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Toronto
DATE: 20051103

**ONTARIO
SUPERIOR COURT OF JUSTICE**

DIVISIONAL COURT

JUSTICES MATLOW, GREER, E. MACDONALD

B E T W E E N:)
)
SOS-SAVE OUR ST. CLAIR INC.) Brian Gover and Patricia MacLean, for the
) Applicant
)
Applicant, Respondent to Motion)
)
)
- and -)
)
)
CITY OF TORONTO and TORONTO) Earl A. Cherniak Q.C. and Cynthia B.
TRANSIT COMMISSION) Kuehl, for the Respondent, City of Toronto
)
) James W. Harbell and Patrick G. Duffy, for
Respondents, Moving Parties) the Respondent, Toronto Transit
) Commission
)
)
)
) **HEARD:** October 25 and 26, 2005

REASONS FOR DECISION

[Note: These reasons were written by and reflect the views of Justice Matlow only. The references which begin on page 28 at paragraph 106 to the decisions and the reasons of the other members of the panel are references to decisions described in separate written reasons released by the other members simultaneously with the release of these reasons.]

MATLOW J.:

The background to these reasons for decision

[1] On October 11, 2005, this panel of the Divisional Court released a unanimous endorsement signed by all three members of the panel for judgment allowing the application for judicial review of the applicant (“SOS”) and setting aside the decision of the respondent, City of Toronto, (“the City”), “to proceed with the construction of a dedicated Streetcar Right of Way on St. Clair Avenue West from Yonge Street to Old Weston Road in the City of Toronto...”. Our endorsement stated that the reasons for our decision would follow in due course. However, because of the bringing of the subsequent motion which is the subject of these reasons, preparation of the reasons for our earlier decision was postponed at the request of counsel for the moving parties and they have not yet been released.

[2] By notice of motion dated October 19, 2005, the moving parties gave notice of a motion made returnable on October 25, 2005, in which they sought an order, as described in their factum, “that Justice Matlow recuse himself, that this panel be struck and that this application be remitted for a new hearing before a reconstituted panel of this court”. It is that motion to which these reasons respond.

[3] The underlying reason given for the motion is that certain actions taken and comments made by me in relation to my opposition to a joint venture between the City and a developer for the construction of a large retail-condominium development on my street just a few doors away from where I live, “the Thelma project”, give rise to a reasonable apprehension of bias. No allegation is made by the moving parties of actual bias.

[4] The relief sought is that I disqualify myself, that the judgment already granted by this panel be set aside and that the application for judicial review be remitted to be heard by a different panel of this Court.

[5] This motion was heard by all three members of this panel on the return dates. However, in accordance with practice and, as expressly requested by the moving parties, only I was requested to discharge the responsibility of deciding whether or not I should be disqualified. Motions of this kind are unlike other kinds of motion because the judge whose impartiality is attacked is required to judge his own conduct and his decision is final unless upset on appeal.

[6] Accordingly, the initial part of the decision that will now be made, which will deal solely with whether or not the moving parties should now be permitted to even raise the issue of reasonable apprehension of bias will be mine alone. So will the decisions about the issue of reasonable apprehension of bias and whether or not I ought to be disqualified be mine alone. My colleagues have taken no part whatsoever in the preparation of those decision and bear no responsibility whatsoever for them. They were present at the hearing of this motion and participated in it only because, as I understood it, it would have been their exclusive

responsibility, should I have decided to disqualify myself, to decide whether or not our judgment should be set aside and the application for judicial review reheard by a different panel or whether our judgment should still be maintained.

[7] Having regard to what my decisions are, in my view there is nothing now left for the other members of the panel to decide.

My decisions

[8] I conclude that the moving parties, by their own conduct, have waived their right to raise the issue of reasonable apprehension of bias and, for that reason alone, this motion is hereby dismissed.

[9] As well, I conclude that the moving parties have failed to establish reasonable apprehension of bias and, for that reason too, this motion must be hereby dismissed.

[10] Because of the unusual circumstances surrounding this motion, to which I will return, this effectively concludes this motion except for my disposition of costs. Counsel may make submissions regarding costs to me in writing within one month. The submissions should be exchanged and then delivered to the Registrar of this Court.

[11] What follows are my reasons for these decisions.

An overview

[12] Unfortunately, because of the numerous allegations that the moving parties have made against me, many of them personal, it is now necessary that I address matters that I would otherwise have preferred to avoid.

[13] I have been a judge for 24 years. I consider it a great honour to be a member of the judiciary. I am also very conscious of the enormous responsibility that goes with that honour and I do my best to fulfill it. I never forget that my judgments can have profound consequences for the persons affected.

[14] I cannot recall any instance prior to this in which I have refused to disqualify myself from participating in a case when asked by counsel to do so. I have, from time to time, raised the issue of whether or not I ought to disqualify myself when I believed that there might be cause but in this case I could think of no reason to do so. In most instances when I have raised the issue, counsel on both sides have agreed that I should continue to preside. In a few, I was asked to disqualify myself and I willingly complied. I have never been asked to disqualify myself after my judgment was released.

[15] Issues relating to reasonable apprehension of bias are really issues of fairness and how they are dealt with inevitably reflects on the integrity of the administration of justice. When a party can establish reasonable apprehension of bias on the part of a judge, it is unfair to require that he submit his rights for determination by that judge and he is entitled to have that judge disqualify himself from the proceeding and have it heard by another judge. However, a party is not entitled to raise frivolous allegations of reasonable apprehension of bias just to be able to avoid one particular judge and then obtain another who may be perceived as likely to be more favourable to the party's cause. Judge shopping is not a legitimate exercise and judges try to prevent it from occurring.

[16] It is even more deplorable for a party against whom an adverse judgment has already been granted to raise frivolous allegations of reasonable apprehension of bias in order to have that judgment set aside so that the party might have another opportunity before another judge, or panel of judges, to attempt to do better. I am satisfied that this is what has occurred in this case and, throughout the balance of these reasons, I will try to explain what has brought me to that conclusion.

[17] In spite of what has taken place, it is now my duty to set aside all personal feelings I may have about the bringing of this motion and to decide it fairly and in accordance with the law. I must strive to be objectively fair not only to the moving parties but, as well, to the responding party which has already secured a favourable judgment in this case and understandably wishes to retain it. As well, I must maintain the honour and dignity of this Court so that people may continue to have confidence in its integrity. All of this must be done while I pass judgment on myself and review things I myself have done. If it were not for all of these considerations, it would have been very tempting for me to take the easy way out by acceding to what the moving parties want me to do. It should be evident, however, that I would never do so.

The moving parties have failed to satisfy their legal duty to raise any issue of reasonable apprehension of bias at the first practicable opportunity

[18] The law imposes an obligation on a party engaged in litigation who wishes to raise an issue of reasonable apprehension of bias to do so at the earliest practicable opportunity. Failure to do so may lead the Court to conclude that the party has waived, or given up, its right to complain by continuing with the case. As well, the Court is entitled to consider the delay as a factor affecting the *bona fides* of the complaint.

[19] The following is a synopsis of the evidence tendered by the moving parties on this issue. The application for judicial review which is the subject of this motion was heard by this panel on October 6 and 7, 2005. The City Solicitor, Anna Kinastowski, became aware on Friday, October 7, 2005 that I was sitting on the panel hearing the judicial review application. The City Solicitor admits that on the evening of October 6, 2005, Albert Cohen, the director of litigation, became aware that I was on the panel and that he raised a concern about it at that time. The City's

counsel on the judicial review application, Graham Rempe, confirms that Mr. Cohen expressed this concern to him on October 6, 2005. Although the City had been in possession of all the pertinent facts since before the commencement of the hearing and despite the fact that its counsel had, by the evening of the first day of the hearing, considered the implications of those facts, the City did not object to my participation on the panel upon the recommencement of the hearing the following morning.

[20] Instead, during the morning of October 7, 2005, while counsel for the moving parties returned to Court to continue with the hearing of the judicial review application, the City Solicitor and Mr. Cohen attended a management team meeting which began at 9:30 AM and continued until between 11:30 AM and 12:30 PM. According to the evidence of the City Solicitor, “The meeting followed the usual agenda, which included receiving updates from the practice areas towards the end of the meeting”. It was at that meeting that she says that Mr. Cohen “raised a concern about Justice Matlow presiding over the SOS application given the similarity between it and the Spadina/Thelma matter”.

[21] In her evidence, the City Solicitor then goes on to describe what else transpired at that meeting and her conclusion that “it would be prudent for us to review the Spadina/Thelma matter, as well as any cases in which Justice Matlow had presided in which the City was a litigant, to determine if there was a valid basis for concern”. I infer from the absence of any complaint by the City relating to those earlier cases that they did not disclose any “valid basis for concern”.

[22] Then, while the hearing of the judicial review was still continuing on October 7, 2005, the City Solicitor states that “the management team decided that Margaret Fischer would review the real estate file and Albert Cohen would review the litigation and planning files”. She does not give any reason why the team thought that it would be useful to review any real estate file and I cannot think of one.

[23] The hearing of the judicial review application concluded during the afternoon of October 7, 2005. It is evident that neither the City Solicitor nor Mr. Cohen was anxious to alert the panel before we either gave our judgment, as we might have done that day, or while it remained under consideration. The City Solicitor states that “Though there was no specific future meeting planned, I anticipated that we will meet again earlier the following week to discuss the outcome of that review”.

[24] Although the moving parties state that, on becoming aware that I was sitting on the panel hearing the judicial review application in relation to the St. Clair project, the City Solicitor “immediately instructed her staff to pull the relevant files from storage in order to review the extent of Justice Matlow’s involvement and determine whether there was any basis for concern,” This is inconsistent with her assistant’s contemporaneously made note.

[25] That note reads as follows:

-Judge Matlow

Look into getting an opinion about whether he should remove himself from some of our cases MAF/***/AHC to pull info on how many cases he has done

[26] There is no indication in the note that this issue was considered urgent or that any opinion was to be sought in relation to the judicial review application with which this motion is related. Rather, the note implies that some thought would be put into whether the City should start requesting me to disqualify myself in “some” of its cases. Any action appears to have been contemplated in relation to future cases only. No date was set for a follow-up meeting to discuss the results of any inquiry performed and there did not appear to be any suggestion that the panel and other counsel should be put on notice of any issue of bias in relation to the St. Clair project.

[27] Nor did counsel for the City or the TTC display any sense of urgency or concern when, at the conclusion of the hearing on October 7, 2005, they expressed the wish that we release our judgment, if possible, prior to October 12, 2005, because, from that day on, any work that would be done in relation to the St. Clair project would be “irrevocable” and would have to be removed if our decision were to be adverse to their clients. This was tantamount to a request that we go ahead and release our judgment even before the moving parties’ investigation was completed.

[28] Monday of the following week was Thanksgiving Day, October 10, 2005. During the morning of the following day, October 11, 2005, the City Solicitor states that she received a copy of the Court’s decision, released that day, which ruled in favour of the applicant. Her response to that was to proceed to a meeting of the Works Committee “to hear an *in camera* debate regarding the award of the tender for the construction of the right of way for the St. Clair Project. The award of the tender had been very controversial. The remainder of the day was spent reviewing the decision and its implications on the City and on the tender”. It would appear that the City showed no reluctance to continue considering the award of the tender for a project that had just been stopped by this Court and that task was given priority over what should be done about my participation on the panel hearing the judicial review application.

[29] It was only after receiving this Court’s decision on October 11, 2005, that the inquiry into my activities in relation to the Thelma project began in earnest. Later that day, apparently after the Works Committee meeting, the City Solicitor met with Mayor Miller. She says nothing in her evidence about what occurred at that meeting other than that she spoke to Jim Harbell, counsel for the TTC, “and advised him that there *may* (emphasis added) be concerns that Justice Matlow had been on the panel for the SOS application given his previous role in the Spadina/Thelma matter.” She also told Mr. Harbell “that we were reviewing the issue”.

[30] On October 13, 2005, the files that the City Solicitor wished to review were delivered to her from a storage facility and they were reviewed by Mr. Rempe who told the City Solicitor that he had concerns that I had heard the judicial review application. The City Solicitor then sent an email message to Mayor Miller at 4:58 PM that day but privilege is claimed for that document and its contents have not been disclosed.

[31] Independent legal advice was not sought until October 14, 2005, and this motion was not set down until October 20, 2005.

[32] It is my respectful view, based entirely on the evidence of the moving parties, that once Mr. Cohen raised some concern, on October 6, 2005, while the hearing was still in progress, about my being a member of the panel hearing the judicial review application, the City ought to have acted reasonably and quickly to alert me of its concern. If the City wished to have more time to investigate the facts before deciding what to do, it was open to counsel for the moving parties to appear before the panel when the hearing resumed on the following day, October 7, 2005, to request an adjournment for a few days. At that stage it would not have been necessary for counsel to tell us what the City's concern was. It would have been quite enough had counsel, as an officer of the Court, told us that something had come to the City's attention that could affect the regularity of the hearing then in progress and that the City needed more time to look into whatever it was. In those circumstances, the hearing of the judicial review application would almost certainly have been adjourned and the issue of my participation could have been clarified a few days later before further arguments on the merits were to be made.

[33] It was also open to counsel for the moving parties to appear before the panel when the hearing resumed to raise the issue with me and to invite me to provide correct information about my conduct which it was the moving parties' obligation to seek out. Had I been asked, I would gladly have provided any relevant information that might have been requested including everything that is contained in these reasons. It was evident to me at the hearing of this motion, as even Mr. Cherniak acknowledged, that even he did not have correct knowledge of all of the relevant facts.

[34] On all of the evidence I am satisfied that neither the City nor the TTC raised the issue of reasonable apprehension of bias at the earliest practicable opportunity and, as revealed by their own evidence, they acquiesced to my participation in the panel hearing the application for judicial review. They then invited the panel to release its judgment even while the moving parties' investigation was in progress. That investigation then continued after the judgment was released. Until the judgment was known to them, they showed no interest in raising any issue of reasonable apprehension of bias. It follows that they should not be permitted to raise the issue now in an attempt to avoid a judgment that has been made against them.

[35] The principle of waiver has been expressed as follows:

...a party may waive his objections to a decision-maker who would otherwise be disqualified on grounds of bias. Objection is generally deemed to have been waived if the party or his legal representative knew of the disqualification and acquiesced in the proceedings by failing to take objection at the earliest practicable opportunity.

S.A. de Smith, Lord Woolf & J. Jowell, *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995) at p. 542, as cited in Donald J.M. Brown, Q.C. and the Honourable John M. Evans, *Judicial Review of Administrative Action in Canada*, Volume 3 (Toronto: Canvasback Publishing, 2004) at 11:77

[36] The absence of a timely objection will usually be fatal to a subsequent challenge.

Canada (Human Rights Commission) v. Taylor [1990] 3 S.C.R. 892 at para. 175

[37] It is not necessary to expressly waive the right to object on the grounds of bias. Waiver can be implied from the parties' failure to allege a violation at the earliest practicable opportunity:

However, even apart from this express waiver, AECL's whole course of conduct before the Tribunal constituted an implied waiver of any assertion of a reasonable apprehension of bias on the part of the Tribunal. The only reasonable course of conduct for a party reasonably apprehensive of bias would be to allege a violation of natural justice at the earliest practicable opportunity. Here, AECL called witnesses, cross-examined the witnesses called by the Commission, made many submissions to the Tribunal, and took proceedings before both the Trial Division and this Court, all without challenge to the independence of the Commission. In short, it participated fully in the hearing, and must therefore be taken impliedly to have waived its right to object.

In Re Human Rights Tribunal and Atomic Energy of Canada Ltd., [1986] 1 F.C. 103 (F.C.A.)

[38] A party who believes that grounds exist for alleging an apprehension of bias must raise those grounds as soon as practicable, and must not remain silent, relying on such grounds only if the outcome turns out badly:

I do not think it is proper for a party to hold in reserve a ground of disqualification for use only if the outcome turns out badly. Bias allegations have serious implications for the reputation of the tribunal and in fairness they should be made directly and promptly, not held back as a

tactic in the litigation. Such a tactic should, I think, carry the risk of a finding of waiver. Furthermore, the genuineness of the apprehension becomes suspect when it is not acted on right away.

Eckervogt et al. v. The Queen in right of British Columbia (2004),
241 D.L.R. (4th) 685 (B.C.C.A) at 698-699

The City knew all about my advocacy in relation to the Thelma project and never objected

[39] My advocacy in relation to the Thelma project was always open and well known by many people throughout Toronto. It was particularly well known within the walls of City Hall at least from the time of my first appearance before the Administration Committee of the City on May 28, 2002. From that time on, I was in frequent correspondence with most members of City Council and met personally with many of them, including former Mayor Lastman. Copies of my letter of November 13, 2003, to Mayor Miller were sent to all members of City Council and were widely circulated and discussed. I even met with members of the City legal department at a meeting arranged by Councillor Michael Walker. I appeared on two occasions before the Ontario Municipal Board and conferred there with members of the City's legal department. The public activities of Friends and its supporters, including petitions, posters and handbills, were widely known and described often in the media as reflected in the material filed by the City on this motion.

My judicial record in cases involving the City shows no sign whatsoever of any bias on my part

[40] According to the research done by counsel for the responding party and set out in his factum, the only cases involving the City over which I have presided since 2002 are the following:

1. In *City of Toronto v First Ontario Realty Corporation*, decided in May, 2002, I reduced a major costs award sought against the City following an unsuccessful leave to appeal motion from \$80,202 to \$21,000.
2. In *Smith v Toronto*, decided on April 22, 2005, I was the president of a panel of judges of this Court that allowed the City's appeal and dismissed a private citizen's claim against the City on a motion for summary judgment, finding that there were no genuine issues for trial.
3. In *Williams v DiCarlo*, decided on May 27, 2005, I granted leave to the City and another litigant in a case where the motions judge had refused to award summary judgment in favour of the City and its co-defendant against a private litigant.

4. In *Vincent v DeGasperis*, decided on July 8, 2005, I was the president of a panel of judges of this Court that overturned an order of the Ontario Municipal Board and restored the findings of the City's Committee of Adjustment, thereby upholding the City's position rather than the interests of certain ratepayers residing in Rosedale. I was the author of the Court's reasons for judgment.

[41] To this list, I have found and can add one further case. In *Toronto v Alcohol and Gaming Commission of Ontario*, decided in June, 2005, I was the president of panel of judges of this Court that dismissed an appeal by the City from a decision of the Commission's Board denying the City party status in a hearing that was before the Board. Written reasons written by another member of my panel were released on October 18, 2005.

[42] Despite what the City now says about my perceived partiality, it raised no objection to my hearing any of these cases. Nor does it apparently now want me to disqualify myself from any of them and set aside my decisions. It is self-evident that none of the decisions that I have made can reasonably be said to reflect any bias on my part against the City.

My oath of office

[43] On October 9, 1981, I took an oath upon becoming a judge of the County Court for the Judicial District of York "that I will faithfully, and to the best of my skill and knowledge, execute the duties of a judge...." of that Court. On September 4, 1990, I repeated that oath upon becoming a judge of the Superior Court of Justice.

[44] I have without exception always remained true to my oaths.

My role in the bringing of this motion

[45] I am aware that many judges would likely not have become involved in the opposition to what will be referred to throughout these reasons as "the Thelma project" in the same way that I was but, for me, there was no reasonable alternative. I saw clear evidence of what I perceived was wrongdoing by officials of the City which, if left unchallenged, would have serious negative consequences directly on me and on my community. And, as someone who cherishes justice and abhors wrongdoing, it would have been impossible for me to remain silent and do nothing about it. I realized, of course, that, as a judge, there were limits to the kind of actions by government that I could properly protest publicly. I knew, for example, that I could never become involved in anything that was political. Those were limits that I willingly accepted when I became a judge.

[46] However, just because I accepted those limits did not mean that I also had to give up all of my rights as a citizen and as a homeowner. Nor did I think that it would be right for me to

close my eyes and seal my lips when I thought that I could perform a useful, albeit unfamiliar, service by bringing the wrongdoing to those engaged in the City's administration. I also knew that I was entitled to argue with governments at all levels about things that affected me directly and I was supported in that view by an opinion about "municipal democracy" that was circulated to federal judges in 1999 by an advisory committee of the Canadian Judicial Council which stated, in part, that

As a ratepayer and citizen the judge is entitled to have and express views on a purely local and municipal question provided, of course, that the judge realizes that in so doing the judge must be disqualified from any participation in any litigation arising from the matter.

[47] The "matter" that concerned me was the Thelma project and, in order to be able to oppose it and express my views, I was prepared to disqualify myself from participation in any future litigation that directly involved that particular project or had issues that were similar. However, I could see no reason why I necessarily would have to disqualify myself from all future litigation that involved the City.

[48] The City, like the other levels of government, is a major litigant in our Court in many different types of cases. The City also has dealings with many of the judges of our Court who live in Toronto and I suspect that not all of those judges like everything that the City does to them. Nevertheless, they continue to hear cases involving the City and they, like I, decide them fairly.

[49] Having a personal dispute with the City is not quite like having a dispute with a stranger. It is more like having a dispute with a spouse or partner – you can be upset with them but you still love them - and no matter what happens, the City remains in your life for as long as you live within its borders. Judges, like other people, dispute a variety of things with all three levels of government and sometimes even go to court against them. Yet, in spite of those confrontations, those judges continue to hear cases involving those same governments and no one ever objects because there is never any real concern that they will allow those confrontations to affect their impartiality.

[50] Accordingly, I proceeded to voice my opposition to what I perceived was wrongdoing by some officials of the City solely in relation to the Thelma project. At no time did I do something or say something that was related to anything else. Together with a few of my neighbours whose concerns were the same as mine, I lobbied and met with many members of City Council and former Mayor Lastman and urged them to intervene. Then, when those efforts failed to produce the desired intervention, I willingly responded to invitations from the news media for comments which I willingly gave. I also took the initiative of sending information to a few columnists who wrote on municipal matters, including, regretfully, John Barber of the Globe and Mail whose involvement in this motion is part of the record. I was admittedly very eager to get the ear of

someone at City Hall who would do the right thing and I hoped that some media attention would provide some much needed pressure. After the municipal election of 2003 brought David Miller to the mayor's office on a platform that included transparency in government and the preservation of neighbourhoods, I felt renewed optimism and I wrote to him and asked him to help us. Inexplicably, he failed to even acknowledge my letter and a subsequent follow up telephone message which I left for him. Nor did the intervention of my local councilor produce a response from the mayor. Although I felt uncomfortable in the role that fate had assigned to me, I was proud to perform it and I did it openly and to the best of my ability.

[51] Eventually, as my recitation of the subsequent part of the saga will reveal, City Council finally did respond to my efforts but, alas, not in the way I had hoped. Rather than reprimand the City officials who had exceeded their authority and had executed the unauthorized formal joint venture agreement and then rescind it, members of City Council met in a secret meeting and retroactively authorized it. This, I felt, was the ultimate whitewash and betrayal. I and thousands of people in my community who had joined in the cause could not believe what the City had done to our neighbourhood against our wishes and for no good reason.

[52] Having become such a thorn in the side of some people in the City's administration, perhaps I should not be surprised at the reaction which is reflected in the bringing of this motion.

How I feel now about how the City mishandled the Thelma project

[53] I still believe that the City seriously mishandled the Thelma project and I wish that there were still a way to stop the project and set things right. That is why I wrote once more to John Barber, a municipal affairs columnist in the Globe and Mail, in early October, 2005, and delivered to him copies of some pertinent documents which he had requested that I provide to him. Counsel for the moving parties spent much of his time in argument criticizing me for trying to engage Mr. Barber, who had written extensively in his column on municipal wrongdoing in Toronto, in my issue and even examined Mr. Barber as a witness for this motion in order to obtain evidence that I had been in touch with him. I see nothing wrong with what I did and clearly did not want to conceal what I was doing. Nothing would have pleased me more than having Mr. Barber tell everyone in Toronto about my story.

[54] Despite everything, I still love Toronto where I have made my home since 1958. I do not like everything about the way the City is run and I do not like everything that seems to go on at City Hall. I continue to be concerned about the Thelma project and I fear for the day, if it ever comes, that it finally takes shape.

[55] I have never and would never, under any circumstances, allow any of my personal experiences and feelings about the Thelma project interfere with my judging cases in which the City is a party. My years of experience as a judge have taught me how to set aside whatever personal views or feelings I may have about issues in a particular case. When the City comes to

my courtroom as a litigant, I treat it as I would any other litigant, fairly. That this is so was demonstrated by counsel for the responding party in an analysis of my recent judgments involving the City to which I will refer again.

The test for finding reasonable apprehension of bias

[56] The leading authoritative statement of the law that applies to reasonable apprehension of bias is that adopted by the Supreme Court of Canada in *Wewaykum Indian Band v Canada*, [2003] 2 S.C.R. 259. At paragraph 60, the Court articulated the test to be applied as follows:

60 In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, *supra*, at p. 394, is the reasonable apprehension of bias:

the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[57] Because Binnie, J., whose conduct was reviewed in *Wewaykum* had already decided the case in issue, the Court slightly altered the formulation of the test in the context of that case, at paragraph 74, from "would not decide fairly" to "did not decide fairly"

[58] The Court then went on to make three remarks on how the test should be applied. The first, at paragraph 76, dealt with the requirement that a reasonable apprehension of bias must rest on serious grounds and not merely on grounds that would meet the standard of a very sensitive or scrupulous conscience. It reads as follows:

76 First, it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. In this respect, de Grandpré J. added these words to the now classical expression of the reasonable apprehension standard:

The grounds for this apprehension must, however, be substantial, and I . . . refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

(*Committee for Justice and Liberty v. National Energy Board*, *supra*, at p. 395)

[59] The second remark, at paragraph 77, dealt with the requirement that that the inquiry must be thorough without any shortcuts. It reads as follows:

77 Second, this is an inquiry that remains highly fact-specific. In *Man O'War Station Ltd. v. Auckland City Council (Judgment No. 1)*, [2002] 3 N.Z.L.R. 577, [2002] UKPC 28, at par. 11, Lord Steyn stated that "This is a corner of the law in which the context, and the particular circumstances, are of supreme importance." As a result, it cannot be addressed through peremptory rules, and contrary to what was submitted during oral argument, there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.

[60] And the third remark, at paragraph 78, dealt with cases in which disqualification of a judge is sought, as here, after judgment has been granted rather than before. It reads as follows:

78 Third, in circumstances such as the present one, where the issue of disqualification arises after judgment has been rendered, rather than at an earlier time in the proceedings, it is neither helpful nor necessary to determine whether the judge would have recused himself or herself if the matter had come to light earlier. There is no doubt that the standard remains the same, whenever the issue of disqualification is raised. But hypotheses about how judges react where the issue of recusal is raised early cannot be severed from the abundance of caution that guides many, if not most, judges at this early stage. This caution yields results that may or may not be dictated by the detached application of the standard of reasonable apprehension of bias. In this respect, it may well be that judges have recused themselves in cases where it was, strictly speaking, not legally necessary to do so. Put another way, the fact that a judge would have recused himself or herself *ex ante* cannot be taken to be determinative of a reasonable apprehension of bias *ex post*.

[61] The requirements for a finding of reasonable apprehension of bias, as applied to this case, must, therefore, include the following :

1. It must be reasonable.
2. It must be based on serious grounds.
3. It must be held by (notional) reasonable and right-minded persons.

4. Those persons must first apply themselves and obtain the information required by them to make their decision. Their inquiry is fact-specific and the facts must be addressed carefully in their proper context without shortcuts.
5. Those persons must apply the strong principle of judicial impartiality
6. Those persons must then conclude that it is likely that, whether consciously or unconsciously, I would not decide the application that was before this panel fairly.

[62] It may be that the test ought also to be applied in this case in accordance with the reformulation of the test described in paragraph 51 above. However, because this motion was not argued on the basis of the reformulation and, in any event, because it would make no difference to the result, I have decided to continue to refer to the classic formulation.

Bias claims made against judges

[63] In applying the test, courts have repeatedly emphasized that different considerations govern bias claims made against judicial officers than those made in relation to members of administrative tribunals. In *R. v. S. (R.D.)*, [1997] 3 S.C.R 484 at para. 32. L’Heureux-Dube and McLachlin JJ. accounted for this difference as follows:

Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate courts inquiring into the apprehension of bias. This is because judges “are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances”: *United States v. Morgan*, 313 U.S. 409 (1941), at p. 421. The presumption of impartiality carries considerable weight, for as Blackstone opined at p. 361 in *Commentaries on the Laws of England*, Book III ... “the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea”. Thus, reviewing courts have been hesitant to make a finding of bias on the part of a judge, in the absence of convincing evidence to that effect: *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (C.A.), at pp. 60-61.

[64] In the same case, Cory J. explained why a high threshold must be surpassed in order to establish the existence of a reasonable apprehension of bias on the part of a judge, stating:

the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including “the traditions of integrity and impartiality that form a part of the background and is apprised also of the fact that impartiality is one of the duties the judges swear to uphold”: *R. v. Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14.

Cory J. continued,

Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.

R. v. S. (R.D.), *supra*, paras. 111 and 113; see also para. 116

Cory J. further stated that:

The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind. (Canadian Judicial Council, Commentaries on Judicial Conduct (1991), at p. 12.), *R. v. S. (R.D.)*, *supra*, para. 119

[65] More recently, in *Wewaykum*, a unanimous eight member panel of the Supreme Court of Canada commented that “[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary” and, referring to the above-excerpted passage from the reasons of L’Heureux-Dubé and McLachlin JJ. in *S. (R.D.)*, stated that “the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption.” Because of the tendency of disgruntled

litigants to raise “angry objection” in their attempt to win at any cost, judges have been cautioned against readily accepting that they should remove themselves, particularly after a hearing or trial has begun:

A reasonable apprehension of bias will not usually arise unless there are legal grounds upon which a judge should be disqualified. It is not quite as simple as that because care must always be taken to ensure that there is no appearance of unfairness. That, however, does not permit the court to yield to every angry objection that is voiced about the conduct of litigation. We hear so much angry objection these days that we must be careful to insure that important rights are not sacrificed merely to satisfy the anxiety of those who seek to have their own way at any cost or at any price.

G.W.L. Properties Ltd. v. W.R. Grace & Co. of *Canada* Ltd. (1992), 74 B.C.L.R. (2d) 283 (C.A.), at page 287, referred to in *Samson Indian Nation and Band v. Canada*, [1998] 3 F.C. 3 (F.C.T.D.)

The facts relating to my impugned actions and comments

[66] I will now set out, to the best of my ability, an accurate summary of my recollection of my conduct which is relied on by the moving parties in support of this motion. With perhaps some minor exceptions, what I describe is supported by evidence and documents filed.

[67] Since 1995, I have lived in a small house on the north side of Thelma. Thelma is a small street that runs east only from Spadina one block north of Lonsdale Road in Forest Hill Village. It is .6 kilometres north of St. Clair Avenue. It is an old street and the buildings on it are a combination of old frame houses, newer townhouse-like houses and two low rise apartment buildings. It comes to a dead end after only one block so access is only from Spadina.

[68] The municipal parking lot which is the site of the Thelma project is at the north-east corner of Spadina and Thelma. The lot is owned by the City and operated for it by the Toronto Parking Authority (“the TPA”) which is an agency of the City. Public documents show that the lot was purchased by the City many years ago to be used to provide parking for customers of the small stores on Spadina. Approximately one-half of the funds used to purchase the lot came from a special tax assessment levied by the City on the owners of the stores who initiated the purchase. Those who contributed money for the purchase now feel, with good reason, that the City has dealt unfairly with them by unilaterally taking the lot away from them.

[69] In October, 1999, at a public meeting which I attended organized by the City and the developer in a nearby church hall, those present were told that the TPA had recognized that the approximately 43 surface public parking spaces on the lot were not adequate for the needs of the

Village and that it and the City were about to enter into a joint venture with a developer in order to solve the parking shortage.

[70] The joint venture described was one that included the sale of air rights over the lot by the City to the developer for the construction of ten townhouses on the lot, a development that fell within the existing zoning. In return, the developer was to build an underground garage beneath the townhouses that would be owned by the City and operated by the TPA which would provide approximately 63 public parking spaces, an increase of 20 parking spaces over the existing surface lot. As well, the developer would make a cash payment to the City of some undisclosed sum. Those who attended the meeting were told that, because the townhouses fell within the existing zoning, no rezoning would be required and there would be no opportunity for them to oppose the development.

[71] In April, 2000, City Council passed the resolution required by law approving the joint venture and authorizing its officials to enter into a formal agreement on behalf of the City with the developer. The resolution specified that the agreement was for the “redevelopment of the site as a ten unit residential complex with approximately 62 or 63 public underground parking spaces” and would include a provision for the payment to the City by the developer of a total of \$135,000 in cash. The agreement was not merely a sale of City owned property. It was expressly stated to be a joint venture between the City and the developer.

[72] For reasons that have never been publicly revealed, the formal agreement giving effect to City Council’s resolution was not prepared and executed by the parties until November, 2001. However, in the intervening 18 months further negotiations between the developer and City officials took place but details have never been fully disclosed.

[73] The formal agreement that finally emerged made no reference to the joint venture development which City Council had authorized, namely, a ten unit residential complex that would have come within the existing zoning. Rather, without any further consideration or authorization by City Council as required by law, the formal agreement was changed by certain City officials, with the knowledge and participation of the City’s legal department, to provide for a joint venture development which was defined as “the proposed mixed use commercial/residential development of approximately 30,000 square feet and the Parking Facility which the Purchaser proposes to construct upon the Lands”. It was then signed by representatives of the developer, by representatives of the TPA and by representatives of the City.

[74] Despite the much larger size of the new joint venture development than the one approved by City Council and its much greater value to the developer, the price to the developer inexplicably remained substantially the same as before. People in the Village who spoke about the project often described it as a “deal that developers dream of”.

[75] In April, 2002, I and approximately five of my neighbours met and decided to oppose the development as defined in the agreement on the grounds that the formal agreement had never been authorized by City Council as required by law and that the development offended certain planning principles which were applicable to the particular project. In particular, we were concerned that the additional traffic that it would attract to our dead-end street would make it difficult and extremely dangerous for us to drive our cars on to Spadina and to return to back to our homes from Spadina. We were also very concerned about the development's size, the way it towered over our homes, its likely long-term impact on our neighbourhood and the viability of the small stores in the Village once the surface parking lot was gone.

[76] We therefore agreed to direct our individual opposition to the development to City Council collectively through an *ad hoc* committee which we named "Friends of the Village". Friends was, in reality, a single issue informal gathering of a few neighbours. It had no rules and no memberships. Although its single goal was supported by thousands of Village residents, as evidenced by signatures on petitions and attendances at meetings at City Hall, it never even resembled a ratepayers' organization. Friends received the support of the local business association and occasionally spoke on behalf of its members too. I became Friends' first spokesman largely because I convened its first meeting and served the coffee. As time went on, others also spoke on our behalf. When I wrote letters on behalf of Friends, I would describe it as an *ad hoc* committee. The ratepayers' organization in our neighbourhood is the North Hill District Homeowners' Association and, although it too was supportive of our efforts, it was entirely separate from Friends.

[77] Councillor Michael Walker, the councillor for my ward, and Councillor Joe Mihevc, the councillor for the adjoining ward that commences on the west side of Spadina directly across from the Thelma development, and several other councillors were staunch supporters of Friends and advocated on our behalf at City Hall with vigour right until the end.

[78] For approximately two years I continued my efforts to oppose the development without much success. From time to time I would learn that the formal agreement had been amended and that terms that were even more favourable to the developer had been inserted. In particular, the size of the development kept growing and the power of the TPA to act arbitrarily kept expanding. As soon as the size exceeded what was allowed by the zoning by-law, the developer went off to the OMB to obtain the necessary amendment to the zoning-by-law and that is when I too became involved at the OMB in my personal capacity as a person affected.

[79] I also became increasingly concerned about the manner in which the joint venture had been negotiated by the City and the developer. Contrary to the City's own rules, there had been no invitation made for proposals that would have enabled other developers to submit alternative plans and the dealings between the City, the TPA and the developer were all conducted in secret. When I sought access to documentation in the possession of the City and the TPA, my requests

were, with some exceptions, refused and I had to resort to launching appeals pursuant to freedom of information legislation to obtain documentation.

[80] As well, I became increasingly concerned about the bona fides of the TPA's intentions and why it and the City were so determined to proceed with a development that made no financial or other sense from the City's perspective and was opposed by virtually all of the residents and business owners in my community. The rationale for the joint venture, namely, to increase the number of public parking spaces in the Village was so transparently false as to defy belief. In its final configuration, the development was to constitute a four-storey building (down from six) that would include 13 residential condominium units and an unspecified number of retail stores at ground level. Provision was made in the plans for only one underground parking space for each condominium. No spaces were allocated for owners who might have more than one vehicle or for their visitors or for owners, employees or customers of the retail stores. It was clear to me that more than just the 20 additional parking spaces that would be created would be occupied by persons other than the general public. As a result, the development would aggravate the TPA's perceived need for more parking and would make the perceived problem even worse.

[81] As well, I wondered why the City would be so anxious to proceed with the development for a payment from the developer of only a small amount in cash plus the construction of the underground parking garage. The mystery was even deeper when I learned, from the TPA's own records, that its anticipated net revenue from the new and larger underground parking lot would be substantially less than what it received from the smaller surface parking lot.

[82] Throughout this period the City legal department kept insisting that the formal agreement entered into and amended from time to time was in accordance with what had been authorized by City Council in April, 2000. The opinion, which supported that view was, astonishingly, prepared by Barbara A. Cappell, the same lawyer who had prepared the joint venture agreement. The following is some of what she wrote:

Comments

The subject matter of the 2000 Report and the authority sought by such Report was a real estate transaction, not a development application.

Conclusion

The Agreement of Purchase and Sale entered into between First Spadina Place Inc. and the City of Toronto relating to the above grade lands at 453 Spadina Road is consistent with the terms of the authorization granted by Council in 2000. There is no prior direction from City Council as to how the nature or form of the development. The current application for a Zoning by-law Amendment should be considered in the normal course on its planning merits.

[83] The report to which she referred was, on its face, submitted by the TPA to City Council to obtain authority to enter into an agreement of purchase and sale with the developer

in order to provide an additional 20 public parking spaces at Carpark No. 164 through the development of the site as a ten unit residential complex with approximately 62 or 63 public underground parking spaces.

The report also stated the following in its conclusions:

Conclusions:

The Parking Authority will make a reasonable profit on the sale of air rights while increasing the parking supply in the area. The residential development as proposed is permitted under the existing zoning and we believe that it will be supported by the local councilors, businesses and residents. We had a public meeting at which time most of the businesses and residents who attended were supportive of this project. We believe that *the proposed joint venture* with First Spadina Place Inc. is consistent with our mandate of developing our locations while continuing to meet the parking needs of the area. Furthermore, there is a minimal financial risk to the Authority as we are not required to lay out any capital funds towards the construction of the proposed garage.

With regard to the *development* of this property, it will be the responsibility of the Purchaser to obtain the appropriate development approvals from the City. We are only asking Council to approve the sale and *business terms* of the Purchase and Sale Agreement. (emphasis added)

Those business terms included many provisions specifically relating to the ten townhouse development that Council was being asked to authorize.

[84] Accordingly, I vehemently disagreed with the reasoning underlying Ms. Cappell's opinion and I openly disagreed with it. It made absolutely no sense to me then and even less now.

[85] Nevertheless, in an effort to help resolve the issue with the City, Friends retained Michael Melling of Davies Howe Partners, a well-known lawyer whose firm is engaged exclusively in municipal law matters and sought his opinion on whether or not the agreement had been authorized by City Council. His view was that it had not been authorized. In his opinion letter, Mr.Melling went on to state the following:

Having reviewed the Agreement, the Clause and the applicable case law, it is my view that:

1. The redevelopment scheme specified in the Clause – a ten unit residential complex – was integral to Council’s decision to authorize staff to execute an agreement of purchase and sale with the Developer. When the development scheme changed fundamentally, staff lost authority to execute an agreement.
2. The consequences of staff’s lack of authority to execute the Agreement are that it is void and unenforceable. A contract purportedly executed on behalf of a municipal corporation which was authorized by by-law or resolution of the Council is invalid. Third parties who contract with municipal corporations are not entitled to rely upon the “apparent authority” of staff, or upon the “indoor management rule” applicable to contracts with private corporations.
3. Citizens can challenge, in the courts, the validity of an agreement entered into without proper municipal authority, even though they are not parties to the agreement.

[86] After reviewing Mr. Melling’s opinion which conflicted with Ms. Cappel’s, and after some further prodding from Friends, City Council relented and agreed to retain a so-called independent counsel, David Boghosian, to give it yet another opinion on the issue. Mr. Boghosian was selected by the City without any consultation with me or Friends. His opinion was that the formal agreement had *not been authorized* by City Council but the difference between what had been authorized and what was inserted in the formal agreement was, in his view, not material. I could never understand the reasoning for the second part of that opinion and I disagreed with it too. I was and remain adamant that the difference between the original ten townhouse development and the final multi-storey residential-commercial development was substantial and required the specific authorization of City Council. (emphasis added)

[87] Eventually, a group of residents and local business owners, out of anger and frustration, got together and retained counsel who commenced legal proceedings to challenge the validity of the formal agreement. Although I assisted them peripherally, I was not a member of that group. Nevertheless, mindful of my involvement, I informed my Regional Senior Justice so that arrangements could be made to have a judge from outside of Toronto who did not know me assigned to hear their application.

[88] In response to those proceedings, City Council, apparently recognizing that the agreement was likely to be set aside, accepted the strategic advice offered by Mr. Boghosian and held a special meeting without public notice and proceeded to pass a resolution approving the formal

agreement retroactively. By doing so City Council regularized what I had maintained was an unauthorized act by City officials who had signed it. That was sufficient to persuade the parties to the litigation to terminate it and to persuade the Friends to concede defeat.

The moving parties' alleged similarities between the Thelma project and the St. Clair project

[89] The moving parties' allegations regarding similarities between the Thelma project and the St. Clair project are set out in their factum and can be summarized as follows:

1. Both projects have been met with opposition instigated by ratepayer organizations that claim to be acting in the interest of the local community (a community in which I live) challenging the authority and legality of the City to authorize a development of public work.
2. Both projects have been met with accusations that the City has acted improperly by failing to properly consider and address the concerns of local residents.
3. Both projects raise issues regarding the City's application of basic planning principles, the conformity of the project in question with the provisions of the City's official plan and zoning issues in the St. Clair Avenue West area.
4. Both projects have been met with allegations from a ratepayer organization that the project will harm businesses in the neighbourhood by reducing the available merchant parking.
5. Both projects concern the effort of the TPA to make available replacement parking for spaces that would be lost if the project were to proceed.

[90] I have already addressed the allegation that Friends qualifies as a ratepayers' organization. It never was a ratepayers' organization. The other alleged similarities, if they are similarities, have no significance in my view and cannot reasonably support the allegation of reasonable apprehension of bias. There was absolutely nothing about the Thelma project which had the slightest relevance to any issue raised before this panel in the judicial review application.

[91] The single most significant issue which I and Friends raised in relation to the Thelma project was whether or not the joint venture agreement had been authorized by City Council. The other issues such as traffic, parking and the size of the development applied only to the unique features of our street and the intersection of Thelma and Spadina. I never thought even once that there might be any connections or similarities between these issues and the issues that arose on the judicial review application relating to the St. Clair project.

[92] The only significant issues raised by the applicant in relation to the St. Clair project were whether the City's decision to proceed was contrary to the Planning Act or the Environmental Protection Act. Nothing that had occurred in relation to the Thelma project was of relevance to any of these issues and I could not see any way that the two projects were related. The panel, in paragraph 7 of our endorsement, attempted to make it clear that "our function has been solely to determine this application in accordance with the law and that it is not our function to impose any policy views on issues which properly fall to be decided by others". In other words, our decision was not affected in any way by any personal views we might have as to whether or not it should proceed. We were concerned only with whether the law allowed it to proceed.

My impugned actions and comments regarding the Thelma project have nothing to do with the St. Clair project

[93] My actions and comments regarding the Thelma project could conceivably be relevant to the issue raised by this motion in two ways. First, if what I did or said shows that I have some views that are in some way adverse to the positions of the moving parties in the St. Clair project application and would interfere with my impartiality, they could reasonably be raised in support of this motion for my disqualification. As well, if I were shown to be so angry with the moving parties that I would be likely to either retaliate against them or to otherwise treat them unfairly, that too could reasonably be raised.

[94] I am certain that I hold no such views with respect to the St. Clair project. On a personal level, I am neither in favour of it or opposed to it. It is solely within the power of City Council to decide whether or not it would be a good thing.

[95] Nor do I have any residual feelings about the City, or anyone associated with it, resulting from the Thelma project that might interfere with my ability to judge the application fairly.

[96] Yet, until this motion was brought, no one associated with the City ever said anything to me about the propriety of what I was doing, either as a private citizen or as a judge. Only in this motion did it become an issue.

Judicial Ethics

[97] Mr. Cherniak devoted a substantial amount of time in argument suggesting that my advocacy in opposition to the Thelma project was in violation of judicial ethics. To support his argument, he referred to a set of guidelines for judicial conduct issued by the Canadian Judicial Council which have no binding effect on judges. Many of the guidelines he referred to counsel judges against getting involved in political activity.

[98] This is not the forum in which I should address my adherence to judicial ethics in detail. I say only that I attempted to conduct myself at all times in accordance with the highest standards of the judiciary and I believe that I succeeded. What is relevant on this motion is what I may have done to create a reasonable apprehension of bias and I have tried to confine my discussion accordingly. If the moving parties wish to challenge my judicial ethical behaviour, there is a process by which that can be done in the proper place.

The moving parties' allegations...much of which is untrue or distorted

[99] The moving parties' allegations are set out in paragraphs 4 to 19, inclusive, of their factum. They are based on actions taken and comments made by me in relation to my opposition to a retail-condominium development that was to be built on my street just a few doors away from where I live on Thelma Avenue. The allegations include the following, summarized directly from the moving parties' factum:

1. I live in the secondary study area for the Environmental Study Report for the project ("the St. Clair project") that was the subject of the application for judicial review ("the application").
2. From 2002 to 2004 I served as president of a ratepayers' association, Friends of the Village ("Friends"), that was opposed to a condominium development at the corner of Spadina Road and Thelma Avenue in Forest Hill Village ("the Thelma project").
3. As president of Friends, I engaged in political lobbying, I was critical of the City and City staff in communications, I was involved as party, counsel and the source of evidence in tribunal and legal proceedings in which the City was a party and I was interviewed by news publications in which I was quoted as being critical of the City's handling of a development in the same neighbourhood as the St. Clair project.
4. Friends challenged the authority by which City staff had authorized the execution of an agreement with a developer. As president of Friends, I appeared in person before the Administration Committee of the City on May 28, 2002, and before the Midtown Community Council on July 8, 2003, to oppose the Thelma project. I also lobbied a local councillor.
5. As part of the campaign to stop the Thelma project, I wrote to the Auditor-General for the City in September, 2003. In my letter, I was very critical of the opinion of a City lawyer, who remains on City staff, who handled the real estate transaction. In that letter I stated;

While I acknowledge my bias, I cannot resist saying that, in my view, her express views are blatantly wrong and ridiculous and that if her report had

been written as part of a first year law school examination, she would undoubtedly receive a failing mark.

6. In response to the issues raised by Friends, the City named David Boghosian as an independent external counsel in order to review the legality of the authority with which the agreement with the developer was executed. I also communicated and met with Mr. Boghosian. In one email exchange with him, I stated that the “devious acts...have taken place” and indicated to Mr. Boghosian that, with sound advice, the City could still avoid a legal confrontation and adverse media publicity.
7. I also wrote to Mayor Miller in November, 2003, using the letterhead of “Justice Ted Matlow”. In that letter, I specifically raised the negative effect of merchant parking should the Thelma development proceed, an issue raised in the application. I emphasized to Mayor Miller that ratepayers ought not to have to organize themselves and take such actions in this type of situation. I sought Mayor Miller’s intervention to “reverse a violation of law” and “restore the rule of law and principles of transparency to the governance of the City”.
8. In relation to the same matter, I sought and was made a party to an appeal to the Ontario Municipal Board (“OMB”) brought by the developer. I subsequently appeared as counsel to Friends.
9. The legal action which I threatened in my communication with independent counsel came to fruition in December, 2003, when certain area residents brought an application to the Superior Court naming the City as a respondent. In that case, the applicants sought the Court’s determination of the legality of the authorization for the agreement. Although I was not a party to that application, the materials filed in support of the application were based, in part, on information from me.
10. City Council ratified the agreement with the developer on January 28, 2004. Although Friends did not pursue the OMB appeal or the residents’ application thereafter, it did not resile from its position that the City had acted improperly, a position taken while I remained the president of Friends.
11. It appears that I was interviewed on several occasions during the period 2002 to 2004 regarding the Thelma project. In a number of instances, I was critical of the City. At the same time, I recognized, but appeared to be dismissive of, a concern that I, a judge, would make such comments. In particular, the Town Crier Online reported on July 26, 2002, as follows;

“I am conscious of the limits that (being a judge) put on me with respect to speaking out publicly on issues like this. But I am also a citizen of this country, I am a ratepayer, I am a

taxpayer and a homeowner. And I have the same rights to protect my property and my way of life just as any citizen does," he says.

"I don't want to be a politician. It's not my purpose. And I have felt uncomfortable doing it."

He's also certain that city officials will likely accuse him of using his clout as a judge in the debate, even though Matlow is certain he's acting well within the guidelines judges must follow when it comes to steering clear of partisan politics.

"They will comment, but I can take the heat. I won't back off," Matlow said.

"I don't think a hassle between me and the parking authority is going to interfere with my ability to serve as a judge."

12. In that same article, I am said to have commented that the Thelma development is "bad planning".
13. Yet another newspaper report attributes to me a comparison between the Thelma development and the MFP computer leasing scandal. I am quoted as saying "I think they (the City) didn't want another scandal, so they wanted to hush the whole thing up and sweep it under the carpet".
14. The comments attributed to me in various newspaper publications clearly establish that I had taken an adversarial stance with the City. In particular, in one article, I am quoted as saying "You can fight City Hall and win".
15. I was again interviewed, this time by the National Post, following the City's approval of the agreement with the developer. The article suggests that I questioned the integrity of the City in its handling of the Thelma project and I am quoted as saying that "They (the City) want to whitewash everything".
16. Although they are concluded before the OMB and the Superior Court, it appears that the issues in the Thelma project have remained fresh and current for me. On October 20, 2005, a day after notice of this motion was served and filed, an article written by John Barber appeared in the Globe and Mail that gives rise to the perception that I have not resiled from my position that the City had acted improperly with respect to the Thelma project. In particular, Mr. Barber wrote that, two days before the hearing of the application, I contacted him and complained that the City's conduct with respect to the Thelma project was, in the words of Mr. Barber, "somewhat crooked".

According to Mr. Barber, while presiding over the application, I was also delivering documents concerning the Thelma project to him.

Some alleged facts that should be corrected

[100] Friends was never a ratepayers' association or any other kind of association.

[101] I never acted as "counsel" to the Friends before the OMB. The order of the OMB dated January 15, 2004, (See moving parties' motion record, page 175) specifically granted "party status" to only me. Friends did not seek or receive party status. The order provided that

the *participants* (emphasis added) shall include Friends of the Village and the North Hill District Homeowners' Association as well as the individuals listed on Schedule "A". Other participants may come forward at the commencement of the hearing.

As I understand it, participants are entitled to receive notices of hearings at the OMB but they do not have the right to examine or cross-examine witnesses.

[102] The letter dated November 13, 2002, that I sent to Mayor Miller was not written on my official judicial letterhead. It was written on blank white paper which I use for personal memos and letters on a form that I have created on my computer. The form shows my name, "Justice Ted Matlow" inserted at the top of the first page and my home address and telephone number inserted at the bottom of the last page.

The conclusion of the reasonable persons

[103] In arriving at my decision, I have had to ask myself what reasonable persons who knew all the relevant facts would say if they were asked about the allegations of reasonable apprehension of bias made against me by the moving parties.

[104] As part of the process, I have had to be mindful of the statements of the Supreme Court of Canada set out in *Wewaykum* referred to above in paragraph 29 that any inquiry about reasonable apprehension of bias must "be thorough without any shortcuts...", that it "remains highly fact-specific" and that the facts "must be addressed carefully in light of the entire context". The notional reasonable persons engaged in this case have done that and have ignored those matters that are unfounded and those which have no probative value. They have shown much interest in ascertaining the true facts.

[105] I am satisfied that, on all of the facts disclosed, the reasonable persons would say that the moving parties have no reason to fear coming before me and that they can continue to feel

confident that I would always judge cases in which they are involved fairly, just as I did when I participated in the judgment in this case that was released on October 11, 2005. Accordingly, they would agree that the moving parties have failed to establish any reasonable apprehension of bias on my part.

My respectful criticism of the decisions of the other panel members

[106] I am dismayed by the decisions made by the other members of the panel “to stand down on the grounds that we (they) believe that the matter is proceeding in breach of the principles of natural justice” and by their conclusion “that the panel must be struck and a new panel constituted to hear the application *de novo*”. In my respectful view, there is no principled reason which justifies the taking of such extreme and unprecedented steps in the circumstances of this case.

[107] Even had I come to the conclusion that my actions and comments had created a reasonable apprehension of bias, my colleagues, in my respectful view, should still have continued serving on the panel and decided that the judgment that we released on October 11, 2005, should still be maintained. This is what I alluded to in paragraph 6 where I described that the role of my colleagues was:

to decide whether or not our judgment should be set aside and the application for judicial review reheard by a different panel or whether our judgment should still be maintained.

[108] This approach adopts the statement of the Supreme Court of Canada in *Wewaykum* at paragraph 93 which reads, in part, as follows;

In the circumstances of the present case, even if it were found that the involvement of a single judge gave rise to a reasonable apprehension of bias, no reasonable person informed of the decision-making process of the Court, and viewing it realistically, could conclude that it was likely that the eight other judges were biased, or somehow tainted, by the apprehended bias affecting the ninth judge.

[109] The following facts, which do not refer to my conduct in any way, are accepted by both me and my colleagues:

1. The applicant, SOS SAVE OUR ST. C LAIR INC., is not alleged to have been involved in any improper conduct.
2. No allegation of actual bias or reasonable apprehension of bias is made against the other members of the panel.

3. All three members of the panel were unanimous in the judgment that was released on October 11, 2005, in favour of the applicant.
4. Each member supported the unanimous judgment independently.
5. I did not try to influence the decisions made by my colleagues. Nor were their decisions tainted in any way by my involvement.

[110] Accordingly, there is no principled reason why my colleagues, who constitute the majority, could not still maintain the applicant's judgment by following the reasoning of the Supreme Court of Canada in *Wewaykum*. The fact that I have concluded that no reasonable apprehension of bias on my part has been established should, as a matter of logic, make no difference whatsoever.

[111] By removing themselves from this case and declaring "that the decisions made by the two of us as null and void", my colleagues have effectively deprived the applicant of the favourable judgment that it obtained and put it to the effort, cost and risk of a new hearing of its application. These are consequences which, in my respectful view, ought to have been avoided.

[112] In the article entitled *The Disqualification of Judges and Judgments* by Paul Perell (now Justice Paul Perell) in (2004) volume 29 of *The Advocates' Quarterly* at page 107, the author states the following:

The standard for disqualification is also high because it is not in the public interest to have judges easily disqualified and judgments nullified with the attendant uncertainty about the finality of decisions and disruption in the administration of justice, not only for the other parties to the impugned proceeding, who waste time and money, but also for other litigants who are delayed access to justice by the wasted use of scarce judicial resources. A low standard would encourage tactical motions by litigants seeking another judge whenever they anticipate or suffer an unfavourable outcome. A low standard could conflate an unfavourable outcome with favouritism and unjustifiably impugn the integrity of judges and judgments.

[113] To uphold a majority judgment given in favour of a blameless party, in the circumstances of this case, can hardly be seen to be in conflict with any principle of natural justice. Nor, when there is a reasonable and just alternative, it is impossible to see how my colleagues' decisions, which will result in draconian consequences for a blameless party, will advance any worthy principle of any kind.

[114] Nor do their decisions address my determination that the moving parties, by their conduct, failed to satisfy their legal duty to raise any issue of reasonable apprehension of bias at the first practicable opportunity and thereby waived the right to do so.

[115] Quite apart from the above, there are other reasons why I respectfully disagree with my colleagues' decisions. Although my colleagues appear to acknowledge that it is my exclusive right to decide whether a reasonable apprehension of bias has been established and that it is not for them to say that I ought to have recused myself, their decisions conflict directly with mine on these very issues. Such intrusions do not contribute to the proper resolution of issues such as these.

[116] Once I made my decisions, it is my respectful view that it was incumbent on my colleagues to accept them. They had no right to take an opposite view because they had no jurisdiction to do so. They had no superior or appellate function to perform.

[117] The approach taken by my colleagues, following "the only practical solution" described by Geoffrey Lester in his paper referred to in their reasons, has not been shown to ever have been adopted by any judge, presumably for good reason. It may well be a practical solution, as the author claims, but it is one which should be taken, if ever, only in extreme cases. This case is surely not one of them.

[118] If other judges were to follow this example whenever they disagreed with a colleague's decision which was for him alone to make, the resulting chaos would cause serious harm to the working and the reputation of the entire judicial system.

MATLOW J.

Released: November 3, 2005

COURT FILE NO.: 329/05
DATE: 20051103

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N:

SOS-SAVE OUR ST. CLAIR INC.

Applicant, Respondent to Motion

- and -

CITY OF TORONTO and TORONTO TRANSIT
COMMISSION

Respondents, Moving Parties

REASONS FOR DECISION

JUSTICE MATLOW

Released: November 3, 2005