CITATION: Aware Simcoe: Environmental and Social Solutions Inc. v. Corporation of the County of Simcoe, 2015 ONSC 5344
BARRIE COURT FILE NO.: DC-15-0922
DATE: 20150826

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	
AWARE SIMCOE: ENVIRONMENTAL AND SOCIAL SOLUTIONS INC. Applicant	Michael Fleischman, for the Applicant
– and –	
CORPORATION OF THE COUNTY OF SIMCOE and TECUMSETH ESTATES INC. Respondents	E. Marshall Green, for the Respondent Corporation of the County of Simcoe
	HEARD: August 19, 2015

EBERHARD J.

[1] The Applicant has sought Judicial Review of the decision of the Corporation of the County of Simcoe ("Simcoe County") to lift stop work order 2015-035 and confirm the Special Permit issued to Tecumseth Estates Inc. On August 19, 2015 the parties were before me on a motion by the Applicant for an interlocutory injunction to stay the decision pending completion of the Judicial Review.

[2] The Special Permit allows Tecumseh Estates Inc. to cut a stand of trees on its property in the Town of New Tecumseh near Beeton. The injunction sought is to prevent the trees being cut and gone before the Judicial Review can be heard. Tecumseh Estates Inc. is awaiting notice that the migratory birds nesting season is finished before commencing to cut, which is expected on or about August 28. 2015.

[3] This was a well-argued, compelling proceeding which engaged issues of environmental concern, the social value of protest, limitations on the rights of ownership of private property, public influence over private property and who is the guardian of public interest.

[4] The Applicant is a group that, in this case, wants to preserve the woodlands on Tecumseh Estates Inc. property and claim as a goal the vigilance of citizens over government decision to require accountability and transparency. They suspect that though the Special Permit was granted for use compliant with current agricultural zoning and planning strictures, that the ultimate purpose of Tecumseh Estates Inc. is to develop the whole of its property for residential use. Tecumseh Estates Inc., by its principal Rizzardo, makes no secret that he is a developer who currently leases out the land for agricultural use but he cannot expect or control changes in zoning, planning or provincial policy that could eventually permit development of this land. The County, for its part, prides itself on its record of forest management and demonstrates the rigorous steps they required of Tecumseh Estates Inc. since Rizzardo applied to cut the trees in 2012 and the several environmental assessments and concessions that were accomplished before the Special Permit was granted.

[5] The Judicial Review sought is of the decision of the County Council, sitting as an appeal body of a stop work order preventing Tecumseh Estates Inc. from cutting the trees. The stop work order was issued in March 2015 when some citizens objected, even though Tecumseh Estates Inc. was fully compliant with the requirements which had been imposed. Coincidentally, it was discovered that through all the rigorous demands placed on Tecumseh Estates Inc. to qualify for a permit, notice had inadvertently not been given to abutting landowners. As this was required anyway, the municipality decided to give notice to the interested citizens also. Fourteen objectors made submissions. One was an abutting landowner but he does not join the Applicants in seeking Judicial Review of the decision of County Council to grant the Special Permit.

[6] County Council is comprised of the Mayors and Deputy mayors of the municipalities within the county. The Applicant asserts that in coming to their decision the County Council deprived AWARE of natural justice.

[7] In argument, counsel for the Applicant urged that the only question was whether there had been a denial of natural justice, that natural justice itself is the interest of the Applicant that demands the protection of this court and that in this injunction motion, the serious case to be assessed is not the merits or reasonableness of the decision made by the County Council but only whether there is a serious issue that natural justice was denied. AWARE argues that there is a serious issue whether they were denied natural justice, that the trees will be gone before that right can be determined, that Tecumseh Estates Inc. would be minimally disrupted by a stay whereas citizens interested in the fate of the trees they view as significant would be deprived of having the decision made in a fair and democratic way.

[8] The Responding parties disagree. The County argues that the Applicant cannot show a serious question to be tried as natural justice was not denied, that the Applicants have not demonstrated irreparable harm as the subject trees have been rigorously assessed and do not have significance, and that injunctive relief holding County Council to a standard of perfection deprives the County of its authority to govern its affairs. Tecumseh Estates Inc. argues that the Applicants have no interest in its property capable of protection and do not raise a serious issue about procedural fairness; that having no right in relation to

the trees they cannot suffer irreparable harm, and the landowner, compliant in every way with the regulatory bodies tasked with environmental protection should not bare the impediment of an injunction for alleged unfairness in decision making procedures not under its control when no objection is put forward as to the reasonableness of the decision.

Context

[9] Tecumseh Estates Inc.'s property is zoned agriculture. It is designated prime agricultural land in a prime agricultural area.

[10] The express concern of AWARE is that Rizzardo's end game is to develop the property into residential subdivision. However, under a provincial policy statement, The Growth Plan for the Greater Golden Horseshoe, "Population and employment growth will be accommodated by directing development to settlement areas". Limits are placed on such growth in that "A settlement area boundary expansion may only occur as part of a municipal comprehensive review where it has been demonstrated that" a series of onerous factors have been met. The Municipal Comprehensive Review An official Plan is available to comprehensively applies the policies and schedules of this Plan. In effect, only the municipality can apply to expand a settlement area.

[11] The Town adopted Official Plan Amendment #31 as a Secondary Plan for Beeton. Tecumseth Estates had submitted applications to redesignate and rezone the lands for residential development on February 28,2003 pursuant to the Secondary Plan Process. When the subject property was not included within the boundary established by OPA #31 Tecumseth Estates appealed the approval of OPA #31, but subsequently withdrew its appeal and the Ontario Municipal Board approved OPA #31 on November 13, 2007.

[12] It may be inferred that being prime agricultural land in prime agricultural area impedes inclusion and also that the Town and County are vigilant in applying provincial policy.

[13] Further, a portion of the Tecumseh Estates Inc. land, by recent enactment but predating the granting of the Special Permit, is designated environmentally protected. This is in contrast to the land upon which the subject trees are located demonstrating that the municipality considered environmental issues and included part but not all.

[14] Tree preservation is addressed by the County. The Town does have Bylaw 123 purporting to regulate trees and anecdotally experienced counsel before me concede that municipalities will often extract concessions about trees before approving development plans. However, by *Municipal Act* s. 4(4) if an upper-tier municipality by-law in respect of woodlands is in effect in a lower-tier municipality, the lower-tier municipality may not prohibit or regulate the destruction of trees in any woodlands designated in the upper-tier by-law and any lower-tier by-law, whether passed before or after the upper-tier by-law comes into force, is inoperative to the extent that it applies to trees m the designated woodlands. 2001, c. 25, s. 135 (4).

[15] The loss of opportunity for the town to regulate the destruction of subject trees in the event of development pursuant to the term was argued before County Council as reason to deny the Special Permit.

[16] It is therefore relevant to consider what the County actually did to ensure proper protection of the trees and thereby determine whether the County truly "occupied the field" of legislative paramountcy.

[17] The County forester described the process:

> In 2012, the County of Simcoe issued a Stop Work Order to Maria Rizzardo (Tecumseth Estates Inc.) under the County of Simcoe Forest Conservation By-law as it was brought to the County's attention that tree clearing had been occurring on the property. An application was subsequently submitted to the County to remove the woodlands for the purpose of expanding an existing agricultural area. As staff were aware that butternut had been impacted (a protected species under the Endangered Species Act), processing the application was delayed until this issue was resolved with the Ministry of Natural Resources. In early 2013 the application to clear trees was circulated as per the normal process to the County Planning Dept., The Nottawasaga Valley Conservation Authority (NVCA), and the Town of New Tecumseth. All parties requested that an Environmental Impact Study (EIS) be completed, and it was agreed that the NVCA determine the scope of the EIS and complete the review of the completed report. In October 2014 the completed EIS was submitted by the applicant to all parties. The Ministry of Natural Resources agreed to a compensation plan with respect to the butternut, and the NVCA reviewed and accepted the results of the EIS on behalf of the County and Township Planning Departments. The EIS recommended a reduction to the proposed woodland removal to properly buffer an area stream, reducing the woodland clearing to 30.6 acres from the original request of 34.7 acres. A report was subsequently provided to County Council which recommended acceptance of the revised application which was approved by County Council in January 2015 to Maria Rizzardo (Tecumseth Estates Inc.).

[18] The reports are contained in the evidence filed before me supported by expert opinion from Cathy Bentley, a qualified arborist, and Brad Baker a qualified terrestrial ecologist and qualified Butternut Assessor retained by Tecumseh Estates Inc. to assist in the application.

[19] In the result, there was a 12% reduction in the Special Permit due to the Baker study.

[20] Quality and significance of trees was rigorously addressed.

The Appeal to County Counsel

[21] At this point, after considerable study and full compliance and completeness by the landowner Tecumseh Estates Inc., the County realized it had failed to notify abutting landowners. Renewed cutting under the Special Permit had attracted the attention of other citizens. Some entered upon the private land and damage is alleged. In an exercise of discretion the County expanded the notice widely to such other citizens as expressed interest and issued a stop work order until any dispute could be considered by County Council by way of appeal of the stop work order.

[22] Tecumseh Estates Inc. submits that the stop work order was a nullity as the failure to notify the abutting owners was not its error and the Town cannot issue a stop work order where there is full compliance with its Special Permit. Without deciding that point, I find that issuing the stop work order was certainly a demonstration by the Town of responsiveness to the objections of citizens who had come forward to complain.

[23] The ongoing narrative was described by the County forester:

> On March 3, 2015. The County of Simcoe issued a Stop Work Order to allow processes and information related to the application to be further evaluated and confirmed. The property in question is privately owned and the landowners, Maria Rizzardo (Tecumseth Estates Inc.) have been fully compliant. It is of utmost importance that their rights be respected. Tree clearing that occurred on their private property between January 27 and March 3, 2015 was legally done and in accordance with the Special Permit issued by County Council. Furthermore, while stop Work Order has been issued, Maria Rizzardo, (Tecumseth Estates Inc.) has permission to clean-up legally felled trees on their property. County officials will be obtaining further direction on this matter early next week and will provide more information about the process and timeline at that time.

[24] The further evaluation proceeded before County Council but the Applicant now argues Tecumseh Estates Inc. was required to seek remedy in the courts.

[25] The Divisional court has previously ruled that in such circumstances where the governing statute specifies a method of disputing orders made by the municipality, an appeal before County Council was the proper procedure. (Re Woodglen & Co. Ltd. and City of North York et al. 42 O.R. (2d) 385) finding "the court's discretion ought not to be exercised in favour of the extraordinary remedy of mandamus where there is a specific alternative remedy under s. 15 [of the Building Code Act, R.S.O. 1980, c. 51,] which is equally, if not more convenient, expeditious, beneficial and effective"

[26] Pursuant to The Municipal *Act and Statutory Powers and Procedures Act* s 25.0.1, the County Council, a quasi-judicial body, may set its own procedures. This is recognized by

the courts, (*Baker v. Canada (Minister of Citizenship and Immigration* 1999] 2 S.C.R. 817),

> **27** Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, supra, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, per Gonthier J.

[27] Tecumseh Estates Inc. made submissions at the appeal. Objectors were permitted to make submissions. Fourteen did, of whom one was an abutting landowner. All who wished to speak were permitted. No limitation was imposed. Tecumseh Estates Inc. had the right of reply.

[28] Submissions by the objectors included three unexpected assertions. Council asked for answers to these assertions when counsel for Tecumseh Estates Inc. rose to reply. He was unable to respond to these unexpected assertions and indicated he had to get instructions from his client

[29] Counsel for Tecumseh Estates Inc. provided answers to the assertions in writing. County Council permitted this further evidence

[30] Meeting in camera County Council determined that rebuttal was not permitted.

[31] This is the first instance which the Applicant submits is a denial of natural justice and seeks Judicial Review.

[32] The second instance is the attendance and voting at the resumption of the hearing by two members of County Council who had not been present when the evidence and submissions were heard. The Applicant submits this is a denial of natural justice and seeks Judicial Review

Application for a Stay

[33] To put this decision in perspective, I begin by remarking that it is the full panel of the Divisional Court, not I, who decides the issue for Judicial Review whether the Applicant has been denied natural justice. If the Applicant is successful, the issue of whether the Special Permit should be granted would not be decided by the Divisional Court. The issue would be sent back for determination at the County level either with the direction to proceed with the denials of natural justice corrected or to initiate the whole procedure de novo.

[34] The issue before me is whether the Applicant is entitled to a stay of the order issuing the Special Permit such that the tress cannot be cut. While urging upon me that the substance or reasonableness of the decision to grant a Special Permit is not before me, and that the serious issue to be tried is not the cutting of trees but the right to natural justice, I am invited to grant the stay because if I do not, the trees will be gone and there will be no purpose in continuing to assert the right to natural justice.

[35] The simplicity of that is tempting. The responsibility though, is to determine whether the Applicant has satisfied the criteria for injunctive relief.

[36] All parties invoke the test laid out by the Supreme Court of Canada in RJR McDonald (RJR-MacDonald Inc. v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 at 82-85) the test as it is applied to motions for Interlocutory injunctions is as follows:

(a) Is there a serious question to be tried?

(b) Would the litigant who seeks the interlocutory Injunction suffer irreparable harm if it is not granted?

(c) Sometimes termed the balance of convenience, which party would suffer the greater harm from the granting or refusal of the interlocutory order?

Serious Question to be Tried

[37] While I am not tasked with determining whether Judicial Review should be granted, I begin with a consideration whether there is a serious question that Judicial Review could be granted. In doing so I must necessarily assess whether there is a serious case that there were denials of natural justice.

[38] The first natural justice complaint is that the Applicants were not permitted to file further evidence after counsel for Tecumseh Estates Inc. filed responses to the questions council asked during his reply to assertions made by objectors. The County clerk had stated that the only evidence to be considered was the evidence submitted at the hearing. When Tecumseh Estates Inc. was permitted to file further evidence, objectors sought to do so too. In camera, County Council refused to receive that evidence.

[39] The further evidence dealt with three fact assertions:

[40] The first was whether Tecumseh Estates Inc. was registered owner of the land. Title had been in the name of Maria Rizzardo but prior to the hearing it was transferred to Tecumseh Estates Inc. The copy date on the documentation suggests that this was a fact known to the objector at the time of the hearing. Counsel for Tecumseh Estates Inc. sent in the confirmation of title.

[41] The second was to respond to complaints about 7 acres not being farmed. Counsel for Tecumseh Estates Inc. filed a response that those lands were currently leased out.

[42] Finally, the objectors pointed to open Development Applications by Tecumseh Estates Inc. in relation to the land. It was argued that a developer should be required to undergo a tree study. Council asked counsel for Tecumseh Estates Inc. whether Tecumseh Estates Inc., as developer, was willing to withdraw the Application. Counsel said he had to seek instructions. He later filed the withdrawal.

[43] In its reasons County Council cited the withdrawal so it is not inconsequential.

[44] The first two items clearly are inconsequential. Relevance is not established and there was nothing in the material the Applicants sought to file that was responsive to these issues.

[45] The only relevant response in the material that county Council refused to receive was the assertion that Tecumseh Estates Inc., as developer, could re-apply.

[46] That assertion is merely a submission of a legal right to re-apply that could not be characterized as new information.

[47] There is no dispute that the material filed by counsel is accurate.

[48] The Applicants had no right of rebuttal after Tecumseh Estates Inc.'s reply. If the information had been known to counsel when he was asked at the hearing the Applicants could not have demanded opportunity to rebut.

[49] Further, the three assertions that required reply by counsel for Tecumseh Estates Inc. were raised in the oral hearing without advance notice that these points were in issue.

[50] The Applicant argues in its factum the denial of natural justice to being heard:

> It is a denial of natural justice to allow one party the ability to provide additional facts in the absence of an adverse party without affording that party the right to rebut those facts. This approach to decision making offends the *maxim audi alteram partem*, or, "giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view. Contrary to this principle, the Applicant was not permitted to respond to the Impermissible Evidence adduced by Simcoe County.
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> Simcoe County overstepped its boundaries as a decision maker in requesting and accepting the Impermissible Evidence in the first Instance. The Applicant was entitled reasonably know the case it had to meet so that it could govern its preparations accordingly. Unilaterally requesting or accepting evidence destroys a decision-maker's image of impartiality and deprives the tribunal of jurisdiction. Decision-makers are bound to determine the issues on the basis of the evidence before them. It is therefore impermissible for Simcoe County to permit Tecumseth Estates Inc. to further

> "respond to questions" posed at the Hearing after it concluded, especially given the explicit directions that no more evidence was to be accepted.

[51] I find that the application of those principles does not favour the Applicant. It was the objectors who raised issues that required reply such that it would have been unfair to deny Tecumseh Estates Inc. opportunity to provide response.

[52] When the Applicants attempted to file further material, quite voluminous, there was in it only one identified item of relevance, which was to point out the obvious that the developer could re-apply. The remainder of the material was not responsive to the facts provided after the hearing by Tecumseh Estates Inc.

[53] Questions by the tribunal do not signal impartiality.

[54] The opportunity for Tecumseh Estates Inc. to make its argument, the objectors to respond and Tecumseh Estates Inc. to reply to assertions raised in the response, is entirely regular and consistent with judicial procedure. The objectors would have had to sit quiet if the response had been available at the hearing and they gain no further opportunity when the information responsive to questions is submitted in writing. Furthermore, the Applicants have demonstrated no relevant rebuttal, even now.

[55] In *IWA v Consolidated Bathurst Packaging Ltd* [1990] 1 S.C.R. 282, albeit considering a different type of input that was outside the formal hearing, the court observed:

> 53. The advantages of an institutionalized consultation process are obvious, and I cannot agree with the proposition that this practice necessarily conflicts with the rules of natural justice. The rules of natural justice must have a flexibility required to take into account the institutional pressures faced by modern administrative tribunals, as well as the risks inherent in such a practice. In this respect, I adopt the words of Professors Blache ...
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> Since its earliest development, the essence of the *audi alteram partem* rule has been to give the parties a "fair opportunity of answering the case against [them]": Evans, de Smith's Judicial Review of Administrative Action (4th ed. 1980), at p. 158. It is true that on factual matters the parties must be given a "fair opportunity ... for correcting or contradicting any relevant statement prejudicial to their view": Board of Education v. Rice, [1911] A.C. 179, at p. 182; see also *Local Government Board v. Arlidge*, [1915] A.C. 120, at pp. 133 and 141, and *Kane v. Board of Governors of the University of British Columbia*, supra, at p. 1113. **However, the rule with respect to legal or policy arguments not raising issues of fact is somewhat more lenient because the parties only have the right to state their case adequately and to answer contrary arguments. This right does not encompass the**

> **right to repeat arguments every time the panel convenes to discuss the case. For obvious practical reasons, superior courts, in particular courts of appeal, do not have to call back the parties every time an argument is discredited by a member of the panel and it would be anomalous to require more of administrative tribunals through the rules of natural justice. Indeed, a reason for their very existence is the specialized knowledge and expertise which they are expected to apply.** (emphasis added)

[56] For these reasons, on the issue of reply evidence I find no serious case to argue that justice must not only be done but be seen to be done.

[57] As to the other procedural complaint, no one suggests that it was proper for two councillors who had not been present for the evidence to vote on the issue of whether the stop work order should be set aside and Special Permit should be confirmed.

[58] If the law is that the presence of these councillors at the vote and their casting a vote is a fatal breach of natural justice then there is a serious case to be argued at Judicial Review.

[59] The Applicant says that is so, citing *Ramm v Public Accountants Council (Ontario)* [1957] O.R. 217 as a statement that the mere presence of a councillor who has not heard the evidence at the deliberations taints the process, whatever the vote may be because of the influence the one who did not hear the evidence on those who did:

> **8** With respect to the difference in the constitution of members of the Public Accountants Council on the first and second hearings, it may very well be that the two members of the Public Accountants Council who were not present at the earlier hearing, abstained from argument on the issues which fell for determination. It appears, however, that they did vote inasmuch as the decision to revoke the licence of the appellant Ramm was unanimous. It is well established that it is not merely of some importance but of fundamental importance, that **"justice should not only be done but should manifestly and undoubtedly be seen to be done." In a word, it is irrelevant to inquire whether two members of the Council who were not present at the earlier hearing took part in the proceeding in the Council's deliberation on the subsequent hearing. What is objectionable is their presence during the consultation when they were in a position which made it impossible for them to discuss in a judicial way, the evidence that had been given on oath days before and in their absence and on which a finding must be based.** In *Rex v. Huntingdon Confirming Authority*, [1929] 1 K.B. 698 at 714, Hanworth L.J. said: "One more point I must deal with, and that is the question of the justices who had not sat when evidence was taken on April 25, but who appeared at the meeting

> of May 16. We think that the confirming authority ought to be composed in the same way on both occasions: that new justices who have not heard the evidence given ought not to attend. It is quite possible that all the parties who heard the case and the evidence on April 25 may not be able to attend on any further hearing, but however that may be, those justices who did hear the case must not be joined by other justices who had not heard the case for the purpose of reaching a decision on the question of confirmation." At page 717 Romer J. added : "Further, I would merely like to point this out: that at that meeting on May 16 there were present three justices who had never heard the evidence that had been given on oath on April 25. There was a division of opinion. **The resolution in favour of confirmation was carried by eight to two and it is at least possible that that majority was induced to vote in the way it did by the eloquence of those members who had not been present on April 25, to whom the facts were entirely unknown".** See *Mehr v. Law Society of Upper Canada*, [1955] S.C.R. 344 at 351, [1955] 2 D.L.R. 289 per Cartwright J.

[60] The Applicant also argues *Seanic Canada Inc. v. St John's (City)* 2014 NLTD(G) 7, for the proposition that lack of justice seen to be done requires that the vote must be set aside even where one City councillor had a closed mind on the rezoning application. The court found the councillor had prejudged the application to the point that by the time Council convened to debate and decide the matter, any representations seeking to persuade him to vote for the rezoning were futile:

> 76 Council voted 7:3 to reject the application. Accordingly it may be suggested that Councillor Collins' vote should simply be disregarded, leaving a 6:3 vote in opposition to the application. In my view that would not be appropriate. The fact that a councillor brings a closed mind to a vote of Council is a breach of Council's duty of fairness and taints the decision that was made. The application was not considered by a body that, as a whole, was still open to persuasion. My conclusion is that the decision of March 12, 2012 to reject the rezoning application must be set aside and remitted to Council for reconsideration. Council is free to establish the process by which the application is brought to Council for such reconsideration.

[61] *Ramm* (supra) and like cases were considered in *IWA v Consolidated Bathurst* (supra) in the context of actual discussion of policy by those who did and did not hear the evidence. That is unlike the present case where the hearing resumed with the additional members but all deliberations were conducted in open session. There is no evidence that the new councillors participated in the discussion whatsoever, much less induce the vote by their eloquence.

[62] If mere presence is the test, then the Judicial Review must be granted and so, I must obviously find there is a serious question.

[63] However, without overturning the principle in *Ramm* the court in *IWA v Consolidated Bathurst* (supra) at paragraphs 33-40 did not adopt the restrictive approach of the strong dissent. Rather it supported the maxim "those who deicide must hear" as a general rule with exceptions. In that case the court found the only issue was whether the impugned meeting vitiated the first decision rendered by the Board on the ground that the case was there discussed with panel members by persons who did not hear the evidence nor the arguments.

> The Judicial Independence of Panel Members in the Context of a Full Board Meeting
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> 33. The appellant argues that persons who did not hear the evidence or the submissions of the parties should not be in a position to "influence" those who will ultimately participate in the decision, i.e., vote for one side or the other. The appellant cites the following authorities in support of its argument: *Mehr v. Law Society of Upper Canada*, [1955] S.C.R. 344, at p. 351; *The King v. Huntingdon Confirming Authority*, [1929] 1 K.B. 698, at pp. 715 and 717; *Re Rosenfeld and College of Physicians and Surgeons* (1969), 11 D.L.R. (3d) 148 (Ont. H.C.), at pp. 161-64; *Regina v. Broker-Dealers' Association of Ontario* (1970), 15 D.L.R. (3d) 385 (Ont. H.C.), at pp. 394-95; Re *Ramm* (1957), 7 D.L.R. (2d) 378 (Ont. C.A.), at pp. 382-83; *Regina v. Committee on Works of Halifax City Council* (1962), 34 D.L.R. (2d) 45 (N.S.S.C.), at pp. 53-55; *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577, at p. 594; Re *Rogers* (1978), 20 Nfld. & P.E.I.R. 484 (P.E.I.S.C.), at p. 499; *Doyle v. Restrictive Trade Practices Commission*, [1985] 1 F.C. 362 (C.A.), at p. 371; *Royal Commission Inquiry into Civil Rights*, vol. 5, Report No. 3, c. 124, at pp. 2004-5. In all those decisions with the exception of Re *Rogers*, some of the members of the panel which rendered the impugned decision had not heard all the evidence or all the representations of the parties; their vote was cast even though some of the members of these panels did not have the benefit of assessing the credibility of the witnesses or the validity of the factual and legal arguments. **I agree that, as a general rule, the members of a panel who actually participate in the decision must have heard all the evidence as well as all the arguments presented by the parties** and in this respect I adopt Pratte J.'s words in Doyle v. Restrictive Trade Practices Commission, supra, at pp. 368-69 **(my emphasis)**

> The important issue is whether the maxim "he who decides must hear" invoked by the applicant should be applied here.
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> This maxim expresses a well-known rule according to which, where a tribunal is responsible for hearing and deciding a case, only those members of the tribunal who heard the case may take part in the decision. It has sometimes been said that this rule is a corollary of the audi alteram partem rule. This is true to the extent a litigant is not truly "heard" unless he is heard by the person who will be deciding his case .... This having been said, it must be realized that the rule "he who decides must hear", important though it may be, is based on the legislator's supposed intentions. It therefore does not apply where this is expressly stated to be the case; nor does it apply where a review of all the provisions governing the activities of a tribunal leads to the conclusion that the legislator could not have intended them to apply. Where the rule does apply to a tribunal, finally, it requires that all members of the tribunal who take part in a decision must have heard the evidence and the representations of the parties in the manner in which the law requires that they be heard.

In that case, one of the issues was whether it was sufficient for the members of the panel who had not heard the evidence to read the transcripts and this question was answered in the negative in light of the relevant statutory provisions. In this case, however, the members of the panel who participated in the impugned decision, i.e., Chairman Adams and Messrs. Wightman and Lee, heard all the evidence and all the arguments. It follows that the cases cited by the appellant cannot support its argument, nor can the presence of other Board members at the full board meeting amount to "participation" in the final decision even though their contribution to the discussions which took place at that meeting can be seen as a "participation" in the decision-making process in the widest sense of that expression.

34. However, the appellant claims that the following extract from the reasons of Romer J. in *The King v. Huntingdon Confirming Authority*, supra, constitutes the basis of a rule whereby decision makers who have heard all the evidence and representations should not be influenced by persons who have not, at p. 717:

> Further, I would merely like to point this out: that at that meeting of May 16 there were present three justices who had never heard the evidence that had been given on oath on April 25. There was a division of opinion. The resolution in favour of confirmation was carried by eight to two, and *it is at least possible that that majority was induced to vote in the way it did by the eloquence of those members who had not been present on April 25, to whom the facts were entirely unknown.* [Emphasis added.]

Thus, Romer J. was of the opinion that the influence of those who did not hear the evidence could go beyond their vote and that this influence constituted a denial of natural justice. Following that reasoning, it was held in Re Rogers that the presence of a person who heard neither the evidence nor the representations at one of the meetings where a quorum of the Prince Edward Island Land Use Commission was deliberating invalidated the decision of the Commission even though that person did not vote on the matter. The opposite result was reached in *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board* (1960), 24 D.L.R. (2d) 673 (Ont. C.A.), where it was held that the presence of Board members who neither heard the evidence nor voted on the matter did not invalidate the Board's decision, at p. 675.

35. I am unable to agree with the proposition that any discussion with a person who has not heard the evidence necessarily vitiates the resulting decision because this discussion might "influence" the decision maker. In this respect, I adopt Meredith C.J.C.P.'s words in Re Toronto and Hamilton Highway Commission and Crabb (1916), 37 O.L.R. 656 (C.A.), at p. 659:

> The Board is composed of persons occupying positions analogous to those of judges rather than of arbitrators merely; and it is not suggested that they heard any evidence behind the back of either party; the most that can be said is that they -- that is, those members of the Board who heard the evidence and made the award -- allowed another member of the Board, who had not heard the evidence, or taken part in the inquiry before, to read the evidence and to express some of his views regarding the case to them .... *[B]ut it is only fair to add that if every Judge's judgment were vitiated because [page332] he discussed the case with some other Judge a good many judgments existing as valid and*

> *unimpeachable ought to fall; and that if such discussions were prohibited many more judgments might fall in an appellate Court because of a defect which must have been detected if the subject had been so discussed.* [Emphasis added.]

36. The appellant's main argument against the practice of holding full board meetings is that these meetings can be used to fetter the independence of the panel members. Judicial independence is a long standing principle of our constitutional law which is also part of the rules of natural justice even in the absence of constitutional protection. It is useful to define this concept before discussing the effect of full board meetings on panel members. In Beauregard v. Canada, [1986] 2 S.C.R. 56, Dickson C.J. described the "accepted core of the principle of judicial independence" as a complete liberty to decide a given case in accordance with one's conscience and opinions without interference from other persons, including judges, at p. 69:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider -- be it government, pressure group, individual or even another judge -- should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

See also *Valente v. The Queen*, [1985] 2 S.C.R. 673, at pp. 686-87, and Benyekhlef, Les garanties constitutionnelles relatives à l'indépendance du pouvoir judiciaire au Canada, at p. 48.

37. It is obvious that no outside interference may be used to compel or pressure a decision maker to participate in discussions on policy issues raised by a case on which he must render a decision. It also goes without saying that a formalized consultation process could not be used to force or induce decision makers to adopt positions with which they do [page333] not agree. Nevertheless, discussions with colleagues do not constitute, in and of themselves, infringements on the panel members' capacity to decide the issues at stake independently. A discussion does not prevent a decision maker from adjudicating in accordance with his own conscience and opinions nor does it constitute an obstacle to this freedom. Whatever discussion may take place, the ultimate

decision will be that of the decision maker for which he assumes full responsibility.

38. The essential difference between full board meetings and informal discussions with colleagues is the possibility that moral suasion may be felt by the members of the panel if their opinions are not shared by other Board members, the chairman or vice-chairmen. However, decision makers are entitled to change their minds whether this change of mind is the result of discussions with colleagues or the result of their own reflection on the matter. A decision maker may also be swayed by the opinion of the majority of his colleagues in the interest of adjudicative coherence since this is a relevant criterion to be taken into consideration even when the decision maker is not bound by any stare decisis rule.

39. It follows that the relevant issue in this case is not whether the practice of holding full board meetings can cause panel members to change their minds but whether this practice impinges on the ability of panel members to decide according to their opinions. There is nothing in the Labour Relations Act which gives either the chairman, the vice-chairmen or other Board members the power to impose his opinion on any other Board member. However, this de jure situation must not be thwarted by procedures which may effectively compel or induce panel members to decide against their own conscience and opinions.

40. It is pointed out that "justice should not only be done, but should manifestly and undoubtedly be seen to be done": see *Rex v. Sussex Justices*, [1924] 1 K.B. 256, at p. 259. This maxim applies whenever the circumstances create the danger of an injustice, for example when there is a reasonable [page334] apprehension of bias, even if the decision maker has completely disregarded these circumstances. However, in my opinion and for the reasons which follow, the danger that full board meetings may fetter the judicial independence of panel members is not sufficiently present to give rise to a reasonable apprehension of bias or lack of independence within the meaning of the test stated by this Court in Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369, at p. 394, reaffirmed and applied as the criteria for judicial independence in Valente v. The Queen, supra, at p. 684 (see also p. 689):

> ... 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 -- concluded ...."(my emphasis)**

[64] In the present case, the evidence about the vote discloses no participation in the deliberations by the two additional councillors. No objection was taken to their presence in this large council. There is no hint of intentionality. Recording their vote was simply a thoughtless mistake.

[65] Absent the specter of influence during the deliberations by the two additional councillors there was no possibility that the votes could make any difference. In open session, the Councillors considered 4 options voting first on the option to " Confirm the Stop Work Order and revoke the Special Permit." With a vote of 20-7 the objectors position was defeated. The remaining options dealt with whether and what conditions should be imposed when the Special Permit was confirmed. By a vote of 15-12 it was decided that no conditions should be imposed. The resolution reflecting those results passed 18-9.

[66] There was no mathematical possibility that the two votes could make a difference.

[67] In summary, two additional councillors are present but there is no evidence of participation in discussion. They voted when they should not have, no-one notices. Their votes make no mathematical difference.

[68] Considering that the natural justice maxim to preserve decisions to those who have heard, as discussed in *Consolidated Bathurst,* is out of concern for judicial independence, and that justice must be seen to be done, I find that, **that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through"** would conclude that the mistake of the County Council did not deprive the objectors of natural justice. The "informed person" might chuckle at the folly of tribunals inexperienced in adjudicative procedures, but would have no apprehension of bias or lack of independence.

[69] I find that the mistake of County Council falls outside the "general rule" "he who decides must hear". In doing so, I remind myself that the Applicant's only assertion of serious issue to be tried is whether they have been deprived of natural justice, carefully partitioned off from the merits of their substantive case. The clear, inept, but inadvertent mistake of County Council in recording the votes of two that did not hear the evidence, was wrong but resulted in no denial of natural justice. Everyone was heard. No external influence on the independence of the decision-makers who heard the evidence is discerned in deliberations in open session. The mistakenly recorded votes made no difference in the result. I do not find a serious case of denial of natural justice to be heard by way of judicial review.

Irreparable Harm

[70] Even if I am wrong and there is a serious care to be tried whether the mistake of County Council is caught within the general rule that "he who decides must hear", for a stay pending Judicial Review the Applicant must also demonstrate irreparable harm. To do so, the Applicant argues "Tecumseth Estates Inc. will be in a position to clear the Beeton Woods as of August 28, 2015. Without the requested stay, the Beeton Woods will be gone and there will be no redress whatsoever available to the Applicant". In this the Applicant departs from the abstract of denial of natural justice and invokes the merits. In oral argument this was no more developed than to observe that without a stay the trees are gone August 28. So, simply put, the harm is to the trees.

[71] Tecumseh Estates Inc. argued, as a subset of the first injunction criteria of serious issue to be tried, that the Applicant has no interest in the property or substantive outcome. I have chosen to address those arguments in the context of irreparable harm.

[72] The stand of trees is on Tecumseh Estates Inc.'s private property. The public has no right of entry and the pictorial evidence of various objectors on the property is insufficient to assert a legal right to be there. Nor is the moniker "Beeton Woods", unheard by the landowner or the County forester before the dispute arose, evidence of heritage use.

[73] Still, the value of public protest is an important consideration. Without requiring evidence, it is well known to this court and informed citizens generally that many societal concerns, and in particular environmental concerns, are brought forward by the actions of protesters for public debate and scrutiny. At the very least it can be said that there is often a public interest in features of the environment even though the land may be privately owned.

[74] But the public does not have an interest in every tree. At least not directly. There are public agencies and statutory bodies charged with the protection of the environment and elected officials representing the public interest.

[75] There is no indication of the extent to which the Applicant's views are representative of the public interest. No elected local representatives join in their Application. There is no evidence of any expert assessment that the trees or the woods are significant

[76] To the contrary, there are the results of the rigorous expert assessment of the significance of the trees on Tecumseh Estates Inc.'s land, and the discernment of agency and official response set out in these reasons as context from paragraphs 9-20.

[77] The County provides evidence of considerable attention and priority given to forest management and stewardship. Also argued is the competing stewardship of farmland. The County, and not the Applicant, is in the better position to represent the public interest in balancing agricultural and forestry priorities.

[78] Caselaw from the Ontario Municipal Board supports the assertion that elected municipal officials, (County Council) and public agencies (Nottawasaga Conservation Authority and the Ministry of Natural Resources and Forestry) are best situated to address the

public interest and protection of the environment. *Zellers Inc. v. Leamington (Town)* [1999] O.M.B.D. No. 264 at para 12 I [2014] O.M.B.D. No. 969 at para 18, *Moran v. Toronto (City) Committee of Adjustment* [2006] O.M.B.D. No. 140 at para 74

[79] In a case similar to one before me, McDermid J. considered whether the concerned citizen had a legal right in relation to trees on private land under the question of serious issue to be tried. (*McGregor v. Rival Developments Inc.*, [2004] O.J. No. 1229 (S.C.J.), para. 13

> **18** In the circumstances, I find that what Ms. McGregor is seeking to do is "protect the ecology" at the site. However, there is no evidence that she has any legal interest in the trees or vegetation that were removed. Moreover, several statutory bodies exist that are charged with protecting the environment. For example, s. 4(1)(c) of Regulation 136, R.R.O. 1990 under the Conservation Authorities Act, R.S.O. 1990, c. C.27 provides that "No person shall, in the conservation area, [being the Upper Thames Valley Conservation Area], ... cut, remove, injure or destroy a plant, tree, shrub, flower or other growing thing ..." The UTRCA is aware of Rival's activity and has granted a fill permit. In other words, the UTRCA is an example of a statutory body whose mandate it is to protect the environment and to prevent the removal of trees or other vegetation in appropriate circumstances.
>
> **19** Moreover, there is no evidence before me that Rival is interfering with any statutory right enjoyed by Ms. McGregor or is acting in an unconscionable manner.
>
> **20** On the basis of the material before me, I am not satisfied on a balance of probabilities that Ms. McGregor has any legal right to the trees or vegetation growing on Rival's property that can be protected by injunctive relief.
>
> **21** In addition, I am not satisfied on a balance of probabilities that Ms. McGregor has established that she will suffer irreparable harm if the relief she seeks is refused or that the balance of convenience favours her.

[80] I have averted to the value of public protest in this ruling but so too did the County by issuing the stop work order when Tecumseh Estates Inc. was in full compliance with its requirements. The objectors were given an opportunity to put forward evidence to give pause to the County in confirming a Special Permit already based on 3 years of assessment with concessions extracted from Tecumseh Estates Inc. The objectors failed and the Applicant fails to put forward evidence of irreparable harm to trees significant in the public interest with the cutting of these trees.

Balance of Convenience

[81] The Applicant asserts that Mr. Rizzardo could name no prejudice except costs from delaying the cutting of the trees until after the Judicial Review is heard. It appears that the Special Permit will expire before the Judicial Review, not to mention the proposed return to County Council to "start from scratch". He can do nothing more in the foreseeable future with his land except agriculture but he is being delayed in doing that in the acreage covered by the subject trees.. His contract for the clearing remains in abeyance.

[82] McDermid J. in *MacGregor,* supra recognized the inherent inconvenience to a landowner:

> **23** Therefore, even if Ms. McGregor is successful in setting aside the decision of the OMB, Rival would still be in a position to remove the trees and vegetation about which she complains. On the other hand, if Rival is denied the right to conduct an archaeological investigation in order to comply with the conditions of approval and Rival is unable to develop its lands, I infer that it would suffer damages in an amount that I am doubtful Ms. McGregor and her husband would be able to pay.

[83] The corporate make-up of the Applicant raises similar concerns about recovering damages but the real point is that a titled landowner should not be restricted in the lawful use of its land without demonstration of a legal right irreparably harmed.

[84] A further considerable inconvenience is argued by the County that an injunction granted in circumstances of a procedural mistake to the Applicant with no interest in the property, no evidence or special expertise in the significance of the trees, no irreparable damage to any legal interest, would compromise the County in exercising its authority under The Municipal Act to "govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues". MA 20012006 c32 Sch A s8

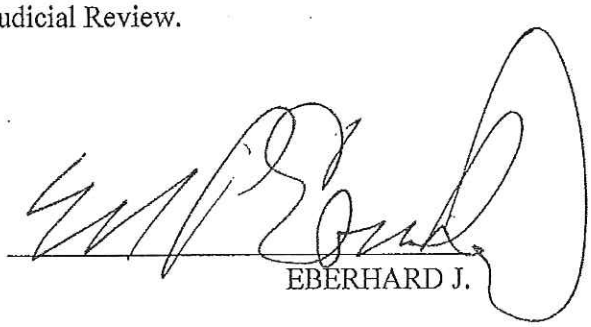
[85] A standard of procedural perfection would leave every decision vulnerable. County Council is made up of elected persons who do not claim legal training.

[86] To deny injunction with a consideration of the County's authority, and responsibility, as a component of balance of convenience is not carte blanche. But the court's response to a mistake that, on the evidence, could have made no difference should be approached with an eye on proportionality.

[87] I find that the County took considerable steps to assess the value of trees on the subject land and Tecumseh Estates Inc. took considerable steps to comply. Then the County realized its inadvertence about notice to the abutting owners and enlarged notice far beyond that which was required. They issued a stop work order to give objectors their say. The vote was clear and could not have been different even if the County had not inadvertently and wrongly, allowed the two who had not heard to cast their votes.

[88] A stay is a disproportional response to an error that went to natural justice but did not result in a decision tainted by a denial of natural justice. This disproportionality is in addition to the Applicant's not demonstrating an interest that is irreparably harmed nor a consequent inconvenience to balance against delay and expense to Tecumseh Estates Inc. and impairing the authority of County Council by a standard of procedural perfection.

[89] For these reasons the Applicant is not entitled to a stay of the decision of the County Council to lift a stop work order 2015-035 and confirm the special permit issued to Tecumseh Estates Inc. pending determination of Judicial Review.



EBERHARD J.

Released: August 26, 2015