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September 12, 2018

VIA RESS AND COURIER

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

Dear Ms. Walli:

RE: EB-2017-0336 – Hydro One Networks Inc. ("Hydro One") Motion to Review

We are counsel to Hydro One in respect of the above-matter and are responding to correspondence dated September 11, 2018 from Mr. Shepherd, on behalf of the School Energy Coalition ("**SEC**").

Hydro One appreciates that the Board is seized of this matter and will likely issue a procedural order to address the process to apply to the Board's reconsideration of its decision. Hydro One will participate in that and in the appropriate manner. However, given some of the incorrect allegations in SEC's letter, Hydro One offers the following comments to ensure that the Board has the correct law before it.

First, SEC suggests that the original panel members are required to be the panel that reconsiders this matter. As a matter of law, this is incorrect. Macaulay's *Practice and Procedure Before Administrative Tribunals* ("Macaulay") states the law as follows:

> "where a final decision has been made, but the agency has the authority to reconsider the matter, the decision-maker at the reconsideration need not have taken part of the original proceeding."[1]

Thus, where, such as here, the original decisions were final, and the Board determines that these should be reconsidered; the Board is to follow the normal practice for appointing panels.

The law and practice for panel appointments is that the appointment is the responsibility of the Chair of the Ontario Energy Board. Again, according to Macaulay, "the selection of panel members and the panel chairman is the responsibility of the agency chairman."[2] Statements in a review panel decision should therefore not be inferred to mean that review panels decide the appointment of future panel members.

Second, SEC suggests that a panel member whose term has expired remains eligible to be appointed to the panel. SEC relies on section 4.3 of the *Statutory Powers Procedures Act*

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[1] *Macaulay's Practice and Procedure Before Administrative Tribunals*, s. 22.2(b)(iv).

[2] *Macaulay's Practice and Procedure Before Administrative Tribunals*, s.13.2, see also, s. 22A.

("SPPA")[3] and the Ontario Court of Appeal Decision in *Piller v. Association of Land Surveyors*[4] for this proposition. This too is incorrect.

The issue in *Piller* concerned the eligibility of a disciplinary tribunal member whose term expired midway through a hearing process and before the tribunal had made its final decision. The Ontario Court of Appeal found that Section 4.3 of the SPPA applied, automatically extending the member's term, because the tribunal had yet to make its final decision.[5]

The circumstances in *Piller* are in contrast to those that are now before the Board. Unlike *Piller*, the EB-2016-0160 proceeding resulted in the taking of final decisions.[6] While Mr. Thompson's original term expiry date preceded the dates of those final decisions,[7] he nonetheless participated in all but one of those decisions and presumably by operation of section 4.3 of the SPPA. Those decisions are now complete and final. As articulated by the Court of Appeal, an extension of a term contemplated by Section 4.3 of the SPPA is possible only (and on strict terms) to allow a decision to be made of the matter being heard. As it concerns Mr. Thompson, section 4.3 of the SPPA no longer has application because the reconsideration decision is separate and distinct from the matters which he heard and decided. To suggest otherwise misconstrues the interpretation provided by the Court of Appeal.[8]

Finally, Hydro One disagrees with SEC's justification to support a further and broader discovery process, "both with respect to Hydro One and with respect to the province in order to better understand how the standalone principle should be interpreted and applied in this case." As noted by SEC in its earlier submissions, the principle was explained in several of the submissions that form the record in both of the EB-2016-0160 and EB-2017-0336 Proceedings.[9] Ample opportunity has already been provided to parties to both explain the principle and argue its application. Reconsideration of this record – as opposed to a reopening and relitigation of that record - is what is now called for. Given this, it is unclear what "better understanding" is necessary about the principle itself, its interpretation or application to Hydro One, the regulated utility. SEC provides no explanation why the EB-2017-0336 Decision has created uncertainty or requires new evidence and input from the Government of Ontario in order to complete the reconsideration task.

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[3] R.S.O. 1990, c. S.22

[4] 2002 CanLii 44996 (ON CA)

[5] Section 4.3 of the SPPA reads as follows:

> Expiry of term. – If the term of office of a member of a tribunal who has participated in a hearing expires *before a decision is given*, the term shall be deemed to continue, *but only for the purpose of participating in the decision and for no other purpose* (emphasis added).

[6] Reasons For Decision EB-2017-0160 dated September 28, 2017 (Revised October 11, 2017, November 1, 2017), Revenue Requirement and Charge Determinants Decision and Order dated November 9, 2017 (Revised November 23, 2017 and December 20, 2017) Cost Claim Decision & Order dated January 8, 2018. Notably, Mr. Thompson did not participate in the Cost Claim Decision.

[7] Mr. Thompson's term expiry date was reported to be September 24, 2017 in the Ontario Energy Board's 2016-2017 Annual Report "Leading Change and Transformation" at page 31.

[8] For ease of reference, the *Piller* Decision is attached.

[9] In its EB-2017-0336 Final Argument, SEC stated (at paragraphs 3.3.5-3.3.7) that the stand-alone principle was fully considered during the Motion to Review and in the EB-2016-0160 by parties including OEB Staff, PWU, LPMA, SEC and BOMA.

In conclusion, Hydro One submits reconsideration of the existing evidentiary record in order to take into account the EB-2017-0336 Decision findings is all that is required. If the Panel finds the need to have interveners address specific questions or issues during this process then that step is well within the Panel's purview. However, establishing an additional discovery process, broader in scope than what was originally contemplated, as well as an additional argument phase, would be tantamount to re-opening and re-litigating these proceedings and a marked departure from the findings and approach contemplated in the EB-2017-0336 Decision.

Yours truly,

McCarthy Tétrault LLP

Per:

Gordon M. Nettleton

GMN
Enclosure

cc: All Intervenors

DATE: 20020618
DOCKET: C37125

COURT OF APPEAL FOR ONTARIO

CARTHY, CRONK and GILLESE JJ.A.

BETWEEN:	)	
	)	
HELMUT PILLER, OLS	)	Heather Laidlaw for the appellant
	)	
Appellant (Applicant)	)	
- and -	)	
	)	
ASSOCIATION OF ONTARIO LAND SURVEYORS and DISCIPLINE COMMITTEE OF THE ASSOCIATION OF ONTARIO LAND SURVEYORS	)	Izaak De Rijcke and Robert J. Fenn for Association of Ontario Land Surveyors
	)	
	)	Carol Street for Discipline Committee of the Association of Ontario Land Surveyors
Respondents (Respondents)	)	
	)	
	)	**Heard:** March 27, 2002

On appeal from the decision of the Divisional Court, Justices Then, Chapnik and Cumming, dated June 18, 2001.

GILLESE J.A.:

[1] [1] Helmut Piller appeals from the judgment of the Divisional Court in which his application for judicial review of certain decisions made by the respondent Discipline Committee was dismissed. The sole issue on appeal is whether Mr. Harris, a member of a panel of the Discipline Committee, is entitled to continue to participate in a disciplinary hearing that began in January of 1999.

FACTUAL OVERVIEW

[2] [2] Mr. Piller has been a land surveyor in Ontario for nearly 40 years. He is a member of the respondent Association and is the subject of the hearing before the Discipline Committee.

[3] [3] The Association is a statutory body whose mandate is to regulate the practice of professional land surveying. The Association referred allegations of misconduct and incompetence by Mr. Piller to its Discipline Committee on September 15, 1998. By way of a Notice dated October 26, 1998, Mr. Piller was informed that a hearing would be conducted to inquire into the allegations against him on January 19th and 20th, 1999.

[4] [4] The hearing convened on January 19th, 1999. The three panel members were Bryan Davies, OLS, Steven Gossling, OLS, and Mr. Harris. The panel was convened for the sole purpose of conducting a hearing into the allegations against Mr. Piller.

[5] [5] The first thing the panel was required to consider was Mr. Piller's request that the hearing proceed as a public hearing. According to s. 27(4) of the *Surveyors Act*, R.S.O. 1990, c. S.29, hearings of the Discipline Committee are closed to the public unless the party whose conduct is being investigated requests otherwise and the panel hearing the matter agrees. The panel determined that the hearing could proceed in public.

[6] [6] Exhibits 1 through 6 were then entered as exhibits in the hearing. Exhibit 3 is a Book of Documents providing details of the allegations against Mr. Piller. Exhibit 4 is an amended Supplementary Book of Documents providing further details as well as "will say" statements of the Association's proposed witnesses. Exhibit 6 is a Notice under the *Evidence Act* that lists various documents and records that the respondent Association intends to rely on at the hearing.

[7] [7] Mr. Piller's counsel then filed, as Exhibit 7, a Motion Record in support of his motion for an order dismissing the proceedings for lack of jurisdiction due to alleged procedural flaws. In the alternative, the appellant sought further disclosure.

[8] [8] Counsel for the Association filed responding materials. Both counsel requested the opportunity to cross-examine the deponents of the affidavits filed on the motion. The panel adjourned the hearing until March 8th and 9th, 1999, to permit such cross-examinations.

[9] [9] When the panel reconvened on March 8th,1999, the transcripts of the cross-examinations of three individuals were filed as exhibits in the hearing. Further exhibits were filed on consent, including further productions relevant to the allegations against Mr. Piller.

[10] [10] Argument on Mr. Piller's motion was heard on March 8th and 9th, 1999. The panel then adjourned to consider its decision.

[11] [11] On May 13th, 1999, the panel released its decision on the motion. The panel made certain orders with respect to the issue of disclosure. It reserved its decision with respect to the issue of jurisdiction to the conclusion of the hearing.

[12] [12] Mr. Piller appealed to the Divisional Court that part of the panel's order in which it reserved its decision on the issue of jurisdiction. The Divisional Court heard the appeal on May 1, 2000. It held that, since the panel had made no decision with respect to that issue, there was no final decision or order that could be appealed. The appeal was dismissed without prejudice to any appeal that might be launched at the conclusion of the proceeding.

[13] [13] The hearing was then rescheduled to continue for two weeks beginning Monday, November 20th, 2000.

[14] [14] On Friday, November 17th, 2000, one of the panel members, Bryan Davies, O.L.S., informed counsel to the panel that he was unable to continue to sit as part of the panel for personal reasons, including business pressures and threats of bodily harm to his son, a Crown Attorney in Durham. Mr. Davies has since died.

[15] [15] That same day – Friday, November 17, 2000 -- counsel to the panel orally informed counsel that Mr. Davies would not be present the following Monday, the first scheduled day of the continuation of the hearing. Counsel for Mr. Piller responded, in correspondence dated November 17, 2000, that she intended to bring a motion on Monday, November 20th, 2000 that Mr. Davies should withdraw from the hearing because of a conflict of interest with Mr. Piller. Prior to this correspondence, there had been no communication to the panel or its counsel that this allegation of conflict of interest would be asserted. Mr. Piller's counsel also advised that she would ask that a new panel be convened.

[16] [16] The hearing reconvened on Monday, November 20th, 2000. Counsel for Mr. Piller immediately filed a Notice of Motion seeking an order dismissing the proceedings with costs on a solicitor/client basis. In the alternative, she sought an order disqualifying all members of the panel, staying the hearing until the final outcome of a report prepared

by KPMG was known, and requiring further disclosure of reports related to the KPMG report.

[17] [17] Mr. Piller asserted that Mr. Davies was biased against him because Mr. Davies' firm was a competitor of his and because Mr. Davies had allegedly behaved in an insulting manner to a colleague of Mr. Piller. It was argued that bias on the part of Mr. Davies, combined with the fact that the other two members of the panel had consulted with Mr. Davies when reaching their decision on disclosure and jurisdiction, was sufficient to disqualify the whole panel.

[18] [18] In addition to the bias argument, it was argued that the remaining two panel members could not continue with the hearing because there was no longer a quorum. The panel adjourned the hearing, asking that counsel provide further written submissions as to whether the panel could continue with only the remaining two members.

[19] [19] On the same day, November 20th, 2000, the Discipline Committee as a whole was meeting. The Chair of the Discipline Committee as a whole spoke to counsel for the panel and learned of Mr. Davies' withdrawal from the hearing and the quorum issue. A new member was appointed to the Discipline Committee as a whole, Talson Rody, OLS. Mr. Rody was prepared to make himself available to sit as a part of the panel beginning on Friday, November 24th, 2000. Counsel for both parties were asked whether they would consent to Mr. Rody replacing Mr. Davies. The panel indicated that it would allow the jurisdictional motion to be fully reargued, so that Mr. Rody could participate in the decision in that regard. Counsel for the Association consented to this proposed method of continuing the hearing but counsel for Mr. Piller did not.

[20] [20] The panel then sought leave to have the Divisional Court hear, on an urgent basis and before a single judge, a motion that essentially sought the court's direction as to whether the remaining two members of the panel constituted a quorum and could therefore continue with the hearing, or whether the hearing could continue with Mr. Rody sitting in the place of Mr. Davies. Mr. Piller, through his counsel, opposed the application on, *inter alia,* the grounds that it was not urgent.

[21] [21] On November 24th, 2000, leave was refused on the basis that there was not sufficient urgency and that the matter should properly be heard by a full panel of the Divisional Court in the ordinary course.

[22] [22] The hearing panel then concluded that it would proceed with the discipline hearing involving the appellant with Mr. Rody replacing Mr. Davies; the jurisdictional issue would be reargued in full before it, as reconstituted, at the conclusion of the hearing. The parties were so advised and the hearing reconvened on Wednesday, November 29th, 2000.

[23] [23] When the hearing reconvened on November 29th, 2000, Mr. Piller, through his counsel, advised that he intended to forthwith bring an application for judicial review of the panel's decision to proceed in this fashion. As a result, the hearing was again adjourned.

[24] [24] The Divisional Court dismissed the application for judicial review. In ruling that the panel could continue with the two remaining members it had this to say.

> In appointing Mr. Rody, the Committee was attempting to accommodate the applicant. Even at the hearing before us, the applicant, through his counsel, indicated a preference for a three-member panel. Yet, the applicant will not consent to the appointment of Mr. Rody. In the absence of his consent, the proceeding must continue with the original two panel members who are seized with this matter.
>
> In the course of the hearing before us Mr. Staples indicated that the applicant would refuse consent to any panel hearing the discipline matter, even one of his own choosing. It appears that the applicant has attempted, from the outset, to use every tactical and technical argument in order to avoid proceeding with this matter on the merits. He is certainly entitled to assert his legitimate rights, but he is not entitled to raise spurious arguments in an attempt to frustrate the process. The respondent has an important role to play pursuant to its statutory duty to protect the public. Serious competency issues have been raised as against the applicant. In our view, the tribunal has acted reasonably and fairly in this matter and in accordance with the legislation and its statutory duties.
>
> The hearing before us seeking judicial review was brought on the basis that the proceeding before the tribunal is fatally flawed. We find no such

> flaw. There will be no denial of natural justice to the applicant if the tribunal were to proceed with the hearing with the two-member panel consisting of Mr. Gossling and Mr. Harris. This is not a matter of great public importance nor was the procedure taken by the Committee clearly wrong. There is therefore no basis for this Court to interfere at this stage of the proceedings.

[25] [25] Leave to appeal to this court from the decision of the Divisional Court was confined to the issue of whether Mr. Harris is entitled to remain a member of the hearing panel.

THE ISSUE

[26] [26] The *Surveyors Act, supra*, provides that the Discipline Committee is composed of persons appointed by the Council of the Association and one member of the Council appointed by the Lieutenant Governor in Council. Three members of the Discipline Committee constitute a quorum, one of whom must be the Cabinet appointee.

[27] [27] Mr. Harris was appointed to the Council of the Association by the Lieutenant Governor in Council. Having served for two terms of three years each, his appointment was not further renewed. His term of office expired in June of 2001.

[28] [28] The appellant argues that since Mr. Harris' term of office has expired and no evidence has been heard, Mr. Harris is not entitled to remain as a member of the Discipline Committee even for the limited purpose of completing the hearing.

[29] [29] At issue is whether s. 26(11) of the *Surveyors Act, supra,* or s. 4.3 of the *Statutory Powers Procedures Act*, R.S.O. 1990, c. S.22 (the "*SPPA")* authorize Mr. Harris' continued participation in the hearing.

THE RELEVANT LEGISLATION

[30] [30] Section 26(11) of the *Surveyors Act* provides:

> ***Where a proceeding is commenced*** before the Discipline Committee ***and the term*** of office on the Council or on the Committee ***of a member sitting for the hearing expires*** or is terminated, other than for

cause, ***before the proceeding is disposed of but after evidence has been heard***, ***the member shall be deemed to remain a member*** of the Discipline Committee ***for the purpose of completing the disposition of the proceeding*** in the same manner as if the term of office had not expired or been terminated. (emphasis added)

[31] [31] Section 4.3 of the *SPPA* reads as follows.

Expiry of term. – If the term of office of a member of a tribunal who has participated in a hearing expires before a decision is given, the term shall be deemed to continue, but only for the purpose of participating in the decision and for no other purpose.

SECTION 26(11) ANALYSIS

[32] [32] Pursuant to s. 26 (11) of the *Surveyors Act*, *supra*, Mr. Harris is entitled to complete the hearing of this matter so long as:

(1) the proceeding has commenced;
(2) the proceeding has not been disposed of; and
(3) evidence has been heard.

[33] [33] At first blush, it seems obvious that the proceeding has commenced. Over the course of three and a half years following the issuance of a formal Notice by the Association, the panel has conducted 5 days of hearing and made rulings and an interim order. Its decisions and processes and procedures have been the subject-matter of a number of applications to the Divisional Court.

[34] [34] As a matter of law, however, it is unclear as to when a quasi-judicial proceeding "commences". There is little guidance that can be obtained from the jurisprudence. The answer to the question of when a civil trial begins appears to vary depending upon the context in which the question is asked. For example, in *Bontje v. Campbell, Roy & Brown Insurance Brokers Inc.*, (1994), 21 O.R. (3d) 545 (Gen. Div.), Matlow J. ruled that for the purposes of the application of Rule 49 (expiration of an offer to settle), a civil non-jury trial commences when the action is called for trial by a judge. In his view, it was not necessary that any evidence be adduced before the trial commenced. In making this determination, he chose not to follow *Jonas v. Barma* (1987), 22 C.P.C. (2d) 274 (Ont. Dist.

Ct.) which stood for the proposition that a civil jury trial commences when evidence is called. In *Catherwood et al. v. Thompson* (1958), 13 D.L.R. (2d) 238 (C.A.), this court held that a trial begins after preliminary questions have been determined and the judge has entered upon the hearing and examination of the facts. In *Reeves v. Arsenault*, [1997] P.E.I.J. NO. 64 (S.C.T.D.), DesRoches J. considered those cases and chose to follow the reasoning of Matlow J. in *Bontje*. He held that a trial commenced when counsel appeared on the day set for trial despite that fact that only preliminary motions were heard that day.

[35] [35] The only forum provided by the *Surveyor's Act* for the determination of preliminary matters in disciplinary matters is the disciplinary panel that has been convened to hear the allegations in question. By their very nature, the matters raised by the parties thus far are preliminary motions in that they are akin to preliminary motions brought at the outset of trial and heard by the presiding judge.

[36] [36] Preliminary matters can drag on for years, as evidenced by this case itself. The preliminary matters thus far raised in this matter have involved arguments of law and submissions on various procedural and jurisdictional matters. The motions have been argued by legal representatives of the parties with reliance upon the exhibits that have been filed. Rulings and an interim order have flowed which in turn have been the subject matter of further court applications.

[37] [37] Understood in the context of an administrative hearing where the sole purpose for which the panel is convened is to deal with matters relevant to the disciplinary matter before it and there is no other forum for preliminary matters to be considered, in my view, the hearing of preliminary motions resulted in the commencement of proceedings.

[38] [38] Has evidence been heard? While no *viva voce* testimony on the merits has been adduced, exhibits have been entered in the hearing and form part of the record. Some of the documentation introduced by way of exhibit, such as motion records, is not evidence. On the other hand, there are exhibits or portions thereof which consist of affidavit evidence or transcripts of cross-examinations on affidavit, both of which are admissible evidence accepted as alternatives to *viva voca* evidence. When arguing motions, counsel referred to the transcripts and affidavit evidence that had been entered as exhibits. The panel made rulings and an interim order based on the submissions received and the filed exhibits.

[39] [39] The underlying purpose of s. 26 (11) is to ensure the continued involvement of a panel member seized of a matter pending before a panel in which he or she is participating. Section 26 (11) is intended to prevent the need to recommence proceedings when a panel member's term expires prior to final disposition of the hearing. Read in the context of the purpose of the section as a whole, there is no reason, in my view, to take a narrow view of the word "heard" and restrict it to instances in which oral evidence has been adduced.

[40] [40] In my view, the admission of evidence by way of exhibit, amounts to the hearing of evidence by the panel for the purposes of s. 26(11).

[41] [41] Accordingly, I conclude that the discipline proceeding commenced and evidence has been heard. It has clearly not been disposed of or completed. As a consequence, pursuant to s. 26(11) of the *Surveyors Act*, Mr. Harris shall be deemed to remain a member of the panel of the Discipline Committee for the purpose of completing the hearing of the allegations against the appellant.

SECTION 4.3 ANALYSIS

[42] [42] Section 4.3 of the *SPPA* provides that if the term of office of a member of a tribunal who has "participated in a hearing" expires before a decision is given, the term shall be deemed to continue "but only for the purpose of participating in the decision and for no other purpose".

[43] [43] In deciding whether s. 4.3 applies in this case, it must first be determined whether Mr. Harris has participated in the hearing. If so, it is then necessary to consider the meaning of the phrase "but only for the purpose of participating in the decision and for no other purpose".

[44] [44] The discipline hearing was convened, by way of Notice, for the first time on January 19th, 1999. Its sole purpose was to consider the allegations against Mr. Piller.

[45] [45] At the time that the discipline panel last adjourned its proceedings, Mr. Harris had attended for 5 hearing days: January 19th, 1999, March 8th and 9th, 1999 and November 20th and 29th, 2000. Mr. Harris presided at, participated in and rendered decisions by way of interim order as part of the panel during those 5 days.

[46] [46] The words "participated in a hearing" are not technical. There is nothing in s. 4.3 or the SPPA as a whole to suggest that the words should be given anything other than their ordinary meaning. In my view, it is beyond doubt that Mr. Harris' actions amount to participation. The proceedings were conducted by way of hearing. Thus, in my view, Mr. Harris participated in the hearing within the meaning of s. 4.3.

[47] [47] Having made the determination that Mr. Harris participated in the hearing, s. 4.3 deems his term to continue "only for the purpose of participating in the decision and for no other purpose".

[48] [48] The appellant argues that the hearing, including presentation of all of the evidence, must have been completed before the member's term expires in order for s.4.3 to apply. Only in such restricted circumstances, he submits, is the panel member's term deemed to continue under s. 4.3 for the purpose of participating in the making of the decision.

[49] [49] Section 2 of the *SPPA* requires a liberal construction of s. 4. 3. It provides that:

> This Act, and any rule made by a tribunal under section 25.1 shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits.

[50] [50] In addition, in determining the meaning to be given to the words "participating in the decision" as they appear in s. 4.3, the purpose of s.4.3 is to be kept in mind. Like s. 26 (11), its underlying purpose is to prevent a hearing from being disrupted by the expiry of a panel member's term of office. Many hearings take place over an extended period with lengthy adjournments or interruptions during which time a member's term of office may expire. The purpose of section 4.3 is frustrated if the expiry of a panel member's term of office during potentially lengthy preliminary proceedings were to require a new member to be appointed and the proceedings to start *de novo*. The deemed extension of a term is to enable the continued involvement and participation of a panel member seized of a matter that comes before the panel in which he or she is participating. It also meets the need for the expeditious and cost-effective determination of proceedings.

[51] [51] Section 4.3 states that if the term of office of a member of a tribunal expires "before a decision is given", that term shall be deemed to

continue. On its plain wording, this could occur at anytime before a decision is given. The words "after the evidence has been heard" do not precede the words "before a decision is given" in s. 4.3 and, in my view, ought not to be read in as to do so is inconsistent with the purpose of s.4.3 and the dictates of s. 2.

[52] [52] Procedural fairness precludes a tribunal member from participating in the making of a decision if the member has not fully heard the matter. In my view, the continuation of a tribunal member's term pursuant to s. 4.3 for the purpose of participating in the decision necessarily encompasses those activities required to meaningfully and lawfully participate in making the decision namely, participation in the completion of the hearing. For the sake of completeness, I note that hearing panel members may have other duties as, for example, attendance at Council meetings. The words in s. 4.3 limiting the extension of a tribunal member's term for the sole purpose of participating in the decision precludes the performance of such other duties by the member whose term has been extended by operation of s. 4.3.

[53] [53] For these reasons, I am of the view that Mr. Harris participated in the hearing involving the appellant and, although his term of office expired before the panel completed the hearing, by virtue of s. 4.3 of the *SPPA*, Mr. Harris' term is deemed to continue for the purpose of completing the hearing and rendering a decision.

CONCLUSION

[54] [54] For these reasons, under the terms of both s. 26 (11) of the *Surveyors Act* and s. 4.3 of the *SPPA*, Mr. Harris is entitled to continue to participate in the discipline hearing involving the appellant.

[55] [55] Section 32 of the *SPPA* provides that its provisions prevail over conflicting provisions of another Act absent express provision in the other Act that its terms are to apply. It is common ground that the *Surveyors Act* does not contain an express provision that s. 26(11) is to apply despite anything to the contrary in the *SPPA.* However, having determined that Mr. Harris is entitled to continue to participate under the terms of both provisions, there is no need to go further and determine whether the terms of the two subsections conflict.

[56] [56] Accordingly, I would dismiss the appeal. The Discipline Committee and the Association are entitled to their costs of the appeal and

the leave to appeal application, fixed in the amounts of $10,500 and $15,000, respectively, plus GST and disbursements.

"Eileen E. Gillese J.A."

"I agree J.J. Carthy J.A."

CRONK J.A. (concurring):

[57] [57] I have read the thorough reasons of my colleague Gillese J.A.. I agree with her that this appeal should be dismissed, and I agree with her analysis. I wish to add, however, my further views concerning whether the discipline hearing in this case had commenced prior to expiry of Mr. Harris' term of office as a member of the Association's governing Council.

[58] [58] Gillese J.A. concludes that the hearing of preliminary motions by the panel resulted in the "commencement" of the discipline hearing. Commencement of the proceeding before the panel of the Discipline Committee is a threshold requirement which must be satisfied to invoke the curative provision set out in s. 26(11) of the *Surveyors Act*. Under that section, the expired or terminated term of office of a member of the Discipline Committee of the Association sitting for a hearing, is extended by operation of law in specified circumstances for the purpose of "completing the disposition of the proceeding".

[59] [59] In support of her analysis regarding commencement of the hearing, Gillese J.A. considers the question of when a civil trial begins. She refers, in that regard, to the decisions in *Bontje v. Campbell, Roy & Brown Insurance Brokers Inc*. and *Reeves v. Arsenault*. Those cases are of assistance concerning the issue raised on this appeal. However, in my view, in many, although not all, respects discipline committee proceedings are more aptly to be compared with criminal or quasi-criminal proceedings than with civil trials. This is particularly so when matters of procedural fairness or natural justice are engaged. For that reason, I conclude, it is instructive to also consider in this case the criminal law jurisprudence concerning the question of when a criminal trial commences.

[60] [60] When the Discipline Committee panel first convened in January 1999 in relation to the allegations against the appellant, Mr. Harris was a public member of the governing Council of the Association, having been appointed to the Council by the Lieutenant Governor in Council. His term of office expired in June, 2001. His appointment was not renewed. When his term of office expired, the panel had not heard and determined the allegations against the appellant on the merits. Accordingly, the proceeding had

not been "disposed of", within the meaning of those words as they appear in s. 26(11) of the *Surveyors Act*.

[61] [61] As outlined by Gillese J.A. in her reasons, however, several preliminary steps in the proceeding had been taken by June 2001. These included the filing of documentary evidence concerning the allegations against the appellant, the filing of motion materials in connection with a jurisdictional challenge brought by the appellant, argument of that motion and a ruling by the panel on the motion. In those circumstances, can it be said that the discipline hearing had "commenced" prior to the expiry of Mr. Harris' term of office?

[62] [62] In the criminal law context, the time for commencement of a jury trial will vary according to the circumstances and the language of the section of the *Criminal Code* being applied. The traditional rule is that a jury trial commences when the accused has been placed in the charge of the jury. Depending on the section of the *Criminal Code* at issue, this may require that the jury be informed of the charge and the plea of the accused, and of their duty to inquire whether the accused is guilty or not guilty of the offence charged. Until those events occur, it cannot be said that the jury is acting *qua* jury. (*Basarabas v. The Queen* (1982), 2 C.C.C. (3d) 257 (S.C.C.), at pp. 265-266, per Dickson J., writing for a unanimous court. See also, *R. v. Hatton* (1978), 39 C.C.C. (2d) 281 (Ont. C.A.) and *R. v. Barrow* (1987), 38 C.C.C. (3d) 193 (S.C.C.)). This court, in *R. v. Varcoe*, [1996] O.J. No. 334 (Ont. C.A.), applied the traditional rule regarding commencement of a jury trial, *although no evidence had been led*, in circumstances where the accused had been arraigned, a plea of not guilty had been entered to the charges, the jury had been selected, the charges had been read to the jury, the trial judge had given his opening instructions to the jury and Crown counsel had made his opening address. In that case, Laskin J.A. commented, at paras. 41 and 43:

> I read *Basarabas* to stand for the proposition that a trial commences for the purpose of s.644 [of the *Criminal Code*] when the accused has been put in the charge of the jury....
>
> ….
>
> Moreover, when the juror was discharged not only had [the accused] been put in the charge of the jury but two additional

steps had been taken: the trial judge had given his opening instructions and the Crown had made his opening address. Logic suggests that once these steps are taken the trial has commenced even though no evidence has been led.

[63] [63] In this case, when the discipline proceeding involving the appellant was convened on January 19, 1999, the Notice issued by the Association on October 26, 1998, by which the hearing was initiated and notice was provided to the appellant of the allegations of professional misconduct and incompetence against him, was marked as the first exhibit. On the record before this court, it is unclear whether the appellant then entered a formal plea in relation to the allegations against him. It is clear, however, that the Discipline Committee panel then received, and marked as exhibits, a Book of Documents providing details of the allegations against the appellant and a Supplementary Book of Documents, which included "will-say" statements of the Association's proposed witnesses, and various other documents. Thereafter, motion materials relating to the appellant's challenge of the panel's jurisdiction were received and the proceedings were adjourned to permit cross-examinations on the affidavit materials filed in support of the motion. When the panel re-convened on March 8, 1999, additional materials were filed with the panel as exhibits and the further steps outlined in the reasons of Gillese J.A. then ensued.

[64] [64] Had the filing with the panel of the Notice which initiated the hearing been followed by a plea by the appellant concerning the allegations against him, there could be no doubt, in my view, that the hearing had “commenced” and the panel had become seized of the proceeding. As observed by R. Steinecke in connection with a differently worded, although similar, curative provision in the *Regulated Health Professions Act*, R.S.O. 1991, c. 18: "A [discipline committee] hearing is usually considered to have started when the notice of hearing has been filed with the committee and the member has stated whether or not he or she agrees with the allegations (i.e. in criminal language, enters his or her plea)...". (See R. Steinecke in *A Complete Guide to the Regulated Health Professions Act* (Aurora: Canada Law Book Inc., 2001) at p. 6-22). It is troubling, in my view, that the usual procedure of affording a member of a self-regulating profession, against whom allegations of professional misconduct or incompetence are made, with an opportunity to formally respond to those allegations at the outset of the discipline hearing does not appear to have been followed in this case. I conclude, however, for several reasons, that that fact alone is

not determinative of the question of whether the discipline hearing in this case had commenced prior to June 2001.

[65] [65] First, the appellant does not raise on this appeal the issue of whether a plea was entered at the discipline hearing, nor does he argue that the absence of a plea demonstrates that the hearing did not commence. The issue arose for the first time during oral argument before this court.

[66] [66] Second, the rule in criminal jury trials that the trial does not commence until the accused has been placed in the charge of the jury, is designed in part to ensure that the jury function of fact-finding has been properly engaged. The entering of a plea by an accused to the charge or charges against him or her in a criminal jury trial is but one element of the necessary pre-conditions to the triggering of that jury function. As illustrated by the decision of this court in *Varcoe*, a jury in a criminal trial may be said to be functioning *qua* jury even when no evidence has been led, if other steps requisite to engagement of the jury function have occurred. Moreover, in criminal proceedings, when the accused refuses to plead, or does not answer directly when a plea is requested, s. 606(2) of the *Criminal Code* requires the court to direct that a plea of not guilty be entered.

[67] [67] No formal steps are set out in the *Surveyors Act* for the commencement of a discipline hearing. In particular, neither that statute nor the developed professional responsibility jurisprudence in Ontario requires that a formal plea be entered by a member of a self-regulating profession at the commencement of a discipline hearing. Moreover, the actions of the appellant before the panel prior to June 2001, including the various motions initiated by him, forcefully illustrate that he did not admit, and did not intend to admit, the allegations against him. In the face of that conduct, no formal plea was necessary to establish the appellant's position concerning culpability for the conduct forming the subject-matter of the allegations. I conclude, therefore, that even if a plea or its equivalent was not requested or obtained from the appellant when the Discipline Committee panel convened in January 1999, or thereafter, that omission is not fatal to a conclusion that the hearing had commenced prior to June 2001.

[68] [68] Of more significance, in my view, is whether prior to June 2001 when Mr. Harris' term of office expired, the members of

the panel were properly functioning as a Discipline Committee panel. In my view, that was clearly so. The panel had been informed of the nature of the allegations against the appellant by the filing as an exhibit of the Notice which initiated the hearing, and which detailed the allegations. The Association had commenced its case before the panel by filing, as exhibits, documents which detailed the allegations and which contained statements of the anticipated evidence of its witnesses. There is no suggestion that the appellant was not present at the hearing when the panel first convened on January 19, 1999. On that day, the appellant requested that the hearing proceed as a public hearing, as he was entitled to do under s. 27(4) of the *Surveyors Act*. He also moved for an order dismissing the proceedings or, in the alternative, for further disclosure from the Association. When the panel reconvened on March 8, 1999, further exhibits were filed on consent with the panel, including further documents relating to the allegations against the appellant.

[69] [69] In those circumstances, in the language of Laskin J.A. in *Varcoe* (at para.43): "Logic suggests that once these steps are taken the [hearing] has commenced even though no [*vive voce*] evidence has been led". Accordingly, it is my view that prior to June 2001, the members of the panel were acting as a Discipline Committee panel charged under s. 26(1) of the *Surveyors Act* with the responsibility to hear and determine the allegations of professional misconduct and incompetence against the appellant. Their statutory function had been engaged.

[70] [70] For these reasons, in addition to those expressed by Gillese J.A., with which I concur, I conclude that the discipline hearing involving the appellant had commenced prior to expiry of Mr. Harris' term of office, so as to satisfy the first pre-condition to invocation of the curative provision set out in s. 26(11) of the *Surveyors Act*.

"E.A. Cronk J.A."

Released: June 18, 2002