

**ONTARIO CIVILIAN COMMISSION ON POLICE
SERVICES**

REASONS FOR DECISION ON PRELIMINARY MOTION

THE REGIONAL MUNICIPALITY OF NIAGARA POLICE
SERVICES BOARD

Applicant (Respondent on Motion)

THE REGIONAL MUNICIPALITY OF NIAGARA

Respondent (Moving Party on Motion)

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: June 29, 2009

This is a preliminary motion brought by the Regional Municipality of Niagara (the "Municipality") for a declaration that Murray W. Chitra, Chair of the Ontario Civilian Commission on Police Services (the "Commission") "is

disqualified from presiding at the remaining motions and at the hearing of [this] proceedings.”

Background:

The facts giving rise to this motion are fairly straightforward.

On January 28, 2009 the Regional Municipality of Niagara Police Services Board (the “Board”) filed an application with the Commission requesting a budget hearing under section 39 of the Police Services Act R.S.O. 1990, c. P. 15 as amended (the “Act”). At issue was the capital budget for the Niagara Regional Police Service (the “Service”).

On February 11, 2009 Mr. McKaig, counsel for the Board, wrote Mr. Tom Bell, Commission counsel. In that correspondence, Mr. McKaig stated:

I have copied Michael Kyne, the Regional solicitor, with this letter. I think that there would be significant benefit in arranging a pre-hearing meeting, or alternatively a conference call, to discuss issues, the exchange of documents and set a tentative or firm hearing dates ...

As explained in my prior correspondence, the facilities needs of the [Service] are urgent and critical. They have been outstanding for several years. On behalf of Chief Southall and the [Board], I hereby request that a pre-hearing conference be convened as soon as practical so that these budget issues can move toward resolution at a Section 39 hearing.

On February 13, 2009 Mr. Bell responded to Mr. McKaig with a copy to Mr. Kyne. Mr. Bell wrote:

The Commission shares your view that a Pre-Hearing Conference would be of assistance in this matter. The

Conference will take place at the Commission's office and will be attended by counsel for the parties. Preliminary matters to be discussed at the Conference include identifying and if possible narrowing the areas in dispute, identifying the types of information to be presented at the hearing, agreeing on a timetable for the parties to complete disclosure and any preliminary motions (for example, motions for leave to intervene), the anticipated length of the hearing, when the hearing might commence, etc ...

On February 27, 2009, Mr. Kyne wrote to Ms. Camacho, Registrar of the Commission, as follows:

In preparing for the pre-hearing conference, by courtesy copy, I would ask Mr. McKaig to summarize what he believes are "the primary principle issues" and provide a rough outline of the evidence and witnesses on which he intends to rely. That information would, I think, bring some focus to our pre-hearing discussions.

On March 9, 2009 Mr. Bell sent an e-mail to Mr. Kyne with a copy to Mr. McKaig. In that e-mail Mr. Bell wrote:

The Commission has asked me to contact you and Mr. McKaig regarding the Pre-Hearing Conference in this matter on April 23, 2009...

The Commission requests that in preparation for the Pre-Hearing Conference both parties exchange and file with the Commission brief summaries (bullet form will suffice) addressing the following issues along with any others deemed material by counsel:

What items or issues are in dispute in this hearing?

What witnesses does each party intend to call?

By what date will the parties complete disclosure of the documents they intend to rely on at the hearing, and the anticipated substance of their witnesses' testimony?

Do the parties intend to rely on expert evidence at the hearing? If so, by what date will expert reports be exchanged?

Does either party anticipate bringing a preliminary motion? If so, what is the nature of the motion, the relief requested and when is it proposed that the motion will be heard?

What is the preferred location of the hearing, and the expected duration?

The Commission requests that counsel exchange and file their summaries at least five business days prior to the Pre-Hearing Conference.

The following date Mr. Kyne wrote Mr. Bell, (with a copy to Mr. McKaig) seeking clarification. In part, Mr. Kyne wrote:

... as you know, it is the Police Services Board that has made the decision to litigate this matter. While Niagara Region will abide by OCCOPS' March 9 procedural directive, in our respectful submission, the onus is on Mr. McKaig to make his case. In this regard, I would expect that Mr. McKaig would already have a fair idea of the evidence and witnesses he will be relying on. As soon as we receive and review that information, we will be better placed to advise what evidence and witnesses we will be relying on in response. That said, if we do not receive Mr. McKaig's information until the April 16 deadline, we reserve the right to seek revisions in our response to OCCOPS' March 9 procedural directive ...

On March 31, 2009 Mr. McKaig wrote the Commission requesting that it also convene a hearing under section 39 of the Act to deal with the Service's 2009 operating budget.

Mr. Bell responded to Mr. McKaig on April 6, 2009 with a copy to Mr. Kyne. Mr. Bell wrote:

The Commission is prepared to consider the Board's request pursuant to section 39 regarding the 2009 Operating Budget during the Pre-Hearing Conference on April 23, 2009.

Similarly to the Board's request under section 39 in connection with the Capital Budgets, and as per my email to counsel dated March 9, 2009, the Commission requests that counsel address any procedural issues related to a hearing under section 39 in respect of the 2009 Operating Budget in a brief writing to be exchanged and filed at least five business days prior to the April 23rd Pre-Hearing Conference.

The requested summaries were prepared, exchanged and filed.

The pre-hearing conference took place on April 23, 2009. It was presided over by Mr. Chitra. Mr. Gover and Ms. Latimer appeared on behalf of the Municipality along with Mr. Kyne. Mr. McKaig appeared for the Board. Mr. Bell and Ms. Camacho were also in attendance.

Unfortunately, it was not possible to deal with all of the issues identified. It was agreed that the pre-hearing conference would continue on May 1, 2009 and that further information would be provided. In particular, the Board was asked to clarify how much money it was seeking from the Municipality in 2009 for capital improvements. The Municipality was asked to articulate its position on the "adequacy" of current facilities. As well, the Municipality was

asked to indicate whether or not it proposed to raise "affordability" as an issue at the hearing.

The pre-hearing conference reconvened as scheduled. Following the conclusion of the pre-hearing conference Mr. Bell prepared a draft memorandum pursuant to section 16.3 of the Rule of Practice of the Commission (the "Rules").

Copies were provided to counsel for both the Board and Municipality. Following minor revisions at the request of the Municipality, concurred by the Board, the memorandum was released in early June.

A copy of that memorandum is appended to this decision. The essential elements can be described as follows:

- The parties agreed that both the operating and capital disputes would be dealt with in a single hearing
- The parties agreed that the amount in dispute for the 2009 operating budget was approximately \$1,500,000
- On the capital side, the parties agreed that given ongoing renovations to the Service's facilities in both Grimsby and Fort Erie, that capital expenditures relating to these facilities were not in dispute
- The Board is requesting relief in the amount of \$29,000,000 in 2009 to address inadequacies in other Service facilities and undertake Phase 1 of its Long Term Accommodation Plan
- The Municipality did not acknowledge that the buildings that are the subject of Phase 1 are inadequate (dependant on the results of a consultant's report on these facilities that it had commissioned which was to be received on July 1, 2009)
- The Board agreed to allow the Municipality's consultant access to the facilities in question and any necessary documents

- The Municipality committed to advise the Board by June 1, 2009 whether or not it proposed to raise the question of “affordability” at the hearing
- Both parties agreed to cooperate on disclosure
- The Commission hearing panel, along with counsel would inspect the facilities in question at an appropriate date in August, 2009
- A number of orders requested by the Municipality as part of the pre-hearing were either beyond the jurisdiction of the Commission or premature
- Preliminary motions would be heard on June 29th and 30th
- The hearing itself would take three weeks to complete and would commence on Monday, September 21st
- The Commission would arrange for an appropriate location for the hearing, and would assume both the costs of rental of a hearing room and the court reporter

Prior to the commencement of the first day set for the hearing of the preliminary motions, counsel for the Municipality raised concerns about Mr. Chitra presiding on these motions and the subsequent hearing.

As a result, it was agreed that these concerns would be addressed first, by way of preliminary motion, on June 29th.

Municipality’s Position:

Mr. Gover presented the position of the Municipality.

He commenced by advising that the Municipality does not assert that Mr. Chitra has said or done anything improper. However, Mr. Gover argued that a plain reading of section 5.3(4) of the Statutory Powers Procedure Act R.S.O. 1990, c. S. 22 (the “SPPA”) and section 19.1 of the Commission’s Rules preclude a member, who presided at a pre-hearing conference where the parties attempt to settle issues or

reach any informal resolution, from any further involvement in the case.

Mr. Gover argued that these provisions codify the common law. The only exception would be where both parties consent to the continued participation of the Commission member. In this case, the Municipality does not consent.

Mr. Gover argued that the sole issue to be determined on this motion is whether or not the pre-hearing conference held in this matter involved an "attempt to settle issues or reach any informal resolution".

He suggested that "actual" settlement is not necessary to trigger disqualification pursuant to section 19.1. Further, that the term "settlement" should not be limited to "the merits of the application for disqualification to follow." As well, he submitted that there was no justification for limiting the application of the provisions of the Commission Rules and the SPPA to disciplinary matters.

Mr. Gover submitted that a pre-hearing conference provides a forum for a candid and free exchange of views and the presiding officer is also entitled to express his opinions. He asserted that even if the parties attend without the intent to settle or attempt to settle, the Commission Rules and the SPPA still apply. He also submitted that even if the disqualification of the presiding member gives rise to problems in conducting the hearing, that is not a sufficient excuse to permit the member to continue.

He asserted that the history of this pre-hearing conference reflects an attempt to settle three key issues. These include adequacy of the Service facilities, the necessary funds to address any inadequacies and the amount of money in dispute.

Mr. Gover argued that the report of the pre-hearing conference makes it clear that Mr. Chitra “disposed” of several matters. These included determining:

- That the capital amount in dispute is 29 million dollars
- That expenditures relating to Grimsby and Fort Erie are not in dispute
- That the Commission has no jurisdiction to order the Board to withdraw a request that it had filed under the Freedom of Information and Protection of Privacy Act R.S.O. 1990, c. F. 31, to participate in a Municipal committee, or submit to mediation
- That several matters raised are premature and will be dealt with by motion or at the hearing
- The dates for both preliminary motions and the hearing
- That the Commission panel and counsel will take a view of the facilities at issue prior to the hearing
- The Commission will arrange for a location for the hearing and assume the costs of the rental of the hearing room and court reporter

Mr. Gover asserted that pursuant to section 19.1 of the Commission’s Rules, the settlement or attempted settlement of these issues precluded Mr. Chitra from presiding at the remaining motions and the section 39 hearing and requested a declaration to this effect.

Board’s Position:

Mr. McKaig, on behalf of the Board, took issue with the Municipality’s position.

He argued that sections 5.3(4) of the SPPA and 19.1 of the Commission’s Rules have no application to the facts before us. He suggested that section 19.1 (with its reference to “informal resolution”) is intended for disciplinary proceedings under Part V of the Act and not budget hearings.

In addition, Mr. McKaig asserted that the issues dealt with at the pre-hearing conference related only to the simplification and clarification of issues, the possibility of whether any facts could be agreed upon, the duration of the hearing, disclosure schedules, motions and other related procedural matters. Mr. McKaig argued that the parties' discussions during the pre-hearing conference did not involve the settlement or attempted settlement of substantive issues.

He stated that the main issues for the budget hearing are whether or not the improvements to the Service's facilities proposed by the Board are necessary to meet provincial adequacy and effectiveness standards and whether additional operating monies are necessary to maintain adequate staffing.

He noted that the pre-hearing conference clarified each party's position on the issue of the improvement to the Service's facilities and the dollar amounts in dispute. As well, the pre-hearing conference identified the dollar difference between the Board's 2009 operating budget request and the amount approved by the Municipality.

Mr. McKaig argued that there is a significant difference between attempts to simplify or clarify issues and attempts to settle them. He asserted that what occurred during the pre-hearing conference was the former. Put another way, the pre-hearing conference focused on clarifying and crystallizing issues and dealing with practical administrative and procedural concerns to facilitate the hearing. Further, he argued that the matters identified by Mr. Gover as having been "disposed" of by Mr. Chitra were largely issues agreed upon by the parties.

In support of his submissions, Mr. McKaig referred to the exchange of e-mails between the parties and the Commission prior to the pre-hearing conference and also to the subsequent memorandum which the parties approved.

More to the point, he argued that neither of the parties were asked if they might accept (or pay) less than the amounts identified as being in dispute. If that had been the case, Mr. McKaig agreed Mr. Chitra would be disqualified because of sections 5.3(4) of the SPPA and section 19.1 of the Rules. However, as no attempt at settlement took place these sections do not apply and disqualification was not required.

For these reasons, Mr. McKaig requested that this motion be dismissed.

Decision:

On January 28, 2009 the Board filed an application for a budget hearing under section 39 of the Act with the Commission. That provision states:

- 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 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 the core of any budget dispute are two questions. First, does the budget established by Municipal Council provide for adequate staffing, facilities and equipment for the Service? If not, how much money must be added to the budget established by Council to make it so?

On February 11, 2009 the Board requested that a pre-hearing conference be convened. The Commission agreed to do so and Mr. Chitra was assigned to preside.

Such pre-hearing conferences are authorized under section 16 of the Commission's Rules. It reads:

16.1 The Commission may direct parties or their representatives to attend one or more pre-hearing conferences, which may be held by conference telephone call or any other manner directed by the Commission for the purpose of settling any and all of the issues, the simplification of issues, the possibility of obtaining admissions that may facilitate the hearing, the estimated duration of the hearing and any other matter that may assist in the just and expeditious disposition of the proceedings.

16.2 The Chair may designate a Commission member or any other person to preside at a pre-hearing conference.

16.3 The Commission member or person who presides at a pre-hearing conference shall cause to be recorded, in a written memorandum, any binding orders, agreements or undertakings which are made at the pre-hearing conference.

These Rules in turn flow from the SPPA. Section 25.1 of the SPPA authorizes a tribunal to make rules. Sections 5.3(1) to (3) of the same statute provide:

5.3(1) If the tribunal's rules made under section 25.1 deal with pre-hearing conferences, the tribunal may direct the parties to participate in a pre-hearing conference to consider,

- (a) the settlement of any or all of the issues;
- (b) the simplification of the issues;
- (c) facts or evidence that may be agreed upon;
- (d) the dates by which any steps in the proceeding are to be taken or begun;
- (e) the estimated duration of the hearing; and
- (f) any other matter that may assist in the just and most expeditious disposition of the proceeding.

(1.1) The tribunal's power to direct the parties to participate in a pre-hearing conference is subject to any other Act or regulation that applies to the proceeding.

(2) The chair of the tribunal may designate a member of the tribunal or any other person to preside at the pre-hearing conference.

(3) A member who presides at a pre-hearing conference may make such orders as he or she considers necessary or advisable with respect to the conduct of the proceeding, including adding parties.

It is evident from the above that a pre-hearing conference can deal with a wide range of issues.

In the normal course, participating in a pre-hearing conference would not disqualify a member from presiding at subsequent motions or hearings arising from an application.

There is one exception. This is described at section 19 of the Commission's Rules. It states:

19.1 A presiding member who presides at a pre-hearing conference at which the parties attempt to settle the issues or reach any informal resolution shall not be a member of the Commission at the hearing of the proceeding unless all parties consent.

19.2 Informal resolution discussions at a pre-hearing conference shall be held in the absence of the public.

19.3 Evidence filed or statements made for the purpose of informal resolution, or otherwise filed or made "without prejudice", shall not be revealed or communicated to Commission members who are conducting the hearing, except with the consent of the party who filed the evidence or made the statement.

This mirrors section 5.3(4) of the SPPA which provides: "A member who presides at a pre-hearing conference at which the parties attempt to settle issues shall not preside at the hearing of the proceeding unless the parties consent."

The reason for this exception is self evident. It is to allow parties who are

engaged in serious settlement discussions under the direction of a tribunal member to speak freely and frankly. This may involve making admissions about the strengths and weaknesses of a case or defences being offered or articulating a "bottom line".

Further, this exception permits a presiding member to receive information that might not be otherwise admissible, engage the parties directly and offer opinions that would not otherwise be acceptable in a formal hearing setting.

The question for us is whether or not the pre-hearing conference in question involved such matters. We think not.

It is evident from the correspondence leading up to the pre-hearing conference and the subsequent memorandum that the pre-hearing conference focused on procedural matters of a preliminary nature. As well, it was directed at attempting to simplify, clarify and focus the issues in dispute. This was all in aid of ultimately ensuring an effective and efficient hearing.

On this point we note that Mr. McKaig's letter of February 11, 2009 requested a pre-hearing conference "to discuss issues, the exchange of documents and set tentative or firm hearing dates ... so that these budget hearings can move forward towards resolution at a Section 39 hearing."

Mr. Bell's direction to the parties of February 13, 009 indicated that the pre-hearing conference was for the purpose of discussing a number of "preliminary matters". These included:

- identifying and if possible narrowing the issues in dispute;
- identifying the types of information to be presented at the hearing;
- agreeing on a timeline for the parties to complete disclosure;
- identifying any possible preliminary motions; and
- the timing and possible length of the hearing.

Only legal counsel were to attend. In his subsequent e-mail of March 9, 2009 Mr. Bell asked counsel to prepare brief written summaries addressing these and "any others deemed material by counsel."

All of the items identified in Mr. Bell's correspondence fall within the scope of subsections 5.3(1)(b) to (f) of the SPPA. None of the pre-hearing conference communications refer to informal resolution or the settlement of issues within the meaning of subsections 19.1 of the Commission's Rules or 5.3(1)(a) of the SPPA. The parties were not directed to attend the pre-hearing conference with settlement proposals or prepared to discuss settlement. Instructing clients were not invited to attend.

This understanding is reflected in the parties' correspondence. For example, in his correspondence dated February 27, 2009, Mr. Kyne asked the Board to summarize what it believed were the primary principal issues. In addition in his e-mail of March 10, 2009 Mr. Kyne referred to all of the directions relating to the pre-hearing conference as being "procedural". As the record on this motion shows, neither of the parties in their pre-hearing summaries included any options for or offers of settlement.

Indeed, one of the directions sought by the Municipality at the pre-hearing conference was that "the parties be ordered to conscientiously participate in a mediation before a professional mediator acceptable to both parties in a

genuine effort to resolve present differences". As reflected in the subsequent pre-hearing memorandum Mr. Chitra advised the parties that the Commission had no jurisdiction to make such an order.

It is evident that all of the procedural matters scheduled to be discussed on April 23rd could not be resolved and the parties agreed to return on May 1, 2009 with additional information.

That information primarily focused on two matters. First, the Board was asked to identify how much money it was seeking in 2009 for capital improvements. Next, the Municipality was asked to outline its position on the adequacy of certain facilities and to determine whether or not it was intending to raise the defence of "affordability".

It is self evident that the question addressed to the Board was an attempt to clarify the amount of capital budget dollars being claimed. The questions addressed to the Municipality were an attempt to obtain a clear position on two issues that might arise at the hearing. The answers to these two questions have an obvious bearing on the possible length of that hearing and disclosure requirements.

In the course of a pre-hearing conference, to request a party to clearly state how much relief they are seeking, whether or not certain matters are in dispute, or whether they intend to raise a particular defence is not to settle "issues" within the meaning of either section 19.1 of the Commission Rules or 5.3(4) of the SPPA.

To our mind, the type of "issues" contemplated by these provisions must be substantive, not procedural, and go to the heart of the dispute in question. They are very different from the issues dealt with here, including setting motion and hearing dates, arranging for a "view", determining who pays for a court reporter, and noting that the Commission has no

statutory authority to order mediation or participation in a local committee.

Finally, in neither the written material filed nor the submissions on this motion has the Municipality made any allegations of bias or apprehension of bias on the part of Mr. Chitra arising from the conduct of the pre-hearing conference.

It is quite clear that the two parties in this matter have a live and ongoing dispute, entrenched positions and will require a full hearing to settle their issues.

Given, the above we find that sections 5.3(4) of the SPPA and 19.1 of the Commission's Rules do not apply here. We do not believe that Mr. Chitra is disqualified and we decline to grant the relief sought.

The parties will reconvene at 10:00 am on July 31, 2009 to argue the remaining preliminary motions.

DATED AT TORONTO THIS 8th DAY OF JULY, 2009.

Murray Chitra
Chair, OCCPS

Roy B. Conacher
Member, OCCPS

NIAGARA BUDGET HEARING

Report of the Pre- Hearing Conference held on April 23 and May 1, 2009

This Report is prepared pursuant to Article 16.3 of the Commission's Rules of Practice.

The Board has requested a hearing under section 39 of the Police Services Act to decide disputes arising from the 2006, 2007, 2008 & 2009 capital budgets, and the 2009 operating budget, for the Niagara Regional Police Service.

A Pre-Hearing Conference was convened on April 23 and continued on May 1, 2009.

The Commission's Chair, Mr. Murray Chitra, attended, along with the Commission's Counsel, Mr. Thomas Bell, and the Commission Registrar, Mary Camacho.

Mr. Woody McKaig appeared on behalf of the Niagara Regional Police Services Board.

Mr. Brian Gover and Mr. Michael Kyne appeared on behalf of the Regional Municipality of Niagara.

It is agreed that there will be a single hearing to decide both of the Board's requests (operating and capital budgets).

OPERATING BUDGET DISPUTE

The parties agree that the amount in issue is approximately \$1,500,000.

The Board proposed a budget of \$115,299,438, a 4.76% increase over the 2008 operating budget.

The Region approved an operating budget in the amount of \$114,827,041, a 3.4% increase over the 2008 operating budget.

CAPITAL BUDGET DISPUTE

This dispute concerns monies required to renew certain facilities from which the Service currently operates.

Work is proceeding on the Service's facilities in Grimsby and Fort Erie. As such, expenditures relating to the improvement of these facilities are not in dispute in this hearing.

It is the Board's position that Stage 1 of its Long Term Accommodations Plan is in issue. Included in Stage 1 is the construction of a new facility in Niagara Falls to accommodate Central Prisoner Management, Central Property and Evidence, the Communications Centre, and 2 District's facility.

The Board requests the initiation of \$29,000,000 of capital funding in 2009 to purchase suitable land, undertake pre-construction steps and construct a new facility in Niagara Falls to accommodate Central Prisoner Management, Central Property and Evidence, the Communications Centre and 2 District's facility.

The Region does not acknowledge that the facilities in question are inadequate. It has commissioned a consultant's report on NPRS facilities which is scheduled to be received by July 1, 2009.

The Board undertakes to ensure the Region's consultants have reasonable access to all NPRS facilities and relevant documents.

The Region will advise the Board by June 1, 2009 whether it will raise affordability as an issue at the hearing.

The parties will cooperate to complete disclosure, both witness and documentary.

In its Supplementary Pre-Hearing Memorandum the Region lists orders which it requested the Chair to make during the conference. The Chair advised that the Commission does not have jurisdiction to make a number of the orders requested (i.e., requiring the Board to withdraw its FOI request; ordering the Board to require Service staff to return to the PLTAC; and ordering that the parties submit their disputes to a mediation), while other orders requested were premature.

Preliminary motions will be heard on June 29 & 30, 2009, at the Commission's office in Toronto. All motion materials will be served and filed in accordance with the Commission's Rules of Practice.

Mr. McKaig will advise of an appropriate date in August, 2009, on which the Panel, together with counsel for the parties, may inspect the facilities in dispute.

The parties agree that the hearing may take three weeks to complete.

The parties agree that the hearing will commence on Monday, September 21, 2009, and will continue all of that week, and the weeks of Monday, September 28, and Monday, October 5.

The Commission's Registrar will make arrangements for an appropriate location in the Region of Niagara to hold this public hearing. The Commission will assume the costs of the rental of any hearing room and the court reporter.