

DECISION AND ORDER

Decision Issue Date Thursday, October 10, 2019

PROCEEDING COMMENCED UNDER Section 53, subsection 53(19), and Section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): VENITA INDEWEY, CITY OF TORONTO

Applicant: VICTOR HIPOLITO

Property Address/Description: 90 ASH CRES

Committee of Adjustment Case File: 17 184062 WET 06 CO (B0063/17EYK), 17 184076 WET 06 MV (A0585/17EYK), 17 184077 WET 06 MV (A0586/17EYK)

TLAB Case File Number: 19 162059 S53 03 TLAB, 19 162061 S45 03 TLAB, 19 162062 S45 03 TLAB

Hearing date: Wednesday, October 02, 2019

DECISION ON FOUR MOTIONS DELIVERED BY T. YAO

Registered Parties and Participants

Applicant	Victor Hipolito
Appellant	City of Toronto
Appellant's Legal Rep.	Aderina Abimbola
Appellant	Venita Indewey
Appellant's Legal Rep.	Ron Jamieson
Party/ Owner	Elizabeth Porritt
Ms. Porritt's Legal Rep.	Russell Cheeseman

Decision of Toronto Local Appeal Body Panel Member: T. YAO
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Party	Long Branch Neighbourhood Association (Judy Gibson)
Participant	Steven Vella
Participant	Christine Mercado
Expert Witness	Svetlana Verbitsky
Expert Witness	Bruce Bostock
Expert Witness	T.J. Cieciora
Expert Witness	Victor Hipolito
Summoned Expert Witness	Allison Smith

INTRODUCTION

These are the reasons for three motions brought by Mr. Cheeseman on behalf of the owner of 90 Ash Cres, Ms. Porritt, and a single motion in the course of the 2 days allotted to this hearing by Ms. Abimbola on behalf of the City of Toronto. The parties to these motions are:

- Ms. Porritt, who was granted a severance by the Committee of Adjustment;
- the appellant Ms. Indewey;
- the appellant the City of Toronto;
- the participant Christine Mercado; and
- the party Long Branch Neighbourhood Association.

The Porritt motions are brought orally by Mr. Cheeseman at the commencement of the hearing. "Orally", in this case, means without a written Notice of Motion and supporting written documentation.

The process began with an email written by Mr. Cheeseman to the TLAB:

From: Russell Cheeseman <rdcheese@aol.com>

Sent: September 16, 2019 3:13 PM

To: Toronto Local Appeal Body

Cc: eporritt@trebnet.com

Subject: TLAB Case No. PL 19 162059 S53 03 TLAB - 90 Ash Crescent - Request for Motion or Pre-Hearing Conference

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I am the solicitor for E. Porritt, the applicant and landowner of 90 Ash Crescent.

I am writing because I have been served with material on behalf of a Party in the within matters, the LBNA, which I want to object to.

The LBNA [Long Branch Neighbourhood Association] filed a Witness Statement for its witness, Christine Mercado, on August 23, 2019 which amounted to 9 paragraphs in total. The LBNA also "disclosed" 66 documents, containing 2,106 pages. There is no specific reference contained in the witness statement to these documents. I do not know what if any "relevance" there is to much of the documentation that has been "disclosed".

In addition, the LBNA has provided a response to the Expert Witness Statement of my client's land-use planner, Mr. T.J. Cieciora, by Ms. Mercado who is not an expert witness. She has provided a "response" to Mr. Cieciora in the nature of an "expert's response" with an additional 1291 pages of documentation. The "response" witness statement of Ms. Mercado is substantially longer than [sic] her initial witness statement and is not proper "response" material.

I am very concerned that the submission of all of the material by the LBNA, with no reference in the witness statements and response witness statement to the "avalanche" of documents is simply an attempt to prolong what is currently scheduled to be a two-day Hearing event into a much longer and more costly Hearing.

I would also point out that yesterday (Sunday) I was served with an additional documents from Mr. Jamieson, who is the Authorized Representative of Ms. Indeway, (sic.) who has sought Party Status, which are not relevant to the Witness Statement of Ms. Indeway which was filed on August 23, 2019. I object to this additional filing as not being on time nor relevant.

I wish to request either a pre-Hearing conference to deal with the issue of what "documents" should be admitted into evidence and whether or not Ms. Mercado has the right as a lay person to file a "response" to an expert witness statement. I also wish to determine whether or not all of the material that has been "served" by the LBNA in this matter should be admitted as "evidence". I believe the onus on having the material to be admitted into evidence would lie on the party seeking to have it introduced, in this case the LBNA, and it will have to show the "relevance" of the material to the matters before the Tribunal for adjudication in this case.

In the alternative, I would like the opportunity to bring a Motion on this matter, prior to the commencement of the Hearing to determine what documents should be allowed to be entered into evidence, and to the status of the Response Witness Statement of Christine Mercado, and whether it should be admitted into evidence at all, given the circumstances.

Russell D. Cheeseman

The TLAB contacted the parties to find a telephone conference call time to deal with the matters in an orderly way and no convenient time was available. Then the TLAB wrote to all the parties and participants on September 24 (a total of eight persons):

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Subject: TLAB - Panel Member Inquiry - 90 Ash Cres

Good Afternoon,

Please see below statement from the presiding Panel Member, T. Yao:

"It is hard for staff to give a motion or TCC date within the last two weeks before the hearing, I suggests (sic.) the motion be brought returnable at 9:30 the morning of the hearing. Motion materials should give the other side adequate notice as per the rules. If this is not possible, then the relief sought should also include abridging notice times" – Panel Member T. Yao

Kind regards,
Tyra Dorsey

Ms. Dorsey's memo states "motion materials" but these were not provided. I should note the same objection that Mr. Cheeseman makes was made by Mr. Bronskill in the case of *65 Tilson Rd*, and my decision there is the same as the one made in 90 Ash Cr. I shall now deal with each of the issues Mr. Cheeseman raised.

1. Porritt Motion to disallow Ms. Indewey's filings because they appear to be created by Mr. Jamieson.

The first appellant, Ms. Indewey, has requested Mr. Jamieson to be her representative¹ and she has also disclosed the documents upon which she intends to rely. Some of her documents are in fact authored by Mr. Jamieson. Rule 14.3 of the TLAB's Rules of Practice and Procedure states "An **expert** witness cannot be a representative² in the same proceeding." Since Mr. Jamieson does not intend to be an expert witness, there is no prohibition on his being the representative. While one can anticipate several issues may arise out of this arrangement, (a party can call witnesses – Rule 12.6 d), I think it is speculative to try to address those issues before they arise. Mr. Cheeseman is at liberty, of course, to raise objections as the hearing progresses.

Motion 1 is dismissed.

2. Porritt Motion regarding Long Branch Neighbourhood Association's and Ms. Mercado's filings.

Long Branch is a participant and there is a loose relationship between Ms. Mercado and the Association as she is an officer of the Association as well as being a participant in her own right. I believe the objection is to Long Branch's filing only although it may be to both. The objection is that the filings are too voluminous; Mr. Cheeseman said the opposing filings were 1 gigabyte, whereas his filings were in the

¹ I realize that "Representative" and "Proceeding", etc. are capitalized since they are defined terms, but I omit this convention here for readability.

300 megabyte range; secondly, the additional filings are alleged to increase the number of hearing days causing a cost to his client, which he estimates are about \$10,000 a day.

I have briefly looked at both filings and indeed Long Branch's take many minutes to download, whereas Mr. Cheeseman's filings took only 38 seconds. Ms. Gibson said Long Branch's filings take up a lot of bytes because they contain numerous photographs, which take up more bytes and load more slowly. She also stated that Long Branch is a participant in some 12 TLAB hearings all of which have taken more than two days and in a recent case at 10 Lake Promenade, the applicant took four days to adduce his case in chief.

I don't see anything in the Rules limiting the amount of material that can be filed and indeed if documents are not disclosed, they can be disallowed under Rule 16.3. There is no penalty for over-disclosure, although there is a wish, probably aspirational, that hearings be "cost-effective." I do not see anything in the Rules that suggests a party's filings should be limited to save the opposing party money.

If I am to err, I prefer that parties over disclose rather than under disclose. It is the usual practice, on all sides, that persons file material that they never refer to. At least this gives the opposing parties an inkling of the case they must meet.

Accordingly, I dismiss Motion 2.

3. Porritt Motion regarding Ms. Mercado's status as a non-expert

Ms. Mercado filed a response to Ms. Porritt's Expert's Witness Statement (the expert being planner TJ Cieciora), and she does not intend to claim expert witness status. Mr. Cheeseman says her filings should be disallowed.

The TLAB is not a court and parties' and participants' witness statements are not pleadings. For example, the pleadings under the Rules of Civil Procedure are accompanied by discovery and an affidavit of documents; a pleading may contain only material facts and not evidence and so on. The TLAB is not a court of record and its members are not judges. The *Statutory Powers Procedure Act* gives tribunals latitude in matters of procedure. It does not apply to courts. So there is nothing except the culture of court litigation that would suggest we import pleading rules to the TLAB Rules.

A participant's witness statement is only an outline of what the participant intends to say and it is overly technical to attempt to circumscribe it. The overriding principles are set out in Rules 2.2 and 2.11 that promote the "just, most expeditious and cost-effective determination of every proceeding on its merits." Accordingly, if a person wishes to file material, to prevent "ambush" by disclosing intended evidence and

argument, then this is in accordance with the just, most expeditious and cost-effective determination of this proceeding on its merits.

Motion 3 is dismissed.

4. City's Motion to allow late filing of City Council motion on climate change emergency

On Oct 2, 2019, City Council adopted a motion declaring a Climate Change Emergency and on Oct. 3, 2019, Ms. Abimbola moved to introduce this as part of her case. At that point, Mr. Cieciora had completed his direct examination and he was to be cross examined by Ms. Abimbola. It was understood that if Mr. Cheeseman wished to reopen Mr. Cieciora's evidence to be permitted to testify on climate change, he would be permitted to do so. However, as I understand the City's case, it is only calling arboriculture evidence and it may be that Ms. Verbitsky (expert arboriculture witness for the City) will incorporate City Council's motion in her evidence or it will only be referred to in submissions. In any case Mr. Cheeseman has the right to recall Mr. Cieciora after he has heard the evidence of all opposing parties.

In the previous page, I said that TLAB filings are not pleadings. Consistent with this approach, I have allowed filings that are late (*65 Tilson Rd*), possibly over-broad, and possibly too voluminous, to allow leeway for a full hearing process. Flexibility is needed to prevent process from displacing fairness, although process is important. Even the courts allow amendment to pleadings at trial. At the conclusion of the hearing counsel can make submissions regarding the relative weight to be given to any document in the light of all the evidence.

Motion 4 is allowed.



T. Yao
Panel Chair, Toronto Local Appeal Body