IN THE MATTER OF the Electricity Act, 1998 as amended (the "Electricity Act");

AND IN THE MATTER OF THE an application by Plateau Wind Inc. for an order or orders pursuant to section 41(9) of the Electricity Act establishing the location of Plateau Wind's distribution facilities within certain road allowances owned by the Municipality of Grey Highlands.

AND IN THE MATTER OF the Board's Decision dated January 12, 2011 (File Number EB-2010-0253)

AND IN THE MATTER OF Rules 42-45 of the Board's *Rules of Practice and Procedure.*

REPLY SUBMISSION OF
THE MUNICIPALITY OF GREY HIGHLANDS

In accordance with the Ontario Energy Board's Procedural Order No. 1 dated March 11, 2011, The Municipality of Grey Highlands makes this submission in reply to the submissions of "Plateau" which submissions were received March 17th, 2011.

THE THRESHOLD QUESTION AND TEST FOR A RULE 42.01 MOTION

1. The Ontario Energy Board unlike traditional courts is not bound by precedent or the principle of stare decisis. In this regard, although decisions of this Board otherwise constituted may provide guidance, such decisions do not establish binding principles of law or procedure. Where principles of a binding nature are to be imposed, they should be imposed in the body of the rule that governs the procedure and decision making of the Board; in this case if the "Threshold Test" referenced by Plateau was intended by the Board to be of universal application, such test would and should be embodied within Rule 45.01. Rule 45.01 is not worded in such fashion.

2. If the "Threshold Test" referenced by Plateau was intended to apply to this review proceeding, the Board should have identified and made reference to such test in its procedural order. Procedural Order No. 1 dated March 11, 2011 makes no reference to the specific nature or content of the threshold test that it would engage or apply.

3. "In the face of legal uncertainties and novel situations, it is not desirable to accord precedent and stare decisis a pivotal role"[1] in tribunal proceedings. The Municipality of Grey Highlands respectfully submits that the determination of whether the review will occur based upon the merits should not be determined, in this case, with respect to or reliance upon the "Threshold Test" identified by Plateau. In the Municipality's respectful submission it is not particularly applicable to the novel issue placed before this Board. The two OEB cases referenced by Plateau are not comparable to the case at hand in terms of fact situations nor, more importantly, with respect to the nature of the issue placed in the Board's hands.

4. The "NGEIR Decision" (Appendix F of Plateau's Responding Material) dealt with the storage of natural gas and rates and services. The OPG Decision (Appendix E of Plateau's Responding Material) dealt with a "payment decision", which as stated by OPG, "purports to de-link OPG's mitigation proposal form the prior tax period loss, require OPG to make an unqualified gift to consumers and expose OPG to liability...". Both decisions address matters within and requiring the technical expertise of the OEB.

5. The matter at hand is unlike those matters. This matter is focused on the determination of the "status" of Plateau based on the interpretation of the applicable legislation and regulations and the interrelationship of that determination with the exclusive jurisdiction granted to municipalities through the *Municipal Act, 2001* with respect to their roads.

6. To the best of the Municipality's knowledge, the interpretation of section 41 of the *Electricity Act, 1998* as it relates to lines connecting a generation system to the local distribution system has not been decided by the Board on any prior occasion nor has it been decided by the Courts. More specifically, since the adoption of the *Green Energy Act*, which it must be noted, provides the Lieutenant Governor with a mandate to pass regulations which "promote access to transmission systems and distribution systems for proponents of renewable energy projects" (emphasis added), the Board nor the Courts have had occasion to consider or determine whether the owner of a "renewable energy generation facility" is a distributor under section 41 of the *Electricity Act* or alternatively whether the electrical lines connecting such facility to the distribution system are, in fact, also a distribution system (the "specific issue").

7. In the absence of any specific required or stipulated test in Rule 45.01 the Municipality respectfully submits that a standard of "correctness" is appropriate in this case. Simply stated, before proceeding to a review on the merits the Board should only determine whether there is reason to doubt the correctness of the

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[1] *Practice and Procedure Before Administrative Tribunals, Vol.2*, MacAuley, R., Q.C., and Sprague, J., Carswell, 2004, Thomson Canada Limited, p. 6-6. (Appendix A)

original decision and the review involves matters of general importance. That test as it was formulated with respect to motions for leave to appeal to the Divisional Court on interlocutory matters is aptly summarized by Justice Farley in *Ash v. Lloyd's Corporation*[2]:

"I do not need to conclude that the decision was wrong or probably wrong (*Canadian Egg Marketing Agency v. Sunnylea Foods Ltd.* (1977) , 3 C.P.C. 348 (H.C.J.)) or that I would, if hearing the original motion, have decided it otherwise. The threshold of this prong is that I be satisfied that the correctness of the order is open to very serious debate..."

8. With regard to the issue of the "general importance" the Court relying upon the words of Justice Catzman (as he was then) in *Rankin v. McLeod Young Weir Ltd.* (1986), 57 O.R. 569 stated that matters of general importance are those "extending beyond the interest of the parties before the court...".

9. Again as the "specific issue" has not been addressed by the Board, it is the Municipality's respectful submission that the Board ought to consider the correctness of the original decision in consideration of the broader implications of the interpretation given in the original decision. If the Board does rely upon its prior decisions to provide "guidance" in future adjudications, the Board should ensure the correctness of such decisions. This duty is of particular importance where the Board is addressing a matter that it has not previously addressed or encountered.

10. Contrary to the assertions of Plateau, the Municipality has not attempted to re-argue its original submissions. Instead the Municipality in its motion materials has identified a number of errors made by the Board in assessing the Municipality's original submissions. The totality of those errors, is in the Municipality's respectful submission, sufficient basis to conclude that the correctness of the order is open to very serious debate. Furthermore, considering that all municipalities in Ontario are vested with exclusive jurisdiction over their roads, the specific issue at hand is a matter of general importance to all municipalities wherein a "renewable energy generation facility" may be located. Section 41 of the *Electricity Act* intrudes upon that exclusive jurisdiction of municipalities and the Board in its original decision failed to have due regard for the principle of strict construction of the special privileges granted in section 41.

REQUEST FOR COSTS

11. The motion for review is not frivolous nor is it vexatious. The Municipality of Grey Highlands has exclusive jurisdiction over its roads. Section 41 of the *Electricity Act* intrudes upon that exclusive jurisdiction.

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[2]8 O.R. (3d) 282 (Gen. Div) at page 284. (Appendix B)

12. Plateau's allegation that the motion is an attempt to delay proceedings is itself spurious and, more importantly, without evidentiary basis. The suggestion or assertion concerning that Council of the Municipality of Grey Highland's motive is to delay construction of Plateau's project is tantamount to an allegation of "bad faith". The standard to be met in establishing bad faith is high, necessitating evidence to demonstrate that the Municipality acted other than in the public interest. [3]

13. Plateau has made only bald allegations that the Municipality is attempting to delay the construction of Plateau's wind project and that the Municipality is using the Board's review process as a forum to "achieve delays in the construction of the Plateau wind energy project". The Municipality's interest is simple and straightforward. Does Plateau have a right under section 41 of the *Electricity Act* to locate its works on the Municipality's road allowances? This principle is a condition precedent to the Board's authority to determine the location of the alleged "Distribution System".

14. Plateau has identified the Municipality's request for an extension of time to file a notice of motion for a review as permitted and granted by the Board under its Rules to substantiate its allegation that the Municipality's intent is to delay its project. That allegation is also without merit. The Municipality's request was premised on the fact that legal counsel required direction from Municipal Council as to its desire to initiate a review. Initiation of tribunal appeals, court actions, etc. must be authorize by Council. Council's next meeting was not scheduled until after the expiry of 20 day period.

15. The Municipality submits that the simple request for an extension of a 20 day "request for review" period is not a demonstration of "bad faith" or ulterior motives. It is by no means a demonstration of an intent to delay the construction of the project. Furthermore, in this regard, the Municipality did not take any formal objection to the failure of the Plateau to meet the Board's service requirements with respect to the originating application. Clearly, Plateau in failing to serve its originating documents within the time required, caused a delay.

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[3] *Municipal Parking Corp. v. Toronto (City)* (2009), 2009 CarswellOnt 7282 (S.C.J.) at paragraph 24. (Appendix C)

16. The Municipality respectfully request the Board to deny the requests for costs and to commence and complete its review of the original decision.

All of which is respectfully submitted this 22nd Day of March, 2011.

Russell, Christie LLP
Barristers & Solicitors
505 Memorial Ave.
Orillia, ON L3V 6J3

Edward B. Veldboom

Tel.: 705 325-1326
Fax.: 705 327-1811
Email: eveldboom@russellchristie.com

Counsel to the Municipality of Grey Highlands
The Municipality of Grey Highlands
by its solicitors Russell, Christie LLP

PRACTICE AND PROCEDURE

BEFORE

Administrative Tribunals

VOLUME 2

by
ROBERT W. MACAULAY, Q.C.
and
JAMES L.H. SPRAGUE, B.A., LL.B.

Contributors

Judy Algar
Peter Budd
Irène Dicaire
Marvin J. Huberman
David P. Jacobs
Charles Mathis
Sharon Silberstein
Patricia Auron
Laura Boujoff
Daria Farr
Irving Kleiner
Steve B. McCann
Judith A. Snider
Gay A. Brown
Douglas Colbourne
Roger R. Elliott
Leslie MacIntosh
Paul Pudge
David Wood

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2075 Kennedy Road
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in Canada are called by their creators, "tribunals" in their mandating legislation and I believe for obvious reasons — they first and foremost are an agency of Parliament or the Legislatures, which courts (basically) are not.

Before proceeding further, however, it may be useful to identify what I believe is the major factor in administrative law which has given rise to the major role played by policy-making in agency decision-making and the resulting confusion respecting rule-making. This is the legal restraint upon agencies to use their decisions as precedents, or, in other words, the inapplicabilty of stare decisis in administrative decision-making.

6.2 THE ROLE OF PRECEDENT IN AGENCY DECISION-MAKING (STARE DECISIS)

Unlike administrative bodies, the traditional courts are generally bound to follow their own rulings. In so doing, parties in court proceedings rely heavily on the doctrine of precedent or stare decisis to substantiate their claims. Judicial decisions are usually categorized as either authoritative or persuasive. If authoritative, they must be strictly followed; if persuasive, they may follow them. The authoritative or persuasive status of decisons depends upon the level of the court which issued them. Within a jurisdiction (e.g. a province, and one may treat the federal court as a separate province simply for the purposes of this discussion), the decisions of a higher court are authoritative (or binding) upon all lower courts. Decisions of the same level of court are persuasive (although courts generally say that they should be reluctant to depart from their own earlier decisions). Decisions of courts of other jurisdictions (e.g. courts of provinces, other than the province of the court hearing the case) of whatever level are persuasive. Decisions of the Supreme Court are authoritative everywhere in Canada. Decisions of the Privy Council prior to 1949 are also authoritative across Canada. In determining which judicial decisions are authoritative for administrative agencies one can use as a general rule of thumb that decisions of the courts of the same jurisdiction as the agency will be authoritative if the judges of that court are appointed by the federal government (i.e. courts known as s. 96 courts — referring to the appointment power set out in s. 96 of the Constitution) while decisions of courts whose judges are appointed by the provincial government will be merely persuasive. Decisions of courts of other juridictions, of whatever level are merely persuasive to an agency. Decisions of the Supreme Court of Canada are authoriative for all Canadian agencies.

In performing their mandates agencies should strive for continuity, consistency and a degree of predictabilty. Justice demands that equality of treatment and impartiality prevail when the merits of a case are considered. On the other hand, in the face of legal uncertainties and novel situations, it is not desirable to accord precedent and stare decisis a pivotal role. Facts are often not comparable. Old precedents are expanded, twisted and contorted so many times that they often

stay to the extent of allowing discovery of Mr. Armour as on an examination in aid of execution.

Counsel for Mr. Armour argues that if he is examined, and if his appeal should later be successful, plaintiff's counsel will have been able to obtain confidential information about Mr. Armour's assets to which the plaintiff is not entitled. However, there is no indication in the material filed on behalf of Mr. Armour on this motion that Mr. Armour would suffer any detriment as a result of such disclosure.

I therefore order that the stay under rule 63.01(1) be removed to the extent of allowing examination of Mr. Armour in aid of execution, pursuant to the rules. The costs of this motion are to the plaintiff/respondent.

Motion granted in part.

Ash v. Lloyd's Corp.

Ontario Court (General Division), Farley J. *May 1, 1992*

Conflict of laws — Forum non conveniens — Plaintiffs bringing action in Ontario in which injunctions sought restraining defendant banks from paying upon letters of credit of plaintiffs at instance of other defendant against whom fraud alleged — Stay of Ontario action granted to those banks with no presence in England on ground United Kingdom was forum conveniens — Stay refused for those banks with English branches — Leave to appeal granted to latter banks — Good reason existing to doubt correctness of order and proposed appeal involving matters of general importance.

The plaintiffs brought actions seeking a declaration that agreements between them and the defendant Lloyd's were void *ab initio* as having been induced by fraud and as having been made in contravention of the Ontario *Securities Act*. They also sought interlocutory and permanent injunctions restraining the defendant banks from paying upon letters of credit of their clients the plaintiffs at the instance of Lloyd's. The defendants moved to stay the plaintiffs' actions on the grounds that the courts of England had exclusive jurisdiction and, in the alternative, that England was the *forum conveniens*.

The motions judge determined that the United Kingdom courts would be better suited to deal with the fraud allegations against Lloyd's. He also held that England and not Ontario was the *forum conveniens* for those banks with no presence in England. Stays were granted to those banks and to Lloyd's. The motion of the four banks with London branches was dismissed, since an injunction in Ontario would effectively prevent those institutions from paying on the letters of credit. Those four banks moved for leave to appeal.

Held, leave should be granted.

Leave to appeal should be granted where there was reason to doubt the correctness of the decision (it did not have to be concluded that the decision was wrong or probably wrong) and where the proposed appeal involved matters of general importance (not matters of particular importance only to the litigants).

There was good reason to doubt the correctness of the order in this case. The fraud allegations against Lloyd's were a common thread to all defendants. It would be highly undesirable if English and Ontario courts were to reach contrary results. There was also the concern that the four banks would have to be involved in the English litigation as well as in the Ontario litigation (in which Lloyd's did not have to respond), thus incurring additional costs.

Affidavits of three well qualified and experienced persons in the field of international letters of credit were filed by the four banks indicating that the decision in question would be perceived as an unexpected jurisdictional outreach by a Canadian court. Also, this was a matter of first instance as to the question of jurisdiction *vis-à-vis* Canadian bank letters of credit. The proposed appeal, then, involved matters of general importance.

Greslik v. Ontario Legal Aid Plan (1988), 65 O.R. (2d) 110, 28 C.P.C. (2d) 294, 30 O.A.C. 53 (Div. Ct.), **apld**

Other cases referred to

Bank of Nova Scotia v. Angelica-Whitewear Ltd., [1987] 1 S.C.R. 59, 36 B.L.R. 140, 36 D.L.R. (4th) 161, 73 N.R. 158; *BP Canadian Holdings Ltd. v. Westmin Resources Ltd.* (1983), 32 C.P.C. 300 (Ont. H.C.J.); *Canadian Egg Marketing Agency v. Sunnylea Foods Ltd.* (1977), 3 C.P.C. 348 (Ont. H.C.J.); *Ecco Heating Products Ltd. v. J.K. Campbell & Associates Ltd.* (1990), 48 B.C.L.R. (2d) 36, 79 C.B.R. (N.S.) 265, 40 C.L.R. 11, [1990] 5 W.W.R. 687 (C.A.); *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.*, [1978] Q.B. 159, [1978] 1 All E.R. 976, [1977] 3 W.L.R. 764, 121 Sol. Jo. 617 (C.A.); *Financial Trust Co. v. Caisse Populaire Ste Anne d'Ottawa Inc.* (1987), 61 O.R. (2d) 538, 21 C.P.C. (2d) 24 (Ont. H.C.J.); *Germond v. Avco Financial Services Canada Ltd.*, Ont. Gen. Div., Misener J., August 5, 1991 [summarized at 28 A.C.W.S. (3d) ¶ 564]; *H.B. Willis (1974) Inc. v. Bank of Montreal*, Que. S.C., February 25, 1982; *MacShannon v. Rockwear Glass Ltd.*, [1978] A.C. 795, [1978] 1 All E.R. 625, 122 Sol. Jo. 81, [1978] 2 W.L.R. 362 (H.L.); *Platinum Communications Systems Inc. v. IMAX Corp.* (1988), 31 B.C.L.R. (2d) 64, 41 B.L.R. 58 (S.C.), affd (1989), 41 B.C.L.R. (2d) 175 (C.A.); *Rankin v. McLeod Young Weir Ltd.* (1986), 57 O.R. (2d) 569, 13 C.P.C. (2d) 192 (H.C.J.); *RD Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.*, [1978] Q.B. 146, [1977] 2 All E.R. 862 (Q.B.); *Rosen v. Pullen* (1981), 16 B.L.R. 28, 126 D.L.R. (3d) 62 (Ont. H.C.J.); *United City Merchants (Investments) Ltd. v. Royal Bank of Canada*, [1983] 1 A.C. 168, [1982] 2 All E.R. 720, [1982] 2 W.L.R. 1039, 126 Sol. Jo. 379, [1982] 2 Lloyd's Rep. 1 (H.L.)

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rule 62.02(5)(b)

MOTION for leave to appeal from the judgment of the General Division (1991), 6 O.R. (3d) 235, 87 D.L.R. (4th) 65.

Alan J. Lenczner, for plaintiff.

R. Bruce Smith, for Canadian Imperial Bank of Commerce, Royal Bank of Canada and Toronto-Dominion Bank.

Martin Sclisizzi, for Bank of Nova Scotia.

No one appearing for Lloyd's Corporation.

FARLEY J.:—This endorsement also covers the motion of the other three moving banks — Canadian Imperial Bank of Commerce, Royal Bank of Canada and the Toronto-Dominion Bank (CIBC, Royal and TD) — aside from the Bank of Nova Scotia (BNS) (collectively four banks). This motion was adjourned part way through on January 7, 1992 on consent of the plaintiffs to allow the four banks to file additional material. On its resumption on April 20, 1992, the four banks only proceeded pursuant to rule 62.02(5)(*b*) of the Rules of Civil Procedure, O. Reg. 560/84 — leave to appeal the order of McKeown J. [now reported (1991), 6 O.R. (3d) 235, 87 D.L.R. (4th) 65 (Gen. Div.)] on the basis that there was good reason to doubt the correctness of his decision and (conjunctive as *per Greslik v. Ontario Legal Aid Plan* (1988), 65 O.R. (2d) 110, 28 C.P.C. (2d) 294 (Div. Ct.), at p. 112 O.R., p. 297 C.P.C.) the proposed appeal involves matters of such importance that leave to appeal should be granted.

I confirm that as to the first prong I do not need to conclude that the decision was wrong or probably wrong (*Canadian Egg Marketing Agency v. Sunnylea Foods Ltd.* (1977), 3 C.P.C. 348 (Ont. H.C.J.)) or that I would, if hearing the original motion, have decided it otherwise. The threshold of this prong is that I be satisfied that the correctness of the order is open to very serious debate (*Germond v. Avco Financial Services Canada Ltd.*, an unreported decision of the General Division, *per* Misener J., dated August 5, 1991 [summarized at 28 A.C.W.S. (3d) ¶ 564]).

As to the second prong of the general importance question, it was said in *Greslik* at p. 113 O.R., p. 297 C.P.C.:

> . . . that those words refer to matters of *general* importance, not matters of particular importance relevant only to the litigants. General importance relates to matters of public importance and matters relevant to the development of the law and the administration of justice . . .

(Emphasis original)
(citing, *inter alia*, *Rankin v. McLeod Young Weir Ltd.* (1986), 57 O.R. (2d) 569, 13 C.P.C. (2d) 192 (H.C.J.)). Catzman J. in *Rankin* at pp. 574-75 O.R., pp. 198-200 C.P.C. said:

> . . . matters of general or public importance extending beyond the interests of the parties before the court . . . (were) matters of such importance . . . (and) while other cases approach the question from the broader standpoint of the litigating public as appears from the examples cited . . . there are instances where these two perspectives converge, in which the issue which arises is one of importance both to the individual litigants and to the general public . . . in my view, the "importance" comprehended by the rule transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application that are felt to warrant resolution by a higher level of judicial authority.

In summary McKeown J. determined that the United Kingdom courts would be better suited to deal with the fraud allegations against Lloyd's *vis-à-vis* Lloyd's based on his determination of *forum conveniens* and the 20 various factors favouring England. He also determined that it would similarly be appropriate to have the United Kingdom courts deal with these fraud allegations against Lloyd's *vis-à-vis* the three financial institutions Canada Trust, Hongkong Bank of Canada and Citibank Canada (3 FI) since the 3 FI had no presence in the United Kingdom and were, therefore, forced to deal with confirming banks concerning letters of credit issued in favour of Lloyd's. However, he concluded that it would be appropriate to deal with fraud allegations against Lloyd's as to the four banks in Ontario since they did not have to deal with confirming banks in the United Kingdom as they had United Kingdom offices since an injunction in Ontario would effectively prevent these institutions from paying on the letters of credit. In contrast, an Ontario injunction would not prevent the English confirming banks from paying.

The key to the injunctions is the aspect of the functional commercial linking of the four relationships in a letter of credit arrangement (see *United City Merchants (Investments) Ltd. v. Royal Bank of Canada*, [1983] 1 A.C. 168, [1982] 2 W.L.R. 1039 (H.L.), at pp. 183-84 A.C., pp. 1044-45 W.L.R.) and the doctrine of "fraud unravels all". Of course, it is the alleged fraud of Lloyd's — not anything that is alleged against the four banks. One, therefore, in a question of fair play, would not wish to see the four banks put at a disadvantage. An injunction against the four banks paying Lloyd's (in the relationship combined of No. 3 and No. 4) would prevent a collection/enforcement by these institutions against the plaintiffs in relationship No. 2. An injunction against the 3 FI would not be effective to prevent the confirming bank in relationship No. 4 from paying Lloyd's and then claiming against the 3 FI in relationship No. 3. The 3 FI could be hung out to dry in such event.

There, of course, is the question of whether the confirming banks in the United Kingdom would by now have sufficient notification that they would pay out at their peril. But the test in the United Kingdom appears to be the same for both (i) notification stoppage and (ii) interlocutory injunctions — clearly established fraud (see *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.*, [1978] Q.B. 159, [1978] 1 All E.R. 976 (C.A.), discussed at pp. 78-79 S.C.R., pp. 172-73 D.L.R., of *Bank of Nova*

Scotia v. Angelica-Whitewear Ltd., [1978] 1 S.C.R. 59, 36 D.L.R. (4th) 161). In Canada the test for notification stoppage is the higher one of clearly established fraud while for an interlocutory injunction it is the lesser one of a strong *prima facie* case of fraud (*Angelica*, at pp. 84-85 S.C.R., pp. 176-78 D.L.R.).

McKeown J. at p. 5 of his reasons [p. 239 O.R., p. 70 D.L.R.] commented that in *Angelica* there was no question of jurisdiction but: "In this case, on the other hand, jurisdiction has been put in issue". That is, of course, the point here in this leave application. He then proceeded to deal with jurisdiction pursuant to the *forum non conveniens* test discussed in *MacShannon v. Rockwear Glass Limited*, [1978] A.C. 795, [1978] 1 All E.R. 625 (H.L.), at p. 812 A.C., p. 631 All E.R. In this respect see *Ecco Heating Products Ltd. v. J.K. Campbell and Associates Ltd.* (1990), 48 B.C.L.R. (2d) 36, 79 C.B.R. (N.S.) 265 (C.A.), at p. 42 B.C.L.R., p. 271 C.B.R., and *BP Canadian Holdings Ltd. v. Westmin Resources Ltd.* (1983), 32 C.P.C. 300 (Ont. H.C.J.), at p. 304.

It must be recognized that the fraud allegations against Lloyd's are a common thread to all defendants (Lloyd's, 3 FI and four banks). As well, "fraud unravels all". In my view it would be highly undesirable if, notwithstanding this common thread, an English court were to conclude that the thread was red in the warp and an Ontario court would conclude that the thread were green in the woof — in other words, at direct cross purposes. As well, there is the concern that not only would the four banks have to deal with the allegations against Lloyd's in Ontario (where Lloyd's does not have to now respond), but they would also have to be involved in English litigation in this regard. I think that there is a question of very serious debate to be addressed as to the possibility of conflicting decisions being reached in Ontario and the United Kingdom and, as well, the question of additional cost to the four banks in having to fight a two-front war rather than a single battle in the main theatre. While McKeown J. said at p. 8 of his reasons [p. 241 O.R., p. 71 D.L.R.]:

> Even though the letters of credit issued by the first group of banks (the four Banks) were confirmed, advised and payable at their branches in England in pounds sterling and in spite of the fact English law may govern, I am not convinced that justice would be done either more conveniently or less expensively in England.

After indicating at p. 7 previously [p. 240 O.R., p. 71 D.L.R.]:

> In my view, given that an Ontario injunction could effectively prevent Lloyd's from being paid on the letters of credit issued by this group of banks (the four banks) and because the plaintiffs and the banks in this group (the four banks) reside in Ontario, Ontario and not England is the *forum conveniens*.

It does not appear that he canvassed the 20 points *vis-à-vis* the four banks situation as he did *vis-à-vis* Lloyd's as a party at pp. 21-24 [pp. 248-50 O.R., pp. 78-80 D.L.R.], many of which would appear to have relevance as to the four banks. It would also seem to me that an English injunction against the four banks would have the same desired effect *vis-à-vis* relationship No. 2 as does an Ontario injunction.

I conclude for the foregoing reasons that there is good reason to doubt the correctness of the subject order.

As to the importance test, I note that the four banks have filed affidavits of three well qualified and experienced persons (their qualifications were unchallenged) in the field of international letters of credit who address the importance of McKeown J's decision from varying perspectives — the Canadian banking sector (Wren), the English (or foreign) banking sector (Barlow) and the Canadian international trade sector (Aronstam). Only Wren was cross-examined on his affidavit. In *Financial Trust Co. v. Caisse Populaire Ste Anne d'Ottawa Inc.* (1987), 61 O.R. (2d) 538, 21 C.P.C. (2d) 24 (H.C.J.), McRae J. said at p. 542 O.R., pp. 28-29 C.P.C. (adopting Craig J.'s adoption [at p. 39 B.L.R., p. 68 D.L.R.] in *Rosen v. Pullen* (1981), 16 B.L.R. 28, 126 D.L.R. (3d) 62 (Ont. H.C.J.) of Kerr J.'s words [p. 155 Q.B., p. 870 All E.R.] in *RD Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.*, [1978] Q.B. 146, [1977] 2 All E.R. 862 (Q.B.): Letters of credit "are the life-blood of international commerce". While Canada conducts most of its international trade with its Southern neighbour the United States without much involvement of letters of credit, international trade involving letters of credit is quite significant for Canada involving about $6.5 billion each way. The cost-competitiveness of letters of credit affect in Canada two groups:

(1) Canadian companies involved in foreign businesses wish to remain cost-competitive with their foreign adversaries and, in this regard, wish to obtain letter of credit financing at the lowest cost. Having to pay a higher amount for a letter of credit because of foreign bank confirmation fees would either raise financing costs generally or turn these companies away from [Canadian] letters of credit to foreign bank letters of credit.

(2) In the latter event the Canadian banking sector would be penalized whereas presently Canadian banks are apparently quite favourably regarded for letters of credit, there being no perception generally that Canadian bank letters of credit require foreign re-confirmation.

It was indicated that the general perception was (and given the general absence of exclusive jurisdiction clauses) that if a Canadian bank letter of credit were dishonoured, the foreign beneficiary could sue in his own courts and under his own law. The general consensus of the three individuals was that the McKeown J. decision would eventually be disseminated throughout the world marketplace in time and it would be perceived as an unexpected jurisdictional outreach of a Canadian court. This is contrasted with the 3 FI treatment where McKeown J. concluded that an Ontario court would not take jurisdiction where the letter of credit is confirmed abroad. It was suggested by Aronstam that it would be more likely to result in foreign confirmation than exclusive jurisdiction clauses (which are poorly regarded as being the resort of emerging nations) with the further possibility that Canadian customers would tend to be more exposed to the risk of fraud as it would lessen the prospects of a Canadian customer being able to claim fraud successfully to be able to stop payment. It is not apparent from the two *Platinum* decisions that jurisdiction was argued: see *Platinum Communications Systems Inc. v. IMAX Corp.* (1988), 31 B.C.L.R. (2d) 64, 41 B.L.R. 58 (S.C.), affd (1989), 41 B.C.L.R. (2d) 175 (C.A.).

It was also indicated that this was a matter of first instance as to the question of jurisdiction *vis-à-vis* Canadian bank letters of credit, which would be a matter therefore relevant to the development of Canadian law and justice. I note that in *H.B. Willis (1974) Inc. v. Bank of Montreal (Le Ministère de L'Agriculture et de la Révolution Agraire* interpleaded), Que. S.C., February 25, 1982, neither the bank nor the Algerian agency contested the matter.

As well, for the foregoing reasons, it seems to me that while the four banks are dominant players in the Canadian banking industry, it is clear that "private" and "public" matters of importance may merge (see *Rankin*, p. 575 O.R., p. 200 C.P.C.). I see the question as being important to the Canadian banking industry generally — a sector of our economy of some significant importance — and to our international trade business sector. I find the importance test also met.

Costs were agreed to be in the event on a party-and-party basis.

Leave to appeal the order of McKeown J. dated November 15, 1991, granted.

Motion granted.

Corporation of the Canadian Civil Liberties Association v. Attorney General of Canada

[Indexed as: Corp. of Canadian Civil Liberties Assn. v. Canada (Attorney General)]

Ontario Court (General Division), Potts J. *March 25, 1992*

Charter of Rights and Freedoms — Interpretation — American "chilling effect" doctrine not to be adopted by Canadian courts in determining scope of freedoms protected by s. 2 of Charter — Application of "chilling effect" doctrine to be limited to s. 1 analysis — Canadian Charter of Rights and Freedoms, ss. 1, 2.

Charter of Rights and Freedoms — Freedom of expression — Sections 12 and 21 to 26 of Canadian Security Intelligence Service Act not having purpose or effect of infringing freedom of expression — Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, ss. 12, 21 to 26 — Canadian Charter of Rights and Freedoms, s. 2(b).

Charter of Rights and Freedoms — Freedom of assembly — Sections 12 and 21 to 26 of Canadian Security Intelligence Service Act not having purpose or effect of restricting freedom of peaceful assembly — Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, ss. 12, 21 to 26 — Canadian Charter of Rights and Freedoms, s. 2(c).

Charter of Rights and Freedoms — Freedom of association — Sections 12 and 21 to 26 of Canadian Security Intelligence Service Act not having purpose or effect of restricting freedom of association — Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, ss. 12, 21 to 26 — Canadian Charter of Rights and Freedoms, s. 2(d).

Charter of Rights and Freedoms — Search and seizure — Sections 21 to 26 of Canadian Security Intelligence Service Act not infringing right to be free from unreasonable search and seizure — Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, ss. 21 to 26 — Canadian Charter of Rights and Freedoms, s. 8.

Charter of Rights and Freedoms — Fundamental justice — Canadian Security Intelligence Service Act not infringing individuals' liberty or security interests or permitting CSIS to act in manner not in accordance with principles of fundamental justice — Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23 — Canadian Charter of Rights and Freedoms, s. 7.

The applicant sought a declaration that s. 12 and ss. 21 to 26 of the *Canadian Security Intelligence Service Act* are unconstitutional and of no force and effect as they violate various sections of the *Canadian Charter of Rights and Freedoms.*

The Canadian Security Intelligence Service (CSIS) is mandated, pursuant to the impugned sections of the Act, to collect information with respect to activities that may on reasonable grounds be suspected of constituting "threats to the security of Canada", which are defined in s. 2 of the Act to include "foreign influenced activities . . . detrimental to the interests of Canada" and "activities directed toward or in support of . . . acts of serious violence . . . for the purpose of achieving a political objective within Canada or a foreign state or activities intended ultimately to lead to the . . . overthrow by violence of the constitutionally established system of government in Canada". Section 2 excludes from the definition "lawful

C

2009 CarswellOnt 7282, 66 M.P.L.R. (4th) 76, 314 D.L.R. (4th) 642

01; 359473494Municipal Parking Corp. v. Toronto (City)

Municipal Parking Corporation (Applicant) and City of Toronto (Respondent)

Ontario Superior Court of Justice

Aston J.

Heard: May 27, 2009
Judgment: November 23, 2009
Docket: 04-CV-273949CM2

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Counsel: Louis Sokolov for Applicants

Ansuya Pachai, Antonella Ceddia for Respondent

Subject: Public; Property; Constitutional

Municipal law --- Attacks on by-laws and resolutions — Grounds — Bad faith

M Corp., which provided parking enforcement services to private property owners, issued common law damage claims in form of "parking violation notices" to parking violators — Notices resembled official city parking tickets (PINs) — In response to public complaints, city passed amending by-law to permit only licensed private parking enforcement agencies (PPEAs) employing municipal law enforcement officers to provide parking enforcement services on private property, and to make PIN only type of demand for payment that could be issued — Purpose of by-law was established to be "consumer protection" — M Corp. applied to quash by-law on basis that it was passed in bad faith and for improper purpose — Application dismissed — Several of M Corp.'s submissions as to whether there was sufficient evidence of any harm to "consumers" questioned policy choice of elected municipal officials — Policy considerations are not reviewable by court — M Corp. failed to prove that city acted other than in public interest — Evidence in support of M Corp.'s submission that city council was presented with misleading information about number of complaints was taken out of context, inaccurate, and adopted unwarranted characterization — M Corp. failed to prove that by-law prohibited lawful business activity under guise of regulation — While all revenue from PINs was paid to city, financial benefit to city was not demonstrably principle motivation for passing by-law — City was justified in trying to regulate practice of PPEAs with by-law, rather than merely regulating form and content of violation notices or prescribing maximum penalties — Evidence fell far short of establishing bad faith in passing of by-law; nor had M Corp. proved any flaw in decision-making process.

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Municipal law --- Attacks on by-laws and resolutions — Grounds — Improper motive

M Corp., which provided parking enforcement services to private property owners, issued common law damage claims in form of "parking violation notices" to parking violators — Notices resembled official city parking tickets (PINs) — In response to public complaints, city passed amending by-law to permit only licensed private parking enforcement agencies (PPEAs) employing municipal law enforcement officers to provide parking enforcement services on private property, and to make PIN only type of demand for payment that could be issued — Purpose of by-law was established to be "consumer protection" — M Corp. applied to quash by-law on basis that it was passed for improper purpose and in bad faith — Application dismissed — Several of M Corp.'s submissions as to whether there was sufficient evidence of any harm to "consumers" questioned policy choice of elected municipal officials — Policy considerations are not reviewable by court — M Corp. failed to prove that city acted other than in public interest — Evidence in support of M Corp.'s submission that city council was presented with misleading information about number of complaints was taken out of context, inaccurate, and adopted unwarranted characterization — M Corp. failed to prove that by-law prohibited lawful business activity under guise of regulation — While all revenue from PINs was paid to city, financial benefit to city was not demonstrably principle motivation for passing by-law — City was justified in trying to regulate practice of PPEAs with by-law, rather than merely regulating form and content of violation notices or prescribing maximum penalties — Evidence fell far short of establishing bad faith in passing of by-law; nor had M Corp. proved any flaw in decision-making process.

Municipal law --- Attacks on by-laws and resolutions — Grounds — Ultra vires — Duplicity — Provincial legislation

M Corp., which provided parking enforcement services to private property owners, issued common law damage claims in form of "parking violation notices" to parking violators — Notices resembled official city parking tickets (PINs) — In response to public complaints, city passed amending by-law to permit only licensed private parking enforcement agencies (PPEAs) employing municipal law enforcement officers to provide parking enforcement services on private property, and to make PIN only type of demand for payment that could be issued — Purpose of by-law was established to be "consumer protection" — M Corp. applied to quash by-law on basis that it conflicted with statutory and common law rights, contrary to s. 14 of Municipal Act, 2001 — Application dismissed — By-law will not be declared invalid unless there is operational conflict such that dual compliance is not possible — M Corp. had not identified any such operational conflict with property owner's rights under Trespass to Property Act, or with right to employ agent to act as "collection agency" under Collection Agencies Act — M Corp. misconstrued by-law in submitting that it conflicted with Solicitors Act and Courts of Justice Act because it prevented service of statement of claim or solicitor's letter demanding redress for trespass — Owner or occupier of property, if not engaged in business of parking enforcement, still has right to bring action for damages or to make written demand for payment — By-law did not operate to limit all private property owners to sole remedy of having licensed PPEA issue PIN — M Corp. had no standing to represent interests of unnamed property owners or property owners in general, and it had failed to prove that by-law effectively frustrated rights or remedies of property owners under statutes to which it referred.

Municipal law --- Attacks on by-laws and resolutions — Grounds — Ultra vires — Beyond power of municipality — Creating monopoly

M Corp., which provided parking enforcement services to private property owners, issued common law damage claims in form of "parking violation notices" to parking violators — Notices resembled official city parking

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tickets (PINs) — In response to public complaints, city passed amending by-law to permit only licensed private parking enforcement agencies (PPEAs) employing municipal law enforcement officers to provide parking enforcement services on private property, and to make PIN only type of demand for payment that could be issued — Purpose of by-law was established to be "consumer protection" — M Corp. applied to quash by-law on basis that it was monopolistic and anti-competitive, in that it awarded monopoly to city over parking enforcement on private property — Application dismissed — Section 18 of Municipal Act, 2001 prohibits municipality from using its licensing power to confer on any person exclusive right of carrying on any business — City did not single out M Corp. with by-law or create any competitive advantage for any other business — No authority was cited for proposition that "confer on any person" in s. 18 includes city itself; nor did evidence establish that by-law conferred on city "exclusive right" to carry on business of parking enforcement — While all revenue from PINs was paid to city, M Corp. did not adduce any evidence of how its own revenues were affected by by-law — There were alternative ways it could operate, with or without issuing PINs.

Municipal law --- Attacks on by-laws and resolutions — Grounds — Improper delegation — Miscellaneous

M Corp., which provided parking enforcement services to private property owners, issued common law damage claims in form of "parking violation notices" to parking violators — Notices resembled official city parking tickets (PINs) — In response to public complaints, city passed amending by-law to permit only licensed private parking enforcement agencies (PPEAs) employing municipal law enforcement officers to provide parking enforcement services on private property, and to make PIN only type of demand for payment that could be issued — By-law prohibited issuing of any ticket, notice, or demand for payment to vehicles parked on private property other than PIN, police service tow card, or other document as approved by chief of police — Purpose of by-law was established to be "consumer protection" — M Corp. applied to quash by-law on basis that delegation to chief of police contemplated therein was improper delegation of authority — Application dismissed — City cannot assign its legislative or policy-making function to individual — Chief of police had no role in determining whether business should be licensed as PPEA, exercised no licensing powers, and could not revoke licence or impose any conditions — Delegation of authority in this case was permissive discretion rather than prohibitive discretion, and by-law itself established some boundaries for exercise of permissive discretion — Fact that PIN and police service tow card were "official" government forms clearly implied that in considering approval for other forms of notice, chief of police was not to allow documents masquerading as city tickets or by-law infractions — There was no evidence that chief of police had unreasonably exercised his function or discretion to detriment of M Corp. or any other PPEA — Discretion granted to chief of police did not constitute improper delegation of authority.

Municipal law --- Attacks on by-laws and resolutions — Grounds — Charter of Rights and Freedoms — Freedom of expression

M Corp., which provided parking enforcement services to private property owners, issued common law damage claims in form of "parking violation notices" to parking violators — Notices resembled official city parking tickets (PINs) — In response to public complaints, city passed amending by-law to permit only licensed private parking enforcement agencies (PPEAs) employing municipal law enforcement officers to provide parking enforcement services on private property, and to make PIN only type of demand for payment that could be issued — Purpose of by-law was established to be "consumer protection" — M Corp. applied to quash by-law on basis that it violated s. 2(b) of Canadian Charter of Rights and Freedoms and was not justified by s. 1 — Application dismissed — While purpose of by-law was not to restrict freedom of expression, its effect was to do so — City had established "pressing and substantial objective" as threshold hurdle in justifying infringement of freedom of

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expression — By-law was legitimate consumer protection initiative — Eliminating ability of businesses to issue private parking tickets was rationally connected to objectives of protecting consumers from misleading, coercive and unjustifiable business practices — City could not have achieved its purpose by less intrusive means, such as regulating amounts charged by capping rates for parking on private property, or regulating form or wording of private violation notices — City had established rational connection between purpose of by-law and need to curtail freedom of expression, and that lesser forms of impairment of freedom of expression would not be sufficient to achieve legitimate purpose of by-law — Goal being achieved by limit on M Corp.'s freedom of commercial expression outweighed deleterious effect of such limitation — There was proportionality between effects and objectives of by-law.

Cases considered by *Aston J.*:

Irwin Toy Ltd. c. Québec (Procureur général) (1989), 94 N.R. 167, (sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General))* [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — considered

Minto Construction Ltd. v. Gloucester (Township) (1979), 1979 CarswellOnt 573, 96 D.L.R. (3d) 491, 23 O.R. (2d) 634, 8 M.P.L.R. 172 (Ont. Div. Ct.) — distinguished

Mr. Pawn Ltd. v. Winnipeg (City) (2002), 2002 MBCA 2, 2002 CarswellMan 2, 170 Man. R. (2d) 1, 285 W.A.C. 1, 26 M.P.L.R. (3d) 75 (Man. C.A.) — considered

Municipal Parking Corp. v. Toronto (City) (2006), 22 M.P.L.R. (4th) 240, 51 R.P.R. (4th) 86, 2006 CarswellOnt 3172 (Ont. S.C.J.) — referred to

Municipal Parking Corp. v. Toronto (City) (2007), 2007 CarswellOnt 5934, 2007 ONCA 647, 229 O.A.C. 59, 286 D.L.R. (4th) 343, 38 M.P.L.R. (4th) 1, 61 R.P.R. (4th) 1 (Ont. C.A.) — referred to

Nanaimo (City) v. Rascal Trucking Ltd. (2000), 20 Admin. L.R. (3d) 1, 183 D.L.R. (4th) 1, 2000 CarswellBC 392, 2000 CarswellBC 393, 2000 SCC 13, 251 N.R. 42, 132 B.C.A.C. 298, 215 W.A.C. 298, [2000] 1 S.C.R. 342, [2000] 6 W.W.R. 403, 76 B.C.L.R. (3d) 201, 9 M.P.L.R. (3d) 1 (S.C.C.) — considered

Nash v. London (City) (1995), 26 M.P.L.R. (2d) 24, 1995 CarswellOnt 165 (Ont. Gen. Div.) — considered

R. v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — considered

Shell Canada Products Ltd. v. Vancouver (City) (1994), 1994 CarswellBC 115, 1994 CarswellBC 1234, [1994] 3 W.W.R. 609, 20 M.P.L.R. (2d) 1, 20 Admin. L.R. (2d) 202, 110 D.L.R. (4th) 1, 88 B.C.L.R. (2d) 145, [1994] 1 S.C.R. 231, 163 N.R. 81, 41 B.C.A.C. 81, 66 W.A.C. 81 (S.C.C.) — referred to

Vann Media Inc. v. Oakville (Town) (2008), 2008 CarswellOnt 8659, (sub nom. *Vann Media Group Inc. v. Oakville (Town))* 95 O.R. (3d) 252, 54 M.P.L.R. (4th) 1, 2008 ONCA 752 (Ont. C.A.) — considered

Vic Restaurant Inc. v. Montreal (City) (1958), [1959] S.C.R. 58, 17 D.L.R. (2d) 81, 1958 CarswellQue 49 (S.C.C.) — distinguished

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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

s. 1 — considered

s. 2(b) — considered

Collection Agencies Act, R.S.O. 1990, c. C.14

Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

Generally — referred to

Municipal Act, 2001, S.O. 2001, c. 25

s. 14 — referred to

s. 18 — considered

s. 100 — referred to

s. 150 — referred to

Provincial Offences Act, R.S.O. 1990, c. P.33

Pt. II — referred to

Solicitors Act, R.S.O. 1990, c. S.15

Generally — referred to

Trespass to Property Act, R.S.O. 1990, c. T.21

Generally — referred to

Words and phrases considered

bad faith

Bad faith by a municipality connotes a lack of candor, frankness and impartiality. It includes arbitrary or unfair conduct and the exercise of power to serve private purposes at the expense of the public interest.

APPLICATION to quash municipal by-law governing private parking enforcement agencies.

***Aston J.*:**

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Nature and History of the Application

1 Municipal Parking Corporation ("MPC") brings this application to quash By-Law No. 725-2004 governing private parking enforcement agencies (the "Amending By-law") passed under the licensing provisions contained in Chapter 545 of the *Toronto Municipal Code*. The application was first heard and decided in May, 2006. The application was granted on the basis that individuals who parked unlawfully could not be considered "consumers", thus making the by-law *ultra vires* under s. 150 of the *Municipal Act*. Having resolved the issue on that basis, it was unnecessary for the application judge to consider the other grounds put forward by MPC.[FN1]

2 On September 21, 2007, the Court of Appeal reversed the decision of the application judge and sent the matter back to this court for consideration of the other grounds. More specifically, at paragraph 11 of the Court of Appeal decision[FN2], the court remitted back "all of the issues that were not dealt with by the application judge" with the observation that several of the grounds relied upon by MPC "raised factual issues that could only be determined on a new hearing".[FN3]

3 On this new hearing, the Court of Appeal's determination that the purpose of the Amending By-Law is indeed "consumer protection", and that it therefore does fall within the City of Toronto's ("City") licensing power under section 150 of the *Municipal Act*, is binding. Expressed another way, it has been conclusively established that the by-law's purpose is consumer protection.

Background

4 MPC is a business that provides parking enforcement services to private property owners such as shopping malls, strip plazas and apartment buildings. Like other similar businesses, one of MPC's enforcement techniques in relation to alleged parking violators is to issue common law damage claims in the form of private parking tickets, or "parking violation notices."

5 It is not clear from the record whether the applicant is a corporate entity, a partnership, or simply a business name. The applicant's affidavit evidence is from its lawyers and is basically second and third hand information. The City does not object to the admissibility of this evidence but submits that appropriate adverse inferences ought to be drawn, where appropriate, from the fact that no principal or partner of the applicant has provided any direct evidence. With some reluctance I refrain from directing a trial of issues and accept the invitation of both sides to determine the matter on the material filed.

6 Businesses that operate commercial parking lots or that perform parking enforcement services are required to obtain a business licence from the City. Specifically, section 545-2(60) of the *Toronto Municipal Code* provides that "every private parking enforcement agency" ("PPEA") must obtain a business licence. A PPEA is defined as "a business which provides or performs parking enforcement services", a definition that includes the applicant. The Amending By-Law introduced additional requirements and restrictions on PPEAs noted below.

7 Parking enforcement on private property in Toronto is managed in part by the City and in part by private agencies.[FN4]

8 On behalf of the City, duties are divided between uniformed police officers and the Parking Enforcement Unit ("PEU") of the Toronto Police Service. The PEU consists of approximately 300 parking enforcement officers who are civilian employees of the Toronto Police Service. Both units enforce parking on private and public property. Pursuant to Part II of the *Provincial Offences Act*, both units are authorized to Issue Parking Infrac-

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tion Notices ("PINs") to vehicles parked in violation of City by-laws.

9 The City also controls private parking enforcement agencies ("PPEAs"), through its licensing power. The Amending By-Law requires PPEAs to employ Municipal Law Enforcement Officers ("MLEOs"). MLEOs are individuals trained and authorized by the City to enforce parking on private property. These individuals are not paid or supervised by the City, but by their private sector employers.

10 The Amending By-Law at issue on this application was enacted July 22, 2004. Its history and particulars are set out in paragraphs 20 to 25 of the Court of Appeal decision as follows:

> [20] As already noted the 2004 Amending By-Law was enacted on July 22, 2004 and included recitals indicating that it was intended as a response to abusive and misleading parking enforcement practices used by PPEAs and commercial parking lots. The practices referred to included issuing parking tags and invoices designed to resemble PINs and charging inflated and unjustified administration fees:
>
> > WHEREAS members of the public have complained to the Toronto Police Service, City staff and City Council concerning the abusive and misleading parking enforcement practices used by private property enforcement agencies and commercial parking lot operators, including the issuance of "look-alike" parking tags and invoices, the imposition of inflated and unjustified administrative fees or "fines" and the sanctioning of abusive collection practices; and
> >
> > WHEREAS there is no meaningful way in which the public can appeal the validity of these tags, invoices or collection notices, or the amount of the "administrative fees" charged by these companies; and
> >
> > WHEREAS the Toronto Police Services has expressed its concern that there is an inherent conflict of interest where persons undertaking enforcement activities have a direct financial interest in the amount and collection of invoiced amounts and administrative penalties, and that this leads to abuses which have the effect of eroding and undermining public respect for legitimate law enforcement particularly with respect to the enforcement of City by-laws regulating parking on private and municipal property.
>
> [21] The 2004 Amending By-Law changed the City's licensing by-law in relation to businesses that operate commercial parking lots and PPEAs in five important respects. First, it amended the definition of Parking Enforcement Services to read as follows:
>
> > Parking Enforcement Services — Any parking enforcement activity, including but not limited to the monitoring of property, issuance of tags, tickets or payment notices, and authorizing the towing of vehicles, carried on in relation to vehicles parked on private property without the consent of the owner or occupant of such property.
>
> [22] Second, it prohibited the owners of businesses that operate commercial parking lots from engaging in parking enforcement activities unless licensed as a PPEA or by using the services of a licensed PPEA.
>
> [23] Third, it required PPEAs to employ MLEOs and to ensure their parking enforcement activities are undertaken by MLEOs only.
>
> [24] Fourth, it prohibited issuing any "document, tag, ticket or notice, or request or demand for payment" to vehicles parked on licensed property (in relation to businesses operating commercial parking lots) or private property (in relation to PPEAs) "other than a parking infraction notice under Part II of the Provincial Of-

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fences Act, a Toronto Police Services tow card or other document as approved by the Chief of Police".

[25] Fifth, it set out a definition for the phrase "Issuance Of A Document" as follows:

> ISSUANCE OF A DOCUMENT — Shall include: to personally hand a document to the vehicle owner or driver, to leave a document on the vehicle with the intention that the vehicle owner will recover it, to mail it to the vehicle owner, or to cause the document to be delivered to the vehicle owner in any other fashion.

11 The effect of the By-Law Amendment is to prohibit commercial parking lot operators or those who provide parking enforcement services, from seeking civil redress from alleged trespassers, or otherwise communicating with drivers or owners of alleged trespassing vehicles, except in the manner provided. Prior to the enactment of the Amending By-Law, MPC would issue demands for payment of "common law damages" and what it calls "statutory damages" as a result of the unauthorized use of parking lots. These demands took the form of "parking violation notices". MPC admits that its parking violation notices were deliberate "look-alikes" of the official City parking infraction notice, or PIN.

12 Under the Amending By-Law, only licensed PPEAs employing qualified MLEOs may provide parking enforcement services on commercial parking lots or private property and the only type of demand for payment which may be issued is a City of Toronto PIN, as opposed to a private demand or private "violation notice". All of the revenue from PINs is paid to the City whether the PIN was issued directly on behalf of the City by a uniformed officer or member of the Parking Enforcement Unit, or by an MLEO in relation to private property. Revenue from parking violations is a significant source of income for the City. While the city receives all of the revenue from parking enforcement on private property, it bears none of the cost except the cost of administering the MLEO program.

Issues and Evidentiary Record

13 Though paragraph 9 of the decision of E.M. Stewart J sets out the grounds upon which MPC first challenged the validity of the Amending By-law, those grounds are reformulated in paragraph 74 of its current factum as follows:

> (1) the by-law was passed for an improper purpose and in bad faith, as:
>
> (i) it gives the City the exclusive right to all revenue from claims against parking trespassers on private property owned by businesses;
>
> (ii) it prohibits a lawful business activity under the guise of regulation; and
>
> (iii) in any event, there was insufficient evidence of any harm;
>
> (2) the by-law is *ultra vires* in that it conflicts with statutory and common law rights contrary to section 14 of the *Municipal Act*, 2001;
>
> (3) the by-law is monopolistic and anti-competitive;
>
> (4) the delegation to the Chief of Police contemplated in the by-law is an improper delegation of author-

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ity; and

(5) the by-law violates section 2(b) of the *Charter* and is not justified by section 1.

14 Before examining these five grounds, I wish to make some general observations about the evidentiary record. The applicant relies on affidavits of Douglas LeFaive, sworn August 12, 2004 and Daniel Iny, sworn April 27, 2007. Both deponents are "associates" with the law firm representing the applicant. The applicant also relies on transcripts from cross-examination of the City's affiants, newspaper articles, and documents from City and Toronto Police Services Board records.

15 The applicant's evidence on this application is problematic. The main affidavit, Mr. LeFaive's, is replete with personal opinion and conclusory statements rather than actual facts. Very little of it, if any, is based on any first hand information or personal knowledge. In many of its assertions it expresses beliefs based on information from "Municipal Parking Corporation". MPC was thus able to avoid having its own affidavit evidence tested effectively by cross-examination. Though Mr. LeFaive identifies the applicant as the source of his information, under cross-examination he admitted that it was all provided to him secondhand by a partner in his law firm; in fact, the same counsel who argued this application. Mr. LeFaive admitted he does not actually know the source of Mr. Sokolov's information, but simply assumed it came from MPC. Mr. LeFaive also admitted:

- he has no knowledge of his client's actual identity or legal status
- he does not know his client's address (registered mail sent to him MPC's "corporate address" having been returned with a "moved" notation)
- he does not know the locations of any properties where MPC carries on business
- he does not know how the so-called damages claimed by MPC from vehicle owners are quantified nor does he know why the amounts demanded by MPC from vehicle owners escalate after 7 days

16 I am skeptical of the inferences counsel for the applicant draws from circumstantial evidence. I am also unconvinced by most of his interpretation of statistical evidence, and conclusions based upon mismatched statistical information. For example, I am not prepared to assume that a member of the public calling City Hall to ask if what was found on a windshield is an official City ticket constitutes a "complaint", statistically or otherwise, as assumed by counsel for the applicant. Inquiries are not necessarily complaints or objections. Furthermore, inquiries about parking in general or the towing of vehicles (as opposed to ticketing) are not relevant to this application.

17 The factum and submissions of the applicant mischaracterize and distort some of the evidence of Mr. Yowfoo. For example, on cross-examination, Mr. Yowfoo refused to guess at numbers when there was no log or record. The applicant translates his refusal to guess as: "he could not provide any records of those complaints", he "admitted that he had no idea whether the complaints had been satisfactorily resolved", he "could not quantify the value of a parking space" and "he had some difficulty articulating some of the perceived problems with MPC's business practices".

18 None of the frailties in the evidence of the respondent effectively hide the fact that the applicant's own evidence is woefully lacking, and in general quite unconvincing.

Was the Amending By-law passed for an improper purpose or in bad faith? (Ground #1)

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19 Though the Court of Appeal decision establishes that the By-Law Amendment is within the City's powers under s. 150 of the *Municipal Act*, as "consumer protection", the applicant contends that the by-law was passed for an improper purpose and in bad faith. The applicant submits that the by-law extends well beyond "consumer protection" and cannot be justified because:

> (a) there was insufficient evidence of any harm to "consumers";
>
> (b) the By-Law Amendment prohibits lawful business activity under the guise of regulation; and
>
> (c) it gives the City the exclusive right to all revenues from claims against trespassers parking on private property.

20 Several of the applicant's submissions are in the nature of questioning the policy choice of elected municipal officials. The applicant contends the Amending By-Law does not aid consumers. For example, the means of contesting the validity of a PIN by attending a First Appearance Centre and setting a trial date does not ensure a more effective or independent resolution process. The applicant points to the fact that First Appearance Centres are only open during business hours and that a person who wishes to contest even a $20 PIN must take time out of his or her work day and stand in line to obtain a trial date just to contest the PIN. The applicant contends that there is an impartial resolution process for parking violation notices and that the repercussions for failing to pay a private parking violation notice are not nearly as severe as those of failing to pay a PIN because the failure to pay the latter can result in denial of a license plate renewal or the imposition of a lien on the offending vehicle. Whether "consumers" are more inconvenienced under the by-law amendment process than they were before its enactment is not a relevant consideration for the court. Nor is it necessary that the City provide compelling evidence of the need to protect consumers or the parking public.

21 Toronto City Council passed the By-Law Amendment by a 24-14 vote after lengthy and polarized debate. Policy considerations are not reviewable by the Court. They are within the exclusive purview of the elected municipal officials who made the choice that they did. The merits of a policy decision, and whether there was "sufficient" evidence of harm to support the decision, are simply beyond judicial review.

22 Municipal by-laws are not subject to review for "unreasonableness" that falls short of bad faith. Municipal councils are elected representatives of their community, accountable to their constituents. In *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342 (S.C.C.) at para. 36, the Supreme Court of Canada adopted the dissenting opinion of McLachlin J. in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 (S.C.C.), at 244, as follows:

> Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens of those municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold.

23 Writing for the court, Major J. stated at paragraph 35:

> ...Municipal councillors are elected by the constituents they represent and as such are more conversant with the exigencies of their community than are the courts. The fact that municipal councils are elected representatives of their community, and accountable to their constituents, is relevant in scrutinizing intra vires decisions. The reality that municipalities often balance complex and divergent interests in arriving at decisions

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> in the public interest is of similar importance. In short, these considerations warrant that the intra vires decisions of municipalities be reviewed upon a deferential standard.[FN5]

24 The standard to be met in establishing bad faith is high and necessitates evidence to demonstrate the City acted other than in the public interest. Bad faith by a municipality connotes a lack of candor, frankness and impartiality. It includes arbitrary or unfair conduct and the exercise of power to serve private purposes at the expense of the public interest. The applicant has failed to prove bad faith.

25 The applicant contends that City Council was presented with misleading information concerning Council debates on the following issues:

> (a) Whether the number of complaints regarding private violation notices were comparatively lesser or greater than complaints regarding City PINs;
>
> (b) The number of complaints about PINs; and
>
> (c) The statistics with respect to First Appearance Centre attendances, phone calls and letters and requests for review.

The applicant also states that the statistics known to the City were not brought to the attention of Council, particularly in response to specific questions by at least one Councillor during the Council debates on the by-law.

26 I reject the applicant's position in this respect and find that the evidence quoted in support of its submission is taken out of context, inaccurate and adopts a characterization not warranted by the specifics. Mr. Yowfoo did *not* say that the only reason 250,000 people attended a First Appearance Centre was to complain about a PIN. There is no evidence whatsoever to link the number of persons attending First Appearance Centres, the number of tags withdrawn (9.9%) and the validity of the complaints, nor is there any evidence to distinguish inquiries from complaints. For example, the applicant's interpretation of the evidence is to construe a phone call to City Hall from a person receiving a private violation notice and inquiring if it is an "official" ticket as a "request for review" of an MLEO issued ticket for parking on private property (about a PIN). I reject that interpretation. I also find as a fact that all of the statistics the applicant brings into question were known or ascertainable by members of City Council through the annual reports to members of Council or otherwise.

27 Furthermore, as the Manitoba Court of Appeal observed in *Mr. Pawn Ltd. v. Winnipeg (City)*, [2002] M.J. No. 3 (Man. C.A.) at para. 11:

> There is, however, no requirement that Council have evidence of anything before enacting a by-law. In particular, there is no requirement that Council have evidence of potential harm. Council can enact laws within its authority on whatever information it chooses, be that information placed before it by evidence or representation or even information within councillors' own knowledge.

28 The applicant submits that the by-law amounts to prohibition under the guise of regulation; that "the City has no authority to drive the applicant and other similar businesses out of operation". The applicant has failed to prove that the Amending By-Law results in outright prohibition of a lawful activity. The owners of parking lots still have effective means by which to regulate and control their property. The original companion application brought successfully on behalf of Imperial Parking Canada ("Impark") is a case in point. The applicant can continue to operate its business in a variety of ways in compliance with the terms of the by-law. The applicant chose

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not to present any evidence as to its financial circumstances or the particular financial impact of the Amending By-Law. I am not prepared to assume or conclude that the By-Law Amendment will "drive it out of business". Nor am I prepared to assume that private "parking violation notices", even look-alike tickets, are more effective than PINs when it comes to providing an incentive for drivers to pay for parking, rather than trespassing by not paying.

29 All the revenue from PINs is paid to the City. The applicant contends that a principle motivation for passing the by-law was to bolster City revenue. It points out that during City Council debates, there was at least a suggestion from City staff that if the by-law was not passed, the City's MLEO program might become redundant. I afford this evidence little weight. There is other evidence of equal weight. On July 23, 2004, the Toronto Star reported "While the money involved was the focus of much of the debate yesterday [when the Amending By-Law was passed by City Council], Moscoe and Gary Ellis, the Superintendent of the Toronto Police Parking Enforcement Unit, said that was never the motivation for the by-law". The applicant also contends that the consequential financial benefit to the City translates into an extra $4.78 million in revenue. The consequential financial benefit to the City was not demonstrably the principle motivation for passing the by-law, but merely an incidental consequence. To hold otherwise would contradict the decision of the Court of Appeal in this case, and would be contrary to the weight of the evidence as well.

30 The applicant contends that the City could have achieved its end by less drastic means, by regulating the content of private parking violation notices and/or establishing maximum monetary penalties. Instead the City simply outlawed private violation notices, requiring the PPEAs to issue PINs for which the City receives all the revenue. It is very doubtful the City has the authority to regulate the amounts charged by capping rates for "violations" on private property. There is no apparent precedent or statutory authority for that. It is evident from the examples of the private parking notices found at Tab 1 of the Applicant's Compendium (the applicant's own form of notice being the third of those four examples) that PPEAs have tried as best they can to make alleged parking violators believe that the violation notice is an official government document. The applicant's very name seems designed to give the impression that it is more than just a private entity. The City had legitimate concerns on behalf of the public, but also in terms of the burden placed on City staff in having to field tens of thousands of inquiries and complaints about private parking infraction notices. Historical and anecdotal evidence of the business practices of those in the private parking enforcement business (including this applicant) were relevant considerations for the City. In my view, the City was justified in trying to regulate the practice of PPEAs in the fashion that it chose with the Amending By-Law rather than merely regulating the form and content of violation notices or prescribing maximum penalties.

31 The applicant contends that "each ground of consumer protection cited in the preamble to the by-law has unraveled for lack of a foundation". The applicant has failed to prove that assertion. The applicant says that the number of people complaining about City tickets dwarfs the number of people complaining about private violation notices. It has failed to prove that assertion either in absolute numbers or in relative numbers, that is to say, *complaints* as a ratio of notices received. The fact is that no records of any complaints were even maintained by the City until after this by-law was passed.

32 The applicant also has failed to prove that the City has a quota for parking enforcement officers. Even if it did, as a matter of measuring the diligence of any particular officer, I fail to see how that is relevant to the issues raised in this application.

33 An elected body speaks as a whole by way of its legislative enactments. The intention of municipal

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council is expressed by what it enacts, not by the expressions of individual councilors before or during debate on the by-law, and whether within the course of a council meeting or elsewhere. It is also irrelevant that city council did not follow its staff recommendations or opinions. As long as the city acts within the scope of its broad authority and in good faith, the court ought not to quash any by-law on the basis of supposed unreasonableness. It is not for the court to decide what is in the best interests of the public and substitute its views to that of city council.

34 The evidence falls far short of establishing bad faith in the passing of the By-Law Amendment. Twenty-four of thirty-eight municipal counselors voted for the by-law. Apart from Counsellor Moscoe, there is no direct or indirect evidence of why the twenty-three others voted as they did. The preamble of the Amending By-law speaks for itself. Even if the evidence considered by Council in passing the by-law was incomplete, misleading, anecdotal or based on conjecture, the applicant's failure to provide any real evidence of bad faith is what matters most. City Council, in its wisdom, by a democratic process and vote, made a policy decision that is beyond second guessing by this Court.

35 Nor has the applicant proved any flaw in the decision making process. Though the City receives substantial revenue as an incidental effect of the Amending By-Law, the evidence does not establish that revenue generation was its true purpose or the reason counsellors voted as they did. The recitals in the by-law itself negate any characterization of "bad faith" and there is no cogent evidence from the applicant to establish that the recited purposes are a sham or a misrepresentation.

Is the Amending By-law *ultra vires* because it conflicts with statutory provisions, or common law rights, contrary to section 14 of the *Municipal Act* (Ground #2)

36 The applicant submits that the Amending By-Law creates an operational conflict with a property owner's rights under the *Trespass to Property Act* or the right to employ an agent to act as a "collection agency" under the *Collection Agencies Act*.

37 The test to be applied in determining whether a municipal by-law fails for its conflict with a provincial statute is whether compliance with one compels a breach of the other. A by-law will not be declared invalid unless there is an operational conflict such that dual compliance is not possible. The applicant has not identified any such operational conflict in this case.

38 Mr. LeFaive admitted that the private parking violation notice by which MPC demands payment includes the threat that "failure to ... [pay] may result in costs and additional fees being charged and may lead to legal action under the *Trespass to Property Act*, wage garnishment and/or seizure of the vehicle". He admitted he had no knowledge about whether his client tries to ascertain the identity of an alleged trespasser, much less how they would go about doing what they threaten to do.

39 The applicant is not registered as a collection agency under the *Collection Agencies Act* and even if it were, the amounts claimed by MPC on behalf of private property owners are not liquidated debts.

40 Further, the applicant submits that the by-law conflicts with the *Solicitors Act* and *Courts of Justice Act* because it goes so far as to prevent service of a Statement of Claim or a solicitor's letter demanding redress for trespass. In my view, the applicant misconstrues the Amending By-Law with this characterization. The by-law does not licence or regulate property owners. It only licenses those who operate commercial parking lots and those who engage in private parking enforcement, as defined. If a property owner chooses to employ a PPEA,

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there are limits and restrictions on the actions that can be taken by that PPEA on behalf of the property owner, but the evidence falls short of establishing that property owners are otherwise deprived of any recourse in enforcing their property rights themselves.[FN6]

41 The Amending By-Law in this case is analogous to the by-law at issue in *Nash v. London (City)*, [1995] O.J. No. 500 (Ont. Gen. Div.). In rejecting the submission that the London by-law was discriminating and in operational conflict with the *Trespass to Property Act*, Brown J. concluded (at para. 21):

> All real property owners may avail themselves of the rights under the *Trespass to Property Act*, civil action based upon trespass, self help, or employ someone to tow who is not in the business of towing. It is only where the particular parking lot is within the definition of "public parking lot" and the person used to tow "carries on the business of towing motor vehicles" that the by-law applies...The regulation is of those persons who tow, not of property.

42 An owner or occupier of property, provided it is not itself engaging in the business of parking enforcement, still has the right to bring an action for damages or to make a written demand for payment. The Amending By-Law does not fetter the manner by which that property owner can communicate with an alleged trespasser, in writing or otherwise. The applicant's assertion that the by-law operates to limit all private property owners to the sole remedy of having a licensed PPEA issue a PIN, resulting in a payment of damages to the City for collecting unpaid parking space charges or trespass damages, is not correct. The only private property owners so limited are those that operate parking lots, or choose to employ PPEAs.

43 There is no evidence the applicant is an owner or occupier of any parking lot or other property. It merely provides parking enforcement services to others. The applicant has no standing to represent the interests of unnamed property owners or property owners in general. Quite apart from that, it has failed to prove that the Amending By-Law effectively frustrates the rights or remedies of property owners under the statutes to which it refers.

44 Nor does the Amending By-Law frustrate the purpose of s. 100 of the *Municipal Act*. A property owner was, and still is, at liberty to choose whether or not the City will be authorized to regulate and enforce parking on that person's property. The applicant's submission that property owners only have a coercive choice is speculative and unproven.

Is the Amending By-law monopolistic and anti-competitive? (Ground #3)

45 Section 18 of the *Municipal Act* prohibits a municipality from using its licensing power to "confer on any person the exclusive right of carrying on any business". The applicant contends that the By-Law Amendment awards a monopoly to the City itself over parking enforcement on private property.

46 The City did not single out the applicant with this by-law or create any competitive advantage for any other business. No authority is cited for the proposition "confer on any person" includes the City itself. Nor does the evidence establish that the Amending By-Law confers on the City the "exclusive right" to carry on the business of parking enforcement, even if the by-law deprives property owners of a source of revenue. The applicant did not adduce any evidence of how its own revenues are affected by the Amending By-Law. Imperial Parking Canada (Impark) continues to carry on its parking enforcement business and there are alternative ways the applicant could operate, with or without issuing PINs.

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Is the delegation to the Chief of Police provided in the Amending By-Law an improper delegation of authority? (Ground #4)

47 Counsel agree as a point of law that the City cannot assign its legislative or policymaking function to an individual. They disagree on the characterization of the power delegated to the Chief of Police in the Amending By-law. The applicant relies principally on *Vic Restaurant Inc. v. Montreal (City)* (1958), [1959] S.C.R. 58 (S.C.C.) in which the court found the delegation of "terms upon which a person would have the right to a municipal license" improper, and *ultra vires.* Counsel for the applicant submits that the discretion to *approve* the wording of a notice or document (as an alternative to a PIN) under the Amending By-Law is no different in its effect; it gives the Chief of Police the arbitrary ability to regulate how a PPEA may carry on its business, without criteria to govern that discretion. Counsel for the applicant referred to the cross-examination of the City's witness Rick Yowfoo on November 18, 2004. Mr. Yowfoo provided the following evidence:

- There is no written policy to govern the discretion of the Chief of Police in approving or not approving any alternative form of notice.

- Every application for approval is done on a site specific basis, for a specific property, because each property is different.

- A form of notice will not be approved if it includes a demand for money or is "threatening" (including credit rating threats or collection agency threats).

- Notices that are simply a "warning" would be approved. The difference between a warning and a threat is distinguished by advising the alleged parking violator what "may" happen as opposed to what "will" happen next time.

- Mr. Yowfoo himself is the "administrative authority" that would "approve" a form of notice in the first instance, before it is submitted to the Chief of Police.

- He is also the individual with responsibility to oversee the MLEO program, but there is no written document delegating authority to him.

- Approximately fifteen or twenty forms of notice actually have been approved under the Amending By-law, as alternatives to a PIN or a police tow card.

- The form of notice cannot use the words "parking violation" because "we just want to make sure that nobody misunderstands this [the notice] is a ticket".

48 I agree with counsel for the City that the nature of the delegation in the *Vic Restaurant* case and to the Fire Chief in *Minto Construction Ltd. v. Gloucester (Township)* (1979), 23 O.R. (2d) 634 (Ont. Div. Ct.) are distinguishable from the case at hand. Here, the Chief of Police has no role in determining whether a business should be licensed as a PPEA. He exercises no licensing powers and cannot revoke a licence or impose any conditions. This case is clearly distinguishable from *Vic Restaurant* in that regard. Furthermore, the delegation of authority in this case is a permissive discretion rather than a prohibitive discretion. Moreover, the by-law itself does establish some boundaries for the exercise of that permissive discretion, considering its preamble and the very specific limitations about not constituting a "demand" for payment.

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49 With respect to the terms "PIN" and "Toronto Police Service Tow Card", the common denominator is that they are "official" government forms not private demands for money. This clearly implies to the Chief of Police that in considering approval for other forms of notice he is not to allow documents that masquerade as City tickets or by-law infractions. The Police Chief is at least indirectly involved in parking enforcement and thus familiar with the issues and conflicts that arise between property owners, vehicle owners and private parking enforcement agencies on an almost daily basis. There is no evidence that the Chief of Police has unreasonably exercised his function or discretion to the detriment of the applicant or any other PPEA. In my view the discretion granted to the Chief of Police does not constitute an improper delegation of authority.

50 There is no evidence the applicant has submitted any application or request to the Chief of Police for approval of any document, tag, ticket, notice, or request for payment. When and if it does, a negative decision by the Chief of Police might be the subject of a judicial review application. The fact that 15 or 20 alternative notices have been approved is an indication that quashing this part of the Amending By-Law altogether is too heavy handed a remedy.

Does the Amending By-Law violate section 2(b) of the *Charter*. If so, is it justified by section 1? (Ground #5)

51 The purpose of the Amending By-law was not to restrict freedom of expression, but the effect of the by-law is to do so, as "expression" has been broadly defined by the Supreme Court of Canada in *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.) at para. 41. It is clear that freedom of expression under section 2(b) of the *Charter* includes commercial expression. The City admits that the by-law infringes on freedom of expression within the meaning of section 2(b), but defends the by-law as a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society, under s. 1.

52 In *Vann Media Inc. v. Oakville (Town)* (2008), 95 O.R. (3d) 252 (Ont. C.A.) at paras. 26 and 28 the Court of Appeal stated:

> In order to establish that a violation of a Charter right is reasonably and demonstrably justified under s. 1, the governmental authority must satisfy the court: first, that the objective of the impugned provisions addresses pressing and substantial concerns; and second, that the provisions are proportional to the objective.
>
> . . . . .
>
> As the Supreme Court established in *Oakes*, the proportionality test has three components: (1) the measures adopted must be rationally connected to the objectives; (2) the measures chosen must constitute a minimal impairment on the right; [and] (3) there must be proportionality between the effects and the objectives.

53 In *R. v. Oakes* (1986), 26 D.L.R. (4th) 200 (S.C.C.), the Court made it clear that the onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation.

54 The applicant submits that the Amending By-Law is not merely about "commercial expression" but more fundamentally about "communication of rights" and "dispute resolution processes" between private property owners and other citizens who park vehicles as alleged trespassers.

55 In looking at section 1 of the *Charter* I begin with this context or frame of reference:

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(a) The Court of Appeal has determined the Amending By-Law is a legitimate exercise of power by the City, aimed at consumer protection.

(b) The protection of commercial expression ought not to be considered on a par with political or religious expression.

(c) The applicant is not a property owner and has no property rights itself,

(d) The Amending By-law purports to regulate those in the business of private parking enforcement, not all private property owners, and

(e) Look-alike tickets have demanded payment for by-law violations and are obviously designed to mislead members of the public into thinking they have received "official" tickets.

56 The applicant melds together the freedom interests of a private property owner with its own right of freedom of expression. It is not at all clear how the applicant has standing to assert, as an agent, the *Charter* rights of an undisclosed principal. Though MPC purports to issue its private parking tickets on behalf of property owners, there is no specific evidence that it has any authority to do so. The evidence also shows that MPC demanded payment from at least one member of the public (Mr. Netanel) for parking in a "designated fire/emergency access route". These emergency routes are designated by municipal by-law. MPC has no authority to enforce municipal by-laws, yet it not only demanded payment for an offence under the city by-law, it refused Mr. Netanel's "reconsideration request" and insisted that he pay the money it claimed. Though the Netanel evidence is just one example, I accept it as evidence of how this applicant has carried on its business in the past. There was no rebuttal or explanation to refute or explain the applicant's outrageous treatment of Mr. Netanel.

57 Having regard to the introductory recitals or preamble contained within the Amending By-Law, quoted above, and the history of attempts to control the activities of private parking enforcement agencies, such as this particular applicant, I am satisfied that the City has established a "pressing and substantial objective" as the threshold hurdle in justifying an infringement of freedom of expression. It is a legitimate consumer protection initiative.

58 The second part of the test is whether the Amending By-Law is proportional in its terms.

59 Eliminating the ability of businesses such as the applicant's to issue private parking tickets is rationally connected to the objectives of protecting consumers from misleading, coercive and unjustifiable business prac- tices.

60 Could the by-law have achieved the result by less intrusive means, for example by regulating the amounts charged by capping rates for parking on private property? I need not repeat here what I have already said in paragraph 30. Clearly there is no single amount which would be appropriate in all parking contexts, even assuming the city has the authority to pass such a by-law. More importantly, to provide an adequate dispute resolution system is an important aspect of the licensing by-law's purpose. A dispute resolution system controlled or conducted by the same business that acts as judge and jury cannot provide any assurance of fairness necessary for consumer protection as that interest has already been recognized in this case by the Court of Appeal.

61 Could the Amending By-Law have achieved its purpose by regulating the form or wording of private violation notice? As pointed out in *Vann Media Group* at para. 42, it is not necessary for the Municipality to show

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that the "least restrictive means" have been enacted. It is sufficient if "the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be "reasonably tailored to its objectives" or "impair the right no more than reasonably necessary". Furthermore, the inquiry on minimal impairment must take into account the difficulty of drafting a by-law that accomplishes the Municipality's goal, achieves certainty and minimally intrudes on rights. At its heart it is a matter of balancing. It would be difficult or impossible to legislate standards and descriptions that would eliminate look-alike tickets. The history of this business in Toronto is that private parking enforcement agencies have deliberately misrepresented the rights of the owners of commercial parking facilities. I accept the City's submission that "half measures" would be inadequate given the history of how these businesses have taken advantage of vehicle owners in the past.

62 The core values underlying the freedom of expression guarantee in the *Charter* are: the pursuit of truth, participation in social and political decision making and individual self-fulfillment and human flourishing (*Irwin Toy* at paragraphs 52-53 and 55). This case does not involve core expression rights fundamental to the fulfillment of personal or democratic values. It involves the right of a business to issue a private parking ticket.

63 The City has established a rational connection between the purpose of the by-law and the need to curtail freedom of expression in some fashion. The City has also established that lesser forms of impairment of freedom of expression, including those vaguely suggested by the applicant, would not be sufficient to achieve the legitimate purpose of the Amending By-Law. I find that the goal being achieved by a measure which limits applicant's freedom of expression outweighs the deleterious effect of such limitation, and there is proportionality between the effects and the objectives of the Amending By-Law.

Conclusion

64 The Application is dismissed. If counsel are unable to agree on costs, written submissions may be served on the other side and directed to my attention, within the next 30 days.

Application dismissed.

FN1 See paragraphs 31 and 32 of the decision of E.M. Stewart J. (Ont. S.C.J.)

FN2 (Ont. C.A.)

FN3 Paragraph 10 of the Court of Appeal decision

FN4 Section 100 of the *Municipal Act* provides that the owner or occupant of private property used as a parking lot may, optionally, consent to the City regulating and authorizing parking and traffic restrictions for the prop- erty.

FN5 The decision went so far as concluding (prior to *Dunsmuir*) that the standard of review of *intra vires* municipal action should be "patent unreasonableness".

FN6 Unless the property owner is itself directly engaged in "parking enforcement services", as defined, in which case the property owner must obtain a PPEA licence itself.

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