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

# ORDER PO-2991

## Appeals PA10-295 and PA10-296

## OMERS Administration Corporation

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## NATURE OF THE APPEAL:

This order disposes of a jurisdictional issue raised in appeals resulting from two requests made in March 2010 to the OMERS Administration Corporation (OMERS) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

- All expense forms, all invoices and all receipts for [a named individual] from March 2007 to the date of the request; and

- All expense forms, all invoices and all receipts for [six named individuals] from 2008 to the date of the request.

On April 15, 2010 and May 11, 2010, respectively, OMERS issued written notices to the requester under section 27 of the *Act* that the 30-day period for responding to the requests for access would be extended for an additional forty-five days and that the requester had the right to ask the Information and Privacy Commissioner of Ontario (the IPC or "this office") to review the extension. The requester did not appeal the time extension notices.

On May 28, 2010, OMERS sent letters to the requester providing fee estimates of the cost of responding to the requests. The deposits for both requests were received on June 28, 2010.

Regulation 261/10, which came into force on July 1, 2010, revoked item 80.1 of the schedule to Regulation 460 made under the *Act*. By so doing, Regulation 261/10 revoked the designation of OMERS as an institution under the *Act*.

On August 31, 2010, OMERS wrote to the requester requiring the balance of the fees to be paid before granting access. The requester paid the balance of the fees on October 8, 2010 and one decision letter for both requests was issued on October 12, 2010. In the decision letter, OMERS provided access to the records subject to severances under sections 18(1)(c) and 21(1) of the *Act*. The decision letter advised the appellant of her right to appeal the denial of access to this office.

The requester (now the appellant) subsequently filed two appeals with the IPC on October 19, 2010 and advised that she was of the view that the records did not contain personal information and were, therefore, not exempt under section 21(1) of the *Act*. Following notification of the appeals during the intake stage of the process, OMERS raised the issue of the IPC's jurisdiction to conduct an inquiry into these appeals. OMERS wrote to the analyst and stated:

> This question arises from the fact that by O. Reg. 261/10, section 80.1 of the Schedule to R.R.O. 1990, Regulation 460, made under [the *Act*], was revoked. This is the section of the Schedule that had designated "OMERS Administration Corporation" an institution for purposes of the *Act*. The regulation revoking this section of the Schedule came into force on July 1, 2010. Since these appeals were commenced after July 1, 2010, it is the position of OMERS that there is no jurisdiction to entertain these appeals. The *Act* specifically contemplates only appeals against bodies that are institutions for the purposes of the *Act*.

In the circumstances of this case, the only way to resolve this issue was to adjudicate upon it, and the appeals therefore moved directly to the adjudication stage of the process, where an adjudicator conducts an inquiry. I initially sought representations from OMERS, asking it to explain the basis for its position that it is not subject to the *Act*, and its related argument that this office did not have the jurisdiction to conduct an inquiry. I also asked OMERS to comment on the impact of the timing of the requests, and on Order P-1258, which contained an *obiter* comment to the effect that, if the exclusion provided by section 65(6) of the *Act* had been enacted after the date of a request, the request would have to be dealt with under the pre-existing version of the *Act*.

I subsequently provided the appellant with the opportunity to respond to OMERS' representations, but did not receive representations from the appellant.

For the reasons that follow, I find that this office does not have jurisdiction to conduct an inquiry into the exemptions claimed by OMERS. The appeals are, therefore, dismissed.

## DISCUSSION:

### JURISDICTION TO CONDUCT AN INQUIRY

#### OMERS' representations

OMERS submits that the IPC has no jurisdiction to conduct an inquiry in these appeals based on the following four main points:

- Only an "institution" is subject to the appeal provisions of the *Act*;
- Effective July 1, 2010, OMERS was no longer an "institution;"
- The appellant is entitled to pursue the appeals, and the IPC has the jurisdiction to consider them only if the appellant had an existing right of appeal when OMERS ceased to be an "institution;" and
- The appellant did not have an existing right of appeal when OMERS ceased to be an institution as its decision dated October 12, 2010, which is the subject of these appeals, was made after OMERS ceased to be an institution, and the right of appeal comes into existence only when the decision sought to be appealed has been made.

The particulars of OMERS' position are as follows.

#### Only an "institution" is subject to the appeal provisions of the *Act*

OMERS cites a number of sections of the *Act* that refer to the term "institution," for example, sections 50(3), 52(4), 52(13), and 52(14). All of these sections relate to the Commissioner's appeal process and powers in regard to an "institution." OMERS states that all of these

provisions, in addition to the sections of the *Act* that refer to the "head" of an institution,[1] presuppose that one of the parties to an appeal at the IPC will be an "institution."

**Effective July 1, 2010, OMERS was no longer an "institution"**

The *Legislation Act, 2006*[2] governs the effective date of regulations in Ontario. Section 22(2) of the *Legislation Act, 2006* states that:

> [u]nless otherwise provided in a regulation or in the Act under which the regulation is made, a regulation comes into force on the day on which it is filed.

Section 23(1) of the *Legislation Act, 2006* states that:

> [u]nless otherwise provided in a regulation or in the Act under which the regulation is made, a regulation comes into force at the first instant of the day on which it comes into force.

Similarly, section 23(3) of the *Legislation Act, 2006* states that:

> [u]nless a regulation of an Act provides otherwise, the revocation of a regulation takes effect at the first instant of the day of revocation.

OMERS argues that as a result of these provisions, the revocation of a regulation is effective on the date when the regulation that effects the revocation is filed. If the regulation itself or the statute under which the regulation is made specifies another "in force" date, the revocation will be effective on that date.

Under its own terms, Regulation 261/10 came into force on July 1, 2010. Therefore, the revocation of item 80.1 of the schedule to Regulation 460 made under the *Act* also took effect on July 1, 2010.

OMERS refers to *Sullivan on the Construction of Statutes* (*Sullivan*)[3], and in particular, the author's description of the effect of the repeal of a statute:

> When the repeal takes effect, the repealed legislation ceases to be law and ceases to be binding or to produce legal effects. This means that . . . everything dependent on the repealed legislation for its existence or efficacy ceases to exist or to produce effects. Regulations lose the force of law and become mere pieces of paper. . . .

OMERS submits that the revocation of a regulation is analogous to the repeal of a statute. Consequently, once item 80.1 was revoked on July 1, 2010, OMERS was no longer an "institution" and, therefore, was not an institution when the appellant filed her appeals.

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[1] See section 54(2) and paragraph (b) of the definition of "head" in section 2(1).
[2] S.O. 2006, c. 21 Sch. F.
[3] R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) at 647.

**The IPC has the jurisdiction to consider the appeals only if the appellant had an existing right of appeal when OMERS ceased to be an "institution"**

OMERS submits that because it was no longer an "institution" when the appellant filed her appeals, the only way that she would be entitled to pursue them, and the only basis for this office to conduct an inquiry is if her right of appeal were somehow protected against the effect of the revocation of OMERS' status as an institution.

OMERS argues that the only potential source of protection is section 51 of the *Legislation Act, 2006*, which provides that the repeal of an Act or the revocation of a regulation does not affect a right or privilege that came into existence under the repealed or revoked Act or regulation.[4] OMERS submits that the effect of this section is to preserve pre-existing rights – in this case, those that arose while item 80.1 was in force.

**The appellant did not have an existing right of appeal when OMERS ceased to be an institution, as a right of appeal comes into existence only when the decision sought to be appealed has been made.**

OMERS argues that as a matter of law, a right of appeal does not come into existence until the decision sought to be appealed has been rendered. OMERS relies on the decision of the Supreme Court of Canada in *R.* v. *Puskas* (*Puskas*)[5] in which two criminal accused sought to appeal to the Supreme Court as of right, that is, without having to apply for leave to appeal from a decision of the Ontario Court of Appeal. A legislative amendment eliminating appeals as of right had come into force while their cases were pending in the Court of Appeal, and before its decisions were rendered. The accused argued that their appeal rights arose when they were charged and the proceedings against them commenced. They relied on the federal *Interpretation Act* to contend that the repeal of the legislation providing for appeals as of right could not affect their right of appeal. The federal legislation provided that the repeal of legislation did not affect any right or privilege acquired, accrued, accruing or incurred under the enactment that was repealed.

OMERS submits that the Supreme Court rejected this argument and held that the right to appeal was not "acquired, accrued or accruing" before the amending legislation came into force. The Supreme Court held that a "right can only be said to have been 'acquired' when the right-holder can actually exercise it." It further held that "a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled." In *Puskas*, the condition precedent for the right of appeal to the Supreme Court was the decision to be appealed from, namely, that of the Court of Appeal, which had not yet been issued when the amending legislation came into force. The accused were, therefore, not entitled to appeal to the Supreme Court as of right.

OMERS submits that the same reasoning applies to the language of section 51(1)(b) of the *Legislation Act, 2006*. OMERS argues that, in this case, the condition precedent to a right of

[4] See section 51(1)(b).
[5] [1998] 1 S.C.R. 1207.

appeal to this office is that the head of the institution has made a decision in response to the access request.

In particular, section 50(1)(a) of the *Act* provides for appeals from decisions in response to requests for access to records. It states, in part:

> A person who has made a request for . . . access to a record under subsection 24(1) . . . may appeal any decision of the head under this Act to the Commissioner.

Given the language of section 50(1)(a), OMERS submits that until the head has made a decision there can be no appeal to this office, as the decision itself is the condition precedent to any right of appeal. In this case, the decision on the appellant's two requests for access under the *Act* had not yet been made by OMERS when the regulation revoking item 80.1 of the schedule and ending OMERS' status as an "institution" became effective. Therefore, the appellant did not have a right of appeal that came into existence under the revoked regulation. Section 51 did not preserve the appellant's right of appeal against the revocation of OMERS' status as an "institution." The appeal provisions of the *Act* no longer applied to OMERS when the appeals were filed and, consequently, OMERS submits that this office has no jurisdiction to consider the appeals.

Lastly, OMERS distinguished Order P-1258 from the circumstances in this case. OMERS submits that the issue in that order was not whether the IPC had jurisdiction to consider an appeal, but whether a request was subject to amendments that came into force before the request was made. The Assistant Commissioner held that it was. However, OMERS states that the reasoning in Order P-1258 can be applied to this case:

> Just as the request in that case was subject to amendments that came into force before the request was made, the appeals in this case are subject to an amendment (the regulation revoking item 80.1) that came into force before the appeals were commenced.

OMERS also disputes the idea that because the requests were made before the amendment came into force, the appellant was therefore entitled to have not only the requests, but also the appeals, considered under the law that existed before the amendment was made. OMERS maintains that this argument, i.e., that appeal rights arise when a proceeding is first commenced, was the very argument rejected by the Supreme Court of Canada in *Puskas*.

As previously stated, the appellant did not provide representations in these appeals.

**Analysis**

In this case, OMERS was no longer an institution when the appellant filed her appeals with this office. However, the appellant had submitted her requests prior to the removal of OMERS as an institution.

In Order P-1258, referred to by OMERS in its representations, and in Order M-1033, the requests were submitted after amendments were made to the *Act* and its municipal equivalent, the *Municipal Freedom of Information and Protection of Privacy Act*, which excluded certain categories of records from their scope. Both orders therefore concluded that the amendments applied. Those cases are both distinguishable, since in the present appeals, the requests were submitted before the legislative change occurred.

Order M-796 also deals with the amendment referred to in Order M-1033, but in that case, the appeal was already underway at the time of the amendment. Adjudicator Holly Big Canoe held that the amendment did not prevent the continuation of the appeal. Again, that is distinguishable from the present appeals, because here the appeals had not been filed, and in fact, OMERS had not even issued its access decision, when the amendment took place.

The analysis in this order is entirely consistent with the outcomes in Orders P-1258, M-796 and M-1033. However, these three decisions all assume that, if the requests had been filed prior to the amendments in question, the law as it existed on the date of the requests would govern. Here, the appellant made her requests when OMERS was still an institution, but OMERS ceased to be an institution before issuing its access decision, which is a condition precedent to the right of appeal in section 50(1) of the *Act*. This unique fact situation must therefore be reviewed under the law governing the temporal application of legislation. For the reasons that follow, I have concluded that this office does not have jurisdiction to proceed with the appeals.

Statutes and regulations (collectively "legislation") have binding force from the date of their commencement until they are repealed, revoked or replaced or until they expire. For example, sections 23(1) and 23(3) of the *Legislation Act, 2006* state that a regulation comes into force at the first instant of the day on which it comes into force and that the revocation of a regulation takes effect at the first instant of the day of revocation unless a regulation or an Act provides otherwise.

However, in some instances, legislation can have effects before the date of its commencement, in the case of legislation that applies retroactively, and can also survive after its repeal, revocation, replacement or expiry.[6] The common law has developed presumptions relating to the temporal application of legislation.

The law presumes that regulations are only intended to apply prospectively, rather than retroactively or retrospectively, and presumes further that they are not to interfere with vested rights.[7]

"Retroactive" has been defined as "new legislation . . . applied so as to change the past legal effect of a past situation," while "retrospective" is defined as "new legislation . . . applied so as to change only the future effect of a past situation."[8]

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[6] Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Quebec: Les Éditions Yvon Blais, Inc., 1991) ("*Côté*") at 84.
[7] *Sullivan* (see citation at note 3, above) at 727.
[8] *Sullivan* at 673

Accordingly, it is necessary to address two questions in order to deal with this issue:

(1) would applying the revocation of item 80.1 to preclude an appeal in this case be a retroactive or retrospective application of Regulation 261/10?

(2) if not, would its application interfere with vested rights of the appellant?

I will address these questions in turn.

**Would applying the revocation of item 80.1 to preclude an appeal in this case be a retroactive or retrospective application of Regulation 261/10?**

With respect to retroactivity, there is a strong presumption that legislation is not intended to have retroactive application unless the legislation contains language clearly indicating that it, or some part of it, is meant to apply retroactively or unless the presumption is rebutted by necessary implication.[9] This presumption is also set out in section 51(1)(a) of the *Legislation Act, 2006*, which states that the revocation of a regulation does not affect the previous operation of the revoked regulation.

Regulation 261/10 does not have express language which would indicate that its effect is retroactive. As a result, I must determine whether the application of Regulation 261/10 proposed by OMERS results in the regulation being given retroactive effect, and, if so, whether the presumption against retroactive application is rebutted by necessary implication.

*Côté* sets out a three-part analysis to determine whether legislation is being applied retroactively.[10] The three-part test involves the identification of the legal facts to which legal consequences attach; the temporal positioning of these facts to determine whether they occurred before, during or after the commencement of the legislation; and determining whether the legislation applies a legal framework to facts that have arisen entirely before its commencement.

Before an appeal can be filed with this office, two things must have taken place: (1) the requester must have made a written request for access to an institution; and (2) a decision must have been made by the head of an institution. These are the legal facts that must be present in order for there to be a right of appeal in the circumstances of this case. This view is supported by section 50(1) of the *Act*, which states:

> A person who has made a request for,
>
> (a) access to a record under subsection 24 (1);
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> (b) access to personal information under subsection 48 (1); or
>
> (c) correction of personal information under subsection 47 (2),

[9] *Sullivan* at 669 and 679.
[10] *Côté* (see citation at note 6, above) at 118-120.

> or a person who is given notice of a request under subsection 28(1) may appeal any decision of a head under this Act to the Commissioner.

OMERS issued the decision letter that gave rise to these appeals on October 12, 2010. Given that this occurred approximately three months after the coming into force of Regulation 261/10, which removed OMERS as an institution under the *Act*, applying the regulation to preclude the appeals is not a retroactive application; rather, it is a prospective application and, therefore, the presumption against retroactivity is inapplicable.[11] As stated in *Côté*:

> The courts have often held that a statute cannot be called retroactive merely because some facts necessary for its application have occurred prior to its commencement. When facts subsequent to commencement are required for the statute to apply, there is no retroactivity.[12]

Accordingly, applying the revocation to preclude the appeals in this case is not a retroactive application and this presumption does not apply.

On the question of retrospectivity, it is also significant that OMERS' decision denying access, a condition precedent to the right of appeal, was not issued until after Regulation 261/10 came into force. Accordingly, the "situation" giving rise to the right of appeal did not exist when the Regulation came into force, and applying it to preclude the appeals in this case does not "change the future effect of a past situation" and is therefore not a retrospective application.

**Does Regulation 261/10 interfere with "vested rights" of the appellant?**

Repealed or revoked legislation ceases to have effect from the moment the repealing or revoking legislation comes into force and starts producing effects, subject to the common law presumption against interference with vested rights.[13] This presumption is also set out in section 51 of the *Legislation Act, 2006* which states, in part:

> 51. (1) The repeal of an Act or the revocation of a regulation does not,
>
> (b) affect a right, privilege, obligation or liability that came into existence under the repealed or revoked Act or regulation;
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> […]
>
> (d) affect an investigation, proceeding or remedy in respect of,
>
> (i) a right, privilege, obligation or liability described in clause (b), or

[11] *R.* v. *Inhabitants of St. Mary, Whitechapel*, [1848] 12 Q.B. 120 at 127; and *Paton* v. *The Queen*, [1968] S.C.R. 341 at 359.
[12] *Côté* (see citation at note 6, above) at 124.
[13] *Côté* at 93-94.

> (ii) a penalty, forfeiture or punishment described in clause (c).
>
> (2) An investigation, proceeding or remedy described in clause (1) (d) may be commenced, continued and enforced as if the Act or regulation had not been repealed or revoked.

This common law and statutory presumption may result in the continued application of legislation that existed at the time the rights of the individual crystallized.[14]

Unlike the presumption against retroactive application, the presumption of non-interference with vested rights is weaker and, in some contexts, easily rebutted.[15] This is because most legislation affects rights which would have been in existence but for the legislation. In *Gustavson Drilling (1964) Ltd.* v. *Minister of National Revenue*, the Supreme Court of Canada stated that "most statutes in some way or other interfere with or encroach upon antecedent rights."[16]

There are no vested rights in matters that are merely procedural.[17] In determining whether Regulation 261/10 interferes with vested rights, and therefore whether item 80.1 of the schedule to Regulation 460 survives for purposes of these appeals, I must begin by considering whether the provisions in Regulation 261/10 are procedural in nature.

Legislation is purely procedural if it affects the means of exercising a right. If the application of the legislation makes exercising a right practically impossible, it is not purely procedural.[18] In my view, Regulation 261/10 is not merely procedural in nature, as it eliminates rights and obligations that previously existed. Specifically, it eliminates: an individual's right to make a written request to OMERS for access to records under the *Act*; OMERS' obligation to respond to the access request; and the right of appeal to this office.

In *Puskas*, the Supreme Court of Canada held that the possibility of an appeal is a substantive right and not merely a question of procedure.[19] This interpretation was adopted by the Ontario Divisional Court in *Elgner* v. *Elgner*.[20] Similarly, courts have held that legislation eliminating a right of action or modifying the jurisdiction of a court are not merely procedural.[21]

Having found that Regulation 261/10 is not merely procedural, then in order to establish that the regulation interferes with vested rights, two requirements must be met: (1) the legal situation of the requester must be tangible and concrete, and (2) it must also be sufficiently constituted at the time of the commencement of the regulation.[22]

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[14] *Côté* at 105 and 140.
[15] *Niagara Escarpment Commission* v. *Paletta International Corp*., 2007 CanLII 36641 (Div. Ct.), at paras. 42-43
[16] [1977] 1 S.C.R. 271 at 282.
[17] *Sullivan* (see citation above at note 3) at 696.
[18] *Côté* at 163.
[19] *Puskas* (see citation at note 5, above) at para. 6.
[20] 2010 ONSC 3512 (Div. Ct.) at para. 13.
[21] *Côté* at 164.
[22] *Dikranian* v. *Quebec (Attorney General)*, 2005 SCC 73 at para. 37-38; *Côté* at 144; *Sullivan* at 714.

Under the first of these requirements, in order to be tangible and concrete, it is insufficient that members of the public or a certain segment of the public may take advantage of the legislation that was repealed or revoked. The individual must have taken steps towards availing him or herself of that right.[23]

In my view, the appellant has satisfied this requirement by making written requests to OMERS for access to records and by paying the prescribed fees. In doing so before the regulation came into force, the appellant acquired a specific right, as opposed to the general right of a member of the public to avail him or herself of the *Act*. The appellant had placed herself in a distinct legal position from other members of the public.

This leads to the second requirement, namely, whether the legal situation of the appellant was sufficiently constituted or crystallized at the time of the commencement of Regulation 261/10.[24] In order to have a vested right, the legal situation must have inevitability and certainty.[25]

The Supreme Court of Canada's decision in *Puskas*, cited by OMERS and referred to above, provides guidance in this situation. As already discussed, this case related to *Criminal Code* amendments that eliminated the right of two criminal accused to appeal to the Supreme Court of Canada as of right if their acquittals or a stay of proceedings were overturned by a Court of Appeal and new trials were ordered. The Supreme Court ruled that the right to appeal did not vest until the judgment appealed from was rendered by the court below. In particular, it held that:

> . . . a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled.
>
> Under the former s. 691(2) of the *Code*, there were a number of conditions precedent to the acquisition of the right to appeal to this Court without leave. The first is that the accused is charged with an indictable offence. The second is that he is acquitted of that offence at trial. The third is that the acquittal must be reversed by the Court of Appeal, and the fourth is that the Court of Appeal order a new trial. Until those events occur, the accused does not acquire the right to appeal to this Court without leave, nor does it accrue, nor is it accruing to him or her.[26]

Therefore, before a right can be said to have vested, all the conditions precedent required by the repealed or revoked legislation must have been completed before its repeal or revocation. As in *Puskas*, there are a number of conditions precedent that must be satisfied in order to appeal OMERS' decision to the IPC. The requester must have made a written request for access to an institution [section 24(1)(a) and (b) of the *Act*]; the requester must have paid the prescribed fees [sections 24(1)(c) and 57, as applicable]; and a decision must have been made by the head of an

[23] *Dikranian* (see citation at note 22, above) at para. 39; *Sullivan* at 714 and *Côté* at 144-6
[24] *Dikranian* at para. 37.
[25] *Niagara Escarpment Commission* (see citation at note 15, above) at para. 42.
[26] *Puskas* at paras. 14-15.

institution [section 50(1)]. Until all of these conditions precedent are satisfied, the right to appeal to the IPC does not vest. As previously stated, OMERS' decision was issued more than three months after Regulation 261/10, revoking OMERS' status as an institution under the *Act*, came into effect. Therefore, the appellant did not have an existing right of appeal on the date of the revocation, and her legal situation was not sufficiently constituted at the time of the commencement of Regulation 261/10 as to form a vested right of appeal.

This conclusion is reinforced by a subsequent decision of the Ontario Divisional Court in *Summit Golf and Country Club* v. *York (Regional Municipality)*[27] (*Summit*). In *Summit*, the Court applied *Puskas* to circumstances where the legislation affected the jurisdiction of the decision maker to hear an appeal after legislation had revoked the right of appeal.

*Summit* involved an application by the Summit Golf and Country Club to the municipality for a tree removal permit in November 2005. The application was denied on June 21, 2007. The golf club appealed the matter to the Ontario Municipal Board (OMB). However, on January 1, 2007, the right of appeal conferred by section 136(1) of the *Municipal Act, 2001* had been repealed. Accordingly, the event giving rise to the right of appeal, namely the denial of Summit's application, had occurred *after* the right of appeal was repealed. The OMB held that it did not have the jurisdiction to entertain the appeal because the appeal rights had not vested prior to the repeal of section 136(1) of the *Municipal Act, 2001*. Summit appealed to the Divisional Court.

The Divisional Court upheld the decision of the OMB and found that the OMB was correct in finding that there was no vested right. It held:

> I find no good reason to doubt the correctness of the Board's decision on a point of law. The Board's decision is consistent with the recent decision of this Court in *Niagara Escarpment Commission v. Paletta International Corporation* (2007), 229 O.A.C. (Div. Ct.) (leave to appeal refused, April 25, 2008 (C.A.)) and with established Supreme Court of Canada jurisprudence dealing with vested rights: *R. v. Puskas; R. v. Chatwell*, [1998] S.C.J. No. 51; *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.); affirmed, [1994] 3 S.C.R. 1100.
>
> [. . .]
>
> The Board correctly found that Summit had no vested right to an appeal as of the effective date of the repeal of section 136. The mere possibility of availing itself of a right of appeal is not sufficient to preserve the right thereafter: *Dikranian v. Quebec (Attorney General)*, [2005] 3 S.C.R. 530. It accepted the Region's position that the appeal hearing to which Summit asserted a vested right is not an end in itself – rather, it is a means by which it hoped to achieve its ultimate goal of obtaining the tree removal permit, thereby creating merely a hope or expectation, as in *Ho Po Sang* and *Paletta*.[28]

[27] *Summit Golf and Country Club* v. *York (Regional Municipality)*, 2008 CanLII 35930 (Div. Ct.).
[28] *Summit* at paras. 5-7.

In my view, both *Puskas* and *Summit* present analogous fact situations to the one before me in these appeals. Both cases deal with situations where a legal process was set in motion under a statutory regime that included a right of appeal, but that right of appeal was either repealed outright (*Summit*) or modified from the form in which it was sought to be exercised (*Puskas*) before the occurrence of the event that would, under the prior law, have triggered a right to appeal. In those circumstances, both these cases found that the right of appeal was not vested and could not be exercised.

Applying the case law to the facts of this case, I find that Regulation 261/10 does not interfere with vested rights because the legal situation of the appellant was not sufficiently constituted when the regulation came into force. The appellant's rights of appeal arose from OMERS' access decision, and OMERS was no longer an institution subject to the *Act* when its decision was issued October 12, 2010. In this situation, the appellant did not have a vested right to appeal OMERS' decision to this office. Accordingly, the presumption against interference with vested rights does not come into play.

In addition, I have found that applying Regulation 261/10 to preclude the appellant's right of appeal is a prospective application of the Regulation and, therefore, does not violate the presumption against retroactive or retrospective application.

Accordingly, I conclude that Regulation 261/10 has the effect of barring appeals to this office from OMERS' decision because it was issued after the Regulation came into force and thereby removed OMERS as an institution under the *Act*.

This conclusion is not affected by OMERS' reference to a right of appeal in its decision letter. Although this may appear to be a consent by OMERS to the jurisdiction of this office, the law is clear that jurisdiction is not conferred by consent. [29]

This office does not have jurisdiction to conduct an inquiry into the matters at issue in these appeals and they are, therefore, dismissed.

## ORDER:

I dismiss the appellant's appeals.

Original signed by: August 25, 2011
John Higgins
Senior Adjudicator

[29] *Rothgiesser v Rothgiesser*, 2000 CanLII 1153 (Ont. C.A.) at paras. 31-39