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

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

I. Christie, M. Tate, B. M. W. Paulin. (Ontario) *August 16, 1978.*

PRELIMINARY MOTION relating to admissibility of evidence.

H. F. Caley and others, for the union.
D. Cameron and others, for the employer.

PRELIMINARY AWARD

On October 13, and 14, 1977, Brian Risdon filed grievances under the collective agreement between the parties. In the first he alleged that he had been discriminatorily demoted and sought reinstatement to his former position without loss of salary, seniority or benefits. In the second he alleged that he had been dismissed without reasonable cause and disciplined twice for the same alleged conduct and sought reinstatement without loss of benefits, wages or seniority and to have the alleged incident stricken from his record. Both grievances were finally denied by letters of January 30, 1978, signed by R. S. W. Rae, director of labour relations for the city.

With regard to the first grievance Mr. Rae's letter states: "I conclude that no element of discrimination was involved in the action of the Commissioner of Buildings in demoting Mr. Risdon." With regard to the second grievance his letter states: "I conclude that the action of City Council in dismissing Mr. Risdon was for reasonable cause and did not constitute additional discipline for the same alleged conduct claimed by the grievor."

At the hearing counsel for the parties agreed that both grievances are properly before this board of arbitration. Counsel further agreed that if the grievances were allowed this board should remain seized of these matters to determine the grievor's remedies should the parties be unable to reach a settlement.

The grievor was demoted and dismissed from his job with the city following receipt by City Council of a report of His Honour Judge G. F. H. Moore arising out of judicial inquiry with respect to Brian Risdon conducted pursuant to 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 Inquires Act* ...

At the outset of the hearing counsel for the city requested us to make a preliminary ruling as outlined in the following letter sent two weeks in advance of the hearing to Mr. R. L. Dowling, representative of the union:

> I am writing to give you notice that it will be the Employer's position before the arbitration board herein that the Employer is not required to adduce evidence on the merits and that the Employer will request the arbitration board to make a preliminary ruling on that point.
>
> You will be aware that His Honour Judge G. F. H. Moore made a report dated October 5, 1977 in respect of the grievor to the Council of the Corporation of the City of Toronto respecting certain allegations against the grievor and that Judge Moore's report was submitted pursuant to Section 240 of The Municipal Act. The Inquiry conducted by Judge Moore took 29 hearing days; Mr. Risdon had reasonable notice of the misconduct alleged against him; he was given a full opportunity during the Inquiry to give evidence and to call and examine or cross-examine witnesses; and upon conclusion of the evidence, through his counsel, he was given a full opportunity to make submissions to Judge Moore.
>
> The action taken by the Employer in respect to the grievor was based entirely upon the matters dealt with by Judge Moore in his report.
>
> At arbitration, the Employer intends to rely on Judge Moore's report, a copy of which is enclosed.

At the hearing Mr. Cameron, for the city, made it clear that if Judge Moore's report were ruled admissible it was the intention of the city not to introduce any other evidence whatever on the merits of the grievances and he specifically requested that the board rule on the admissibility of Judge Moore's report in that context. Mr. Cameron explicitly stated that if, in the opinion of the board, such a report standing alone could not justify the city's actions, then the board should rule the report inadmissible. The issue was put as one of principle since this arbitration board has not seen the report in question.

The way in which this preliminary question arose and the city's position on it must be clearly understood, because our conclusion is that the report is inadmissible.

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. For reasons that are explained in detail below I would have held that the report came within the "public documents" exception to rule against the admission of hearsay evidence. Further, I would have concluded that, even if I were wrong in applying that exception, the report should be admitted in the exercise of the power of this arbitration board under s. 37(7)(*c*) of the *Labour Relations Act*, R.S.O. 1970, c. 232, which empowers 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;

It would then have been for the city to determine whether it would rest its case entirely on the Moore report or call oral evidence, presumably including some, if not all, of the witnesses who testified before Judge Moore. Had the city elected to call no further evidence the union would then have had to decide if it should call evidence or base its case on the argument that, although Judge Moore's report was ruled admissible, standing alone it lacked sufficient cogency in law to support the city's actions. Had that course been followed, in my view this board would appropriately have asked itself two questions: first, "Could a report such as this, standing alone, regardless of how damaging its contents might be to the grievor, be the basis upon which an arbitration board could dismiss a grievance against demotion or discharge?" If the answer to that question were "no", then we would allow the grievances. If the answer to that question were "yes", then the second question would be: "Do the contents of

this report satisfy us that the City had reasonable cause to demote and discharge the grievor, as required by art. 2.01(b) of the collective agreement between the parties?" In my opinion, for the reasons fully set out below, it would have been unnecessary to ask the second question because the answer to the first question would have been "no".

Here the normal course had not been followed. In this case the city has chosen to tell us in advance that Judge Moore's report, if admitted, will stand alone. Because in my view no such report standing alone has sufficient cogency in law to justify the denial of grievances such as those before us, it makes no sense to admit the report. Under the *Labour Relations Act* this arbitration board has the power to accept such evidence as it "in its discretion considers proper, whether admissible in a court of law or not". I do not consider it proper in the circumstances to admit the Moore report as evidence.

I consider it regrettable from the standpoint of the credibility of arbitration procedures that the city has elected to proceed in this way because this board has had no opportunity to consider the Moore report. However, in adversary proceedings the parties must be presumed to know where their interests lie. Clearly, the city cannot depart from the normal course of proceedings as it has done here and then, after it has heard the union's arguments on the cogency of the evidence in issue and has had the board's ruling on that matter, be allowed to depart from its stated position and rely on the Moore report along with such other evidence as it chooses to introduce.

My reasons for concluding that the report of His Honour Judge G. F. H. Moore is not admissible in evidence before this board of arbitration may be conveniently considered under four heads: the first having to do with whether the matter of Mr. Ridson's misconduct can be considered *res judicata*; the second having to do with the characterization of the report as hearsay and the purpose for which it was to be introduced; the third dealing with the admissibility of hearsay evidence and the "public documents" exception; and the fourth having to do with the cogency in law of the report as evidence in these proceedings.

Res judicata

It was not seriously contended that the arbitration of these grievances was rendered *res judicata* by the Moore inquiry. In other words, it was not seriously suggested that the matter had already been settled by Judge Moore. If such were the case, His Honour's report would, of course, not only be admissible but would be conclusive on the matters before us.

For the doctrine of *res judicata* to apply, the matter before the board must already have been determined "by a judgment in its nature final" on the same question between the same parties. The question before us is whether the city demoted and discharged the grievor "without reasonable cause" contrary to art. 2.01(b) of the collective agreement. Under s. 240 of the *Municipal Act*, Judge Moore was to investigate "a supposed malfeasance, breach of trust or other misconduct" on the part of Mr. Risdon in regard to his duties or obligations to the city. Undoubtedly many of the facts that were the concern of the inquiry are relevant to the question before us but the question was not the same. Nor were the parties the same because there were no "parties" before His Honour Judge Moore. In legal terms, there was no *lis inter partes*. Such is not the nature of an inquiry. It follows, I think, that no conclusions reached in an "inquiry" of any sort would, under our system, be considered by the Courts to be *res judicata*. Further, there was in fact no "judgment in its nature final" in Judge Moore's report to City Council. His Honour almost certainly made findings of fact and probably expressed opinions, but under s. 240 of the *Municipal Act* it was not his function and he had no power to make any final judgments whatsoever.

The requirements of the doctrine of *res judicata* are so obviously lacking here that it is, perhaps, superfluous to mention that even if the city and Mr. Ridson could, by some stretch, be considered to have been "parties" to the inquiry by Judge Moore, unquestionably the union was not. But it is the city and the union, not the city and Mr. Risdon, who technically are parties in this arbitration. The union and the city are signatory to the collective agreement and art. 15.06 is perfectly clear that it is the union, not the grievor, that may require the grievance to be submitted to arbitration. As MacDonald, J., of the Alberta Supreme Court, Trial Division, stated in *Re United Brotherhood of Carpenters & Joiners of America, Local 1525 and Norfab Homes Ltd.* (1975), 62 D.L.R. (3d) 516 at p. 523, [1976] 1 W.W.R. 621 *sub nom. United Brotherhood of Carpenters & Joiners, Local 1525 v. Coyle, Logan and Gilchrist*:

> The arbitration then, is not between the grievor and the company, but is rather between the union and the company. Its purpose is to ascertain by arbitration if the grievance as stated is justified. The arbitration process does not have to be understood as a contest between the union and the company although both are parties, but even if it is so regarded, it certainly is not, according to the collective agreement, a contest between the grievor and the company.

Hearsay: the purpose for which the Moore report was to be introduced

In *Re Ontario Jockey Club and Restaurant, Cafeteria & Tavern Employees Union, Local 254* (1977), 15 L.A.C. (2d) 273 (Schiff) at p. 275, the board of arbitration gave the following as a standard definition of hearsay:

> ... any evidence offered at a hearing, whether in the shape of oral testimony or written documents, setting out a factual assertion made before the hearing by some person about a matter relevant to the grievance when the evidence is offered to prove the truth of the assertion.

(In addition to the authorities cited there see *Phipson on Evidence*, 12th ed. (1976), at p. 263, para. 625.) According to this definition Judge Moore's report to City Council is, for the purposes of this arbitration, hearsay. It is introduced to prove the facts asserted in the report. Obviously, without having seen the report, we can assume that it contains a number of highly relevant assertions.

At one point in the course of the hearing, Mr. Cameron seemed to suggest that the report was being introduced simply to establish that when the city dismissed Mr. Risdon it had before it this highly damaging report and therefore did not act "unreasonably".

If this is what Mr. Cameron meant to say, he must be suggesting that art. 2.01(b) of the collective agreement, in providing that the city shall not demote or discharge any employee "without reasonable cause", is merely requiring that the action not be arbitrary. The suggestion appears to be that because Judge Moore's report is worthy of great respect the mere fact that His Honour made an adverse report would itself constitute "reasonable cause" for demoting and discharging Mr. Risdon. That, however, is most assuredly not what the requirement of "reasonable cause" in the discharge and discipline provision of this collective agreement can be taken to mean. "Reasonable cause", like the even more common phrase "just cause", has been interpreted in countless arbitrations as requiring the employer to demonstrate cause which, in the objective judgment of the arbitrator or board of arbitration appointed under the collective agreement, justifies discipline: see Brown and Beatty, *Canadian Labour Arbitration* (1977), para. 7:3000 *ff.*, at p. 291 *ff.* Indeed, s. 37(8) of the Ontario *Labour Relations Act* provides that where an arbitrator or arbitration board determines that an employee has been discharged or otherwise disciplined for cause the arbitrator or arbitration board may substitute such other penalties for the discharge or

discipline as "to the arbitrator or arbitration board seems just and reasonable in all the circumstances." Thus, the mere fact that Judge Moore made an adverse report is not in itself relevant to the question of whether there was "reasonable cause" for the disciplinary action taken by the city. What is relevant are the matters with which the report deals; any "malfeasance, breach of trust or other misconduct" of which Mr. Risdon may have been guilty.

In summary, on this point, in so far as it was suggested that the Moore report was to be introduced simply to prove that an adverse report was received by the city, it is inadmissible because it is irrelevant; in so far as the report was to be introduced to prove the facts that it asserts, it is hearsay and its admissibility depends on considerations to which I now turn.

Hearsay: the "public documents" exception — Power of a board of arbitration under s. 37(7)(c) of the Ontario Labour Relations Act

Mr. Cameron supported the admissibility of Judge Moore's report mainly on the basis that it was a public document within the established exception to the rule against the admission of hearsay evidence. He relied on the statement of the exception found in *Sturla et al. v. Freccia et al.* (1880), 5 App. Cas. 623 (H.L.). That case, like most of the cases cited by the authorities on this matter (see *Phipson on Evidence*, at pp. 460-7, paras. 1097-115; Sopinka and Lederman, *Law of Evidence in Civil Cases* (1974), at pp. 107-9) dealt with evidence on a question status, specifically where and when an ancestor of one of the parties had been born, but the doctrine does appear to have wider application. In *Finestone v. The Queen*, [1953] 2 S.C.R. 107, 107 C.C.C. 93, 17 C.R. 211, the Supreme Court of Canada held that a customs bill of lading which showed receipt of goods from customs authorities and committal of them to the collector of customs at New York was properly admitted in evidence as proof of the fact asserted in the document and Lord Blackburn's formulation of the public document exception in *Sturla et al. v. Freccia et al.* appears to have been accepted.

In *R. v. Kaipianen*, [1954] O.R. 43 at p. 53, 107 C.C.C. 377, 17 C.R. 388, the Ontario Court of Appeal suggested that the tests for the applicability of the public documents doctrine are those laid down in *Ioannou et al. v. Demetriou et al.*, [1952] A.C. 84 (P.C.), and in that case, in turn, Lord Tucker suggested that Lord Blackburn's test is authoritative. In *Sturla et al. v. Freccia et al.*, at p. 643, his Lordship states:

> ... the principle upon which it goes is, that it should be a public inquiry, a public document, and made by a public officer. I do not think that "public" there is to be taken in the sense of meaning the whole world. ... an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be "public" within that sense. But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or *quasi*-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown.

In *Sturla et al. v. Freccia et al.* itself the exception was held not to apply, because the report in question was not in fact a public one. However, I must conclude that the report of His Honour Judge Moore to the City of Toronto was public in the sense that the term is used in the cases. Certainly, His Honour Judge Moore was under a public duty in making the report, and it is that, according to both *Sturla et al. v. Freccia et al.*, at p. 642, and *Finestone v. The Queen*, *per* Rand, J., at p. 109, which gives public documents sufficient trustworthiness to be admissible.

I have more difficulty with Lord Blackburn's stipulation that the exception applies "where there is a judicial, or *quasi*-judicial, duty to inquire". I must conclude, however, after considering *Irish Society v. Bishop of Derry* (1846), 12 Cl. & Fin. 641, 8 E.R. 1561, to which His Lordship refers, as well as later cases, that Lord Blackburn does not mean that the inquiry leading to the report must be "*quasi*-judicial" in the sense of that term in modern Anglo-Canadian administrative law. It was held in *Godson v. Corporation of the City of Toronto* (1890), 18 S.C.R. 36, *per* Sir W. J. Ritchie, C.J.C., at p. 40, that prohibition would not lie to a County Court Judge acting under the predecessor of s. 240 of the *Municipal Act* because "he had no powers conferred on him of pronouncing any judgment, decree or order imposing any legal duty or obligation whatever on the applicant for this writ, nor upon any other individual." While that undoubtedly means that in modern terms, as stated by Reid, J., in *Hydro-Electric Com'n of Mississauga v. City of Mississauga et al.* (1975), 71 D.L.R. (3d) 475 at p. 486, 13 O.R. (2d) 511 at p. 522, a County Court Judge operating under s. 240 of the *Municipal Act* is not exercising judicial or *quasi*-judicial power, a reading of *Sturla et al. v. Freccia et al.* itself, suggests that their Lordships in that case were concerned not with whether the report before them constituted a final judgment or determination but rather with the "official" qualities of the inquiry that preceded it. Their concern, in other words, was with whether there had been an objective and judge-

like assessment of the facts. Lord Selborne, L.C., at p. 633, speaks of:

> ... persons having legal jurisdiction to inquire, under public authority, into matters within that jurisdiction ... persons ... whose duty it was, in the exercise of that authority, to proceed upon just proof, and who may be presumably supposed to have discharged their duty properly, and to have taken such proof, and only such proof, as the law of the country required concerning the several matters before them.

That, I think, was the sense in which Lord Blackburn used the phrase "*quasi*-judicial". It should, perhaps, also be mentioned that in the leading case of *Ioannou et al. v. Demetriou et al.* Lord Tucker, at p. 94, uses the phrase "semi-judicial" rather than the phrase "*quasi*-judicial" which has now become a term of art in administrative law. Further, the application of the "public documents" exception to reports of inquiries and the like is infrequent compared with its application in relation to documents such as public registers, official certificates and corporation, company and bankers' books: see *Phipson on Evidence*, at p. 440, para. 1053. As has already been mentioned, the leading Canadian case, *Finestone v. The Queen*, involved a customs bill of lading evidencing receipt of certain goods. In any cases of this type there would have been no inquiry that was *quasi*-judicial in the modern sense.

On the basis of these authorities, I am not prepared to exclude Judge Moore's report to City Council from this arbitration proceeding merely because it is hearsay. It is, I think, within the "public documents" exception as recognized by the Courts.

Without wishing to further confuse an already difficult issue I must mention two further considerations which do leave me with some doubt about the admission of such a report under the "public documents" exception to the hearsay rule.

First, it is stated in *Phipson on Evidence*, at p. 440, para. 1053, that:

> The general grounds of reception are (1) that the statements and entries have been made by the *authorized agents of the public in the course of official duty*; and (2) that the facts recorded are of *public interest or notoriety. To which it may be added that it would not only be difficult, but often impossible, to prove facts of a public nature by means of actual witnesses examined upon oath*

(Emphasis added.) In the same vein, in *Finestone v. The Queen*, Rand, J., states, at p. 107, the grounds for this exception to the hearsay rule as being not only the trustworthiness of the entry arising from the public duty but also "the inconvenience of the ordinary modes of proof". In *Finestone*, conceivably, the New York official who issued the document in question could have per-

sonally given evidence but in the vast majority of cases referred to in the texts on this topic, the public official who made the document in question was long since deceased. In this arbitration, as far as I know, it would not be impossible for us to hear first hand the evidence upon which Judge Moore based his report but it would duplicate His Honour's effort and be wasteful of time and money.

Second, there is an obvious relationship, recognized apparently in the American law of evidence but not brought out in the Anglo-Canadian authorities, between the "public documents" exception to the hearsay rule and the rule with regard to the admissibility of judgments and the reasons therefor in previous judicial proceedings. No document would appear more fully to satisfy the tests for the admission of public documents laid down by Lord Blackburn in *Sturla et al. v. Freccia et al.* than does the official report of an earlier case. However, the countervailing rule in the oft quoted and much criticized case of *Hollington v. F. Hewthorn & Co. Ltd. et al.*, [1943] 1 K.B. 587 (C.A.), is then encountered. In that case it was held that in the trial of an issue in a subsequent case the opinion of the Court in an earlier case arising out of the same facts was irrelevant. This was true, said the Court of Appeal, not only of convictions, but also of judgments in civil actions, at pp. 596-7:

> If the judgment is not conclusive ... it ought not to be admitted as some evidence of a fact which must have been found owing mainly to the impossibility of determining what weight should be given to it wihout retrying the former case. A judgment, however, is conclusive as against all persons of the existence of the state of things which it actually affects when the existence of that state is a fact in issue. Thus, if A sues B, alleging that owing to B's negligence he has been held liable to pay x *l.* to C, the judgment obtained by C is conclusive as to the amount of damages that A has had to pay C, but it is not evidence that B was negligent...

I return to *Hollington v. F. Hewthorn & Co., Ltd. et al.* below. My point here is simply that in concluding that Judge Moore's inquiry was sufficiently "judicial" to bring it within the "public documents" exception to the hearsay rule, we may be admitting a "Trojan horse", because if the proceeding is analogous to that of a Court, the policy underlying the rule in *Hollington v. F. Hewthorn & Co., Ltd. et al.* suggests exclusion of the evidence quite apart from the hearsay rule.

Notwithstanding these concerns my conclusion is that a report such as that of Judge Moore is a public document within the recognized exception to the rule against the admission of hearsay evidence. In the normal course of things, if counsel for the city

had not raised the issue of admissibility as a preliminary matter and coupled thereto the question of the cogency in law of the report standing alone, I would have resolved any doubts by invoking s. 37(7)(*c*) of the Ontario *Labour Relations Act* which empowers 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;

On that basis I would have said that the report could properly be put before the arbitration board to be considered with other evidence led by the city. However, as pointed out above, matters did not take what I would regard as their normal course and the cogency in law of such a report, standing alone, has been put in issue as a preliminary matter.

Cogency in law of a report under s. 240 of the Municipal Act in a collective agreement arbitration

Mr. Caley, for the union, submitted that even if the Moore report were ruled admissible, such a report could not be the basis for denying the grievances before this board of arbitration. This submission was put on the basis that the report was hearsay and, as well, on the several grounds considered in detail below. In the result, I agree that regardless of the facts found or the conclusions drawn by His Honour Judge Moore we cannot, on the basis of such a report standing alone, deny the grievances before us.

In *R. v. Barber et al., Ex p. Warehousemen & Miscellaneous Drivers' Union Local 419* (1968), 68 D.L.R. (2d) 682, [1968] 2 O.R. 245, Mr. Justice Jessup, for the Ontario Court of Appeal, after quoting s. 37(7)(*c*) of the Ontario *Labour Relations Act* (set out above), which gives arbitration boards a broad discretion to admit evidence, whether admissible in a Court of law or not, said, at p. 689:

> By that clause the Legislature recognized that arbitrations will frequently be presented before arbitration boards by lay persons. Accordingly, it relaxed the strict rules as to the admissibility of evidence and in particular allowed hearsay evidence to be adduced without objection. However, that provision does not relieve a board from acting only on evidence having cogency in law.

That passage was quoted with approval by the Divisional Court of the Ontario High Court of Justice in *Re Girvin et al. and Consumers' Gas Co.* (1973), 40 D.L.R. (3d) 509 at p. 512, 1 O.R. (2d) 421 at p. 424. In *Re Girvin et al. and Consumers' Gas Co.*, in quashing the decision of an arbitration board, the Court observed that the board had made a finding of fact which excluded, in effect, the evidence of the grievor and *relied exclusively on hearsay evidence*, some of which was in conflict.

In my opinion, using the phrase in the *Barber* case, a report such as that in issue here, standing alone, lacks cogency in law. In reaching this conclusion I have attempted to assess the shortcomings of such a report in the following respects:

(i) by analogy to the rule in *Hollington v. F. Hewthorn & Co., Ltd. et al.*;
(ii) by analogy to the rules limiting the admissibility in Court of evidence given in previous proceedings;
(iii) because of the possible applicability of the *Public Inquiries Act*, 1971 (Ont.), c. 49, and the *Evidence Act*, R.S.O. 1970, c. 151;
(iv) because of the natural justice considerations raised by the Divisional Court in *Re Girvin et al. and Consumers' Gas Co.*; and
(v) on broader "institutional" grounds.

(i) *Rule in Hollington v. F. Hewthorn & Co., Ltd. et al. Hollington v. F. Hewthorn & Co., Ltd. et al.* has been quoted above in connection with the "public documents" exception to the hearsay rule. It is commonly cited as authority for the proposition that in both criminal and civil cases judgments are not conclusive against strangers except as to the existence of the state of things which the judgment actually affects when the existence of that state is a fact in issue. The rule has been criticized because it precludes recognition in a civil case of a previous criminal conviction even though the onus of proof would have been higher in the criminal case. Common sense would suggest that the question should be whether the onus in the previous proceeding was the same or greater. If it was, then the finding of the Court in the previous proceeding could be given at least presumptive respect. This, apparently, is the approach in the American Courts, where the whole matter is regarded as an aspect of the "public documents" exception to the hearsay rule

However justified the criticism may be, the rule in *Hollington v. F. Hewthorn & Co., Ltd. et al.* in the rigid form laid down by the English Court of Appeal, has been practically universally applied in Canada except in matrimonial cases, which might be regarded as falling outside the rule as originally stated by Goddard, L. J., to the extent that they deal with status, that is with "the existence of the state of things which [the judgment] actually affects": at pp. 596-7.

Technically, the rule in *Hollington v. F. Hewthorn & Co., Ltd. et al.* does not apply here because we are not a Court and because

His Honour Judge Moore's report is not a judgment in a Court in a previous proceeding. However, since the reason for the rule is that proceedings before a subsequent civil Court involve a different onus of proof than the previous proceedings before the criminal Court (see *per* Goddard, L.J., at p. 595) the rule should apply here *a fortiori*. As observed above in connection with the application of the doctrine of *res judicata*, Judge Moore was conducting an *inquiry* under s. 240 of the *Municipal Act*, and the Act does not state who bears the onus or what the burden of proof is. The issue, if it can be called an issue, was simply for His Honour to report on the supposed malfeasance, breach of trust or other misconduct of Mr. Risdon. Before this board of arbitration, on the other hand, the onus of proof is clearly on the employer; the burden is a civil burden although, because discharge is involved, the board would require clear and convincing proof of the facts alleged. The ultimate issue is whether there was reasonable cause for the discharge of the grievor and that involves questions not only of whether he committed the wrongful acts alleged but also, possibly, of his employment record, of the way the employer has in the past treated similar acts by the grievor or other employees and generally a weighing of the seriousness of the offence against the seriousness of the sanction invoked by the employer. Thus the onus of proof and the issues are quite different and if the rules followed by the Courts are to provide any guidance we should be hesitant to uphold the discharge of the grievor on the basis of a report under s. 240 of the *Municipal Act*, standing alone.

(ii) *Limitations on the admissibility of evidence in previous proceedings.* It might be said that the purpose in admitting a report under s. 240 of the *Municipal Act* would not be for the findings of fact or the judgment therein, but for the report therein of the evidence given by the grievor or other witnesses before the inquiry. We are not a Court, but to thus take account of evidence beyond the limits within which the Courts themselves operate must be regarded as deciding on the basis of evidence not having cogency in law. In *R. v. Sommers et al.* (1958), 122 C.C.C. at p. 21, Wilson, J., of the British Columbia Supreme Court quotes *Phipson on Evidence*, 9th ed., at p. 455, as follows, at p. 22:

> "(*a*) At common law, testimony given by a witness in civil or criminal proceedings is admissible in a subsequent (or in a later stage of the same) trial in proof of the facts stated, provided (1) That the proceedings are between the *same parties* or their privies; (2) that the *same issues* are involved; (3)

> that the party against whom, or whose privy, the evidence is tendered had on the former occasion a *full opportunity of cross-examination*; and (4) that the witness is *incapable of being called* on a second trial."

In that case Wilson, J., clearly faced the question of whether evidence given to a Royal Commission was admissible in subsequent proceedings over which he was presiding. He refused the evidence on the basis that to admit it would create a very bad precedent. Here no suggestion has been made that any of the witnesses heard by His Honour Judge Moore are incapable of being called before this board of arbitration. I have no doubt that during the inquiry the grievor was given full opportunity for cross-examination in accordance with s. 5 of the *Public Inquiries Act, 1971*, but, as has already been pointed out, it cannot be said that the proceedings before us involved the same parties or the same issues. Thus, in so far as Judge Moore's report is sought to be introduced as a means of putting before us a record of the evidence in the proceedings before him, it appears that such evidence would not be accepted in a Court of law and must be said not to have cogency in law.

(iii) *The Public Inquiries Act, 1971.* The issues relating to the *Public Inquiries Act, 1971* appear to be more complex than they are deserving of lengthy consideration at this stage. It will be recalled that s. 240 of the *Municipal Act*, quoted at the outset, provides that a Judge conducting an inquiry under that section "has all the powers that may be conferred upon commissioners under *The Public Inquiries Act*". Section 18 of the *Public Inquiries Act, 1971* provides:

> 18. Where, for the purpose of an investigation, inquiry or matter under any Act or regulation, any person or body is given the powers of or that may be conferred on a commissioner under *The Public Inquiries Act* or the powers of a court in civil cases, on and after the day this Act comes into force such person or body may exercise the powers of a commission under Part II of this Act, which Part applies to such investigation, inquiry or matter as if it were an inquiry under this Act.

It is clear, therefore, 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 applied to his investigation. Thus, s. 9(1) applied. It 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 proceedings against him thereafter taking place, other than a prosecution for perjury in giving such evidence.

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.

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* 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 (Ont. (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.

I am aware that it has been suggested that there is no common law principle on the basis of which a witness is excused from answering a question on the grounds that the answer may tend to criminate him in civil proceedings and therefore that the protection afforded by s. 9(2) of the *Evidence Act* is illusory: see Sopinka and Lederman, *Law of Evidence in Civil Cases*, at p. 223. Even if that is so, I remain impressed by the apparent intent of the Legislature in enacting s. 9(1) of the *Public Inquiries Act, 1971*, that persons subjected to such inquiries should not as a result be prejudiced in either criminal or civil proceedings.

On this point I need go no further than to say that the legislation suggests to me that when this arbitration board, in the exercise of its discretion under s. 37(7)(*c*) of the *Labour Relations Act*, refuses to admit the Moore report, we are acting consistently with the intent of the Legislature in so far as we thus preclude the admission of any testimony given by the grievor himself to

the inquiry or excerpts therefrom. Further, if it is not proper to admit a report of such testimony, I have serious doubts that it is proper to admit conclusions of fact based, presumably in part at least, on such testimony.

(iv) *Re Girvin et al. and Consumers' Gas Co. — natural justice considerations. Re Girvin et al. and Consumers' Gas Co.*, which has been referred to above, is a case in which the Ontario Divisional Court suggested that hearsay evidence, some of which was in conflict, lacked cogency in law at least where the board relied exclusively on hearsay evidence. In granting the application to quash the award of the board, Holland, J., stated on behalf of the Court, at p. 512 D.L.R., p. 424 O.R., that:

> Such evidence may well be admissible by reason of [s. 37(7)(*c*)] of the *Labour Relations Act* above referred to, but it must be borne in mind that in cases of this type the burden is on the employer to show that the employer acted properly in the discharge of the employee and in order to satisfy that burden in this case the employer, in effect, relied exclusively on hearsay evidence. Even though that evidence may well have been admissible we are all of the view that the employee *did not receive a fair hearing in the circumstances.* His counsel had *no real opportunity to cross-examine* on the evidence that was presented.

(Emphasis added.)

Clearly, to conclude that the report of an inquiry under s. 240 of the *Municipal Act*, standing alone, is evidence of sufficient cogency in law to justify denial of the grievances before us is to conclude that we could deny the grievance on evidence upon which the grievor's counsel could have no opportunity whatsoever to cross-examine. True, I have concluded that the report probably falls within the "public documents" exception to the hearsay rule and, even if it does not, it is hearsay which carries the *imprimatur* of a highly respected Judge and is quite different from the kind of hearsay relied upon by the board of arbitration in the *Girvin* case. It is also true that the grievor was represented by counsel in the course of the Moore inquiry and his counsel did, apparently, cross-examine witnesses. Certainly he had the opportunity to do so. This, however, carries us back to the matter considered in connection with the doctrine of *res judicata*.

The parties here are the union and the city. Before Judge Moore it was Brian Risdon personally who had the right to have his counsel cross-examine witnesses. Even if we assume all counsel to be of equal ability, the fact remains that because the issues are very different here than they were in the inquiry, the union's counsel may well have different matters he would wish to take up with the witnesses in cross-examination.

Moreover, in *Re Girvin et al. and Consumers' Gas Co.* the hearsay upon which the arbitration board relied was at least first hand. The witness before the board was testifying with regard to statements of fact made to him by others and he, at least, could be cross-examined with regard to exactly what was said and its apparent meaning. A report from an inquiry under s. 240 of the *Municipal Act* would come before us as second-hand hearsay and would afford no opportunity whatever for cross-examination.

This consideration is, at bottom, perhaps no different from those involved in the preceding three bases for concluding that a report such as Judge Moore's, however carefully prepared, lacks cogency in law for the purposes of labour arbitration proceedings. It does, however, restate those considerations from a perspective recently adopted in the Ontario Court charged with judicial review of arbitration awards.

(v) *Institutional considerations.* Section 240 of the *Municipal Act* and its predecessors have been on the statute books of Ontario since the 19th century. It was, apparently, the *Municipal Amendment Act*, 1903 (Ont.), c. 18, that first extended the jurisdiction of the investigating Judge to include not only the members of municipal councils, their officers and persons having contracts with them, but also the servants of municipal councils. It was no doubt considered very fair, and with good reason, that the servant of a municipal council should have his misconduct made the subject of a judicial inquiry rather than unilateral determination by his employer, subject only to his right to bring an action for wrongful dismissal if he were discharged. However, the acquisition by city employees of collective bargaining rights and, subsequently, of rights under their collective agreements superimposed even greater protection for them.

The collective agreement, which is binding on the city, and each employee in the bargaining unit and his union, not only provides that an employee may be discharged or disciplined only with reasonable cause, it also imposes grievance and arbitration procedures on the city. The collective agreement does not take away the city's right under s. 240 of the *Municipal Act* to request a County Court Judge to conduct an inquiry into the misconduct of its servant, but it clearly does require the city, regardless of the report it receives from the Judge, to follow an orderly grievance procedure and in the end to submit its decision to discipline or discharge an employee to the objective judgment of an arbitration board acting under art. 15.06 of the collective agreement.

It is not my intention to sing praises to the grievance arbitration procedure under this collective agreement. They are perhaps not justified and in any case not appropriate here. But it must be noted that labour management arbitration has its own unique dynamic. An arbitration board is a tripartite tribunal, consisting of one member nominated and paid by the city and one member nominated and paid by the union (not by the grievor) and a chairman jointly agreed upon by the nominees and paid by both parties. The chairman is not a public judicial official. He is selected under this collective agreement, *ad hoc* for each particular case.

It follows that each arbitration board must fulfil the particular function for which it is appointed. It must find its own facts on the basis of the evidence presented before it and reach its own interpretation of the collective agreement. With regard to the latter function arbitrators and arbitration boards commonly afford respect to the principles developed by their predecessors, particularly where they are dealing with the same collective agreement, but each arbitrator or arbitration board must find the *facts* for its case on the basis of the evidence that it hears. As Paul Weiler, sitting as a single arbitrator, stated in *Re Douglas Aircraft of Canada Ltd. and U.A.W.* (1972), 2 L.A.C. (2d) 56 at p. 58:

> Although [a previous arbitrator's] general legal judgments may be of persuasive value before me, the same cannot be said for his findings of fact. I can only decide what probably happened on the basis of the evidence in the record before me ...

That this is true as between arbitrators and arbitration boards has never been doubted even though different findings of fact based on the same event may tend to bring the process into disrespect. Because arbitration has its own unique dynamic, *a fortiori* an arbitration board cannot give over its fact-finding function to some other decision maker. It therefore involves no disrespect whatever to His Honour Judge Moore to suggest that it might be quite improper for this board of arbitration, in effect, to accept His Honour's findings of fact as our own. It might be that if the city had chosen not to agree to have the cogency in law of Judge Moore's report dealt with as a preliminary matter, the report could have been of assistance in attempting to assess any other evidence the city might choose to call, but to rely on such a report, standing alone, would be to abdicate our function under the collective agreement.

Mr. Cameron, for the city, submitted that it would be unduly wasteful for this board to rehear the evidence that was the subject of an inquiry stretching over 29 hearing days and that it

would bring the processes of the law into contempt and ridicule if this board were to reach a different conclusion than that reached by Judge Moore in his report. There may be some truth in that, but in my view the union and the grievor have a right under the collective agreement, and under the Ontario *Labour Relations Act*, to have these grievances settled by arbitration. City Council must be presumed to know that. If the city wishes to devote its resources to a lengthy judicial inquiry in order to determine whether or not it should discipline or discharge an employee, that is the city's right, just as it is the right of any employer to be as meticulous as he chooses in determining whether discipline should be imposed. But once the city imposes discipline it has no choice but to make its case before this arbitration board if it wishes to have the employee's grievance against its discipline denied.

It is perhaps to be regretted, but it is not the fault of this arbitration board, that in this case the city has chosen to devote its resources to the judicial inquiry and to take the position that if the report were admissible, it would not prove its case before us beyond presenting the report of the inquiry.

Conclusion and order

For all these reasons I do not, in the exercise of this arbitration board's discretion, consider it proper to admit in evidence the report of a County Court Judge in an inquiry under s. 240 of the *Municipal Act* when, because of the position taken by the city, that report, if admitted, will stand alone in substantiating the city's case. I do not think that any such report, standing alone, would have cogency in law sufficient to justify dismissal of the grievances before us. On that basis, and without having considered at all the particular report in question, 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.

Because of the position taken by the city in this matter the ruling that Judge Moore's report is inadmissible 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. The board will therefore reconvene at a date acceptable to the parties.

PARTIAL DISSENT (Tate)

I have read the chairman's proposed award and am in complete agreement that it would not be proper for this board of arbitration to admit in evidence the Judge Garth Moore report.

However, with great respect to my learned colleague, I cannot subscribe to the employer being given an opportunity to present further evidence. A careful review of the argument placed before the board by Mr. Cameron, counsel for the employer, reveals that the dismissal and demotion of the grievor was based completely on the Moore report. Further, he made it clear that, *apart from the submission of the Moore report*, it was the intention of the city *not* to introduce any evidence whatsoever on the merits of the grievances.

This is supported by the argument of city counsel that it would be unduly wasteful for this board to rehear evidence that had stretched over 29 hearing days and included 69 witnesses. Mr. Cameron explained that the costs would be great and that he wanted to prevent a multiplicity of action. Such concern for the taxpayer is commendable, if somewhat belated. However, this board must make a decision based upon positions taken by counsel. In my view, it was clear that the city took the position that *it would not prove its case before us beyond presenting the report of the Moore inquiry.*

Under the circumstances, and because of the position taken by Mr. Cameron, I find that the city *has not and cannot* discharge the onus it bears to justify the demotion and discharge of the grievor. To permit the city to do otherwise would, in essence, give the city two "bites at the apple", a privilege not warranted under the circumstances.

Accordingly, I would allow the grievances to succeed.

DISSENT (Paulin)

I regret that I disagree with the award which is proposed by the chairman.

Under s. 37(1) of the *Labour Relations Act*, R.S.O. 1970, c. 232, every collective agreement is required to provide, as does this one, for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from, *inter alia*, alleged violation of the agreement. The basic violation alleged by Mr. Risdon in his grievance of October 14, 1977, is that he was dismissed without reasonable cause. In my view, there can be no dispute that the city has the burden of establishing reasonable cause for dismissal, nor can it be disputed that the standard of proof is the same as that required in civil cases.

The preliminary question we have been asked to decide is whether Judge Moore's report is admissible in evidence.

The chairman has taken two steps in dealing with this novel point. First, he has concluded that the report could be admitted in evidence in the exercise of the special power given to arbitrators under s. 37(7) of the *Labour Relations Act*. Secondly, he has decided that the report has no cogency in law and is therefore inadmissible.

With the greatest respect, it seems to me that the chairman has unduly sought to distinguish between evidence which is admissible from that which is cogent. In my understanding of this somewhat difficult area of the law, evidence is both admissible and cogent when it is pertinent and proper to be considered in reaching a decision. I am not sure that "cogent" is a term of art, but rather that it means something which is forcible or convincing.

The preliminary issue before our board involves the probative force of Judge Moore's report. There is no doubt it is hearsay. In my opinion, however, Judge Moore's report is within one of the clearly recognized exceptions to the hearsay rule. It is a public document and meets all the criteria of a public document, including, as counsel has told us, the giving of evidence under oath and the opportunity of full cross-examination.

The essence of the award seems to be that the chairman has rejected Judge Moore's report for the reason that the city has attempted to usurp the function of grievance arbitration. The award says that "an arbitration board cannot give over its fact-finding function to some other decision maker" and "to reply on such a report, standing alone, would be to abdicate our function under the collective agreement." I hasten to point out that these quotations are parts of sentences I have used to illustrate what I think is the essence of the award.

It was common ground that while Judge Moore made findings of fact on the evidence he heard, he did not make a decision for that was not his function.

We are told by counsel that the city is prepared to rest the merits of its case on the report. If the report is received in evidence, the union is certainly not precluded from calling evidence and making submissions including the question of whether or not the findings of fact made by Judge Moore and the other evidence adduced before our board are reasonable cause for dismissal. The receiving in evidence of Judge Moore's report clearly does not foretell an automatic result.

If, as a general proposition, the report meets the test of admissibility as an exception to the hearsay rule, it would be admissible

in Court. If it is admissible in Court, then it is admissible at arbitration.

The manner in which the city proceeded may be unusual but it does not, in my view, amount to usurpation of grievance arbitration. Indeed, the jurisdiction of our arbitration board to entertain Mr. Risdon's grievances was not challenged.

I would find that Judge Moore's report is admissible in evidence.