

DECISION AND ORDER

Decision Issue Date Monday, November 27, 2017

PROCEEDING COMMENCED UNDER subsection 45 (1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): NARENDRA ARMOGAN

Applicant: VELTA MUSSELLAM

Property Address/Description: 31 MAPLE AVE

Committee of Adjustment Case File Number: 16 248550 STE 27 MV

TLAB Case File Number: 17 188180 S45 27 TLAB

Hearing date: Monday, November 27, 2017

DECISION DELIVERED BY S. Gopikrishna

INTRODUCTION

The purpose of this Decision is to respond to Motions made by the Appellants and others requesting from the Toronto Local Appeal Body (TLAB) Rules as well as adjourning the date of the hearing originally scheduled for 27 November 2017 to three consecutive hearing dates.

The Appellant had originally retained Mr. John Wight of Wight Tree Services Inc. to provide expert evidence before the Committee of Adjustment. As part of his Appeal to the TLAB, Appellant desired to add another Expert Witness or substitute Mr. Wight with another Expert Witness. This triggered the Motion as well as other requests from other Parties.

It is important to note that the TLAB had scheduled an oral hearing on 27 October 2017 to hear various Motions referred to in this Decision. My Decision to hear those Motions

**Decision of Toronto Local Appeal Body Panel Member: S. Gopikrishna
TLAB Case File Number: 17 188180 S45 27 TLAB**

in writing was communicated to Parties on or around the 25 October 2017. This Decision discusses the reasons for my preference for hearing the Motion in writing.

It is noted that the Background Section which follows this Introduction lists various Parties as well as acknowledge the specific requests made in related Motions, Responses to Motions and Replies to Responses to Motions by the Parties. The detailed content of the Motions is discussed in the Evidence section of this Decision

BACKGROUND

1. On 11 October 2016, the Applicant Narendra Armogan applied to the Committee of Adjustment for various minor variances at 31 Maple Avenue. On 7 June 2017, the Committee of Adjustment heard the application and refused the minor variances.
2. Mr. Armogan appealed this decision to the Toronto Local Appeal Body (TLAB) on June 27, 2017. The following couples and individuals elected Party Status-
 - Michael Labrecque and Cecilia Ramos (reside at 29 Maple Avenue)
 - Peter and Heather Senst (reside at 33 Maple Avenue) ,
 - James Carr (resides at 24 Maple Avenue)
 - Robert Henderson (resides at 74 Glen Road)
 - John Emery (President of Fairmont Properties)

In addition, 23 other persons or organizations filed Statements electing to be recognized as Participants.

3. With the exception of Messrs Henderson and Emery, all the other Parties named in Paragraph 2 filed their expert witness statements by 21 August, the deadline for filing Expert Witness Statements. On 12 October, 2017, Narendra Armogan brought forward a motion to:
 - a) Permit Expert Witness Statement and Acknowledgement of Expert's Duty of Peter Kuntz Forestry Inc. to be filed into evidence
 - b) Permit Mr. Kuntz to provide expert evidence at the November 27, 2017 TLAB hearing.
 - c) Exempt the Moving Party from TLAB Rule 16.6 to permit the Expert Witness Statement and Acknowledgement of Expert's Duty after the deadline set out in the Notice of Hearing
 - d) Permit an updated landscape plan to be submitted at the 27 November, 2017 hearing if necessary.

The Motion also stated the Appellant's willingness to substitute Mr. Wight with Mr. Kuntz as an Expert Witness.

The TLAB accepted receipt of the Motion and set a Motion hearing date for 27th of October 2017 where oral evidence could be heard to make a decision on Appellant's motion.

4. Some of the Parties filed “Notices of Response” after receiving notice of the Appellant’s motion. Through their Notice of Response to Motion and Affidavit dated 18 October 2017, Respondents Labrecque and Ramos (henceforth “Party Labrecque) objected to the Motion and requested for relief in the form of:

- e) Order refusing the relief requested by the Appellant
- f) Such further and other relief as TLAB deemed appropriate

5) In their Response and Affidavit filed on 18 October 2017, Peter and Heather Senst (henceforth Party Senst) also requested that the relief requested by the Appellant not be granted. In addition, they requested for:

- g) TLAB to decide the within motions by written submissions without oral argument and to
- h) Adjourn the hearing currently set for November 27, 2017 to 3 consecutive hearing dates in January or February 2018

Senst also indicated that their lawyer Mr. Alan Heisey could not attend the within motion date of October 27, 2017 due to a hearing before the Ontario Municipal Board (OMB).

6) Through his “Notice of Response to Motion” filed 18 October 2017, Party Carr stated that he did not support the Appellant’s motion. He also indicated his inability to attend the TLAB hearing on 27 October because of a different and important commitment.

7) On 23 October, the Appellant filed a “Notice of Reply to Response to Motion”. Besides opposing the Motions of Respondents, the Reply agreed with the requests by Senst for hearing the within motions in writing and an order of the TLAB adjourning the existing single hearing date assigned of November 27, 2017 to three consecutive hearing dates in January or February 2018.

8) Appellants’ Notice of Reply to Response to Motion was accompanied by an Affidavit by the Expert Witness Kuntz responding to the Witness Statement of Expert Witness Bruce. An updated landscape plan was submitted along with the Affidavit.

9) On October 25, 2017, Party Labrecque enquired about the Hearing in Writing since they were preparing oral submissions for the scheduled hearing on 27 October. When informed that the Hearing would be held in Writing, they submitted an Affidavit and a Notice of Reply to the Appellant’s “Notice to Reply to Response to Motion”. Ms. Coulter submitted the materials on behalf of Labrecque with a cover letter stating that they were submitting in writing what would have otherwise been submitted in oral submissions. This document discussed how Parties would be prejudiced if Mr. Wight were substituted by Mr. Kuntz.

10) Counsel for Appellant objected to the Respondent’s Notice of a Reply dated 26 October, 2017 stating that the TLAB Rules did not permit for Respondents to fill out

Notices of Responses to Responses to Motions, and asked that they be struck out completely by the Presiding Member. This requests may be framed in the following form for the sake of decision making purposes:

(i) Whether the Notice of Reply to Response to Motion from Respondents may be allowed or not.

MATTERS IN ISSUE

11) The matters in issue are listed below in the same alphabetical order in which they are identified in the Introduction and Background section.

- a) Permit the Expert Witness Statement and Acknowledgement of Expert's Duty of Peter Kuntz Forestry Inc. to be filed into evidence
- b) Permit Mr. Kuntz to provide expert evidence at the November 27, 2017 Toronto Local Appeal Body hearing in addition to or in place of Mr. Wight
- c) Exempt the moving Party from TLAB Rule 16.6 to permit the Expert Witness Statement and Acknowledgement of Expert's Duty after the deadline
- d) An order permitting an updated landscape plan to be submitted at the 27 November, 2017 hearing if necessary
- e) Order refusing the relief requested by the Appellant
- f) Such further and other relief as the TLAB deems appropriate
- g) Adjourn the "within motion" or for TLAB to determine the motion in writing without oral submissions and to
- h) Adjourn the hearing currently set for November 27, 2017 to 3 consecutive hearing dates in January or February 2018 so that the hearing can be completed at one time without the inefficient and expense of an extensive delay between separate hearing days
- i) Whether the Notice of Reply to Response to Motion from Respondents may be allowed or not.

The various requests listed above (a)- (i) may be combined and collapsed into the following questions:

I) Can the appellant add or substitute one Expert Witness with another Expert Witness without prejudice to other Parties? Can the new Expert Witness be exempted from Rule 16.6 to submit an Expert Witness Statement and Acknowledgement of Expert's Duty after the deadline for filing such statements?

II) Can the Appellant submit an updated landscape plan at the 27th November 2017 hearing if necessary?

III) Can the hearing currently set for November 27, 2017 be adjourned to hearings on 3 consecutive days in January or February 2017?

IV) Can the TLAB hear and rule on Points I- III above through a Written Hearing instead of an oral hearing?

V) Can Parties, other than the Appellant, file a **Notice of Reply to Response to Motion and Service?**

JURISDICTION

12) To make rulings on Questions (I)- (V) above, the relevant sections from the TLAB's "Rules of Practice and Procedure" are reproduced. Appellants and Respondents have referenced some Rules in their submissions while other Rules are reproduced because they have been utilized and applied by me in the Analysis, Evidence and Decision Sections. Excerpts from the Rules follow:

Interpretation of these Rules

2.1 The Local Appeal Body is committed to fixed and definite Hearing dates. These Rules shall be interpreted in a manner which facilitates that objective.

2.2. These Rules shall be liberally interpreted to secure the just, most expeditious and cost-effective determination of every Proceeding on its merits.

2.3 The Local Appeal Body may exercise any of its powers under these Rules or applicable law, on its own initiative or at the request of any Person.

Matters Not Dealt With by the Rules

Section 2.5

Where procedures are not provided for in these Rules the Local Appeal Body may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate matters before it in a just, expeditious and cost effective manner.

APPLICANT'S DISCLOSURE

Whether or not Applicant is Appellant, Applicant must disclose

11.1) Whether or not an Applicant is an Appellant, an applicant shall disclose any intended revisions or modifications to the application that was made to the Committee of Adjustment for the City of Toronto.

11.2 The Applicant shall file an Applicant's Disclosure, using Form 3, with the Local Appeal Body not later than 15 days after a Notice of Hearing is served.

Section 16.6 Witness Statement of Expert

Parties shall serve an expert witness statement on all Parties and File same with the Local Appeal Body using Form 14 no later than 45 days after a Notice of Hearing is served.

Section 17.4 -Local Appeal Body may Require Motions to be in Writing or Electronically

The Local Appeal Body may require a Motion to be held by Written Hearing or by Electronic Hearing upon such terms as the Local Appeal Body directs.

Sections 17.7 and 17.8 Notice of Response to Motion and Service

17.7- If a Party intends to respond to a Motion a responding party shall serve on all Parties a notice of response using Form 8 and File same with the Local Appeal Body at least 7 days before the Day the Motion is to be held by Oral Hearing or by Electronic Hearing, unless the Local Appeal Body directs otherwise.

17.8- A notice of response shall:

- a) State the responding party's response, including a reference to any statutory provisions or Rules to be relied on
- b) list and attach the Documents to be used in the Motion and
- c) be accompanied by an Affidavit setting out a brief and clear statement of the facts upon which the responding Party will rely.

Notice of Reply to Response to Motion and Service

Section 17.9

17.9 If a Moving Party intends to reply to new issues, facts or Documents raised in the notice of response to Motion, the Moving Party shall serve on all Parties a notice of reply using Form 9, and File same with the Local Appeal Body at least 4 days before the Motion is to be held by Oral Hearing or by Electronic Hearing, unless the Local Appeal Body directs otherwise.

Section 17.10

A notice of reply shall:

- a) Only address new issues, facts and Documents raised in the notice of response;
- b) State the Moving Party's reply; including any reference to any statutory provisions or Rules to be relied on
- c) List and attach the Documents to be used in the Hearing relating to those matters addressed in the reply and
- d) Be accompanied by an Affidavit setting out a brief and clear statement of the facts upon which the Moving Party will rely

Further it is also important to refer to the Sections of the Rules reproduced below to address questions where there is no explicit direction or to address potential ambiguity.

Factors Considered for Holding a Written Hearing

24.6 The Local Appeal Body may consider any relevant factors in deciding to hold a Written Hearing including:

- a) The convenience to the Parties and the Local Appeal Body
- b) The likelihood of the process being less costly, faster and more efficient
- c) Whether it is a fair and accessible process for the Parties
- d) The desirability or necessity of public participation in or public access to the Local Appeal Body's process
- e) Whether the evidence or legal issues are suitable for a Written Hearing
- f) Whether credibility may be an issue or the extent to which facts are in dispute or
- g) Whether a Written Hearing is likely to cause significant prejudice to any Party or Participant

EVIDENCE

13. The Appellant's Motion of 12 October 2017 states that they were taken unawares by the contents of Expert Witness Bruce's Witness Statement circulated by Senst -on August 21, 2017. The Appellants claim that they weren't aware of Party Senst's ' concerns about the urban forest canopy on their property before reviewing Mr. Bruce's submissions. The Appellants take issue with Mr. Bruce's question about whether the Appellant had retained a qualified arborist to produce a Tree Inventory at the outset of renovations as well as his conclusions about the quality of the Forestry Reports submitted by Mr. Wight. The Appellant states that these statements cast aspersions about Wight's skills and objects to Mr. Bruce's characterization of Forestry issues as being the subject of the minor variance appeal.

14. However, the Appellant goes on to state that in order to be able to respond to Mr. Bruce's comments about forestry conditions as well as "new information" and "issues" about their Appeal, they retained an additional arborist, Peter Kuntz of Kuntz Forestry Consulting. They state that Mr. Kuntz will respond to the new information, will assist with preparation for the oral Hearing and will also provide Expert Witness testimony at the oral Hearing.. Appellant states that Mr. Kuntz is the Applicant's primary urban forestry expert and has met with Urban Forestry staff at the site to discuss the Order to Comply to reduce the existing driveway width to make room for replacement trees. The Appellant requests for relief from Section 16.6 of the Rules to allow Kuntz's Expert Witness and Acknowledgement of Expert duty Statements to be filed after the deadline for such submissions. This request is followed by a discussion of Rules which support grounds for Exemption from 16.6. They believe that no prejudice is created since the Witness statement was submitted more than a month before the hearing. The Motion to admit Mr. Kuntz as an Expert Witness also references prior TLAB decisions and decisions by the Ontario Municipal Board (OMB) to demonstrate that Appellants had been granted relief to file evidence after the closing date in circumstances comparable to theirs. The Appellant then offers to substitute Mr. Wight with Mr. Kuntz in the interests of efficiency.

15. In their Response dated 18 October, 2017, Senst begins with a request for an Order to refuse the relief requested by the Appellant. Senst also requests that the within

motion be heard through written submissions without oral argument as well as that the Oral Hearing scheduled for 27 November be replaced by three consecutive days in January or February 2018. Senst then states that Forestry issues were a part of the Original Application and Appeal and cite comments from Toronto's Urban Forestry Department on the application submitted to the Committee of Adjustment. The Response then goes onto quote Section 11 of the Rules and points out that the Appellant varied his application in a letter dated July 24 2017 outlining the changes from his solicitors. The Appellant now wants to further vary the application.

16. The accompanying Affidavit by Party Senst submitted 18 October 2017 states that they retained expert arborist Bruce only after being made aware about the Appellant's appeal of the COA decision. They state that their lawyer Alan Heisey couldn't be present in person for the hearing scheduled for 27 October because of a previous commitment. Without requesting for a formal ruling on the question, they ask if they or Party Labrecque can call more than one expert witness in response to the Appellant's having more than one Expert Witness. They reiterate their concern with the landscaping of the proposed redevelopment of 31 Maple and request sufficient time to review any further landscaping plan and obtain any professional advice to prepare their response. Senst requests that the one day set aside for the hearing is insufficient and that a three day hearing would be more adequate to hear and litigate the case. The Affidavit reiterates the request in the accompanying Response to adjourn the within motion and determine the within motion without oral submissions. The Affidavit concludes by requesting adjournment of the hearing date currently set for November 27, 2017 to three consecutive hearing dates in the month of January

17. In the Notice of Response dated 18 October 2017, Party Labrecque requests that the relief sought by Appellant be denied. The Response then discusses how permitting submission of further changes to the landscape plan breaches Rule 11 and how admitting such changes creates prejudice to the Participants and Parties. The Notice disputes the Appellant's interpretation of Expert Witness Ian Bruce's characterization of John Wight as not being a qualified arborist. It states that no Arborist report was filed until August 2015 although renovations on the house began in the fall of 2013. This is followed by a discussion of circumstances where the Relief requested by Appellant may be granted including a new factual matrix, material change in circumstances or applicable policy. According to this Response, the Appellant's request for relief should be denied because the circumstances didn't fit any of these conditions.

18. As noted in Paragraph 7, Carr did not support Appellant's Motion for Relief; namely, that the Appellants are trying to gain an unfair advantage by circumventing the Rules. Carr's Response declares that if the Appellant's request for relief be accepted, then the door to further submissions is opened muddying the waters further. Carr regrets his inability to attend the Oral Hearing scheduled for 27 October. It may be noted that no Response was received from Parties Henderson and Emery

19.. The Appellant filed a Notice of Reply to Response to Motion on 23 October, 2017. This Reply concurs with Senst's request that the within Motions be decided on the basis of written submissions without oral argument. It also concurs with Senst's requesting an Order from the TLAB adjourning the hearing of the within appeal from the single date assigned in November 2017 to three consecutive hearing dates in January

or February 2018. The Reply points out that if the matter were adjourned for oral hearing in early 2018, then additional time would be available to Parties to review and consider Mr. Kuntz's Statement. It points out that no source or authority has been quoted to support Party Labrecque's discussion of circumstances under which relief can be granted (referenced in Paragraph 17). It then goes on to state the Appellant's circumstances fit a new factual matrix and are therefore consistent with Labrecque's observations about when relief can be granted. The Reply draws attention to the Participant, the South Rosedale Residents Association (SRRA) filing a Participant Statement six weeks past the deadline provided in the Notice of Hearing without any objections from any other Party. The Appellant claims that the Witness Bruce's alleged characterization of Wight as not being a qualified arborist resulted in their retaining Kuntz to provide evidence. The Reply then disagrees with the conditions listed in the Respondent's submissions about conditions under which late reports are admissible. However, the Appellant also asserts that since a new factual matrix has been created by Witness Bruce's expert witness statement, their requesting for relief fits into the conditions stated by the Respondents for granting relief.

20. The Appellant's Reply referenced precedent authorities (*1091402 Ontario Ltd vs. Oro Medonte(Township) 2066 Carswell Ontario*, a decision by the Ontario Municipal Board where the latter granted a motion to allow a witness statement although his name didn't appear on the witness list but the issue he wanted to opine on had been identified as an issue. The Ontario Environmental Review Tribunal permitted the submission of two reply witness statements not previously disclosed by permitting two additional witnesses to testify in its decision, see "*Hirsch v. Ontario (Environment and Climate Change), 2016 CarswellOnt 735*") its rules around appeals are comparable to TLAB Rules. Further, Member Yao of the TLAB permitted filing of an expert witness statement and calling an expert to provide oral evidence almost two months after the witness statements were to be filed in his decision on the TLAB Case No 17 160622 S45 31, a decision dated 15 September 2017. Appellants' Reply also reiterated the Appellant's willingness to remove Mr. Wight from the list of Witnesses and only have Mr. Kuntz provide evidence at the Oral Hearing.

21. As noted in Paragraph 8, an Affidavit completed by Mr. Kuntz accompanied the Appellant's Reply of 23 October, 2017. In this document, Mr. Kuntz opined that the Expert Witness Bruce had reviewed a broader urban forestry and expanded landscape context resulting in new issues and information not contemplated by Mr. Wight. He further stated that he, Kuntz, had been retained to review proceedings regarding construction activities, and to provide an expert opinion related to the Applicant's renovations on his property and its effects on three City By-law protected trees. In his opinion, there was ample time for other Parties to review his evidence since it was being submitted more than 30 days ahead of the hearing. With respect to an updated Landscape Plan, Kuntz stated that he had provided recommendations to his clients to facilitate longer life specimen trees. An updated landscape plan referenced as Exhibit A dated October 23, 2017 is attached to the Affidavit and has been submitted with the Affidavit.

22. Respondent Labrecque filed a Notice of Reply on 25 October 2017 accompanied by a cover email from Kathleen Coulter, their legal representative which submitted the Notice of Reply corresponds to oral arguments that would have otherwise been made at the oral Hearing scheduled for 27 October, 2017. This Reply discusses the impact of replacing or reinforcing Witness Wight with Witness Kuntz. This Notice of Reply reviews the Affidavits of Expert Witness Kuntz and states that Kuntz relies almost entirely on Wight's arborist evidence. It then discusses two scenarios – if Mr. Kuntz replaced Mr. Wight, then the latter would not be able to be cross examined resulting in prejudice to the Respondents because Wight's evidence would be bolstered while depriving the Respondents the ability to directly challenge that evidence. On the other hand, if Kuntz and Wight were both permitted to give evidence, then the Respondents would have to face the expense and hardship of having to respond to two arborists. Based on these situations, the Affidavit concludes that there is no fair way to add Kuntz at such a late stage. It disputes the Appellant's suggestion that the Witness Bruce introduced new issues in his witness statement. Lastly, the Affidavit disagrees with the Appellant's suggestion that the Witness Bruce they should be allowed to add a new Witness past the deadline because South Rosedale Residents Association (SRRA) was allowed to file a participant statement past the deadline set in the Notice of Hearing. Respondent Labrecque believes that the circumstances under which the late submissions were made by SRRA are different from that of the Appellant . They agree with the reasons given by SRRA for not submitting their Statement in time while concluding that the Appellant has not provided any credible reason for missing the deadline. They state that Appellant's Witness Wight failed to thoroughly address the issues and that the mistake caused thereby is being repaired through the introduction of Mr. Kuntz

23. As noted in Paragraph 10, Counsel for the Appellant responded by email to Party Labrecque's Notice of Reply to Response to Motion" and asked that they be struck out by the Presiding Member.

ANALYSIS, FINDINGS, REASONS

24. To begin, it is useful to again list the questions defined in Paragraph 11 of this Decision and discuss the order in which they can be answered before responding to them on the basis of the evidence presented (Paragraphs 13- 23 above).

I) Can the appellant add or substitute one Expert Witness with another Expert Witness without prejudice to other Parties? Can the new Expert Witness be exempted from Rule 16.6 to submit an Expert Witness Statement and Acknowledgement of Expert's Duty after the deadline for filing such statements?

II) Can the Appellant submit an updated landscape plan at the 27th November 2017 hearing if necessary?

III) Can the hearing currently set for November 27, 2017 be adjourned to hearings on 3 consecutive days in January or February 2017?

IV) Can the TLAB hear and rule on Points I- III above through a Written Hearing instead of an oral hearing?

V) Can Parties, other than the Appellant, file a **Notice of Reply to Response to Motion and Service?**

25. It would be appropriate to begin with a response to Question IV above since the decision about hearing the motion of October 27, 2017 through writing has already been communicated to the Parties and Participants. The reasoning behind my agreeing to hear the Motion in writing arises from the fact that the Appellant and Parties Labreque and Senst have submitted a wealth of evidence in the form of the original Motion, Responses and Replies to Responses. On the basis of such an abundance of information, new and reiterated in their submissions, I concluded that the conditions for holding a Written Hearing as listed in Section 24.6 of the Rules had been adequately met and that it was possible to hear the motion in Writing without oral argument. Further, Senst and Carr stated their inability to attend the hearing on 27 October due to prior commitments. Senst and the Appellant had concurred about the adequacy of a written Hearing. Given the convergence of views among the Parties about the suitability of a Written Hearing to hear the Motion and the requirements of Section 24.6 being satisfied adequately, I decided to hear the Motion in Writing.

26. The next question to be answered is Question V above regarding the admissibility of the Reply to Response filed by Labreque on 25 October 2017. Counsel for the Appellant responded by email on 26 October asking that the Reply be struck out by the Presiding Member because the TLAB Rules do not expressly allow for Replies to be filed by Respondents. The Appellant is correct in pointing out that the TLAB Rules don't have a mechanism for admitting a Reply to a Response to a Motion from the Respondents; the Rules only discuss the Appellant's ability to file such a Reply. However, the larger issue around the admissibility of such a submission is the substance and any questions raised. This submission discusses the actual prejudice that could be caused to respondents under two different scenarios- the Appellant's relying on both Witnesses Wight and Kuntz and substituting the former with the latter. This discussion does not appear in the other Responses submitted by Respondents, many of which assert prejudice to the Respondents without detailing how and why such prejudice would be caused. Secondly, the communication from Party Labreque makes it clear that they were prepared to make oral arguments on 27 October and then submitted the Reply only when they realized that the Motion would be heard in writing. Given how the issue of possible prejudice is discussed in the Reply and the consequence of not allowing such new information, I conclude that allowing the Reply from the Respondent into evidence results in a more fulsome discussion and that it is fair to the needs and requirements of all Parties.

27. Question I), namely, Can the appellant add/substitute one expert witness with another expert witness who is then exempted from Rule 16.6 to submit an Expert Witness Statement and Acknowledgement of Expert's Duty? may now be considered. I note that the Appellant has proposed the idea of substituting Expert Witness Wight with Expert Witness Kuntz as opposed to having both of them provide testimony. In the interests of an efficient and cost-effective hearing as discussed in Section 2.2 of the

Rules, it is more meaningful to consider the question of substitution of Expert Witnesses rather than having both Witnesses Kuntz and Wight testify- I will therefore address the question of substitution and not address the question of Appellants using both Witnesses. The question I then consider next is the possible disadvantage and possibility of prejudice to other Parties if the substitution were allowed.

28. Parties Carr, Senst and Labrecque have provided Responses to the Motion by Appellant on the question of substitution. Party Carr indicates their disagreement with the Motion without providing any specific discussion of disadvantage and there is no explicit reference to prejudice in Senst's submissions. Party Labrecque provides detail around the specifics of the prejudice caused in their Reply of 25 October 2017- there is a discussion of how using both Witnesses results in inefficiencies while substitution of Mr. Wight with Mr. Kuntz would shield the former from cross-examination but allow Mr. Kuntz to rely on the former's testimony resulting in prejudice. However, if Mr. Kuntz were recognized as an Expert Witness, then the Parties would be responding to his Expert Witness Statement rather than Mr. Wight's. Given that Parties seem to be in agreement about a three day hearing early in 2018, it is reasonable to conclude that all Parties and Participants would have a fair chance to review the new Expert Witness statement from Kuntz by the time of the Hearing, if it were allowed. In the event that substitution of one witness by another were allowed, I acknowledge the concern expressed by Parties about allowing the latter to rely on the evidence of the former witness while shielding the former from cross examination results in disadvantages to the opposing Parties.

30. Lastly, providing relief from the Rules to allow inclusive Witness Statements has been demonstrated in the decisions written by my esteemed colleagues Ian Lord, Ted Yao and Gillian Burton, on the TLAB, based on Sections 2.2 and 2.3 of the Rules - as well as is borne out through Case Law referenced by the Appellant. In passing, I note that various Parties refer to SRRA submitting its evidence after the deadline but none have challenged the admissibility as a result of missing the deadline. Admitting SRRA's evidence in the absence of explicit objections from Parties and excluding Expert Witness testimony from the Appellant when both were submitted after the deadline creates a situation of asymmetry where different Parties and Participants are treated differently.

31. Given the reasoning in Paragraphs 26-30, I will allow the Appellant's Request to introduce and substitute Expert Witness Mr. Wight with Expert Witness Mr. Kuntz, and grant relief from TLAB Rule 16.6 with respect to admissibility of Mr. Kuntz's Witness Statements as well as his Acknowledgement of Expert Duty. In so ruling, I am cognizant of the point made respecting reliance on the prior work of the tendered witness Mr. Wight. Mr. Kuntz will give evidence in respect of his own knowledge, investigations, research and opinions. Mr. Wight's statement is therefore to be struck from the record for all purposes when the decision on substitution is perfected; Parties and Participants may respond only to Mr. Kuntz's statement in their Submissions.

32. Question III about the dates of the hearing is considered in this paragraph. To reiterate, Senst and the Appellant concur about the need to have a continuous three day hearing in January or February 2018 instead of the scheduled hearing on 27 November. The other Parties have not objected to the preference of the Appellants and

Senst. Given scheduling issues and the availability of a space large enough to accommodate all listed Parties and Participants, the existing hearing date of 27 November, 2017 is vacated and the new proposed hearing dates are appropriate, at April 10, 11 and 12, 2018.

33. Lastly, the Appellant requested for relief from the Rules to submit an updated landscape plan, where applicable on 27 November 2018. It is noted that Kuntz's Affidavit, dated 23 October, 2017, refers to an updated landscape plan described and attached to the Affidavit as "Exhibit A" prepared by Earth Inc. It is also noted that Parties Carr and Emery have not made any submissions while Party Henderson filed a Participant Statement despite registering as a Party. Given these issues and the rescheduled hearing dates, I direct the following deadlines for finalizing submissions:

- Appellant must complete all additional submissions, if any, by 15 January, 2018, after which no new submissions will be allowed.
- Other Parties and Participants may complete their submissions and Responses (if any) by 5 February, 2018, after which no Responses will be allowed .
- Appellant needs to complete a Reply (if any) to Responses from Parties by 20 February, 2018, after which submissions will not be allowed.


DECISION AND ORDER

The decisions communicated in the Analysis, Findings and Reasons section are summarized below:

- The Motions and cross motions are allowed in part as set out herein. All materials filed are on the Motion and responses thereto form part of the TLAB file for proof and reference at the Hearing of these matters, with the exception of the Statement and materials, if any, of Expert Witness Wight.
- All documents and submissions submitted by Mr. Wight are struck from the record. Mr. Kuntz is to submit a Witness Statement based on his own research and investigation to which Parties and Participants may respond.
- The Notice of Reply to Motion from Respondents dated 25 October, 2017 is allowed and accepted into evidence
- The Appellant's request for approval to substitute Mr. Wight with Mr. Kuntz as an Expert Witness for the purposes of providing advice, and oral evidence is granted. Further, the Appellant is granted relief from Rule 16.6 to enable Mr. Kuntz's Expert Witness Statement and Acknowledgement of Duty to be accepted into evidence.
- The Appellant must complete all new submissions by 15 January 2018 after which no further or evidentiary submissions will be allowed.
- Other Parties and Participants must complete their updated submissions and Responses (if any) by 5 February 2018.
- The Appellant needs to complete any Reply (if any) to Responses from Parties by 20 February 2018.
- The hearing date of 27 November, 2017 is vacated and no attendance is required. A rescheduled Hearing will commence and be held, as required on April

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10, 11 and 12, 2018. The TLAB Staff will issue a Notice of Hearing to communicate the foregoing.

X 

S. Gopikrishna
Panel Chair, Toronto Local Appeal Body