").

This letter is in response to the Notice of Intention to Make an Order for Compliance against Toronto Hydro-Electric System Limited ("THESL") under section 112.3 of the Ontario Energy Board Act, 1998, issued on August 4, 2009 under the above-noted docket number (the "Notice"). This letter is also further to THESL's Request for a hearing dated August 17th and the Board's Notice of Hearing and Procedural Order No. 1 dated August 21.

Members of the SSMWG have been directly impacted by the conduct of THESL that is at issue in this proceeding. As SSM Providers contract with condominium developers and condominium boards in the City of Toronto, members of the SSMWG have encountered the same types of practices and behaviour by THESL as detailed in the Notice. It follows that the members of the SSMWG will likely be directly affected by any Board Order (or lack thereof) arising from this proceeding which could include an order(s) directing THESL to amend its Conditions of Service, remedy contraventions of "enforceable provisions" that have occurred and/or prevent any future contraventions of "enforceable provisions".

In these circumstances, the SSMWG wishes to participate in this proceeding. Representatives of the SSMWG and its counsel will attend the hearing on September 24th and 25th. The SSMWG would be pleased to respond to any questions that might arise at that time. Additionally, the SSMWG respectfully requests that it be granted the opportunity to make submissions about the appropriate outcomes to this proceeding,

given the fact that members of the SSMWG have been adversely impacted by the conduct that is the subject of this proceeding.

The SSMWG does not intend for its participation to complicate or add time to the proceeding. To that end, the SSMWG does not intend to lead evidence or participate in the cross-examination of witnesses. The SSMWG simply seeks an opportunity to provide its perspective about what outcomes and remedies are appropriate under the circumstances. This is consistent with the Board's Notice, which indicates that the OEB may issue an Order that will aim to remedy THESL's past contraventions and prevent future contraventions.

We trust the above is satisfactory. Should the Board require the SSMWG to formally apply for intervenor status, please advise.

Yours very truly,

AIRD & BERLIS LLP

Original Signed,

Dennis M. O'Leary

cc. George Vegh, Counsel to THESL

DMO/ct

5696730.1

Indexed as:

Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.

Regional Municipality of Peel and Attorney General of Ontario v. Great Atlantic & Pacific Co. of Canada Ltd., Loblaws Supermarkets Ltd., Steinberg Inc. (c.o.b. Miracle Food Mart) and Oshawa Group Ltd.

[1990] O.J. No. 1378

74 O.R. (2d) 164

46 Admin. L.R. 1

45 C.P.C. (2d) 1

2 C.R.R. (2d) 327

22 A.C.W.S. (3d) 292

Action No. 455/90

Ontario
Court of Appeal

Dubin C.J.O., in Chambers

August 3, 1990.

Counsel:

David A. McKee, for People for Sunday Association of Canada, applicant for leave to intervene.

Elizabeth C. Goldberg and Hart Schwartz, for Attorney General of Ontario.

Robert S. Russell and Freya J. Kristjanson, for Loblaws Supermarkets Ltd.

Julian N. Falconer, for Great Atlantic & Pacific Co. of Canada Ltd.

John B. Laskin and Kent E. Thomson, for Oshawa Group Ltd.

Robert J. Arcand and Sharon M. Addison, for Steinberg Inc.

(c.o.b. Miracle Food Mart).

Angus T. McKinnon, for Hudson's Bay Co.

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1 DUBIN C.J.O.:-- This is an application by the People for Sunday Association of Canada for leave to intervene as an added party or as a friend of the court in the appeals now pending from the judgment [in the High Court of Justice on June 22, 1990] of Mr. Justice Southey [reported 73 O.R. (2d) 289, 90 C.L.L.C. Paragraph14,023], who held that the Retail Business Holidays Act, R.S.O. 1980, c. 453 (the Act), as amended in February 1989, is in contravention of the Canadian Charter of Rights and Freedoms and is thereby unconstitutional.

2 This is the first time that the constitutionality of the Retail Business Holidays Act, as amended, has come before this court, although it has twice before considered the constitutionality of its predecessor.

3 The applicant is a non-profit organization incorporated under the Canada Business Corporations Act, R.S.C. 1985, c. C-44. The current objects of the corporation include:

> (a) To affirm Sunday as a unique weekly opportunity, for as many people as possible, to enjoy spiritual, physical, moral and cultural renewal;
> (b) To cultivate the conviction of Canadian people that the preservation of Sunday as the national, weekly day of rest is necessary for the well-being of the individual, the family and the community;
> (c) To monitor carefully the drafting and enactment of all legislation bearing on Sunday labour or business and to press for new legislation or amendment of existing law where deemed necessary to minimize activity on Sunday;
> (d) To encourage active enforcement of laws protecting the special status of Sunday.

4 Historically, the membership of the Association was drawn from religious groups. While certain of such groups are still members of the Association, the majority of its members are representatives of trade unions, small retail businesses and trade associations. Included in its membership is a trade union, the majority of whose members work in the retail food sector. The membership also includes retail associations which represent small retail businesses, often owned and operated by single families.

5 Over the years the Association has taken an active role on issues arising under the present statute, as well as its predecessor, and, in particular, has addressed the role that municipalities play in the present Act, a core factor in the reasons for judgment of Mr. Justice Southey.

6 In constitutional cases, including cases under the Canadian Charter of Rights and Freedoms, which is the case here, the judgment has a great impact on others who are not immediate parties to the proceedings and, for that reason, there has been a relaxation of the rules heretofore governing the disposition of applications for leave to intervene and has increased the desirability of permitting some such interventions.

7 The Attorney General for Ontario supports this application for intervention, but it is opposed by all the other respondents. The principal submission made by those who submit that leave to intervene should not be granted is that the interests of those whom the applicant represents are now fully protected by the position being taken on the appeals by the Attorney General for Ontario and, indeed, much of the evidence relied upon by the Attorney General in the proceedings before Mr. Justice Southey was drawn from sources that the applicant represents.

8 However, in my opinion, that is not a sufficient reason in this case to deny leave to intervene. The role of counsel for the Attorney General for Ontario is to support the constitutionality of the province's legislation. Although the argument may overlap, the applicant represents a very large number of individuals who have a direct interest in the outcome, has a special knowledge and expertise of the subject- matter and is in a position to place the issues in a slightly different perspective than that of the Attorney General.

9 It was also submitted that the applicant had considered seeking the right to intervene in the proceedings before Mr. Justice Southey and declined to do so and, therefore, should not be permitted to intervene now. However, I do not think that the failure to apply for intervention before Mr. Justice Southey should foreclose the applicant's opportunity for seeking intervention at this stage.

10 Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

11 The relevant provisions of our rules of practice relating to intervention [Rules of Civil Procedure, O. Reg. 560/84, rules 13.01 [am. O. Reg. 221/86, s. 1], 13.02, 13.03(2) [am. O. Reg. 221/86, s. 1]] are as follows:

> 13.01(1) Where a person who is not a party to a proceeding claims,
>
> (a) an interest in the subject matter of the proceeding;
>
> (b) that he or she may be adversely affected by a judgment in the proceeding; or
>
> (c) that there exists between him or her and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding,
>
> the person may move for leave to intervene as an added party.
>
> (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

> 13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.
>
> . . . . .
>
> 13.03(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario.

12 It is apparent that the Retail Business Holidays Act does not affect the applicant corporation as such or its employees, and I do not think that leave to intervene as an added party pursuant to rule 13.01 would be appropriate.

13 However, in my opinion, it is appropriate to grant leave to intervene under rule 13.02, as a friend of the court, for the purpose of rendering assistance to the court by way of argument.

14 In the result, I would grant leave to the applicant to intervene on such a basis subject to the following conditions:

(1) that the applicant takes the record as it is and will not be permitted to adduce further evidence;
(2) that it will not seek costs on the appeals, but that costs may be awarded against it;
(3) that it file its factums within seven days of having been served with the factums of the Attorney General for Ontario;
(4) that the costs of this application will be costs in the appeal.

Order accordingly.

Case Name:

Hollinger Inc. (Re)

IN THE MATTER OF the Securities Act, R.S.O. 1990, c. S.5, as amended, and IN THE MATTER OF certain Directors, Officers and Insiders of Hollinger Inc., and IN THE MATTER OF certain Directors, Officers and Insiders of Hollinger International Inc. (Applications for standing in the hearing on the merits of the Applications to vary under section 144 of the Act)

2005 LNONOSC 858

Also reported at: (2006), 29 OSCB 7071

Ontario Securities Commission

Panel: Susan Wolburgh Jenah, Vice-Chair (Chair of the Panel); Robert W. Davis, Commissioner; Suresh Thakrar, Commissioner

Heard: March 21, 2005.
Decision: August 18, 2005.

(64 paras.)

Appearances:

Leah Price, Dale Denis, Avi Greenspoon, Elliot Vardin, Stephen Infuso, and Norman May - For Hollinger Inc.

Alan Mark, Steve Tenai, and Ava Yaskiel - For 1269940 Ontario Limited, 2753421 Canada Limited, Conrad Black Capital Corporation, Conrad M. (Lord) Black, the Ravelston Corporation Limited

Harry Burkman - For 509643 N.B. Inc., 509644 N.B. Inc., 509645 N.B. Inc., 509466 N.B. Inc., 509647 N.B. Inc., and Argus Corporation Limited

Stephen Halperin and Jessica Kimmel - For the Independent Committee of the Board of Directors of Hollinger Inc.

Robert Staley and Julia E. Schatz - For Hollinger International Inc. and the Special Committee for Hollinger International Inc.

Peter Howard and Brian Pukier - For Lawrence & Company Inc.

Chris Paliare, Gordon Capern, and Jeffrey Larry - For Kenneth McLaren and other minority shareholders

David C. Moore - For Catalyst Fund General Partner I Inc.

Johanna Superina, Naizam Kanji, and Paul Hayward - For Staff of the Ontario Securities Commission

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DECISION AND REASONS

BACKGROUND

1 Two applications, dated March 15, 2005 ("the Applications") pursuant to section 144 of the Securities Act (the "Act") were made to vary the following Orders (the "MCTOs"):

(a) the Order of the Commission dated June 1, 2004, as varied by the Order of the Commission dated March 8, 2005 (the "Hollinger MCTO"), relating to certain directors, officers, and insiders of Hollinger Inc. ("Hollinger"); and

(b) the Order of the Commission dated June 1, 2004, as varied by the Order of the Commission dated March 8, 2005 (the "International MCTO"), relating to certain directors, officers, and insiders of Hollinger International Inc.

2 The applicants (collectively, the "Applicants") were Hollinger Inc.; 1269940 Ontario Limited; 2753421 Canada Limited; Conrad Black Capital Corporation; Conrad M. (Lord) Black ("Black"); The Ravelston Corporation Limited ("Ravelston"); 509643 N.B. Inc.; 509644 N.B. Inc.; 509645 N.B. Inc.; 509646 N.B. Inc.; 509647 N.B. Inc.; and Argus Corporation Limited.

3 The hearing on the merits of the Applications was held on March 23 and 24, 2005. On March 28, 2005, the Commission released its decision refusing to grant the Applications as requested.

4 In our decision, we noted that prior to the hearing on the merits, we heard submissions on standing on March 21, 2005. Certain parties requested and were granted standing. We indicated that our reasons for the decision relating to standing would follow.

5 We granted modified "Torstar" standing to International and Catalyst and full standing to the McLaren, Lawrence, and the IDC (all defined below). These are the reasons for that decision.

APPLICATIONS FOR STANDING

6 Following the issuance of the Notice of Hearing on March 15, 2005, a number of parties requested standing in the Applications. Those who asked for standing were:

a. Hollinger International Inc. ("Hollinger International") and the Special Committee of Hollinger International Inc. (collectively "International"). Hollinger's principal asset was its holdings in Hollinger International;

b. Kenneth McLaren, Stephen Jarislowsky, David Wilkes and Andrew Wilkes (collectively "McLaren"). This was a group of minority shareholders of the common shares of Hollinger (the "Common Shares"), who, at the time of the hearing, held in the aggregate approximately 1,000,000 Common Shares, approximately 13% of the Common Shares held by minority shareholders. McLaren was opposed to the Going Private Transaction (the "GPT" or the "Transaction") proposed by Hollinger, and initiated by Ravelston and Black. The GPT would be put to the common shareholders for a vote in the event that the Commission decided to grant the relief sought in the Applications;

c. Catalyst Fund General Partner I Inc. ("Catalyst"). Catalyst was the largest holder of the Series II Preference Shares of Hollinger ("Preferred Shares"). Catalyst was also opposed to the GPT;

d. Lawrence & Company Inc. ("Lawrence"). Lawrence was also a minority common shareholder of Hollinger, holding 493,300 of the Common Shares, approximately 6.5% of the Common Shares held by the minority shareholders. Lawrence was in favour of the GPT; and

e. The Independent Directors Committee of Hollinger (the "IDC"). The IDC appeared on behalf of the minority common shareholders of Hollinger collectively.

ARGUMENTS FOR STANDING

International

7 International sought full standing and argued that granting it such standing would fully and adequately serve the public interest.

8 As one of the MCTOs sought to be varied related to the securities of Hollinger International, International maintained that it should be a party to that Application. As there would be no reason to separate the two hearings for the Applications to vary the MCTOs, International argued it should therefore be a party to the Application to vary the Hollinger MCTO as well.

9 International argued that it was directly affected by the outcome of the proceeding because Hollinger International was the true target of the GPT. The GPT would directly affect and threaten to harm the economic interests of Hollinger International and its shareholders inasmuch as it would allow Hollinger to reassert its position in Hollinger International and gain the control that had been lost.

10 International maintained that it could make a useful contribution to the proceedings as it was "uniquely positioned to provide highly relevant and probative evidence that relates to the public interest issues raised by the hearing." This would consist of new facts and evidence that would contradict information included in the Circular relating to the GPT (defined below) and in the Applications that International maintained was untrue or incorrect.

11 This new evidence included an affidavit of Hollinger International's General Counsel, James Van Horn. This affidavit referred to Hollinger International's offer to provide assistance in connection with Hollinger's 2003 annual financial statement audit, and to provide Hollinger with access to documents, information and personnel needed to complete the audit. The affidavit further stated that no one from the Privatization Committee of Hollinger had asked for assistance from Hollinger In-

ternational, contrary to what was stated in the Notice of Special Meeting and the Management Proxy Circular in Connection with the Special Meeting of the Holders of Retractable Common Shares and Series II Preference Shares to be Held on Thursday, March 31, 2005 to Consider a Proposed Going Private Transaction by Way of a Consolidation dated March 4, 2005 (the "Circular").

McLaren

12 McLaren sought full standing on the basis that they could make a useful contribution to the proceedings without unfairly prejudicing the interests of the parties.

13 In its submissions, Counsel for McLaren pointed out that McLaren, as a group of minority common shareholders opposed to the GPT, was uniquely positioned to advance arguments and evidence as to why the GPT was contrary to their interests as minority shareholders.

14 McLaren stated that they would call evidence and make submissions on a number of matters including whether the Circular and the valuation conducted by GMP Securities Ltd. (the "GMP Valuation") provided sufficient, appropriate and accurate information to allow the minority shareholders to make an informed decision.

15 McLaren would also argue that minority shareholders would benefit from receiving the report of the inspector appointed by Justice Campbell to investigate related-party transactions involving Hollinger. Moreover, McLaren would call evidence and make submissions about whether the minority shareholders would benefit from further disclosure, including additional information about Hollinger International that was not reflected in the GMP Valuation.

16 If the Commission were to vary the MCTOs, a vote on the GPT would be allowed to proceed. This would have a direct financial impact on the minority common shareholders, in the event of a favourable vote. McLaren argued that it would be wrong to allow a vote in these circumstances without the benefit of a proper and complete valuation based on current financial statements or a recommendation of the Board of Directors as to the fairness of the subject transaction.

17 In short, as in Re Canadian Tire Corp. (1987), 10 O.S.C.B. 857 ("Canadian Tire") and Re Canada Malting Co. (1986), 9 O.S.C.B. 3565, the financial interests of McLaren would be directly affected by the Commission's decision.

Catalyst

18 Catalyst also sought full standing. As owner of 1,398,000 Preferred Shares of Hollinger, approximately 80% of the Preferred Shares, Catalyst argued that the GPT would have a significant impact on its economic interest.

19 Catalyst maintained that it would be directly affected by a decision to grant the Applications as Catalyst could then be forced to vote on the PS Consolidation Resolution, as defined in the Circular.

20 As a security holder, Catalyst was entitled to expect that, in connection with the GPT, appropriate disclosure and a proper valuation would be provided in accordance with applicable requirements.

21 Catalyst had been a party to related court proceedings under the Canada Business Corporations Act involving Hollinger. Catalyst generated materials which the Commission would have access to and which were, according to Catalyst, "highly material to the public interest considerations." Catalyst had also obtained a letter from BMO Nesbitt Burns that raised issues with respect to

the GMP Valuation. Catalyst also proposed to file an affidavit of Wesley Voorheis, whose previous experience with a litigation trust would be useful in an analysis of the litigation trust described in the Circular.

22 In summary, Counsel for Catalyst stated that his client had particular insight into relevant matters such as the GMP Valuation, the litigation trust and the CBCA proceedings relating to Hollinger, and could therefore make a unique and useful contribution to the proceedings.

Lawrence

23 Lawrence originally applied for modified Torstar standing, a restricted type of standing described below, in order to make submissions in respect of the Applications. Upon learning that McLaren sought full standing, Lawrence sought the same standing as that afforded to McLaren.

24 Lawrence was said to have a direct interest because the minority shareholders would be asked to vote on the GPT if the Commission were to vary the MCTOs as requested.

25 As a minority shareholder, Lawrence's economic interests would be directly affected if it were to be deprived of the opportunity to vote on the GPT and the protections being offered as part of the GPT.

26 Lawrence stated that it could "provide a useful contribution from a different perspective" inasmuch as it was a minority shareholder openly in favour of the GPT.

IDC

27 The IDC maintained that it was the only representative of the minority shareholders as a collective group.

28 Counsel for the IDC argued that the public minority shareholders of Hollinger should be given the opportunity to exit the company.

29 Although the IDC had been involved in discussions relating to the GPT from the beginning, the IDC took no position on the fairness of the GPT and was not prepared to make a recommendation to shareholders with respect to how they should vote in relation to the GPT. Notwithstanding, the IDC had determined that the GPT ought to be put to the shareholders for a vote.

30 The IDC stated that it was uniquely positioned to provide a useful perspective on the relevant matters before us.

Ravelston

31 As a party to the Applications, Ravelston opposed International's and Catalyst's applications for standing. Counsel for Ravelston maintained that International and Catalyst were attempting to turn the Applications hearing into a sanctions hearing against Black.

32 Counsel for Ravelston argued that the only direct interest engaged by the Applications is whether it would be in the interests of the minority public shareholders to consider and vote on the GPT, and that neither Catalyst nor International have any direct interest in the Applications given they were not minority common shareholders.

33 Counsel for Ravelston also pointed out that in those cases where Torstar standing was granted, the applicants have typically been shareholders or other persons with a direct financial interest in the subject company.

34 Ravelston's Counsel argued that Catalyst's economic interest was not affected by the GPT and further noted that Catalyst had stated its intention to vote against the consolidation, whatever the outcome of the hearing to determine whether or not to grant the Applications.

35 Finally, Ravelston's Counsel maintained that to allow Catalyst and International to participate in the hearing would cause injustice to the immediate parties.

Hollinger

36 Hollinger opposed International's request for standing in the Application to vary the Hollinger MCTO because International was not directly or indirectly affected by any decision in relation to the Hollinger MCTO, and International would not be able to make a useful contribution without injustice to the parties.

37 Hollinger also argued that neither International nor Catalyst had any financial or economic interest in the outcome of the Applications. Rather, their concerns were indirect and speculative, and therefore insufficient to justify standing of any kind.

38 Hollinger disputed the assertion by International and Catalyst that they could make a useful contribution to the proceedings and argued that International's submissions and their proposed evidence was unrelated to the issues raised in the Application to vary the Hollinger MCTO.

39 Hollinger agreed that the common shareholders that applied for standing should be granted Torstar standing because their financial interests would be impacted by the decision to proceed with the GPT in the event of a favourable vote.

Staff

40 Staff recommended that the Commission grant modified Torstar standing or enhanced standing to all of the parties that applied for intervenor status, with the exception of the IDC who should be given full standing.

41 Staff's position was that the proposed intervenors would be able to offer a different and useful perspective on the issues to be determined by the Commission.

REASONS

42 In previous Commission decisions, the Commission has granted two types of standing to those seeking intervenor status:

a. Full standing, including the opportunity to adduce evidence and make submissions; and
b. Torstar standing, a restricted form of standing.

43 "Torstar" standing derives its name from Re Torstar Corp. (1985), 8 O.S.C.B. 5068 ("Torstar"), and refers to a restricted type of standing which entitles a party to make submissions before the Commission but not to tender evidence in the proceeding.

THE TEST

44 In Re Albino (1991), 14 O.S.C.B. 365 ("Albino"), the Commission set out a test that has been adopted in a number of subsequent Commission decisions [at pp. 425-426]:

> ... on requests for standing the Commission must first and foremost consider the nature of the issue and the likelihood that the intervenors will be able to make a useful contribution without injustice to the immediate parties (the MacMillan Bloedel test, adopted in Torstar). Where a would-be intervenor has a direct financial interest, in that the person may acquire a benefit or incur a loss as an immediate result of a Commission decision, full standing is appropriate. The clearest application of that principle is to security holders and to those who have announced an intention (i.e. offerors in take-over bids) to acquire securities. Where the intending intervenor has a clear financial interest - most obviously, as a holder of securities of the subject issuer - but that interest will not be immediately affected by the decision the Commission may make, then only restricted (i.e. Torstar) standing is to be granted.

45 Albino suggests that the following factors should be considered in an application for standing:

a. The nature of the proceeding;
b. Whether the proposed intervenor will make a useful contribution to the proceeding;
c. Whether the proposed intervention would unfairly prejudice the interests of the existing parties; and
d. The effect, if any, of the proceeding's potential outcomes on the economic interests of the proposed intervenor.

46 Hearings before the Commission may relate to a variety of matters, including: discipline for breaches of the Securities Act and/or conduct contrary to the public interest; consideration of contested take-over bids; reviews of decisions of self-regulatory organizations; or reviews of decisions of a Director.

47 In previous cases, the Commission has noted that issues of standing should be viewed differently in hearings involving contested take-over bids, for example, versus disciplinary proceedings. The Commission has granted broader intervention rights in bid-related and similar types of proceedings than in disciplinary hearings. These principles are laid out by the Commission in Re Instinet Corp. (1995), 18 O.S.C.B. 5439 at p. 5446 and in Canadian Tire.

48 When deciding if a proposed intervenor will make a useful contribution to the proceedings, the Commission will consider whether the proposed intervenor will advance arguments or evidence that would not otherwise be presented. In MacMillan Bloedel v. Mullin, [1985] B.C.J. No. 2076 (C.A.) ("MacMillan Bloedel") at paragraph 9, the British Columbia Court of Appeal said that a successful intervenor should "bring a different perspective to the issue before the Court". This Commission held in Albino that where an existing party can adequately advance a position, then interventions may be neither helpful nor necessary.

49 The Commission must always be mindful of the need to deal fairly with the existing parties to the proceeding in considering applications for intervenor status. Excessive interventions may unduly protract the proceedings and thus unfairly prejudice existing parties, as noted in Albino at page 426. The Commission has the statutory authority to determine its own procedures and practices and can make orders to apply in any particular proceeding, as provided under paragraph 25.0.1(a) of the Statutory Powers Procedure Act, R.S.O. 1990. This power is analogous to a court's ability to control its own process at trial or on a motion to avoid an unfair outcome to the immediate parties, as per

Re Ontario Securities Commission and Electra Investments (Canada) Ltd. (1983), 44 O.R. (2d) 61 (Div. Ct.).

50 Previous Commission decisions relating to standing have focused on the impact the Commission's decision would have on the economic interests of a proposed intervenor.

51 The nature of the relief sought in this case and the surrounding circumstances were such that we allowed all of the proposed intervenors to participate in the hearing on the merits of the Applications. We concluded, based on oral and written submissions, that we would benefit from hearing the various perspectives of the intervenors on the issues before us and that they could all make a useful contribution to the proceedings.

52 The Commission has the ability to control its own process and can exercise its discretion to grant intervenor standing in a manner that does not cause prejudice to the immediate parties.

53 Having considered the arguments and written submissions of the proposed intervenors, the Applicants, and Staff, we granted standing to all of the applicants for intervenor status while imposing limits on the time available for submissions and in some cases setting parameters around the issues on which we were prepared to hear evidence.

54 International was granted modified Torstar standing with respect to the Application to vary the International MCTO.

55 We concluded that International would be able to make a useful contribution to our consideration of the Application to vary the International MCTO and, in particular, on issues relating to: access to, and cooperation between, Hollinger and Hollinger International with regard to the provision of financial disclosure to Hollinger and with regard to the GMP Valuation.

56 We concluded that granting International modified Torstar standing to make submissions and adduce limited evidence on the issues identified above would not unfairly prejudice the interests of the immediate parties.

57 Similarly, we afforded modified Torstar standing to Catalyst, allowing Catalyst to adduce evidence relating to the adequacy of the GMP Valuation and the information underlying such valuation, and of the viability of the CCPR and the CCPR Trust mechanism, as defined in the Circular.

58 Catalyst's role in pending court proceedings involving Hollinger and the evidence it proposed to introduce from BMO Nesbitt Burns relating to the GMP Valuation made Catalyst uniquely positioned to provide a perspective on this important issue without causing prejudice to the immediate parties.

59 Although Catalyst and International arguably did not have a direct economic interest in the outcome of the Applications, we concluded that our consideration of the Applications would benefit from the targeted evidence they would lead. More importantly, we determined that such evidence would not otherwise be presented without their participation.

60 We granted full standing to each of McLaren, Lawrence, and the IDC. Each of these parties was, or represented, minority common shareholders of Hollinger.

61 We afforded full standing to McLaren who would clearly be directly affected by a decision to allow or deny the requested relief. McLaren opposed the relief sought. We believed that McLaren could provide useful input with regard to the relevant issues at the hearing including the adequacy and accuracy of the disclosure provided in the Circular and the appropriateness of asking the minor-

---- End of Request ----
Print Request: Current Document: 1
Time Of Request: Sunday, September 13, 2009 15:01:41

Case Name:

McFadyen v. Ontario (Mining and Lands Commissioner)

Between
Nancy McFadyen, John McFadyen, David Roffey, Karen Walsh, Applicants, and
The Mining and Lands Commissioner and Derek Russell, Respondents, and
Attorney General of Ontario, Intervenor

[2007] O.J. No. 4875

162 A.C.W.S. (3d) 873

232 O.A.C. 239

41 M.P.L.R. (4th) 267

2007 CarswellOnt 8040

Divisional Court File No. 153/07

Mining and Lands Commissioner File No. CA003-05

Ontario Superior Court of Justice
Divisional Court

J.D. Carnwath, S.E. Greer and G.F. Speigel JJ.

Heard: November 1, 2007.
Judgment: December 13, 2007.

(52 paras.)

Administrative law -- Natural justice -- Duty of fairness -- Procedural fairness -- Application by McFadyen for judicial review of Land Commissioner's order dismissing applicants' motion to grant them party status in appeal by respondent Russell -- Russell appealed Conservation Authority's decision refusing to grant Russell a fill permit -- Applicants had opposed Russell's application -- Application dismissed -- Commissioner's decision disclosed no procedural unfairness -- Failure to grant a motion for party status did not breach duty of fairness -- Commissioner properly concluded

applicants were seeking to preserve amenities for privately-held interests which did not fall within scope and jurisdiction of the appeal.

Municipal law -- Planning -- Building or development permits -- Application by McFadyen for judicial review of Land Commissioner's order dismissing applicants' motion to grant them party status in appeal by respondent Russell -- Russell appealed Conservation Authority's decision refusing to grant Russell a fill permit -- Applicants had opposed Russell's application -- Application dismissed -- Commissioner's decision disclosed no procedural unfairness -- Failure to grant a motion for party status did not breach duty of fairness -- Commissioner properly concluded applicants were seeking to preserve amenities for privately-held interests which did not fall within scope and jurisdiction of the appeal.

Application by McFadyen for judicial review of Land Commissioner's order dismissing applicants' motion to grant them party status in appeal by respondent Russell -- Applicants and Russell were adjacent property owners -- Russell appealed Conservation Authority's decision refusing to grant Russell a fill permit -- Applicants had opposed Russell's application and had made substantial submissions at application -- Applicants submitted they were denied procedural fairness before Commissioner -- HELD: Application dismissed -- Commissioner's decision disclosed no procedural unfairness and no unreasonable conclusions -- Applicants had no right in law to be parties to Russell's appeal -- Failure to grant a motion for party status did not breach duty of fairness -- Commissioner received applicants' request to be added, permitted them to file affidavit material and to have an oral hearing -- Commissioner exercised statutory discretion in refusing applicants' request for party status -- Commissioner properly concluded applicants were seeking to preserve amenities for privately-held interests which did not fall within scope and jurisdiction of the appeal -- Decision to hold a hearing de novo on appeal did not constitute procedural unfairness to applicants.

Statutes, Regulations and Rules Cited:

Conservation Authorities Act, R.S.O. 1990, c. C.27, s. 28, s. 28(12), s. 28(15)(a), s. 28(15)(b)

Mining Act, s. 113, s. 116, s. 117

Ministry of Natural Resources Act, s. 6(6), s. 6(7)

Rules of Civil Procedure, Rule 13.01

Counsel:

William Chalmers and *Eileen Costello*, for the Applicants.

Amber Stewart, for the Respondent, Derek Russell.

Fateh A. Salim, for the Intervenor.

[Editor's note: A corrigendum was released by the Court January 16, 2008; the correction has been made to the text and the corrigendum is appended to this document.]

The judgment of the Court was delivered by

1 J.D. CARNWATH J.:-- The applicants reside in the City of Toronto, either adjacent to or close to, 119 Glen Road ("the Subject Property"), which is owned by the respondent, Derek Russell.

2 The applicants seek judicial review of the order of the Mining and Lands Commissioner ("the Commissioner"), dated March 9, 2007. In her Order, the Commissioner dismissed a motion by the applicants for an order granting them status as parties to the appeal filed by Mr. Russell to the Commissioner. Mr. Russell's appeal was from the decision of the Executive Committee of the Toronto and Region Conservation Authority ("the TRCA"), dated January 25, 2005.

3 The TRCA decision refused Mr. Russell's application to the TRCA for a permit permitting development on his property. A TRCA permit was required since the property is within the area governed by the TRCA's jurisdiction and lies beneath the floodline established in the TRCA's Stream and Valley Guidelines. A public hearing was held on January 14, 2005, to consider Mr. Russell's application. The applicants received formal notice of the hearing, attended at the hearing and made submissions in opposition to Mr. Russell's application. Mr. Russell's application was denied by the TRCA.

4 The issues to be decided on this judicial review application are as follows:

(i) Did the Commissioner deny the applicants procedural fairness by finding they had no legitimate expectation to be granted party status in Mr. Russell's appeal of the TRCA decision?
(ii) Did the Commissioner deny the applicants procedural fairness by determining that Mr. Russell's appeal would be conducted as a hearing *de novo* and by refusing to allow them the right to participate in the hearing?
(iii) Did the Commissioner deny the applicants procedural fairness in failing to consider the evidence as to the applicants' involvement in, contribution to and ongoing interest in Mr. Russell's appeal?
(iv) Did the Commissioner deny the applicants procedural fairness by prejudging the evidence the applicants would adduce at the hearing without allowing them to make proper and full submissions in this regard?

BACKGROUND

5 Mr. Russell had previously applied to the TRCA for a development permit. That application ultimately reached the Divisional Court by way of an application for judicial review brought by these applicants. The Divisional Court stayed that application until Mr. Russell's second application (described in para. 6 below) proceeded "to finality". The respondents in this application submit that first application has no relevance in these proceedings. I agree.

6 In the Fall of 2004, Mr. Russell submitted a revised site plan for his property with the TRCA and requested a permit to develop in accordance with the revised plans.

7 TRCA staff prepared a hearing report which concluded that "while the architectural improvements to the building are commendable, it is the opinion of staff that the proposal is not in compliance with the TRCA policies for reasons as outlined in the previous hearing report". Staff recommended that the TRCA reconsider its prior decision and refuse Mr. Russell's application as it would affect the conservation of land.

8 On January 5, 2005, the TRCA issued a Notice of Hearing in respect of Mr. Russell's application which notice was sent to the applicants.

9 On January 14, 2005, the Executive Committee of the TRCA convened a public hearing on Mr. Russell's application and the applicants and their counsel attended. The applicants made extensive submissions in support of the staff's conclusion that Mr. Russell's application to permit development on his property ought to be denied.

10 On January 25, 2005, the TRCA released its decision denying Mr. Russell's application. On February 14, 2005, Mr. Russell appealed the TRCA decision to the Commissioner under s. 28(15) of the *Conservation Authorities Act*, R.S.O. 1990, c. C.27.

11 On November 7, 2005, the applicants served a notice of motion in connection with Mr. Russell's appeal in which they sought an order from the Commissioner granting them party status in Mr. Russell's appeal.

12 The applicants' motion was argued on March 3, 2006 and on March 9, 2007, the Commissioner released her Order and reasons for decision dismissing the applicants' motion for party status.

13 On April 5, 2007, the applicants issued their application for judicial review of the Commissioner's decision and, on the same day, launched an appeal of the Commissioner's decision, pursuant to the *Act*. Both this application for judicial review and the appeal were heard the same day, the judicial review application being heard first. Following the applicants' submissions on the judicial review application, the panel advised the applicants that their application was refused with reasons to follow. Counsel for the applicants then submitted that the appeal, being based upon the same arguments as the judicial review application, should be endorsed as dismissed.

The Statutory Scheme

14 Section 28(15) of the *Conservation Authorities Act* ("*CAA*") provides the right to appeal a conservation authority's refusal to grant a fill permit to the Minister of Natural Resources ("the Minister"), as follows:

> 28.(15) A person who has been refused permission or who objects to conditions imposed on a permission may, within 30 days of receiving the reasons under subsection (14), appeal to the Minister who may,
>
> (a) refuse the permission; or
> (b) grant the permission, with or without conditions.
>
> *Conservation Authorities Act*, R.S.O. 1990, c. C.27 (the *CAA*), s. 28(15) *CAA*, above

15 Under s. 6(6) of the *Ministry of Natural Resources Act* ("*MNR Act*"), the Lieutenant Governor in Council may, by regulation, assign the authorities, powers and duties of the Minister of Natural Resources to the Commissioner. (*Ministry of Natural Resources Act*, R.S.O. 1990, c. M.31, s. 6(6)(b) ("*MNR Act*"))

16 Under O. Reg. 571/00, made under the *MNR Act*, the Commissioner is assigned the Minister's powers and duties for the purpose of hearing and determining fill permit appeals under s. 28(15) of the *CAA*.

17 Section 6(7) of the *MNR Act* provides:

> 6.(7) Part VI of the *Mining Act* applies with necessary modifications to the exercise of authorities, powers and duties assigned to the Commissioner under clause (6)(b).

Standard of Review

18 To the extent that this application raises issues of procedural fairness and natural justice, no assessment of the appropriate standard of review is required. Rather, as our Court of Appeal explained in *London (City)* v. *Ayerswood Development Corp.*:

> [w]hen considering an allegation of a denial of natural justice, a court need not engage in an assessment of the appropriate standard of review. Rather, the court is required to evaluate whether the rules of procedural fairness or the duty of fairness have been adhered to. The court does this by assessing the specific circumstances giving rise to the allegation and by determining what procedures and safeguards were required in those circumstances in order to comply with the duty to act fairly.
>
> *London (City)* v. *Ayerswood Development Corp.* (2002), 167 O.A.C. 120 (C.A.), at paras. 9-10; (see also: *Moreau-Berube v. New Brunswick (Judicial Council)* (2002), 209 D.L.R. (4th) 1 (S.C.C.), para. 74)

19 To the extent that the Commissioner's decision requires a determination of the standard of review, a pragmatic and functional approach determines that standard of review. That approach considers four contextual factors - the presence or absence of a privative clause or a statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question - law, fact, or mixed law and fact - the factors may overlap. (*Dr. Q.* v. *College of Physicians and Surgeons of B.C.*, [2003] 1 S.C.R. 226 *et seq.*)

20 Section 117 of the *Mining Act*, above, contains a privative clause that prohibits the appeal of interim decisions of the Commissioner:

> 117. Despite the Statutory Powers Procedure Act, the Commissioner may hear and dispose of any application not involving the final determination of the matter or proceeding, either on or without notice, at any place he or she considers convenient, and his or her decision upon any such application is final and is not subject to appeal but, where the Commissioner makes his or her decision without notice, he or she may later reconsider and amend such decision.

21 The applicants submit that because their participation in Mr. Russell's application for a fill permit came to an end with the Commissioner's decision, therefore the Commissioner's order is a final order. The applicants submit that s. 117 of the *Mining Act* does not apply. We reject this submission. The language of s. 117 makes it clear that the Commissioner's refusal to grant party status to the applicants did not involve a final determination of the matter or proceeding; Mr. Russell's appeal remains to be determined. The presence of this privative clause is "compelling evidence" that

the Court ought to show deference to the Commissioner's decision. (*Pushpanathan* v. *Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982, at p. 1006)

22 The expertise of the tribunal also attracts curial deference. At pp. 23-26 of her decision, the Commissioner summarizes the technical issues that are raised on fill permit appeals, including:

> (a) Slope stability and preservation of ephemeral or first order streams and their functions in relation to hydrology;
> (b) TRCA policy, including the Valley and Streams Corridor Management Program and Terrestrial Natural Heritage Program;
> (c) Ecosystem services contemplated by the *CAA*;
> (d) Disruption of the ongoing biological functions, including forestation or re-forestation of mixed natural and invasive species;
> (e) Silt and sedimentation issues caused by disruption of soils; and,
> (f) The role of the valley corridor and strategies for corridor systems and green space restoration.

In our view, the Commissioner is better situated to decide who should raise evidence on these issues.

23 Pursuant to the *CAA*, the issues addressed by the Commissioner are "polycentric" in nature, which also requires that more deference be shown to the tribunal. Polycentric issues are defined to be issues that involve a large number of interlocking and interacting interests, as follows:

> Where the purposes of the statute and of the decision-maker are conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a delicate balancing between different constituencies, then the appropriateness of court supervision diminishes ...
>
> While judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties. Where an administrative structure more closely resembles this model, courts will exercise restraint.
>
> *Pushpanathan,* above, at pp. 1008-1009

24 The issues the Commissioner has to decide when considering a s. 28 appeal are polycentric in nature. A balancing of numerous competing interests is required, including the competing interests of public interest in conservation of land and private property rights. Section 116 of the *Mining Act* gives the Commissioner wide latitude to establish the procedures to be followed on fill permit appeals.

25 In essence, who is better placed to make the decision, the Commissioner or this Court? We conclude the expertise of the tribunal and the polycentric issues involved establish that the Commissioner is in a better position to determine whether neighbouring landowners should be parties to fill permit appeals. The governing legislation supports this conclusion since the Commissioner is given the authority to establish the tribunal's procedure:

> The Court should not simply be invited by an order of mine to engage in crafting extensive or detailed guidelines as to the tests to be used by the Board in deciding whether to add parties. Any such exploration of territory inherently foreign to judges has been deliberately circumscribed by statute.
>
> *Toronto (City) v. 1133373 Ontario Inc.*, (2000), 16 M.P.L.R. (3d) 101, paras. 7-8

26 For the purposes of this appeal, we conclude the standard of review is, at the very least, reasonableness.

Procedural Fairness

27 The applicants submit they were denied procedural fairness before the Commissioner. It is not disputed the Commissioner owes a duty of procedural fairness to those affected by her decision. However, the applicants' position must be viewed from this perspective - they have no right in law to be parties to Mr. Russell's fill permit appeal.

28 The *SPPA*, s. 5 provides:

> The parties to an administrative proceeding shall be the persons specified as parties by or under the statute under which the proceeding arises or, if not so specified, persons entitled by law to be parties to the proceeding.

29 Section 28(12) of the *CAA* grants a right of hearing on a fill permit application only to the person who applies for the permit. Section 28 of the *CAA* does not provide for added parties on a fill permit appeal. The mere refusal to add a party does not, in and of itself, breach the duty of fairness.

30 This Court has held that the failure to grant a motion for party status does not breach the duty of fairness:

> The Moving Party argues that it has been denied natural justice, as it will be unable to participate in a hearing in which its private interests are likely to be affected ...
>
> In my view, there is no denial of natural justice here because Lafarge was not added as a party. Lafarge was given an opportunity to bring the motion to be added as a party and to be heard on that motion. However, it has no right to be added as a party to the site plan appeal proceeding.
>
> *Lafarge Canada Inc. v. 1341665 Ontario Ltd.* (2004), 185 O.A.C. 35 (Div. Ct.) at paras. 4-5

31 The Commissioner received the applicants' request to be added, permitted them to file affidavit material and to have an oral hearing. Their counsel made submissions and was granted a right of reply in a hearing which lasted three hours approximately.

32 In refusing the applicants' request, the Commissioner was exercising the discretion granted to her by s. 25.0.1 of the *SPPA* and s. 116 of the *Mining Act*. The Court, in *Lafarge*, above, confirmed that the exercise of discretion to grant party status was a matter of practice and procedure. There is ample authority for the proposition that courts should defer to a tribunal in matters of its practice