2-14-1983

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) February 14, 1983.

PRELIMINARY ISSUE relating to arbitrability of judicial inquiry report. Report admissible.

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

PRELIMINARY AWARD

Employee grievances alleging discriminatory demotion and discharge without reasonable cause contrary to art. 2.01 of the collective agreement between the parties in force from January 1, 1977 until December 31, 1977. Grievor seeks reinstatement to his former position without loss of salary, seniority or benefits and to have the alleged incident stricken from his record.

An award of this board of arbitration, dated October 29, 1980, reported at 28 L.A.C. (2d) 249, reinstating the grievor was set aside by the Ontario Divisional Court in *Re City of Toronto and C.U.P.E., Local 79* (1981), 125 D.L.R. (3d) 249, 81 C.L.L.C. para. 14,132, 33 O.R. (2d) 512; affirmed 133 D.L.R. (3d) 94, 82 C.L.L.C. para. 14,174, 35 O.R. (2d) 545 (Ont. C.A.) [leave to appeal refused 36 O.R. (2d) 386*n*, 42 N.R. 586*n* (S.C.C.)].

The city sought to introduce in evidence the report of His Honour Judge G.F.H. Moore on a judicial inquiry with respect to Brian Risdon conducted pursuant to s. 240 of the *Municipal Act*, R.S.O. 1970, c. 284 [now R.S.O. 1980, c. 302, s. 102]. The parties agreed that the admissibility of the Moore report would be dealt with in a preliminary award and that if this board finds the report inadmissible we should remake our decision on the basis of the evidence already before us and remain seised for purposes of determining compensation, which would then be the only matter left for consideration. Counsel also agreed that if the Moore report is found to be admissible further witnesses may be called, witnesses previously called may be recalled and counsel for the

city stated that he would not object counsel for the union being allowed to subpoena and cross-examine any witnesses thus far called by the city.

Counsel agreed that the board is properly constituted and seised of this matter.

The first preliminary award of this board of arbitration in (1978), reported at 19 L.A.C. (2d) 388, the unreported judgment of Mr. Justice Krever speaking for the Ontario Divisional Court delivered August 29, 1979, in which the city's application to quash the board's first award was denied, and the judgments of the Divisional Court and the Court of Appeal quashing this board's award on the merits are described by Blair J.A., delivering the judgment of the Court of Appeal. I will resist the temptation to put this award fully in context by quoting extensively from his lordship's judgment and content myself with saying that the basis for the board's refusal, in its first award, to admit the Moore report in evidence was the conclusion that, standing alone, the report lacked that "cogency in law" which, according to the Ontario courts, evidence must have before it can provide a proper basis for the decision of an arbitrator or board of arbitration, notwithstanding the discretion granted by the *Labour Relations Act*, R.S.O. 1980, c. 228, s. 44(8)(*c*):

> (*c*) to accept such oral or written evidence as the arbitrator or the arbitration board, as the case may be, in its discretion considers proper, whether admissible in a court of law or not.

See *R. v. Barber, Ex. p. Warehousemen & Miscellaneous Drivers' Union, Local 419* (1968), 68 D.L.R. (2d) 682 at p. 689, 68 C.L.L.C. para. 14,098, [1968] 2 O.R. 245 (Ont. C.A.), and *Re Girvin et al. and Consumers' Gas Co.* (1973), 40 D.L.R. (3d) 509, 1 O.R. (2d) 421 at p. 424 (Ont. Div. Ct.). That, at least, was the basis of my award as chairman. A ruling on "cogency in law" appeared to be required there because at the initial hearing in this matter the then counsel for the city explicitly stated 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.

In the course of that first preliminary award I expressed the view that the doctrine of *res judicata* did not apply and that the Moore report was within the public document's exception to rule against hearsay. With Mr. Tate's apparent concurrence, I concluded, however, that standing alone the report could not be considered to have cogency in law, by analogy to the rule in *Hollington v. F. Hewthorn & Co. Ltd. et al.*, [1943] 1 K.B. 587 (C.A.), by analogy to the rules limiting the admissibility in court

of evidence given in previous proceedings and because of the possible applicability of the *Public Inquiries Act, 1971* and the Ontario *Evidence Act*. Additionally, the natural justice considerations raised by the Divisional Court in *Re Girvin and Consumers' Gas Co., ibid.*, and what were referred to as "broader institutional grounds" led me to conclude that the board should not exercise its discretion under what is now s. 44(8)(*c*) of the *Labour Relations Act* to admit the Moore report in evidence. This led me to the conclusion that the city could discharge its onus to justify the demotion and discharge of the grievor only by calling further evidence to satisfy this board that there was reasonable cause as is required by the collective agreement. Mr. Tate was of the view that because of the position taken by counsel at the outset the city was precluded from calling further evidence. Mr. Paulin held the Moore report admissible.

When the board reconvened in June of 1980 Mr. Sanderson, who had become counsel for the city in this matter, sought once again to introduce the Moore report in evidence but the board held, over Mr. Paulin's dissent, that the report had already been ruled inadmissible. The majority expressed the view that the context had not changed so that it was now too late for the city to ask the board to change its ruling.

It was this decision, to refuse to admit the Moore report on the basis that its admissibility had already been determined, that resulted in our award of October 29, 1980, being set aside. Speaking for the Court of Appeal, Mr. Justice Blair stated (at pp. 100-2):

> The critical decision of the Board at its second hearing was its refusal to change its earlier ruling and to consider the admission of the Moore Report in evidence. . . .
>
> . . . . . .
>
> . . . I do not consider that the Board refused to admit the Report in evidence. Its error was more fundamental in refusing to consider whether or not it should be admitted . . .
>
> . . . . . .
>
> The legal issue . . . is whether the Board committed a jurisdictional error by refusing to consider the admissibility of the Moore Report at its second hearing. The Chairman's straightforward declaration [in the Board's first preliminary award] that the Report would have been admitted if the hearings had followed the normal course underlines the practical importance of this question.

The essence of the submission by counsel for the union is that we should undo that jurisdictional error by now considering the admissibility of the Moore report and, having considered it, once

again refuse to admit it for the reasons given in my first award, bolstered by new arguments based on the *Canadian Charter of Rights and Freedoms* which has come into effect since the decision of the Court of Appeal. Leaving aside the Charter arguments for the moment, this disposition of the Court of Appeal judgment would have us disregard the fact that Mr. Justice Blair, speaking for the court, went on to express strong opinions with respect to the exclusion of evidence by arbitration boards in general and with respect to the exclusion of the Moore report by this board in particular.

While Mr. Justice Blair's opinions do not appear to be strictly necessary to the court's conclusion that we committed a jurisdictional error in refusing to consider the admissibility of the Moore report at our second hearing they do, nevertheless, represent the considered opinion of the Court of Appeal on the approach that should be taken to this matter. Unfortunately, perhaps, the court has not given us specific guidance with respect to a number of the submissions put forward by counsel for the union, but the general thrust is clear enough. With respect to our first award, Mr. Justice Blair states at pp. 105-6:

> . . . the chairman sensibly concluded that he was not bound by legal exclusionary rules, some of which he examined in considerable detail. He would have admitted the Report under the broad discretion conferred on the Board by s. 44(8)(*c*) of the *Labour Relations Act* had it not been for the procedural problems created by the City's request for a preliminary ruling. He clearly would have been entitled to do so under the discretion conferred by that section . . .
>
> The argument made to this Court that the Board would have been prevented from doing so by exclusionary rules applicable in the Courts is singularly without merit.

More pointedly, his lordship states at pp. 108-9:

> In particular, what Professor Christie called in another context "the credibility of arbitration procedures" is jeopardized by the tendency of arbitration boards to exclude or to attempt to exclude reports like the Moore Report. . . . To suggest that the findings and conclusions of such an inquiry are not "facts" or "evidence" which could justify dismissal or demotion is to deny reality. Public confidence in the arbitration process would suffer if arbitration boards were able to ignore such reports of properly constituted inquiries on the conduct of public officials — the very evidence in which the City in this case reached its decision to dismiss Risdon.
>
> Such reports cannot be rejected almost out of hand, as they appear to have been in the arbitration awards cited above. Some boards have acted in the erroneous belief that the arbitration must be conducted as if it were a trial *de novo* where the decision must be based entirely on facts established at the hearing and not in other proceedings.
>
> . . . . .

> From what I have said earlier it must be obvious that a decision to exclude a report like the Moore Report for this reason would be an improper exercise of the Board's discretion.
>
> There can be little question that ordinarily such reports will be relevant to the grievance proceedings.

Counsel for the union submitted that this board is not bound by these views because they were not part of the court's ruling on our jurisdictional error, although he bowed to the court's view that, for the purpose of making our decision on the admissibility of the Moore report, we "must give careful consideration to [the report] which necessarily implies that the Board could peruse the report to the extent necessary for reaching its decision" (at p. 107).

Counsel for the union submitted that, having considered the Moore report, this board should refuse to admit it in evidence because it was excluded by agreement of counsel at the commencement of our initial hearing in this matter, or by waiver or estoppel, which amounted to the same thing. The Court of Appeal acknowledged at p. 103 that an agreement by counsel relating to the admissibility of the Moore report would have been binding. However, in the first award in this matter I described as fully and clearly as I could then, or can now, what transpired at the first hearing. The positions of counsel thus described were given full consideration by Mr. Justice Blair in the Court of Appeal judgment. He points out, at p. 103, that the first ground taken by counsel for the union in the Court of Appeal was that this board's decision was based on an agreement between the parties to the arbitration and, at pp. 104-5, his lordship concludes: "After a careful review of the whole record, I am unable to find any basis for the Union's argument that an agreement between the parties justified the exclusion of the Moore Report." Since I have nothing to add to the record reviewed by the Court of Appeal it is not open to me to question that conclusion.

Counsel for the union also submitted that, having considered the Moore report as directed by the Court of Appeal, this board of arbitration should exercise its discretion under s. 44(8)(*c*) of the *Labour Relations Act* and refuse to admit the report, as we did in our first award in this matter. In accordance with my reasons there, he submitted, not that we were bound by court rules of admissibility, but that we should take them into account in exercising our discretion. Specifically counsel referred to the rule that the findings of fact and conclusions of a separate tribunal will not be admitted as evidence before a court, to the rule in

Hollington v. Hewthorn, *supra*, and to the rule limiting the admissibility of evidence given in previous proceedings, emphasizing the policy underlying those rules rather than the rules themselves, and coupling them with broader institutional considerations, with the natural justice considerations raised by the Divisional Court in *Re Girvin and Consumers' Gas Co.* and with the combined effect of the *Public Inquiries Act*, R.S.O. 1980, c. 411, and the *Evidence Act*, R.S.O. 1980, c. 145. All of these considerations were canvassed in our initial award as providing the basis for exercising our discretion not to admit the Moore report. That, of course, is a somewhat different argument from that which, according to Mr. Justice Blair, was advanced by the union before the Court of Appeal. At p. 105 his lordship states:

> The second ground advanced by the Union to support the Board's decision was that a number of established rules of law *rendered the Moore Report inadmissible.* These included the hearsay and best evidence rules and the alleged general principle that the conclusions, findings of fact and evidence resulting from one legal proceeding are not admissible in another, in support of which the much disputed decision in *Hollington v. F. Hewthorn & Co. Ltd. et al.*, [1943] 1 K.B. 587, was cited.

(Emphasis added.) The Court of Appeal did not deal separately with these grounds, upon which counsel there argued that the Moore report was inadmissible. His lordship stated simply, at p. 105: "Since I do not accept this argument, it is unnecessary to discuss in detail the eight or nine specific legal rules advanced by the Union as justifying exclusion."

Counsel for the union cited to the Court of Appeal at least four arbitration awards, three of them subsequent to our first award, in which other arbitration boards refused to admit reports like the Moore report. In that context the Court of Appeal stated, at p. 106:

> A decision by any board to refuse to admit evidence because it was not admissible in the Courts or because the board was bound by decisions of other arbitration boards would constitute an obvious error of law. In addition, the discretion of a board obviously would be improperly exercised if it acted in the belief that these legal rules or prior arbitration decisions were binding upon it. It is beyond question that any board so acting would fetter its discretion.

We did not, of course, decide in our first award (nor did counsel for the union submit here) either that the legal rules mentioned were binding upon us or that the arbitration decisions cited by the court were binding upon us.

On a strict reading, there is nothing in the judgment of the Court of Appeal which constitutes a binding direction to us not to take such factors as we see fit into account in the exercise of our

discretion under s. 44(8)(*c*) of the *Labour Relations Act*. On the other hand, speaking for the court, Mr. Justice Blair has made its views on the general question perfectly clear. To repeat only one part of the passage from his judgment set out above, at p. 108, his lordship stated: "Public confidence in the arbitration process would suffer if arbitration boards were able to ignore such reports of properly constituted inquiries on the conduct of public officials . . .". Moreover, as his lordship acknowledged (at p. 109), I said several times in the initial award that had it not been for the context in which counsel for the city originally asked for a ruling on the admissibility of the Moore report, had it come in other words, in the normal course of things, my inclination as chairman would have been to admit the report and to let all of the considerations that, according to counsel for the union should lead to its exclusion go into the weighing of its probative value. The Court of Appeal has now decided that the way in which the admissibility of the Moore report was approached originally by counsel for the city should not have led this board of arbitration to treat the report differently than if it had come in the normal course.

The Court of Appeal did acknowledge, at p. 109, that:

> There may be cases where prejudice to an employee will so far outweigh the evidentiary value of a report that it should not be admitted. These are likely to occur where the employee's activities are peripheral to main issues dealt with in the report and where he has had no proper opportunity to represent or defend himself before the Commission of Inquiry.

Because the Moore report had not been admitted by this board of arbitration it was not part of the record before the Court of Appeal. It is now, however, before us for perusal to the extent necessary for us to reach a decision on this question of whether prejudice to the employee outweighs the evidentiary value of the report. Counsel for the union took the position that there were two types of prejudice involved here:

(i) the loss to the union and the grievor of the benefit of making a motion for non-suit — and the loss of substantive right; and

(ii) the legal prejudice that relates to the protections provided in the *Evidence Act*, the *Public Inquiries Act* and now the *Constitution Act, 1982*.

In my view to take account of the first type of prejudice enumerated by counsel for the union is simply to consider all over again the effect of the procedural context in which our first award was made. As I have already said, it is not open to us to question the Court of Appeal ruling on the effect of the positions taken by counsel at the outset of the first hearing.

The second type of prejudice put forward by counsel for the union is subsumed in what I regard as the three issues that remain to be dealt with here: First, is the evidence that the grievor, Brian Risdon, gave in the course of the Moore inquiry, as distinguished from the Moore report itself, admissible, on a proper interpretation and application of the Ontario *Evidence Act* and the Ontario *Public Inquiries Act*? Does the Court of Appeal judgment afford us any guidance on this? Second, does the proclamation of the *Canadian Charter of Rights and Freedoms* on April 17, 1982, affect the admissibility in proceedings before this board of arbitration of evidence given by Brian Risdon to the Moore inquiry? Third, is the Moore report so infused with Risdon's evidence that if we conclude that any direct report of evidence that he gave before the Moore inquiry must be excluded on either of these two grounds should we exercise our discretion under s. 44(8)(*c*) of the Ontario *Labour Relations Act* to exclude the report in its entirety?

I turn initially to the third of the issues just stated. The impact of the *Evidence Act* and the *Public Inquiries Act* was considered in our first award, not in relation to excluding particular evidence given to the Moore inquiry by Risdon but in relation to the Moore report as a whole. While the judgment of the Court of Appeal does not address the impact of those two statutes specifically the submission that they exclude the report must be considered to be part of "the argument" which Mr. Justice Blair says, at p. 105, he does "not accept". Moreover, those considerations were before this board when I stated in the first award that had the procedural context been different I would have admitted the Moore report and let those and the other objections made by counsel for the union go to weight. It is true, of course, that up to this point neither the Court of Appeal nor this board has been in a position to assess prejudice that might result to the grievor because of the degree to which the Moore report is infused with his evidence before the inquiry. But that is not the sort of prejudice which the Court of Appeal appears to have thought might outweigh the evidentiary value of a report like the Moore report. The "employee's activities" with which we are concerned here are not "peripheral to main issues dealt with in the report" (at p. 109), they are central to it. Moreover, while, as I pointed out in my first award, the union was not a party in the inquiry in the way that it is here, it is not the case that the grievor "had no proper opportunity to represent or defend himself before the Commission of Inquiry" (*ibid.*).

Where activities of a grievor or other party to a labour arbitration proceeding have been central rather than peripheral to the main issues dealt with by a commission of inquiry it would seem highly likely that the report of any such inquiry would be, to a significant degree, the product of the commission's assessment of that party's evidence. Thus, to conclude that, because Risdon's testimony was clearly a significant factor in the Moore report, the report itself, and not merely its recitation of his direct evidence, should be excluded here would be to fly in the face of the Court of Appeal's admonition that ordinarily such reports will be relevant to and admissible in grievance proceedings. Even if the *Public Inquiries Act*, the *Evidence Act* or the Charter excludes, or suggests that this board in the exercise of its discretion under s. 44(8)(*c*) of the *Labour Relations Act* should exclude, direct recitals of Risdon's evidence before the Moore inquiry that does not justify exclusion of the report itself. Such considerations will, of course, be of great concern in assessing the weight to be given to the conclusion reached in any such report.

My conclusion, therefore, is that the Moore report "should be admitted subject to contestation by other evidence and the weighing of [its] probative value by the Board" (Blair J.A., at p. 109). I adopt those words both out of deference to the Court of Appeal and because I agree that that is the best way for us to deal with the Moore report.

I now turn to the issue of whether the evidence that Brian Risdon gave in the course of the Moore inquiry, as distinguished from the Moore report itself, is admissible. Section 9(1) of the *Public Inquiries Act*, R.S.O. 1980, c. 411 provides:

> 9(1) A witness at an inquiry shall be deemed to have objected to answer any question asked him upon the ground that his answer may tend to criminate him or may tend to establish his liability to civil proceedings at the instance of the Crown or of any person, and no answer given by a witness at an inquiry shall be used or be receivable in evidence against him in any trial or other proceeding against him thereafter taking place, other than a prosecution for perjury in giving such evidence.

As I pointed out in my first award, 19 L.A.C. (2d) 388 at p. 401, s. 18 of the *Public Inquiries Act, 1971* makes it clear that not only was Judge Moore empowered to exercise the powers of a Commission under Part II of the *Public Inquiries Act, 1971* but also that the whole of that "Part applies to such investigation".

In that first award, at p. 402, I stated:

> On the face of it the matter before us cannot be said to be "proceedings *against*" Brian Risdon. Thus, strictly speaking, I do not think that he is protected by s. 9(1) of the *Public Inquiries Act, 1971* against the introduction

here, via Judge Moore's report, of evidence that he gave in the course of the inquiry.

It was not, however, necessary for me to reach any final conclusion on the point there because I treated the effect of the *Public Inquiries Act*, whether it was strictly applicable or not, as simply another factor in concluding that the Moore report lacked sufficient cogency in law to be admissible under the peculiar procedural circumstances. The issue that this board now faces is whether a direct recitation in the Moore report of Risdon's evidence before the inquiry is admissible. This has called for further consideration, as a result of which I am now of the view that the reference in s. 9(1) of the *Public Inquiries Act* to "other proceedings against him thereafter taking place" must be taken to include any proceedings relating to him in the way that "any trial" might relate to him. My conclusion from this is that no answer given by Risdon to the Moore inquiry can be used or be receivable in evidence against him in this arbitration.

In my first award I also considered the applicability of s. 9(2) of the Ontario *Evidence Act* to evidence given by Risdon to the Moore inquiry. I said there, at p. 402:

> However, the opening words of s. 9(1) of the *Public Inquiries Act, 1971* which provide that Brian Risdon must be deemed to have objected to answer any questions asked him in the course of the Moore inquiry on the grounds that his answers might tend to criminate him, are clearly relevant to s. 9(2) of the *Evidence Act* [R.S.O. 1970, c. 151] which provides:
>
> "9(2) If, with respect to a question, a witness objects to answer upon any of the grounds mentioned in subsection (1) [which before a public inquiry he is deemed to do] and if, but for this section or any Act of the Parliament of Canada, he would therefore be excused from answering such question, then, although he is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him in any civil proceeding or in any proceeding under any Act of the Legislature."
>
> There is high judicial authority for the proposition that a labour arbitration in Ontario is a statutory proceeding under the *Labour Relations Act* (see *Re International Nickel Co. of Canada Ltd. and Rivando* (1956), 2 D.L.R. (2d) 700, [1956] O.R. 379 (C.A.)) so it might well be concluded that the combined effect of s. 9(1) of the *Public Inquiries Act, 1971* and s. 9(2) of the *Evidence Act* is to preclude the use in these arbitration proceedings of any evidence that Brian Risdon may have given before the Moore inquiry.

In that award I referred to some uncertainty in the authorities about whether there was any common law principle on the basis of which a witness was excused from answering a question on the grounds that the answer might be used against him in civil proceedings. However, perusal of the Moore report satisfies me that Risdon's deemed objection under s. 9(1) of the *Public*

Inquiries Act can be considered to have related to potential criminal liabilities so that there is really no room for doubt that s-s. 9(2) of the *Evidence Act* comes into play, not to preclude the admission here of the Moore report as such, but to exclude the admission here of the recitation in the Moore report of any of Risdon's direct evidence that might be used against him.

It should be noted that s. 2 of the *Evidence Act* provides:

> 2. This Act applies to all actions and other matters whatsoever respecting which the Legislature has jurisdiction.

and that s. 1(*a*) provides:

> 1. In this Act,
>
> (*a*) "action" includes any issue, matter, arbitration, reference, investigation, inquiry ...

I reiterate that judgment of the Court of Appeal in this matter addressed and rejected the argument that the city was legally precluded from introducing the Moore report but nowhere did the court consider whether the *Public Inquiries Act* and the *Evidence Act* rendered explicit reports of Risdon's evidence before the Moore inquiry inadmissible. It could be argued that s. 44(8)(*c*) of the *Labour Relations Act*, in empowering an arbitration board

> (*c*) to accept such oral or written evidence as the arbitrator or the arbitration board, as the case may be, in its discretion considers proper, whether admissible in a court of law or not;

overrides those statutes to the extent of giving this board of arbitration discretion to admit evidence precluded by those two Acts, but I must reject that interpretation of s. 44(8)(*c*). Both s. 9(2) of the *Evidence Act* and s. 9(1) of the *Public Inquiries Act* quite explicitly reach beyond courts of law and apply, in the case of the *Evidence Act*, to "any proceeding under any Act of the Legislature" and, in the case of the *Public Inquiries Act*, to "any trial or other proceeding". I do not, however, rest my decision with respect to the admissibility of direct recitations of Risdon's evidence before the Moore inquiry on my interpretation of the combined effect of the *Labour Relations Act* and the *Public Inquiries Act* and/or the *Evidence Act*. Even if s. 44(8)(*c*) of the *Labour Relations Act* does give us discretion to admit evidence precluded by those two statutes I do not consider it proper to admit such evidence and in the exercise of this board's discretion under s. 44(8)(*c*) rule that it not be admitted.

My conclusion that, in the exercise of our discretion under s. 44(8)(*c*) of the *Labour Relations Act*, this board will admit the Moore report in evidence but not the specific excerpts therein from the testimony of Brian Risdon before the inquiry makes it

unnecessary to reach any firm conclusion on the effect in these proceedings of the *Canadian Charter of Rights and Freedoms*. Since by s. 32(1)(*b*) the Charter applies "to the legislature . . . of each province in respect of all matters within the authority of the legislature of each province" I would have thought that it applied to labour arbitration in Ontario which, as pointed out above in connection with the application of the *Public Inquiries Act*, has been held to be a statutory proceeding. In Hogg, *Canada Act 1982 Annotated* (1982), the learned author states at p. 75:

> The references to the "Parliament" and a "legislature" [in s. 32(1)] make clear that the Charter operates as a limitation on the powers of those legislative bodies. Any statute enacted by either Parliament or a Legislature which is inconsistent with the Charter will be outside the power of (ultra vires) the enacting body and will be invalid. (See also s. 52(1)). It follows that any body exercising statutory authority . . . is also bound by the Charter. Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to . . . all . . . action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

In this way I would have thought that s. 13 of the Charter could be considered to attach as a rider on the direction of the Ontario *Labour Relations Act* to the parties that they must settle their differences by arbitration and, even more clearly, as a limitation on the discretion conferred upon Ontario arbitrators by s. 44(8)(*c*) to admit any evidence whether admissible in a court of law or not. Section 13 provides:

> 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

I would have thought, too, that to hold s. 13 applicable here is not to give it retrospective effect, since it addresses the introduction of evidence in these proceedings, and the date of the hearing in this matter, which would appear to be the relevant date, was well after the proclamation of the Charter.

The most difficult question in my view is whether the "other proceedings" referred to in s. 13 include proceedings such as this or, indeed, any non-criminal proceedings. Section 5(2) of the *Canada Evidence Act*, R.S.C. 1970, c. E-10 precludes the use of self-incriminating evidence "in any criminal trial, or other criminal proceedings". The equivalent Ontario legislation, on the other hand, as I have already pointed out, clearly extends to non-

criminal proceedings. To say, as Professor Hogg does, *ibid.*, at p. 48, that "Section 13 essentially declares the law as it now exists in s. 5(2) of the Canada Evidence Act (and its provincial counterparts) . . ." is probably correct in general but begs the question on this aspect of the law, where the *Canada Evidence Act* and at least its Ontario counterpart clearly differ. In the circumstances it is unnecessary for me to express any opinion on this question which, of course, is more appropriately, and in any event ultimately, one for the superior courts. The same is even more obviously true of the submission by counsel for the union that s. 7 of the Charter has application here.

Conclusion

The Court of Appeal has characterized the basis upon which this board of arbitration was asked originally to determine the admissibility of the Moore report as not involving any agreement or other binding undertaking by counsel for the city that if the report, standing alone, were held to lack "cogency in law" it should be ruled inadmissible. There is nothing further on the record and it is not now open to us to disagree with the court's characterization. While the narrow ground for the setting aside of our award of October 29, 1980 (28 L.A.C. (2d) 249) was our refusal to consider anew the admissibility of the Moore report the Court of Appeal was clearly of the view that reports such as the Moore report should normally be admitted in arbitration. In the normal course that would have been my approach as well. Thus, given the rejection by the Court of Appeal of my characterization of the context in which the Moore report was originally put before us, I have concluded that it should be admitted in evidence, with all of the objections put forward to its admissibility being considered in determining what probative value it should have.

I think that both the *Public Inquiries Act*, R.S.O. 1980, s. 9(1) and the combined effect of that subsection and s. 9(2) of the *Evidence Act*, R.S.O. 1980, preclude the admission in evidence here of direct excerpts from the evidence of Brian Risdon before the Moore inquiry. However, I do not rest my decision to exclude such excerpts from admission here on my interpretation of those statutes. Rather, I have concluded that in the exercise of this board's discretion under s. 44(8)(*c*) of the *Labour Relations Act* it would not be proper to accept such evidence.

The ruling of the board is that the Moore report is admissible in evidence, purged of any direct quotation therein of the evidence of Brian Risdon.

Because of our conclusion with respect to the effect of the

Public Inquiries Act and the *Evidence Act* it is unnecessary to make any decision with respect to the application and effect of the *Canadian Charter of Rights and Freedoms*.

[M. Tate dissented.]