

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

REASONS FOR DECISION ON PRELIMINARY MOTIONS

THE REGIONAL MUNICIPALITY OF NIAGARA POLICE SERVICES BOARD

Applicant

THE REGIONAL MUNICIPALITY OF NIAGARA

Respondent

Presiding Members:

Murray W. Chitra, Chair
Roy B. Conacher, Member

Appearances:

Brian Gover and Patricia Latimer, Counsel for the Regional Municipality of Niagara
Woodward B. McKaig, Counsel for the Regional Municipality of Niagara Police Services Board

Hearing Date: July 31, 2009

This is a decision on two preliminary motions. The first was brought by the Regional Municipality of Niagara (the "Municipality") and the second by the Regional Municipality of Niagara Police Services Board ("the Board").

The Municipality seeks a declaration that the Ontario Civilian Commission on Police Services (the "Commission") has no jurisdiction to hear the Board's application under section 39 of the Police Services Act R.S.O. 1990, c. P. 15 as amended (the "Act") concerning its 2006, 2007, 2008 and 2009 capital budgets and 2009 operating budget.

The Board seeks a declaration that the Municipality exceeded its jurisdiction by imposing certain conditions on capital budgets approved for 2007 and 2008.

Background:

The facts giving rise to these motions are straightforward.

On January 28, 2009 the Board filed an application with the Commission requesting a hearing under section 39 of the Act. It reads:

- 39(1) The board shall submit operating and capital estimates to the municipal council that will show, separately, the amounts that will be required,
 - (a) to maintain the police force and provide it with equipment and facilities; and
 - (b) to pay the expenses of the board's operation other than the remuneration of board members.
- (2) The format of the estimates, the period that they cover and the timetable for their submission shall be as determined by the council.
- (3) Upon reviewing the estimates, the council shall establish an overall budget for the board for the purposes described in clauses 1(a) and (b) and, in doing so, the council is not bound to adopt the estimates submitted by the board.
- (4) In establishing an overall budget for the board, the council does not have the authority to approve or disapprove specific items in the estimates.
- (5) If the board is not satisfied that the budget established for it by the council is sufficient to maintain an adequate number of police officers or other employees of the police force or to provide the police force with adequate equipment or facilities, the board may request that the Commission determine the question and the Commission, shall, after a hearing, do so.

At issue was the Board's capital budget for the Niagara Regional Police Service (the "Service"). The Board took the position that the capital budget established for it by Council was not sufficient to provide the Service with adequate facilities.

The Board asserts that it has raised concerns with the Municipality about inadequate facilities for several years. As a result, the Municipality approved the capital budgets of:

- \$25,350,000 in 2006,
- \$22,445,000 in 2007; and
- \$34,084,000 in 2008.

However, none of these funds have ever been advanced. Additionally, the Board's capital budget request for \$14,396,000 in 2009 was not approved.

Further, the approved capital budgets for 2007 and 2008 were subject to three conditions imposed by the Municipality. These were:

1. Completion of the Niagara Regional Police Board's Long Term Accommodations Plan;
2. Regional Council's receipt and approval of this Plan; and
3. Regional Council's approval of the spending ... on a facility by facility basis.

No conditions were imposed on the approved 2006 capital budget.

The Board approved a Long Term Accommodations Plan on February 11, 2008. A copy was forwarded to the Municipality the next day. It was subsequently referred to a Committee of Council where, for reasons beyond the scope of this decision, it appears to remain.

On March 31, 2009 the Board requested that the Commission also convene a hearing under section 39 of the Act to deal with the Service's 2009 operating budget.

During a pre-hearing conference held on April 23 and May 1, 2009 a number of agreements were made. These included:

- Both the operating and capital disputes would be dealt with in a single hearing;
- In respect of the capital budget, the Board was requesting \$29,000,000 in 2009 to address inadequacies in certain Service facilities and undertake Phase 1 of its Long Term Accommodations Plan; and
- The amount in dispute for the 2009 operating budget was approximately \$1,500,000.

As well, it was agreed that several outstanding issues would be dealt with by way of preliminary motion. This includes the matters that are the subject of this decision.

Municipality's Motion:

Mr. Gover appeared on behalf of the Municipality. He argued that the Commission has no jurisdiction to hear the Board's applications.

First, Mr. Gover asserted that the Board failed to submit its proposed operating and capital budget estimates in accordance with the timetable and in the format established by Municipal Council as required by section 39(2) of the Act.

Mr. Gover noted that the deadline for submission of proposed 2009 budgets was September 30, 2008. The Board's capital budget submission was submitted to the Municipality on January 5, 2009.

Mr. Gover pointed out that the Board had a history of failing to submit budget submissions on time. The deadline for the 2007 capital budget submission was September 30, 2006. It was submitted on January 26, 2007. The deadline for the

2008 capital budget submission was November 15, 2007. It was submitted on February 4, 2008.

Mr. Gover asserted that the approval of 'late' budgets by Municipal Council in the past cannot give rise to an ongoing "waiver" of a statutory requirement.

On the matter of format, Mr. Gover argued that the Board:

- does not adhere to the Municipality's process for setting and achieving "budget targets";
- only provides "very high level budget information" which "thwarts" Council's ability to review extraordinary high budget increases; and
- engages in "questionable budget practices" relating to staffing and funding of new positions.

Given the Board's failure to comply with these requirements, he asserted that the Board had failed to meet essential statutory preconditions for seeking relief from the Commission under section 39.

Mr. Gover also argued that two other essential statutory preconditions are not met. He asserted that before a budget hearing can be held, there must be:

- (a) A failure on the part of municipal council to approve the police services board's budget estimates; and
- (b) An assertion on the part of the police service board that the approved budget is insufficient to maintain an adequate complement of police officers and other employees, equipment or facilities.

Mr. Gover noted that the Municipality had approved the capital budget estimates submitted by the Board in 2006, 2007 and 2008. He pointed out that the Board has never asserted that the approved amounts were insufficient.

Mr. Gover argued that the Board's real complaint is that there has been a delay in initiating the approved funds. He asserted that under section 39 the Commission has no legislative authority to "order" the initiation of the funds in question.

In support of these arguments, Mr. Gover drew to our attention a number of cases on statutory interpretation. These include Rizzo & Rizzo Shoes Ltd. [1998] 1 S.C.R. 27 (S.C.C.), Bell ExpressVu Limited Partnership v. Rex [2002] 2 S.C.R. 559 (S.C.C.) and Bristol-Myers Squibb Co. v. Canada (Attorney General) [2005] 1 S.C.R. 553 (S.C.C.). He cited Dunsmuir v. New Brunswick [2008] 1 S.C.R. 190 (S.C.C.) for the proposition that a tribunal may only exercise authority conferred by statute.

As well, he noted four previous Commission decisions: Town of Hawkesbury (15 February, 1996, O.C.C.P.S.), Town of Picton (14 October, 1981, O.P.C.), City of

Ottawa (15 November, 1994, O.C.C.P.S.) and Town of Innisfil (30 September, 1977, O.P.C.).

In conclusion, Mr. Gover asked that we declare that we have no jurisdiction to proceed with the applications brought by the Board under section 39 of the Act.

Mr. McKaig responded to these arguments on behalf of the Board.

On the matter of timetable and format he noted that historically the Municipality's budget process has been flexible. Mr. McKaig described it as a "moving target". He stated that the Board, for the most part, complies with timelines, but when it cannot do so "any late presentation is done with the full knowledge and consent of regional staff". On the latter point Mr. McKaig observed that the Vice Chair of the Board is also the Chair of the Municipality's Budget Review Committee.

Mr. McKaig noted that there can be many reasons for delay. In the past this has included Municipal staff being unable to make available necessary information in a timely manner. The Municipality provides most of the financial systems for the Service. This includes general ledger, payroll, purchasing, accounts payable and budgeting.

Mr. McKaig acknowledged that the Board and Municipality each have a different budgeting philosophy. The Municipality prepares its budget by working from the prior year's budget, without considering surpluses. The Board works from "actuals" to produce the next year's budget. Notwithstanding this difference, Mr. McKaig asserted that the Board's budgets are always prepared and presented in a manner respectful of the Municipality's requirements and proper role.

In any event, Mr. McKaig argued that the requirements of section 39(2) are administrative and a failure to meet a deadline is neither fatal to the presentation of those estimates, nor a bar to relief under the Act. Town of Innisfil, supra

On the question of the other preconditions, Mr. McKaig made two points. First, while the Municipality says that it approved the proposed capital budget items in 2006, 2007 and 2008 – no money has ever been provided.

Second, the Municipality has refused to deal with the Board's Long Term Accommodations Plan in a timely manner. Mr. McKaig asserted that the delay by the Municipality in either approving or disapproving the Plan or to initiate funding for 16 months, is tantamount to a refusal to approve the Board's estimates. Simcoe Muskoka Catholic District School Board v. Collingwood (Town) (2007) CanLII 44182 (Ont. S.C.), Brykan Ferndale Holdings Ltd. v. Director, Simcoe County District Health Unit [1993] O.A.E.B. No. 24 and Canadian Union of Public Employees, Local 1289 v. Civic Centre Corp. [2006] N.J. No. 299 (Nwfld. S.C.)

Mr. McKaig argued that a municipality that fails to make a decision or to allocate approved capital funding should not be permitted to avoid the application of section 39 of the Act.

For the above noted reasons, he requested that the Municipality's motion be denied.

Board's Motion:

Mr. McKaig, on behalf of the Board, requested that we declare that the conditions imposed on the approved 2007 and 2008 capital budgets by the Municipality exceeded its authority under the Act.

Mr. McKaig reviewed the various sections in the Act governing the role of boards and municipalities.

He noted that it is the exclusive role of the Board to provide adequate and effective policing. To this end, the Board is required to determine what resources are required to meet the policing needs of a community and submit an annual budget to Council. Council may review the overall budget, but under section 39(4) of the Act "does not have the authority to approve or disapprove specific items in the estimates."

Given the above, Mr. McKaig argued that a municipality cannot impose conditions on budgetary approval that would have the effect of putting Council in the place of the Board or give it veto power over specific estimate items (i.e. approval on a facility by facility basis).

Mr. McKaig asserted that the conditions imposed by the Municipality cannot stand and that the section 39 hearing should proceed focusing solely on the issue of whether or not the proposed facilities are needed to meet the threshold of adequate and effective policing in Niagara.

In response, Mr. Gover on behalf of the Municipality, argued that there is nothing in the Act which would prohibit Council from imposing conditions on capital budget approvals. Further, the imposition of such conditions was consistent with the Municipality's normal practices in order to establish financing requirements and to control municipal debt levels. He submitted that the Board has consistently submitted budgets beyond the target limits established by Council.

He asserted that the Municipality has a responsibility to ensure proper oversight on the expenditure of taxpayer's monies. This is particularly, the case where the sums in question are approaching \$100 million dollars.

Mr. Gover argued that the Municipality must ensure that all elements of the Board's proposal represent a necessary and prudent expenditure of taxpayer's money and that all other reasonable options have been explored.

He pointed out that the Board had accepted the conditions imposed in 2007 and 2008. Further, the Board had decided to forego cooperative efforts to move forward with the Accommodations Plan and, as such, its application before the Commission is “disingenuous”.

For the above noted reasons, Mr. Gover asked that the Board’s motion be dismissed.

Decision:

Policing in Ontario is governed by the Act. It establishes a detailed scheme with the primary objective of ensuring that all citizens in Ontario receive this essential service, being adequate and effective policing.

To this end, the Act assigns to various parties specific responsibilities. Municipalities are required to provide adequate and effective policing. They are given a number of different ways of meeting this objective. (section 5)

If a municipality elects for a local service then it must fund “all of the infrastructure and administration necessary for providing such services, including vehicles, boats, equipment, communication devices, buildings and supplies”. (section 4)

Where there is a municipal police service, the Act mandates that there must be a board. The board is an independent statutory entity composed of provincial and municipal representatives. It must establish local policing priorities and policies and ensure that adequate and effective policing services are delivered.

To this end, boards are required to create an annual budget for submission to municipal council. Municipal council is not obliged to approve a board’s budget. In the event that it does not do so, a board may bring an application before the Commission for a hearing under section 39.

At the heart of any budget hearing is one issue: is the budget established by municipal council “sufficient to maintain an adequate number of police officers or other employees of the police force or to provide the police force with adequate equipment or facilities”?

This is the critical question bearing directly on public safety.

On behalf of the Municipality, Mr. Gover asserted that the Board may not bring an application under section 39 because it failed to meet certain timing and formatting requirements.

We do not agree.

First, the evidence before us clearly establishes that historically, the timelines and annual budgeting practices of the Municipality have been flexible. Over the course of several years the Board has submitted budgets outside of prescribed timelines, typically by two to three months. It is evident that in some cases, municipal staff were aware of the delay and consented to it. It is also evident that municipal staff provided assistance to the Service in financial systems including the budgeting process.

This has never prevented the budgets in question from being approved. To allow delay, which never appears to have been an issue in the past, to be a bar to a statutory remedy would be unfair.

Further, even if this were not the case, we do not believe that compliance with section 39(2) is a precondition to seeking relief before the Commission. It reads:

39(2) The format of the estimates, the period that they cover and the timelines for their submission shall be as determined by the council.

The predecessor section was found at section 14(2). It read:

14(2) Every board shall, on or before the 1st day of March in each year, prepare and submit to the council or each council responsible for maintaining the force, for its consideration and approval its estimates of all moneys required for the year to pay the remuneration of the members of the police force and to provide and pay for the accommodation, arms equipment and other things for the use and maintenance of the force.

In Town of Innisfil, supra the Commission dealt with the impact of the failure to comply with the timing prescribed by section 14(2). At page 14 of that decision the Panel held:

There was one other question dealt with orally at the hearing. This related to the fact that Section 14 of The Police Act provides that the estimates of the Board shall be submitted to Council on or before March 1, 1977. The Board did not observe this deadline, and, in fact, submitted the estimates on March 18, 1977, at the earliest. The Commission ruled that the direction in The Police Act is administrative and that the failure to meet the deadline is not fatal to the presentation of the estimates.

While we acknowledge that the provisions are somewhat different, we believe that the same principle applies here. Specifically, the failure to meet filing deadlines is administrative in nature and not fatal to the estimates in question or any statutory remedy.

To hold otherwise would mean that matters potentially relating directly to public safety would be secondary to filing and formatting requirements. This cannot be the case.

The other argument presented by the Municipality focused on the fact that capital budgets were actually approved in 2006, 2007 and 2008. As such it is suggested by Mr. Gover that there is no dispute that can attract the application of section 39.

Again, we do not agree.

No matter how you describe it, despite the passage of several years, these approved funds have not been paid out or even “reserved”. It is suggested that disbursement is pending a Municipal review of the Service’s Long Term Accommodations Plan. On this point we would note that the Municipality has had the Plan now for almost 18 months.

Delay was also an issue in Town of Innisfil, supra. On that point the Panel stated at page 9:

This Commission finds further that the long delay on the part of the Municipal Council is sufficient evidence that the Council did not agree with the Board’s estimates. The converse would mean that the Municipal Council by taking no action at all could prevent the Board from seeking a ruling under this section.

The delays in this case, either to disburse the funds or conclusively deal with the Plan certainly seem to fall under this principle.

Even if this were not the case, it is evident on the facts before us, that there has been a clear refusal to approve the Board’s 2009 capital budget estimates. The Affidavit of Mr. Gord Lockyer, Treasurer/Director, Financial Management and Planning, Corporate Services Department of the Municipality dated June 15, 2009 states at pages 6 and 8:

17. As indicated in the “Police 10 Year Capital Budget Summary” (Exhibit “C”), in 2009 the PSB [Police Service Board] requested \$17.65. However, Regional Council only approved \$3.26 million in non-facilities related capital funding.
18. In summary, the PSB’s estimate of facilities spending grew to be so extraordinary that the proposed annual amounts were approved only conditionally for 2007 and 2008 and were not approved – even conditionally – in 2009 ...
- 27 As previously mentioned earlier, Regional Council did not approve the facilities related portion of the PSB’s 2009 capital budget request even on a conditional basis.

We find that this failure to approve the requested expenditures as well as the Municipality's refusal to approve the 2009 operating budget is sufficient to engage section 39.

For the above noted reasons, the Municipality's motion is dismissed.

That brings us to the Board's request that we declare the conditions imposed by the Municipality on the 2007 and 2008 capital budgets to be beyond its jurisdiction.

As noted earlier, the Act establishes a detailed scheme for policing. This sets out the roles of the various parties. For that scheme to work these roles must be respected.

It seems self evident that a municipality cannot usurp a board's legislated role on matters of adequacy, or a board prevent a council from asking important questions in its role as guardian of the public purse.

That being said, the relevance of the Board's motion with respect to conditions imposed on previous budgets (and not objected to at that time) is not evident to us.

The essential question for the hearing we are about to undertake, is the adequacy of the Service in 2009. Matters relating to prior budgets may be helpful in establishing context. However, by way of example, if the Service's facilities are currently inadequate then conditions imposed by Council in 2007 and 2008 to the expenditure of capital monies are irrelevant. The same would apply if, after a hearing, it was found that the facilities in question are adequate.

For the above noted reasons, we are not prepared to grant the discretionary relief sought by Mr. McKaig. This is, of course, subject to his client's right during the hearing to adduce evidence that might convince us otherwise.

DATED AT TORONTO THIS 15th DAY OF SEPTEMBER, 2009.

Murray Chitra
Chair, OCCPS

Roy Conacher
Commission Member