10-29-1980

Re Corporation of the City of Toronto and Canadian Union of Public Employees, Local 79

Innis Christie

M Tate

BM W. Paulin

RE CORPORATION OF THE CITY OF TORONTO AND CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 79

I. Christie, M. Tate, B. M. W. Paulin. (Ontario) October 29, 1980.

EMPLOYEE GRIEVANCE alleging unjust discharge.

H. F. Caley, for the union.
J. P. Sanderson, Q.C., for the employer.

AWARD

On October 13, 1977, the grievor, Brian Risdon, was demoted from the position of chief plumbing inspector for the City of Toronto, which he had held since January 23, 1970, to plumbing inspector. On October 14, 1977, he was discharged. The evidence is that prior to the events which gave rise to this demotion and then discharge the grievor had never been disciplined, or even criticized by his superiors in the department of buildings of the City of Toronto, for the way he did his job.

On May 24, 1978, this board of arbitration first convened and, by agreement, heard only the submissions of the parties on what they presented as a preliminary issue with regard to the admissibility of the Moore report (which is considered further below). Having ruled on that issue in an award dated August 16, 1978 [19 L.A.C. (2d) 388 (Christie)], the board adjourned while its ruling was reviewed by the Ontario Divisional Court. Having been upheld on that preliminary issue (decision of the Court released August 29, 1979 — unreported), this board reconvened on June 5, 1980, and over the next two and a half months heard four days of evidence and one of argument on the issue of whether there was reasonable cause for the discharge, or for any lesser discipline, of the grievor.

As in any discharge or discipline case the question for this board of arbitration is whether the employer has proved that there was just cause for discharge or discipline: see generally, Brown and Beatty, *Canadian Labour Arbitration* (1977), para. 7:2300, p. 286. In other words, to justify the discharge of the grievor the city (*ibid.*, para. 7:3000, p. 291)

> . . . must affirmatively establish that as a result of some misconduct . . . the grievor has demonstrated his incompatability for the continuation of the employment relationship or has seriously prejudiced or injured the reputation or some other ligitimate interest of the employer.

Finally on this general plane, in so far as the city is justifying discharge or other discipline on the basis of misconduct in the sense of substandard work performance it must prove not only the grievor's performance but also establish the "standard" of required performance below which he fell. To constitute such a "standard" a requirement must be one that can reasonably be assumed to have been understood by the grievor, either because it is a presumed requirement of all employees, of all employees of his type or all employees in his place of work, or because it has been brought to his attention as a rule or through previous warnings: see generally, Brown and Beatty *ibid.*, para. 7:3542, p. 332.

In light of the foregoing I have real doubts about the relevance, in any strict sense, of much of the evidence which the board heard. the testimony of the principal witness called on behalf of the city, Ronald Bazkur, contained little if anything by way of specific fact that would establish just or reasonable cause for discharge or discipline of the grievor even if taken at face value. On the other hand, while the grievor's evidence was self-serving, he was a credible witness and at critical points his testimony tended to be substantiated by documentary evidence, by the testimony of William Harper, structural examiner with the City of Toronto, and by the testimony under cross-examination of Richard Hadley, who in 1976-77 was the commissioner of buildings and is now co-ordinator of district heating with the City of Toronto. Throughout the relevant period the grievor, as chief plumbing inspector, reported to John Rouane, director of inspections, who in turn reported to Hadley.

Having considered all of this evidence I find the following to be the factual context within which our decision on this discharge and discipline grievance must be made.

Early in the summer of 1976 Ronald Bazkur, a plumbing inspector for the City of Toronto, was called to a meeting held by the late David Lyons of the city's legal department. The meeting had been prompted by a letter written by Alderman Ed Negridge, who had written on behalf of ratepayers in the Parkdale area complaining about the demolition without a permit of a building at 116-118 Spencer Ave. While there was little direct evidence of the subject at the hearing, it is clear that Alderman Negridge's letter and the meeting were part of what was becoming a highly political issue for the City of Toronto; the conversion of lodging houses into "bachelorettes", tiny one-room apartments each equipped with its own kitchen facilities and separate bathroom. Apparently these conversions had been precipitated by a change in the building by-

law with respect to the number of separate dwelling units allowed in such structures. According to the evidence of Richard Hadley, then commissioner of buildings, the applicable legislation at the time was inadequate both in substance and means of enforcement to control what was widely regarded as an undesirable type of development. It was in this context that Lyons convened a meeting of himself, a Mr. Shimski from zoning, Mr. Cowie, a building inspector, and Bazkur. It is clear that Bazkur was summoned to the meeting because he had earlier inspected the plumbing at 116-118 Spencer Ave. and his name therefore appeared on the file available to Lyons.

The demolition aspect of work to be done at the Spencer Ave. address would have required an application for a building permit. Working from a list of building permit applications Bazkur had conducted his plumbing inspection on July 21, 1976, and had ascertained that plumbing was being done without a permit. By the time of his meeting with Lyons the plumbing permit had been applied for, but, as Bazkur said, the concern at that meeting was not with plumbing but with the fact that there had been a demolition prior to the issue of the building permit.

Bazkur testified that in February, 1976, well before this first meeting with Lyons, he had discussed with his neighbour, a staff sergeant on the Metro Toronto Fraud Squad, his belief that preferential treatment was being given to certain plumbing contractors by his immediate superior, Brian Risdon, the chief plumbing inspector. His concern was that "clearance" was being given to properties that had not been properly cleared under R.R.O. 1970, Reg. 647, as amended, made under the *Ontario Water Resources Act*, R.S.O. 1970, c. 332, and which did not conform to the plumbing By-law 253-67. Bazkur testified that this information was passed on by the neighbour to his superior in the police force but there was no further reference in Bazkur's testimony or by any other witness to this early initiative by Bazkur. There was no suggestion that it was in any way related to Bazkur's acts subsequent to his meeting with Lyons, Shimski and Cowie in July of 1976.

Shortly after that meeting Bazkur privately contacted Alderman Negridge. This led to a meeting at which various buildings were discussed. This in turn led to a meeting with Mayor Crombie who directed Bazkur to see Messrs. Lyons and Callow of the city's legal department. Bazkur met with them at least three times and the result was statutory declaration drafted in the legal department which he signed on about November 1,

1976. In testifying to this board of arbitration, Bazkur referred continually to this statutory declaration but it was not entered in evidence.

From the end of August, 1976, the grievor was aware that allegations were being made against him by Bazkur. In the early fall Bazkur's job functions were changed and later in the year, on Risdon's recommendation, his annual discretionary increment was denied. It was not suggested on behalf of the city that these reactions by Risdon justified his discipline or discharge and their propriety was not put in issue. They do not, therefore, appear to have any relevance to the issues for this board of arbitration.

At the end of August, 1976, Richard Hadley, then commissioner of buildings, received a letter from Karl J. Jaffary who was acting as legal counsel to the grievor, stating that Mr. Risdon believed that allegations were being made "to the effect that he is somehow involved or complicit in the illegal conversion of lodging house units to apartment units". Mr. Jaffary further stated that Mr. Risdon denied any such allegations and was prepared to co-operate in any formal or informal inquiry, and asked to be informed of the precise nature of the allegations. In a letter dated December 22nd Mr. Hadley replied that no investigation into Mr. Risdon's business or private life was being conducted by his office and that he had no evidence of any impropriety by Mr. Risdon. In November, 1976, Mr. Hadley met with Mayor Crombie and Mr. Callow of the city's legal department and then, for the first time, saw Bazkur's statutory declaration. Mayor Crombie and Mr. Callow suggested that there should be a judicial inquiry and Mr. Hadley testified that he felt he had little choice but to agree that that was the way to clear the matter up.

On November 22, 1976, the city's Executive Council recommended such an inquiry and on December 17, 1976, City Council by resolution established the commission of inquiry. The text of the resolution of December 17th is as follows:

> Therefore be it resolved that pursuant to the said section this Council hereby requests His Honour Judge Garth F. H. Moore a Judge of the County Court of the Judicial District of York, to investigate and inquire into or concerning the following matters arising from the allegations made by Mr. Bazkur and with all convenient speed to report to this Council the result of the inquiry and the evidence taken:
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> 1. Has Mr. Brian Risdon failed to have persons prosecuted for violations of By-law No. 253-67 of the Corporation of the City of Toronto respecting plumbing or Regulations respecting plumbing under The Ontario Water Resources Commission Act in circumstances in which such persons should have been prosecuted? The properties in the City of Toronto to

which that question relates are 286 Roncesvalles Avenue, 452 Wellesley Street East, 582 Parliament Street, 20 Maynard Avenue, 313 Wellesley Street East and 587 Yonge Street.

2. Has there been unjustifiable delay on the part of Mr. Brian Risdon in having prosecutions commenced under the aforesaid By-law or Regulations? The properties in the City of Toronto to which that question related are 504 Kingston Road, 116-118 Spencer Avenue, 589 Parliament Street and 40 Beaty Avenue.

3. Has Mr. Brian Risdon, without proper cause, approved certain plumbing work in the City of Toronto which contravened the provisions of the aforesaid By-law or Regulations? The properties in the City of Toronto to which that question relates are 286 Roncesvalles Avenue, 504 Kingston Road, 116-118 Spencer Avenue, 582 Parliament Street, 589 Parliament Street, 40 Beaty Avenue, 155 Cowan Avenue, 224 Sherbourne Street, 1655 St. Clair Avenue West and 79 Roxborough Street West.

4. Has Mr. Brian Risdon, without proper cause, failed to require permits to be issued before certain plumbing work was carried out in the City of Toronto, such permits being required by the aforesaid By-law? The properties in the City of Toronto to which that question relates are 20 Maynard Avenue, 145 Cowan Avenue, 79 Roxborough Street West, 452 Wellesley Street East and 313 Wellesley Street East.

5. Has Mr. Brian Risdon, without proper cause, failed to require certain plumbing in the City of Toronto to be tested as required by the aforesaid Regulations? The properties in the City of Toronto to which that question relates are 582 Parliament Street, 587 Yonge Street, 214-216 Ontario Street, 452 Wellesley Street East and 313 Wellesley Street East.

6. Has Mr. Brian Risdon given preferential treatment to certain plumbing companies in the City of Toronto with respect to their compliance with the provisions of the aforesaid By-law or Regulations? The properties in the City of Toronto to which that question relates are 504 Kingston Road, 116-118 Spencer Avenue, 582 Parliament Street, 589 Parliament Street, 40 Beaty Avenue, 313 Wellesley Street East and 587 Yonge Street.

Subsequently, on June 6, 1977, this resolution was amended as follows:

Therefore be it resolved that His Honour Judge Moore be requested in addition to the matters set out in the Resolution hereinbefore referred to, to investigate and inquire into or concerning the following matters arising from the foregoing allegations and with all convenient speed to report to this Council the result of the inquiry and the evidence taken:

(1) Has there been malfeasance or other misconduct on the part of Brian Risdon with respect to the following properties in connection with the granting of permits, the inspection of properties or the enforcement of the provisions of the relevant Acts, By-laws and Regulations? The properties in the City of Toronto to which the foregoing relate are:

116-118 Spencer Avenue

20 Maynard Avenue
40 Beaty Avenue
286 Roncesvalles Avenue
145 Cowan Avenue
155 Cowan Avenue
504 Kingston Road
1248-1266 King Street West
8 Gwynne Avenue

(2) Has Brian Risdon received any improper benefit in respect of the properties referred to in Question 1?

The text of this second resolution reflects the terminology of s. 240 of the *Municipal Act*, R.S.O. 1970, c. 284, which provides in part:

> 240(1) Where the council of a municipality passes a resolution requesting a judge of the county or district court of the county or district in which the municipality is situate, or a judge of the county or district court of a county or district adjoining the county or district in which the municipality is situate, to investigate any matter relating to a supposed malfeasance, breach of trust or other misconduct on the part of a member of the council, or an officer or a servant of the corporation, or of any person having a contract with it, in regard to the duties or obligations of the member, officer, servant or other person to the corporation, or to inquire into or concerning any matter connected with the good government of the municipality or the conduct of any part of its public business, including any business conducted by a commission appointed by the municipal council or elected by the electors, the judge shall make the inquiry and for that purpose has all the powers that may be conferred upon commissioners under *The Public Inquiries Act* . . .

Mr. Hadley testified that after the resolution of December 17th was passed he discussed with Risdon, in consultation with John Rouane, director of inspections, whether he could carry on as chief plumbing inspector. In the result the grievor did carry on.

Judge Moore's report of the results of his inquiry is officially dated October 5, 1977. Mr. Hadley reviewed it over the following week-end. On Tuesday, October 11th he saw the grievor, told him that in view of the circumstances he should not continue as chief plumbing inspector and that he was demoted to inspector, asked him to consider resigning and arranged to see him the next day. The grievor responded that he had no intention of resigning and that he disagreed with the conclusions in the Moore report. The next day Hadley met with Risdon who again refused to resign. In the meantime Hadley had discussed the matter with Alderman Beavis who was acting in the mayor's absence. Beavis informed Hadley that City Council would look after the matter and that Hadley was to take no further action. On October 13, 1977, Risdon's appointment as chief plumbing inspector was terminated by resolution of Toronto City Council.

Risdon grieved both his demotion and his discharge immediately upon being advised of them. It is, of course, these grievances that are before this board of arbitration.

As mentioned at the outset, this board of arbitration first convened on May 24, 1978. What transpired at that hearing is explained in the following excerpt from the preliminary award by the chairman dated August 16, 1978, from which Mr. Paulin dissented and from which Mr. Tate dissented in so far as it allowed the city to introduce further evidence. That award is reported as *Re Corporation of City of Toronto and C.U.P.E., Local 79*.

[The long quotation from the reported award is omitted. The arbitrator refused to admit the Moore report in evidence. See 19 L.A.C. (2d) 388 at pp. 389-91.]

The city applied for judicial review of that award but the application was dismissed, with oral reasons, at a hearing on August 22, 1979. In the course of delivering the reasons of the Ontario Divisional Court Krever J. stated, in part:

> It is our view that the decision on this preliminary point is not reviewable by the Court. The problem really is of the city's own making, because it was at the hearing before the arbitration board that counsel for the city stated that, if the board ruled Judge Moore's report to be admissible, it was the city's intention not to introduce any other evidence on the merits of the grievances, and counsel specifically requested that the board rule on the admissibility of the report in that context.
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> Counsel explicitly stated, we are told in the decision of Professor Christie, that if in the opinion of the board such a report standing alone could not justify the city's actions, the board should rule the report inadmissible. If it had not been for such a request, it is clear from the decision of the chairman of the board that he probably would have ruled the report admissible. He said [19 L.A.C. (2d) 388 at p. 390]:
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> > "In what I would regard as the normal course the city would simply have attempted to introduce Judge Moore's report and the union could have objected to its admissibility. Had this taken place I would probably have ruled the document admissible."
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> In our view, he would have been right in so ruling. But to come to the point that is before us, the city is really quarrelling with the decision that the evidence sought to be admitted did not have sufficient weight to prove that the grievor's dismissal was justified. In essence, in my view, that quarrel is one with the board's determination as to weight, although expressed, because of the city's method of proceeding and its explicit request, as a question of admissibility.

(Unreported — typescript of oral reasons released August 29, 1979.)

Subsequently, in the late spring of 1980 charges of breach of trust and municipal corruption under ss. 111 and 112 of the

Criminal Code were laid against the grievor in respect of two properties, 286 Roncesvalles Ave. and another property which was not subject of the Moore inquiry nor of these proceedings. Risdon was acquitted by the jury on both charges.

On June 5, 1980, this board of arbitration reconvened. The city's first witness was Ronald Bazkur, who testified with regard to his actions and Risdon's in respect of 10 properties which had been the subject of adverse comment in the Moore report. Prior to cross-examination of Bazkur, by consent of both counsel we were asked to deal with the admissibility in these reconvened proceedings of the Moore report. Mr. Sanderson, for the city, advised that he would call Mr. Hadley and through him introduce the report. Mr. Caley, for the union stated that he would object to the admissibility of the report at this stage and both agreed that the matter should be fully argued and ruled upon before the board proceeded further. For reasons given in the course of the hearing and repeated below the board again refused to admit the Moore report. The hearing then proceeded with cross-examination and redirect of Mr. Bazkur. Mr. Sanderson, for the city, called Mr. Hadley to testify with regard to the events leading up to Mr. Risdon's discharge, as he perceived them, and closed the case. Mr. Caley then called the grievor, Brian Risdon, and three other witnesses, William Harper, structural plan engineer with the City of Toronto, and Thomas Mason and Phillip Burns senior building inspectors with the city. No rebuttal evidence was called on behalf of the city by Mr. Sanderson.

I think it is a fair summary of Mr. Sanderson's submission with regard to the admission of the Moore report to say that he suggested, using this board's own words in its decision on the preliminary issue, that we should now follow "the normal course", that is admit the report and weigh it, together with other evidence called by the city, against evidence called by the union in determining whether there was just cause for the discipline and discharge of Mr. Risdon. The short answer to that submission is that this is not a different proceeding from the one in which we have ruled the Moore report inadmissible. The only change is in counsel appearing for the city.

As we stated at the hearing, it may well be that the inadmissibility of the Moore report flowed from the context in which this board was first asked to rule on its admissibility. Counsel for the city at that time departed from the normal course of having "cogency in law" determined at the end of the proceedings, counsel for the union agreed, and this board of arbitration

accepted that way of proceeding. In other words the ruling on admissibility of the Moore report has been made, correctly I suggest in this context, and has been upheld upon application for judicial review. The context has not changed so it is now too late for the city to ask us to change our ruling.

Board member Paulin dissented from the majority ruling on this matter in the course of the hearing, taking the view that this board has upheld the union's objection to the admissibility of the Moore report standing alone and as it was no longer to stand alone it should have been admitted. In the opinion of the majority of the board, however, our ruling on the preliminary objection was not to that effect. In our preliminary award I stated in conclusion (p. 406):

> ... the report of His Honour Judge G. F. H. Moore arising out of the judicial inquiry with respect to Brian Risdon must be ruled inadmissible.
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> Because of the position taken by the city in this matter the ruling that Judge Moore's report is admissible means that the city can discharge the onus that it bears to justify the demotion and discharge of the grievor only by the calling of further evidence which satisfies this board that there was reasonable cause as required by the collective agreement.

It is not our intention to repeat in detail our reasons for refusing to admit the Moore report, which are fully set out in the decision on the preliminary issue repoted, *supra*, but we do note that an even stronger position was taken by the Ontario Grievance Settlement Board under the *Crown Employees Collective Bargaining Act, 1972*, in the matter of an arbitration between Mr. C. E. Casey and the Ministry of Correctional Services (1978), unreported, George W. Adams, chairman). In that case, a unanimous Grievance Settlement Board made the following comments:

> It is our opinion that the Report of the Royal Commission [on the Toronto Jail and Custodial Services by His Honour Judge B. Barry Shapiro] is not admissible in these proceedings to establish the truth of the matters therein reported. The policy for this approach is, of course, found in the hearsay evidence rule, the requirements of natural justice, and s. 9(1) of the *Public Inquiries Act, 1971*. The Board ought to be provided with the best evidence available in support of an employee's dismissal and, in turn, the employee must be provided with a meaningful opportunity to cross-examine those persons who tender evidence against him. To rely exclusively on the Royal Commission Report would fly in the face of these fundamental principles.
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> ... the Reports findings ... are one man's opinion after having had the opportunity to observe the response and demeanour of all the witnesses before him. It is the duty of the Grievance Settlement Board to perform this same function and to come to its judgment in respect to the issues relevant to this grievance.

This board of arbitration having ruled for a second time that the Moore report was inadmissible, Mr. Sanderson's examination of Mr. Hadley was directed only to the circumstances of the decision to terminate the grievor, which have been set out above. Mr. Hadley, who, it must be borne in mind, was at the relevant time head of the department of buildings and the grievor's direct superior at one step removed, did not at any time in the course of his evidence suggest a single reason why Mr. Risdon should have been demoted or discharged other than as a response to the Moore report. On cross-examination by Mr. Caley he testified that he was fully satisfied with Mr. Risdon's work until he became aware of Bazkur's affidavit and, indeed, right up to the time of Risdon's eventual dismissal! That testimony was not touched upon on redirect and Mr. Risdon's immediate superior at the time, Mr. Rouane, was not called as a witness.

Mr. Hadley further testified on cross-examination that the by-laws with which his department was working at the time were inadequate to meet the problem of conversions to bachelorettes, that for many years, with his full approval, final tests called for by law have not been made and that "letters of approval" had nevertheless been given on request to enable owners to obtain their financing. Incidentally, he acknowledged that Mr. Risdon had internally expressed his disapproval of this policy. Finally, and most significantly, Mr. Hadley testified that frequently construction had been started without a building permit and that plumbing had often been started without a permit and continued after the permit was applied for but before it was granted. Very often, he said, a plumbing inspector would see a job completed without permit and would simply tell the person to get a permit. Often, according to Mr. Hadley, where there was a prosecution it resulted only in a suspended sentence or a nominal fine and tied up limited inspection staff in Court.

Mr. Hadley nevertheless asserted on redirect that it had been his intent that the by-laws and regulations be enforced. Day-to-day decisions on the enforcement of the law relating to plumbing were left to Mr. Risdon with recourse to Mr. Rouane if he required assistance. This does not contradict Risdon's unrebutted testimony to the effect that primary responsibility for prosecutions lay with Mr. Rouane, in the sense that he had to approve any prosections, although Risdon had control of prosecutions for breaches of Reg. 647 under the *Ontario Water Resources Act* or By-law 253-67 in the sense that in the normal course there would be no prosecution unless Risdon recommended it.

Perhaps most important, Mr. Hadley's testimony was perfectly consistent with Risdon's asertion, again unrebutted, that it was the policy of the department not to prosecute contractors for installing plumbing without a permit where they had actually applied for the permit, because permits were frequently delayed by the departmental requirement that they not be granted until the building permit was granted although plumbing permits were never refused in their own right.

With the Moore report having been ruled inadmissible, Mr. Hadley having spoken favourably of the grievor's performance of his functions and no other management having been called as a witness, what then was the evidence before this board of arbitration in support of the demotion and discharge of the grievor? At the hearing Mr. Bazkur, the building inspector whose allegations gave rise to all of the proceedings in which Mr. Risdon has been involved, testified with regard to 10 properties that he inspected over the period in question. Mr. Risdon in the course of his testimony also addressed himself to each of these 10 properties in turn. Consideration of what happened in respect of each of them appears therefore to be called for, bearing in mind that in his summation for the city Mr. Sanderson took the position that what justified Mr. Risdon's demotion and discharge was in some cases his delay in prosecuting and in other cases his failure to prosecute at all for breach of the laws he was charged to administer.

It is important to note that, apart from the fact that two plumbing companies, Imperial Crown and Southern Plumbing, were each involved in three or more of these properties, there was not only no direct evidence, there was not even any basis for inference from the evidence heard by this board of arbitration that Risdon's delay or failure to prosecute resulted from "any improper benefit", "malfeasance" or "preferential treatment" on his part. Rather, the suggestion was that delay in prosecution and failure to prosecute were simply failures to do his job properly.

Much was made at the hearing of 286 Roncesvalles Ave., which like the other nine properties about which we heard specific evidence was apparently the subject of adverse comment in the Moore report, and was also one of the two properties that were the subject of the criminal charges against the grievor dismissed in the spring of 1980. The building at that address was converted into bachelorettes by Kupa Contracting, a company not involved with any of the other nine properties. In mid-June of 1976, Bazkur inspected the property. He noted on his report of inspection, which went to the grievor as chief plumbing inspector, that

plumbing was being done without a permit and that plastic pipes were being installed throughout, that water-closets had no vents, that waste pipes were undersized and had no clean-outs and that there was no proper separation of storm and sewage drains. Bazkur issued a stop-work order and on July 9th recommended that a "no-permit" charge be laid. Toward the end of July a permit was applied for but, in mid-August, the charge was processed, notwithstanding what Risdon said was the department's long-standing policy against proceeding with prosecution where a plumbing permit had been applied for. Risdon, the grievor, testified that the "no-permit" charge was proceeded with in this particular case because two aldermen, Negridge and O'Donoghue, were pressing for "action" in respect of properties being converted into bachelorettes. In the final result a fine was levied.

There are a number of critical points arising out of the evidence in respect of 286 Roncesvalles Ave., most of which also apply to several of the other properties about which we heard evidence:

(a) It was not suggested that the grievor acted improperly in processing the "no-permit" charge as a result of aldermanic pressure. Indeed, the city's argument was the opposite; that he acted improperly in delaying prosecutions or failing to prosecute at all. However, Risdon's testimony, which tended to be corroborated by that of Mr. Hadley, to the effect that the city's long-standing policy was not to prosecute where a permit had been applied for is not contradicted by the fact that in the political furor over bachelorette conversion, City Hall, in reaction to aldermanic pressure, departed from that policy. The fact that Risdon acquiesced in or even recommended prosecution of contractors who did plumbing without a permit in that context cannot lead to the conclusion that he was acting improperly in not prosecuting in other contexts. The policy of not prosecuting where a permit had been applied for was not his policy and even if it had been there is nothing on the record before this board of arbitration to suggest that it constituted an improper exercise of discretion in making the decision whether or not to prosecute. With due respect to Mr. Sanderson's suggestion to the contrary, the fact that the charges brought under aldermanic pressure did result in a fine does not mean that a decision not to proceed with the prosecution would have been improper. Officials charged with prosecutorial discretion, including the policeman on patrol, regularly exercise that discretion against prosecution in cases where prosecution would result in conviction. There is simply nothing improper about such an exercise of discretion if it is made in good faith on the basis of

properly relevant considerations. Thus, a plumbing permit having been applied for at 186 Roncesvalles Ave., the grievor cannot be said to have failed in the performance of his function as chief plumbing inspector by delaying the laying of charges. Nor, indeed, could he be said to have failed in that function if he had not laid charges at all, since he would have been acting in accordance with established departmental policy.

(b) In respect of the fact that plastic pipe was being used throughout the building at 286 Roncesvalles Ave. little need be said here, although a great deal of the evidence at the hearing was directed to the use of plastic pipe. The use of plastic pipe is not prohibited by either of the laws administered by the chief plumbing inspector. Its use is a matter of concern to building inspectors because it calls for specific fire precautions; but it was not alleged that the grievor failed to do anything in respect of the use of plastic pipe that he had any obligation to do. Toward the end of his argument I specifically asked counsel for the city whether he was alleging any wrong-doing by the grievor in respect of plastic pipe, and his answer was a clear "no".

The only confusing aspect of the lengthy evidence relating to the use of the plastic pipe was the fact that at 504 Kingston Rd., where Bazkur also reported its use, Risdon issued a stop-work order with respect to the plastic pipe. This, he testified, he did to bring to the builder's attention the fact that the building code regulated the use of plastic pipe. He explained that he did this in relation to 504 Kingston Rd. and not other properties, including 286 Roncesvalles, because 504 Kingston Rd. was a different type of building, a small three-storey apartment. Whether this is an altogether satisfying explanation or not, the fact is that the city is not alleging that Risdon acted improperly in issuing that stop-work order, nor, indeed, that he acted improperly at all in respect of the use of plastic pipes in any of the properties in question.

(c) With respect to the separation of storm and sewage drains, Risdon explained in full detail, with supporting documentary evidence, the policy worked out with his counterpart in the works department for trying to achieve separation in the face of a building law of less-than-desirable rigour. In the case of 286 Roncesvalles Ave. the owner had the option of constructing a separate storm drain or spilling rain water on his own property. More to the point, nothing in Bazkur's evidence suggested any impropriety in the grievor's treatment of the storm and sewage separation question. Counsel for the city did not suggest that he acted other than in accordance with established policy or in any way improperly in respect of this matter at 286 Roncesvalles Ave.

(d) In respect of the lack of water-closet vents, undersized waste stacks and lack of clean-outs reported by Bazkur at 286 Roncesvalles Ave. the grievor offered perfectly plausible explanations as to why no charges were laid. The water-closets in question were in a location where vents were not required; prior to final approval of the plumbing the required clean-outs were installed; the stacks in question were permitted as a matter of plumbing department policy adopted consistently across Metropolitan Toronto to respond to the problem created by a change in the regulations for contractors caught without notice with a supply of three-inch fittings. No rebuttal was offered for any of these explanations and, indeed, Bazkur never recommended that any charge should be laid in respect to any of these matters.

As has already been mentioned, the property at 405 Kingston Rd. on which Imperial Crown was the contractor, was a three-storey apartment building. Bazkur inspected the site in February of 1976 and reported that the plumbing was being done without the permit and that plastic pipe was being installed. On March 8, 1976, Risdon issued the stop-work order in respect of plastic pipe referred to above. On August 16th Bazkur again visited the property and found the plumbing was being done without a permit. On this occasion what was involved was the installation of club facilities in the basement of the building. Bazkur recommended, on August 16th, that there be a "no-permit" prosecution. On August 18, 1976, a permit was applied for. Nevertheless on September 30, 1976, the charge was processed. Here again, the grievor testified, normally there would have been no charge because the permit had been applied for, but because the building had inadequate parking facilities the building permit was being held up by those in charge of the administration of the zoning regulations. Again, in the context of the aldermanic pressure arising from the bachelorette problem the grievor, together with Mr. Rouane, who it will be recalled had to approve any prosecutions, decided to depart from the established policy and prosecute because the zoning problem made it appear that the plumbing permit would be delayed for some time. In the result the plumbing permit was granted on November 18, 1976, and because of that the charge was dismissed.

I note that in the case of several of the other properties about which we heard evidence subsequent grant of a plumbing permit does not appear to have precluded a fine for installing plumbing without a permit. Such inconsistency in the enforcement of regulatory legislation of this kind is not particularly surprising and

here serves only to buttress the observation, made in connection with 286 Roncesvalles Ave., that the propriety of the exercise of prosecutorial discretion can hardly be made dependent on the outcome of the case.

The charge in respect of plumbing without a permit at 504 Kingston Rd. was processed on September 30, 1976. It surely is not a coincidence that charges in respect of 116-118 Spencer Ave., 20 Maynard St., and at 40 Beatty Ave., all of them bachelorette conversions, were processed about the same time if not on the same date. I think it is fair to conclude from the evidence that in each of these cases, as in the case of 286 Roncesvalles Ave., aldermanic pressure resulted in the laying of the charge. The significance, or lack of significance, of this conclusion as far as this board of arbitration is concerned, has already been discussed in connection with 286 Roncesvalles Ave. It is nevertheless perhaps worth reiterating that the grievor's discharge is not being justified by the city on the basis that he recommended that the charges be processed; if anything it is on the basis that he did not recommend that they be laid earlier. The evidence of the laying of five charges in cases where permits had been applied for does not contradict the evidence that the general policy was not to lay charges in such cases, a policy departed from because of the political furor over bachelorette conversions. If it would not have been wrong for Risdon not to recommend charges at all it can hardly be said to have been wrong for him to delay them to September 30th. There is simply no evidence to suggest that in not laying charges where a permit had been applied for he was doing anything other than acting in accordance with a legitimate departmental policy of long standing.

From another perspective, if the concern of the city is that there was undue delay in the processing of charges it would seem incumbent upon the city to introduce some evidence with respect to how quickly charges were normally laid, or some other basis upon which this board could decide what constituted a proper time within which to lay charges.

Number 116-118 Spencer Ave. was a bachelorette conversion done by Imperial Crown. The property was visited by Bazkur on June 21, 1976. He reported the plumbing was being installed without a permit and that plastic pipe was being used. On July 9th he recommended that a charge be laid for installing plumbing without a permit. The permit had been applied for on July 6, 1976 (and was apparently issued on August 9, 1976), but the charge was nevertheless processed on September 30th, apparently as a

result of aldermanic pressures, and resulted in a fine. My comments in respect of the "no permit" charges relating to 286 Roncesvalles Ave. and 504 Kingston Rd. would appear to be equally applicable to 116-118 Spencer Ave. The evidence does not appear to reveal any failure by the grievor to properly discharge his function as chief plumbing inspector.

In respect of 582 Parliament St., an apartment building with a travel agency at ground level, there appeared to be some confusion in dates in the evidence of Bazkur and Risdon, but nothing turns on that. We find that Bazkur visited the property on May 18th and on that day issued a stop-work order based on the fact that plumbing was being done without a permit. A permit was applied for on May 20th and in fact issued on June 3rd. However, on July 30th Bazkur recommended a "no-test" charge. The charges were not proceeded with because the normally required tests were in fact subsequently performed. It is difficult to see what failure in the performance of his function is even being attributed to the grievor in respect of 582 Parliament St.

Number 589 Parliament St. is a florist shop to which an apartment was being added on the upper floor at the rear. Bazkur inspected the property in the summer of 1976 and reported that plumbing was being done without a permit. A permit was applied for on July 19, 1976, and, consequently, a "no-permit" charge was not processed. Toward the end of July Bazkur recommended that a letter be sent to the plumber with regard to the requirement of tests. Such a letter was sent and no response was received with the result that the "no-test" charge was processed early in the autumn of 1976. However, the documents in evidence indicate some clerical difficulty in proceeding with the charge, apparently because the address could not be located. This evidence may disclose something less than total efficiency on the part of the clerks in either the plumbing or the legal department of the city but it is difficult to see how it reflects adversely on the grievor.

Number 20 Maynard St. was a bachelorette conversion done by Christopher Plumbing. Bazkur reported the plumbing was being installed without a permit and that storm and sewage drainage were not properly separated. On March 12, 1976, he recommended a "no-permit" charge. No charge was proceeded with because a permit was applied for on that same date, March 12, 1976, but, subsequently, in the context of aldermanic pressure over the bachelorette problem a "no-permit" charge was processed. We heard no evidence with regard to the outcome of the charge but the case seems to fall into the same general catagory as 286

Roncesvalles and 116-118 Spencer Aves. For reasons discussed in connection with those properties the evidence in respect of 20 Maynard St. does not appear to disclose any failure to fulfil his function on the part of the grievor.

Number 40 Beatty Ave., a bachelorette conversion done by Imperial Crown, was inspected by Bazkur on July 21, 1976. He reported the plumbing was being done without a permit and plastic pipe was being installed. On July 23, 1976, he recommended a "no-permit" charge but on that same day a permit was applied for. Nevertheless, at the end of September, 1976, a charge was processed and resulted in a fine. Once again, this case seems to fall into the same category as 286 Roncesvalles, 116-118 Spencer Aves. and 20 Maynard St. In light of established departmental policy against prosecuting where a plumbing permit had been applied for the grievor could not be said to have failed in his function as chief plumbing inspector had he not recommended prosecution at all. How then can he be said to have failed in his function by delaying prosecution until the end of September, 1976? And, of course, it is not being suggested that he acted improperly in proceeding to prosecution in the face of aldermanic pressure on City Hall.

Number 313 Wellesley Ave. was merely a home where Southern Plumbing did some work. The property was inspected by Bazkur on July 19, 1976. His report alleged the plumbing was being done without a permit and that proper tests had not been done and on August 3, 1976, he recommended that charges be laid. A permit had in fact been applied for on June 2, 1976, and, subsequently, Risdon himself conducted the required tests. As a result the "no-test" charge was not processed and in accordance with departmental policy, since this was not a bachelorette situation, the "no-permit" charge was not processed. Unless it can be said that Risdon by following long-established departmental policy failed to fulfil his function he was guilty of no wrong in connection with 313 Wellesley Ave.

Similary in the case of 79 Roxborough, which was also a home, no charge was laid in accordance with departmental policy. That property had been visited by Bazkur in July of 1975. In that case Bazkur reported plumbing being installed without a permit, issued a stop-work order, advised the owner to apply for a permit and did not even recommend a charge. The permit was applied for on July 24, 1975, and no charges were processed.

Finally, on June 1, 1976, Bazkur inspected the property at 587 Yonge St. where Southern Plumbing was installing some

plumbing at Bubbles Restaurant. Bazkur reported plumbing being installed without a permit and advised that a permit be applied for. This was done on June 2nd and in respect to further work again on June 11th. Consistent with departmental policy no charge was processed. A further complication in respect to this property was that in addition to the plumbing which Bazkur discovered being installed in the kitchen without a permit, wash-rooms had previously been installed in the basement without a permit. Risdon testified that when he visited the property with another inspector the tenant denied having installed the basement plumbing and because it would have been difficult to prove that the tenant had in fact installed it or was responsible for it Risdon decided not to prosecute. He acknowledged that the basement plumbing looked new but suggested that his experience with the city's legal department told him that an attempt to prosecute where responsibility for the installation of the plumbing could not be proved by direct evidence would not be welcomed. In the circumstances we find this to be a plausible explanation on which no doubt was cast through cross-examination or by the testimony of Mr. Bazkur or any other witness.

The sum of Mr. Bazkur's "allegations" with respect to the grievor's actions, or inaction, in respect of each of these 10 properties appears to us to add up to no more than that Risdon did not recommend prosecution for installing plumbing without a permit in some five cases, because a permit had been applied for and it was the policy of the building department not to prosecute in such cases. Whether or not that was a good policy is not the issue before us. It appears not to have been a policy established by Mr. Risdon and, even if it were, it could not be said to have involved an improper exercise of the discretion which he unquestionably had in deciding whether or not to recommend prosecution for installing plumbing without a permit. If City Council disagreed with the policy it could have ensured that a new policy was adopted. In five other cases, four of them involving bachelorette conversions, the grievor did process charges even though a permit had been applied for. He did so apparently as a result of aldermanic pressure for "action" in respect of bachelorette conversions. Since, in our view Risdon would not have acted improperly had he not processed charges at all in these cases, delay in their prosecution can hardly be said to have amounted to failure in the exercise of his function. If there is anything distasteful in these cases it is the fact that they were prosecuted contrary to the established policy, but that is not the basis of the city's case

against Risdon. Indeed, since he needed the approval of his superior, Mr. Rouane, in bringing prosecutions it would be very difficult to fix him with ultimate responsibilty for this.

We have concluded there is simply no evidence of improper failure to prosecute or delay in prosecuting breaches of the legislation the grievor was charged with administering. Nor is there evidence of any other shortcoming or wrong-doing that would justify discharge, demotion or any other disciplinary action against the grievor. Faced with the inadmissibility of the Moore report the city simply did not put any such evidence before us. None is contained in Mr. Bazkur's recital of fact and Mr. Hadley had only good things to say about the grievor. The grievances are therefore upheld.

As agreed by the parties we will reserve on the question of the remedy to be accorded to the grievor and will remain seised of this matter to reconvene at the request of either party should they be unable to agree on a remedy.

DISSENT (Paulin)

I do not agree with the award proposed by the chairman on two points: first, as to the admissibility in evidence of the report of Judge Moore (the "report") concerning the merits of this case, and secondly, with regard to whether there was any wrong-doing on the part of Mr. Risdon which would justify discharge or other disciplinary action against him.

When the case first came before our board on May 24, 1978, counsel for the city sought what amounted to an interlocutory ruling as to the admissibility of the report as the only evidence it would put in against Mr. Risdon. In the chairman's view, the city did not take what he characterized as "the normal course" but rather it sought a preliminary ruling as to whether the report, standing alone, had sufficient cogency in law to justify the denial of Mr. Risdon's grievances.

In view of the novelty of the point on which the preliminary ruling was sought on May 24, 1978, it seems to me that it was no more than prudent to proceed in that way. The chairman made an award against the city upon this point [see 19 L.A.C. (2d) 388], the essence of which was that the report, standing alone, was inadmissible. That award was upheld by the Ontario Divisional Court [unreported].

When our board first reconvened on June 5, 1980, to deal with the merits of this case, Mr. Sanderson put in relevant, *viva voce* evidence and then sought to have the report admitted in evidence.

In ruling against the city on this point, my colleagues said in part, commencing *ante*, pp. 256-7:

> I think it is a fair summary of Mr. Sanderson's submission with regard to the admission of the Moore report to say that he suggested, using this board's own words in its decision on the preliminary issue, that we should now follow "the normal course", that is admit the report and weigh it, together with other evidence called by the city, against evidence called by the union in determining whether there was just cause for the discipline and discharge of Mr. Risdon. The short answer to that submission is that this is not a different proceeding from the one in which we have ruled the Moore report inadmissible. The only change is in counsel appearing for the city.
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> As we stated at the hearing, it may well be that the inadmissibility of the Moore report flowed from the context in which this board was first asked to rule on its admissibility. Counsel for the city at that time departed from the normal course of having "cogency in law" determined at the end of the proceedings, counsel for the union agreed, and this board of arbitration accepted that way of proceeding. In other words the ruling on admissibility of the Moore report has been made, correctly I suggest in this context, and has been upheld upon application for judicial review. The context has not changed so it is now too late for the city to ask us to change our ruling.
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> Board member Paulin dissented from the majority ruling on this matter in the course of the hearing, taking the view that this board had upheld the union's objection to the admissibility of the Moore report standing alone and as it was no longer to stand alone it should have been admitted.

With respect, I think my colleagues were in error when they refused to admit the report. It is no longer "standing alone". The city called relevant *viva voce* evidence before seeking to have the report admitted in evidence as part of its case on the merits. Mr. Sanderson put it that the city's position at the reconvened hearing was not only consistent with the preliminary ruling which the Ontario Divisional Court had upheld but also that the city's position directly recognized the correctness of the preliminary award and he was seeking to apply it.

The chairman's preliminary award was made on the basis of an evidentiary deficiency in the report. In the similar case of *Casey and Ministry of Correctional Services* (Adams) [unreported], which is referred to *ante*, p. 257 of the majority award, the Grievance Settlement Board said, "To rely *exclusively* on the Royal Commission Report would fly in the face of these fundamental principles" (emphasis added).

In the passage from the majority award I have quoted above, the following sentence appears, "The only change is in counsel for the City". That appears to be quite incorrect.

It must be remembered that the city never sought to rely exclusively on the report: at the outset of this case, counsel for the city asked our board to rule whether it could, as a matter of law, rely

exclusively on the report. The chairman said it could not. My colleagues appear to take the view that counsel for the city somehow elected to take his chances, once and for all, whether the report could ever be admitted in evidence. That is not what occurred. The chairman's preliminary award made it clear that he considered the report to be admissible (*supra*, at p. 390), but not for the purpose which he considered on that occasion.

I therefore disagree with my colleagues that the only change is in counsel for the city. The change is that the city has called relevant, *viva voce* evidence and it is in that context that the city now seeks to have the report admitted.

The report no longer "stands alone" but is coupled with relevant, *viva voce* evidence. In my opinion, the evidentiary deficiency concerning the report was thereby cured and I would have admitted it in evidence.

As to the merits, I disagree with my colleagues in their finding that there was no wrong-doing on the part of Mr. Risdon.

In the case of the properties mentioned below, Mr. Risdon purported to provide an explanation either for his failure to prosecute or his undue delay in taking action. On the evidence, I thought it clear that the responsibility to make a decision was that of Mr. Risdon. His explanations were many and they were varied. They included his statement that no prosecution should take place in a no-permit violation where the permit had been applied for. An exception to his policy was the case where a permit was applied for but there was a zoning problem. However, in the case of 582 Parliament St., he was of the view that the permit should not only be applied for but also issued.

I would not have accepted Mr. Risdon's explanations and I would have found that they indicated a deliberate determination not to prosecute even though his own inspector had recommended prosection in *prima facie*, if not clear, cases of violation. I thought that the evidence disclosed a lack of sufficient dedication to his duties and responsibilities on Mr. Risdon's part.

I would have found that Mr. Risdon did not properly carry out his responsibility with respect to the prosecutions that were recommended to be taken and that his explanations did not justify his failure to prosecute.

I would have found there was unjustifiable delay on the part of Mr. Risdon in having prosecutions commenced under the by-laws and regulations. As I read the evidence, there were four properties which involved delays in prosecutions:

(1) At 286 Roncesvalles Ave. the recommendation was made July 9th and the charge was processed August 18th.

(2) At 504 Kingston Rd. the recommendation was made August 16th and the charge was processed September 30th.

(3) At 116-118 Spencer Ave. the recommendation was made July 9th and the charge was processed September 30th.

(4) At 40 Beatty Ave. the recommendation was made July 23rd and the charge was processed at the end of September.

There was no evidence before us as to the general progress from the date a charge is recommended to the date that, in the normal course of events, it would be processed. However, I did not regard that feature of the case as significant because in each instance Mr. Risdon gave or attempted to give explanations for delay which seemed inconsistent with his own responsibilities. Mr. Risdon's credibility in these matters ought to be tested with what he had to say about plastic pipe, an area in which he was completely contradictory. He said that his department had nothing whatever to do with plastic pipe, and indeed, no wrong-doing was alleged against him on that score. However, with regard to 504 Kingston Rd., Mr. Risdon himself issued a stop-work order regarding plastic pipe. In my opinion, this necessarily casts doubt on all of his many explanations.

With regard to 116-118 Spencer Ave., Mr. Risdon's initial explanation was that he delayed prosecution because an application for permit had been made but he also said that there was a zoning problem which prompted him to institute a charge. Since there was subsequently a conviction for a plumbing violation, I would have found that he should have proceeded with considerably more dispatch.

At 40 Beatty Ave., Mr. Risdon's explanation was even more complicated in that he told us that a permit had been applied for and that there were zoning problems and he concluded that he ought to prosecute because of aldermanic pressure.

With respect, I think my colleagues have put undue weight on attempts made by elected officials of the city to influence Mr. Risdon's actions. He did not report to them and they had no jurisdiction over him.

We heard evidence that the policy of Mr. Risdon's department was to persuade people to comply with the law and that prosecution was the last resort. I would find that both the action and the inaction on the part of Mr. Risdon coupled with the conflicting excuses he gave for what he did or did not do are quite inconsistent with any coherent policy. In my opinion, they are consistent only with the conclusion that Mr. Risdon either deliber-

ately delayed or determined not to recommend prosecution in some cases where there was a flagrant breach of the law. I would have found that he did nothing until the cases became virtually notorious or, in the alternative, that he displayed a lack of dedication to his duties and responsibilities which warranted a disciplinary response by the city. Mr. Risdon's duties and responsibilities were essentially supervisory in nature and required exercise of judgment and discretion on his part. While it may be uncommon to find such a position covered by the collective agreement, that fact cannot lessen the obligations of the incumbent toward his employer.

In summary, I think my colleagues have erred in law in refusing to accept the report in evidence concerning the merits and they also erred in finding that there was no evidence of wrong-doing on the part of Mr. Risdon that would justify discharge, demotion or other disciplinary action.