Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2570

Appeal MA09-25

Municipality of Port Hope

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BACKGROUND:

Certain harbour lands located in the Municipality of Port Hope (the Municipality) were purchased by the Municipality from the Port Hope Harbor and Wharf Company by an agreement dated January 3, 1852. In order to finance the cost of the purchase, the Town Council of the Municipality decided it was necessary that personal security be provided by eight individuals. In exchange for the personal security, a counter security was provided by the Municipality to the named eight individuals.

To put the agreement into effect, the *Port Hope Harbour Vesting Act, 1853* (*Vesting Act*) was enacted on May 23, 1853. The *Vesting Act* set out the terms of the counter security and the details of the agreement vesting the lands in the hands of the individuals who provided security for the purchase price. The *Vesting Act* also dissolved the Port Hope Harbor and Wharf Company and created a new corporate body called the Commissioners of the Port Hope Harbor (the Harbour Commission). It provided, among other things, that the eight individuals who provided the security were to be commissioners, along with "the Mayor of the said Town of Port Hope, for the time being."

NATURE OF THE APPEAL:

This order addresses the issues raised by a community association's request made to the Municipality under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the Harbour Commission. The request states:

> I am writing to you to request certain documents and information relating to the Port Hope Harbour Commission (the "Harbour Commission"). My understanding is that the Harbour Commission is comprised of individuals who have been appointed by the Port Hope Municipal Council. Under section 2 of the Act, a corporation or commission is considered part of a municipality for the purposes of the Act if all its members or officers are appointed by the council of the municipality.
>
> As such in accordance with subsection 17(1) of the Act, please provide me with copies of the following records (the "Request"):
>
> (i) all minutes of Harbour Commission meetings held between January 1, 2005 to present;
>
> (ii) all bylaws and regulations that established or govern the present Harbour Commission;
>
> (iii) all leases governing land or buildings between Cameco Corporation ("Cameco"), including renewals and addendums to such leases, and the Harbour Commission or any other body of the Municipality of Port Hope;

(iv) all documents related to the transfer of land title from any body of the Municipality of Port Hope to the current Harbour Commission;

(v) all structural reports, building condition reports and building permit applications for all buildings located on land owned or controlled by the Harbour Commission (the "Pier Buildings");

(vi) all studies, reports or any other documents or information considered by the Harbour Commission and/or Municipality of Port Hope that led to the decision of the Harbour Commission that the Pier Buildings should be demolished;

(vii) all correspondence between the Harbour Commission and Cameco regarding the Harbour Commission's decision that Cameco demolish the Pier Buildings;

(viii) all studies, reports or other documents obtained or considered by the Harbour Commission or the Municipality of Port Hope that relate to the environmental clean-up of land owned or controlled by the Harbour Commission and the decommissioning of the Pier Buildings; and

(ix) all correspondence with the Federal or provincial government department or agency (including the Ganaraska Conservation Authority and its predecessors) that relates to the Pier Buildings or land owned or controlled by the Harbour Commission.

The Municipality granted access to the responsive records it had in its possession. However, it stated that it could not provide an access decision on records that were in the "custody, care and control" of the Harbour Commission. The Municipality took the position that the Harbour Commission is not part of the Municipality and is not deemed to be part of the Municipality under section 2(3) of the *Act*. With respect to section 2(3), the Municipality stated that section 2(3) does not apply because the Mayor is appointed under the *Vesting Act* and is not appointed by Council.

The appellant appealed the Municipality's decision to this office (referred to in this order as the "Commissioner" or "IPC"). During mediation, the parties confirmed that the sole issue on appeal is whether or not the Harbour Commission is subject to the *Act*.

On commencing this inquiry, I sought, and received, representations from the Harbour Commission, the Municipality and the appellant. Representations were shared in accordance with Section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

In its representations, the Harbour Commission made arguments disputing the jurisdiction of this office over records in the possession of the Harbour Commission on constitutional grounds. Consequently, the Harbour Commission served the Attorneys General of Canada and Ontario with a notice of constitutional question in accordance with section 109 of the *Courts of Justice*

Act and Rule 12 of the *IPC Code of Procedure*. However, the Attorneys General did not communicate with our office in connection with this appeal.

In the discussion that follows, I reach the following conclusions:

- this office has jurisdiction to make a determination regarding the constitutional arguments raised by the Harbour Commission;
- the *Act* applies to the Harbour Commission; and
- pursuant to section 2(3) of the *Act*, the Harbour Commission is deemed to be part of the Municipality.

Based on these findings, this order requires the Municipality to issue a decision in relation to the records in the possession of the Harbour Commission that are responsive to the request.

ISSUES:

A. Does this office have jurisdiction to make a determination regarding the constitutional arguments raised by the Harbour Commission?

B. Are there any constitutional impediments to the application of the *Act* to the Harbour Commission?

C. Is the Harbour Commission deemed to be part of the Municipality under section 2(3) of the *Act*?

DISCUSSION:

A. Does this office have jurisdiction to make a determination regarding the constitutional arguments raised by the Harbour Commission?

In its representations, the Harbour Commission takes issue with my jurisdiction to consider the constitutional applicability of the *Act*. However, the right of a tribunal to determine whether or not its statute applies in particular circumstances, based on the constitutional division of powers, is well established by previous decisions of the courts and in previous orders of this office (see for example, Order PO-1805).

The Supreme Court of Canada considered the issue in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] S.C.J. No. 54. Gonthier, J., writing for the majority, found that administrative tribunals have jurisdiction to apply both the *Canadian Charter of Rights and Freedoms* and to decide other issues regarding the constitutional validity of legislative provisions. He stated:

> Administrative tribunals which have jurisdiction – whether explicit or implied – to decide questions of law arising under a legislative provision are presumed to

> have concomitant jurisdiction to decide the constitutional validity of that provision.

In the more recent case of *R. v. Conway*, 2010 SCC 22, the Supreme Court of Canada reviewed the authorities relating to the power of administrative tribunals to decide constitutional issues (including the *Martin* case), and observed (at paragraph 78):

> … administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them.

Section 39(1) of the *Act* provides that:

> A person may appeal any decision of the head under this *Act* to the Commissioner ...

Section 41(1) of the *Act* empowers the Commissioner to conduct an inquiry to review the head's decision.

Section 43(1) of the *Act* provides that:

> After all of the evidence for an inquiry has been received, *the Commissioner shall make an order disposing of the issues raised*. [Emphasis added.]

Under section 41(1) of the *Act*, decisions of the head that may be appealed to the Commissioner include exemption claims under sections 6 through 15 of the *Act*, which encompass claims that records are subject to, for example, the exemptions to protect personal privacy (section 14(1)) and solicitor-client privilege (section 12). One of the exceptions to the personal privacy exemption, found at section 14(1)(d), permits the disclosure of personal information "under an Act of Ontario or Canada that expressly authorizes the disclosure."

From these provisions, it is abundantly clear that the Commissioner has the power to decide questions of law on a wide range of subjects, triggering the constitutional authority referred to in the *Martin* and *Conway* cases. There is no provision in the *Act* or in any other pertinent legislation withdrawing the Commissioner's power to decide constitutional questions.

In the circumstances of the present appeal, it is also important to note that section 4(1) of the *Act* provides that "[e]very person has a right of access to a record or part of a record *in the custody or under the control of an institution* …" (emphasis added). "Institution" is defined in section 2 of the *Act*, and section 2(3) provides, as discussed in more detail below, that certain bodies are deemed to be "part of" an institution if they meet specified criteria. In this case, the City has decided that the Harbour Commission does not meet these criteria. On this basis, the City's decision states that records of the Harbour Commission are not in its custody or under its control. The appellant has appealed this decision to this office, as it is entitled to do under section 39(1).

In a related argument, the Harbour Commission, which was notified of the appeal as an affected party under section 39(3) of the *Act*, argues that there are also constitutional grounds for deciding that the *Act* does not apply to it, as an additional ground for concluding that the appellant does not have a right of access to the requested records under the *Act*. Accordingly, it is clear that this constitutional issue is linked to a matter properly before the Commissioner in this case, namely, the question of whether the *Act* applies to records of the Harbour Commission.

I therefore find that this office has jurisdiction to make a determination regarding the constitutional arguments raised by the Harbour Commission.

B. Are there any constitutional impediments to the application of the *Act* to the Harbour Commission?

The Harbour Commission submits that it is not subject to the *Act* or more broadly to provincial jurisdiction since it is a public harbour, which falls within the exclusive jurisdiction of the federal government pursuant to the *Constitution Act, 1867* (*Constitution Act*) and the *Vesting Act*.

The Harbour Commission states that it was incorporated by the *Vesting Act* of 1853, a statute of the United Province of Canada, to govern the affairs of the public harbour in Port Hope. It states that pursuant to the *Constitution Act*, public harbours fall exclusively under federal, not provincial, jurisdiction. The argument continues to the effect that the Harbour Commission is therefore not subject to any provincial legislation or regulation purporting to make it subject to this office's jurisdiction. In supplementary representations, the Harbour Commission describes itself as a "federal undertaking" and a "federal regime" and it refers to the federal *Ontario Harbours Vesting Act* and the *Ontario Harbours Agreement Act* and the case of *British Columbia (A-G) v. LaFarge Canada Inc.*, [2007] 2 S.C.R. 86 in support of its position.

The Municipality did not submit representations that address this issue.

The appellant disputes the Harbour Commission's position. Quoting from the *Vesting Act*, the appellant states that certain lands and buildings (the Pier Properties) were transferred to the Harbour Commission to hold the properties "in trust for the sole and only use and benefit of the Municipality" and that according to the *Vesting Act*, the properties "are within the limits and to be part" of the Municipality.

The appellant also submits that section 91 of the *Constitution Act* does not apply as it gives the federal government jurisdiction over navigation and shipping but not over harbours. It states that the Pier Properties are not primarily used for navigation and shipping and they are not, and have never been, subject to the *Ontario Harbours Agreement Act* and the *Ontario Harbours Vesting Act* and have never been under the jurisdiction of the federal government.

The appellant states, however, that there is another harbour at Port Hope which is primarily used for recreational purposes and is owned by and is under the jurisdiction of the federal government. The appellant states that these lands are "likely subject to the *Ontario Harbours Agreement Act*."

The appellant also argues that even if the Harbour Commission were a "federal regime," this office would still have jurisdiction over the Harbour Commission, if the Harbour Commission falls within the deeming provisions of section 2(3) of the *Act*. It states that overlap between federal, provincial and municipal government jurisdictions occurs in respect of harbour lands because the federal government has jurisdiction over navigation and shipping while provinces have jurisdiction over property within the province.

The appellant disagrees with the Harbour Commission's position regarding the decision of the Supreme Court of Canada in *Lafarge*. It submits that the *Lafarge* decision recognized the overlap of jurisdictional boundaries and found that legislation which overlaps federal jurisdiction is permitted to exist. The appellant indicates that in *Lafarge*, the court stated that where such overlap exists, it would only be in clear cases where the provincial and federal legislation conflict, in the sense that they cannot both operate along side each other, that a valid federal law or regulation would be found to "prevail" over its provincial counterpart.

The appellant concludes its representations on this issue by stating:

> In the instant case, the Pier Properties are clearly held by the Harbour Commission in trust for the Municipality, are not being used for shipping and navigation and, most importantly, no legislative conflict has been identified by the Harbour Commission and indeed none exists. In such circumstances, the Harbour Commission's submission that it is immune from provincial jurisdiction, and the jurisdiction of the IPC, is wholly without merit.

In reply, the Harbour Commission states:

> Pursuant to s. 91, paragraph 10 of the *Constitution Act*, parliament was given exclusive jurisdiction over navigation and shipping. By the third schedule, paragraph 2, public harbours became the property of Canada. Harbour Commissions are an important aspect of the navigation and shipping power and fall under exclusive federal jurisdiction. The operational conflict that arises is with respect to the *Access to Information Act*, R.S., 1985, c.A-1, which occupies the field for federal information purposes.

The Municipality did not submit representations on the constitutional issue raised by the Harbour Commission other than to state that the issues raised by the appellant are not relevant.

Analysis and Findings

Section 91, paragraph 10, of the *Constitution Act, 1867* gives legislative power over navigation and shipping to the federal parliament. Section 92, paragraph 13, gives legislative power over property and civil rights to the provinces.

The approach to issues relating to the constitutional division of legislative powers was described by Senior Adjudication David Goodis in Order PO-1805 as follows:

> In Canada the distribution of legislative power between the federal Parliament and the provincial legislatures is mainly set out in sections 91 and 92 of the Constitution Act, 1867. Section 91 lists the kinds of laws which are competent to the federal Parliament, and section 92 lists the kinds of laws which are competent to the provincial legislatures. Both sections give legislative authority in relation to "matters" coming within "classes of subjects" [P.W. Hogg, Constitutional Law of Canada, 4th ed. (Toronto: Carswell, 1997) (looseleaf), p. 15-5].
>
> There are two main steps in the process of deciding the constitutional applicability of a provincial statute based on the division of powers. The first step is to identify the "matter", or "pith and substance" of the statute. The second step is to assign the matter to one of the "classes of subjects" or "heads of legislative power" [Hogg, p. 15-6].
>
> If the statute is determined to fall within a provincial head of legislative power under the Constitution Act, 1867, the general rule is that it is valid and applicable, even if it impacts on federal matters.
>
> The exception to this rule is where the provincial law affects a federal matter to what may be described as "an unacceptable degree" (see discussion below). This principle is often referred to as "interjurisdictional immunity." If an otherwise valid provincial statute is found to affect a federal matter to an unacceptable degree, it may be "read down", so that it is interpreted as not applying to the federal matter [Hogg, pp. 15-8, 15-10, 15-25].

In *Lafarge*, the Supreme Court of Canada considered the constitutional validity of a municipal by-law in relation to property held by the Vancouver Port Authority. The court stated:

> There is no separate head of legislative power over "ports". The federal government enjoys exclusive jurisdiction in relation to its public property and over shipping and navigation activities. The province exercises jurisdiction over "property and civil rights" and "municipal institutions" within the province but it has, of course, been long recognized that the power to control navigation and shipping conferred by s. 91(10) is "capable of allowing the Dominion Parliament to restrict very seriously the exercise of proprietary rights": *Montreal (City of) v. Montreal Harbour Commissioners*, [1926] 1 D.L.R. 840 (P.C.), at pp. 848-49, per Viscount Cave L.C.
>
> The development of waterfront land could potentially fall under either provincial or federal jurisdiction, depending on the ownership and the use to which the land is proposed to be put. *Waterfront lands do not cease to be "within the province" by reason of their potential use for federally regulated activities* (*Cardinal v. Attorney General of Alberta, [1974] S.C.R. 695), but of course federal authority will be paramount to the provincial authority in cases of overlapping jurisdiction where there is a valid federal law and a valid provincial law applicable to different aspects of the proposed use and the two laws come into operational*

> *conflict*. In this respect, we agree, as did the Ontario Court of Appeal ((1978), 21 O.R. (2d) 491), with what was said by Griffiths J. (as he then was) in *Hamilton Harbour Commissioners v. City of Hamilton* (1976), 21 O.R. (2d) 459 (H.C.J.), at p. 484:
>
> > In my opinion, land-use control within a harbour has both provincial and federal aspects. . . . *Only if conflict arises with respect to the use of a parcel of land within the limits of the harbour, will the paramountcy of the federal power cause the operation of the by-law of the City to be suspended.*
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> [Emphases added.]

Applying the principles set out in these decisions and in Order PO-1805, the first issue before me is whether the *Act* is valid provincial legislation. In considering this question, I must determine the "matter," or "pith and substance" of the *Act* and then assign the matter to one of the "classes of subjects" or "heads of legislative power" of the province. In those cases where the matter might be considered properly as a matter within federal legislative authority, but also properly falls under provincial legislative authority, then I must determine whether it affects the federal government's interest in shipping and navigational activities to an unacceptable degree. If it does not, then there is no basis for "reading it down" so as not to apply to the Harbour Commission.

In this case, based on the arguments of the Harbour Commission, I will also consider the doctrine of federal legislative paramountcy, and whether there is any conflict between the *Act* and the federal *Access to Information Act* with respect to the possible application of the latter to the Harbour Commission.

For the purposes of my analysis it is not necessary for me to decide whether the Harbour Commission is a "federal undertaking" or a "federal regime" that falls within federal legislative power under the *Constitution Act*. As noted in *Lafarge*, and set out above, even if it were properly subject to federal legislative jurisdiction, provincial legislation of general application may apply to federal undertakings. This approach was followed in Order PO-1805 by former Senior Adjudicator Goodis.

In that order, Senior Adjudicator Goodis addressed an argument by the World Association of Nuclear Operators (WANO) that, because the operation of nuclear facilities falls under the legislative authority of the Parliament of Canada, Ontario's *Freedom of Information and Protection of Privacy Act* (*FIPPA*) could have no application to reports generated by WANO, even though copies of them were in the possession of Ontario Hydro, which was at that time designated by regulation as an institution under *FIPPA*.

In Order PO-1805, Senior Adjudicator Goodis decided that the pith and substance of *FIPPA*, whose purposes and provisions are essentially identical to those of the *Act*, was "to provide a right of access to information held by Ontario government ministries, agencies and other bodies, and to protect the privacy of individuals in relation to personal information held by these

organizations." In determining whether that particular "pith and substance" falls under an area that is within the legislative competence of the Province of Ontario, Senior Adjudicator Goodis referred to the purpose of the legislation, as described by the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)* (1977), 148 D.L.R. (4th) 385 at 403, as follows:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry…Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable...

He concluded that this analysis places *FIPPA* within the section 92(13) head of power, that is "Property and Civil Rights in the Province," and for this reason, *FIPPA* is within the legislative competence of the Province. The purposes and substance of the *Act* are more or less identical to those enunciated in *FIPPA*, and clearly the same conclusion applies with respect to the *Act*.

On the question of whether *FIPPA* affected a federal power (in that case, the authority over nuclear facilities) to an unacceptable degree, and following an extensive review of the constitutional authorities, Senior Adjudicator Goodis stated:

> Several principles emerge from these authorities. Provincial legislation of general application may apply to federal undertakings, provided they do not affect a "vital and integral" or "vital and essential" part of the undertaking, including its operation and management. Where provincial legislation is not aimed as a whole at the management of an undertaking, but can be seen as merely regulating or circumscribing some aspect of the enterprise or a particular exercise of management decision making, it is not inapplicable for that reason alone. To be inapplicable, the effect of the provincial statute on the federal undertaking must relate to the "basic, minimum and unassailable content" of the federal head of power; in other words, it must relate to the "vital and essential" management and operation of the undertaking.
>
> Working conditions, labour relations and occupational health and safety rules are examples of areas considered integral to the management and operation of federal undertakings, such that a provincial statute which bears essentially on these areas can have no application. These spheres of activity are, by their very nature, vital and essential aspects of the management and operation of the enterprise. Provincial laws purporting to regulate these areas cannot apply because they enter directly and massively into the basic content of federal jurisdiction in both their purpose and their effect.
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> Workers' compensation and environmental protection laws, on the other hand, are in a different category. Both in purpose and effect, statutes of this nature may be said to have some limited impact on the management of an undertaking, in that they regulate or circumscribe certain kinds of decision making within the

> enterprise and/or prescribe consequences in relation to certain kinds of activities. However, neither type of law is directed at or affects vital aspects of the management of a federal undertaking. Workers' compensation statutes are designed to create new legal rights in lieu of civil causes of action and provide ancillary remedies integral to the compensatory schemes. Environmental protection laws are designed to protect the environment in a variety of ways across a wide spectrum of human activities. In neither case is the core content of exclusive federal jurisdiction impinged in any vital or essential respect.
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> …
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> In my view, freedom of information laws fall into a category of legislation akin to workers' compensation and environmental protection statutes. While the *Act* contains some provisions which arguably could be said to regulate management of government institutions, the *Act* as a whole is not about the management of institutions. [The *Act*] … is a complex and multi-faceted scheme to ensure the public's right of access to information and the protection of individual privacy. The *Act* deals with all recorded information of whatever sort within the custody or under the control of government institutions in the province and sets up a delicately balanced regime of rights and obligations in relation to those information holdings.
>
> …
>
> Based on the above, I find that the Act does not affect a "vital and integral" or "vital and essential" part of the operation and management of the facilities. Therefore, I do not accept WANO's argument that the Act is constitutionally inapplicable to the records for this reason.

In making this finding, Senior Adjudicator Goodis concluded that *FIPPA* did not interfere with the federal jurisdiction over nuclear facilities to an unacceptable degree, and therefore it could not be constitutionally attacked on that basis.

In Order M-13, former Commissioner Tom Wright dealt with similar issues, and also considered whether the *Act* was in conflict with the federal *Access to Information Act*. This order concerned a request for access to records in the possession of OC Transpo, which operated an interprovincial bus service between Ottawa, Ontario and Gatineau, Quebec. Former Commissioner Wright stated:

> The fact that "exclusive" legislative competence over a federal or interprovincial entity has been granted to the Parliament of Canada, does not mean that no provincial legislation applies to that entity. The exclusiveness of the power to legislate is limited by the rule that a provincial law of general application is applicable to a federal entity. (*Construction Montcalm Inc. v. Minimum Wage Commissioner*, [1979] 1 S.C.R. 754, 93 D.L.R. (3d) 641.)

…

> It is my view that the [*Act*] falls within the definition of a "provincial law of general application." (*Kruger and Manuel v. The Queen*, (1978) 2 S.C.R. 309 (S.C.C.))
>
> Before a law of general application can apply to a federal entity, the law must be valid in the sense that it is within the enacting province's legislative competence. The matter of the [*Act*] is to regulate the information practices of municipal institutions. This brings it within the class of subjects under section 92.8 as being in relation to "municipal institutions in the province". Thus the *Act* is validly enacted, being with the legislative competence of the province.
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> …
>
> In the present case, an *Access to Information Act* (federal Act) exists. This federal Act purports to have objects and purposes which are similar to those of the [Act], with the important distinction that the federal Act applies only to federal entities. It does not purport to extend to municipal or provincial entities.

I adopt the approach taken in Orders M-13 and PO-1805 here and find that the *Act* is valid provincial legislation within the province's legislative competence under section 92 of the *Constitution Act*. There is also no basis for finding that the application of the *Act* to the Harbour Commission would affect a "vital and integral" or "vital and essential" part of the Harbour Commission's undertaking, including its operation and management. In my view, the access to information scheme set out in the *Act* does not touch on issues that are integral to the core and essential functions of the Harbour Commission and on that basis I find that it can apply to the Harbour Commission whether or not it is a federally regulated undertaking.

Having found that the *Act* is valid provincial legislation that can apply to the Harbour Commission, as a law of general application, whether or not the Harbour Commission is considered a federal undertaking, the question remains whether the *Act* is in conflict with the provisions of any federal legislation under the doctrine of federal legislative paramountcy.

The Harbour Commission states in its representations that the federal *Access to Information Act* applies and that legislation conflicts with the *Act*.

Section 4(1) of the federal *Access to Information Act* (the federal *Act*) creates a right of access to any record under the control of a "government institution." "Government institution" is defined in section 2 of the federal *Act* as follows:

> "government institution" means
>
> (a) any department or ministry of state of the Government of Canada, or any body or office, listed in schedule 1, and

> (b) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the *Financial Administration Act*;

The Harbour Commission is not a "government institution" as defined above because it is not a department or ministry of state of the Government of Canada, or a body or office listed in schedule 1 of the federal *Act*, nor does the Harbour Commission fall within paragraph (b) of the definition of "government institution."

Arguably, that is the end of the matter, given that the federal *Act* applies to government institutions, and the Harbour Commission is not included in that category, with the result that the federal *Act* does not apply to it. Accordingly, one can conclude on that basis that there is no conflict, and no issue of paramountcy therefore arises.

Nevertheless, I will consider whether the silence of the federal *Act* in relation to the Harbour Commission has any significance in this case. In Order P07-03, the Office of the British Columbia Freedom of Information and Protection of Privacy Commissioner found that the silence of the federal *Act* in relation to constituency offices of federal MP's located in the province meant that it was not open to provincial legislation to impose privacy obligations on these offices. The adjudicator stated:

> The fact that MPs are not explicitly excluded from the provincial legislation simply reflects the fact that federal legislators are not subject to provincial jurisdiction in that regard.
>
> The result is the same whether obtained by the application of the doctrine of interjurisdictional immunity or the doctrine of federal paramountcy. With respect to the former, I find that the activities of an MP's office in obtaining and managing information are integral to the MP's ability to carry out her or his activities in assisting constituents. With respect to the latter doctrine, I find that the fact that Parliament has enacted legislation addressing the privacy obligations of federal government bodies and has not included MPs in the operation of that legislation means that the provincial legislation cannot operate to frustrate the federal purpose in that regard.

The adjudicator cites the *Lafarge* decision and *Canadian Western Bank v. Alberta*, 2007 SCC 22 in support of his reasoning.

Although I agree with the conclusion reached by the adjudicator in Order P07-03, in my view, the findings are not applicable to the circumstances of the Harbour Commission. I note that, similar to the circumstances that exist in British Columbia, MLA's offices are not covered under the *Freedom of Information and Protection of Privacy Act* (the provincial equivalent to the *Act*). The rationale for the non-application of access to information and privacy legislation to MP's constituency offices relates to the fact that the management of information in the constituency office is "vital and essential" to the work of the MPs over whom Parliament has legislative authority by section 18 of the *Constitution Act*. The same circumstances do not exist in relation

to the Harbour Commission because, as noted above, the *Act* does not affect a "vital and integral" or "vital and essential" part of the undertaking of the Harbour Commission.

I also note that in Order P07-03, the adjudicator states that her findings are based on the application of the constitutional doctrines of "interjurisdictional immunity" and "federal paramountcy." In arriving at my decision not to follow Order P07-03, I have considered the following comments of Justices Binnie and LeBel in *Canadian Western Bank* regarding these two doctrines:

> [A]lthough the doctrine of interjurisdictional immunity has a proper part to play in appropriate circumstances, we intend now to make it clear that the Court does not favour an intensive reliance on the doctrine, nor should we accept the invitation of the appellants to turn it into a doctrine of first recourse in a division of powers dispute.

After reviewing the cases where the doctrine has been considered, the Court stated:

> [N]ot only should the doctrine of interjurisdictional immunity be applied with restraint, but with rare exceptions it has been so applied.

With respect to the paramountcy doctrine, the Court stated that the main difficulty lies in determining the degree of incompatibility needed to trigger the application of the doctrine and in that regard, the Court has shown a "prudent measure of restraint in proposing strict tests." The court cites the following passage from the judgment of Dickson, J. in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is *actual conflict in operation* as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [Emphasis added.]

I agree with, and adopt the approach taken in, *Canadian Western Bank*. As noted above, the Harbour Commission does not qualify as a "government institution," and therefore does not fall within the federal *Act*. The result is that the appellant does not have any access to information rights under that legislation and there is no "actual operational conflict" between the *Act* and the federal *Act*. In addition, I have found, above, that the application of the *Act* to the Harbour Commission will not impair or impact the "vital and essential" aspects of its activities to such an extent that the doctrine of interjurisdictional immunity would apply. For these reasons, the circumstances that were present in Order P07-03 do not exist here.

I note that the federal and provincial Attorneys General did not respond to the notice of constitutional question sent to them by the Harbour Commission. I have considered this circumstance and my findings have taken into account the comment of Dickson, J in *Kitkatla Band v. British Columbia (Ministry of Small Business, Tourism and Culture)*, [2002] 2 S.C.R.

146, at para. 72, that a court should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity.

For all of these reasons, I find that the *Act* is valid provincial law and that there are no constitutional impediments to its application to the Harbour Commission.

C. Is the Harbour Commission deemed to be part of the Municipality under section 2(3) of the *Act*?

Section 2(3) states:

> Every agency, board, commission, corporation or other body not mentioned in clause (b) of the definition of "institution" in subsection (1) or designated under clause (c) of the definition of "institution" in subsection (1) is deemed to be a part of the municipality for the purposes of this Act if all of its members or officers are appointed or chosen by or under the authority of the council of the municipality.

The application of section 2(3) was recently considered by the Ontario Court of Appeal in *City of Toronto Economic Development Corporation v. Ontario (Information and Privacy Commissioner)* (2008), 292 D.L.R. (4th) 706 (*TEDCO*). In that case, the Court counseled against a technical interpretation of the *Act* in considering whether the City of Toronto Economic Development Corporation (TEDCO) was part of the City under section 2(3). The Court stated (at para. 39) that "… a formal and technical interpretation [of section 2(3)] runs contrary to the purpose of the Act," and took into account, among other things, that the sole purpose of TEDCO was to "advance the economic development of the City." The Court also observed (at para. 32) that:

> When one considers that the object or purpose of the Act is to provide a right of access to information under the control of municipalities and related municipal institutions, it would appear reasonable to conclude that TEDCO should be subject to the Act.

The *TEDCO* case involved an access to information request for records of TEDCO concerning the "Mega Studio Project" in the Port Lands. The facts are that the City of Toronto (the City) incorporated TEDCO under the *City of Toronto Act*, 1985, and the *Business Corporations Act*. The City is the sole shareholder of TEDCO. All members of TEDCO's board of directors are appointed by City Council. The directors elect or appoint the officers of TEDCO pursuant to s. 5.01 of TEDCO's By-Law No. 1. The issue was whether the officers were "appointed or chosen by or under the authority of the council" as required by 2(3) given that section 5.01 of the by-law gave the directors, not council, the authority to elect or appoint the officers.

The Court of Appeal concluded that TEDCO was part of the City under section 2(3) since all of its officers are "appointed or chosen by or under the authority of the council of the municipality" within the meaning of that section. In writing for the Court of Appeal, Armstrong J.A. sets out the following reasons for the Court's finding:

First, the ordinary meaning of the word "authority" supports this conclusion. In the *Canadian Oxford Dictionary* (2nd ed., 2004), the main definition of "authority" has two parts: "(a) the power or right to enforce obedience. (b) delegated power." In my view, given the purpose of access to information legislation and the modern approach to statutory interpretation, it is preferable to read s. 2(3) in light of the second part of the definition, rather than imposing a restrictive interpretation that embraces only the first part. A similar point emerges from the *New Shorter Oxford English Dictionary* (1993), which provides as one of its definitions of "authority": "Derived or delegated power".

…

Second, beyond the ordinary meaning of the word "authority," the language of s. 2(3) is cast in broad terms which suggests that the legislature intended an examination of substance rather than a fixation on formal and technical appointment processes. The provision uses both the words "chosen" and "appointed" and also contemplates processes that are effected both "*by* the authority" and "*under* the authority" of City Council. In the face of this broad language, I question an approach that treats as decisive the mere fact that City Council has delegated direct appointment power to TEDCO's board of directors.

Third, although City Council does not *directly* choose TEDCO's officers and does not hold an official veto over that process, the City's role as TEDCO's sole shareholder provides a significant nexus between City Council's authority and the officers of TEDCO. TEDCO's board of directors, whose members are appointed directly by City Council, is always subject to City Council's removal power. This power finds expression in s. 3.06 of TEDCO's bylaw, which provides that City Council may "remove any director from office and … elect any person in his stead". Moreover, City Council also has the discretion, as sole shareholder of TEDCO, to unilaterally make "shareholder agreements" that control the powers of the directors. Under s. 3.09 of the bylaw, all the powers of the board of directors are fully subject to shareholder agreements, including its power to appoint officers.

Fourth, a formal and technical interpretation of s. 2(3) runs contrary to the purpose of the Act. We are dealing with a corporation whose sole shareholder is the City of Toronto, whose sole purpose is to advance the economic development of the City, and whose board of directors – at the time of the proceedings before the adjudicator – was populated by persons directly appointed by City Council, including the Mayor of Toronto (or his/her designate), the Chair of the City's Economic Development and Parks Committee, two City Councillors, and the Commissioner of Economic Development, Culture and Tourism (or his/her designate). In light of what La Forest J. observed in the above-cited passage from *Dagg*, it seems to me that TEDCO is just another example of a complex bureaucratic structure of public administration. In my view, it is contrary to the purpose of the Act and access to information legislation in general to permit the

> City to evade its statutory duty to provide its residents with access to its information simply by delegating its powers to a board of directors over which it holds ultimate authority.

In summary, the court found that in light of the ordinary meaning of the word "authority" in section 2(3), the broad language of s. 2(3), the City's status as TEDCO's sole shareholder, and the purpose of the *Act* and access to information legislation in general, it would be wrong to exclude TEDCO from the *Act's* reach merely because City Council has delegated direct appointment power to the board of directors.

Representations

Both the Municipality and the Harbour Commission submit that the Harbour Commission is not part of the Municipality and cannot be deemed to be part of the Municipality pursuant to section 2(3) of the *Act*.

The Harbour Commission submits that section 2(3) does not apply to it because all the Commissioners are not appointed by or chosen by or under the authority of the Council of the Municipality. It also takes the position that the decision of the Court of Appeal in the *TEDCO* case is distinguishable from the circumstances of this appeal. It explains, in supplementary representations, that the Mayor is appointed as a Commissioner "automatically by virtue of the *Vesting Act* and operates independently in accordance with the purposes of that act" and, therefore, the Mayor is not appointed by council as required for the application of section 2(3).

The appellant states that section 2(3) applies to deem the Harbour Commission part of the Municipality. It states that the proper approach to section 2(3) was set out in *TEDCO*:

> According to the Court of Appeal, subsection 2(3) must be interpreted in accordance with section 10 of the *Interpretation Act*. According to Armstrong, J.A. the *Interpretation Act* "deems the act to be remedial and mandates that the Act "shall … receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the *Act* according to is true intent, meaning and spirit."

The appellant argues that the object and purpose of access to information legislation is, according to *Dagg*, which is cited above, to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable. The appellant submits:

> These important policy goals of the *Act* are fully engaged in the instant case. The Pier Group is a group of concerned citizens of Port Hope dedicated to the preservation of significant industrial heritage buildings located on the municipality's waterfront (the "Pier Buildings") on land controlled by the [Harbour Commission] and which the Municipality has publicly announced will be demolished. The Pier Group believes that the documents and information that it has requested of the Municipality and the [Harbour Commission], and which

> the Municipality and the [Harbour Commission] have refused to provide, are vital for the Pier Group and the citizens of Port Hope to properly evaluate the Municipality's decision to demolish these important historic assets belonging to the town of Port Hope.

It also submits that the Harbour Commission is deemed to be part of the Municipality firstly, because all of its members are appointed by the Council of the Municipality and, secondly, it is under the authority of the Council.

The appellant argues that the Harbour Commission was created for the sole purpose of holding the Pier Properties in trust for the Municipality. It states:

> In light of the very clear language in the [Harbour Commission's] constating statute that it holds the Pier Properties in trust for the Municipality, the [Harbour Commission] clearly owes fiduciary obligations to the Municipality and could not do anything in respect of the Pier Properties that was inconsistent with the interests, or contrary to the wishes, of the Municipality. In the event that the [Harbour Commission] did take steps that the Port Hope Council deemed to be contrary to the interests of the Municipality, the Council could clearly direct the [Harbour Commission] to abide by its wishes in light of the language of the *Vesting Act* which makes it clear that the [Harbour Commission] does not hold the Pier Properties in its own right but instead holds the Pier Properties "in trust for the sole and only use and benefit of … Town Council." This language signals Parliament's unambiguous intent that the [Harbour Commission] falls under the authority of the Municipality.
>
> The *Vesting Act* also makes it clear that Parliament intended the Pier Properties themselves, and not just the [Harbour Commission], to fall within the jurisdiction of the Municipality. In section III of the *Vesting Act* titled "Harbor and works vested in the new corporation in trust," the *Vesting Act* reiterates that the Pier Properties are held by the [Harbour Commission] in trust for the Municipality and that the Pier Properties are declared by virtue of the *Vesting Act* "to be within the limits, and to be part of the said Town of Port Hope."

The appellant argues that the court's decision in *TEDCO* suggests that an analysis of the application of section 2(3) should be focused on substance rather than an overly technical interpretation of the section and the term "authority" means both "a power or right to enforce obedience" and "delegated power." The appellant states that when section 2(3) of the *Act* is considered in light of the important interpretive principles set out by the Court of Appeal in *TEDCO,* and given the provisions of the *Vesting Act*, it is clear that the Harbour Commission is "under the authority" of Council.

With respect to the words "appointed or chosen by" Council, the appellant states:

> In addition to the individuals who had posted security for the debt, the *Vesting Act* also appointed "the Mayor of the said Town of Port Hope, <u>for the time being</u>" to

the [Harbour Commission]. The *Vesting Act* also sets out the terms of office and the manner in which the Commissioners are to be replaced. All of the original Commissioners were to hold office for five years by which time they were to have been "relieved from personal responsibility in respect of the debt contracted in the purchase of the said Harbour." After five years, two of the original Commissioners were required to retire to be replaced by two other persons "duly qualified, and eligible to be elected as Town Councillors, to be nominated and appointed by the said Municipality of the said town" and that every year after that two other original Commissioners were to retire to be replaced by appointments made by the Municipality. The newly appointed Commissioners would then hold office for a term of five years at which time the Town Council would appoint their replacements.

Significantly, the *Vesting Act* makes it clear that, after the original Commissioners had been replaced, the Municipality had the sole authority to fill all vacancies that might occur thereafter. Section IV of the *Vesting Act* reads, in part, "that all vacancies occurring after [the original five year period] shall be filled by the Municipality of the said town." While it is true that the *Vesting Act* did appoint the Mayor as a Commissioner to the original [Harbour Commission], it is not the case, as submitted by the [Harbour Commission], that the *Vesting Act* requires the Mayor to be a Commissioner for all time. In fact, the *Vesting Act* expressly states that the Mayor's appointment to the Commission was "for the time being". That the *Vesting Act* does not require that the Mayor be a permanent member of the [Harbour Commission] makes eminent sense; the Mayor was made a member of the newly formed [Harbour Commission] in order to provide a connection between the Town Council and the [Harbour Commission] at a time when the other members were appointed by the *Vesting Act* and not by Council. Thereafter, Commissioners were, and continue to be, appointed by Town Council. In these circumstances, there is no need for the Mayor to continue as a Commissioner and there is nothing in the *Vesting Act* that requires that he or she do so. *What is clear, however, is that the Municipality has the sole power to appoint a Commissioner to fill all vacancies on the [Harbour Commission], including the position on the Commission which has historically been held by the Mayor.*

Although the *Vesting Act* is somewhat ambiguous regarding whether it contemplates the Mayor being a permanent member of the [Harbour Commission], it is clear that all other members of the [Harbour Commission] are appointed by the Municipality and that, should the Mayor choose to step down from the [Harbour Commission], the Municipality would have the right to appoint someone to act in his or her place. In light of the Ontario Court of Appeal's direction in *TEDCO* that "a formal and technical interpretation of subsection 2(3) runs contrary to the purpose of the *Act*" and should be rejected, it is clear that all members of the [Harbour Commission] are appointed by the Municipality for the purposes of the *Act*.

[Emphasis added.]

In support of the position set out in the italicized portion of this passage, the appellant refers to section 226 of the *Municipal Act*, which states:

> A municipality may, with the consent of the head of council, appoint a member of council to act in the place of the head of council on any body, other than on the council of another municipality, of which the head of council is a member by virtue of being head of council.

The appellant also states that the following additional considerations apply:

- The Harbour Commission ceased operating in 1989 and was not reactivated until 2005. When it was reactivated, this was done by means of By-Law 38/2005 of the Municipality, which provided for the appointment of the members of the Commission and which confirmed the fact that the Mayor was an "ex officio" Commissioner in accordance with the *Vesting Act*. The majority of the current Commissioners are members of Council, including the Mayor.

- Significantly, in the 16 years when the Harbour Commission was dormant, a committee of the Municipality named the Harbour Committee, which later merged with the Port Hope Waterfront Trail Committee, assumed the roles and responsibilities of the Harbour Commission.

- All revenues are paid over to the accounts of the Municipality for public uses and the accounts are required by statute to be published with those of the Municipality.

- Staff of the Municipality maintains the Pier Properties.

- The Pier Properties that are under the control of the Harbour Commission, and on which the Pier Buildings are situated, are part of a planned redevelopment of the Port Hope waterfront being undertaken by the Municipality. The appellant explains:

> The Municipality's Consolidated Waterfront Master Plan calls for the removal of the Pier Buildings and redevelopment of the lands controlled by the [Harbour Commission] to allow for a "passive recreation area providing opportunities for strolling, picnicing, fishing and other activities." Clearly the use of the lands held by the [Harbour Commission] are not limited to "the affairs of the public harbour of Port Hope" as suggested in the submissions of the [Harbour Commission] and extend to what are clearly municipal uses, including parkland and recreational uses. The fact that the Municipality is clearly contemplating redeveloping these properties by, among other things, removing the historic industrial buildings that the Pier Group is dedicated to preserving, is further evidence that the Pier Properties, and therefore the [Harbour Commission], are under Municipal control.

In reply representations, the Harbour Commission states that because the Mayor holds office as a Commissioner by virtue of the *Vesting Act*, he is not "appointed or chosen by or under the authority of the council of the municipality" as required by section 2(3) of the *Act*. He is a permanent member of the Commission pursuant to the *Vesting Act*, and the reference in that act to the words "from time to time" is to be interpreted as requiring that the individual, who may hold the office of Mayor at any given time, be a member of the Commission.

It also states that the Harbour Commission does not hold lands and operate the harbour solely for the benefit of Council but in trust for the benefit of a "wider public." It states that in the *Vesting Act* (Part III), the harbour and lands attached thereto were vested in the Commissioners, in trust, to include the "purpose of rendering the said Harbor as safe, commodious and convenient as possible, for the purposes of the trade of the said Town, and attracting thither vessels navigating Lake Ontario."

With respect to the other considerations set out in the appellant's representations, the Harbour Commission states:

- The final design of the Master Plan is conditional on the concurrence of the Harbour Commission and that is why the final design is deferred in the Master Plan. It also states that reference to the Municipality's Master Plan adds nothing to the issues under consideration here.

- It disputes that its main activity is that of a landlord and states that although leasing of land is an authorized function under the *Vesting Act*, the Harbour Commission also owns and operates yachting facilities within the inner harbour.

- The revenues generated go to the expenses of managing the harbour and keeping the same in efficient repair. Previously, revenues were applied to the debts referred to in the *Vesting Act*.

In its reply representations, the Municipality states:

> The [*Vesting Act*] does state that the property in question is being held by the Corporation in trust for the sole and only use and benefit of the Town Council. The [Harbour Commission] may have fiduciary obligations to the Municipality but this does not mean the Municipality has authority over the [Harbour Commission]. Even if it is assumed that the Municipality is the beneficiary, the beneficiary does not have authority over the trustees to direct the trustee to do what the beneficiary wishes.

It distinguishes the *TEDCO* case on the basis that it dealt with a corporation established by the Municipality, the Municipality was the sole shareholder and Council retained authority over TEDCO because it had a right of recall with respect to any director.

With respect to the other considerations listed by the appellant, the Municipality acknowledges that after the payment of expenses and debt of the Harbour Commission, any surplus revenue of

the Harbour Commission is to be provided to the Municipality. In this respect, the positions of the Harbour Commission and the Municipality appear to differ.

The Municipality acknowledges that the accounts of the Harbour Commission are to be published with those of the Municipality, but adds that this circumstance is of little relevance. It also acknowledges that staff at the Municipality maintain the Harbour Commission properties but adds that what is important is that the responsibility for the work lies with the Harbour Commission. It also states that the proposed redevelopment of the lands of the Harbour Commission is in keeping with the intent of the *Vesting Act*, which was to keep the lands in trust for and to benefit the Municipality but that the final decision on the appropriateness of the development will be made by the Harbour Commission.

Findings and Analysis

Counsel for the appellant argues that for section 2(3) to apply, it is sufficient that the Harbour Commission operates "under the authority" of Council. However, I note that the words "under the authority" qualify or describe the appointment process of members or officers, and, in my view, the phrase cannot be read as merely requiring that the Harbour Commission *operate* under the authority of Council. This view is consistent with the approach taken by the Court of Appeal in *TEDCO*, where the court framed the issue in the following manner:

> The question of statutory interpretation that must be answered is whether "all … [the] officers [of TEDCO] are appointed or chosen by or under the authority of the council of the municipality." Since all the officers of TEDCO are appointed by its directors, it must be determined if this process is effected "by or under the authority" of City council.

The question before me in this appeal turns on the appointment process for members of the Harbour Commission. In particular, the issue relates to the status of the Mayor as a member of the Harbour Commission and whether the appointment of the Mayor under the terms of the *Vesting Act*, qualifies as an appointment "by or under the authority of council" for the purposes of Section 2(3) of the *Act*. As noted above, the essence of the Harbour Commission's argument is that the Mayor is appointed to the Board by virtue of the *Vesting Act*, which does not satisfy the requirement of section 2(3).

Unlike *TEDCO*, the issue here requires a statutory interpretation of two statutes, the *Vesting Act* and section 2(3) of the *Act*. I must consider both statutes as a whole and have regard to the plain meaning, the entire context and the scheme of the statutes and their stated purposes.

In *TEDCO*, the Court of Appeal decided that a formal and technical interpretation of section 2(3) of the *Act* should be avoided and I will adopt the same approach here. I am also guided by section 64 of the *Legislation Act* which states:

> An act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

The recitals of the *Vesting Act* provide some guiding contextual information. In the recitals, the *Vesting Act* states that an agreement was entered into for the sale of the harbour, lands, stock and premises described by the Port Hope Harbor and Wharf Company to the Town Council of Port Hope on January 3, 1852. Eight individuals who were willing to give the security for the purchase price were authorized under the *Vesting Act*:

> … to take and receive the proper conveyances, (*in trust for the sole and only use and benefit of the said Town Council*,) and to apply and to obtain from the Legislature of the province an Act to vest the said Harbor and premises in themselves and *the Mayor of the Town, for the time being*, as commissioners on behalf of the Town, to manage, conduct, control and complete the same, with certain stipulations as to the provisions which it should be sought to obtain in the said Harbor, and the powers of the said commissioners in relation thereto; [Emphasis added.]

A body corporate was created, named the Commissioners of the Port Hope Harbor, and the eight individuals and "the Mayor of the said Town of Port Hope, for the time being," were appointed as Commissioners. The *Vesting Act* states that these eight individuals and the Mayor "shall form the first Board for the management of the affairs of the said corporation, a majority of whom or of the Members of the said Board for the time being shall form a quorum for the transaction of business." One of the stated purposes of the legislation was to vest the "harbor and premises" in the eight individuals who would "manage, conduct, control and complete [the construction of] same, with certain stipulations …" and render "the said Harbor safe, commodious and convenient as possible, for the purposes of the trade of the said Town."

After the first five years of operation, the *Vesting Act* provides that "vacancies on the Board" will be filled by the Municipality. The *Vesting Act* also states:

- All books of account are published with the Town's accounts and are audited by the Town's auditors.

- Proceeds of the tolls and revenues are applied, after payment of the principal, interest and expenses of the harbor to the Treasurer of the Municipality of the said Town for the public uses of the Town.

The provisions of the *Vesting Act* relating to the appointment of successors to the original members of the Board are important and I note that this section of the *Vesting Act* does not specifically mention the Mayor. The *Vesting Act* states, in part:

> And be it enacted, that [the eight members], shall hold Office respectively as Members of the said Board, for a period of five years, from the passing of this Act, and at the expiration of such period, and on their being relieved from personal responsibility in respect of the debt contracted in the purchase of the said Harbour as above mentioned, two of the above named parties, to be determined or appointed, as hereinafter mentioned, shall retire from the said Board, and cease to be Members thereof, their places to be supplied by two persons duly qualified,

> and eligible to be elected as Town councilors, to be nominated and appointed by the said Municipality of the said Town, and at the expiration of every year thereafter, two others of the above named parties shall in like manner retire, and their places be supplied by two other duly qualified as aforesaid, to be likewise nominated and appointed by the said Municipality of the said Town, until the whole number of the said above named commissioners shall in turn have retired from the said Board; and that such persons, so to be nominated by the Municipality of the said Town, shall each hold Office for the period of five years, and at the expiration of every such respective period, other persons, duly qualified as aforesaid, shall in like manner be nominated and appointed in their places;…*and that all vacancies occurring in the said Board, after [the first five years] shall be filled up by the Municipality of the said Town;* Provided always, That any retiring Member of the said Board, being otherwise duly qualified shall be eligible for re-election by the Municipality of the said Town.
>
> [Emphasis added.]

The first part of this passage specifically addresses the replacement of the eight individual members of the Board at the expiration of the first five year period and upon their being relieved of their responsibilities relating to the security for the purchase price of the harbour lands "until the whole number of the said above named commissioners shall in turn have retired from the said Board." Although the concluding passage highlighted above does not refer specifically to the position of the Mayor, it clearly applies to "all vacancies occurring in the said Board" after the first five years and provides that these positions shall be filled by the Municipality. In my view, this is evidence of a clear intention that, after the first five years following the transfer of the lands to the Harbour Commission, all successive members of the Board were to be appointed by the Municipality.

I agree with the views as set out by the appellant that the successor provisions are reasonably capable of an interpretation that the Council has the authority to appoint someone else in the place of the Mayor after the original eight members of the Board have been replaced by individuals appointed by Council. Read in this context, the words "for the time being" relating to the Mayor arguably contemplates a temporal limit to the Mayor's appointment. I agree with the appellant that this interpretation of the *Vesting Act* is reasonable because the Mayor's position as a member would not be required once all of the security holders had been replaced by individuals duly appointed by Council.

As suggested by the appellant, section 226 of the *Municipal Act* gives the Mayor the authority to appoint any member of council to act in his or her place on any body to which the head of council is a member by virtue of being head of council. Consequently, even if the Mayor was required to be a member of the Board, then he or she would have the authority to appoint a member of council to sit in his or her place.

Sections 225 and 226.1 of the *Municipal Act* set out the Mayor's role as head of council. It states:

225. It is the role of the head of council,

(a) to act as chief executive officer of the municipality;

(b) to preside over council meetings so that its business can be carried out efficiently and effectively;

(c) to provide leadership to the council;

(c.1) without limiting clause (c), to provide information and recommendations to the council with respect to the role of council described in clauses 224 (d) and (d.1);

(d) to represent the municipality at official functions; and

(e) to carry out the duties of the head of council under this or any other Act.

226.1 As chief executive officer of a municipality, the head of council shall,

(a) uphold and promote the purposes of the municipality;

(b) promote public involvement in the municipality's activities;

(c) act as the representative of the municipality both within and outside the municipality, and promote the municipality locally, nationally and internationally; and

(d) participate in and foster activities that enhance the economic, social and environmental well-being of the municipality and its residents.

Applying sections 225 and 226.1 of the *Municipal Act*, I reject the argument of the Harbour Commission that the Mayor "operates independently in accordance with the purposes of [the *Vesting Act*]."

It is also significant that the Municipality has acted as if it had authority over the Harbour Commission and the appointment of its members. During its 16 years of hiatus, the functions and activities of the Harbour Commission were carried out by a committee of the Municipality called the Port Hope Waterfront Trail Committee. The reactivation of the Harbour Commission is also significant in that it was affected by by-law 38/2005 of the Municipality.

The Harbour Commission, in its reply representations, distinguishes the *TEDCO* case on the basis that, among other things, the functions that were carried out by TEDCO could have been carried out by the municipality. This however, is not a distinguishing factor as it is clear that not

only can the functions of the Harbour Commission be carried out by the Municipality, they were in fact carried out by the Municipality during the 16 year hiatus.

I also note that, for the purposes of financial reporting and accounting, the Municipality appears to consider the Harbour Commission to be owned or controlled by the Municipality. The Municipality's financial statements are available on its website. The notes to the financial statements for the year ending in 2008 state, in part:

> The reporting entity is comprised of all organizations, committees and local boards *accountable for the administration of their financial affairs and resources to the Municipality and which are owned or controlled by the Municipality*. Interdepartmental and inter-organizational transactions and balances between these organizations are eliminated.
>
> These consolidated financial statements include:
>
> Port Hope Library Board
> Municipality of Port Hope Cemetery Board
> Heritage Business Improvement Area
> *Harbour Commission*
>
> [Emphasis added.]

I find that the Harbour Commission's argument regarding the distinction between the process for appointment of the Mayor and that of other councilors is contrary to *TEDCO*, which mandates "an examination of substance rather than a fixation on formal and technical appointment processes." It cannot now be said that what amounts to an arrangement to secure financing set out in the *Vesting Act* has the effect of taking away a citizen's right to access to records and transparency that they would otherwise have had if the Town had purchased the land outright. Such an interpretation would be contrary to the purposes of both the *Vesting Act* and the *Act*.

Even if the Mayor is, on a narrow view of the *Vesting Act*, appointed by virtue of statute only, the distinction between his or her position and the other members of council who sit on the Board is an artificial one. Sections 225 and 226.1 highlight the absurdity of the narrow interpretation of the appointment provisions of the *Vesting Act* advanced by the Harbour Commission in this appeal. As the Mayor is required to act at all times in accordance with the interests of the muncipality, it is absurd to make a distinction between the appointment process for the Mayor and the other members of the Commission for the purposes of section 2(3) of the *Act*.

In my view, on a fair and liberal interpretation of the *Vesting Act* and section 2(3) of the *Act*, and having regard to all of the circumstances set out above, the appointments made to the Harbour Commission are made under the authority of council of the Municipality.

Having considered all of the representations that have been submitted, I find that the members of the Harbour Commission are "appointed or chosen by or under the authority of the council of the municipality" within the meaning of section 2(3) of the *Act*.

In view of my findings set out above, it is not necessary for me to consider the appellant's argument that the Harbour Commission is a local board and therefore an institution within the definition of that term in section 2(1)(b) of the *Act*.

ORDER:

1. I order the Municipality to secure the original or copies of the records responsive to the appellant's request in the possession of the Harbour Commission and to make an access decision under Part I of the *Act*, treating the date of this order as the date of the request.

2. In order to verify compliance with this order, I order the Municipality to provide me with a copy of the decision letter referred to in Provision 1 at the same time it is sent to the appellant.

Original signed by: November 24, 2010
Brian Beamish
Assistant Commissioner