Court of Appeal File No. C54206

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

FRIENDS OF LANSDOWNE INC.

Applicant
(Appellant)

- and –

CITY OF OTTAWA

Respondent
(Respondent)

-and-

OTTAWA SPORTS AND ENTERTAINMENT GROUP

Intervener

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APPELLANT'S FACTUM

PART I - THE APPEAL

1. The Appellant, Friends of Lansdowne, appeals the final decision of Hackland, R.S.J. of the Superior Court of Justice, dated July 28, 2011. In his decision Justice Hackland dismissed the Appellant's application to quash decisions made by the Respondent, the City of Ottawa, approving a plan to redevelop Lansdowne Park.

2. Friends of Lansdowne is a public interest group comprised of a broad range of persons from across the City of Ottawa. The group was formed in 2009 in response to the City's decision to abandon a plan to seek competing proposals for the redevelopment of Lansdowne Park, and instead proceed with a sole-source procurement of a development plan proposed by the Ottawa Sports and Entertainment Group ("OSEG"). The Appellant maintains that, in the process, the City illegally bonused OSEG contrary to the *Municipal Act, 2001,* failed to maintain a procurement by-law as required by the *Municipal Act*, and failed to act in good faith.

PART II - OVERVIEW

3. This case arises from a decision by the City of Ottawa to make major commitments of public funds, assets and lands to a development plan that has proceeded without the benefit of a competitive procurement process. Under that plan, the City is to provide financial assistance to OSEG, including by leasing city property at below market value and subsidizing two sports franchises. The Appellants contend that in doing so, the City has acted in violation of s. 106 of the *Municipal Act* which precludes granting bonuses to commercial entities, and s. 270 which requires that municipalities establish and maintain procurement policies.

4. This case raises fundamental questions concerning transparency and accountability in municipal governance, and the obligation of city staff and councillors to act in good faith and with due diligence. It questions the extent to which the Court should show deference when the legality of municipal government action is put at issue. It also represents the first time that a Canadian appellate court has been asked to interpret provisions of municipal legislation prohibiting a city from granting certain forms of financial assistance to private developers.

PART III - THE FACTS

A. Background

5. Lansdowne Park is a 37.5 acre site located in heart of the City of Ottawa and is one of the most important pieces of public property in the City. The site is bounded on two sides by the Rideau Canal, which is a World Heritage Site. The site is home to Frank Clair Stadium, the Civic Centre Arena, and two designated heritage buildings, the Aberdeen Pavilion, and the Horticulture Building. While it is often described as a City "jewel" a number of facilities on the site have been neglected by the City for several years.[1]

6. The process for revitalization of Lansdowne Park began in November 2007, when Ottawa City Council approved a "design competition" to solicit competing proposals for redeveloping the Park, and reward the successful proponent with "the right to develop the land and negotiate with the City for the transfer and/or long-term lease of the lands..."[2]

7. The design competition, which was to conclude by December 2008, got underway in early 2008 with public consultations that attracted hundreds of participants who were told that

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[1] Affidavit of Elizabeth Ballard [hereafter "Ballard Affidavit"], paras. 3-5, Appeal Book and Compendium [hereafter "Appeal Book"], Vol. 1, Tab 21, p. 139-140.
[2] Exhibit C, Ballard Affidavit, Appeal Book, Vol. 1, Tab 23, p. 168 and 181-182.

their views would help create a design brief for the competition.[3] However, no further steps were taken to carry the design competition forward. Instead, City staff and then-Mayor Larry O'Brien held private meetings and exchanges with the group of developers and sports entrepreneurs, that would later become OSEG, who were promoting their own proposal for the redevelopment of Lansdowne Park.[4]

8. City procurement bylaws then in place did not permit the receipt or consideration of unsolicited bids for goods and services which were the subject of an extant competitive procurement process, such as the design competition.[5] Nevertheless in November 2008, City Council authorized the evaluation of an "unsolicited" OSEG development proposal for Lansdowne Park that staff had received in the previous month.[6]

9. For the purpose of carrying out that evaluation, the City retained Deloitte, one of the country's leading financial consulting firms.[7] The report prepared by Deloitte offered several criticisms of the OSEG proposal and presented recommendations for addressing them (see paragraph 74 below).[8] In meetings with City staff, the Deloitte report's author also advised against acceding to OSEG's proposal that the City subsidize OSEG costs to operate two sports franchises.[9] The Deloitte report represents the only review of the OSEG scheme to have been commissioned by the City and carried out by a competent authority independent of City

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[3] Ballard Affidavit, para. 14, Appeal Book, Vol. 1, Tab 21, p. 142.
[4] Ballard Affidavit, Exhibits E: Appeal Book Vol. 1, Tab 24, p 184; Exhibit F: Vol. 1, Tab 25, p. 238-239; Exhibit G: Vol. 1, Tab 26, pp. 240-241; Exhibit H: Vol. 1, Tab 27, pp. 242-243, and paras. 17-22, Vol. 1, Tab 21, p. 143-44. Initially formed under the banner "Lansdowne Live", this group become OSEG: Ballard Affidavit, paras. 18-22, Appeal Book, Vol. 1, Tab 21, pp. 143-44.
[5] Exhibit 2 ["Ottawa Option 2002"], Cross-Examination of Kent Kirkpatrick, May 10, 2011 ["Kirkpatrick cross-examination"], Appeal Book, Vol. 1, Tab 50, p. 903.
[6] Exhibit B, Ballard Affidavit, Appeal Book, Vol. 1, Tab 22, p. 157-161; and Affidavit of Kent Kirkpatrick sworn December 20, 2010 ["Kirkpatrick Affidavit"], paras. 30-31, Vol. 1, Tab 38, p. 420.
[7] Exhibit 6, Kirkpatrick Cross-examination, Appeal Book Vol.2, Tab 52, pp. 927-930.
[8] Exhibit B ["Deloitte Report"], Affidavit of Colleen J. Bauman, sworn April 14, 2011 ["Bauman Affidavit"] Appeal Book, Vol. 2, Tab 58, p. 1053-1056.
[9] Exhibit E, Kirkpatrick cross-examination, May 10, 2011, Appeal Book, Vol. 2, Tab 53, pp. 959-960.

government,[10] but neither the report nor the concerns of its author were shared with City Council or the public.[11]

10. In early 2009, the City was presented with another "unsolicited" proposal by the Senators Sports and Entertainment group ("SS&E") proposing a soccer stadium in Kanata (the "SS&E Proposal"). The SS&E Proposal had nothing to do with redevelopment of Lansdowne Park, but the City decided to carry out a comparative assessment of the SS&E Proposal and OSEG's proposal while it held the design competition in abeyance.[12] On April 22, 2009, after considering that assessment, City Council decided to abandon the design competition and directed staff "to negotiate a partnership agreement with OSEG to redevelop Lansdowne Park ... based on a revenue- and value-neutral basis ..."[13]

11. It was only after that approval, and in response to public concerns, that the City addressed the requirements of its procurement by-laws. Thus, in May 2009, the City Solicitor provided a legal opinion stating that City procurement by-laws did not apply to the OSEG proposal because it concerned real estate development.[14] A subsequent report by the City Manager in September 2009 expressed a contrary view, but suggested that the Purchasing Bylaw allowed the City to waive a competitive bid solicitation because OSEG was the only party with a conditional Canadian Football League ("CFL") franchise and could be an anchor tenant for Frank Clair

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[10] Kirkpatrick cross-examination, Qs. 1665-1677, Appeal Book, Vol. 1, Tab 12, pp. 95-100
[11] Decision of the Superior Court of Justice, para. 5 [hereafter "Decision"], para. 44, Appeal Book, Vol. 1, Tab 3, p. 25.
[12] Kirkpatrick Affidavit, para. 41, Appeal Book, Vol. 1, Tab 38, p. 423.
[13] Kirkpatrick Affidavit, para. 49, Appeal Book, Vol. 1, Tab 38, p. 426.
[14] Exhibit M, Ballard Affidavit, Appeal Book, Vol. 1, Tab 28, p. 247-49.

Stadium.[15] A report by the City Auditor generally concurred with this view, but advised that no waiver was necessary.[16]

12. At the same time, the first detailed iteration of the OSEG redevelopment plan – the Lansdowne Partnership Plan ("LPP") - was presented to Council and the public.[17] On November 16, 2009, Council approved the LPP in principle, and directed staff to negotiate a comprehensive project agreement framework with OSEG for future consideration by Council.[18]

13. Consequently, at meetings held in June 2010, Council heard public deputations and received numerous studies and reports on the proposed LPP, including one by the Ottawa Auditor General.[19] On June 28, 2010, Council voted to approve the LPP and enacted By-law 2010-225 to confirm its proceedings. Council's approval of the LPP was set out in a series of resolutions which, *inter alia*, approved the Project Agreement Framework,[20] the PWC Business Model,[21] the two principal documents setting out the essential financial and legal dimensions of the partnership scheme, and authorized the City Manager to negotiate and execute, on behalf of the City, the Project Agreements as described in the Project Agreement Framework.

B. The Lansdowne Partnership Plan

14. As approved by Council, the LPP sets out a redevelopment plan for the entire Lansdowne site, which is to include the reconstruction of Frank Clair Stadium, as well as the establishment of an urban park (which will include the Aberdeen Pavilion and the Horticulture Building),

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[15] Exhibit 3, Kirkpatrick Affidavit, Appeal Book, Vol. 1, Tab 39, p. 475.
[16] Exhibit 47, Kirkpatrick Affidavit, Appeal Book, Vol.2, Tab 43, pp. 564-565.
[17] Kirkpatrick Affidavit, paras. 66-67, Appeal Book, Vol. 1, Tab 38, p. 442.
[18] Kirkpatrick Affidavit, para. 91, Appeal Book, Vol.1, Tab 38, pp. 449-50.
[19] Exhibit 73, Kirkpatrick Affidavit, Appeal Book, Vol. 2, Tab 46, pp. 675-93.
[20] Exhibit 69, Kirkpatrick Affidavit, Appeal Book, Vol. 2, Tab 44, pp. 582 - 607 [hereafter "Project Agreement Framework"]
[21] Exhibit 71, Kirkpatrick Affidavit, Appeal Book, Vol. 2, Tab 45, pp. 609 – 673 [hereafter "PWC Business Model"]

residential townhouses and condominiums, over 330,000 square feet of new retail and integrated office space, an office tower and underground and surface parking facilities.[22]

15. The LPP also calls for the establishment of a complex partnership structure involving a master limited partnership, and limited partnerships for each component of the project. OSEG is the general partner of each component partnership. Revenues and losses from these partnerships are aggregated and then distributed through a closed system waterfall scheme discussed in paragraphs 20-22 below.

16. The City's commitments and obligations under the LPP[23] include:

- spending $129,300,000 on the redevelopment of the Stadium the Arena and related parking facilities, and a further $35,000,000 to establish an urban park;
- paying all costs for environmental remediation for addressing archaeological conditions at the Lansdowne site;
- entering into a 30 year lease with the stadium component limited partnership for the Stadium and Arena for an annual base rent of $1.00;
- entering into a 50 year lease (renewable for an additional 20 years) with the retail component limited partnership for the 10.2 acres of Lansdowne Park for commercial development, at an annual rent of $1.00 for the first 30 years;
- selling or leasing lands and air rights for residential development;
- granting OSEG contracts for developing and managing the construction of the sports, commercial and park facilities on the Site, and for ongoing management of the urban park, the Stadium and Arena;
- assigning all revenues derived from the sale of rights and the operation of concessions at the Stadium an Arena to the closed system; and

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[22] *Ibid.*
[23] Project Agreement Framework, Appeal Book, Vol. 2, Tab 44, pp. 583-607.

- providing OSEG with the right of first opportunity to acquire the retail lands should the City desire to dispose thereof, rather than have it submit a competitive bid.

17. To finance these commitments, the City is to issue debentures totalling $164,000,000,[24] and has agreed to commit a further $10,200,000 from the sale of air rights relating to the proposed condominium development on the site.[25]

18. Under the LPP, the OSEG must:

- acquire and operate a CFL team at the Stadium for minimum period of 5 years;[26]
- acquire and operate the Ottawa 67's Ontario Hockey League ("67's" or "OHL") franchise and maintain the Arena, together with the Stadium, as the 67's "home-ice" location;[27]
- make a Minimum Equity contribution of $30,000,000, of which $19.2 million will be the costs of acquiring the CFL and OHL sports franchises;[28]
- guarantee the completion of the stadium component and the City's portion of the parking structure and be responsible for cost overruns in relation thereto but with the right to be repaid any money so expended, with interest at 8%, from revenues generated under the LPP;[29]
- fund any shortfalls in the reserve fund established to maintain the stadium and arena, but with the same right of repayment as noted with respect to cost overruns;[30] and
- arrange third party financing for the costs of building the retail development.[31]

19. As confirmed by the City Manager, the actual financial commitments of OSEG under the LPP are to be $10 million for OHL franchise, $9.65 million for the CFL franchise and start up

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[24] Exhibit 85, Kirkpatrick Affidavit, Appeal Book, Vol. 2, Tab 48, p. 815
[25] Exhibit 74, Kirkpatrick Affidavit, Appeal Book, Vol. 2, Tab 47, p. 765.
[26] Project Agreement Framework, Appeal Book, Vol. 2, Tab 44, p. 585.
[27] PWC Business Model, Appeal Book, Vol. 2, Tab 45, p. 638-39.
[28] Exhibit X, Ballard Affidavit, Vol. 1, Tab 30, p. 258.
[29] Project Agreement Framework, Appeal Book, Vol. 2, Tab 44, p. 584.
[30] *Ibid.*
[31] PWC Business Model, Appeal Book, Vol. 2, Tab 45, p. 650.

costs, $11.9 million to construct parking, and $.7 million for retail development (the other $86 million needed to finance the retail development is to be provided by third party lenders).[32]

20. The stadium, arena, parking and commercial components form part of a 'closed system' whereby net cash flows from operations are distributed to the City and to OSEG according to a priority payment structure. "Net cash flow" was not defined in financial documents approved by Council in June 2010, but is to be comprised of any funds remaining after servicing third party debt incurred to fund commercial development at Lansdowne Park, and the payment of certain unspecified expenses.[33]

21. Any net revenues will be distributed according to a "waterfall scheme" in accordance with the following priorities:[34]

i) payments on account of the reserve for the stadium and related parking;

ii) a return on OSEG's Equity and on the City's Funding Equity at 8% per annum;

iii) a return of OSEG's *Additional Equity*;[35]

iv) a return of OSEG's *Minimum Equity*, amounts paid in connection with the completion guarantee and the City's *Funding Equity*;

v) a return on the City's *Deemed Equity* at 8% per annum, on a cumulative, but not compounded basis; and

vi) any remaining balance will be shared equally by the parties.

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[32] Answer No. 25 to Undertakings given by Kent Kirkpatrick arising from his cross-examination held May 5, 6, 10 and 11, 2011, Appeal Book, Vol. 2, Tab 54, pp. 679-80. It is noteworthy that the $10 million OHL franchise cost was the product of non-arms length negotiation among the principals of OSEG, and that no independent or other review of that price has been carried out by the City, see Kirkpatrick cross-examination, May 6, 2011, Qs. 1011-1015, and 1041-1057. Appeal Book, Vol. 1, Tab 8, p. 82 and Tab 9, pp. 84-90.

[33] Project Agreement Framework, Appeal Book, Vol. 2, Tab 44, p. 587;

[34] *Ibid.*

[35] This is also represented as being in fourth place in the waterfall : see for example Exhibit 71, Kirkpatrick Affidavit, Appeal Book, Vol. 2, Tab 45, pp. 617-18

22. The extent to which the City and the OSEG will receive cash distributions from the waterfall scheme also depends on the extent to which their respective investments in the LPP are recognized as equity. This is to be determined as follows:[36]

- all capital contributions by OSEG (cash or its equivalent) and/or letters of credit in respect of the project including the CFL and OHL franchises (described as OSEG "Minimum Equity";)

- all contributions by OSEG in connection with the completion guarantee for the stadium and parking structures, or required to meet payments to the capital reserve or to cover net losses, including those relating to operation of the sports franchises, and any equity contribution in excess of the $30 million minimum (described as OSEG "Additional Equity");

- the City is to receive a credit for "Deemed Equity", of $23.5 million, being the assigned value of the retail component lands and the office head lease; and

- a portion of the Capital committed by the City which is to be calculated according to a formula, and estimated to be $13.4 million of the $172 million the City is to commit under the LPP.[37]

23. In other words, all of the capital and other commitments made by OSEG, including to cover losses on the sports franchises, will be recognized as equity on which it will earn 8% annually until the funds are returned in accordance with waterfall priorities. By comparison, less than 8% of the capital committed by the City to the LPP is to be recognized as equity in the waterfall, and the only recognition of the non capital commitments made by the City will be its Deemed Equity on which it will earn an 8% annual return at level 5 in the waterfall.

24. As acknowledged by the City, inaccurate and inconsistent versions of the LPP were presented to, and approved by, City Council. In one instance, the City approved a formula for

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[36] Project Agreement Framework, Appeal Book, Vol. 2, Tab 45, p. 585-86.

[37] The value of the City's funding equity was estimated according to a formula and is inversely proportional to the costs of borrowing for the City. The $13.4 million figure was derived using an interest rate of 5.65%, so if the City borrows at a more favourable rate, its funding equity would decline, perhaps substantially, see footnote 38 to this factum.

calculating the City's Funding Equity to be $76 million, five fold the amount the City says was intended.[38] In another, City Council approved two contradictory versions of the waterfall scheme. According to one version, OSEG is to receive the return of its Additional Equity only after the City is paid a return on its Deemed Equity. In the other version, that priority is reversed.[39]

25. The City has said that these inconsistencies were errors that it only became aware of during the course, and in consequence, of this proceeding, and has stated its intention to implement a version of the LPP that provides the City with only a fraction of the potential returns it would have received according the other version of the LPP it approved.

C. The decision of the Superior Court of Justice

26. The Appellant contended that the City of Ottawa acted illegally in approving the LPP by:

i) granting bonuses to OSEG, contrary to s. 106 of the *Municipal Act;*

ii) violating the City procurement by-law, and in doing, failing to maintain that bylaw as required s. 270 of the *Municipal Act*; and

iii) not acting in good faith by failing, *inter alia*, to observe City policies, or provide accurate and timely information about LPP costs and risks.

27. The Court below held that no breach of s. 106 had occurred on several grounds. First, that s. 106 should be "interpreted restrictively" so as not to unduly restrict the public/private partnership (P3) ventures. Second, that notwithstanding the specific prohibitions of s. 106, the court must view the commercial arrangement between a municipality and a private developer "as a whole" to determine whether an "obvious advantage" had been conferred on the developer.

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[38] Answer No. 24 to Undertakings given by Kent Kirkpatrick arising from his cross-examination held May 5, 6, 10 and 11, 2011, Appeal Book, Vol. 2, Tab 54, pp. 975-978.

[39] Supplementary Affidavit of Kent Kirkpatrick, sworn April 26, 2011 ["Kirkpatrick Supplementary Affidavit"], paras. 57-71, Appeal Book, Vol. 2, Tab 49, pp. 847-54.

Finally in regard the entirety of that commercial arrangement, the Court below held that it did not have "the jurisdiction to interfere with City Council's determination on the reasonableness of the financial model."[40]

28. In holding that the sole source procurement of the LPP was lawful, the Court below held that City had complied with its procurement bylaw, and that in any event the City was lawfully entitled to depart from the procedures of its procurement by-law, notwithstanding s. 270 of the *Municipal Act* which requires municipalities to "adopt and maintain" policies with respect to the procurement of goods and services.

29. In regard to the question of good faith, the Court below found that City had failed to: i) keep records of private meetings between staff and OSEG as required by City policy; ii) share the Deloitte report with Council or the public; iii) obtain an independent appraisal of the $10 million cost of the OHL franchise; or iv) present accurate and consistent information about the LPP. However, characterizing the Applicant's contention as a complaint about the merits of the LPP, rather than its lawfulness, the Court below held that none of these deficiencies amounted to bad faith.[41]

PART IV - ISSUES AND ARGUMENT

30. The Appellant maintains that the Superior Court of Justice:

a. erred in law in adopting a reasonableness standard of review and according substantial deference to decisions made by the City that were impugned for being *ultra vires*;

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[40] Decision, paras. 75 and 84, Appeal Book, Vol. 1, Tab 3, pp. 34 and 38.
[41] Decision, paras. 17 and 68, Appeal Book, Vol. 1, Tab 3, pp. 17, and 32.

b. erred in law in its interpretation of s. 106 of the *Municipal Act* and its conclusion that the City bylaw approving the LPP was compliant with s. 106 of the Act;

c. erred in fact and law in concluding that the impugned by-laws did not violate the City's procurement policies and that the City had not violated its obligation under s. 270 of the *Municipal Act* to adopt and maintain procurement policies; and

d. erred in fact and law in concluding that the City had acted in good faith in approving the LPP.

A. The Superior Court erred in applying a deferential standard of review

31. The Court below applied the standard of reasonableness to the question of whether City Council had breached the *Municipal Act* by providing bonuses to OSEG, contrary to s. 106, or by failing to maintain a procurement by-law, contrary to s. 270. In so doing, the Court below failed to distinguish between the standard of review applicable to a case in which an *intra vires* decision is being reviewed and a case, such as the present one, where it is alleged that the municipality acted outside the scope of its statutory mandate.

32. The Supreme Court of Canada addressed this distinction in *London (City) v. RSJ Holdings Inc.*, a case that also involved an application under s. 273 of the *Municipal Act*:[42]

> Municipalities are creatures of statutes and can only act within the powers conferred on them by the provincial legislature...On the question of "illegality" which is central to a s. 273 review, municipalities do not possess any greater institutional expertise than the courts – "[t]he test on jurisdiction and questions of law is correctness.

33. As the Supreme Court explained in another case, municipal councillors, unlike tribunal members, do not have any "special expertise"; their decisions are the "by-products of the local political milieu [rather] than a considered attempt to follow legal or institutional precedent" and they are "motivated by political considerations and not by an entirely impartial application of

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[42] *London (City) v. RSJ Holdings Inc.*, [2007] 2 S.C.R. 588 at para. 38.

expertise." Therefore, deference should not be shown to municipal decisions engaging jurisdictional questions of law.[43]

34. Despite the clear direction from the Supreme Court and the fact that it had been asked to determine whether the City had acted in contravention of ss. 106 and 270 of the *Municipal Act,* the Court below approached these questions as if they were questions of policy in respect to which the Court was required to show deference, and not as questions of law falling squarely within the competence of the Court. Put another way, the Court below incorrectly conflated the approach adopted by the courts in determining questions of good faith, with the standard of review applicable to a determination of whether a municipality has acted outside its legal authority. A standard of correctness ought to have been applied.

B. The Superior Court erred in its interpretation and application of s. 106 of the *Municipal Act*

(i) No Special Consideration is Warranted for Public-Private Partnerships

35. The Court below held that s. 106 should be "interpreted restrictively in the sense of 'conferring an obvious advantage,'" because to do otherwise "would be to unduly restrict the public/private joint ventures that are of increasing importance in the establishment of municipal facilities." In so holding, Justice Hackland relied on his own decision in *1085459 Ontario Ltd. v. Prince Edward County (Municipality)* and a decision of the British Columbia Supreme Court.[44] The Appellant submits that it was an error to give s. 106 a restrictive interpretation that effectively insulates complex public-private-partnerships from judicial scrutiny.

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[43] *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342 at para. 29.

[44] *1085459 Ontario Ltd. v. Prince Edward County (Municipality)*, [2005] O.J. No. 3471 (S.C.J.) [*Prince Edward County*]; *Nelson Citizen's Coalition v. Nelson (City)*, [1997] B.C.J. No. 138 (B.C.S.C.) [*Nelson*]. The prohibitions of the B.C. statute in place at that time are narrower than those set out in s. 106, and did not include "exemption from any levy, charge or fee" or "leasing or selling any property of the municipality at below fair market value.

36. First, a restrictive interpretation of this provision is inconsistent with s. 64(1) of the *Legislation Act* which provides that a statute "shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects."[45] It is also inconsistent with the grammatical and ordinary sense of the words of the provision and with the overall scheme of the *Municipal Act*.[46] The prohibition on granting bonuses set out by s. 106 is defined broadly and includes both direct and indirect assistance. A non-exhaustive list of specific deemed examples of prohibited assistance are set out in s. 106(2) which includes giving or lending any property, and leasing property at below fair market value. The language chosen by the legislature suggests an intention to prohibit both specific forms and a wide range of assistance, whether simple or complex.

37. In addition, ss. 107 to 110 of the Act establishes specific but limited exceptions to the prohibition against granting bonuses. There is no exemption for P3s. As explained in *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance*,[47] "if a statute specifies one exception (or more) to a general rule, other exceptions are not to be read in. The rationale is that the legislator has turned its mind to the issue and provided for the exemptions which were intended." Therefore, the Court below erred in effectively reading-in an additional exception to s. 106.

38. Further, there was no evidence before the Court below that a restrictive interpretation of s. 106 of the Act was necessary to ensure that municipalities are able to enter into P3 agreements.

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[45] *Legislation Act*, 2006 S.O. 2006, ch. 21, Schedule F, s. 64(1). See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paras. 21-22.
[46] *Rizzo, supra* at para. 21.
[47] *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance* [2004] F.C.J. No. 2116 at para. 96 (F.C.A.)

Moreover, the Court below disregarded the expert evidence of Professor John Loxley[48] which identified best practice norms for P3s that, if followed, would have established fair market value for the lands, leases and rights involved, and allowed the City to adopt a P3 approach for redeveloping Lansdowne Park while complying with s. 106 of *Act*.[49]

(ii) Section 106 does not engender an "obvious advantage" test

39. As noted above, the Court below held that leasing land at a nominal rental as part of a P3 arrangement is not *per se* an illegal bonus even where it assists a private developer. Rather it held that in such a case, it is necessary to view the commercial P3 arrangement as a whole to determine whether an "obvious advantage" has been conferred on the developer. In this regard, the Court below appeared to apply three similar but substantively different standards, which required the determination of whether the scheme in question: (1) clearly confers a benefit on the developer unsupported by any concomitant obligation benefitting the City;[50] (2) confers an obvious advantage on the private developer not balanced by a concomitant benefit to the City;[51] or (3) fails to represent an appropriate balance of risk and potential reward or potential loss.[52] Each of these iterations required the Court to assess the complexities of the LPP to determine whether some *quid pro quo* could be found to offset the assistance provided to OSEG.

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[48] Professor Loxley is a Professor of Economics and former Head of Department of Economics at the University of Manitoba. He is a Fellow of the Royal Society of Canada and has served as an Economic Advisor to several governments, including that of Manitoba. He has studied P3s for 15 years, including P3 economics and financing, government policy towards P3s throughout Canada, value for money assessments and the use of public sector comparators, Affidavit of John Loxley sworn October 14, 2010, ["Loxley Affidavit"] Appeal Book, Vol. 1, Tab 33, pp. 292-305.

[49] *Ibid.* at paras. 9-40. Professor Loxley's evidence was that two basic norms have been recognized by Canadian authorities for proceeding with P3s. The first requires a public authority to solicit competitive bids for the goods and services it is seeking to acquire or contract for. The second, which was developed in response to the particular challenges presented by complex public-private partnership projects such as the LPP, requires that P3 projects should also be subject to a value-for-money assessment or audit to provide a further safeguard of the public interest and the public purse. It was Professor Loxley's uncontroverted evidence that, in his extensive experience with P3s in Canada, the LPP was unique in not having been subject to either of these rudimentary norms.

[50] Decision, para. 73, Appeal Book, Vol. 1, Tab 3, p. 34.

[51] Decision, para. 77, Appeal Book, Vol. 1, Tab 3, p. 35.

[52] Decision, para. 84, Appeal Book, Vol. 1, Tab 3, p. 38.

40. The Appellants submit that, in taking this approach, the Court below ignored the plain and ordinary language of s. 106. While the term "bonus" is not defined by the Act, the obvious intent of this provision, as illustrated by the specific prohibitions set out in s. 106(2), is to prohibit municipalities from using public property and revenue to underwrite or subsidize a commercial enterprise. One particular example is the prohibition set out by s. 106(2)(c) on the lease or sale of any municipal property at below fair market value. This prohibition is unqualified and does not require or, indeed, permit a court to look beyond the terms of the lease or sale (let alone examine the entirety of the arrangements that may exist between the municipality and commercial entity) to determine whether some consideration or *quid pro quo* for such a lease or sale may be found elsewhere.

41. Having asked the wrong question, the Court below compounded its error by holding that this it was primarily one "for the City Council to answer as a matter of policy and business judgment and such answer, if arrived at in good faith, is entitled to a very high degree of [deference] by the court."[53] The Court below further erred by holding that it did not have the jurisdiction to interfere with City Council's determination of the reasonableness of the LPP financial model, in effect leaving the question of compliance with s. 106 entirely in the hands of the municipality.[54]

42. Consistent with this view, the Court below did not carry out an analysis of the LPP, but deferred to the views of City Council, and adopted those of the City Auditor that the LPP was compliant with s. 106 because the LPP represented "an appropriate balance of risk and potential

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[53] Decision, para. 77, Appeal Book, Vol. 1, Tab 3, p. 35.
[54] Decision, para. 84, Appeal Book, Vol. 1, Tab 3, p. 38.

reward or potential loss" for each party.[55] Whatever his financial acumen, the City Auditor is not a competent authority on the legal questions at issue in this proceeding, and no deference to his views should be shown by the Court. Furthermore, the question addressed by the Auditor, namely whether the LPP engendered an appropriate balance of risk as between the City and OSEG, is not a proper to measure compliance with s. 106. Moreover, it was an error to accord any weight to the City Auditor's report because, apart from being hearsay evidence, the City Auditor failed to indicate that he was aware of the two serious discrepancies in the financial model discussed above in paragraphs 24-25, and there is no way to know which version of the scheme he had in mind in offering his conclusion.

(iii) The City bylaw approving the LPP did not comply with s. 106 of the Act

43. If the prohibitions contained in s. 106 of the Act are interpreted and applied according to their ordinary and plain meaning, the Appellant submits that it is clear that in approving the LPP the City acted contrary to s. 106. In particular, it did so by granting bonuses to OSEG as: (a) leases to City property at below fair market value; (b) subsidies to acquire and operate sports franchises; and (c) the payment of costs related to the public park to facilitate commercial development and activity under the LPP.

(a) The leases granted to OSEG are below fair market value

44. Under the LPP, the City proposes to enter into long term leases of City owned facilities and land for $1.00 per year. Under the commercial lease, more than ten acres of Lansdowne Park are to be leased for commercial development and for a term of 50 to 70 years. For the first 30 years of this lease, rent is to be $1.00/year, with the City only being entitled to charge a

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[55] Decision, para. 82 Appeal Book Vol. 1, Tab 3, p. 37.

market rent in years 31 and following. The Deloitte report recommended to the contrary - that the retail development "be required to pay land rent and that the land lease be registered on title and take precedence over bank debt."[56]

45. The annual rent under the 30 year Stadium lease is also to be $1.00, and there is to be a sublease to the CFL partnership at $300,000 per year. In addition, under the Stadium lease any revenues from the sale of naming rights, corporate boxes, advertising, and concessions, which Deloitte estimated to potentially be in excess of $2.35 million/year, are assigned to the closed system and the waterfall. The Deloitte report recommended to the contrary, that the portion of these revenues attributable to Stadium and Arena, be used to support the City's debt repayment obligations, and that a substantially higher rent be charged the CFL.[57]

46. As the recommendations of Deloitte Report underscore, both the Commercial and Stadium Leases are on terms below fair market value, and are therefore prohibited by s. 106(2)(c). It was therefore an error for the Court below to look for some offsetting benefit or *quid pro quo* in the face of such clear non-compliance.

47. In the alternative, and in any event, the Appellant submits that the City failed to demonstrate that it will receive any consideration or other *quid pro quo* that represents fair market value for the land and facilities it intends to lease under the LPP. The only putative benefits the City is to derive under the LPP in regard to the stadium lease are i) contributions to the reserve fund, and ii) recognition of a small fraction of the investment it will make under the LPP which is to be its *Funding Equity*. As for contributions to the reserve fund, these are first

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[56] Deloitte Report, Appeal Book, Vol. 2, Tab 58, p. 1055
[57] *Ibid.* at pp. 1053-1054.

and foremost an obligation of the Stadium Partnership, not OSEG. Only in the event that there is insufficient net cash flow to the waterfall scheme, will OSEG be called upon to backstop the reserve fund; and even then it will earn interest on and the return of any such payments.[58] The only actual cash the City may ever receive in return for its substantial investment in, and ownership of, the Stadium and parking facilities will be in regard to its Funding Equity which nominally represents less than 8% of the total capital commitment it will make under the LPP (see discussion at paragraphs 22-23).

48. However neither the reserve fund, nor a potential return on its funding equity can be considered a net benefit to the City, because they are unlikely to replace revenues the City will lose under the LPP. These include the profits the City would otherwise have earned as the owner of the Stadium and related parking facilities,[59] including more than $2.35 million/yr from the sale of naming rights, premium seating, advertising and concessions at the Stadium and Arena; and from charging a market rent to the CFL.

49. The only *quid pro quo* for leasing the commercial lands for $1.00/yr, is a potential return on the City's Deemed Equity, and the reversionary interest the City may have in the retail development when the lease terminates 50 or 70 years from now. However, any return on the City's Deemed Equity is speculative and not expected to begin until 2038, and then only if LPP projections are borne out.[60] There is no evidence that the City's reversionary interest will have any value a half century or more from now.

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[58] Project Agreement Framework, Appeal Book, Vol. 2, Tab 44, pp. 584-86; Kirkpatrick cross-examination, May 6, 2011, Qs. 1387-1390, Appeal Book, Vol. 1, Tab 10, p. 92

[59] PWC Business Model, Appeal Book, Vol. 2, Tab 45, p. 664.

[60] PWC Business Model, Appeal Book, Vol. 2, Tab 45, pp. 662-63; and Kirkpatrick cross-examination, Qs. 2287-2288, Appeal Book, Vol. 1, Tab 16, p. 114-15.

(b) The LPP subsidizes OSEG's sports franchises

50. In addition to providing leases and development rights at nominal cost, the LPP can largely be seen as a scheme for subsidizing OSEG's costs and losses relating to the acquisition and operation of CFL and OHL franchises. These OSEG investments represent nearly two-thirds of the initial capital it will commit to the LPP, and lion's share of revenue it is to receive from the waterfall will be to reimburse it for those investments. [61]

51. In particular, and as noted, OSEG's costs to acquire two sports franchises are to be repaid from the waterfall, together with annual interest at 8%. If the CFL franchise loses money, as it is expected to do so for some time,[62] losses will, at first instance, be directly subsidized by profits from other components of the LPP. If this cross-subsidy is insufficient, any OSEG payments to cover remaining losses, together with accumulated interest, are to be repaid under the waterfall.[63] Moreover, so long as it operates for 5 years, OSEG will receive these reimbursing payments even if the CFL team subsequently fails.[64]

52. This financial assistance is largely to be paid with revenues generated by facilities established entirely at public expense, or with foregone revenues that would otherwise be paid to the City as fair market value for land, facilities and rights which under the LPP are being assigned to the waterfall scheme.

53. These include revenues from the sale of advertising, premium seating and concessions are also appropriately seen as subsidies to OSEG, as should the CFL lease also at below market

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[61] PWC Business Model, Appeal Book, Vol. 2, Tab 45, pp. 663 and 665.
[62] PWC Business Model, Appeal Book, Vol. 2, Tab 45, p. 638.
[63] Kirkpatrick cross-examination, Qs. 1468-1473, Appeal Book, Vol. 1, Tab 11, pp. 93-95.
[64] *Ibid.*

value. As the author of the Deloitte report advised City Staff, after carrying out a review of other sports franchises,[65] "No other municipality provides these subsidies."[66]

54. While the Court below acknowledged the Appellant's contentions concerning these subsidies, it failed to directly address them. The Appellant submits that these subsidies are unlawful bonuses contrary to s. 106, and there is therefore no need to search for some offsetting benefit. However, if the overall LPP must be taken into account, the only putative benefit to the City for providing these subsidies is the right of first refusal to purchase the sports franchises if OSEG decides to sell them.[67] In the Appellant's submission, the inadequacy of this consideration is obvious and cannot be taken as a reasonable offsetting benefit to the City.

(c) The City's spending on the urban park also bonuses OSEG

55. A significant portion of City spending on the urban park under the LPP also provides assistance to OSEG contrary to s. 106. This assistance includes the $6 million the City will spend to move the Horticulture Building to make way for commercial development on the site.[68] It also includes unspecified amounts the City will spend to create surface parking and a bus staging area in the park to primarily serve the Arena and Stadium.[69] The Court below entirely failed to address this issue.

(iv) Tax revenues and avoided costs do not offset bonuses granted to OSEG

56. As noted, the Court below deferred to the views of City Council and the City Auditor on the reasonableness of the financial model, which assumes that tax revenues from commercial

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[65] Deloitte Report, Appeal Book, Vol. 2, Tab 58, p. 1040-1043.
[66] Exhibit E, Kirkpatrick cross-examination, May 6, 2011, Appeal Book, Vol. 2, Tab 53, pp. 959-60.
[67] Project Agreement Framework, Appeal Book, Vol. 2, Tab 44, p. 585.
[68] Kirkpatrick cross-examination, Qs 1928-1936 Appeal Book, Vol. 1, Tab 13, pp. 103-06.
[69] Kirkpatrick cross-examination, Qs. 1937-1940, Appeal Book, Vol. 1, Tab 14, pp. 107-08.

development at Lansdowne Park, as well as avoided costs resulting from the capital spending by the City, are available in some manner to service the City's LPP debt. As set out in paragraphs 71-72 below, these assumptions are largely unfounded. In any event, for the purposes of Justice Hackland's approach to s. 106, neither of these putative benefits can be considered concomitant obligations of OSEG, which is the test he endorsed and adopted in *Prince Edward County, supra* case,[70] and relied on in this case.

57. In this case, Justice Hackland relied on a variant of the test he articulated in his previous decision, requiring only that the City derive *some* benefit from the assistance it provides to OSEG. This is inconsistent with the legislative purpose of s. 106 which is to preclude the use of bonuses to attract a particular business to a community that would not otherwise locate there, in order to prevent unfair competition among municipalities.[71] Therefore, to suggest that a municipality can treat tax revenues paid by such a business as offsetting a bonus turns the purpose of this provision on its head. Section 106 would become, according to this reasoning, a provision to encourage rather than prohibit the granting of bonuses.

C. The impugned by-laws violate the City's procurement policies

58. The Court below also erred in holding that the City had acted in accordance with its procurement bylaws and, in the alternative, was entitled to depart from the procedures of those by-laws without offending the requirement of s. 270 of the Act that the City adopt and maintain procurement policies.

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[70] *Prince Edward County, supra* at paras. 13-17.
[71] *Ibid.* at paras. 10-11.

59. In making these findings, the Court below failed to consider the guiding principles for public procurement as recognized by governing legal authorities. In considering public procurement in *Shell Canada*, *supra*, McLachlin J. acknowledged the importance of "public concerns such as equality of access to government markets, integrity in the conduct of government business, and the promotion and maintenance of community values..."[72] Similarly, the Federal Court of Appeal has held that the essential objectives of government procurement policies include:[73]

> Fairness to competitors in the procurement system. A fair procurement system that applies one set of transparent rules to all bidders increases confidence in the system, and encourages increased participation in competitions. This maximizes the probability that the government will get good quality goods and services that meet its needs, at minimum expense to the taxpayer. In short, fairness gives taxpayers value for the taxes they pay.

60. Indeed, these very principles are given expression in the City Purchasing By-Law, which provides that:[74]

> 2. (1) The objective of this By-Law respecting procurement is to obtain best value when purchasing goods, construction and services for the City while treating all suppliers equitably.
>
> (2) The guiding procurement principle is that purchases be made using a competitive process that is open, transparent and fair to all suppliers.

61. The importance of fairness and competition in public procurement is also reflected by the restrictions on the receipt of "unsolicited proposals" where a competitive procurement process is underway. These restrictions are set out in s. 25 of the Purchasing By-Law, and the Ottawa Options Policy which complements it, and intend to prevent a proponent from "jumping the

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[72] *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 at pp. 240-241 (dissenting).
[73] *Canada (Attorney General) v. Almon Equipment Ltd.*, 2010 FCA 193 (CanLII) at para. 23.
[74] Exhibit 32, Kirkpatrick Affidavit, Appeal Book, Vol.1, Tab 41, p. 483.

queue". To allow otherwise would confound the principles of fairness and transparency that are the cornerstones of public procurement.

62. In dismissing the application, the Court below failed to address the question of whether, in 2008, it was lawful for the City to receive and assess the OSEG proposal to redevelop Lansdowne Park. The Ottawa Options Policy in place at the time,[75] which had been established specifically to deal with unsolicited proposals for P3 initiatives, did not allow for the receipt of an unsolicited proposal where a competitive procurement process had been "initiated or is planned to be initiated." As the City Manager confirmed, the design competition was a competitive procurement process that had been initiated in the fall of 2008.[76]

63. It was therefore unlawful for City staff and the Mayor to meet privately with OSEG representatives after that date to discuss an OSEG proposal for redeveloping Lansdowne Park, and to subsequently receive and assess its "unsolicited" redevelopment proposal. It was similarly unlawful for City Council to authorize or condone those actions, and ultimately abandon the design competition in consequence thereof.

64. The Court below further erred in holding that the City had complied with Ottawa Options Policy as amended in February 2009, for those amendments did not obviate the need for a competitive process following the receipt of an unsolicited proposal in the narrow circumstances where that might be permitted.[77] The comparative evaluation of the OSEG and SS&E Proposals

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[75] Ottawa Option 2002, Kirkpatrick cross-examination, Appeal Book, Vol. 2, Tab 50, p. 903. The Ottawa Options Policy was amended by City Council in February 2009: Exhibit 33, Kirkpatrick Affidavit, Appeal Book, Vol. 2, Tab 42, pp. 542-44. As this was five months after the OSEG proposal was formally received in October 2008, the earlier policy applied.
[76] Kirkpatrick cross-examination, May 5, 2011, Q. 300, Appeal Book, Vol. 1, Tab 5, p. 69.
[77] Exhibit 33, paras. 3-4, Kirkpatrick Affidavit, Appeal Book, Vol. 2, Tab 42, p. 542.

(described in paragraph 10 above) did not constitute such a competitive process since the SS&E Proposal was entirely unrelated to redevelopment of Lansdowne Park.

65. The Court below further erred in holding that the City was entitled to dispense with a competitive bidding process under s. 22(1)(d) of the Purchasing Bylaw, not only in regard to contracting for the redevelopment of Lansdowne Park, but also for a variety of post development services. Non-competitive procurement is permitted under s. 22(1)(d), but only where "there is an absence of competition for technical or other reasons and the goods, services or construction can only be supplied by a particular supplier and no alternative exists."[78] In this case, that exemption clearly did not apply.

66. Legal authorities have held that "competition is the norm",[79] that exceptions are to be interpreted narrowly, and that the proponent of an exception bears the onus of establishing it applies.[80] The City presented no evidence to establish that the OSEG proposal was exempt under s. 22(1)(d) of the Purchasing Bylaw, other than its unique interest in two sports franchises. At best, this would have qualified OSEG to rent the Stadium and Arena for CFL and OHL games. There is no evidence that OSEG was the only entity qualified to develop the entire Lansdowne Site, or provide ongoing management services with respect to the Stadium, Arena, commercial development and the urban park with its heritage assets. There is also no evidence that redevelopment of the Lansdowne Park depended upon the success of the CFL franchise, indeed according to one of the principals in OSEG, the contrary was true.[81] Certainly the CFL franchise

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[78] Section 22(1)(d) of the Ottawa Purchasing By-law, Exhibit 32 Kirkpatrick affidavit, Appeal Book, Vol. 2, Tab 41, p. 498.
[79] *In Business Systems Inc. (Re)*, 2002 CanLII 46962 (C.I.T.T.); *Re Complaint Filed by Foundry Networks* (23 May 2001), PR-2000-060 (CITT); *Re Complaint Filed by Novell Canada, Ltd.* (17 June 1999), PR-98-047 (CITT).)
[80] *Sybase Canada Ltd. (Re),* 1997 CanLII 12034 (C.I.T.T.) and *Patlon Aircraft & Industries Limited (Re),* 2003 CanLII 54791 (C.I.T.T.)
[81] Exhibit 4, Kirkpatrick cross-examination, May 6, 2011, Appeal Book, Vol. 1, Tab 51, p. 921.

was not linked the redevelopment of Lansdowne Park.[82] Furthermore, the evidence indicated that OSEG would have responded to a competitive procurement for the reconstruction of Frank Clair Stadium.[83] Finally, in regard to s. 22(1)(d) of the Purchasing By-law, the claim to this exemption was made well after Council had already approved negotiations with OSEG, and no motion to waive the application of the Purchasing By-Law was ever put to or passed by Council.[84]

67. For these reasons, the Court below erred in according deference to the views of City staff and the City Auditor with respect to the requirements of the City's procurement rules. The Court below further erred in holding that the City was entitled to depart from the procedures in its procurement bylaw because s. 270 of the *Municipal Act* does not specify the particular elements required to be included in a procurement policy, relying on *Blyth v. Northumberland (County)*[85]. The Appellant submits that the Court below erred in this respect, since there was nothing in *Blyth* to indicate that the *procedural* by-law in issue was required under the provisions of the *Municipal Act* then in effect.[86] Moreover, there is authority that non-compliance with a by-law required by s.270 is a breach of this provision.[87]

D. The City failed to act in good faith

68. In considering the Appellant's contentions that the City engaged in a pattern of conduct that failed to meet the standard of candour, frankness and impartiality required of municipal governments, the Court below did find that the City had in fact failed to: keep records of private

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[82] Exhibit T, Ballard Affidavit, Appeal Book, Vol. 1, Tab 29, pp. 251-257
[83] Exhibit 6, Kirkpatrick Affidavit, Appeal Book, Vol. 1, Tab 40, p. 479.
[84] Exhibit 47, Kirkpatrick Affidavit, Appeal Book, Vol. 2, Tab 43, p. 556.
[85] *Blyth v. Northumberland (County)* (1990), 75 O.R. (2d) 576, [1990] O.J. No. 2166 (S.C.J.).
[86] *Municipal Act*, R.S.O. 1980, c. 302, as amended (now repealed).
[87] *Niagara River Coalition v. Niagara-On-The-Lake (Town)*, 2009 CanLII 25982 (ON S.C.) at paras. 149-152, overturned on other grounds 2010 ONCA 173 (CanLII), para. 65.

meetings and exchanges between staff, the Mayor and OSEG as required by City policy;[88] failed to share the Deloitte report with Council or the public; and failed to present accurate and consistent information about the LPP. However, it concluded that no particular event or conduct represented bad faith by the City and failed to consider whether taken together, the City's actions represented a pattern of conduct reflecting a lack of good faith.

69. The conclusion of the Court below on this issue also failed to accord with the test it identified for determining good faith, namely that "As long as the operational and financial proposals are fully and accurately disclosed to City Council, its acceptability and wisdom are matters for council to decide. These are issues of policy, not legality." However, as the Court below acknowledged, key documents approved by Council greatly overstated the benefits the City would derive under the LPP,[89] and could hardly therefore be seen as representing full and accurate disclosure.

70. Further, as the uncontroverted evidence established, key aspects of the LPP were impossible even for a sophisticated reader to understand, not only because of incomplete and often contradictory information provided about the scheme, but also because of the public claims about the scheme made by the Mayor and other proponents.[90]

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[88] Exhibit A, Affidavit of Guy Michaud, sworn January 19, 2011, Appeal Book Vol 1, Tab 35, pp. 321-24; and Kirkpatrick cross-examination, May 5, 2011, Qs. 335-337, and 695-705, Appeal Book, Vol. 1, Tabs 6 and 7, pp. 71-72, and 75-78.

[89] Decision, para. 61, Appeal Book, Vol. 1, Tab 3, p. 31.

[90] Professor Ian Lee, who is a professor at the Sprott School of Business, Carlton University and who previously served as the Director of its MBA Program, gave evidence that it was impossible to understand key elements of the LPP business model because City had failed to provide a candid and accurate account of it: "In my view, the City's statements on revenue neutrality, cash surpluses and incremental taxation are based upon a notional or fictitious accounting model and are, at best, misleading. One should not need an accounting degree to understand the true costs of redeveloping a unique public landmark property. Moreover, the material provided by the City to explain its economic model is so lacking in critical details that even with such a degree, getting a clear understanding of the costs and risks of the scheme is virtually impossible." Affidavit of Ian Lee sworn October 4, 2010, para. 43, Appeal Book, Vol. 1, Tab 31, p. 276; Reply Affidavit of Ian Lee sworn January 13, 2011, paras. 7-16, Appeal Book Vol. 1, Tab 32, pp. 282-287 ; and Cross-Examination of Ian Lee, May 5, 2011, Qs. 216, and 293-298, Appeal Book Vol. 1, Tabs 18 and 19, pp. 126-27 and 129-131.

71. For example, the description of the LPP as "revenue neutral" featured prominently in material submitted to Council and made available to the public. This claim was used by advocates of the LPP, including the Mayor and Councillor Chiarelli, who the City cites as an authority on the subject,[91] to persuade the public that redevelopment of Lansdowne Park would "not cost the taxpayers a dime".[92] The claim that tax revenues would be used to service LPP debt prevented even those following the scheme closely from understanding the City's true intentions.[93] Even the City Auditor appears to have understood that it was the City's intent to directly allocate tax revenue to servicing LPP debt.[94] In fact, the concept of dedicating tax revenues to service the LPP debt was purely notional, and it was never the City's intention to segregate tax revenues from the Lansdowne site for that purpose.[95] Nevertheless, tax revenues from development under the LPP were repeatedly described as being available to "cover" the City's LPP debt or relieve budget pressures on the City treasury.[96]

72. Other aspects of the revenue neutrality claim were also misleading. For example, the City's LPP-related debt is $9.9 not $7.1 million as represented,[97] and the avoided costs arising from the City's investment in the LPP were significantly overstated by failing to deduct the costs of maintaining the Horticulture and Aberdeen buildings which will remain with the City under the LPP, or the lost revenue from trade show exhibitions which are being moved offsite under the LPP.

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[91] Kirkpatrick Supplementary Affidavit, para. 31, Appeal Book, Vol. 2, Tab 49, p. 832.
[92] Cross-examination of Ian Lee, May 5, 2011, Qs. 42-63, 433, 439, Appeal Book, Vol. 1, Tab 17, pp. 116-20, and 123-25.
[93] Cross-examination of Ian Lee, Qs. 152-160, 540-541, Appeal Book, Vol. 1, Tab 20, pp. 132-34, and 186-87.
[94] As the City Auditors' report stated: "The Proposed use of property tax revenue to provide a direct revenue stream is unusual and could establish an undesired precedent", Exhibit 47, Kirkpatrick Affidavit, Appeal Book, Vol. 2, Tab 43, p. 568.
[95] Kirkpatrick Supplementary Affidavit, paras. 6 and 10, Appeal Book, Vol. 2, Tab 49, p. 822, 826-827.
[96] Exhibit 74 to Kirkpatrick Affidavit, Appeal Book, Vol. 2, Tab 47, p. 767; Exhibit X, Ballard Affidavit, Appeal Book, Vol. 1, Tab 30, p. 258
[97] Exhibit X, Ballard Affidavit, Appeal Book, Vol. 1 Tab 30, p. 258, and Exhibit B, Affidavit of Alan T. Mak, sworn January 17, 2011 ["Mak Affidavit"], Appeal Book, Vol. 1, Tab 36, p. 365

73. The Court below also excused the City's failure to share the Deloitte report, a decision that appears to have been influenced by the mistaken view that its recommendations had been "negotiated into the current LPP," as the City contended, but its evidence failed to support.[98] The following comparison reveals that in fact the opposite was true.

Deloitte Recommendation	**LPP**
Capital costs estimates for the stadium and arena be increased by 30-40%, to $120 to $130 million.	Capital costs for these facilities were approved at $106.2 million.
Strong recommendation that revenues from naming rights, sponsorships, club boxes and suites, concessions, and advertising (estimated to be $2.5 million/yr) not be assigned by the City.	Any such revenue will be assigned to the waterfall, but not recognized as City equity. Revenue from the sale of premium seating and half that from pouring rights are to allocated to the sports franchises.[99]
An annual rent of $410,000 be charged to the CFL franchise in year one and rise to $535,000 in year five.	The annual rent is fixed at $300,000 and no increases are provided under the 30 year Stadium lease.
That the retail development be required to pay land rent and that the lease be registered on title and take precedence over the bank debt.	No land rent is payable for the first 30 years of the commercial land lease, and the payment of third party debt for the commercial development takes precedence over any prospective distribution to the City.
That any net operating surplus be distributed first on account of major maintenance and operating reserve, then to repay the City contribution (equal to land rent), and only then to provide a return on OSEG equity for the retail development.[100]	The first claim on surpluses is to repay the bank debt and unspecified expenses, and thereafter to the reserve, then to repay all OSEG equity with interest, and only then as a return on the City's *Deemed Equity.*[101]

[98] Kirkpatrick cross examination, Q. 1957, Appeal Book Vol. 1, Tab 15, p. 109.
[99] Answer No. 35 to Undertakings given by Kent Kirkpatrick arising from his cross-examination held May 5, 6, 10 and 11, 2011, Appeal Book, Vol. 2, Tab 54, pp. 983-984.
[100] Deloitte Report, Appeal Book, Vol. 2, Tab 58, p. 1053-1056.
[101] Project Agreement Framework, Kirkpatrick Affidavit, Appeal Book, Vol. 2, Tab 44, pp. 582 - 607 and PWC Business Model, Appeal Book, Vol. 2, Tab 45, pp. 609 – 673.

E. The Superior Court wrongly excluded relevant evidence

74. Finally, the Court below wrongly held that the expert evidence of Professors Loxley[102] and Kitchen[103] were irrelevant and that of Rosen and Associates[104] be given little weight. In this respect, the Court below misapprehended the purpose of this evidence, which was not to challenge to wisdom of the City's decision but rather to address the questions of good faith and due diligence. The evidence exposed the repeated failures by the City to provide a candid, frank and impartial description of the LPP, or act with due diligence before making such substantial commitments of public lands and revenues and was for these reasons relevant to the issues before the Court.

PART V - ORDER REQUESTED

75. The Appellant asks that the Court grant this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

September 26, 2011

Steven Shrybman

SACK GOLDBLATT MITCHELL LLP
Solicitors for the Applicant/Appellant,
Friends Of Lansdowne Inc.

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[102] Loxley Affidavit, Appeal Book, Vol. 1, Tab 33, pp. 292-305.
[103] Affidavit of Harry Kitchen, sworn January 13, 2011, Appeal Book, Vol. 1, Tab 33, pp. 292-305.
[104] Exhibit B, Mak Affidavit, Appeal Book, Vol. 1, Tab 36, pp. 341-406 and Reply Affidavit of Alan T. Mak, sworn April 11, 2011, Appeal Book, Vol. 1, Tab 37, pp. 407-409.

CERTIFICATE RESPECTING ORIGINAL RECORD AND TIME ESTIMATE FOR APPEAL

An order under subrule 61.09(2) is not required.

The Appellant estimates that it will need 5 hours for oral argument, not including reply.

September 26, 2011

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SCHEDULE "A"

Blyth v. Northumberland (County) (1990), 75 O.R. (2d) 576, [1990] O.J. No. 2166 (S.C.J.).

Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance, 2004 FCA 424 (CanLii), [2004] F.C.J. No. 2116

Canada (Attorney General) v. Almon Equipment Ltd., 2010 FCA 193 (CanLII), 2010 FCA 193

London (City) v. RSJ Holdings Inc., 2007 SCC 29, [2007] 2 SCR 588

Nanaimo (City) v. Rascal Trucking Ltd., 2000 SCC 13, [2000] 1 S.C.R. 342

Nelson Citizen's Coalition v. Nelson (City), [1997] B.C.J. No. 138 (BCSC)

Niagara River Coalition v. Niagara-On-The-Lake (Town), 2009 CanLII 25982 (ON SC)

Niagara River Coalition v. Niagara-On-The-Lake (Town), 2010 ONCA 173

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, 1998 CanLII 837 (SCC)

Re Complaint Filed by Foundry Networks (23 May 2001), PR-2000-060 (CITT)

Re Complaint Filed by Novell Canada, Ltd. (17 June 1999), PR-98-047 (CITT)

Re In Business Systems Inc., 2002 CanLII 46962 (CITT)

Re: Pation Aircraft & Industries Limited, 2003 CanLII 54791 (CITT)

Re: Sybase Canada Ltd., 1997 CanLII 12034 (CITT)

Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231

1085459 Ontario Ltd. v. Prince Edward County (Municipality), [2005] O.J. No. 3471 (S.C.J.), 2005 CanLII 28851 (ON SC)

SCHEDULE "B"

***Municipal Act*, 2001, S.O 2011, c. 25, ss. 106 – 110, 270, 273.**

Assistance prohibited

106. (1) Despite any Act, a municipality shall not assist directly or indirectly any manufacturing business or other industrial or commercial enterprise through the granting of bonuses for that purpose. 2001, c. 25, s. 106 (1).

Same

(2) Without limiting subsection (1), the municipality shall not grant assistance by,

(a) giving or lending any property of the municipality, including money;

(b) guaranteeing borrowing;

(c) leasing or selling any property of the municipality at below fair market value; or

(d) giving a total or partial exemption from any levy, charge or fee. 2001, c. 25, s. 106 (2).

Exception

(3) Subsection (1) does not apply to a council exercising its authority under subsection 28 (6), (7) or (7.2) of the Planning Act or under section 365.1 of this Act. 2001, c. 25, s. 106 (3); 2002, c. 17, Sched. A, s. 23; 2006, c. 23, s. 34.

General power to make grants

107. (1) Despite any provision of this or any other Act relating to the giving of grants or aid by a municipality, subject to section 106, a municipality may make grants, on such terms as to security and otherwise as the council considers appropriate, to any person, group or body, including a fund, within or outside the boundaries of the municipality for any purpose that council considers to be in the interests of the municipality. 2001, c. 25, s. 107 (1).

Loans, guarantees, etc.

(2) The power to make a grant includes the power,

(a) to guarantee a loan and to make a grant by way of loan and to charge interest on the loan;

(b) to sell or lease land for nominal consideration or to make a grant of land;

(c) to provide for the use by any person of land owned or occupied by the municipality upon such terms as may be fixed by council;

(c.1) to provide for the use by any person of officers, employees or agents of the municipality upon such terms as may be fixed by council;

(d) to sell, lease or otherwise dispose of at a nominal price, or make a grant of, any personal property of the municipality or to provide for the use of the personal property on such terms as may be fixed by council; and

(e) to make donations of foodstuffs and merchandise purchased by the municipality for that purpose. 2001, c. 25, s. 107 (2); 2006, c. 32, Sched. A, s. 49.

Small business counselling

108. (1) Without limiting sections 9, 10 and 11 and despite section 106, a municipality may provide for the establishment of a counselling service to small businesses operating or proposing to operate in the municipality. 2006, c. 32, Sched. A, s. 50.

Small business programs

(2) Without limiting sections 9, 10 and 11, a municipality may do the following things in order to encourage the establishment and initial growth of small businesses or any class of them in the municipality:

1. With the approval of the Minister, establish and maintain programs for that purpose.

2. Participate in programs administered by the Crown in right of Ontario. 2006, c. 32, Sched. A, s. 50.

Permitted actions

(3) Without limiting sections 9, 10 and 11, a municipality may do the following for the purposes of a program referred to in subsection (2):

1. Acquire land and erect and improve buildings and structures in order to provide leased premises for eligible small businesses or for a corporation described in paragraph 4.

2. Despite section 106, to make grants to corporations described in paragraph 4.

3. Lease land to small businesses included in a program.

4. Enter into leases of land and other agreements related to the program with a corporation without share capital established by the municipality in accordance with section 203 for the purposes of encouraging the establishment and initial growth of small businesses or any class of them in the municipality.

5. Sell, lease or otherwise dispose of any personal property of the municipality to an eligible small business or to a corporation described in paragraph 4 or provide for the use of such property by the small business or corporation.

6. Provide for the use of the services of any municipal employee by an eligible small business or by a corporation described in paragraph 4.

7. Establish a municipal service board under this Act to administer a program or to administer the municipality's participation in a program referred to in subsection (2).

8. Appoint one or more of the directors of a corporation described in paragraph 4. 2006, c. 32, Sched. A, s. 50.

Grant includes loans

(4) The power to make grants under paragraph 2 of subsection (3) includes the power to make loans, to charge interest on the loans and to guarantee loans. 2006, c. 32, Sched. A, s. 50.

Same

(5) A corporation described in paragraph 4 of subsection (3) that leases any building or structure from the municipality shall use it for the purpose of providing leased premises to small businesses included in a program referred to in subsection (2). 2006, c. 32, Sched. A, s. 50.

Availability of assistance

(6) Despite section 106, a lease of land, the sale, lease or other disposition of personal property or the use of personal property or personal services under subsection (3) may be made or provided at less than fair market value. 2006, c. 32, Sched. A, s. 50.

Limitation

(7) Subsection (6) ceases to apply to an eligible small business on the third anniversary of the day it first occupied premises leased to it under this section. 2006, c. 32, Sched. A, s. 50.

Municipal service board

(8) The power of a municipality to raise money by the issue of debentures or otherwise for the acquisition of land or construction of buildings shall not be delegated to the municipal service board described in paragraph 7 of subsection (3), despite section 23.1. 2006, c. 32, Sched. A, s. 50.

Interpretation

(9) A business is an eligible small business if it is included in a program referred to in subsection (2) and it is in occupation of premises leased to it under this section. 2006, c. 32, Sched. A, s. 50.

109. Repealed: 2006, c. 32, Sched. A, s. 50.

Agreements for municipal capital facilities

110. (1) This section applies to an agreement entered into by a municipality for the provision of municipal capital facilities by any person, including another municipality, if the agreement provides for one or more of the following:

1. Lease payments in foreign currencies as provided for in subsection (2).

2. Assistance as provided for in subsection (3).

3. Tax exemptions as provided for in subsection (6).

4. Development charges exemptions as provided for in subsection (7). 2006, c. 32, Sched. A, s. 51.

Contents of agreements

(2) An agreement may allow for the lease, operation or maintenance of the facilities and for the lease payments to be expressed and payable partly or wholly in one or more prescribed foreign currencies. 2001, c. 25, s. 110 (2).

Assistance by municipality

(3) Despite section 106, a municipality may provide financial or other assistance at less than fair market value or at no cost to any person who has entered into an agreement to provide facilities under this section and such assistance may include,

(a) giving or lending money and charging interest;

(b) giving, lending, leasing or selling property;

(c) guaranteeing borrowing; and

(d) providing the services of employees of the municipality. 2001, c. 25, s. 110 (3).

Restriction

(4) The assistance shall only be in respect of the provision, lease, operation or maintenance of the facilities that are the subject of the agreement. 2001, c. 25, s. 110 (4).

Notice of agreement by-law

(5) Upon the passing of a by-law permitting a municipality to enter into an agreement under this section, the clerk of the municipality shall give written notice of the by-law to the Minister of Education. 2001, c. 25, s. 110 (5).

Tax exemption

(6) Despite any Act, the council of a municipality may exempt from all or part of the taxes levied for municipal and school purposes land or a portion of it on which municipal capital facilities are or will be located that,

(a) is the subject of an agreement under subsection (1);

(b) is owned or leased by a person who has entered an agreement to provide facilities under subsection (1); and

(c) is entirely occupied and used or intended for use for a service or function that may be provided by a municipality. 2001, c. 25, s. 110 (6); 2006, c. 19, Sched. O, s. 3 (1).

Development charges exemption

(7) Despite the Development Charges Act, 1997, the council of a municipality may exempt from the payment of all or part of the development charges imposed by the municipality under that Act land or a portion of it on which municipal capital facilities are or will be located that,

(a) is the subject of an agreement under subsection (1);

(b) is owned or leased by a person who has entered an agreement to provide facilities under subsection (1); and

(c) is entirely occupied and used or intended for use for a service or function that may be provided by a municipality. 2006, c. 19, Sched. O, s. 3 (2).

Notice of tax exemption by-law

(8) Upon the passing of a by-law under subsection (6), the clerk of the municipality shall give written notice of the contents of the by-law to,

(a) the assessment corporation;

(b) the clerk of any other municipality that would, but for the by-law, have had authority to levy rates on the assessment for the land exempted by the by-law; and

(c) the secretary of any school board if the area of jurisdiction of the board includes the land exempted by the by-law. 2001, c. 25, s. 110 (8).

When agreement entered into

(9) If a municipality designated as a service manager under the Social Housing Reform Act, 2000 has entered into an agreement under this section with respect to housing capital facilities, any other municipality that has not entered into an agreement under this section with respect to the capital facilities and that contains all or part of the land on which the capital facilities are or will be located may exercise the power under subsections (3), (6) and (7) with respect to the land and the capital facilities but,

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (9) is amended by striking out "the Social Housing Reform Act, 2000" in the portion before clause (a) and substituting "the Housing Services Act, 2011". See: 2011, c. 6, Sched. 1, ss. 187 (1), 189.

(a) a tax exemption under subsection (6) applies to taxation for its own purposes; and

(b) clauses (8) (b) and (c) do not apply. 2001, c. 25, s. 110 (9).

Reserve fund

(10) The council of a municipality may establish a reserve fund to be used for the exclusive purpose of renovating, repairing or maintaining facilities that are provided under an agreement under this section. 2001, c. 25, s. 110 (10).

Same

(11) An agreement under this section may provide for contributions to the reserve fund by any person. 2001, c. 25, s. 110 (11).

Tax exemption by school board

(12) Despite any Act, a school board that is authorized to enter into agreements for the provision of school capital facilities by any person may, by resolution, exempt from all or part of the taxes levied for municipal and school purposes land or a portion of it on which the school capital facilities are or will be located that,

(a) is the subject of the agreement;

(b) is owned or leased by a person who has entered an agreement to provide school capital facilities; and

(c) is entirely occupied and used or intended for use for a service or function that may be provided by a school board. 2001, c. 25, s. 110 (12); 2006, c. 19, Sched. O, s. 3 (3).

Education development charges exemption

(13) Despite Division E of Part IX of the Education Act, a school board that is authorized to enter into agreements for the provision of school capital facilities by any person may exempt from the payment of all or part of the education development charges imposed by the school board under that Part land or a portion of it on which school capital facilities are or will be located that,

(a) is the subject of the agreement;

(b) is owned or leased by a person who has entered an agreement to provide school capital facilities; and

(c) is entirely occupied and used or intended for use for a service or function that may be provided by a school board. 2006, c. 19, Sched. O, s. 3 (4).

Notice of tax exemption by school board

(14) Upon the passing of a resolution under subsection (12), the secretary of the school board shall give written notice of the contents of the resolution to,

(a) the assessment corporation;

(b) the clerk and the treasurer of any municipality that would, but for the resolution, have had authority to levy rates on the assessment for the land exempted by the resolution; and

(c) the secretary of any other school board if the area of jurisdiction of the board includes the land exempted by the resolution. 2001, c. 25, s. 110 (14).

Restriction on tax exemption

(15) The tax exemption under subsection (6) or (12) shall not be in respect of a special levy under section 311 or 312 for sewer and water. 2001, c. 25, s. 110 (15).

Effective date

(16) A by-law passed under subsection (6) or (7) or a resolution passed under subsection (12) or (13) shall specify an effective date which shall be the date of passing of the by-law or resolution or a later date. 2006, c. 19, Sched. O, s. 3 (5).

Tax refund, etc.

(17) Section 357 applies with necessary modifications to allow for a cancellation, reduction or refund of taxes that are no longer payable as a result of a by-law or resolution passed under this section. 2001, c. 25, s. 110 (17).

Taxes struck from roll

(18) Until the assessment roll has been revised, the treasurer of the local municipality shall strike taxes from the tax roll that are exempted by reason of a by-law or resolution passed under this section. 2001, c. 25, s. 110 (18).

Deemed exemption

(19) Subject to subsection (15), the tax exemption under subsection (6) or (12) shall be deemed to be an exemption under section 3 of the Assessment Act, but shall not affect a payment required under section 27 of that Act. 2001, c. 25, s. 110 (19).

Regulations

(20) The Lieutenant Governor in Council may make regulations,

(a) defining municipal capital facilities for the purposes of this section;

(b) prescribing eligible municipal capital facilities that may and may not be the subject of agreements under subsection (1);

(c) prescribing eligible municipal capital facilities for which municipalities may and may not grant tax exemptions under subsection (6) or development charges exemptions under subsection (7);

(d) prescribing rules, procedures, conditions and prohibitions for municipalities entering agreements under subsection (1);

(e) defining and prescribing eligible school capital facilities for which school boards may and may not grant tax exemptions under subsection (12) or exemptions from education development charges under subsection (13);

(f) prescribing foreign currencies in which a municipality may make lease payments under such conditions as may be prescribed. 2001, c. 25, s. 110 (20); 2006, c. 19, Sched. O, s. 3 (6, 7).

Role of council

224. It is the role of council,

(a) to represent the public and to consider the well-being and interests of the municipality;

(b) to develop and evaluate the policies and programs of the municipality;

(c) to determine which services the municipality provides;

(d) to ensure that administrative policies, practices and procedures and controllership policies, practices and procedures are in place to implement the decisions of council;

(d.1) to ensure the accountability and transparency of the operations of the municipality, including the activities of the senior management of the municipality;

(e) to maintain the financial integrity of the municipality; and

(f) to carry out the duties of council under this or any other Act. 2001, c. 25, s. 224; 2006, c. 32, Sched. A, s. 99.

227. It is the role of the officers and employees of the municipality,

(a) to implement council's decisions and establish administrative practices and procedures to carry out council's decisions;

(b) to undertake research and provide advice to council on the policies and programs of the municipality; and

(c) to carry out other duties required under this or any Act and other duties assigned by the municipality. 2001, c. 25, s. 227.

Retention of records

254. (1) A municipality shall retain and preserve the records of the municipality and its local boards in a secure and accessible manner and, if a local board is a local board of more than one municipality, the affected municipalities are jointly responsible for complying with this subsection. 2001, c. 25, s. 254 (1).

Adoption of policies

270. (1) A municipality shall adopt and maintain policies with respect to the following matters:

1. Its sale and other disposition of land.

2. Its hiring of employees.

3. Its procurement of goods and services.

4. The circumstances in which the municipality shall provide notice to the public and, if notice is to be provided, the form, manner and times notice shall be given.

5. The manner in which the municipality will try to ensure that it is accountable to the public for its actions, and the manner in which the municipality will try to ensure that its actions are transparent to the public.

6. The delegation of its powers and duties. 2006, c. 32, Sched. A, s. 113.

Quashing By-laws

Restriction on quashing by-law

272. A by-law passed in good faith under any Act shall not be quashed or open to review in whole or in part by any court because of the unreasonableness or supposed unreasonableness of the by-law. 2001, c. 25, s. 272.

Application to quash by-law

273. (1) Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality. 2001, c. 25, s. 273 (1).

Definition

(2) In this section,

"by-law" includes an order or resolution. 2001, c. 25, s. 273 (2).

Inquiry

(3) If an application to quash alleges a contravention of subsection 90 (3) of the Municipal Elections Act, 1996, the Superior Court of Justice may direct an inquiry into the alleged contravention to be held before an official examiner or a judge of the court, and the evidence of the witnesses in the inquiry shall be given under oath and shall form part of the evidence in the application to quash. 2001, c. 25, s. 273 (3).

Other cases

(4) The court may direct that nothing shall be done under the by-law until the application is disposed of. 2001, c. 25, s. 273 (4).

Timing

(5) An application to quash a by-law in whole or in part, subject to section 415, shall be made within one year after the passing of the by-law. 2001, c. 25, s. 273 (5).

***Municipal Act,* R.S.B.C. 1979, c. 290, s. 292.**

292. the council shall not, directly or indirectly, assist an industrial or commercial undertaking, and, without limiting this section generally, shall not grant assistance by

(a) giving or lending money or other security, or giving the use or ownership of any immovable;
(b) guaranteeing borrowing;
(c) granting an exemption from taxation;
(d) granting as a gift property owned by the municipality

***Legislation Act,* S.O. 2006, ch. 21, Schedule F, s. 61(1).**

Rule of liberal interpretation

64. (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. 2006, c. 21, Sched. F, s. 64 (1).

Same

(2) Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act. 2006, c. 21, Sched. F, s. 64 (2).

FRIENDS OF LANSDOWNE INC.	and	**CITY OF OTTAWA**	and	**OTTAWA SPORTS AND ENTERTAINMENT GROUP**
Applicant (Appellant)		Respondent (Respondent)		Intervener

Court of Appeal File No. C54206

ONTARIO COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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