Consortium Developments (Clearwater) Ltd. *Appellant*

v.

The Corporation of the City of Sarnia and the Lambton County Roman Catholic Separate School Board *Respondents*

and between

Kenneth MacAlpine, James Pumple and MacPump Developments Ltd. *Appellants*

v.

The Corporation of the City of Sarnia and the Lambton County Roman Catholic Separate School Board *Respondents*

and

The Attorney General for Saskatchewan *Intervener*

Indexed as: Consortium Developments (Clearwater) Ltd. *v.* Sarnia (City)

File No.: 25604.

Hearing and judgment: March 16, 1998.

Reasons delivered: October 22, 1998.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Bastarache and Binnie JJ.

on appeal from the court of appeal for ontario

Municipal law -- Judicial inquiry -- Municipality passing resolution to establish judicial inquiry concerning certain land transactions -- Land developers causing summonses to be issued to municipal officials -- Whether resolution complies with requirements of Municipal Act -- Whether judicial inquiry trenches on federal criminal law power -- Whether quashing of summonses issued to municipal officials prevented land developers from assembling proper record -- Whether requirements of natural justice breached by procedure adopted at inquiry pre-hearing -- Municipal Act, R.S.O. 1990, c. M.45, s. 100(1) -- Constitution Act, 1867, s. 91(27).

Constitutional law -- Division of powers -- Judicial inquiry -- Municipality authorizing judicial inquiry concerning certain land transactions -- Whether judicial inquiry trenches on federal criminal law power -- Municipal Act, R.S.O. 1990, c. M.45, s. 100(1) -- Constitution Act, 1867, s. 91(27).

Administrative law -- Natural justice -- Judicial inquiry -- Municipality authorizing judicial inquiry concerning certain land transactions -- Whether requirements of natural justice breached by procedure adopted at inquiry pre-hearing -- Municipal Act, R.S.O. 1990, c. M.45, s. 100(1).

As a result of a series of land transactions with the appellant Consortium Developments (Clearwater) Ltd. ("Consortium"), a private developer, the town of Clearwater acquired a 40-acre park and some rights to adjoining land, and Consortium emerged with 107 acres of unserviced land intended for residential development. Clearwater and the former city of Sarnia were subsequently amalgamated. Questions arose soon after amalgamation regarding the propriety of the land transactions. It was alleged that the town had paid inflated prices for the land it acquired as a park, while Consortium paid too little. Local taxpayers petitioned the Minister of Municipal Affairs to convene an inquiry under s. 178 of the *Municipal Act*. The Ministry investigated and decided not to order a provincial inquiry, but referred the matter to the provincial police. The police eventually issued a press release advising that their investigation had been concluded and revealed no evidence of the commission of any criminal offence. While the police investigation was still ongoing, Sarnia city council passed a resolution to establish a judicial inquiry into the transactions pursuant to s. 100(1) of the *Municipal Act*, which grants a broad power to Ontario municipalities to authorize judicial inquiries into matters of municipal concern. The first branch of this power contemplates an investigation into specific misconduct, while the second branch contemplates an inquiry more generally into "the good government of the municipality or the conduct of any part of its public business". Consortium has consistently taken the position that the proposed judicial inquiry is not directed at concerns with respect to "good government" or "the public business" but constitutes a substitute police investigation. It sought to develop the factual foundation for this allegation by causing summonses to be issued to members of the city council and some of its senior officials. These summonses were ultimately quashed by the Divisional Court on the basis that evidence about the intent of individual members would be irrelevant to the validity of the council resolution. The s. 100 resolution was also quashed, for vagueness. Approximately a month later, and more than 16 months after termination of the police investigation, city council passed a longer and

more detailed authorizing resolution that referred specifically to the "good government" and "conduct of public business" branch of s. 100(1) of the *Municipal Act*. The appellants brought applications for judicial review. The Commissioner then opened his inquiry, indicating that he intended to proceed without awaiting the final resolution of the judicial review applications and outlining the general inquiry procedure he would follow. The appellants' motion to seek his removal from the inquiry was dismissed by the Divisional Court. Their application for judicial review to quash the new resolution was dismissed by a majority of the Divisional Court. The Court of Appeal affirmed that decision, as well as the decisions of the Divisional Court dismissing the motion to remove the inquiry Commissioner for partiality and quashing the summonses.

Held: The appeal should be dismissed.

The power of a municipality to authorize a judicial inquiry is an important safeguard of the public interest, and should not be diminished by a restrictive or overly technical interpretation of the legislative requirements for its exercise. At the same time, individuals who played a role in the events being investigated are also entitled to have their rights respected. The fact a s. 100 inquiry is a judicial inquiry clearly seeks to balance the municipality's desire to have accurate information and useful recommendations from an independent Commissioner against the right of private citizens and others to have their legitimate interests recognized and protected. A good deal of confidence is inevitably and properly placed in the ability of the Commissioner to ensure the fairness of the inquiry. While the public benefits sought to be achieved by the judicial inquiry cannot be purchased at the expense of violating the rights of the appellants and others involved in the land transactions, those rights will be protected in the course of the proceeding by the principles of natural justice and the fairness of the Commissioner, and thereafter by the inadmissibility of compelled testimony in

subsequent proceedings. The attack on the legislative validity of the second resolution in this case must be rejected. The resolution is perfectly intelligible. It identifies not only what is to be inquired into but the limits of the municipality's interest. The subject matter of the inquiry as set out in the resolution is a matter of legitimate municipal concern within the ambit of the matters referred to in s. 100.

Inquiry participants are entitled to particulars of what, if any, misconduct is alleged against them sufficiently in advance of the conclusion of the hearings (and ordinarily to each of them in advance of giving testimony) to reasonably enable each of them to respond as each of them may consider appropriate. Witnesses are routinely required to make disclosure of relevant documents to Commission counsel, and it should be customary for Commission counsel, to the extent practicable, to disclose to witnesses, in advance of their testimony, any other documents obtained by the Commission which have relevance to the matters proposed to be covered in testimony, particularly documents relevant to the witness's own involvement in the events being inquired into.

The courts below were correct to quash the summonses to city councillors and city officials. While courts should be slow to interfere with a party's effort to build its case, they should set aside summonses where, as here, the evidence sought to be elicited has no relevance to a live issue in the judicial review applications.

The second resolution is not *ultra vires* on the ground that the inquiry it creates is in reality a substitute police investigation invading the exclusive jurisdiction of Parliament in relation to criminal law and procedure. The decision in *Starr* cannot be taken as a licence to attack the jurisdiction of every judicial inquiry that may incidentally, in the course of discharging its mandate, uncover misconduct potentially

subject to criminal sanction. The second resolution is not directed to specific allegations of criminal misconduct by named individuals.

The new amalgamated municipal body may lawfully undertake an inquiry into the affairs of its predecessor municipality. Section 9 of the amalgamating legislation, which puts the new city "in the place of the former" municipality for purposes relevant to assets and liabilities, brings Sarnia within s. 100 of the *Municipal Act*.

The Commissioner did not breach the requirements of natural justice and irrevocably lose jurisdiction by the procedure he adopted at the inquiry pre-hearing. While he stated that he would proceed notwithstanding the filing of the judicial review application, at the time he made this statement neither the Commissioner nor Commission counsel had received any application from the appellants for an adjournment. His decision to proceed and the proposed arrangements for the hearing were decisions properly made within the ambit of his procedural discretion. The appellants were not denied a hearing and the Commissioner's conduct disclosed no bias.

Cases Cited

Referred to: *MacPump Developments Ltd. v. Sarnia (City)* (1994), 20 O.R. (3d) 755; *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106; *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440; *Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152; *Dubois v. The Queen*, [1985] 2 S.C.R. 350; *Godson v. City of Toronto* (1890), 18 S.C.R. 36; *Starr v. Houlden*, [1990] 1 S.C.R. 1366; *British Columbia (Milk Board) v. Grisnich*, [1995] 2 S.C.R. 895; *Re Canada Metal Co. and Heap* (1975), 7 O.R. (2d) 185; *Re Nelles and Grange* (1984),

46 O.R. (2d) 210; *Attorney General of Quebec and Keable v. Attorney General of Canada*, [1979] 1 S.C.R. 218; *O'Hara v. British Columbia*, [1987] 2 S.C.R. 591; *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97; *Hydro Electric Commission of Mississauga v. City of Mississauga* (1975), 13 O.R. (2d) 511.

Statutes and Regulations Cited

Canada Evidence Act, R.S.C., 1985, c. C-5, s. 5(2).

Canadian Charter of Rights and Freedoms, s. 13.

Constitution Act, 1867, ss. 91(27), 92(8), (13), (16).

Criminal Code, R.S.C., 1985, c. C-46, s. 121.

Inquiries Act, R.S.C., 1985, c. I-11, s. 13.

Municipal Act, R.S.O. 1990, c. M.45, ss. 100(1), 178.

Planning Act, R.S.O. 1990, c. P.13.

Public Inquiries Act, R.S.O. 1990, c. P.41, ss. 5(2), 9(1).

Sarnia-Lambton Act, 1989, S.O. 1989, c. 41, s. 9.

APPEAL from a judgment of the Ontario Court of Appeal (1996), 30 O.R. (3d) 1, 138 D.L.R. (4th) 512, 92 O.A.C. 321, 34 M.P.L.R. (2d) 291, [1996] O.J. No. 3004 (QL), affirming a decision of the Divisional Court (1995), 23 O.R. (3d) 498, 83 O.A.C. 241, 27 M.P.L.R. (2d) 157, [1995] O.J. No. 1649 (QL), dismissing an application for judicial review. Appeal dismissed.

Harvey T. Strosberg, Q.C., and *Susan J. Stamm*, for the appellants.

George H. Rust-D'Eye, *Barnet H. Kussner* and *Valerie M'Garry*, for the respondent the City of Sarnia.

Thomson Irvine, for the intervener.

The judgment of the Court was delivered by

//*Binnie J.*//

1 BINNIE J. -- This appeal involves an attack on the validity and conduct of a municipally authorized judicial inquiry into alleged conflicts of interest and alleged irregularities in certain land transactions in the City of Sarnia, Ontario. The appellants, who include private developers, allege that the judicial inquiry trenches on the federal criminal law power, was otherwise improperly constituted and *ultra vires* the municipality, and that they were wrongly prevented by the courts below from assembling a proper record to demonstrate the facts in support of their various allegations of invalidity. At the conclusion of the hearing in this Court, the appeal was dismissed from the bench with reasons to follow. These are the reasons.

Factual Background

2 In the fall of 1989 and spring of 1990, a number of transactions took place involving vacant land near the intersection of Highways 402 and 40, in the Town of Clearwater, just east of the old City of Sarnia. As a result of these land transactions, which included reciprocal sales of land between the municipality and a developer, the appellant Consortium Developments (Clearwater) Ltd. ("Consortium"), lands were transferred between the public and private sectors. The Lambton County Roman Catholic Separate School Board emerged with a school site, the Town of Clearwater

emerged with a park and some rights to adjoining land, and Consortium emerged with 107 acres of unserviced land intended for residential development. It was later alleged that the Town of Clearwater had paid inflated prices for the 40 acres it acquired as a park, while the appellant, Consortium (which had acquired a right of first refusal on the municipal lands as part of the purchase price of its lands by Clearwater) paid too little. The sale to Consortium was by public tender. Consortium, as purchaser, gave back a mortgage to the Town of Clearwater as vendor for $3,390,812 (the "Consortium mortgage").

3 On January 1, 1991, Clearwater and the former City of Sarnia were amalgamated. By the terms of the *Sarnia-Lambton Act, 1989*, S.O. 1989, c. 41, the newly amalgamated municipality inherited the assets and liabilities of Clearwater, including the Consortium mortgage. The respondent Sarnia says that the effect of the amalgamating Act is that the City and its local boards stands in the place of the former municipalities and their local boards. If the Town of Clearwater could have authorized the inquiry, it is argued, so too could the newly amalgamated City of Sarnia.

4 Questions arose soon after amalgamation regarding the propriety of the land transactions. The Mayor of Sarnia wrote to the solicitor for Consortium requesting information and, in particular, disclosure of the identities of the shareholders and principals of Consortium. The request was refused. The political pot boiled over.

The Consortium Mortgage

5 The Consortium mortgage has a number of controversial features. It provides that neither interest nor principal will be payable until the municipality has completed a secondary plan for the subject property and assumed the services on the

lands. These steps would open the way to Consortium to develop the lands for residential homes under a plan of subdivision in accordance with the *Planning Act*, R.S.O. 1990, c. P.13. Payment of the principal monies is not tied to any calendar date, but is scheduled to begin three years after interest begins to accrue. Consortium explained this arrangement on the basis that, until Clearwater (now Sarnia) satisfies this condition, which it was anticipated would be done "almost immediately" after the sale, Consortium would be the owner of undeveloped land worth only a fraction of the purchase price. From Sarnia's perspective, these financial terms mean that the $3,390,812 Consortium mortgage generates no immediate benefit for the City and, further, could be criticized as an inducement to facilitate the development of the Consortium lands ahead of other raw lands in the municipality, perhaps contrary to the priority that ordinary planning considerations might otherwise dictate.

6 Another controversial feature of the Consortium transaction is the continuing insistence of the shareholders and principals on anonymity. The Town of Clearwater had not insisted on disclosure, and its dealings had all been with the developer's lawyer. Accordingly, Consortium now argues that anonymity has somehow become a contractual term of the sale of the park binding on the new City of Sarnia. The identity of the shareholder(s) remained undisclosed at the date of the hearing of this appeal. The other appellants, Kenneth MacAlpine, James Pumple and MacPump Developments Ltd., were (or were involved with) the predecessors in title of the lands involved in some of the transactions, and have joined in the challenge to the judicial inquiry on the basis that they consider themselves to be potential targets. In earlier judicial review proceedings, the Sarnia City Solicitor filed an affidavit stating:

> One councillor and the Mayor of Clearwater Council and two of the principals of MacPump were all employed by the same Real Estate

> Company during the relevant time. As a result, questions are raised concerning Conflict of Interest legislation.

The Investigations

7 Local taxpayers petitioned the Minister of Municipal Affairs to convene an inquiry under s. 178 of the *Municipal Act,* R.S.O. 1990, c. M.45. The Ministry investigated and decided not to order a provincial inquiry, but referred the matter to the Ontario Provincial Police Anti-Rackets Branch. On August 18, 1993, the Ontario Provincial Police issued a press release advising that the police investigation had been concluded and revealed "no evidence of the commission of any criminal offence". On two occasions, the role of the solicitors for Consortium in the land transactions was investigated by the Law Society of Upper Canada. On both occasions, the Law Society found no evidence of professional misconduct or conduct unbecoming a solicitor and took no action.

The First Sarnia City Council Resolution

8 On November 23, 1992, Sarnia City Council passed a Resolution pursuant to s. 100(1) of the *Municipal Act* to establish a judicial inquiry concerning the land transactions. Section 100(1) grants a broad power to Ontario municipalities to authorize judicial inquiries into matters of municipal concern. The appellants say that this power is divided into two distinct branches. The first branch contemplates an investigation into specific misconduct and the second branch contemplates an inquiry more generally into the good government of the municipality, "or the conduct of any part of its public business", as follows:

> **100. --** (1) Where the council of a municipality passes a resolution requesting a judge of the Ontario Court (General Division) to investigate [*the first branch*] any matter relating to a supposed malfeasance, breach of trust or other misconduct on the part of a member of the council, or an officer or employee of the corporation, or of any person having a contract with it, in regard to the duties or obligations of the member, officer, employee or other person to the corporation, or [*the second branch*] to inquire into or concerning any matter connected with the good government of the municipality or the conduct of any part of its public business, including any business conducted by a commission appointed by the municipal council or elected by the electors . . . .

9 The operative portion of the text of the first Sarnia City Council Resolution provided as follows:

> THAT Sarnia City Council ask for the appointment of a Judge under the appropriate legislation to carry out an inquiry for the City concerning the sale of City lands to Consortium and the sale from Consortium to the Lambton County Separate School Board of land in OPA #7, and Lottie Neely Park.

10 Consortium has consistently taken the position that the proposed judicial inquiry is not directed at concerns with respect to "good government" or "the public business" but constitutes a substitute police investigation. Consortium supports its case not only by reference to the inconclusive OPP investigation and Law Society inquiries already mentioned, but also by reference to local press reports of the various statements by Sarnia municipal politicians, including the following:

(i) On July 17, 1993, Alderman John Vollmar is quoted as saying, "People who talked to me want answers, who's involved . . . the legality and the morality of it".

(ii) On August 19, 1993, Alderman Elizabeth Wood is quoted as saying that "council is interested in finding out about 'mistakes in judgment and possible conflicts of interest'".

(iii) On August 31, 1993, Mayor Mike Bradley is quoted with respect to his views on why the city wanted to proceed with the judicial inquiry:

> He said council wants to find out who the unnamed principals are behind Consortium, since the city inherited from Clearwater its purchase arrangement with the group, which includes a $3.4 million mortgage.
>
> [Council] also wants to know why Clearwater acted as it did and whether any public official had a conflict of interest.

(iv) On September 3, 1993, Alderman Terry Burrell is quoted as saying that the OPP investigations "did not examine whether members of public bodies, like Clearwater council, were in conflict of interest . . . that is the outstanding question here". Alderman Wood is quoted as saying that a judicial inquiry is a powerful instrument to get at the truth of whether public officials or staff "misused" their positions.

(v) On February 14, 1994, Alderman Dave Boushy is quoted as saying that "the issue is whether there were any laws broken when the transactions took place".

(vi) On February 16, 1994, while commenting on the OPP finding that there was no evidence of commission of a criminal offence, Mayor Mike Bradley is quoted as stating that such a finding does not mean everything was above board.

11 Consortium sought to develop the factual foundation for the allegation that the inquiry was a colourable attempt to create a substitute criminal inquiry by causing summonses to be issued to members of the Sarnia City Council and some of its senior officials. These summonses were ultimately quashed by the courts below, and this quashing gives rise to one of the grounds of appeal to this Court.

Quashing the First Sarnia City Council Resolution

12 The first Resolution was quashed for vagueness; see *MacPump Developments Ltd. v. Sarnia (City)* (1994), 20 O.R. (3d) 755 (C.A.). However, the Court of Appeal did hold on that occasion that as Sarnia now included within its boundaries the whole of the former municipality of Clearwater, and stood in its place under s. 9 of the amalgamating statute, the new City of Sarnia had the power under s. 100 to pass a properly framed resolution to inquire into the affairs of the former municipality of Clearwater. Doherty J.A. observed at p. 771:

> . . . matters connected with the good government or public business of Clearwater are after amalgamation matters connected with the good government and public business of Sarnia.

The Second Sarnia City Council Resolution

13 On January 9, 1995, only a month after the quashing of its previous Resolution authorizing a judicial inquiry, and more than 16 months after termination of the OPP investigation, the City of Sarnia passed a longer and more detailed authorizing Resolution that referred specifically to the "good government" and "conduct of public business" branch of s. 100 of the *Municipal Act*. As its terms formed a significant part of the argument on the appeal, I reproduce it in full:

Being a Resolution to request a Judicial Inquiry pursuant to Section 100 of the *Municipal Act*, and to provide the Terms of Reference therefor

WHEREAS, under section 100 of the *Municipal Act*, R.S.O. 1990, c. M.45, a Council of a municipality may, by resolution, request a Judge of the Ontario Court (General Division), to inquire into or concerning any matter connected with the good government of the municipality, or the conduct of any part of its public business;

AND WHEREAS any Judge so requested shall make the Inquiry and shall report with all convenient speed, to Council, the result of the Inquiry and the evidence taken, and for that purpose shall have all the powers of a commission under Part II of the *Public Inquiries Act*, R.S.O. 1990, c. P.41;

AND WHEREAS the Corporation of the City of Sarnia has become the owner of certain lands, shown on the attached map, and known as the "Lottie Neely lands" or "Lottie Neely Park", as a result of the amalgamation of the former Town of Clearwater ("Clearwater") with the former City of Sarnia, and as a result of the purchase of these lands from MacPump Developments Ltd. ("MacPump") by Clearwater;

AND WHEREAS the consideration for the purchase by Clearwater of the Lottie Neely lands included, in addition to the purchase price of $1,200,000.00, the granting to MacPump of a right of first refusal on a 142 acre parcel of land owned by Clearwater, also shown on the attached map, and known as the "Parklands";

AND WHEREAS Clearwater sold the Parklands to Consortium Developments (Clearwater) Ltd. ("Consortium") following a public tender process, which was subject to the right of first refusal;

AND WHEREAS, prior to the sale of the Parklands to Consortium, Clearwater declined to negotiate with the Lambton County Roman Catholic Separate School Board (the "Board"), the Board's offer to purchase a portion of the Parklands;

AND WHEREAS the right of first refusal granted by Clearwater to MacPump, was assigned by MacPump, to a trustee (the "Trustee");

AND WHEREAS the Trustee agreed to sell a 35 acre parcel of the Parklands to the Board;

AND WHEREAS the Parklands which Clearwater sold to Consortium were conveyed in two parcels, as follows:

1. a 35 acre parcel conveyed to the Trustee, and

2. a 107 acre parcel conveyed to Consortium.

AND WHEREAS, on the same day that the Parklands were conveyed by Clearwater to the Trustee and Consortium, the Trustee conveyed the 35 acre parcel of land, to a trustee, in trust for the Board;

AND WHEREAS, as a result of the sale to Consortium, the Corporation of the City of Sarnia is now the holder of a mortgage in the amount of $3,390,812.20 on the 107 acre portion of the Parklands, which mortgage was registered April 5th, 1990 and provides, in part, that:

"The said principal sum shall be repayable as follows:

a) interest shall be calculated at the rate of 10% per annum, half yearly not in advance, and shall be payable yearly. Interest shall commence on the completion by the Chargee of the secondary plan for the subject property and upon completion and assumption by the Chargee of the infrastructure in relation thereto in order that the lands being charged can proceed to be developed by plan of subdivision in accordance with the Planning Act.

b) all outstanding principal and interest to be due and payable three (3) years from the date upon which interest commences as set out in clause (a) above."

AND WHEREAS the conditions precedent for the commencement of interest on the principal sum secured by the mortgage have not been satisfied;

AND WHEREAS, by virtue of section 9 of the *Sarnia-Lambton Act*, S.O. 1989, c. 41, the assets and liabilities of Clearwater have become assets and liabilities of the City of Sarnia, and the City stands in the place of Clearwater;

AND WHEREAS a public inquiry would permit the public to understand and evaluate fully the above noted transactions, and would permit the Commissioner to make recommendations that would be of benefit for the future conduct of the public business of the municipality;

AND WHEREAS the City of Sarnia has received delegations and petitions calling for the City to inquire into these transactions;

AND WHEREAS the Ontario Court of Appeal has affirmed the City's right to pass such a Resolution;

NOW THEREFORE THE MUNICIPAL COUNCIL OF THE CORPORATION OF THE CITY OF SARNIA DOES HEREBY RESOLVE THAT:

1. An Inquiry is hereby requested to be conducted pursuant to that portion of Section 100 of the *Municipal Act* which authorizes the Commissioner to, "inquire into, or concerning, any matter connected with the good government of the municipality, or the conduct of any part of its public business", and

2. The Honourable Mr. Justice Gordon P. Killeen be requested to act as Commissioner for the Inquiry.

AND IT IS FURTHER RESOLVED THAT the Terms of Reference of the Inquiry shall be:

> To inquire into all aspects of the above transactions, their history and their impact on the ratepayers of the City of Sarnia as they relate to the good government of the municipality, or the conduct of its public business, and to make any recommendations which the Commissioner may deem appropriate and in the public interest as a result of his Inquiry.

AND IT IS FURTHER RESOLVED THAT the Commissioner, in conducting the Inquiry into the transactions in question to which the Town of Clearwater was a party, and without expressly inquiring into the internal affairs and conduct of the Board, except as is incidental to his primary inquiry, is empowered to ask any questions which he may consider as necessarily incidental or ancillary to a complete understanding of these transactions.

AND, for the purpose of providing fair notice to those individuals who may be required to attend and give evidence, and without infringing on the Commissioner's discretion in conducting the Inquiry in accordance with the Terms of Reference stated herein, it is anticipated that the Inquiry may include the following:

1. an inquiry into all relevant circumstances pertaining to the various transactions referred to herein, including: their relationship to one another; the consideration provided by the parties in each instance; the granting by Clearwater of a right of first refusal to MacPump upon the purchase of the Lottie Neely lands by Clearwater; the acceptance by Clearwater of a mortgage given by Consortium upon its purchase of the Parklands; and the timing of the various transactions in relation to one another and in relation to the amalgamation of Clearwater and the former City of Sarnia;

2. an inquiry into the nature and extent of the information which was available to the parties to the various transactions at all relevant times;

3. an inquiry into the relationships, if any, between the elected and administrative representatives of Clearwater, and the principals and representatives of the Board, MacPump, the Trustee and Consortium at all relevant times; and

4. an inquiry into the legal or other professional advice obtained by Clearwater in connection with its negotiations.

14 On February 28, 1995, several weeks after passage of the Second Sarnia City Council Resolution, the present applications for judicial review were commenced. Included in the grounds was the allegation that the Second Sarnia City Council Resolution had a colourable purpose in that it:

> . . . creates an inquiry into the supposed misconduct of named and unnamed individuals while purporting to create an inquiry into the good government of the municipality.

Opening of the Commission of Inquiry

15 On March 6, 1995, Commissioner Gordon P. Killeen, a justice of the Ontario Court (General Division), opened his inquiry. His opening statement indicated an intention to proceed without awaiting the final resolution of the judicial review applications together with an outline of the general inquiry procedure he would follow. The appellants took the position that Commissioner Killeen had made up his mind not only to proceed without hearing their submissions, but also how he would proceed. They brought a motion to seek his removal from the inquiry. This removal motion was dismissed by a unanimous Divisional Court by order dated March 10, 1995.

Subpoena to Members of City Council

16 As stated, in an effort to advance its allegation of colourable purpose Consortium caused summonses to be issued to various members of City Council and senior city officials to testify as witnesses in the pending motions for judicial review. The Divisional Court, on a preliminary motion with written reasons released on April 12, 1995, 81 O.A.C. 102, quashed the summonses on the basis that evidence about the intent

of individual members would be irrelevant to the validity of the Council resolution, citing *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106.

Relevant Statutory Provisions

17 Section 100(1) of the *Municipal Act*, R.S.O. 1990, c. M.45, provides:

> **100.**--(1) Where the council of a municipality passes a resolution requesting a judge of the Ontario Court (General Division) to investigate any matter relating to a supposed malfeasance, breach of trust or other misconduct on the part of a member of the council, or an officer or employee of the corporation, or of any person having a contract with it, in regard to the duties or obligations of the member, officer, employee or other person to the corporation, or to inquire into or concerning any matter connected with the good government of the municipality or the conduct of any part of its public business, including any business conducted by a commission appointed by the municipal council or elected by the electors, the judge shall make the inquiry and for that purpose has all the powers of a commission under Part II of the *Public Inquiries Act*, which Part applies to such investigation as if it were an inquiry under that Act, and the judge shall, with all convenient speed, report to the council the result of the inquiry and the evidence taken.

Judgments

18 The appellant's application for judicial review to quash the new Resolution of January 9, 1995 was dismissed by a majority of the Divisional Court (Steele J. and Rosenberg J. concurring, with Borins J. dissenting) on June 8, 1995. The Court of Appeal, on September 6, 1996, dismissed the appeals of the decisions of the Divisional Court rendered on March 10 (the application to remove Commissioner Killeen), April 12 (the quashing of the subpoenas) and June 8, 1995 (dismissal of the judicial review applications on their merits).

Ontario Court (General Division), Divisional Court (1995), 23 O.R. (3d) 498

Per Steele J., for the majority

19 A by-law or resolution is presumed to be valid and the onus was on the applicants to show that it should be quashed. Doubtful expressions should be resolved in favour of an *intra vires* interpretation. City council had the authority to pass a resolution appointing the inquiry unless on the face of the resolution it is vague or infringes upon federal criminal law powers. Even if the alleged oral contract of non-disclosure regarding the names of Consortium's principals was binding on Sarnia, this would not preclude Sarnia from passing the Resolution. The Resolution was not vague. It made the necessary connection required by s. 100 of the Act between the particular subject-matter and the good government or business affairs of the municipality. "The . . . resolution raises the issue to be investigated in a sufficient manner to show valid connection to the public business and good government of the municipality and the purpose of the inquiry" (p. 515). The pith and substance of the Resolution is to inquire into good government of the municipality and, in particular, the conduct of its public business. All inquiries may result in evidence showing bad conduct, and this possibility alone is not sufficient to hold that the Resolution is invalid. It should be presumed that the Commissioner knows the law and would respond appropriately if a question about evidence or the invasion of individual rights should arise. The application for judicial review should be dismissed.

Per Rosenberg J., concurring

20 The inquiry should be permitted to proceed for the reasons of Steele J. and for the following reasons. The inquiry was being conducted by a superior court judge well aware of the limits imposed on an inquiry. It would be wrong to take too technical a view of the requirement that terms of reference define the questions to be answered.

Only when the full details of the various land transactions have been explored can the true questions be knowledgeably formulated and recommendations made.

Per Borins J., dissenting

21 Borins J. concluded that this was, in reality, a first branch inquiry, the focus of which was to determine whether there was anything corrupt respecting the land transactions, and not a second branch inquiry concerning good government or public business of the municipality. He concluded (at p. 521) that its true purpose

> was to determine whether there was unspecified malfeasance, breach of trust, conflict of interest, or some other type of impropriety on the part of MacPump and Consortium, or their principals, or the representatives of the school board, or the representatives of the former Town of Clearwater.

Borins J. held that particulars are required for either branch of s. 100, but especially the first branch, and that this Resolution was improper because it "identifies nothing about the land transactions which may be suspect, such as a conflict of interest or improper use of funds" (p. 527). He said (at pp. 531-32):

> In short, there is nothing on the face of the resolution, or in the evidence, that demonstrates that the subject matter of the proposed inquiry affects the good government or public business of Clearwater. Similarly, if characterized as a first branch inquiry, the resolution also lacks particularity as it fails to state any act of alleged malfeasance.

The Resolution offends the principle that a by-law, or resolution, must express its meaning with sufficient certainty to enable those persons affected by it to understand it in order to be able to comply with it. Furthermore, the Resolution was void on constitutional grounds. A review of all the circumstances led to the conclusion that the

true purpose of the inquiry was a criminal investigation. The Resolution was an unconstitutional exercise by a municipal council of federal criminal law powers under s. 91(27) of the *Constitution Act, 1867*. Borins J. would have quashed the second City of Sarnia Resolution and halted the inquiry.

Court of Appeal (1996), 30 O.R. (3d) 1

22 The appeal was dismissed. Section 100(1) of the *Municipal Act* has two branches. Under the first branch, the council can pass a resolution to investigate supposed misconduct on the part of officials or any person dealing with the municipality. Under the second branch, the council can pass a resolution to inquire into "any matter connected with the good government of the municipality or the conduct of any part of its public business". The court rejected the argument that the City's Resolution was unlawful because it was drafted as a second branch inquiry, when in reality it created a first branch inquiry without the appropriate procedural safeguards. The court concluded that it was not necessary for the municipality to specify the branch under which it purports to act as it had jurisdiction to act under either branch.

23 The argument that the Resolution was too vague and lacked particularity was rejected. The preamble to the Resolution described the land transactions in considerable detail. "It is clear that the land transactions are 'the matter' to be investigated within the meaning of s. 100(1) of the *Municipal Act*" (p. 20). The Resolution was sufficiently particular to comply with the requirements of s. 100(1) of the Act. McMurtry C.J.O. for the court observed (at p. 22) that:

> The City of Sarnia has specified the "matter" to be investigated, and that matter is a limited, defined series of transactions. The resolution does not need to spell out specific allegations for the commissioner to understand the

> potential problem areas that might be related to the public interest. Public funds were used to purchase two properties at what appears to be substantially inflated prices, the City is holding a mortgage which may be unenforceable and Consortium has steadfastly refused to disclose its principals. Again, the transactions are described in sufficient detail to direct the commissioner as to the subject-matter of the inquiry.

The court was of the opinion that the appellants appeared to be asking for particulars that might be available only after the inquiry had concluded its investigation.

24 As to the argument that the Resolution infringed upon federal criminal law powers under s. 91(27) of the *Constitution Act, 1867*, McMurtry C.J.O. stated that the land transactions had generated considerable public concern, and the Resolution on its face addressed policy issues by asking the commissioner to inquire into all aspects of these transactions including their impact on the ratepayers of the City. This was a matter of municipal good governance and the conduct of public business. The *Municipal Act* authorizes such an inquiry, and the constitutional division of powers did not invalidate the inquiry. Even if the inquiry incidentally touches on what may be criminal conduct, the inquiry itself was established for a valid provincial purpose. The pith and substance of the Resolution fell within provincial jurisdiction. All of the other grounds of appeal were dismissed.

Issues

25 In this Court the appellants advanced the following issues:

1. Is the Resolution unlawful in that it fails to comply with the requirements of s. 100(1) of the Act?

2. Should the appellants' attempt to create a record of surrounding circumstances have been restricted by the quashing of the summonses issued to the mayor and the Sarnia City councilors, and city officials?

3. Is the Resolution *ultra vires* because the inquiry it creates is in reality a substitute police investigation and preliminary inquiry infringing the federal criminal law powers under s. 91(27) of the *Constitution Act, 1867*?

4. Is the Resolution unlawful in that it requires an investigation by Sarnia into the affairs of Clearwater?

5. Did the Commissioner breach the requirements of natural justice and irrevocably lose jurisdiction by the procedure he adopted at the inquiry pre-hearing?

1. *Is the Resolution Unlawful in That It Fails to Comply with the Requirements of s. 100(1) of the Act?*

26 The power of an Ontario municipality to authorize a judicial inquiry into matters touching the good government of the municipality, or "any part of its public business", and any alleged misconduct in connection therewith, reaches back prior to Confederation. Apart from a few amendments to harmonize this power with other legislative changes in the province, s. 100 of the *Municipal Act* is substantially unchanged from its predecessor section in 1866. This reflects a recognition through the decades that good government depends in part on the availability of good information. A municipality, like senior levels of government, needs from time to time to get to the bottom of matters and events within its bailiwick. The power to authorize a judicial

inquiry is an important safeguard of the public interest, and should not be diminished by a restrictive or overly technical interpretation of the legislative requirements for its exercise. At the same time, of course, individuals who played a role in the events being investigated are also entitled to have their rights respected. The basic issue in this appeal is how a balance is to be struck between those two requirements.

27 Counsel for Consortium expressed his client's opposition to the apparent sweep of s. 100 with the comment that it gives every municipality in the province the power to compel a private citizen "to come to the town square to be interrogated". It should be remembered, however, that Consortium elected to do business with a public body, whose successor is now accountable to its taxpayers for a $3.39 million unperforming mortgage and 40 acres of parkland allegedly purchased at an excessive price. The interrogation of Consortium's shareholders or principals (if and when they are identified) will be under the direction of a Commissioner who is (as he must be) a judge of the Ontario Court (General Division). The fact a s. 100 inquiry is a judicial inquiry clearly seeks to balance the municipality's desire to have accurate information and useful recommendations from an independent Commissioner against the right of private citizens and others to have their legitimate interests recognized and protected. A good deal of confidence is inevitably and properly placed in the ability of the Commissioner to ensure the fairness of the inquiry.

Procedural Fairness

28 Some of the arguments advanced on behalf of the appellants did, in fact, seem to overlook the distinction between the requirements for a valid exercise of the s. 100 power to establish an inquiry, on the one hand, and the procedural protections to which the appellants are entitled in the course of an inquiry once validly established on

the other hand. The municipal council resolution contemplated by s. 100 must, to be sure, be intelligible. It must convey to the Commissioner and every other interested person the subject matter of the inquiry, and it must connect the subject matter to one or more of the matters referred to in s. 100 of the *Municipal Act*. It must provide those who appear before the Commissioner with a reasonable understanding of the scope, as well as the limits, of the inquiry, so as to avoid the possibility, however remote, that an overly enthusiastic Commissioner or commission counsel could, in effect, draw their own terms of reference. The s. 100 resolution must provide sufficient particularity to satisfy these legislative requirements.

29 That having been said, the s. 100 Resolution is not a pleading, much less is it a bill of indictment. It creates a jurisdiction, but in the exercise of that jurisdiction the Commissioner is limited by the principles of procedural fairness, irrespective of whether or not these limits are spelled out in the s. 100 Resolution. The application of these principles will, of course, depend upon the subject matter of the inquiry and the varying interests of those who appear to give evidence or who are otherwise caught up in the proceedings. The need for flexibility in the application of procedural fairness is evident in the spectrum of matters which are referred to in s. 100 itself. Witnesses who appear at a general policy inquiry to give expert evidence about, for example, municipal finances will likely have little need of procedural protection. An inquiry into a particular item of "public business", such as a tendering mishap, is more likely to impact on individual rights, and the procedure will be more strictly controlled in consequence. At the most sensitive end of the spectrum, where misconduct is alleged that may have the potential of civil or criminal liability (irrespective of whether the inquiry is a first branch inquiry or a second branch inquiry), the full strictures of natural justice will protect those who are reasonably seen as potential targets.

30 The conceptual distinctions between legislative validity and the fair inquiry interests of the participants is important. If the municipality had a sufficient grip on the relevant facts to give detailed particulars there might be no need for an inquiry. At the same time, the municipality's lack of knowledge does not license it to trample on the rights of its employees, former employees, persons with whom it has done business, or others. Aspects of procedural fairness, such as the need for particulars, should not defeat an inquiry at the outset unless it is concluded that in the particular circumstances of the case a fair inquiry simply cannot be had based upon the wording of the particular resolution under consideration. Otherwise the inquiry should be allowed to proceed, and procedural objections dealt with at a later stage when the Commissioner has had an opportunity to consider the fairness issues and deal with them.

31 It is true, as pointed out by Borins J. dissenting in the Divisional Court, at p. 525, that s. 100, unlike s. 13 of the federal *Inquiries Act*, R.S.C., 1985, c. I-11, and s. 5(2) of the Ontario *Public Inquiries Act*, R.S.O. 1990, c. P.41, does not explicitly state that no finding of misconduct shall be made against a person unless that person is given reasonable notice of the substance of the alleged misconduct, and given an opportunity to be heard during the inquiry in person or by counsel. Borins J. considered that this omission meant:

> . . . that the commissioner, in reporting the result of his or her inquiry to the municipal council, may make findings of misconduct without the necessity of [such notice].

I do not agree. Section 13 of the federal *Inquiries Act* and s. 5(2) of the Ontario *Public Inquiries Act* reflect the applicable principles of natural justice dealing with notice and the opportunity to be heard where misconduct is alleged, and a Commissioner under

s. 100 is bound to govern himself accordingly even though s. 100 is silent on the requirement.

Legislative Validity of the Second Sarnia City Resolution

32 With these principles in mind, I turn to the argument that the second Sarnia Council Resolution fails to meet the minimum legislative requirements for a valid exercise of the s. 100 power. The Resolution first identifies s. 100 as the source of the municipality's jurisdiction, and then recites in considerable detail each step of the transactions involving the subject lands, including the controversial terms of the Consortium mortgage mentioned above, and then describes the successor relationship between Sarnia and the former Town of Clearwater. Having identified the subject matter of the inquiry, and appointed Mr. Justice Killeen as the Commissioner, the Resolution then relates the terms of inquiry to s. 100 as follows:

> To inquire into all aspects of the above transactions, their history and their impact on the ratepayers of the City of Sarnia as they relate to the good government of the municipality, or the conduct of its public business, and to make any recommendations which the Commissioner may deem appropriate and in the public interest as a result of his Inquiry. [Emphasis added.]

33 The Commissioner is thus directed to, and limited by, the municipality's interest in good government and the conduct of public business. The limitation is important and counsel for the various participants are entitled to see that it is respected. The Resolution then provides:

> for the purpose of providing fair notice to those individuals who may be required to attend and give evidence, ... it is anticipated that the Inquiry may include ... [in respect of the various transactions] their relationship to one another; the consideration provided by the parties in each instance; the

> granting by Clearwater of a right of first refusal to MacPump upon the purchase of the Lottie Neely lands by Clearwater; the acceptance by Clearwater of a mortgage given by Consortium upon its purchase of the Parklands; and the timing of the various transactions in relation to one another and in relation to the amalgamation of Clearwater and the former City of Sarnia; [Emphasis added.]

34 In terms of "good government" and the conduct of "public business" the Resolution specifically recites its "anticipation" of

> 2. an inquiry into the nature and extent of the information which was available to the parties to the various transactions at all relevant times;
>
> 3. an inquiry into the relationships, if any, between the elected and administrative representatives of Clearwater, and the principals and representatives of the Board, MacPump, the Trustee and Consortium at all relevant times; and
>
> 4. an inquiry into the legal or other professional advice obtained by Clearwater in connection with its negotiations.

35 The appellants complain that there is no mention here of specific acts of "supposed malfeasance, breach of trust or other misconduct". Their objective, apparently, is to limit the inquiry to particulars the municipality already knows about, if indeed there are any such particulars. Section 100, however, does not compel a municipality to advance more extravagant allegations than it is ready, willing and able to make. Item 3 in the Resolution talks about an inquiry into the "relationships" between representatives of the developer and City officials. This item clearly raises the topic of potential conflicts of interest. There is no obligation on the City to allege as a fact that such conflicts of interest existed. Item 4 raises the issue whether Clearwater ignored its professional advisors. Such matters as potential conflicts of interest and possible disregard of professional advice have a good government aspect as well, potentially, as a misconduct aspect. Section 100 creates a broad power, and it was open to Sarnia City Council to authorize the more general inquiry into the conduct of public business

expressed in its Resolution as opposed to the narrower inquiry into specific acts of misconduct that the appellants think would have been preferable.

36 The appellants argue that the connection between "good government" and the subject land transactions should be spelled out in the s. 100 Resolution, but the Resolution, taken as a whole, makes it clear to a mind willing to understand that the City believes that as a result of "public business" that may have involved "relationships" between public officials and private developers, the City is now stuck with an unperforming mortgage and an overpriced park, which have generated "delegations and petitions", and the City believes it would benefit from the Commissioner's recommendations for the "future conduct of the public business of the municipality". It is evident that an inquiry under the second branch of s. 100 into an item of public business may disclose misconduct. Equally, an inquiry under the first branch may look into "supposed malfeasance", and discover the conduct was entirely innocent, but ought nevertheless to result in recommendations for the good government of the municipality. While it may therefore be useful for some purposes to think of s. 100 as having two branches, it is but a single power, and the preconditions for its valid exercise to establish a judicial inquiry do not vary with the subject matter. A more compartmentalized interpretation would undermine the utility of the power and contradict the broad legislative intent evident on the face of s. 100. The concern, which I believe is a legitimate concern, about the need for greater particularity in cases where misconduct may be found can best be handled, in my view, within the framework of procedural fairness at the inquiry stage.

37 It must be remembered that the report of the Commissioner to the City Council will represent only his views, and will not determine civil or criminal liability, if any. As this Court recently emphasized in *Canada (Attorney General) v. Canada*

(Commission of Inquiry on the Blood System), [1997] 3 S.C.R. 440 (the "*Blood Inquiry* case"), *per* Cory J. at para. 34:

> A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter.

While the public benefits sought to be achieved by the judicial inquiry cannot be purchased at the expense of violating the rights of the appellants and others involved in the land transactions, those rights will be protected in the course of the proceeding by the principles of natural justice and the fairness of the Commissioner, and thereafter by the inadmissibility of compelled testimony in subsequent proceedings federally under s. 5(2) of the *Canada Evidence Act*, R.S.C., 1985, c. C-5, and s. 13 of the *Canadian Charter of Rights and Freedoms* (*Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152; *Dubois v. The Queen*, [1985] 2 S.C.R. 350), and provincially under s. 9(1) of the Ontario *Public Inquiries Act*, which is incorporated by reference into s. 100(1) of the *Municipal Act*.

38 The appellants rely, as did Borins J., dissenting, in the Divisional Court, on the dissenting reasons of Gwynne J. in this Court in *Godson v. City of Toronto* (1890), 18 S.C.R. 36. In that case, the majority upheld a very sweeping municipal resolution to establish a judicial inquiry into the conduct of a municipal inspector suspected of malfeasance. The resolution lacked particulars. A majority of this court, *per* Sir W. J. Ritchie C.J., held at p. 40 that "[t]he city was empowered by law to issue the commission

to the county judge to make the inquiries directed in this case". The sole dissenting judgment of Gwynne J. was based on his view that the municipal power to authorize a judicial inquiry was so "open to abuse" that the legislation should be "so construed as to confine the powers . . . within the strictest construction of its letter" (p. 41). Clearly a restrictive interpretation was rejected by the majority of the Court. Gwynne J. went on to hold that jurisdiction under the first branch required the municipal resolution to "specify some act, matter or thing, either in the nature of malfeasance, breach of trust, or other named misconduct" (p. 42). It seems to me that Gwynne J. was merely pointing out that the subject matter of an inquiry has to be specified, a proposition with which I agree. It hardly bears repetition that an inquiry into misconduct must identify the misconduct to be inquired into. However, to the extent that Gwynne J. is taken by the appellants as advancing the broader proposition that, in the absence of such specification of misconduct, a municipality cannot initiate a more general inquiry under the second branch of s. 100 to get to the bottom of some controversial item of public business, I do not agree that Gwynne J. was advancing such a proposition. If he was, I think the majority of this Court in *Godson* can be taken as having rejected it, and rightly so.

39 A more recent and instructive case is the *Blood Inquiry* case, *supra*. That case involved a challenge to the authority of Commissioner Horace Krever to find not only the "facts" about Canada's blood supply in the early 1980s, but to draw inferences that might indicate that there had been conduct on the part of the corporations or individuals which could attract criminal culpability or civil liability. The terms of reference in that case, as here, did not make any allegations of misconduct. In that aspect, it provides a striking parallel to the present case. This Court unanimously rejected the challenge to Commissioner Krever's notices of potential misconduct, and his authority eventually to make findings that disclosed misconduct if he were to think it fit to do so. The ruling in that case ought to be applied to the present case to hold that

not only may the Commissioner acting under the second branch of s. 100 inquire into, as part of his larger mandate, conduct which may have potential criminal or civil consequences, but may in his report (*per* Cory J. at para. 57):

> . . . make findings of misconduct based on the factual findings, provided that they are necessary to fulfill the purpose of the inquiry as it is described in the terms of reference.

40 The s. 100 Resolution in this case is perfectly intelligible. It identifies not only what is to be inquired into but the limits of the municipality's interest. The subject matter of the inquiry as set out in the second Sarnia City Council Resolution is a matter of legitimate municipal concern within the ambit of the matters referred to in s. 100. The attack on the legislative validity of the s. 100 Resolution must therefore be rejected.

Procedural Fairness at the Inquiry

41 Before leaving the appellants' first ground of appeal, I want to emphasize that the concerns of individuals caught up in judicial inquiries are real and understandable. Unlike an ordinary lawsuit or prosecution where there has been preliminary disclosure and the trial proceeds at a measured pace in accordance with well-established procedures, a judicial inquiry often resembles a giant multi-party examination for discovery where there are no pleadings, minimal pre-hearing disclosure (because commission counsel, at least at the outset, may have little to disclose) and relaxed rules of evidence. The hearings will frequently unfold in the glare of publicity. Often, of course, at least some of the participants will know far in advance of commission counsel what the documents will show, what the key witnesses will say, and where "misunderstandings" may occur. The inquiry necessarily moves in a convoy

carrying participants of widely different interests, motives, information, involvement, and exposure. It is a tall order to ask any Commissioner to orchestrate this process to further the public interest in getting at the truth without risking unnecessary, avoidable or wrongful collateral damage on the participants. While the appellants go too far in arguing that the particulars they seek must be built into the s. 100 Resolution, inquiry participants are entitled to particulars of what, if any, misconduct is alleged against them sufficiently in advance of the conclusion of the hearings (and ordinarily to each of them in advance of giving testimony) to reasonably enable each of them to respond (if they have not already responded) as each of them may consider appropriate. Witnesses are routinely required to make disclosure of relevant documents to Commission counsel, and in the spirit of even-handedness it should be customary for Commission counsel, to the extent practicable, to disclose to witnesses, in advance of their testimony, any other documents obtained by the Commission which have relevance to the matters proposed to be covered in testimony, particularly documents relevant to the witness's own involvement in the events being inquired into. Judicial inquiries are not ordeals by ambush. Indeed, judicial inquiries often defend the validity of their existence and methods on the ground that such inquiries are inquisitional rather than adversarial, and that there is no *lis* between the participants. Judicial inquiries are not, in that sense, adversarial. On this basis the appellants and others whose conduct is under scrutiny can legitimately say that as they are deemed by the law not to be adversaries, they should not be treated by Commission counsel as if they were.

2. *Should the Appellants' Attempt to Create a Record of Surrounding Circumstances Have Been Restricted by Quashing the Summonses to the Mayor, the Sarnia City Councillors, and City Officials?*

42 This point is governed by the principles already discussed. The appellants submit that evidence of the surrounding circumstances, including the intent of the

individual members of the Sarnia City Council, is admissible and relevant to show whether or not the true purpose of the Resolution was to uncover and disclose unspecified misconduct. The evidence would be directed to whether the Councillors really intended to constitute a "first branch" inquiry masquerading as a "second branch" inquiry within the general framework of s. 100 so as to avoid the necessity of providing appropriate particulars of misconduct. Beyond this, the appellants want to demonstrate that, even as a "first branch" inquiry, the supporters of the Resolution were, in fact, seeking a substitute police investigation into the commission of specific criminal offences, by specific individuals, thus attracting the prohibition of *Starr v. Houlden*, [1990] 1 S.C.R. 1366.

43 I will address the *Starr* issue below. Subject to that, it is clear that the evidence directed to a "first branch" versus "second branch" argument is irrelevant. The doctrine of colourability applies where a legislature purports to exercise its power in relation to a matter within its jurisdiction but, in fact, is directing its legislative effort to a matter outside its jurisdiction. To put the matter another way, the appellants argue that while the s. 100 Resolution "in form" authorizes a second branch inquiry, it is "in substance" a first branch inquiry, and should attract what the appellants contend should be the more rigorous procedural requirements of a "first branch" inquiry. Leaving aside the division of powers issue that prevailed in *Starr* the appellants cannot succeed simply by showing that some members of Council may have had in mind one aspect of the s. 100 jurisdiction while others had in mind a different aspect of the s. 100 jurisdiction. The Resolution was in writing. Members of Council voted for the written text. The Commissioner is bound by the written text. The question is whether the municipality, as opposed to the individual members of its Council, had jurisdiction to do what it did. See *British Columbia (Milk Board) v. Grisnich*, [1995] 2 S.C.R. 895, at para. 5.

44 This case provides a good illustration of why the rule in *Thorne's Hardware, supra,* is salutary. In that case the Court was invited to conclude that the federal Cabinet was motivated by crass and improper financial considerations to extend the boundaries of St. John Harbour to include new deep water liquid bulk terminal facilities which Irving Oil and its wholly owned subsidiaries had carefully located outside the previous harbour limits. The result was that harbour dues not previously payable at the new facility became payable. Dickson J. for the Court said, at p. 112:

> Counsel for the appellants was critical of the failure of the Federal Court of Appeal to examine and weigh the evidence for the purpose of determining whether the Governor in Council had been motivated by improper motives in passing the impugned Order in Council. We were invited to undertake such an examination but I think that with all due respect, we must decline. It is neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council. . . .

45 The motives of a legislative body composed of numerous persons are "unknowable" except by what it enacts. Here the municipal Council possessed the s. 100 power and exercised it in the form of a resolution which speaks for itself. While some members of the present or previous Sarnia Council may have made statements which suggest a desire to unmask alleged misconduct, the inquiry will not be run by city councillors but by Commissioner Killeen, a Superior Court judge, who will take his direction from the s. 100 Resolution, not from press reports of comments of some of the city politicians. Accordingly the courts below were correct to quash the summonses and strike from the record certain other evidence. While courts should be slow to interfere with a party's effort to build its case, they should set aside summonses where, as here, the evidence sought to be elicited has no relevance to a live issue in the judicial review applications: *Re Canada Metal Co. and Heap* (1975), 7 O.R. (2d) 185 (C.A.), *per* Arnup J.A., at p. 192.

3. *Is the Resolution Ultra Vires Because the Inquiry It Creates Is in Reality a Substitute Police Investigation and Preliminary Inquiry Infringing the Federal Criminal Law Power Under s. 92(27) of the Constitution Act, 1867?*

46 An issue of colourability would properly be raised if it were established that this judicial inquiry, purportedly authorized under provincial law, was in fact a substitute police investigation invading the exclusive jurisdiction of Parliament in relation to criminal law and procedure. Extrinsic evidence would be admissible to demonstrate colourability: *Starr*, *supra*, at p. 1403. If the appellants are correct the Resolution would be *ultra vires* s. 100, which authorizes only inquiries within provincial jurisdiction, and the s. 100 Resolution would be invalid on division of powers grounds.

47 The constitutional validity of s. 100 itself is undoubted. It can be supported under various provisions of s. 92 of the *Constitution Act, 1867*: (a) s. 92(8), Municipal Institutions in the Province; (b) s. 92(13), Property and Civil Rights in the Province; and (c) s. 92(16), Generally all Matters of a merely local or private Nature in the Province. The question is whether this particular resolution, passed pursuant to that authority, is itself *ultra vires*.

48 The appellants' allegation is that members of Sarnia City Council were frustrated by the failure of investigations of the police and the provincial Ministry of Municipal Affairs to produce evidence of "wrongdoing". The appellants' solicitor points to a meeting he had with some city officials on March 3, 1995 in which three municipal Councillors mentioned an *in camera* meeting within a month prior to passing the January 9, 1995 Resolution in which there was talk of getting to the bottom of "wrongdoing" and the city's solicitor allegedly reported she had been told by an OPP officer "off the record" that the Council should go ahead with the inquiry. Implicit in this statement, it

is argued, was the OPP officer's belief that criminality might well be uncovered if there was an inquiry. The appellants seek to attribute this motive to City Council.

49 The first problem with this line of argument is that wishful thinking on the part of municipal councillors, even if established, could not turn a s. 100 inquiry into a substitute police investigation. The reason why the jurisdictional challenge succeeded in *Starr* was not that the framers of the provincial Order in Council hoped that the Commissioner would be able to conduct a substitute police investigation, but because this Court concluded that in fact that is what the Order in Council directed the Commissioner to undertake. Extrinsic evidence was admitted to support the finding of *ultra vires* but such evidence corroborated what was already evident in the text of the Order in Council. The simple answer to the appellant's argument in this case is that if the Commissioner did attempt to undertake a substitute police investigation as in *Starr* he would be acting *ultra vires* the authority conferred by the s. 100 Resolution. Even if some members of the City Council were motivated to vote for the Resolution by an erroneous view of what it accomplishes, this motive cannot turn an *intra vires* resolution into an *ultra vires* resolution.

50 The decision in *Starr* cannot be taken as a licence to attack the jurisdiction of every judicial inquiry that may incidentally, in the course of discharging its mandate, uncover misconduct potentially subject to criminal sanction. In the present case, while the OPP investigation was ongoing at the time of the first City Council Resolution, it had terminated 16 months prior to passage of the second Sarnia Council Resolution of January 9, 1995. Even if passage of the second Resolution is thought to be tainted with the circumstances alleged to have surrounded the first Resolution (notwithstanding the intermediate election of a new City Council), the fact remains that the second Resolution is not directed to specific allegations of criminal misconduct by named individuals.

51 It must be remembered that in *Starr* the police criminal investigation was ongoing during the Houlden inquiry itself. A senior official in the office of the Ontario Premier had resigned after admitting improper receipt of personal benefits at no cost, including the famous refrigerator. The Houlden inquiry had regular police officers assigned to its investigation staff. Efforts had to be made to prevent the work of the "inquiry police" from tainting the work of the "police police" who were investigating concurrently the possibility of charges under the *Criminal Code*. Both investigations were working under substantially identical terms of reference, namely s. 121 of the *Criminal Code*, R.S.C., 1985, c. C-46, as may be seen by comparing s. 121 with the Houlden Commission terms of reference.

Criminal Code, s. 121

> Every one . . . who . . . pays a commission or reward to or confers an advantage or benefit of any kind on an employee or official of the government with which he deals, or to any member of his family . . .

Houlden Commission terms of reference, para. 2

> . . . a benefit, advantage or reward of any kind was conferred upon an elected or unelected public official or upon any member of the family . . . .

In the result, the "police police" and the "inquiry police" were covering the same ground under substantially the same terms of reference at the same time. The difference was that the "police police" had to work within the constraints of the criminal law, whereas the "inquiry police" did not. The Houlden Commission Order in Council was thus quashed on the basis that it was directed to exclusive federal jurisdiction over criminal law and

procedure and was therefore *ultra vires* the legislative authority of the province. The narrowness of its finding is evident from the judgment of Lamer J., as he then was, at p. 1402:

> The terms of reference name private individuals and do so in reference to language that is virtually indistinguishable from the parallel *Criminal Code* provision. Those same terms of reference require the Commissioner to investigate and make findings of fact that would in effect establish a *prima facie* case against the named individuals sufficient to commit those individuals to trial for the offence in s. 121 of the *Code*. The net effect of the inquiry, although perhaps not intended by the province, is that it acts as a substitute for a proper police investigation, and for a preliminary inquiry governed by Part XVIII of the *Code*, into allegations of specific criminal acts by Starr and Tridel Corporation Inc.

Further, the general constitutional rule that permits provincial inquiries that are in "pith and substance" directed to provincial matters (in this case local government) to proceed despite possible "incidental" effects on the federal criminal law power was affirmed by Lamer J. at p. 1409:

> There is no doubt that a number of cases have held that inquiries whose predominant role it is to elucidate facts and not conduct a criminal trial are validly constituted even though there may be some overlap between the subject-matter of the inquiry and criminal activity. Indeed, it is clear that the fact that a witness before a commission may subsequently be a defendant in a criminal trial does not render the commission *ultra vires* the province. But in no case before this Court has there ever been a provincial inquiry that combines the virtual replication of an existing *Criminal Code* offence with the naming of private individuals while ongoing police investigations exist in respect of those same individuals.

52 The exceptional nature of *Starr*, and the exceptional set of facts that compelled this Court's decision, was emphasized in the *Blood Inquiry* case, *supra*. In that case as stated, the Krever Inquiry, established under the federal *Inquiries Act*, was held to be within its jurisdiction to make findings of misconduct, even misconduct carrying potential civil or criminal liability, provided such findings were properly

relevant to the broader purpose of the inquiry, as set out in its terms of reference. In delivering the reasons of this Court, Cory J. distinguished *Starr* and *Re Nelles and Grange* (1984), 46 O.R. (2d) 210 (C.A.), at para. 47:

> Clearly, those two inquiries were unique. They dealt with specific incidents and specific individuals, during the course of criminal investigations.

The *Blood Inquiry* case picked up and endorsed the earlier line of cases in this Court giving broad scope to provincial inquiries, including *Attorney General of Quebec and Keable v. Attorney General of Canada*, [1979] 1 S.C.R. 218; *O'Hara v. British Columbia*, [1987] 2 S.C.R. 591; and *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97. The *Westray* case is particularly interesting in comparison to the facts of this case because at the time the mine managers were called to testify before the Commission they were in fact simultaneously facing charges under the provincial *Occupational Health and Safety Act.* The affirmation of the correctness of those decisions by a unanimous Court in the *Blood Inquiry* case renders the division of powers ground of appeal untenable in the present case as well.

4. *Is the Resolution Unlawful in That It Requires an Investigation by Sarnia into the Affairs of Clearwater?*

53 The appellants submit that the new municipal body of Sarnia created by operation of the *Sarnia-Lambton Act, 1989* could not lawfully undertake an inquiry into the affairs of the predecessor municipality. In this regard the appellants rely on *Hydro Electric Commission of Mississauga v. City of Mississauga* (1975), 13 O.R. (2d) 511 (Div. Ct.). The appellants submit that the *Sarnia-Lambton Act, 1989*, read as a whole, provides for the creation of a new body from two separate municipalities, both of which were dissolved upon the amalgamation. It is argued that the language of the Act creates

a discontinuity between the former municipalities, now dissolved, and a new and separate entity, and that s. 100 does not allow the new City of Sarnia to investigate the officers, servants and contractors of a defunct municipality or to inquire into the conduct of that other municipality's public business.

54 This issue turns upon the intent of the Ontario legislation, and in particular s. 9 of the *Sarnia-Lambton Act, 1989*, which provides as follows:

> **9.** Except as otherwise provided in this Act, the assets and liabilities of the former municipalities and their local boards become assets and liabilities of the City or a local board thereof without compensation, and the City and its local boards stand in the place of the former municipalities and their local boards. [Emphasis added.]

The appellants argue that if the concluding words had included "for all purposes" the underlined phrase "might well have broadened the ambit of the section beyond the subject of 'assets and liabilities'" (Appellants' Factum, at para. 36). I think the interpretation of s. 9 advanced by the appellants is too narrow, but in any event the fact is that the springboard for the s. 100 Resolution in this case is precisely Sarnia's inheritance of the assets and liabilities from Clearwater. The conditions attached to these assets, as we have seen, require the new City of Sarnia to take planning action and to assume municipal services before interest or principal becomes payable. These conditions, and their provenance, constitute "live issues" for the consideration of the new City of Sarnia. Thus, even on the appellants' interpretation, s. 9 of the *Sarnia-Lambton Act, 1989*, which puts the new City of Sarnia "in the place of the former" municipality for purposes relevant to assets and liabilities, brings Sarnia within s. 100. It is unnecessary to consider the broader view of s. 9 contended for by the respondent.

5. *Did the Commissioner Breach the Requirements of Natural Justice and Irrevocably Lose Jurisdiction by the Procedure He Adopted at the Inquiry Pre-Hearing?*

55 The appellants submit that the Commissioner erred in failing to share the advice from Commission counsel with interested parties and in failing to hear submissions from the appellants' counsel before deciding the procedure he would follow. The appellants submit that when the Commissioner denied them a hearing, he was not acting impartially and thus undermined public confidence in the integrity of the Commission process.

56 In my view this submission, as well, fails on the facts. The appellants were not denied a hearing and the Commissioner's conduct disclosed no bias. It is true that at the opening of the "pre-hearing" on March 6, 1995 the Commissioner stated that he would proceed notwithstanding the filing of the judicial review application. However, at the time he made this statement, neither the Commissioner nor Commission counsel had received any application from the appellants for an adjournment. When counsel for the appellants came to address the Commissioner, it seems that they felt their tactical position would be stronger if they treated the Commissioner's opening announcement as irrevocable. This strategy was carried to the point that counsel who at that time acted for Consortium, after making submissions that cover two and a half pages of transcript, concluded by saying:

> So I thought out of courtesy, sir, I should let you know what we would have said to you. [Emphasis added.]

After saying what they would have said, but making it clear that they were not actually saying it, appellants' counsel sat down and did not participate further. The Commissioner's statement of the procedure he proposed to follow consisted largely of generalities seemingly addressed to the non-lawyers in the hearing room. In the absence of any notification that an adjournment would be sought, the Commissioner cannot be faulted for outlining his proposal to proceed with the inquiry in an expeditious way, nor can he be faulted for declining to consider a possible adjournment in circumstances where the appellants themselves refused, in apparent umbrage, or for tactical reasons, to make submissions in support of that relief. There is no basis to attribute lack of impartiality to the Commissioner. In the particular circumstances of the pre-hearing, he was entitled to outline how he proposed to proceed without disclosing the advice he received from Commission counsel. His rulings will stand or fall on their own merits, irrespective of what advice he received. His decision to proceed and the proposed arrangements for the hearing were decisions properly made within the ambit of his procedural discretion, and thus this ground too must be rejected.

Disposition

57 The appeal is therefore dismissed with costs.

Appeal dismissed with costs.

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