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Failure to Comply with Procedural Orders at the Ontario Municipal Board

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Introduction

> *"The Board ordered Parties' consolidated issues list (Exhibit 3, Tab 12) does not contain the issues of the City, who did not comply with the two board orders to submit its issues within the body of a comprehensive consolidated issues list. The Board accepted Ms. Jubb's explanation for the City's failure to comply with the two orders; however, the Board also warned the City's counsel that the Board will tolerate no further failure on the City's part to comply with Board orders in the subsequent administration of this case. Ms. Jubb was directed to communicate with the Board directly and promptly in advance of any future appearances before the Board if the City was having difficulties meeting the requirements arising from the Board's orders.* …(para 8)
>
> *The Board also denies the City's motion to defer the hearing and finalization of the procedural order of this matter until a proposed City Council review of recommendations in January 2008. Rather, the Board orders a peremptory hearing for all parties to attend at the Toronto offices of the Ontario Municipal Board on Monday, 19 November 2007 at 1:00 p.m. to finalize the Procedural Order for the May 2008 hearing. The Board further orders the City to now comply with this issuing order by virtue of its failure to comply with the previous two orders that required it to contribute to a consolidated issues list of all Parties. The Board expects the City to be in attendance and have prepared its issues list to be consolidated with the other Parties' issues." (SmartCentres Inc. v. Toronto (City), 2007 CarswellOnt 7303 (O.M.B.))* (para 47)

The above quotation from a recent decision of the Ontario Municipal Board, or possibly the interaction of counsel with Mr. Rossi, the Board member issuing this decision, on the subject of enforcement of Board orders, is arguably the reason why the Chair of this program, Mary Flynn-Guglietti, somewhat mischievously, invited me to address the subject of this presentation; but to spend no more than 6 minutes doing it.

Given that each of those invited to address other topics at this conference have been burdened with a similar time limitation, I can presume, safely, that the topic deserves somewhat more attention than 6 minutes. For that reason, I have prepared the following summary notes on the subject, which, I judge, will take longer than 6 minutes to read.

Although the request of me was to address the enforcement of a Procedural Order, my comments are equally applicable to the enforcement of Board orders generally.

Procedural Orders

Procedural orders are commonplace for hearings before the Board where there is any degree of complexity or controversy. The sample Procedural Order that is attached to the Board's Rules of Practice and Procedure is found at Attachment "A" at the end of this paper.

This sample Procedural Order is a generic order that contains the basics that are common to most hearings. One can expect that procedural orders for most hearings will bear differences from the generic order.

Each of the provisions of the Procedural Order usually requires some measure of process to achieve the intent of the provision. This may call for a Board order to ensure that the intent of the provision is achieved. For instance, section 5 provides as follows:

> *5. The Issues are: [Optional:... set out in the Issues List attached as Attachment 2.] There will be no changes to this list unless the Board permits, and a party who asks for changes may have costs awarded against it.*

In the matter giving rise to the quotation above, the Board found it necessary to make an order requiring that a consolidated issues list (including issues of all the parties) be prepared by a certain date in order that it could be added to the Procedural Order as Attachment 2. The failure of the City to provide its issues to the party preparing the consolidated list of issues in accordance with the Board's timetable gave rise to the Board's comments.

Using this failure on the part of the City as a point of departure, the question is: what remedies are there in the event of a failure of a party to comply with a Board order, whether that order is a provision in a Procedural Order or an order of another nature directed to one or more parties to a hearing.

Statutory Backdrop

The *Ontario Municipal Board Act*, ss.34-38 and 86 to 90, provides the Board with a very wide pallet with which to make orders and through which to require compliance and punish non-

compliance. Sections 34, 37 and 86 are the most relevant in the context of the question of the enforcement of Board made orders, whether Procedural Orders or otherwise.

The following are the full pallet.

PART III
GENERAL JURISDICTION AND POWERS

Board to have powers of court of record and a seal

34. *The Board for all purposes of this Act has all the powers of a court of record and shall have an official seal which shall be judicially noticed. R.S.O. 1990, c. O.28, s. 34.*

Power to determine law and fact

35. *The Board, as to all matters within its jurisdiction under this Act, has authority to hear and determine all questions of law or of fact. R.S.O. 1990, c. O.28, s. 35.*

Jurisdiction exclusive

36. *The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other general or special Act. R.S.O. 1990, c. O.28, s. 36.*

General jurisdiction and powers

37. *The Board has jurisdiction and power,*

(a) to hear and determine all applications made, proceedings instituted and matters brought before it under this Act or any other general or special Act and for such purpose to make such orders, rules and regulations, give such directions, issue such certificates and otherwise do and perform all such acts, matters, deeds and things, as may be necessary or incidental to the exercise of the powers conferred upon the Board under such Act;

(b) to perform such other functions and duties as are now or hereafter conferred upon or assigned to the Board by statute or under statutory authority;

(c) to order and require or forbid, forthwith or within any specified time and in any manner prescribed by the Board, the doing of any act, matter or thing or the omission or abstention from doing or continuance of any act, matter or thing, which any person, firm, company, corporation or municipality is or may be required to do or omit to be done or to abstain from doing or continuing under this or any other general or special Act, or under any order of the Board or any regulation, rule, by-law or direction made or given under any such Act or order or under any agreement entered into by such person, firm, company, corporation or municipality;

(d) to make, give or issue or refuse to make, give or issue any order, directions, regulation, rule, permission, approval, certificate or direction, which it has power to make, give or issue.

(e) despite the Statutory Powers Procedure Act, to hold hearings or other proceedings by a conference telephone call or any other electronic or automated means, subject to any rules made by the Board under section 91 regulating their use. R.S.O. 1990, c. O.28, s. 37; 1994, c. 23, s. 73….

Powers of Superior Court of Justice exercisable by Board

38. *The Board, for the due exercise of its jurisdiction and powers and otherwise for carrying into effect the provisions of this or any other general or special Act, has all such powers, rights and privileges as are vested in the Superior Court of Justice with respect to the amendment of proceedings, addition or substitution of parties, attendance and examination of witnesses, production and inspection of documents, entry on and inspection of property, enforcement of its orders and all other matters necessary or proper therefor. R.S.O. 1990, c. O.28, s. 38; 2006, c. 19, Sched. C, s. 1 (1)*

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PART VI
PRACTICE AND PROCEDURE

ORDERS OF COURT

Enforcement of orders

86. *(1) A certified copy of any order or decision made by the Board under this Act or any general or special Act may be filed with the Superior Court of Justice, and thereupon becomes and is enforceable as a judgment or order of the Superior Court of Justice to the same effect, but the order or decision may nevertheless be rescinded or varied by the Board. R.S.O. 1990, c. O.28, s. 86 (1); 2006, c. 19, Sched. C, s. 1 (1).*

Board may select method of enforcing order

(2) It is optional with the Board to adopt the method provided by this section for enforcing its orders or decisions or to enforce them by its own action. R.S.O. 1990, c. O.28, s. 86 (2).

TERMS OF ORDERS

Contingent orders

87. *(1) The Board may direct in any order that the order, or any portion or provision thereof, shall come into force at a future fixed time, or upon the happening of any contingency, event or condition specified in the order, or upon the performance, to the satisfaction of the Board or person named by it, of any terms which the Board may impose upon any party interested, and the Board may direct that the whole, or any portion of the order, shall have force for a limited time, or until the happening of any specified event.*

Interim orders

(2) The Board may, instead of making an order final in the first instance, make an interim order and reserve further directions, either for an adjourned hearing of the matter or for further application. R.S.O. 1990, c. O.28, s. 87.

May grant partial or other relief than that applied for

88. *Upon any application to the Board, the Board may make an order granting the whole, or part only, of the application, or may grant such further or other relief in addition to, or in substitution for, that applied for as to the Board may appear just and proper as fully in all respects as if the application had been for such partial, other, or further relief. R.S.O. 1990, c. O.28, s. 88.*

Interim orders without notice

89. *The Board may, if the special circumstances of any case, in its opinion, so require, make an interim order without notice authorizing, requiring or forbidding anything to be done that the Board would be empowered on application, notice and hearing to authorize, require or forbid, but no such order shall be made for any longer time than the Board may consider necessary to enable the matter to be heard and determined. R.S.O. 1990, c. O.28, s. 89.*

Extension of time specified in order

90. *When any work, act, matter or thing is, by any regulation, order or decision of the Board, required to be done, performed or completed within a specified time the Board may, if the circumstances of the case in its opinion so require, upon notice and hearing, or in its discretion upon application without notice, extend the time so specified. R.S.O. 1990, c. O.28, s. 90.*

GENERAL RULES

Power to makes rules

91. *The Board may make general rules regulating its practice and procedure. R.S.O. 1990, c. O.28, s. 91.*

OTHER PROVISIONS

Presumption of jurisdiction to make order

92. *An order of the Board need not show upon its face that any proceeding or notice was had or given, or any circumstance existed, necessary to give it jurisdiction to make the order. R.S.O. 1990, c. O.28, s. 92.*

Non-Compliance with a Board Order: Contempt of the Board

Generally speaking, a failure to comply with a Board order, whether a Procedural Order or otherwise, is contempt of the Board. Non-compliance with a Board order, whether a Procedural Order or otherwise, may give rise to a variety of responses by the Board. The nature of the conduct will influence the approach of the Board in making a finding of contempt and in addressing the punishment, if any.

Civil vs. Criminal Contempt

In dealing with contempt, it is important to distinguish between the notions of criminal contempt and civil contempt in the context of an order made by an administrative tribunal.

In his dissent in a leading judgement of the Supreme Court of Canada, *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 on the subject of criminal contempt, Mr. Justice Sopinka noted as follows regarding the distinctions between civil and criminal contempt:

> ***The Nature of Contempt***
>
> *47 The criminal law of contempt must be distinguished from civil contempt. The purpose of criminal contempt was and is punishment for conduct calculated to bring the administration of justice by the courts into disrepute. On the other hand, the purpose of civil contempt is to secure compliance with the process of a tribunal including, but not limited to, the process of a court: see* B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, [1988] 6 W.W.R. 577, 31 B.C.L.R. (2d) 273, 71 Nfld. & P.E.I.R. 93, 220 A.P.R. 93, 30 C.P.C. (2d) 221, 88 C.L.L.C. 14,047, 87 N.R. 241, 53 D.L.R. (4th) 1, 44 C.C.C. (3d) 289*, R. v. Hill *(1976), 73 D.L.R. (3d) 621, 37 C.R.N.S. 380, 33 C.C.C. (2d) 60 (B.C.C.A.), at p. 629 [D.L.R.],* Poje v. British Columbia (Attorney General)*, [1953] S.C.R. 516, 17 C.R. 176, 105 C.C.C. 311, [1953] 2 D.L.R. 785. A useful summary of the two forms of contempt can be found in* Black's Law Dictionary, *6th ed. (St. Paul: West Publishing Co., 1990), at p. 319:*
>
> > Contempts are also classed as civil or criminal. The former are those quasi contempts which consist in the failure to do something which the party is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court, while criminal contempts are acts done in disrespect of the court or its process or which obstruct the administration of justice or tend to bring the court into disrespect. A civil contempt is not an offense against the dignity of the court, but against the party in whose behalf the mandate of the court was issued, and a fine is imposed for his indemnity. But criminal contempts are offenses upon the court such as wilful disobedience of a lawful writ, process, order, rule, or command of court, and a fine or imprisonment is imposed upon the contemnor for the purpose of punishment

Contempt is addressed in the Criminal Code, C-46 as follows:

> *Disobeying order of court*
>
> ***127.*** *(1) Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of*
>
> *(a) an indictable offence and liable to imprisonment for a term not exceeding two years; or*
>
> *(b) an offence punishable on summary conviction.*
>
> *Attorney General of Canada may act*
>
> *(2) Where the order referred to in subsection (1) was made in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, any proceedings in respect of a contravention of or conspiracy to contravene that order may be instituted and conducted in like manner.*
>
> *R.S., 1985, c. C-46, s. 127; R.S., 1985, c. 27 (1st Supp.), s. 185(F); 2005, c. 32, s. 1.*

As to the relevance of this provision to tribunal orders, in the majority judgement, *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, *McLachlin J.* (*La Forest, Gonthier* and *Iacobucci JJ.* concurring),noted,

> *The distinction between creating the criminal law and engaging it is illustrated by consideration of s. 127 of the Criminal Code, R.S.C. 1985, c. C-46, which makes it an offence to disobey a lawful order made by a court of justice "or by a person or body of persons authorized by any Act to make or give the order." "Act" is defined (in s. 2 of the Code) to include "an Act of the legislature of a province." This means it is always a criminal offence to breach an order of a provincial tribunal, even if that tribunal is not authorized by provincial law to file the order as an order of the court. It is clear that the province is not enacting criminal law every time it empowers a tribunal to make orders which may not be filed with the court, even though it is a criminal offence to breach such an order; rather, the province has enacted non-criminal law, which is within its sphere of competence, and Parliament, acting within its sphere, has decided to make it a criminal offence to breach this provincial law. Similarly, the province is not enacting a new criminal law each time it provides that orders of a particular tribunal are to be enforced as a court order. Such a provision is non-criminal law; it is the common law which provides that breach of such an order may, in certain circumstances, be a criminal offence.*
>
> *38 But, it may be asked, is it right that the order of an inferior tribunal can be given the status of a court order by legislative fiat, leading to the consequence that its breach is elevated from breach of tribunal order to contempt of court? Should the common law offence of criminal contempt be available to protect orders of an inferior tribunal, or should it be restricted to orders actually made by the court? Criminal contempt is a serious offence, it is argued, and one which it is neither necessary nor appropriate to use in a civil labour dispute.*
>
> *39 This argument is not one of jurisdiction, but of policy. It questions whether the legislature should enact that breach of a tribunal order is subject to the same consequences as breach of a court order. The power of the legislature to do this cannot be questioned; legislatures routinely make changes in the law which empower or require federally appointed judges to impose certain remedies. Thus the question is one of policy; policy moreover, which can be debated. Against the argument that the contempt power is so*

serious that it should only be available for breaches of orders actually made by s. 96 judges, can be raised the argument that in reality important portions of our law are administered not by s. 96 judges but by inferior tribunals, and that these decisions, like court decisions, form part of the law and deserve respect and consequently the support of the contempt power. Similarly, against the argument that labour disputes should be settled by civil remedies, can be raised the argument that these disputes, when they threaten public respect for orders of law, transcend private concerns and properly become the subject of criminal remedies, as this court has held in Poje, supra, and B.C.G.E.U. v. British Columbia (Attorney General), supra. Whatever the answers to these difficult issues, where the legislature has acted properly within its jurisdiction, it is not open to the courts to substitute their views on the proper policy of the law for the views of the legislature.

40 It is true that the legislature must be clear in making such a policy decision, and it is urged that as a matter of construction, s. 142(7) of the Labour Relations Act should be read as excluding the remedy of criminal contempt. Two arguments are advanced in support of this proposition. The first is that a directive of the board which is filed with the court is not thereby converted into a court order, but remains a directive of the board. The power to punish for criminal contempt, it is said, is available only in relation to orders of a court. Secondly, it is argued that the word "enforceable" engages only the civil contempt power, and not the criminal contempt power, which relates not to enforcement, but to punishment.

41 Both of these arguments were considered and rejected by the majority of the Ontario Court of Appeal in Re Ajax & Pickering General Hospital (1982), 35 O.R. (2d) 293, 132 D.L.R. (3d) 270, (sub nom. Ajax & Pickering General Hospital v. C.U.P.E.) 82 C.L.L.C. 14,164 (C.A.). I agree with Blair J.A.'s analysis and his conclusions. With regard to the first argument, the case law led him to the following conclusion, at p. 286 [D.L.R.]:

> *These and similar cases simply demonstrate that Board orders are not the same as Court orders; they do not establish that Board orders are any less enforceable by the Court. On the contrary, all the decisions dealing with similar provisions in labour legislation in Canada establish that where such Board orders are filed with the Court, they have the same force and effect as orders of the Court and disobedience can be punished by contempt and other similar proceedings ...*

Contempt *ex facie* and Contempt *in facie*

A further distinction that is important to appreciate is that between contempt *ex facie* and contempt *in facie*, that is contempt outside of the hearing room and contempt in the presence of the tribunal.

According to the *CED Administrative Law* §420,

> *The traditional test is whether it is possible for the tribunal itself to deal with the matter of contempt on the basis of its personal knowledge; if so, it is contempt in facie. For the most part, this distinction is fairly obvious with the typical kind of contempt in facie consisting of misconduct in the actual hearing room and contempt ex facie exemplified by conduct scandalizing the court or tribunal and by refusing to obey orders of the court directed to conduct outside the hearing room.[FN1] The failure of counsel to appear at a hearing when obliged to do so is contempt in facie.[FN2] So is failing to appear in accordance with a summons,[FN3] as opposed to evading service of a summons.[FN4]*
>
> *FN1. Macaulay, Practice and Procedure Before Administrative Tribunals, §29A.4(a);*
> *FN2. McKeown v. R., [1971] S.C.R. 446.*

> FN3. *Canadian Broadcasting Corp. v. Quebec (Police Commission), [1979] 2 S.C.R. 618.*
> FN4. *Hawkins v. Halifax (County) Residential Tenancies Board (1974), 47 D.L.R. (3d) 117 (N.S.T.D.).*

As to the significance of the distinction between contempt *in facie* or *ex facie*, according to the *CED Administrative Law* §*363*,

> *There is no constitutional impediment to legislation conferring on federal or provincial statutory bodies including commissions of inquiry the authority to punish persons for contempt of court whether committed in the face of or ex facie the tribunal.[FN1] It is a matter of statutory interpretation whether the tribunal possesses that authority; but there is a presumption against the conferral of power to punish for contempt ex facie, a presumption that only clear statutory language can displace.[FN2]*
>
> FN1. *Chrysler Canada Ltd. v. Canada (Competition Tribunal),* [1992] 2 S.C.R. 394 ([B.C.]);
> FN2. *Chrysler Canada Ltd. v. Canada (Competition Tribunal),* [1992] 2 S.C.R. 394.

Re Diamond and the Ontario Municipal Board

As to the powers of the Ontario Municipal Board in regard to contempt *in facie* and *ex facie*, the leading authority is *Re Diamond and the Ontario Municipal Board*, 1962 CarswellOnt 147 (Ontario Court of Appeal). In that case, a municipal staff planning witness refused to provide a personal planning opinion, upon instruction from his municipal employer. The following questions were remitted to the Court as a stated case for the opinion of the Court under then s. 93 of the *Ontario Municipal Board Act*:

> *1. Has the Ontario Municipal Board the power to compel witnesses before it to answer questions as to fact?*
>
> *2. Has the Ontario Municipal Board the power to compel witnesses before it who are qualified to give opinion evidence to answer questions as to their opinion?*
>
> *3. If the answer to question Number 1 or Number 2 is in the affirmative has the Ontario Municipal Board the power to commit a witness to jail for refusing to answer any such question?*
>
> *4. Has the Metropolitan Toronto Planning Board the right to prevent professional planners in its employ from giving their opinions in evidence when called as witnesses before the Ontario Municipal Board?*
>
> *5. Has the Ontario Municipal Board the power, after due notice, to order any individual or group of individuals to withdraw any instructions or direction given to any other individual to refuse to answer any question before this Board?*
>
> *6. If the answer to Number 5 is in the affirmative has the Ontario Municipal Board power to commit to jail for failure to comply with such an order?*

The Court answered the questions as follows:

> *…. I would answer Qq. 1, 2 and 3 affirmatively. I refrain from answering Q. 4, since that question is too general in its scope and effect and perhaps somewhat academic. Question 5 is a rather odd question. For a Court or an administrative body to do what that question contemplates, is, to say the least, rather unorthodox procedure. Question 6 necessarily falls into the same pattern and it, too, should not be answered. Perhaps it is sufficient to say that if a witness lawfully summoned before the Board, is bound to answer questions put to him if ordered to do so, persons attempting to dissuade any such witness from giving evidence or to interfere with his testimony may well come within the purview of those sections of the Criminal Code, 1953-54 (Can.), c. 51, which are designed to prevent attempts to obstruct, pervert or defeat the course of justice. As I have stated, the Board, in my opinion, does not possess the contempt powers of a superior Court of Record, and it would have no power to deal with any contempt of its authority not committed in its presence. In that view, the content of Qq. 4, 5, and 6 becomes irrelevant.*

The reasons for the answers to the questions are as follows:

> *9….It is not contended that the language of s. 37 of the Ontario Municipal Board Act when read with s. 33 which declares that the Board for all purposes of the Act has all the powers of a Court of record, is not sufficiently broad in its scope and effect to give the Board the power to issue subpoenas to secure the attendance of witnesses. By the provisions of s. 37 the Board was given all such powers as were vested in the Supreme Court with respect to attendance and examination of witnesses, production and inspection of documents, entry on and inspection of property, enforcement of its orders and all other matters necessary or proper therefor.*
>
> *This language is admittedly very broad and reasonably construed it must be held to include by necessary implication such powers as are vested in the Supreme Court for the punishment of disobedience of its orders but subject to the restrictions mentioned later. That would, in my opinion, carry with it the authority to fine or commit to prison, or both, for contempt committed in the face of the tribunal.*
>
> *10 The practical reason for conferring contempt power is the Board's need, if its machinery is to function smoothly and efficiently. It is a power which is indispensable to the proper conduct of the proceedings before it. But notwithstanding the general language used in s. 37, since those essential powers are given to that body only to facilitate the procedure before it, to the extent of its reasonable requirements, they are not unrestricted in scope. The words are capable of a wide and a narrow construction, but I would consider that the principle to be deduced from the judgment of Bowen, L.J., in Wandsworth Bd. of Works v. United Telephone Co. (1884), 13 Q.B.D. 904, can appropriately be applied here. That learned jurist stated at p. 920:*
>
> > *. . . . if a word in its popular sense, and read in its ordinary way, is capable of two constructions, it is wise to adopt such a construction as is based upon the assumption that Parliament merely intended to give such power as was necessary for carrying out the objects of the Act and not to give any unnecessary powers.*
>
> *The power to fine or commit for contempt should be restricted to a degree adequate to the end intended to be served by the legislation, for although the powers, rights and privileges which are vested in the Supreme Court are, as to certain aspects of procedure and enforcement, conferred upon the Board and it has been given the powers of a Court of Record, it is nevertheless an inferior tribunal, and its administrative processes are subject to the general supervisory and appellate powers of the Supreme Court of Ontario. <u>At common law, an inferior Court of Record may commit to prison or fine for a contempt committed in facie curiae, but not for a contempt not committed in the Court's presence. That power is possessed only by superior Courts of Record. If the Board's contempt power is held to be equal to that possessed by an inferior Court of Record</u>*

the real object of the enactment will be adequately met and its effectiveness not impaired. The words should, in my view, be construed accordingly….(pp5-6).(emphasis added)

13…As I have stated, the Board, in my opinion, does not possess the contempt powers of a superior Court of Record, and it would have no power to deal with any contempt of its authority not committed in its presence....(p.7)

14 It should be remembered that while the power to punish summarily for contempt is considered necessary for the proper administration of justice, it is a power which, as has been said, should be used cautiously and sparingly; from a sense of duty and under the pressure of the public necessity, and not to vindicate the Judge or administrative officer as a person, but rather to prevent undue interference with the administration of justice.(p.7)

Statutory Powers Procedure Act

When the *Statutory Powers Procedure Act, 1971*, S.O. 1971 c.47 was enacted in the early 1970s, the following provision concerning contempt proceedings was included:

Contempt proceedings

13. *(1) Where any person without lawful excuse,…*

(c) does any other thing that would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court,

the tribunal may, of its own motion or on the motion of a party to the proceeding, state a case to the Divisional Court setting out the facts and that court may inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of the court. R.S.O. 1990, c. S.22, s. 13; 1994, c. 27, s. 56 (27). (emphasis added)

Same

(2) Subsection (1) also applies to a person who,

(a) having objected under clause 6 (4) (b) to a hearing being held as a written hearing, fails without lawful excuse to participate in the oral or electronic hearing of the matter; or

(b) being a party, fails without lawful excuse to attend a pre-hearing conference when so directed by the tribunal. 1997, c. 23, s. 13 (17).

Obtaining Compliance

As noted above, when faced with a person/party who has not complied with a Board order, one of the more common responses is to bring a motion before the Board for another order requiring compliance. Such an application may be appropriate where there is a genuine disagreement as to the intention of the order and where the disagreement cannot be resolved on consent. See *Re*

Track Corp Canada Inc.(May 11, 2006). Such a motion might be considered by the Board on an expedited basis, by teleconference, where circumstances warrant it.

Punishment for Non-Compliance with Board Orders: Committal to Jail and/or Financial Penalties

Ascot Estates at King Ltd. v. King (Township)

In *Ascot Estates at King Ltd. v. King (Township*, 1991 CarswellOnt 501, 6 M.P.L.R (2d) 101(Ont. Court of Justice (General Division)), an application was made to Court by a development company for an order committing the respondents to the common jail for failing to comply with an Ontario Municipal Board order. The applicant further sought an order that the respondents pay fines for breaching the order and for every day the respondents continue to breach the order.

As the headnote to the case advises:

> *The applicant owned 96 acres of land in the respondent township upon which it sought to develop on 30 residential lots. It required an official plan amendment, a rezoning and a draft plan of subdivision. The township refused to grant the official plan amendment and the change in zoning. The applicant successfully appealed to the Ontario Municipal Board ("OMB"). The OMB did not, however, stipulate a specific date by which the rezoning by-law was to be enacted. The township first petitioned the Minister of Municipal Affairs to review the OMB decision and to impose a development freeze until new development policies were established, and then requested the OMB to review its decision pursuant to s. 42 of the Ontario Municipal Board Act. The applicant obtained a mandatory order compelling the township to comply with the OMB order. The township was requested to comply with the filed order, and refused. The applicant brought an application seeking an order committing the respondents to jail for failure to comply with the OMB's filed order and for monetary damages for breach of the order. The township defended the application on the basis that (1) the order was premature, as the applicant had not exhausted all of its remedies before the OMB, and (2) the OMB was to enforce its own orders.*

The Court declined to determine whether it was proper for the development company to file the order pursuant to then s.85 (now s.86) of the *Ontario Municipal Board Act* or whether such filing had to be done by the Board. Rather the Court decided that the development company had not exhausted all of its possible remedies before the Board before making application to the Court and dismissed the application.

It is clear that the Board is prepared to make findings of contempt and to administer punishment for non-compliance. Once again, the nature of the non-compliance affects the nature of the punishment, if any.

Lionheart Enterprises v. Richmond Hill

On the other hand, the Board has made it quite clear that the prospect of finding oneself in jail as a result of a contempt proceeding before it (in comparison with a proceeding before a Court) is "virtually preposterous". See *Lionheart Enterprises Ltd. vs. Richmond Hill*, (August 3, 2003) PL020446.

Wal-Mart v. Onyschuk et. al.

In an earlier case, *Wal-Mart v. Onyschuk et.al*, Oct. 2, 2002, PL971055,PL97090, where the Board was asked to exercise its jurisdiction under s. 13(c) of the *Statutory Powers Procedure Act*, in regard to a failure of one party to comply with one its orders regarding the safeguarding of the confidentiality of information provided by another party, the Board noted as follows:

> *Even if the Board only needs to be satisfied that a civil contempt was committed ex facie curiae and only on the less onerous test of finding that there is a prima facie case of contempt as a first step, the second step is to consider, in its discretion, whether to state a case to the Divisional Court, and the Board will not do so unless the administration of justice and the Board's process has been brought into disrepute and penal consequences should follow. (p.4)*

The Board found that the impugning of the Board's order was inadvertent and declined to state a case to the Court. The Board found that:

> *…its process and its role in the administration of justice has not been prejudiced nor has it been prejudiced in carrying out that exercise because of the inadvertent errors …*

In so doing, the Board referred, with approval, to paragraph 14 of the Diamond judgement referred to above.

In this case, it is important to note that the bringing of the motion requesting the Board to state a case suggested that the aggrieved party believed that punishment of the type that only a court could administer was called for since the harm had already occurred, the harm could not be

corrected by a further Board order, and since the harm had occurred ex facie the Board itself could not address the penalty for the alleged contempt.

Punishment for Non-Compliance with Board Orders: Application/Appeal Refused

Re Trident Members Inc.

In a recent decision, January 2008, *Re Trident Members Inc.* 2008 CarswellOnt 551, Ontario Municipal Board, the Board addressed the matter of contempt in the context of a request by a municipality that an appeal by an owner seeking approvals be dismissed as a result of the owners conduct in undertaking works in the area of the original Draft Plan of Subdivision (ie. a wetland area) of the 88 lots contrary to a previous order of the Board. In this case, it is important to note that the contempt was not in the face of the Board, rather it was a contempt ex facie.

> ***Contempt***
>
> *20 This Member accepts that consideration of contempt is more rare than the Board's awarding costs. In the past, the Board considered the awarding of costs in less than four percent of the cases and awarding costs in less than two percent. The threshold of contempt should be even higher and should exemplify "clearly unreasonable behaviour".*
>
> *21 This Member accepts that Section 37(c) of The Ontario Municipal Act R.S.O. 1990. c. 0.28 gives the authority for making the Order in Decision No. 3054 even without the agreement of the Parties.*
>
> > *General jurisdiction and powers*
> >
> > *37 (c). The Board has jurisdiction and power, to order and require or forbid, forthwith or within any specified time and in any manner prescribed by the Board, the doing of any act, matter or thing or the omission or abstention from doing or continuance of any act, matter or thing, which any person, firm, company, corporation or municipality is or may be required to do or omit to be done or to abstain from doing or continuing under this or any other general or special Act, or under any order of the Board or any regulation, rule, by-law or direction made or given under any such Act or order or under any agreement entered into by such person, firm, company, corporation or municipality;*
>
> *22 In addition, the Board accepts the Ontario Court of Appeal directions in Re Diamond and the Ontario Municipal Board [1962] O.J. No. 554 [1962] O.R. 328 that while accepting "the practical reason for conferring contempt power is the Board's need, if its machinery is to function smoothly before it", "they are not unrestricted in scope". The Court distinguishes between actions that actually occur before the Board and those that occur outside the Hearing itself. Clearly, this action occurred outside any Hearing.*
>
> *23 Further, the Board accepts that the actual determination of such "contempt" and more importantly, its punishment, is the prerogative of a higher Court based upon submissions received.*

It is not the prerogative of this Board to punish by way of a cost award or by ignoring the planning merits of the underlining Application.(emphasis added)

24 This Member, however, is mindful of the precautions and directions of this same Court Decision

> *"Par 14 It should be remembered that while the power to punish summarily for contempt is considered necessary for the proper administration of justice, it is a power which, as has been said, should be used cautiously and sparingly: from a sense of duty and under the pressure of the public necessity, and not to vindicate the Judge or administrative officer as a person, but rather to prevent undue interference with the administration of justice."*

25 Yet in considering the severity of the Applicant's action in clearing the vegetation from a proposed roadway and in building a road through a wetland designated as an Environment Protection area, the Board must consider the "public necessity" and the prevention of "undue interference".

26 In this regard, the Board distinguishes between the Applicant's actions and the consideration of the proposals on their planning merit. Further, the Board separates the consideration of the Applicant's actions with the consideration of punishment, which is the prerogative of a higher Court.

27 After considering all the information before it, the Board cannot ignore or pretend that the Applicant's action did not happen. The punishment, the process, and authority of the higher Courts, do not distract the Board from declaring the simple truth that the Applicant's actions constitute a form of contempt of the Board Order of October 31, 2006 in Decision No. 3054. The Board simply lets that conclusion stand quietly for the following reasons:

28 Firstly, the Board is mindful that the Applicant's construction works prior to October 2006 required the Board's response and Order in Decision No. 3054.

29 Secondly, the Applicant freely agreed to stop all construction and work activity in the area of the 88 lots as well as the St. Ola Lake 22 lot proposal. This obviously excluded the demolition of the existing shorefront cottage for which the Applicant had a permit.

30 Thirdly, Mr. Burton on behalf of the Applicant advised the Board that their client admitted to undertaking works in the area of the original Draft Plan of Subdivision of the 88 lots contrary to the previous Order.

31 Fourthly, the Board is mindful that before the latest extensive amendments to the internal road, the construction of the road through the wetland could pre-empt any later consideration of this portion of the project as to width and nature. This is to the Applicant's advantage prior to winter. The Board does not have the information before it in accessing otherwise about the rehabilitation already conducted.

32 Fifthly, the magnitude of the works is immense. They involve clearing trees and other vegetative cover along the whole of the previously proposed internal road allowance; the removal of organic soils up to 1.1 metres in depth down to the bottom of the wetland; and the placement of gravel material for the road to a height above the surrounding wetland.

33 Sixth, the Applicant claims that the construction contractor undertook the works in building a road through the wetland in the area of the proposed St. Ola Lake lots without the Applicant's direction. The Applicant's explanation requires the belief that the contractor would do such extensive work without direction; without the possibility of reimbursement for the original work; or without consideration of the costs of any necessary rehabilitation work on someone else's

property. The Board holds that such an explanation defies common sense and the reality of the circumstances.

34 Seventh, the Board accepts Mr. Burton's statement that it is the Applicant's responsibility for any construction on his property. The Board concludes that the actions of the Applicant undermine the trust that the Township, the County, and the population at large may hold in the ability of the Board in fairly managing events once the matter is before it. This Board does not accept that in providing the judicial framework, the Court expected the Board ignore or pretend that such an egregious action did not occur. They occurred; they damaged the wetland; the Applicant acted wrongly. In considering a remedy, the Board accepts the limitations established by the Courts. The Board takes no further action.

In this instance, the Board made the finding of contempt but felt constrained in regard to any possible punishment by the fact that the conduct was ex facie. Furthermore, the Board concluded that it could not use the contemptuous conduct as a reason for refusing the relief sought by the appellant in the context of the merits of its planning case.

On the other hand, where the contempt is in facie, the Board has been prepared to address the penalty side of non-compliance, where the circumstances warranted it.

***IBI Group v. Niagara Falls (City),* [1996] O.M.B.D. No. 1522 (O.M.B.)**

In *IBI Group v. Niagara Falls (City),* the Board was invited to refuse the relief sought by an appellant on the basis of a failure of the appellant to comply with the Board's procedural orders. The Board refused.

***Gateshead Enterprises Ltd. v. Kee Group Inc.*, 1998 CarswellOnt 3205 (O.M.B.)**

In *Gateshead Enterprises Ltd***.** the Board was invited to consider the following motion for relief:

1. Direction with respect to Kee Group Inc., Mavis Mall Limited and Barstev Holdings Inc.'s (collectively referred to as the "Kee Group") failure to adhere to the Board's Procedural Order issued on February 4, 1998;

2. An Order indicating the Board will exclude any evidence from the Kee Group with respect to the market impact on existing or planned facilities;

This relief was requested in the following context:

1 The matter before the Board relates to a proposal by Gateshead to develop a neighbourhood commercial facility along with the completion of a residential development at the southeast quadrant of the Mavis Road/Bristol Road intersection in the City of Mississauga. The Kee Group, which have an interest in similar existing or planned commercial facilities in the area is opposed to the Gateshead proposal. In

particular, it is the intention of the Kee Group to present evidence to the Board which purports that the incursion of the Gateshead proposal will have negative impacts on the planned function of the existing and planned commercial facilities. This assertion has spawned a motion by Gateshead and a cross-motion by the Kee Group.

After hearing argument, the Board ordered as follows:

27 Based on the foregoing and my review of the cases filed, I find that the Kee Group must provide all of the information detailed in the subject Board's Order and Attachment. If it is unable to do so, the Board will exclude it from calling any evidence with respect to the market impact on existing or planned commercial facilities.

Punishment for Non-Compliance with Board Orders: Awards of Costs

Glenpark Developments Inc. v. Caledon (Town), 2000 CarswellOnt 6753 (O.M.B.)

In this case, a development charges appeal, the following motion for relief was brought and ultimately ordered:

1. an order compelling the Town of Caledon to produce outstanding information it had promised to provide to the appellant both at and prior to the last prehearing conference held on September 15, 2001;

2. an order setting a new date for the meeting of like experts;

3. an order moving the date set in the Board's procedural order for the pre-filing of evidence;

4. an order adjourning the commencement date of the hearing; and

5. an order for costs against the Town in the amount of $3,000.

The reasons for the decision are found in Attachment "C" to this paper. The Board's order is based upon a municipal failure to comply with the procedural order. The key finding in this regard is as follows:

The Board has carefully considered all of the submissions for both parties and finds that the Town has failed to co-operate with the appellant and has acted improperly. The Town has failed to provide a reasonable justification for its delay in completing the undertakings and for the delay by its consultants in providing the necessary documentation requested by the appellants. It has acted in an unfair and unreasonable manner. The lack of co-operation by the Town has frustrated the terms of the Board's procedural order and has caused undue delay in these proceedings. The Town's actions constitute a frivolous disregard for the Board's process which is unacceptable.

***Sixteenth Warden Ltd. v. Markham (Town)*, 2002 CarswellOnt 3680 (O.M.B.)**

In *Sixteenth Warden*, the Board made an adverse award of costs against a party opposing a private appeal to the Board, on the following basis, related to non-compliance with the relevant procedural order:

> *16 Based on the evidence presented in the hearing, the Board finds that SRV is an active participant in the planning process in Ontario and that SRV is familiar with the Board's rules of practice and procedure. SRV is aware of the responsibilities that come with being a party to an Ontario Municipal Board hearing. Any party to a proceeding before the Board who engages in unreasonable conduct exposes itself to the possibility that costs may be awarded against it. The Board will not hold SRV to a lower standard of conduct than any other party appearing before it, regardless of the nature of its mandate.*
>
> *17 The Board finds that SRV's failure to comply with the Board's procedural order constituted unreasonable conduct that resulted in undue prejudice and delay in the hearing process. The failure of SRV to comply with the Board's procedural order wasted the Board's time during the hearing and wasted a great deal of the proponent's time and resources, in preparing for the hearing.*
>
> *18 The Board feels compelled to make reference to the conduct of Mr. Donnelly. During the hearing, Mr. Donnelly made statements impugning the character, veracity and competence of opposing counsel and of other professionals, some of whom were at the hearing and others of whom were not in attendance. At times, during the hearing, his conduct and style of advocacy were inappropriate. It is hoped that only inexperience causes Mr. Donnelly to mistake deceptive and disrespectful behavior for tough and effective client representation.*

Punishment for Non-Compliance with Board Orders: Report Lawyer Conduct to Law Society of Upper Canada or Institute contempt proceedings pursuant to s. 13 of *Statutory Powers Procedure Act*

I attach *Re West End Development Corp.* 1995 CarswellOnt 477, 29 Admin. L.R. (2d) 71, a decision of the Ontario Environmental Appeal Board in regard to a show cause hearing instigated by the Board itself in the face of conduct of a lawyer in failing to attend a prehearing at the appointed time. The discussion in this decision is instructive on the question of when the more severe remedies in regard to contempt are appropriate.

Board Rules of Practice and Procedure

Given the rather impressive arsenal of tools to enforce compliance with its orders, whether procedural or otherwise, the provisions in the Board's Rules of Practice and Procedure are quite

tame. The following are provisions that might be said to be relevant to the question of compliance with Board rules or orders:

> **6. Board may exempt from Rules** The Board may grant all necessary exceptions from these Rules or a procedural order, or other relief as it considers appropriate, to ensure that the real questions in issue are determined in a just manner.
> *(Note, however, about dates for filing/delivering of documents:* ***appeals must be filed on time.*** *If a party files evidence or other material after the required date, the Board may decide to disregard it.)*
>
> **7. Failure to comply with Rules** The Board expects that these Rules and Board orders will be met. If a party has not complied with a requirement of these Rules or of a procedural order, the Board will decide whether or not any part of or step in the proceedings, or any written or visual evidence or order is not valid as a result.
>
> **11. Extension or Reduction of Time** The Board may extend or reduce any time required **in these Rules or in a Board order**, with any terms or conditions. A request for a change in time requirements may be made by bringing a motion, or the Board may change a time requirement on its own initiative, with or without a hearing, either before or after the time period expires. Time for serving *(delivering)* a document or other evidence may also be extended or reduced if all those who must be served consent to this in writing.
>
> **108. Issuing a Board Decision or Order** A Board order may be contained in the decision, and issue as a Decision and Order of the Board. Where the order issues after the written decision (such as where conditions have been imposed which must be met before final approval), the Board Secretary will issue the appropriate order as directed by the Board.
>
> **109. Effective Date of Board Decision** A Board decision is effective on the date that the decision or order is issued in hard copy, unless it states otherwise.

Comments on Prehearings (Rules 73 to 82 below):

There can be at least three types of activities at a prehearing conference, as may be seen from the subjects which may be considered (see Rule 73 below). These are: a settlement conference (which is similar to a mediation), a discussion of procedure for the hearing, and a preliminary hearing (for motions, etc.). There may be no clear division between these procedures, and the Board may switch from one to another whenever it seems appropriate.

Before a prehearing conference, the Board may send the parties a sample Procedural Order (a copy follows these Rules in the Attachments). The parties are expected to study the contents of this sample, and to meet if possible, and to come to the prehearing conference prepared to discuss the issues and procedures dealt with in the sample order. Following the prehearing, the Board will issue a formal order governing the procedure and issues for the hearing, based on the discussion of the contents of the sample order at the prehearing. <u>The Board Member(s) conducting the later hearing must follow the order, unless a party convinces the Member that it is appropriate to change the order.</u>

If the Board hears some evidence and/or submissions on the issues in a preliminary hearing mode at the prehearing, and decides that it can dispose of some or all of them, it will make

formal decisions about the issues (given either during the prehearing or at a later date). These will be set out in the written order following the prehearing, and this is a final order on those issues.

Note that the prehearing Member will not necessarily conduct the hearing. It is usually desirable that this Member preside at the hearing to ensure continuity. A Member may state this at the prehearing (it is often stated as "This Member is seized".) However, in order to ensure speedy hearings, the Board may assign another Member or Members where the prehearing Member is not available for an early hearing.

Sample Procedural Order

As noted previously, the Board's Sample Procedural Order is found at Attachment "A" to this paper. On the matter of compliance with the Procedural Order the following commentary is found in the introductory language to the Sample Order:

> *"Note that the Board expects that the terms of the procedural order when issued will be met. If a party has not complied with a requirement of a procedural order, the Board will decide whether or not any part of or step in the proceeding, or any written or visual evidence or order is not valid as a result." (ed - Attachments to the Rules of Procedure, 2.Sample Procedural Order - found in a paragraph before the sample Procedural Order)*

This language is rather obtuse. It is not readily clear what is meant. Furthermore, could it be interpreted to limit the Board's effective ability to exercise its broader enforcement jurisdiction, such as the awarding of financial penalties in the event of non-compliance with its orders? Although unlikely, as noted previously, given the Board's wide enforcement jurisdiction, this language could have been considerably clearer and stronger.

Attachment "A" - Sample Procedural Order

This is a sample of the Procedural Order that the Board issues for most matters (except expropriation) after holding a prehearing conference. For further explanations and meanings of the terms used, see the attachment to this sample order. Note that the Board expects that the terms of the procedural order when issued will be met. If a party has not complied with a requirement of a procedural order, the Board will decide whether or not any part of or step in the proceeding, or any written or visual evidence or order is not valid as a result.

ONTARIO MUNICIPAL BOARD

PROCEDURAL ORDER

This is an appeal (referral)…

OMB Case and File Number:

1. The Board may vary or add to these rules at any time, either on request or as it sees fit. It may alter this Order by an oral ruling, or by another written Order.

Organization of the Hearing

2. The hearing will begin on ……,… (year) at …a.m./p.m. at ..... in the municipality of .....[Optional:.. An evening session will be held on .....]

3. The length of the hearing will be about ……days.

4. The parties and participants identified at the prehearing conference (see the Attachment for the meaning of these terms) are: [Optional:...listed in Attachment 1 to this Order.]

5. The Issues are: [Optional:... set out in the Issues List attached as Attachment 2.] There will be no changes to this list unless the Board permits, and a party who asks for changes may have costs awarded against it.

6. Any person intending to participate in the hearing should provide a telephone number to the Board as soon as possible (preferably before the prehearing conference.) Any such person who will be retaining a representative should advise the other parties and the Board of the representative's name, address and phone number as soon as possible.

Requirements Before the Hearing

[7]. [Optional] Expert witnesses in the same field shall have a meeting before the hearing to try to resolve or reduce the issues for the hearing. The experts must prepare a list of agreed facts and the remaining issues to be addressed at the hearing, and provide this list to all of the parties and the municipal Clerk.

[8]. [Optional] A party who intends to call witnesses, whether by summons or not, shall provide to the Board, the other parties and to the Clerk a list of the witnesses and the order in which they will be called. This list must be delivered at least .....…calendar days before the hearing.

9. An expert witness shall prepare an expert witness statement which shall list any reports prepared by the expert, or any other reports or documents to be relied on at the hearing. Copies of this must be provided as in section [12]. Instead of a witness statement, the expert may file his or her entire report if it contains the required information. If this is not done, the Board may refuse to hear the expert's testimony.

[10.] [Optional] A [witness] [participant] must provide to the Board and the parties a [witness] [participant] statement at least ..... calendar days before the hearing, or the witness or participant may not give oral evidence at the hearing.

11. Expert witnesses who are under summons but not paid to produce a report do not have to file an expert witness statement; but the party calling them must file a brief outline of the expert's evidence, as in section [12].

12. On or before …….[a minimum of 30 calendar days before the hearing date], the parties shall provide copies of their [witness and] expert witness statements to the other parties and to the Clerk of ……..

13. [Optional] On or before ……, the parties shall provide copies of their visual evidence to all of the other parties. If a model will be used, all parties must have a reasonable opportunity to view it before the hearing.

14. Parties may provide to all other parties and file with the Clerk a written response to any written evidence within 7 days after the evidence is received.

15. A person wishing to change written evidence, including witness statements, must make a written motion to the Board.

(see Rules 34 and 35 of the Board's Rules, which require that the moving party provide copies of the motion to all other parties 10 days before the Board hears the motion.).

16. A party who provides a witness' written evidence to the other parties must have the witness attend the hearing to give oral evidence, unless the party notifies the Board at least 7 days before the hearing that the written evidence is not part of their record.

17. Documents may be delivered by personal delivery, facsimile or registered or certified mail, or otherwise as the Board may direct. The delivery of documents by fax shall be governed by the Board's Rules [26 – 31] on this subject. Material delivered by mail shall be deemed to have been received five business days after the date of registration or certification.

18. No adjournments or delays will be granted before or during the hearing except for serious hardship or illness. The Board's Rules 61 to 65 apply to such requests.

This Member is [not] seized.

So orders the Board.

ATTACHMENT TO SAMPLE PROCEDURAL ORDER

Purpose of the Procedural Order and Meaning of Terms

The Board recommends that the parties meet to discuss this sample Order before the prehearing conference to try to identify the issues and the process that they want the Board to order following the conference. The Board will hear the parties' comments about the contents of the Order at the conference.

Prehearing conferences usually take place only where the hearing is expected to be long and complicated. If you are not represented by a lawyer, you should prepare by obtaining the Guide to the Ontario Municipal Board, and the Board's Rules, from the Board Information Office, 15th Floor, 655 Bay Street, Toronto, M5G 1E5, 416-326-6800 or Toll Free 1-866-887-8820 , or from the Board website at www.omb.gov.on.ca.

Meaning of terms used in the Procedural Order:

Party is an individual or corporation permitted by the Board to participate fully in the hearing by receiving copies of written evidence, presenting witnesses, cross-examining the witnesses of the other parties, and making submissions on all of the evidence. If an **unincorporated group** wishes to become a party, it must appoint one person to speak for it, and that person must accept the other responsibilities of a party as set out in the Order. Parties do not have to be represented by a lawyer, and may have an agent speak for them. The agent must have written authorization from the party.

NOTE that a person who wishes to become a party before or at the hearing, and who did not request this at the prehearing conference, must ask the Board to permit this.

Participant is an individual, group or corporation, whether represented by a lawyer or not, who may attend only part of the proceeding but who makes a statement to the Board on all or some of the issues in the hearing. Such persons may also be identified at the start of the hearing. The Board will set the time for hearing this statements. **NOTE** that such persons will likely not receive notice of a mediation or conference calls on procedural issues. They also cannot ask for costs, or review of a decision as parties can. If a participant does not attend the hearing and only files a written statement, the Board <u>will not</u> give it the same attention or weight as submissions made orally. The reason is that parties cannot ask further questions of a person if they merely file material and do not attend.

Written and Visual Evidence: Written evidence includes all written material, reports, studies, documents, letters and witness statements which a party or participant intends to present as evidence at the hearing. These must have pages numbered consecutively throughout the entire document, even if there are tabs or dividers in the material. **Visual evidence** includes photographs, maps, videos, models, and overlays which a party or participant intends to present as evidence at the hearing.

Witness Statements: A **witness statement** is a short written outline of the person's background, experience and interest in the matter; a list of the issues which he or she will discuss and the witness' opinions on those issues; and a list of reports that the witness will rely on at the hearing. An **expert witness statement** should include his or her (1)

name and address, (2) qualifications, (3) a list of the issues he or she will address, (4) the witness' opinions on those issues and the complete reasons for the opinions and (5) a list of reports that the witness will rely on at the hearing. A **participant statement** is a short written outline of the person's or group's background, experience and interest in the matter; a list of the issues which the participant will address and a short outline of the evidence on those issues; and a list of reports, if any, which the participant will refer to at the hearing.

Additional Information

Summons: A party must ask a Board Member or the senior staff of the Board to issue a summons. This request must be made before the time that the list of witnesses is provided to the Board and the parties. (See Rules 41 and 42 on the summons procedure.) If the Board requests it, an affidavit must be provided indicating how the witness' evidence is relevant to the hearing. If the Board is not satisfied from the affidavit, it will require that a motion be heard to decide whether the witness should be summoned.

The order of examination of witnesses: is usually direct examination, cross-examination and re-examination in the following way:

direct examination by the party presenting the witness;
direct examination by any party of similar interest, in the manner determined by the Board;
cross-examination by parties of opposite interest;
re-examination by the party presenting the witness; or
another order of examination mutually agreed among the parties or directed by the Board.

Attachment "B" - *West End Development Corp., Re*

1995 CarswellOnt 477
29 Admin. L.R. (2d) 71

West End Development Corp., Re

Re sections 137, 140 and 144 of the Environmental Protection Act as amended

Re an application by WEST END DEVELOPMENT CORPORATION dated February 22, 1994 and received by the Board on August 15, 1994, for a hearing before the Environmental Appeal Board with respect to the order of the Director, Peel Regional Health Department, requiring the applicant to repair the leaking kitchen drain pipe, pump the kitchen septic tank, and connect all plumbing fixtures to municipal sanitary sewers. The applicant must obtain a Certificate of Approval prior to any construction, installation, enlargement, extension or alteration of the sewage system serving the residential rental property located at 1600 Hurontario Street, City of Mississauga, Regional Municipality of Peel, Ontario

Ontario Environmental Appeal Board

Levy, Member

Heard: December 13, 1994
Judgment: January 6, 1995
Docket: Doc. 00439.A1

Counsel: D. Martin, for Frances M. Viele.

Subject: Public; Civil Practice and Procedure

Administrative Law --- Practice and procedure.

Practice and procedure -- Contempt -- Show cause hearing -- Pre-hearing panel of Environmental Appeal Board ordering counsel to attend before board to show cause why board should not report conduct to Law Society of Upper Canada or institute contempt proceedings pursuant to s. 13 of Statutory Powers Procedure Act -- Explanation for counsel's non-attendance at pre-hearing conference and for related difficulties being reasonable and acceptable -- No prima facie case of contempt being established -- Circumstances not warranting complaint to Law Society of Upper Canada -- Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, s. 13.

An order made by a pre-hearing conference panel of the Environmental Appeal Board required counsel for a company to attend before the board to show cause why the board should not report her conduct to The Law Society of Upper Canada or institute contempt proceedings in accordance with s. 13 of the Statutory Powers Procedure Act (Ont.). The circumstances in which the order was issued involved the non-attendance of that counsel at a pre-hearing conference of a panel of the board, on a date that had been cleared in advance by board staff with the lawyer's office and confirmed in writing.

Held:

No order was made against counsel.

With respect to s. 13 of the Statutory Powers Procedure Act, no prima facie case of contempt was established. A complaint to The Law Society of Upper Canada about the lawyer's conduct was unwarranted in the circumstances.

The evidence did not support a finding that there had been an abuse of process in this case. No order under s. 23(1) of the Statutory Powers Procedure Act was appropriate.

The difficulty that occurred with respect to the pre-hearing conference date was the result of a communication error between counsel for the company and the individual who attended the pre-hearing conference in her place. While the counsel believed that the other person had taken over carriage of the file, he did not realize that she expected him to represent the company in the appeal and to attend at the pre-hearing conference. On the morning of the pre-hearing conference he believed he was standing in for her, and only after the pre-hearing conference concluded did he realize that the file had been made his responsibility. These facts were not known to the pre-hearing conference panel.

The explanation for the events that occurred was both reasonable and acceptable. The counsel

did not double-book, and the late attendance and lack of preparedness of the agent were due to a misunderstanding as to which person in the company's legal department was responsible for the file. The mistake appeared to have been an innocent one.

Cases considered:

Ontario Waste Management Corp., Doc. CH-87-02 [unreported] -- applied

R. v. Chippeway, [1994] 10 W.W.R. 153, (sub nom. R. v. Bunn) 97 Man. R. (2d) 20, 79 W.A.C. 20, 94 C.C.C. (3d) 57 (C.A.) -- applied

R. v. Glasner (1994), 19 O.R. (3d) 739, 34 C.R. (4th) 243, 93 C.C.C. (3d) 226, 74 O.A.C. 81, 119 D.L.R. (4th) 113 (C.A.) -- followed

Statutes considered:

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22 --

s. 13

s. 13(c)

s. 14(2)

s. 23

s. 23(1)

s. 23(3)

Show Cause Hearing pursuant to s. 13(c) of Statutory Powers Procedure Act (Ont.).

***Levy*, Member:**

1 A show cause hearing was conducted by me on December 13, 1994, pursuant to s. 13(*c*) of the *Statutory Powers Procedure Act* ("SPPA"), R.S.O. 1990, c. S.22.

13. Where any person without lawful excuse,

. . . . .

(*c*) does any other thing that would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court,

the tribunal may, of its own motion or on the motion of a party to the proceeding, state a case to the Divisional Court setting out the facts and that court may inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of the court.

Background

2 On November 14, 1994, a pre-hearing conference was conducted by another member of the Board, resulting in several orders which were made orally (and later confirmed on November 22), including the following requirement:

1. Frances M. Viele shall attend before the Board on December 13, 1994 to show cause why the Board should not report her conduct to the Law Society of Upper Canada or institute contempt proceedings in accordance with section 13 of the *Statutory Powers Procedure Act*.

3 Ms Viele, a lawyer, is an employee of the applicant and solicitor of record in this proceeding. On November 22 the Board also issued written reasons explaining why this order had been made. The commencement of the pre-hearing had been delayed by at least one-half hour due to the late arrival of the applicant's representative, Ray Niejadlik. Several people had been kept waiting, including other counsel, parties and witnesses. The Board had scheduled this matter in Brampton as a convenience to the parties, and had no other matters or work to attend to.

4 Upon his arrival, Mr. Niejadlik advised the Board that the lawyer had been "called away to another court this morning." He had just been handed the file, which he had not had an opportunity to review; nor had he been briefed on the matter. The date for the pre-hearing had been cleared in advance by Board staff with the lawyer's office, and was then confirmed in writing.

5 The written reasons of the Board, dated November 22, include the following observations:

It would appear from all this that counsel for the applicant deliberately double-booked, and failed to make adequate and timely arrangements to ensure that her obligations to this Board, which were put in jeopardy by double-booking, were carried out.

Regardless of what other courts and tribunals have come to expect from counsel and are prepared to accept, this Board is concerned about the problems that arise from double-booking. Counsel who double-book make a deliberate decision to enter into a course of action that entails serious risks that they will not keep their commitments to one or the other of their clients and to one of the two tribunals before which they are to appear. Even if they do not intend to cause such problems, they can foresee such problems arising when they double-book and have a duty to take all reasonable steps to guard against this. (p. 4 [p. 63, ante])

6 The Board was concerned about an apparent pattern of extensive and repeated double-booking on the part of the lawyer.

[T]he agent for counsel for the applicant told the Board that on the day following the pre-hearing conference, counsel for the applicant was scheduled to appear in six different courts, and volunteered that it would be impossible for her to accomplish this feat. He added that he had been hired to help correct this problem. (pp. 6-7 [p. 66, ante])

7 The reasons discussed the type of problems which the Board has experienced in this regard:

Problems of lateness, lack of preparation, and non-attendance of lawyers as a result of double-booking have been an ongoing problem at this Board. ...

. . . . .

It is particularly important that counsel and agents honour their commitments for a number of reasons, which result from differences between this Board and many courts. First and foremost, we schedule only one hearing per day. Unlike many courts, if a lawyer is not prepared to proceed at the allotted time, there are no other matters on the docket that can fill the time until the lawyer arrives. In addition, in an attempt to be accessible to the main parties and the community potentially affected by decisions that are before the Board, we schedule our pre-hearing conferences and hearings as close as possible to the location of the facility or property that is the subject of our proceedings. This frequently means that some Board members, counsel, other parties, and witnesses have travelled substantial distances to attend the hearing or pre-hearing conference, and may have had to travel the day before and incur hotel and meal expenses. (This

was not the case in this instance, however.) In addition, most of this Board's members are part-time members, who agree to set aside time from their other careers to attend hearings. Aborted or delayed hearings and pre-hearing conferences cause considerable disruption to their schedules as well as creating difficulties in rescheduling around their other responsibilities. (pp. 5-6 [pp. 63-64, ante])

8 In the reasons, the Board indicated that it would be left open for me to consider other possible sanctions, such as an order made under s. 23 of the SPPA. The relevant portions of that section state:

(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

(3) A tribunal may exclude from a hearing anyone, other than a barrister and solicitor qualified to practise in Ontario, appearing as an agent on behalf of a party or as an adviser to a witness if it finds that such person ... does not understand and comply at the hearing with the duties and responsibilities of an advocate or adviser.

The Process

9 A Notice of Show Cause Hearing was issued by the Board on November 28 and sent to all of the parties (Exhibit 1). I was advised by Ms Martin that she had received no indication from the other parties that they were intending to appear at this hearing. At the suggestion of Ms Martin, the hearing commenced with lengthy submissions, on behalf of the lawyer, as to the facts and circumstances. At my request, Mr. Niejadlik and Ms Viele were then sworn as witnesses, and asked whether they accepted as true the submissions of counsel. I then proceeded to ask them a few questions, and provided counsel with the opportunity to ask any further questions of them. A caution was provided to the witnesses pursuant to s. 14(2) of the SPPA. Also in attendance was Dina Almeida, one of the applicant's law clerks. She was not called as a witness. No evidence was called to contradict the case presented on behalf of the lawyer. When no closing submissions were forthcoming by Ms Martin, I adjourned the hearing and reserved my decision.

10 In a 1990 decision of the Environmental Assessment Board, involving a show cause hearing (*Ontario Waste Management Corporation*, CH-87-02), the Board determined that s. 13 entails a two-step process:

1) Was there contempt?

2) If there was, whether the Board, in the exercise of its discretion, ought to state a case to the Divisional Court. (p. 14)

11 I also found that a prima facie case of contempt would have to be established before the Board would proceed to determine whether it ought to forward the matter to the court.

The Evidence

12 The following facts were adduced on the lawyer's behalf at the show cause hearing.

13 Ms Viele is a duly licensed Ontario lawyer who has been employed since January 1993 by the applicant, a company with 13,000 residential units under management in several municipalities. The legal work involves collection matters in Small Claims Court, trials in landlord-tenant court, prosecutions in Provincial Offences Court and hearings before a variety of administrative tribunals. The company's legal department includes a lawyer and three law clerks. All of them attend hearings. One clerk, Vesna Vojvodic, was handling this matter up until mid-September when she left work on maternity leave. She was also in charge of coordinating the hearings schedule for all matters involving the legal department, and ensuring that the appointment books and tickler (reminder) file were diarized. After she left, this work fell to another clerk who did not manage this task in a satisfactory manner.

14 When the pre-hearing conference was scheduled, the appointment book in the office was blank for November 14, although a trial had, in fact, been scheduled for the Small Claims Court in Mississauga. Ms Martin produced a Notice of Trial (returnable November 14) issued by the Mississauga Small Claims Court on October 3 (and received by the applicant, according to the date stamp, on October 11), which has been marked as Exhibit 2.

15 Mr. Niejadlik had been employed by the applicant previously, and had competently carried out the scheduling function, among other things. He had left the company some time ago, but Ms Viele requested him to return, in light of the difficulties which were occurring in the wake of Ms Vojvodic's departure. He returned to the company at the beginning of November and began once again to take responsibility for coordinating the hearing schedule and maintaining the appointment books.

16 The problem which arose in this case is not related to double, triple or even quadruple booking, as the staff in the department are capable of handling several matters scheduled for the

same day in different locations. There are currently six outstanding files involving Georgina Bates, a tenant of the applicant, and one of the parties in this proceeding. The difficulty which occurred on November 14 was the result of a communication error between Mr. Niejadlik and Ms Viele. She believed that he had taken over carriage of all of the Bates files except a lengthy landlord-tenant case which she was handling. However, he did not realize that Ms Viele expected him to represent the applicant in this appeal, including attendance at the pre-hearing conference.

17 On Friday, November 11, Ms Viele was involved in a long examination for discovery which did not conclude until 6:30 pm. She did not return to the office. Consequently, she did not meet or talk with Mr. Niejadlik at the end of the day, as was their usual practice, to review the schedule for the next day (in this case, Monday, November 14). He believed that he was supposed to attend the Small Claims Court trial on Monday. It was not until that morning when they spoke by telephone and realized there had been a misunderstanding between them. Mr. Niejadlik took the file, placed calls alerting others that he would be arriving late, and travelled as quickly as he could to the municipal building for the pre-hearing. He was still under the belief at this time, however, that it was Ms Viele's file, and that he was merely standing in for her.

18 At the pre-hearing conference, Mr. Niejadlik quickly reviewed the file and was able to participate in developing a hearing schedule and providing the undertakings which are confirmed in the orders made by the Board. After his arrival, the matter proceeded relatively smoothly. Ms Martin advised that Mr. Niejadlik had practised law for many years in Toronto, and is an experienced and capable advocate.

19 It was not until sometime after the pre-hearing conference concluded, when Mr. Niejadlik had an opportunity to speak further with Ms Viele, that he realized that the file had been made his permanent responsibility. The timing was, once again, unfortunate. If the presiding Board member had been provided with the same facts which were presented to me, I have considerable doubt as to whether this show cause hearing would have been ordered.

20 Ms Martin submitted that there had been a grave inconvenience and discourtesy to the Board and persons in attendance on November 14 as a result of the late arrival and lack of preparedness of Mr. Niejadlik. However, this did not result from double-booking by Ms Viele or the applicant's legal department. On behalf of the lawyer, Ms Martin apologized to the Board for any inconvenience and discourtesy which was caused. She submitted that the events which occurred, and the error which had caused them, do not warrant a finding of contempt or a complaint to the Law Society.

21 With respect to the Board's finding, referred to above, regarding the number of matters scheduled for the day following the pre-hearing conference, Ms Martin submitted that there were in fact four, not six, separate matters scheduled, three of them in different courts. The four members of the legal department staff were able to attend to all of these matters.

Findings

22 The conduct of some agents and lawyers before this Board has given rise to serious concerns about the problems caused by double-booking, late attendances and lack of preparedness. The Board has taken steps to deal with this situation by issuing a directive on the subject in November 1993 (*Practice Direction No. 1* [at p. 67, ante]), publishing it in the *Ontario Reports* (a publication sent to all Ontario lawyers) in January 1994, and sending a copy to the parties (or their representatives) in each proceeding. Mr. Niejadlik confirmed at the pre-hearing that a copy of the practice direction was in his file.

23 The practice direction includes the following statements [at pp. 67-69, ante]:

Accordingly, all hearings scheduled with the consent of the parties, or by the Board at a status hearing are peremptory. The hearing will proceed on the date fixed. By consenting to the date, all parties or their counsel or agents will be considered to have committed themselves to be present on the date fixed, to be prepared to proceed, and to have undertaken to make no other commitments that will render their attendance impossible.

. . . . .

Counsel and agents who are retained by a party after a hearing date has been set should accept the retainer only if they are available on that date and have sufficient time to prepare their case. A counsel or agent who accepts a retainer under these circumstances will be deemed to have agreed to appear and present his or her client's case on the date set for the hearing unless he or she persuades the Board that there were compelling reasons for accepting the retainer without having time to prepare the case and being ready to proceed on the hearing date.

Counsel and agents are expected to arrive at hearings on time and be prepared to proceed. When counsel arrive late to hearings, fail to attend hearings of which they have been notified, or arrive at hearings unprepared to proceed, without reasonable excuse, the Board will consider reporting their conduct to the Law Society of Upper Canada or instituting contempt proceedings

in accordance with section 13 of the *Statutory Powers Procedure Act*. In the case of agents, the Board will consider instituting contempt proceedings or exercising its power under section 23 of the *Statutory Powers Procedure Act* to exclude the agent from hearings before the Board.

24 The Board expects full compliance by parties and their representatives, be they lawyers or otherwise. The situation, as it unfolded before and was explained to the Board at the pre-hearing, appeared to involve each of these problems and constitute a direct violation of Board policy, as stated in the practice direction.

25 However, I am satisfied by the evidence tendered on behalf of the lawyer at the hearing before me, that the explanation for the events which occurred on November 14 is both reasonable and acceptable. I find that double-booking on this occasion by the lawyer did not occur, and that the late attendance and lack of preparedness of the agent was due to a misunderstanding as to which person in the applicant's legal department was responsible for this file. The confusion no doubt resulted from a variety of circumstances such as the heavy court calendar of the applicant's legal department, the problem of keeping appointment books current and coordinating schedules which resulted from a maternity leave, the number and variety of files involving Ms Bates, and Mr. Niejadlik's recent return to the company. The mistake appears to have been an innocent one. In addition, I accept the apology made on behalf of the lawyer, and believe that she is sincere in her regret as to what has happened.

26 Ms Martin presented no legal argument. I have briefly reviewed the law of contempt, including two recent appellate decisions involving double-booking by lawyers. In *R. v. Glasner*, 19 O.R. (3d) 739 (September 1994), the Ontario Court of Appeal overturned a conviction for contempt and included in its decision the following observations:

Lawyers are officers of the court and a lawyer who undertakes to appear in court on behalf of a client at a specified time commits to being present at that time unless he or she takes the remedial steps called for in *R. v. Anders* (1982), 67 C.C.C. (2d) 138, 136 D.L.R. (3d) 316 (Ont. C.A.) (arrange for an adjournment, ask to be excused from attending or find substitute counsel), or unless some unforeseen event occurs. A lawyer's ethical and professional obligation is the same whether the court attendance is for a murder trial or to speak to sentence or even to attend on a matter to be spoken to. But when determining whether to make a finding of contempt of court, I agree with Mr. Greenspan's submission that the court should consider the consequences of failing to appear. The nature of the proceedings, delay, inconvenience to the participants -- jurors, witnesses, lawyers and judge -- prejudice to the client, wastage of court time and resources, and repetitious conduct may all be relevant in assessing the consequences

of a lawyer's non-attendance on the administration of justice. Conduct that has little or no effect on the administration of justice cannot support a conviction for contempt.

. . . . .

In short, the fault requirement for criminal contempt calls for deliberate or intentional conduct, or conduct which demonstrates indifference, which I take to be akin to recklessness. Nothing short of that will do. And, of course, the court hearing a contempt charge must consider the accused's explanation, including any apology tendered, and then determine on all of the evidence whether the case has been made out beyond a reasonable doubt ... (pp. 750-1)

27 In *R. v. Chippeway*, [1994] 10 W.W.R. 153 (October 1994), the Manitoba Court of Appeal, in overturning a conviction for contempt, held that inadvertence without "wilful or deliberate conduct intended to frustrate, or capable of frustrating, the administration of justice, does not constitute contempt of court" (p. 159).

28 In light of the above, I am not persuaded that a prima facie case of contempt has been established. Further, it seems to me that a complaint to the Law Society about the lawyer's conduct in these circumstances is unwarranted. I have considered whether an order made under s. 23(1) of the SPPA would be appropriate. In some situations a tribunal might contemplate, for example, using this provision to award costs personally against an agent or lawyer. However, in my view, the evidence does not support a finding that there has been an abuse of process in this case.

29 Accordingly, I make no order whatsoever against Ms Viele.

Order accordingly.

END OF DOCUMENT

Attachment "C" - *Glenpark Development Inc. v. Caledon (Town)*

Glenpark Developments Inc. v. Caledon (Town)

Glenpark Developments Inc. has appealed to the Ontario Municipal Board under subsection 14 of the Development Charges Act, S.O. 1997 c. 27, as amended, against By-law 99-109 of the Town of Caledon OMB File No. D990071

Ontario Municipal Board

Wyger Member

Heard:
Judgment: November 23, 2000
Docket: DC990054

Counsel: J. Alati for Glenpark Developments Inc.
D. J. Ostler for Town of Caledon

Subject: Public

Municipal law --- Development charges and levies -- Development charges -- Miscellaneous.

Cases considered by Wyger Member:

Glenpark Developments Inc. v. Caledon (Town) (2000), 2000 CarswellOnt 6965 (O.M.B.) -- considered

Wyger Member:

1 The appellant brought a motion for the following:

1. an order compelling the Town of Caledon to produce outstanding information it had promised to provide to the appellant both at and prior to the last prehearing conference held on September 15, 2001;

2. an order setting a new date for the meeting of like experts;

3. an order moving the date set in the Board's procedural order for the pre-filing of evidence;

4. an order adjourning the commencement date of the hearing; and

5. an order for costs against the Town in the amount of $3,000.

2 The Board is satisfied that sufficient notice of this motion has been provided to the Town. The time for service of the motion materials is hereby abridged.

3 Prior to the last prehearing conference the parties and like experts met for the purposes of discussing and narrowing the issues. The parties agreed at that meeting, to provide by way of undertaking, additional information to assist the parties in preparing for the hearing. The Town prepared the list of outstanding undertakings. The Town indicated that the remaining

outstanding information requested by the appellant and itemized on the undertakings list would be provided within two weeks. On consent of the parties agreed to a schedule of dates for the exchange of witness statements, a meeting of like experts and the commencement of the hearing. The Board issued a procedural order on September 27, 2000 (see Decision/Order No. 1409 [2000 CarswellOnt 6965 (O.M.B.)]) which reflected those dates as agreed upon.

4 The evidence presented today demonstrates that the appellant has worked diligently towards meeting those dates and that the appellant has complied in a timely manner with the undertakings it gave to the Town. The Board also finds from the evidence submitted and from the submissions of counsel, that full and complete answers to all of the undertakings given by the Town to the appellant have not been provided. The outstanding information is pertinent to and is material to the issues that will be dealt with by the Board in the upcoming hearing. The appellant is entitled to receive that information. The Town has agreed once again today to provide the information to the appellants within two weeks.

5 As a result of the Town's failure to fulfill its undertakings the dates in the Board's procedural order cannot be met. The procedural order must be amended and the Board must reschedule the hearing date.

6 The Board orders that the procedural order (Attachment 1 to Decision/Order No. 1409 issued on September 27, 2000) is hereby amended as follows:

1. Paragraph 2(a) is deleted in its entirety and replaced with the following:

The hearing will begin on January 29, 2001 at 10:00 a.m. in the Municipality of Caledon, 6215 Old Church Road, Community Centre Complex.

2. Paragraph 9 is deleted in its entirety and replaced with the following:

If parties intend to call expert or professional witnesses, the witnesses in the same discipline shall meet on or before December 15, 2000, and shall produce for the Board and the parties a written outline of facts and issues in agreement or in dispute. This will be filed and copies provided within fifteen days of the meeting, as set out below.

3. Paragraphs 12 (i) and (ii) are deleted in their entirety and replaced with the following:

(i) On or before Friday, January 5, 2001 the parties shall provide copies of their written evidence to all of the other parties.

(ii) On January 19, 2001 the parties shall meet to provide copies of their visual evidence for viewing.

7 All other provisions of the Board's procedural order will remain the same.

8 The appellant has asked that costs be awarded in the amount of $3,000. The Board has carefully considered all of the submissions for both parties and finds that the Town has failed to co-operate with the appellant and has acted improperly. The Town has failed to provide a reasonable justification for its delay in completing the undertakings and for the delay by its consultants in providing the necessary documentation requested by the appellants. It has acted in an unfair and unreasonable manner. The lack of co-operation by the Town has frustrated the terms of the Board's procedural order and has caused undue delay in these proceedings. The Town's actions constitute a frivolous disregard for the Board's process which is unacceptable.

9 The Board orders that the Town of Caledon pay costs in the amount of $3,000 to Glenpark Developments Inc.

10 The Board further orders that on or before November 28, 2000 the Town of Caledon provide full and complete answers to all of its outstanding undertakings including Undertaking No. 2.3, 2.7, 2.10, as set out on Attachment 1.