HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Michael McKinnon

Complainant

-and-

Ontario Human Rights Commission

Commission

-and-

Her Majesty the Queen in Right of Ontario as represented by the Ministry of Correctional Services, Frank Geswaldo, George Simpson, Phil James and James Hume

Respondents

-and-

Ontario Public Service Employees Union

Intervenor

INTERIM DECISION

Adjudicator: H. Albert Hubbard

Date: February 8, 2011

File Number: BI-0033-95

Citation: 2011 HRTO 263

Indexed as: **McKinnon v. Ontario (Correctional Services)**

APPEARANCES

Ontario Human Rights Commission	)	Anthony Griffin, Counsel
Michael McKinnon, Complainant	)	Kate Hughes, Counsel
Ministry of Correctional Services, Frank Geswaldo, George Simpson, Phil James and James Hume, Respondents	)	Leslie McIntosh and Judie Im, Counsel
Ontario Public Service Employees Union, Intervenor	)	Joshua Phillips, Counsel

INTRODUCTION

[1] This Interim Decision deals with the Complainant's Request for an Order During Proceedings, filed on June 2, 2010, asking the board to state a case for contempt to the Divisional Court pursuant to section 13 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the "*SPPA*"), which is as follows:

> 13(1) Where any person without lawful excuse,
>
> (a) on being duly summoned under section 12 as a witness at a hearing makes default in attending at the hearing; or
>
> (b) being in attendance as a witness at an oral hearing or otherwise participating as a witness at an electronic hearing, refuses to take an oath or to make an affirmation legally required by the tribunal to be taken or made, or to produce any document or thing in his or her power or control legally required by the tribunal to be produced by him or her or to answer any question to which the tribunal may legally require an answer; or
>
> (c) does any other thing that would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court,
>
> the tribunal may, of its own motion or on the motion of a party to the proceeding, state a case to the Divisional Court setting out the facts and that court may inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of the court.

[2] The case the board was asked to state was described as follows in Schedule B of the Complainant's Request:

> At issue in this case is whether there is a *prima facie* case that the Respondent Ministry of Correctional Services and/or their Deputy Minister, Jay Hope, are in contempt by their failure to disclose relevant documents in these proceedings. Specifically, at issue is whether the Respondent and DM Hope's deliberate and repeated violations of the Tribunal's orders (including the pre-hearing disclosure order, the repeated disclosure orders made during the hearings, and the Tribunal orders requiring the Deputy Minister to disclose information to the parties) and the general ongoing disclosure obligation under Tribunal rules, by way of failing to disclose

> and, at times, intentionally hiding relevant documents, ought to be addressed by way of a contempt order.

[3] Because of intervening circumstances, the Complainant's contempt motion was not heard until October 4, 5 and 21, 2010. Thus, in the course of the hearing of that motion, references were made to post-June evidence. Furthermore, as a result of his acceptance of the August 31, 2010 suggestion of counsel for the Ontario Human Rights Commission ("the Commission"), the specific wording of the case the Complainant asks the board to state to the Divisional Court was reformulated as follows:

> That the Divisional Court inquire into whether either or both the Ministry of Correctional Services and Deputy Minister Jay Hope are in contempt of the Tribunal's disclosure orders and rules.

[4] The process a tribunal must follow in dealing with a motion by a party to state a case of contempt to the Divisional Court was explained in *McNaught v. Toronto Transit Commission*, 2005 O.J. No. 224 (C.A.), in which it is said (at paragraph 44) that:

> Proceedings pursuant to s.13 of the *SPPA* have two stages. The first stage takes place before the tribunal, which in this case is the Board. The goal of the first stage is for the Board to determine whether a case ought to be stated to the Divisional Court. In making this determination, the Board must decide whether a *prima facie* case has been made out that conduct described in s.13 occurred. If it determines that a *prima facie* case is established, it must decide whether to state a case to the Divisional Court. If it chooses to state a case, the matter proceeds to the second stage.

[5] The test to be applied by a Court in determining whether to make a finding of contempt is set out as follows by the Ontario Court of Appeal in *Prescott-Russell Services for Children and Adults v. N.G. et al*, (2006), 82 O.R. (3d) 686 (paragraph 27):

> The criteria applicable to a contempt of court conclusion are settled law. A three-pronged test is required. First, the order that was breached must state clearly and unequivocally what should and should not be done. Secondly, the party who disobeys the order must do so deliberately and wilfully. Thirdly, the evidence must show contempt beyond a reasonable doubt. Any doubt must clearly be resolved in favour of the person or entity alleged to have breached the order. [Cited cases omitted.]

[6] The *Prescott-Russell* case was concerned with the criteria to be used by a court. Although it said nothing as to the test to be used by a tribunal under s.13 of the *SPPA*, since contempt could not be found by a court unless those criteria were met, it follows that in making a *prima facie* determination as to whether the conduct of an alleged contemnor falls within the scope of that section the tribunal must determine whether the first two "prongs" of the *Prescott-Russell* test have been established. As to the third "prong", however, must the tribunal itself be satisfied that the constituent elements of contempt have been established beyond a reasonable doubt? Nothing in the *SPPA* or in *McNaught* imposes that standard of proof, and the need only to "decide whether a *prima facie* case has been made out" seems inconsistent with such a burden. Ms. McIntosh's submission that the tribunal must decide whether the elements of contempt are "capable" of proof beyond a reasonable doubt seems unrealistic. How can one conclude that something is "capable" of proof beyond a reasonable doubt without being satisfied that that there is no reasonable doubt about the matter? And, unless an allegation cannot be proved at all, how could the tribunal conclude that it is "incapable" of proof beyond a reasonable doubt without usurping the court's function by applying that standard? In my view, the third "prong" of the *Prescott-Russell* test has no direct application in the first stage under s.13(1) of the *SPPA*.

[7] Thus, the matters that may have to be dealt with as the analysis of the issues progresses are these: (a) Does the behaviour complained of as contemptuous come within the scope of s.13(1) of the *SPPA*? (b) If so, does that behaviour take the form of a failure on the part of the alleged contemnor to observe an order of this board? (c) If so, was that order stated clearly and unequivocally? (d) If so, was the breach of that order deliberate and wilful? (e) If so, do the circumstances warrant stating that *prima facie* case to the Divisional Court? Before turning to those matters, however, there are preliminary issues of law of considerable importance in this case that must be resolved.

PRELIMINARY MATTERS

1. General

[8] On October 5, following the submissions of the Complainant, the Commission and the Ontario Public Service Employees Union ("OPSEU"), Ms. McIntosh, part way through her submissions on behalf of the Ministry of Correctional Services ("the Ministry"), asserted that the Ministry cannot be the subject of a finding of contempt. That the other parties were caught by surprise is shown by their having failed to address the issue, and that led to the following exchange at the close of the Ministry's submissions (transcript, pp. 9670 ff.):

> Ms. Hughes: ... this argument that Ms. McIntosh made about Crown immunity, I did not see that in her materials, and the only thing that I could see in her materials that I guess I could have gleaned that from is paragraph 26 where she talked about "you must be personally responsible" and relied on the *Bhatnager* case [which had to do with the Minister's liability rather than that of the department itself] and said that you can't be vicariously responsible. But she did not argue [in her written response] that in law you could not make the Crown in any way responsible for contempt, … and that would include the Ministry. And I raise that because I did not understand that was an issue, and I don't know whether or not the Commission wants to reply on that issue as well.
>
> Ms. McIntosh: Can I just say, I guess I always understood that why the deputy was being named in the order was because it was understood that the Ministry couldn't be. I mean, it's such a fundamental Crown thing. ... So I mean I must say I thought it was sort of a matter of redundancy to put the Ministry in there, but anyway, if my friend needs some time to look into that I'm, you know, happy to afford her that time.

[9] Since it is unnecessary to determine whether conduct amounts to contempt if the alleged contemnor is impervious to such proceedings, that particular submission might better have been made by the Ministry as an immediate response to the contempt motion and dealt with much sooner as a preliminary issue of law. The Complainant was particularly disconcerted by this unexpected assertion, and in her written submission of October 15 on his behalf Ms. Hughes noted that:

> The Ministry's position that the Crown and its representatives are immune from contempt orders was first raised orally on October 5 ... We submit that if the Ministry was serious in its position that the Crown is immune from contempt, it would have raised this defence as a complete answer to the motion at the first possible instance.

[10] As to the Ministry's failure to raise the issue clearly in its written submissions, the suggestion is that it did not do so because its immunity from contempt proceedings is "such a fundamental Crown thing" that it was simply assumed that the Complainant knew that to be the case from the outset and had named the Deputy Minister in the requested order precisely because he knew the Ministry for that very reason could not be named, the added implication being that had he thought the Ministry could be held in contempt he would not have named the Deputy Minister. It is further suggested that the fact it was named just the same was reasonably seen to be a matter of "redundancy" rather than an indication that the Complainant did not know that the Ministry "couldn't be named" in the request. That explanation is untenable. Be that as it may, the question of legal immunity is an issue that must be addressed, as was pointed out (at p. 9672) following the above exchange:

> Professor Hubbard: Well, it is a rather significant matter, and certainly, if the law is that a Ministry cannot be held in contempt, I cannot decide to override that law because that was not expressly made evident in your written response. ... But what I can do is hear argument to the effect that you are wrong and that the Ministry can be held in contempt, and Ms. Hughes must have an opportunity to see if she can muster such an argument.

[11] Because the issue of the Ministry's immunity was not brought home to the other parties prior to their submissions and the matter was not addressed by any of them, an exchange of written submissions was required prior to hearing the Complainant's reply arguments on October 21. The other parties were given until October 15 to provide written submissions regarding this issue, and the Ministry's written response thereto was received on October 20.

[12] Before turning to the substantive submissions of the parties regarding the issues of immunity raised by the Ministry, it is convenient to deal with *Marsden v. Ontario*

(Community Safety and Correctional Services), 2009 HRTO 1795 (CanLII), which is the only decision cited in which the Human Rights Tribunal of Ontario (the "HRTO") dealt with a request to state a case of contempt against a ministry. In paragraphs 6 and 13 of her submissions on the Complainant's behalf, Ms. Hughes makes these statements:

> We are not aware of the government raising the issue of Crown immunity in any human rights cases, including those seeking a stated case of contempt against the same Ministry.
>
> Note that in *Marsden* ... where a stated case of contempt was also sought [under s. 13 of the *SPPA*] at this Tribunal, The Ministry of Corrections did not claim Crown immunity against contempt. The *Proceedings against the Crown Act* does not support the existence of such a Crown immunity in Ontario. This is why the Ministry did not raise Crown Immunity in the *Marsden* case or earlier in these proceedings.

[13] In *Marsden*, the Tribunal was requested to find this same Ministry in contempt of court for its alleged failure to disclose arguably relevant documents. In the course of her decision disposing of that motion, the adjudicator wrote as follows (paragraphs 7 to 9):

> In its Response, the respondent denies the allegation that it is in contempt, and submits that the Tribunal does not have the jurisdiction to hear contempt proceedings. It also argues that the documents referred to are not "arguably relevant" to this Application.
>
> The HRTO has the jurisdiction to state a case for contempt to the Divisional Court but, as the respondent correctly notes, does not have the authority to make a finding of contempt. Only the Court has that power.
>
> The decision to state a case for contempt to the Divisional Court is one which is exercised by adjudicative tribunals in only the rarest of cases and where there are no other options available to appropriately respond to the actions of a party. The HRTO has never taken this step in its history. This is a dispute over disclosure and, while the issues are very important to these parties, this is not a case where the Tribunal would exercise its discretion to state a case for contempt. The applicant's Request is denied. The applicant may, if she chooses, proceed to the Divisional Court on her own motion seeking this relief.

[14] The Ministry's position as respondent in *Marsden* appears to have been that the HRTO lacks jurisdiction to entertain contempt proceedings against anyone, regardless of the status of the alleged contemnor. There is no indication that it also argued that it

was immune from contempt proceedings, and the adjudicator's reason for declining to state such a case to the Divisional Court was that it would be inappropriate to do so in the circumstances. Not only was Crown immunity not given as the reason for the decision in *Marsden*, but the suggestion that the applicant might apply directly to the Divisional Court for such relief would not have been made had the adjudicator considered the matter and reached the conclusion that the Ministry is immune from the process; but, of course, the adjudicator had no reason to deal with the issue.

[15] Ms. McIntosh's view that the Ministry's immunity is "a fundamental Crown thing" was echoed in her response of October 20 in which she wrote that the averment that: "a government department is 'not a legal entity' and that the Crown is immune from contempt proceedings ... is trite law". Of course, even were that so, I must go on to deal thoroughly with the opposing views of the Complainant and OPSEU. However, while the failure of this same Ministry to claim immunity as a complete answer in that case suggests that it is not something that springs readily to mind, *Marsden* is of no assistance in determining whether the Crown and/or a ministry is immune from contempt proceedings before this board precisely because those issues were not addressed in that case.

2. Respondent's Submissions on the Immunity of the Crown and the Ministry

[16] As I understand it, the argument on behalf of the Ministry regarding immunity is this: the respondent in these proceedings is Her Majesty the Queen in Right of Ontario, *i.e.*, "the Crown" (as represented herein by the Ministry), and because it is immune from that process the Crown cannot be held in contempt; moreover, because it is not a legal entity, a government department or ministry cannot be held liable for anything; therefore, as a matter of law, the Ministry cannot be found in contempt of court, directly or indirectly.

[17] Ms. McIntosh referred to the 3rd Edition of *Liability of the Crown* (Carswell, 2000), by Professors Hogg and Monahan regarding her submission that the Crown cannot be held in contempt. After the bare statement (at page 58) that "Contempt has never been

available against the Crown itself" the authors provide a short historical explanation for that conclusion. However, they go on to say (at page 60) that they "believe that the contempt order ought to be available to enforce orders against the Crown".

[18] In support of her contention that a government department or ministry is not a legal entity Ms. McIntosh referred to paragraph 39 of the decision of the Court of Appeal of Alberta In *Ouellet v. B.M.,* 2010 ABCA 240 (CanLII), in which it is observed that: "There is little Canadian law on the point. The Supreme Court of Canada has said that government departments are not legal entities and therefore cannot be sued: *Canada (National Harbours Board) v. Langelier*, [1969] S.C.R. 60, 2 D.L.R. (3d) 81 at para. 27."

3. Submissions of the Commission and OPSEU on Crown Immunity

[19] Since what was said on behalf of the Commission and OPSEU about Crown immunity *per se* was both brief and ambiguous, it is expedient to address their submissions in that regard before turning to those of the Complainant. Prompted by the unexpected assertions of immunity made by the Respondent on October 5, their written submissions focused on what Ms. McIntosh said about the immunity of the Ministry and its officials, rather than the matter of Crown immunity.

[20] Mr. Griffin's brief response of October 14 on behalf of the Commission seems intentionally neutral. It makes no real submission regarding the issue of Crown immunity and provides no analysis for preferring one position to the other. While his August 31 reformulation of the case to be stated names the Ministry, Mr. Griffin did not disagree with its belatedly expressed position on the matter; neither did he endorse it. His response did not address the issues whether the Ministry is sheltered from contempt proceedings by the Crown's immunity or whether it is in any case immune in its own right in that it is not a legal entity. The Commission's complete response (after an introductory sentence) was as follows:

> ... The jurisprudence indicates that an individual public officer can be held liable for contempt if the constituent elements of contempt are proven. See, *e.g.*, *Ouellet v. B. M.*, [2010] A.J. No. 873 at pars. 27-29 (C.A.). The

> Crown's immunity from contempt is not an impediment to enforcement of an order against an individual public officer.
>
> In the circumstances, the Commission submits that if the Tribunal decides to state a case to the divisional Court, the case should include the following:
>
> > That the Divisional Court inquire into whether Deputy Minister Jay Hope is in contempt of the Tribunal's disclosure orders.

[21] Ms. McIntosh read that letter as implying agreement with the Ministry's position. Perhaps, however, the statement that "The Crown's immunity from contempt is not an impediment to enforcement of an order against an individual public officer" might be taken to suggest that, "even if" the Crown is immune, that does not prevent the enforcement of an order against a government official and therefore any stated case should be sure to "include" a reference to Deputy Minister Hope.

[22] Mr. Phillips' five-page submission of October 15 on behalf of OPSEU concerns almost exclusively the issue as to the availability of contempt proceedings against government Ministries and government officials. Although his position is that the Crown's immunity "at common law" does not preclude findings of contempt against government departments and officials, he does not suggest that such immunity remains unchanged by statute. However, since it does not deal with the issue of Crown immunity *per se* the OPSEU submission contains nothing of assistance in that regard. (Because of their similarity, Mr. Phillips' views regarding contempt findings against a government department or Ministry will be referred to when dealing with Ms. Hughes' submissions in that regard.) The only references to Crown immunity made by Mr. Phillips were these:

> With respect to oral submissions of the Ministry on October 5, 2010, OPSEU submits that there is no merit to the Ministry's argument that either the Ministry or its representative are immune from contempt proceedings, and that the concept of Crown immunity in no way prevents the Tribunal from stating a case for contempt to Divisional Court. ...
>
> Although contempt proceedings may not be available against the Crown itself, at common law, findings of contempt may be made against a government department or a Minister of the Crown. ...

4. Complainant's Submissions on Crown Immunity

[23] In her October 15 submissions on behalf of the Complainant, Ms. Hughes dealt with the issue of the Ministry's immunity under these headings:

> A. The Crown is bound in all proceedings flowing from the *Human Rights Code*, R.S.O. 1990, c. H.19 [the "*Code*"].
>
> B. The *Proceedings Against the Crown Act*, R.S.O.1990, c. P.27, supersedes the common law position regarding Crown immunity and eliminates Crown immunity from contempt proceedings.
>
> C. The Jurisprudence supports the availability of contempt against Crown ministries and officials.

[24] The submission that the Crown is bound in all proceedings flowing from the *Code* is based on s. 47 of that Act, which is as follows:

> 47. (1) This Act binds the Crown and every agency of the Crown.
>
> (2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.

[25] I take the Complainant's argument, insofar as it is based on the *Code*, to be as follows: Since the Crown is bound thereby, it cannot be "immune from any proceedings flowing from the *Code*, nor is it beyond the reach of the Tribunal or the courts in a proceeding relating to the *Code*"; the motion to hold the Ministry in contempt is (or is related to) a proceeding flowing from the *Code*; therefore, the Crown as represented by the Ministry cannot plead immunity in answer to the Complainant's Request for a stated case of contempt.

[26] Ms. Hughes buttressed that argument with references to the primacy accorded the *Code* over other Acts and the expansive remedial powers conferred on the HRTO by that "quasi-constitutional" legislation. In further support of that position, Ms. Hughes suggested that s. 47 of the *Code* has been the basis for this board's decisions regarding the Ministry since the hearings into these matters began in 1996. She wrote that: "It is

clear in every decision of this Tribunal including those reviewed and upheld by the Divisional Court and the Court of Appeal, that both the Ministry and the Deputy Minister are bound by the *Code* and the Tribunal proceedings".

[27] In her oral reply on October 21, Ms. Hughes returned to the overriding importance of s. 47(1) of the *Code* which, she maintained, provides "the full answer to this matter", namely: "the Crown is bound". In her view, the proposition that contempt proceedings against the Crown fall within the ambit of s. 47(1) of the *Code* is supported by its Preamble, in accordance with which the dignity and worth of every person is to be recognized and equal rights and opportunities are to be provided without discrimination contrary to law. Thus, since others are subject to contempt proceedings in human rights cases the Crown must be as well. She made her point in part as follows (transcript, p. 9742):

> The Ministry is not to be treated differently. And of course, ... the most important section is that there is an express binding of the Crown, section 47(1). This Act binds the Crown and every agency of the Crown. It says so. We've got it expressly in the *Code*, and it also of course has primacy over other Acts, and we know that the Act is quasi-constitutional. But [by reason of] section 47(1), if there's any doubt in this matter, then the Act binds the Crown and every agency of the Crown and, quite frankly, I think that that is the answer here.

[28] The proposition that s. 47 of the *Code* renders the Crown subject to the full range of orders and dispositions of matters that this board is authorized by that Act to make seems perfectly sound—the key phrase being "authorized by that Act". In fact, however, the *Code* does not confer on a tribunal the authority to state a case of contempt against anyone. Rather, as with all Ontario tribunals, that authority is conferred by the *SPPA* and not by the legislation under which a tribunal is established.

[29] Had s. 13 of the *SPPA* not been enacted, the HRTO could not state a case of contempt against any party appearing before it. It follows that the scope of its authority to do so is determined by the *SPPA*, and there is nothing in s. 13 or elsewhere in that Act that purports to override any immunity the Crown may have from contempt proceedings. Thus, provided its immunity has survived the *Proceedings Against the*

Crown Act, it seems to me that no Ontario tribunal, including the HRTO, has the authority to state a case of contempt against the Crown.

[30] The Complainant's submission that the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27 (the "*PACA*") supersedes the common law position and eliminates Crown immunity from contempt proceedings appears to rest on the scope and purpose of sections 9 and 13 of that Act, which are as follows:

> 9. In a proceeding under this Act, the Crown shall be designated "Her Majesty the Queen in right of Ontario" ...
>
> 13. Except as otherwise provided in this Act, in a proceeding against the Crown, the rights of the parties are as nearly as possible the same as in a suit between persons, and the court may make any order that it may make in a proceeding between persons, and may otherwise give such appropriate relief as the case may require.

[31] Since Her Majesty the Queen in Right of Ontario is a respondent before this board and is faced with allegations of non-compliance and bad faith, these hearings are for general purposes not unfairly described as "a proceeding against the Crown". Thus, the argument appears to be that the rights (and correlative duties and obligations) of the Complainant and the Ministry in this case are to be "*as nearly as possible* the same as in a suit between persons". Thus, the HRTO may make any order in respect of the Crown that it may make in respect of anyone else so as to provide "such appropriate relief as the case may require". However, it does not follow automatically that a hearing before the HRTO is "a proceeding against the Crown" as contemplated by the *PACA* simply because the Crown is the respondent, and that is a matter to which I will return.

[32] By virtue of s. 13(1) of the *SPPA*, one of the rights of a party appearing before the HRTO is to request it to state a case of contempt against another party to the proceeding. However, if the Crown is to be treated under s.13 of the *PACA* as though it were a natural person unless it is not "possible" to do so, the question arises as to whether a request to state a case of contempt against it is a matter in respect of which it is not possible to treat the Crown in the same way as a person. In a statute evidently

meant to alter the Crown's common law position by placing it on the same footing as natural persons, surely the phrase "as nearly as possible" is not intended to conserve its common law privileges and immunities, but rather simply to recognize that there may be unanticipated rights and duties of natural persons that cannot be enjoyed by or imposed upon the Crown and which therefore cannot be catalogued in advance. Of course, the Ministry's answer to the question posed would be that because of the Crown's common law immunity it is not possible to treat it as a person in the context of contempt. Whether that response begs the question depends on whether the *PACA* applies to this Tribunal's proceedings.

[33] In support of her submissions based on s. 13 of the *PACA*, Ms. Hughes quoted the following extract from *Liability of the Crown* (p. 306):

> The most obvious effect of these rights-of-the-parties provisions is to make the procedure in proceedings against the Crown the same as in a suit between person and person. Each rights-of-the-parties provision is expressly subject to other provisions of the Crown proceedings statute, and it is in those other provisions that we find the immunity from injunction and specific performance that exists in all Canadian provinces. In the absence of any specific provision to the contrary, the rights-of-the-parties provision would make the full range of remedies available "in proceedings against the Crown".

[34] The Complainant's argument is that the "full range of remedies" includes the contempt process, from the reach of which the Crown is not expressly excluded. Ms. Hughes said that the *PACA* "is silent on contempt. Contempt can thus apply against the Crown as it is included by s. 13 in 'any order the court may make' and is not expressly excluded." Furthermore, it was argued, if all the Crown's common law immunities continued to apply notwithstanding s. 13 of that Act it would not have been necessary to enact sections 14 and 15 in order to safeguard some of them. Those sections preclude the granting of injunctions and the making of orders for specific performance or recovery of property as against the Crown, but provide that the court "in lieu thereof may make an order declaratory of the rights of the parties." The point being made is that those immunities not expressly saved have been discarded—at least for the purposes of that Act, it may be added.

[35] Ms. Hughes referred to the decision of the Supreme Court of Canada in *Nelles v. Ontario*, [1989] 2 S.C.R. 170, in which the Crown's immunity from the tort of malicious prosecution was considered. She suggested that, although not directly on point, the following statement by Lamer J. in that case supports the Complainant's position that the Crown is not immune from contempt orders:

> It is said by those in favour of absolute immunity that the rule encourages public trust and confidence in the impartiality of prosecutors. However, it seems to me that public confidence in the office of a public prosecutor suffers greatly when the person who is in a position of knowledge in respect of the constitutional and legal impact of his conduct is shielded from civil liability when he abuses the process through a malicious prosecution. The existence of an absolute immunity strikes at the very principle of equality under the law and is especially alarming when the wrong has been committed by a person who should be held to the highest standards of conduct in exercising a public trust.

[36] Although made in a different context, Ms. Hughes submitted that, from a policy perspective, those remarks are relevant to contempt proceedings against the Crown. While policy considerations may assist a tribunal if in the final analysis it finds the law unclear in respect of a particular issue, I do not find the law unclear regarding the matter of the Crown's immunity from contempt orders. However, whether Lamer J.'s remarks have any bearing on the issue of the Ministry's immunity from the contempt process, as Ms. Hughes also argued, is a separate matter.

[37] In any event, Lamer J.'s remarks were not directed at the Crown *per se*, but at the suggestion that its immunity from malicious prosecution extends to its agents, the Attorney General and the Crown Attorneys. Moreover, it is not Ms. McIntosh's position that ministry officials are immune to the full range of redress for their failures to comply with tribunal orders directed at them, and if its officials can be held in contempt in apposite circumstances the concerns expressed by Lamer J. would appear to be addressed. Of course, there remains the possibility that orders directed at a ministry might be blatantly disregarded without a complainant being able to identify the official responsible.

[38] Ms. Hughes referred as well to the following broad statement made by McIntyre J. in the course of his judgment in *Nelles*:

> Any consideration of Crown liability must now be based upon the [*Proceedings Against the Crown*] Act and I do not find it necessary for the purposes of this case to consider the common law position respecting Crown immunity. The purpose of the Act, clearly discernible from its form and structure, was to remove Crown immunities and place the Crown upon the same footing as any other person before the courts, save for the exceptions which are set out in the Act.

[39] The inference I am expected to draw from that statement is that, although *Nelles* involved immunity from malicious prosecution, McIntyre J.'s reasoning extends to other common law Crown immunities for which the *PACA* makes no exceptions, such as contempt proceedings. The difficulty with that submission is that everything that was said in *Nelles* was said in the context of a tort action. Unlike malicious prosecution, the contempt process is not a tort action, and the *PACA* appears to be restricted to tort actions. That point was made as follows by Ms. McIntosh in her October 20 submission:

> The effect of the *Proceedings Against the Crown Act* is to remove the requirement for a fiat to permit the Crown to be sued for claims for which it could be sued prior to the enactment of that statute (s.3) and to make the Crown liable for the torts of its servants or agents (s.5). The Crown has no other liability apart from that authorized by the Act. If the Crown was not liable [for contempt of court] prior to the enactment of the statute, then (apart from liability in tort) the Crown continues not to be liable.
>
> The Crown was never subject to contempt proceedings, and s. 13 of the *Proceedings Against the Crown Act* does not alter that. Hogg and Monahan state [at p. 9] that:
>
> > "(t)he present position in Canada is that, in general, the Crown may be sued in the ordinary courts by the procedure that would be appropriate in suits between subjects. This does not leave the Crown in exactly the same situation as a private litigant. As succeeding chapters will show, the Crown retains some privileges and immunities with respect to procedure, evidence and substantive law.

[40] In her reply argument on the Complainant's behalf, Ms. Hughes did not address that particular submission of the Ministry, and it is a submission that I find entirely compelling. In their book, *Principles of Administrative Law* (Carswell, 1985), Professor

D.P. Jones and Anne de Villars make the same point in this way (at pp. 427 ff.):

> At common law, the Crown was immune from suit ... [but] the Crown accepted petitions to it directly to right such wrongs. In due course, the Crown delegated the determination of these Petitions of Right to the courts to advise the Crown what (if any) remedy should be granted. Subsequent legislation enshrined the Petition of Right procedure, but reserved to the Crown the unfettered discretion to grant or withhold its fiat to permit the courts to determine such claims against the Crown.
>
> With the great expansion of governmental activity in all aspects of society in this century, a move came to put Crown (or, really, governmental) liability on a more solid foundation, particularly in the area of vicarious liability for torts committed by public servants. As Dicey pointed out, some public servant was always liable personally for any actionable wrong committed in the name of the Crown, but this alone would not make the much deeper pocket of the Crown available to pay any damages resulting from such a judgment. Accordingly, the Federal Parliament and most Canadian provinces followed the English solution of adopting new legislation expanding the ambit of Crown liability. Sections 4 and 5 of the Alberta *Proceedings Against the Crown Act* demonstrate the model. ...
>
> It must be realized that these provisions do not impose any primary responsibility on the Crown, but only vicarious liability. Accordingly, Her Majesty cannot be found liable for Her own torts. ...

[41] Sections 4 and 5 of the Alberta statute are the same as the following provisions in the Ontario legislation that were referred to by Ms. McIntosh.

> Right to sue Crown without fiat
>
> 3. A claim against the Crown that, if this Act had not been passed, might be enforced by petition of right, subject to the grant of a fiat by the Lieutenant Governor, may be enforced as of right by a proceeding against the Crown in accordance with this Act without the grant of a fiat by the Lieutenant Governor.
>
> Liability in tort
>
> 5. (1) Except as otherwise provided in this Act, and despite section 71 of Part VI (Interpretation) of the *Legislation Act, 2006*, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject,
>
> (a) in respect of a tort committed by any of its servants or agents;
>
> (b) in respect of a breach of the duties that one owes to one's

servants or agents by reason of being their employer;

(c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and

(d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.

5. Conclusions regarding Crown Immunity

[42] Perhaps one may with some justification complain about the failure to completely eliminate the Crown's common law immunities. Indeed, in *Liability of the Crown*, after expressing their view that "the contempt order ought to be available to enforce orders against the Crown", Professors Hogg and Monahan go on (at page 61) to suggest that:

> If the Crown were liable for contempt for breach of a court order, it could be subjected to the same rules as a corporation. The Crown, like a corporation, could not be imprisoned, but the Crown could be ordered to pay a fine. The Court should also have the power, on finding the Crown to be in contempt, to make an order against an officer or servant of the Crown. Such an order could direct a particular person to carry out the duty that had been broken, or it could order the imprisonment or fining of the person responsible for the Crown being in default. This would enable the contempt power to penetrate into the bureaucracy and fasten on particular individuals, which would certainly be the most efficient way of securing compliance with an order that is being blocked by bureaucratic resistance.

[43] Although I happen to share the view that "the contempt order ought to be available to enforce orders against the Crown", I agree with Ms. McIntosh that the Crown is presently immune from the contempt process. But whether the Ministry is also immune from that process depends on other considerations.

6. Complainant's Submissions on the Ministry's Immunity

[44] The Complainant seems to be of the view that the fact that the Ministry has been "named" as respondent in countless human rights proceedings is proof that it is a legal entity. OPSEU appears to share that view. Mr. Phillips wrote that: "The history of this lengthy and complex proceeding confirms that this Tribunal has repeatedly exercised its jurisdiction to make orders against both the Ministry and against specific government officials, many of which have been reviewed and upheld by the Courts." In her reply

submissions (transcript, p. 9743) Ms. Hughes made the point this way:

> There are dozens and dozens of cases against the Ministry of Corrections or the Ministry of Safety and Correctional Services, whatever title you want to use about it. ... I would venture to say it is the most common respondent in Ontario and nobody has ever said: "What are you doing bringing a case against the Ministry? You know, it's simply a government department, and it's trite law that it's not an entity for human rights."

[45] Thus, the Complainant may wonder how it is that the Ministry may "appear" before the Tribunal "as representing" Her Majesty the Queen in Right of Ontario if it is not an agency of the Crown. And, if the Ministry is an agency of the Crown, he may have other questions as well: Does s. 47(1) of the *Code* not then bind the Ministry, and is it not a legal entity for such purposes? If the Tribunal's orders may be addressed either to the Deputy Minister or other officials or to the Ministry as such (as repeated assertions that "the Ministry" has complied with the orders of this Tribunal appear to concede) are those orders not enforceable against the Ministry?

[46] It may be true that it has been referred to countless times in litigation and that countless orders have been addressed to the Ministry *per se* without reference to any particular public servant (such as the Deputy Minister). However, it is the Crown as represented by the Ministry that has been the party in question. The word "ministry" is most often used in litigation in this province as an ellipsis for "Her Majesty in Right of Ontario", the name of the specific ministry (*e.g.*, Ministry of Corrections) being included as the Crown's representative in the style of cause presumably to indicate the particular department of government affected thereby and the source of instructions for its counsel. Thus, whether the Ministry is itself a legal entity cannot be established simply by reference to the volume of litigation in which its name appears.

[47] The only authority cited by the Complainant in support of the proposition that a government department or ministry may be held in contempt is the decision of the House of Lords in *M. v. Home Office*, [1993] UKHL 5. In that case, the United Kingdom Secretary of State for Home Affairs (but not the occupant of that office personally) was held by the House of Lords to be in breach of a court order to refrain from deporting a

person referred to as “M”. The failure to comply with that order was contempt, and that fault was attributed by the House of Lords to the office of the Home Secretary. The following passage from the speech of Lord Templeman (beginning at page 33) lends support to the Complainant’s contention, but apparently only by way of *obiter*:

> The Court of Appeal were of the opinion that a finding of contempt could not be made against the Crown, a government department or a Minister of the Crown in his official capacity. *Although it is to be expected that it will be rare indeed that the circumstances will exist in which such a finding would be justified, I do not believe there is any impediment to a court making such a finding, when it is appropriate to do so, not against the Crown directly, but against a government department or a Minister of the Crown in his official capacity.* The Master of the Rolls considered that a problem was created in making a finding of contempt because the Crown lacked a legal personality. ... In any event it is not in relation to the Crown that I differ from the Master of the Rolls, but as to a government department or a Minister. [Emphasis added.]

[48] Ms. McIntosh’s October 20 response to the Complainant’s submission that *Home Office* settled the issue was to point out that it was *obiter* and to suggest that the opposite conclusion was “stated clearly” by the Supreme Court of Canada. While that juxtaposition of contrary views seems to imply that the statement made in the Supreme Court is not to be taken as *obiter*, since unnecessary observations may also be clearly stated, that may be an unwarranted inference. Ms. McIntosh wrote as follows:

> Even if *M. v. Home Office* stands for the proposition that a government department can be found in contempt, it is not the law of Canada. The Supreme Court of Canada has stated clearly that government departments are not legal entities: *Canada (Conseil des Ports Nationeaux) v. Langelier*, [1969] S.C.R. 60. For that reason, it is submitted that the Ministry cannot be found in contempt.

[49] The opinion of the House of Lords that government departments and ministries are amenable to contempt proceedings would not be binding on Canadian courts even if it were not *obiter*. However, its opinions are entitled to great respect and, other than an *obiter dictum* of the Supreme Court of Canada, there appears to be nothing that would impede our courts from adopting that position. In *Langelier*, *supra*, Martland J. made this statement in passing (at p. 71):

> After reviewing the authorities cited by counsel, and a number of other cases, which I do not think it is necessary to list, my understanding of the position of servants or agents of the Crown, at common law, in respect of a claim in tort, is this: ... Second is the proposition that Crown assets could not be reached, indirectly, by suing in tort, a department of government, or an official of the Crown. *As to a government department, there was the added barrier that, not being a legal entity, it could not be sued*. [Emphasis added.]

[50] The *Langelier* case, decided a quarter of a century before *Home Office*, was not concerned with the position of a government department but with whether an injunction could be granted against a Crown agent, namely, the National Harbours Board. It was held that such relief could be obtained whether the Crown agent is an individual or a corporation. Not only was it unnecessary in that case to say anything about the position of government departments but, unlike in the *Home Office* case, no rationale was offered in *Langelier* for that unnecessary observation. In *Home Office*, Lord Templeman provided an explanation for his view that a government department ought to be subject to contempt proceedings.

[51] As noted earlier, the Court of Appeal of Alberta in *Ouellet* (*supra*) observed in passing that: “There is little Canadian law on the point. The Supreme Court of Canada has said that government departments are not legal entities and therefore cannot be sued [citation omitted].” That observation in *Ouellet* was *obiter*. The issue in that case was not whether a government department is a legal entity but whether Mr. Ouellet as the holder of a public office in charge of a government agency could be held personally liable for contempt of court in the circumstances of that case. As to whether a government department is a legal entity, the Court of Appeal appeared to be rather non-committal.

[52] After noting (in paragraph 38) that “in the appropriate circumstances, a government official can be held personally liable for the failure of his or her department to comply with a court order”, the Court of Appeal in *Ouellet* continued as follows:

> ... Whether the department itself may also be held liable under Canadian law, as was suggested by the House of Lords in the *Home Office* case, *is*

> *not as clear.* The chambers judge in this case did not think so. When faced with the suggestion that there is some distinction between "Mr. Ouellet in his personal capacity" and his "official capacity", he said, at para. 21, that he knew of no authority for such a distinction, although he was not referred to *Home Office*. [Emphasis added.]

[53] Since the suggestion that a government department could be held liable for contempt is found in a House of Lords decision that was not brought to his attention, how could the chambers judge be said to have disagreed with that proposition unless the validity of the distinction between personal and official capacity is seen to depend on whether "the department itself may also be held liable"? In that case, however, the statement in *Home Office* about departmental liability would not have been *obiter*; it would have been essential to the conclusion that the office of the Home Secretary and not Mr. Baker personally was in contempt. In any event, what was held to be "clear" in *Ouellet* is that a government official may be personally liable for his own involvement (however tenuous) in a failure to comply with a court order; what was said to be "not *as* clear" is whether the department might also be liable.

[54] As seen earlier, in submitting that the Crown has no immunity, the Complainant relied in part on the Preamble in the *Code*. That Preamble, which is as follows, was mentioned as well in relation to the issue of the Ministry's immunity:

> Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;
>
> And Whereas it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province;
>
> And Whereas these principles have been confirmed in Ontario by a number of enactments of the Legislature and it is desirable to revise and extend the protection of human rights in Ontario;

> Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows.

[55] The purpose for which counsel for the Complainant cited that Preamble in relation to the issue of Ministerial Immunity can be encapsulated in a question he would regard as rhetorical: If the provincial government as the largest employer in Ontario is immune from the full range of consequences faced by all other employers found liable for human rights violations, how could it be said that in this province "the dignity and worth of every person" is recognized, that "equal rights and opportunities without discrimination" are provided, and that "a climate of understanding and mutual respect for the dignity and worth of each person" exists?

[56] Ms. Hughes went on to suggest that the remarks made by Lamer J. in *Nelles* (quoted earlier) reflect policy considerations that should be seen as applicable to contempt proceedings: public confidence is eroded by shielding the government from liability and "the existence of an absolute immunity strikes at the very principle of equality under the law". She wrote as follows in the Complainant's October 15 submission:

> From a policy perspective, Crown immunity from contempt in a human rights proceeding makes no sense. Such immunity would undermine human rights and principles of equality; employees of the Crown should not be put in a less protected position than employees of private employers. There is no reason to shield the Ministry or its officials from liability for violating human rights orders. To hold otherwise would mean that court and tribunal orders are not binding on Ministry officials but are merely voluntary.

[57] A major purpose of Ontario's human rights law is to protect all employees from workplace discrimination, harassment and reprisals and to hold employers accountable in appropriate circumstances for breaches of the rights accorded by the *Code*. In attaining that end, it is the function of the present HRTO to make appropriate orders to redress such breaches and rid workplaces of unlawful discrimination, and that end cannot be assured unless the HRTO's orders are fully enforceable. A most important means of enforcing the orders of any court or tribunal is the contempt process, and that point is stressed in a passage quoted by Ms. Hughes from the speech of Lord Templeman in *Home Office* (beginning at p. 34):

> Nolan L.J. considered that the fact that proceedings for contempt are "essentially personal and punitive" meant that it was not open to a court, as a matter of law, to make a finding of contempt against the Home Office or the Home Secretary. While contempt proceedings usually have these characteristics and contempt proceedings against a government department or a Minister in an official capacity would not be either personal or punitive ... this does not mean that a finding of contempt against a government department or Minister would be pointless. The very fact of making such a finding would vindicate the requirements of justice. In addition an order for costs could be made to underline the significance of a contempt. A purpose of the courts' powers to make findings of contempt is to ensure the orders of the court are obeyed. This jurisdiction is required to be coextensive with courts' jurisdiction to make the orders which need the protection which the jurisdiction to make findings of contempt provides. In civil proceedings the court can now make orders (other than injunctions or for specific performance) against authorised government departments or the Attorney-General. On applications for judicial review orders can be made against Ministers. In consequence of the developments identified already such orders must be taken not to offend the theory that the Crown can supposedly do no wrong. Equally, if such orders are made and not obeyed, the body against whom the orders were made can be found guilty of contempt without offending that theory, which would be the only justifiable impediment against making a finding of contempt. ... In that exceptional situation, the ability of the court to make a finding of contempt is of great importance. It would demonstrate that a government department has interfered with the administration of justice.

7. Conclusion regarding the Ministry's Immunity

[58] Having advanced the Complainant's submissions regarding the Ministry's want of immunity as fully and fairly as I can, it remains to consider matters that may lead to the opposite conclusion—matters that were not argued by Ms. McIntosh. And, of course, one must keep in mind the many judicial statements stressing the importance of the contempt process while emphasizing the need to use it sparingly and cautiously.

[59] Whereas the Court of Appeal of England in *Home Office* found Mr. Baker personally in contempt, the House of Lords came to the conclusion that it was not Mr. Baker who was at fault but, rather, that it was the Secretary of State for Home Affairs (which office he held) that was in contempt. Responsibility had to be placed somewhere, and it was unfair in the circumstances to blame Mr. Baker personally. What better solution than to blame him in his "official capacity"—unless to blame the

government department itself, as was suggested *per obiter dictum*? Having settled on the former, however, it was unnecessary to commit to the latter.

[60] Apparently, the chambers judge in *Ouellet* found no authority for that distinction, and I have conceptual difficulties with it in relation to contempt proceedings and issues of liability generally. That there is a distinction between “official capacity” and “personal capacity” in certain contexts seems plain: a government minister, for instance, may be said to have acted either in an official capacity (signed an official document) or in a personal capacity (entered into a marriage). But those are that minister’s acts, not the acts of others. The suggestion that we may assign to the “official capacity” of one person the acts or omissions of some other person for which the holder of the office is nonetheless exculpated does not make sense to me. What acts that I did not do at all can I be held to have done by virtue of some office I hold so that, while I cannot be held personally to blame, my alter ego (*i.e.*, myself in an “official capacity”) may be blamed? An officeholder may do an act, but the “office” he or she holds cannot do an act. To suggest otherwise is to suggest that a vacant office may do an act, or that while I am unconscious I may nevertheless act in my official capacity.

[61] Of course, a cabinet minister may have an entourage, a member of which might be guilty of conduct amounting to contempt of court, and it may seem right and just to attribute that conduct to the office of that minister in order to access deep pockets. However, the attainment of that goal would appear to require some kind of corporate responsibility on the part of the minister (at least in his or her official capacity), and that seems to be excluded by *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217. In that case, the summary provided of the trial judgment of Strayer J. is worth noting. The following passages in the judgment of Sopinka J. (paragraphs 7 to 9) were written with evident approval of Strayer J.’s views:

> Strayer J. held first that, in his view, the spirit of the order of August 15 had not been obeyed by the responsible officials in the two departments involved. ...
>
> On the question of the appellants' personal responsibility for the failure to comply with the August 15 order, Strayer J. held that the common law

> requires actual personal knowledge of the order. Such knowledge could be proved by evidence of personal service or of the acquisition of knowledge by some other means. There was nothing in this case showing that the appellants ever had personal knowledge of the order and therefore they could not be personally responsible for having failed to carry out the order. ...
>
> Strayer J. concluded by rejecting the present respondent's arguments that the appellants are vicariously liable for the contempt of court committed by their employees. *Strayer J. took the view that no analogy could be drawn between the appellants and a "corporation sole", and that the more appropriate analogy was the situation of a minister of the Crown whose employee commits a tort: such a minister is not vicariously liable for the tort.* [Emphasis added.]

[62] Be that as it may, not one of the many Canadian cases to which I was referred found that (in effect) a government office, rather than the office-holder, could be held in contempt. In the *Ouellet* case (*supra*), Mr. Ouellet was not found in contempt in his "official capacity" as the Director of Child, Youth and Family Enhancement, but he was held personally liable for contempt of court for his conduct while acting in that capacity. There was no hint of any possibility that had the contempt not been brought home to him personally he might nevertheless be held in contempt in his public capacity, the consequences of which would fall not on him but on the public purse exclusively.

[63] As just seen, the question whether a minister of the Crown could be held in contempt arose in Canada in *Bhatnager* in which Strayer J. found at trial that the Minister of Employment and Immigration and the Secretary of State for External Affairs were not guilty of contempt for the disobedience of an order of the Federal Court. The Federal Court of Appeal reversed that decision and found the appellants guilty of contempt personally. In turn, the Supreme Court of Canada reversed the Court of Appeal. No one, including ministers of the Crown, can be found in contempt for disobeying a court order the existence of which the alleged contemnor had no knowledge at the time. Such knowledge might be inferred in some circumstances from the service of the order on an alleged contemnor's solicitor, but such service is not sufficient to establish knowledge in all situations. Here is part of what Sopinka J. had to say in that regard (at p. 226):

> This lengthy history of a strict requirement at common law that the party alleging contempt must prove actual knowledge on the part of the alleged

> contemnor is inconsistent with the submission that a rebuttable presumption arises in every case upon service of the order on the solicitor. In my opinion, a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed. Indeed, in the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn. In the case of Ministers of the Crown who administer large departments and are involved in a multiplicity of proceedings, it would be extraordinary if orders were brought, routinely, to their attention. In order to infer knowledge in such a case, there must be circumstances which reveal a special reason for bringing the order to the attention of the Minister. Knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases the inference of knowledge will always be available where facts capable of supporting the inference are proved: see *Avery v. Andrews* (1882), 51 L.J. Ch. 414.

[64] I found no Canadian case absolving anyone of personal liability while instead finding him or her guilty of contempt in an "official capacity". The cases examined seem inconsistent with such a conclusion; indeed, *Bhatnager* suggests the opposite. Lord Templeman's statement in *Home Office* regarding departmental liability might have been unnecessary, but it is the logical terminus of the reasoning that led to the decision that a minister may be held liable in an official capacity but personally exonerated. Since the latter is of unlikely application here, the persuasive value of the former seems greatly diminished. That being so, it would be rash of me to reject this country's long-held view based on Martland J.'s *obiter dictum* in *Langelier* and embrace instead the suggestion that a government department might be held in contempt. Thus, despite the absence of clear authority regarding this difficult issue, I have (with some reluctance) come to the conclusion that government ministries are not amenable to contempt proceedings and that I lack the jurisdiction to state a case for contempt against the Ministry.

APPLICABILITY OF S. 13(1) *SPPA* TO DEPUTY MINISTER HOPE

[65] Before turning to the particulars of the Complainant's allegations in his Request that I ask the Divisional Court to inquire into whether Deputy Minister Jay Hope is in contempt of the Tribunal's orders, I must deal with the submissions made regarding the Ministry's assertion that I lack the jurisdiction to do so.

1. The Matter of Jurisdiction regarding Deputy Minister Hope

[66] Although it conceded that a Deputy Minister has no absolute immunity from contempt proceedings, the Ministry argued that this board has no jurisdiction to state a case of contempt against Mr. Hope. That submission was made in the Ministry's September 22, 2010 Response to the Complainant's Request and developed in oral argument on October 5. Quite apart from the question of immunity, Ms. McIntosh claims that the board has no jurisdiction to state a case against Mr. Hope because the facts do not bring the matter within the scope of s. 13(1) of the *SPPA*. However, if that argument is sound, I must conclude that the request is to be denied, not because I lack jurisdiction, but because the matter is outside the scope of s. 13(1). Although her submission does not raise a preliminary issue of law, since its validity would make it unnecessary to consider the specific allegations of contemptuous behaviour, it should be dealt with at this point.

[67] According to Ms. McIntosh, the Complainant and OPSEU persist in wrongly describing the responsibility of a tribunal involved in a contempt process as being to determine whether a *prima facie* case of contempt has been made out. She pointed out that, according to the *McNaught* case (*supra*), the tribunal "must decide whether a *prima facie* case has been made out *that conduct described in s. 13 occurred*". (See as well: *West End Development Corp. v. Peel Region (Regional Municipality) Health Department*, [1995] O.E.A.B. No. 2; *Hammerson Canada Inc v. Guelph (City)*, [2002] O.M.B.D. No. 738.)

[68] The importance of that distinction is that not all conduct that might prove to be contemptuous falls within the ambit of s. 13(1), the three clauses of which must be carefully construed. Clauses (a) and (b) concern what has been called "testimonial obligations". Clause (a) has to do with default in attending at the hearing and does not apply in respect of Mr. Hope. Clause (b) refers to various obligations, only one of which could have any possible application. The relevant part of s. 13(1)(b) is that a tribunal may state a case: "Where any person without lawful excuse, being in attendance as a witness at an oral hearing ... refuses to produce any document or thing in his or her

power or control legally required by the tribunal to be produced by him or her". Clause (c) authorizes the tribunal to state such a case where the alleged contemnor "does any other thing that would ... have been contempt" had the tribunal been a court of law. It is the Ministry's contention that none of the Complainant's allegations of contumacious conduct on Mr. Hope's part falls within either clause (b) or clause (c).

[69] One plank in the Ministry's submission that Mr. Hope's conduct is not caught by clause (b) has to do with the meaning in that provision of the verb "to refuse" and with its application in this case. In the Ministry's September 22 Response to the Complainant's Request for an Order, Ms. McIntosh wrote (in paragraph 15) that:

> ... the use of the word "refuses" requires deliberate withholding of a document. "Refuses" is synonymous with "resists". It does not include error, neglect or recklessness. Because of its subject matter, s.13(1) must be strictly construed. Accordingly, the Ministry submits that the Tribunal has no legal authority to state a case for refusal to produce a document in this case.

[70] Of course, there is a significant difference between the pre-emptive assertion that there is no legal authority to state a case and the conclusion after proper analysis that there is no case to state. The former obviates the need to engage in the latter. It is the Complainant's contention, however, that the Deputy Minister deliberately and wilfully withheld documents and failed to provide information. If that were so, then clearly he would be found to have refused to produce those documents and provide that information. One cannot get to the bottom of those assertions without an analysis of the facts as well as the relevant law.

[71] The principal plank of the Ministry's submission regarding clause (b) is that, even if the production of relevant documents had been refused previously, because the verb "to refuse" is used in the present tense (*i.e.*, "refuses", not "refused"), that clause does not apply if the document in question is provided before the contempt motion is heard. In the Ministry's submission, clauses (a) and (b) are solely intended to compel compliance with the testimonial obligations of witnesses, and according to Ms. McIntosh that purpose is not only apparent in the structure of those clauses but is implicit in the

observations of the courts. It follows, she says, that they are not intended to punish a witness after he or she has produced a document: “These provisions are to compel compliance with outstanding obligations.”

[72] The argument, then, is that I lack authority to state a case for contempt to the Divisional Court regarding Mr. Hope because the Complainant’s Request for an Order during Proceedings does not identify any arguably relevant documents that were not provided before the hearing commenced. The Request itself simply alleges that various documents were not produced in a timely way. Compliance with testimonial obligations before a contempt motion is heard precludes a finding of contempt for failure to do so in a timely way. (Of course, this overlooks the Complainant’s allegations of contumacious conduct other than the failure to provide documents in a timely way.)

[73] *Ajax and Pickering General Hospital et al. and Canadian Union of Public Employees et al.* (1982), 35 O.R. 293 is the only case Ms. McIntosh cited in support of her argument based on syntax. That case had to do with the enforcement of a direction made by the Ontario Labour Relations Board (the “OLRB”) under s. 92 of the Ontario *Labour Relations Act*, R.S.O. 1980, c. 228 (the “*LRA*”) and filed in accordance with s. 94 of that Act. Section 92 has to do with directions the OLRB may make regarding unlawful strikes, and s. 94 states that the OLRB “shall” file such directives with the Registrar of the Supreme Court. The question before the Court of Appeal was whether compliance with the Board’s direction prior to the hearing by the court of a contempt application deprives the court of jurisdiction to make a finding of contempt regarding the failure that triggered the application. It was held that “the Supreme Court has jurisdiction to commit for contempt for disobedience of an order which had been complied with before the application to commit was heard” and, having been filed under s. 94, the Board’s direction became “enforceable” in the same way as a judgment or order of the court. That section is as follows:

> 94. The board shall file in the office of the Registrar of the Supreme Court a copy of a direction made under section 92 or 93, exclusive of the reasons therefor, whereupon the direction shall be entered in the same way as a judgment or order of that court and is enforceable as such.

[74] Cory J., in dissent, was of the view that the court did not have jurisdiction to punish for past acts in breach of directives filed pursuant to s. 94 of the *LRA*. His dissent was based in part on his opinion that the interpretation of s. 94 favoured by the majority was unnecessary because there is an alternative process that the OLRB could have pursued to the same end, namely, to state a case for contempt pursuant to s.13(1)(c) of the *SPPA*. Although the majority did not accept the suggestion that the availability of an alternative process affects the interpretation of sections 92 and 94 of the Act, they said nothing as to the view Cory took of the scope of s.13(1) of the *SPPA*, which was expressed by him (at page 19 of the report given to me) as follows:

> Although cls. (a) and (b) appear to be rather narrow in their application, cl. (c) is quite broad. In my view, it is wide enough to encompass past acts of disobedience of directions of the Board. ... The same opinion is expressed in the Inquiry into Civil Rights by Dr. McRuer. ... It was said that its provisions were sufficient to enable the court to punish for contempt. Specifically, it was thought that cl. (c) made applicable the whole law of contempt for breach of an order of a tribunal and not just that part of the doctrine relating to "coercing the performance of testimonial obligations".

[75] In any event, having conceded that if clause (c) applies a person may be held in contempt for disobedience of an order complied with prior to the contempt hearing, Ms. McIntosh went on to argue that clause (c) does not apply in the circumstances of this case. Her argument was that the phrase with which the clause begins, "does any *other* thing", means "does any thing other than fail to comply with the testimonial obligations" referred to in clauses (a) and (b), which "other thing" must of course amount to contempt had it occurred in a court of law.

[76] It was contended by the Ministry that all of the allegations of contemptuous conduct made by the Complainant have to do with the failure to provide documents in a timely way and not with "other things" within the meaning of clause (c). Because (in her view) those allegations do not entail behaviour falling within clause (b) either, that completes Ms. McIntosh's argument that this board lacks jurisdiction to state a case of contempt regarding the Deputy Minister.

2. Other Submissions as to Jurisdiction regarding Deputy Minister Hope

[77] The Complainant and OPSEU, of course, hold a different view of the matter. In her response to the Ministry's submission that clause (b) is inapplicable where a previously withheld document is produced prior to the filing of a contempt motion, Ms. Hughes relied not on case law but, apparently, on indignation. What she said in this regard is as follows (beginning at page 9799):

> What we have here is the Ministry says, in their overview of these submissions, there's no prima facie case. ... All the documents complained about in the complainant's motion materials have been produced. ... Well, these are the ones that we know about, but they clearly are missing the point. Mr. McKinnon has been out of work now for six years waiting to come back. We have outstanding orders from 2002, from 2007. In 2008, December, we wrote detailed submissions with respect to this matter. We are now in October of 2010, [and the Ministry says], "What's your complaint? We eventually produced the documents."
>
> In terms of this process, the Tribunal, the expense, the wasting of time in terms of your time, the Tribunal's time and ... Mr. McKinnon and Vicki Shaw-McKinnon's careers have been completely hijacked, and in the meantime, we have a process where the Ministry puts forward red herrings, puts forward evidence, actively gives evidence and discloses documents, yet does not disclose what I think at the end of the day are extremely highly-relevant documents to these proceedings, and those are the ones -- and I think it's wider than the list, quite frankly, that I'm relying on, but I put those forward because I think that's sufficient with respect to that.

[78] The narrow issue here in question is whether a case for contempt may be stated pursuant to clause (b) for having withheld for a time documents provided just before the contempt motion was scheduled to be heard. That is a question of law the answer to which is not likely to be found in the outrageous character of the initial default.

[79] On behalf of OPSEU, Mr. Phillips referred to three cases that indicate that the breach of an order otherwise amounting to contempt is not necessarily purged by subsequent compliance or apology. One of them is the decision of Conway J. in *Peach Films Pty. Ltd. v. Cinemavault Releasing Inc.*, 2008 CanLII 48815 (ON S.C.), the relevant passage of which (paragraph 16) is as follows:

> Even if the contemptuous acts have ceased, or the contemnor has purged his contempt, the court still has jurisdiction to consider and punish for contempt. The purging of contempt is merely a mitigating factor to consider when determining an appropriate sanction: *Re Ajax and Pickering General Hospital and Canadian Union of Public Employees* (1981), 35 O.R. (2d) 293 (C.A.) at page 298.

[80] In my view, *Peach Films* is not relevant in the present context to a proceeding under s. 13(1) of the *SPPA*. The contempt proceeding in *Peach Films* was conducted in accordance with Rules 60.05 and 60.11(1) of the *Rules of Civil Procedure* (*Courts of Justice Act*, R.R.O. 1990, Regulation 194). Moreover, the order that was not complied with was that of a court, and it was one compelling answer regarding various undertakings and refusals and not an order for the disclosure of a document.

[81] Mr. Phillips referred to two other cases dealing with the "purging" of contempt prior to hearing the contempt motion. In *United Steelworkers Local 1-2693 v. Kimberly-Clark Corporation*, 2008 CanLII 23941 (ON L.R.B.) the OLRB declined to state a case for contempt. The conduct in question was not the refusal of a witness to produce a document, but the breach of the board's confidentiality order regarding documents already produced. Since the alleged contempt fell within clause (c) and not clause (b), that decision is not authority for or against the proposition that the production of the document in question prior to the filing of the contempt motion does not purge the alleged contempt. However, in the course of its reasons the Board in *Kimberly-Clark* (in paragraph 102) referred to the third case cited by Mr. Phillips, regarding which it made the following observation:

> Finally, it should be noted that in *Plaza Fibreglas* the party subsequently complied with the Board's order and produced the documents prior to the contempt proceeding. However, the Divisional Court ruled that the subsequent compliance did not purge the contempt and still issued a sentence of thirty days in jail, but suspended the sentence. See *Plaza Fibreglas Manufacturing Limited*, [1989] OLRB Rep. May 528 (Div. Ct.). Accordingly, the Board can still state a case, and the Divisional Court can still find a party to have been in contempt, even though [as in *Kimberly-Clark*] a party has admitted to a breach and offered an apology.

[82] In the *Plaza Fibreglas* case the contemnor expressly refused to comply with the directions of the Board to provide documents in un-redacted form. That refusal was outstanding at the time the Board heard the matter and decided to "accede to the applicant's request" to state a case pursuant to s. 13(1) of the *SPPA* "so that the Divisional Court may, on application by the complainant, determine the matter in accordance with that section": *Plaza Fibreglas Manufacturing Ltd. and Plaza Electro-Plating and Citron Automotive Industries and Sabina Citron*, [1988] O.L.R.B. No. 220. The conduct of the contemnor was blatant, as shown in the following statement made by the Board (in paragraph 18 of that 1988 report):

> My earlier ruling dealt with the relevancy of the material. I found that the application forms were arguably relevant to the union's ability to determine whether employees who had worked at Chesswood were employed at Citron Court and that, further, the documents were only of limited utility unless Mr. Richmond could be satisfied there were no other marks or notations on them hidden by the covering over of the addresses. Nothing counsel said could persuade me that the Board could ignore Mrs. Citron's refusal to obey its direction: Mrs. Citron was not only breaching her undertaking to produce documents, which undertaking was not qualified or restricted to a self-selected part of any of the documents, but she had explicitly and repeatedly refused to comply with my direction.

[83] Although the production ordered by the Board in *Plaza Fibreglas* was complied with before the Divisional Court made its contempt ruling ([1989] OLRB Rep. May 528 (Div. Ct.)), it was not complied with before the Board heard the application to state a case for contempt to the Divisional Court. Thus, the case is not authority for the proposition that a tribunal can state a case under clause (b) even though the previously undisclosed document has been produced before it; but neither is it authority to the contrary. The following unnumbered paragraphs from the decision of the Divisional Court in the *Plaza Fibreglas* case tell the story:

> It has been urged upon us by Mrs. Citron's counsel that no finding should be made against her as, on April 28, 1989, on the advice of counsel, Mrs. Citron produced the documents to the Board or counsel for the Board. The position has been taken in argument before us that the contemnor, having purged her contempt, should not now be convicted for contempt and that the purpose of s. 13 is coercive and not punitive. ...

> We note that the Ontario Court of Appeal in *Re Ajax & Pickering General Hospital et al. and Canadian Union of Public Employees et al.* (1981), 132 D.L.R. (2d) 270 at p. 284 dealt with the question of subsequent compliance with Board orders and noted that compliance by a union and its members with the Board's order does not have the effect of rendering prior acts of disobedience moot questions. That applies equally in this case where the order of the Board, after being confirmed by this Court, has been belatedly complied with in a grudging manner.
>
> The Court of Appeal in the *Ajax & Pickering General Hospital* case also indicated that, in the field of labour relations, the settlement of a labour dispute does not deprive the Court of power to consider the effect of previous acts of disobedience. It is on that basis that we have considered the past conduct of Mrs. Citron and the past relationship with the related companies and her union.

3. Conclusion as to Jurisdiction regarding Deputy Minister Hope

[84] Cory J. did not say in *Ajax & Pickering General Hospital* that, owing to their narrow application (or anything else), clauses (a) and (b) do not apply to breaches of testimonial obligations subsequently complied with. It may be tempting to conclude that he implied as much by having said by way of contrast that, given its breadth, clause (c) encompasses past acts of disobedience. However, it seems more logical to me to draw the inference that he considered clauses (a) and (b) to be narrow in that they are exclusively concerned with testimonial obligations, whereas clause (c) is not. After all, since testimonial obligations were not in issue in the case before him the alternative to proceeding under s. 94 of the *LRA* would be to state a case under s. 13(1)(c) of the *SPPA*. In any event, Cory J. did not discuss the grammatical construction of these clauses or say anything that expressly supports Ms. McIntosh's opinion in that regard.

[85] In *Ajax and Pickering General Hospital*, Cory J. said that in McRuer's Inquiry into Civil Rights it was "thought that clause (c) made applicable the whole law of contempt for breach of an order of a tribunal and not just that part of the doctrine relating to 'coercing the performance of testimonial obligations'." Not only does that fail to warrant the conclusion that only "outstanding obligations" can be met with findings of contempt, but it suggests the opposite. Clearly, the obligation regarding disclosure is the timely production of arguably relevant documents, not their production at whim any time up

until a contempt motion is about to be heard. I fail to see how timeliness can be coerced by the threat of contempt if in fact deliberately prejudicial dilatoriness cannot be punished by contempt. Is it really the law that, if a party who has incurred considerable expense in preparing a contempt motion is provided with a by-then useless document on the eve of its hearing, that party must swallow those expenses and move on?

[86] On the one hand, the cases referred to by Mr. Phillips do not lead to the conclusion that a tribunal may state a case for contempt for non-compliance with production orders even though the documents were produced prior to the hearing. On the other hand, those cases certainly do not point to the contrary conclusion—a conclusion for which the only authority cited by Ms. McIntosh is an observation made by Cory J. in dissent, the scope of which is unclear. Thus, I find myself having to decide an issue regarding which there appears to be no conclusive authority. In the absence of jurisprudence governing it, the issue posed by the tense of the verbs used in a provision is one of statutory interpretation.

[87] The effect attributed by Ms. McIntosh to the tense of the verb “to refuse” in clause (b) of s. 13(1) is inconsistent with the case law regarding the application of clause (c), which uses the verb “to do” in the present tense: “*does* any other thing”. The cases make it clear that the other things to which clause (c) applies include both past and ongoing misconduct. In order to encompass both kinds of misconduct the kind of grammatical correctness espoused by the Ministry would require clause (c) to begin with the phrase “*has done* any other thing”. If the contemnor disclosed the contents of a document that was subject to a confidentiality order, that is a thing that is done and cannot be undone; it is not a thing that the contemnor “does” or “is doing” or “continues to do” at the time of the hearing; yet such conduct may be held under that provision to be contempt just the same. Since the use of the present tense of the verb “to do” in clause (c) does not preclude a finding of contempt for past misconduct, why should the use of that tense of the verb “to refuse” in clause (b) preclude such a finding where, for instance, the contemnor “refused” to produce a relevant document until after its usefulness had knowingly expired?

[88] While some might be inclined to agree with Ms. McIntosh's analysis of s. 13(1)(b) had that clause stood entirely on its own, if that particular view of the requirements of syntax is used in respect of one of the clauses in a provision surely it must be used in respect of them all, and that is clearly nonsensical in the context of clause (c). Indeed, in the opinion on which she relies (and despite the phrase "*does* any other thing" with which that clause begins), Cory J.'s point was precisely that, since s. 13(1)(c) of the *SPPA* can be applied to such circumstances, s. 94 of the *LRA* need not be found applicable to past disobediences.

[89] As it happens, I think the answer is found in Professor E.A. Driedger's text on *The Composition of Legislation* (Second Edition Revised, 1975, Department of Justice). Chapter II on "The Verb in Legislation" deals (*inter alia*) with the tenses in which verbs are used, and the following is said (at p. 9) under the subheading "*Past Perfect*":

> If the simple past is used, there is no indication whether the action is or is not completed at the time of reading. If the perfect is used, as in
>
> > A person who had been carrying on a brokerage business when this Act came into force
>
> the implication is that the action was completed at the time indicated.
>
> Often it makes no difference whether the simple present or present perfect is used.
>
> > Every person who has failed to comply with this Act is guilty of an offence.
> >
> > Every person who fails to comply with this Act is guilty of an offence.
>
> In the former, the perfect tense connects a past occurrence with the present time. The event is past, but the consequences bear on the moment immediately thereafter and are prescribed by the legal predicate *is guilty of an offence*. In the latter, the present tense is regarded as an eternal truth, which may, grammatically, be expressed in the present tense.

[90] Since s. 13(1)(c) of the *SPPA* applies to past events (such as the breach of a confidentiality order), it is clear that the verb "to do" found in the phrase "Where a

person *does* any other thing" is used in the present tense in the same way and with the same effect as the verb "to fail" in Professor Driedger's phrase "Every person who *fails* to comply". It is a context in which "the present tense is regarded as an eternal truth, which may, grammatically, be expressed in the present tense". It seems to me that the verb "to refuse" is used in that same way in s. 13(1)(b) of the *SPPA*. Thus, in my opinion, if documents were improperly withheld for a time, the mere fact that they were provided at any time before the hearing of the contempt motion was to commence does not deprive a tribunal of the authority to state a case of contempt.

[91] But even if one agrees with Ms. McIntosh's analysis, one may ask whether ongoing non-compliance with production orders is more pernicious than deliberately late compliance causing delay, interference with the flow of evidence and lost opportunities to examine those witnesses best able to speak to the matters in question. Whereas the former may be redressed under clause (b), is the latter beyond redress under clause (c) because it arises out of a testimonial obligation or is it really some "other thing that would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court"? For the sake of argument, suppose a relevant document that can be spoken to meaningfully only by a certain potential witness remains hidden until the alleged contemnor is sure that that person is no longer available to testify or until the document is discovered by another party too late to be of use. What if there is a pattern of such harmfully late and now worthless disclosure? Could a court do nothing but grin and bear it? Surely, not; and nor should a tribunal be required to accept such conduct.

[92] Given their nature, the allegations made in the Complainant's Request for an Order During Proceedings must be closely examined in order to determine whether the behaviour complained of comes within the scope of any part of s. 13(1) of the *SPPA*. As to clause (c), it is to be noted that the Request also alleges failures by the Deputy Minister to comply with certain non-testimonial obligations imposed upon him by orders made by the tribunal in past decisions. In that regard, it is worth setting out the following passages from the judgment of Dickson, C.J.C. in *British Columbia Government*

Employees' Union v. British Columbia (Attorney General), [1988] 2 S.C.R. 214 (paragraphs 35 and 36):

> In some instances the phrase "contempt of court" may be thought to be unfortunate because, as in the present case, it does not posit any particular aversion, abhorrence or disdain of the judicial system. In a legal context the phrase is much broader than the common meaning of "contempt" might suggest and embraces *"where a person, whether a party to a proceeding or not, does any act which may tend to hinder the course of justice or show disrespect to the court's authority",* "interfering with the business of the court on the part of a person who has no right to do so", "obstructing or attempting to obstruct the officers of the Court on their way to their duties" See *Jowitt's Dictionary of English Law*, vol. 1, 2nd ed., at p. 441. [Emphasis added.]
>
> An intent to bring a court or judge into contempt is not an essential element of the offence of contempt of court. That was decided in *R. v. Hill* (1976), 73 D.L.R. (3d) 621 (B.C.C.A.) McIntyre J.A., speaking for a unanimous court said at p. 629:
>
> > Even, however, if the cases could not be distinguished on their facts, it is my opinion that an intent to bring a Court or Judge into contempt is not an essential ingredient of this offence. In Canada the proposition stated in *R. v. Gray*, [1900] 2 Q.B. 36 at p. 40, by Lord Russell of Killowen has been accepted. He said:
> >
> > > Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court.
>
> These words have received the approval of the Supreme Court of Canada in *Poje et al. v. A.G. B.C.* (1953), 105 C.C.C. 311 [as well as others]. In my view, they express the law as it now stands in this country. The word "calculated" as used here is not synonymous with the word "intended". The meaning it bears in this context is found in the Shorter Oxford English dictionary as fitted, suited, apt: see Glanville Williams *Criminal Law: General Part*, 2d ed. (1961), p. 66.

[93] Finally, before examining the allegations regarding the Deputy Minister that are made in the Request for an Order During Proceedings, an aspect of clause (b) of s.13(1) not addressed by the parties should be noted. If a particular allegation falls within the ambit of that clause, the document or thing Mr. Hope "refuses" to produce

(whatever that is taken to mean) must be something that was within his control and legally required to be produced by him *in his capacity as a witness*. Allegations that documents were not produced in a timely way as a result of Mr. Hope's conduct or influence in his capacity as Deputy Minister (rather than as a witness) cannot come within clause (b), but would have to be dealt with under clause (c).

THE CASE ALLEGED AGAINST THE DEPUTY MINISTER

[94] Some of the matters that must be canvassed in relation to the Complainant's contempt motion are set out as follows in the Request for an Order During Proceedings filed on his behalf:

> 89. The Operational [*sic*] Effectiveness Division ("OED") is an entity created as a result of the Tribunal orders. The Respondent Ministry called 5 days of evidence in chief detailing the structure and workings of the OED and the role of the ADM. What it failed to tell the Tribunal (or the parties and the intervenor) was that the OED was actually in a state of crisis, with allegations of racism, intimidation, bullying and chaos, and had been for some time. The powers of the ADM had been stripped, and an Interim Support Team, consisting of two police officers (one retired) and several other individuals from outside the OED had been put in charge. A document called the Operational Review (Exhibit 40) detailed the very serious problems in OED.
>
> 92. The Ministry produced many other documents about the OED, including organization charts, PowerPoint presentations and memos (see, for example, Exhibits 1, 1b, 2, 3, 4 and 5) all of which were misleading in light of the reality set out in the Operational Review (Exhibit 40).
>
> 93. The Operational Review and the fact of its existence or the existence of the investigation and the implemented recommendations were not disclosed to the Complainant, the Tribunal, the OHRC, METRAC Or the intervenor, OPSEU, despite the fact that the Ministry was going through the charade of calling evidence about the OED painting it in a misleading positive light. The Report was disclosed only after Dr. Agard was terminated after being cross-examined over two days.
>
> 95. Deputy Minister Hope states he knew about the disclosure order, knew about the Operational Review, but said he did not plan on revealing it until someone asked him. He said he would be "forthright" if asked. The disclosure order was not just to disclose specific documents if asked and such a dismissive response is indicative of a highhanded disregard for the

> Tribunal's disclosure orders and the integrity of the process. Mr. McKinnon would not, of course, know about the report as it had been suppressed by the Ministry during ADM Agard's evidence and thus could not be in a position to "ask". The same would be true of the Tribunal chair and the Commission counsel.

[95] As noted at the outset, where the allegation is a failure to comply with an order of the tribunal, the burden is on the party requesting the stated case to prove that the order in question was clear and unambiguous and that there was a deliberate and wilful breach of that order. While the parties are in agreement in that regard, the Ministry stressed that the alleged contemnor must be personally responsible for the breach. That point is made in the *Bhatnager* case in which Sopinka J. said that: "Given the premise that liability in contempt is essentially criminal liability, the respondent's main hurdle on this issue is that, in general, vicarious liability is unknown to the criminal law". In her reply submissions Ms. Hughes acknowledged the requirement of personal knowledge, saying that "the *Bhatnager* case deals with whether or not you can be held vicariously liable ... we are not relying on vicarious liability. We are saying that in this case there is actual knowledge".

1. The Orders Allegedly Breached: Their Scope and Applicability

[96] The disclosure orders with which it is alleged that the Ministry and/or Mr. Hope failed to comply are identified and commented upon in the Complainant's Request for an Order During Proceedings (pp. 20-23), and in paragraph 1 of that Request reference is made as well both to disclosure orders and to the board's substantive orders:

> Specifically, at issue is whether the Respondent and DM Hope's deliberate and repeated violations of the Tribunal's orders (including the pre-hearing disclosure order, the repeated disclosure orders made during the hearings, *and the Tribunal's orders requiring the Deputy Minister to disclose information to the parties*) and the general ongoing disclosure obligation under Tribunal rules, by way of failing to disclose and, at times, intentionally hiding relevant documents, ought to be addressed by way of a contempt order. [Emphasis added.]

[97] Thus, to begin with, there is a continuing disclosure obligation imposed by the Tribunal's Rules. Rule 73 of the "old rules" that apply to this long-running proceeding is as follows:

> Disclosure is an ongoing obligation. Each party must promptly disclose and produce, to all other parties, all arguably relevant documents discovered or acquired during the proceedings, and must promptly advise all other parties of any changes to the information disclosed or produced.

[98] In addition to that standing rule, two express disclosure orders were made in the course of the present round of hearings. The first was set out in the board's Interim Decision of April 22, 2009 and the second was made orally on July 8, 2009. It is also the Complainant's contention that a Deputy Minister has a statutory obligation to disclose documents. Finally, in addition to the reference to it in paragraph 1 of the Complainant's Request, Ms. Hughes' submissions of October 4 and October 15 allege that Mr. Hope's failure to provide documents and information was a breach of the orders addressed to him in previous decisions of the board—orders that Ms. McIntosh referred to as "substantive orders".

[99] Since it presents fewer difficulties I will deal first with the October 15 submission of the Complainant and OPSEU that Mr. Hope has a statutory obligation to see to it that all arguably relevant documents are produced in litigation involving the Ministry. The sweeping implication is that all deputy ministers are responsible for compliance with disclosure orders by reason of s. 29(1) of the *Public Service of Ontario Act, 2006*, S.O. 2006, c. 35, Schedule A, which provision reads as follows:

> s. 29(1) The deputy minister of a ministry, acting on behalf of the minister, is responsible for the operation of the ministry.

[100] When dealing with the *Ouellet* case in paragraphs 29 and 30 of her October 15 submissions, Ms. Hughes raised that provision peripherally as follows:

> The Court found that Ouellet was given certain powers and responsibilities for administering child protection matters under [an Alberta statute] ... Similarly, as Deputy Minister, Jay Hope has a statutory responsibility for the operation of the Ministry under the *Public Service of Ontario Act, 2006*.

[101] I agree with Ms. McIntosh regarding the want of meaningful comparison between the legislation involved in *Ouellet* and the Ontario provision in question. Here is what Ms. McIntosh wrote in that regard:

> The general provision in the *Public Service of Ontario Act, 2006* is not a sufficient basis for imposing a legal responsibility for the disclosure orders on the Deputy Minister. In contrast, in the *Ouellet* case, the statutory provisions were very specific and extensive. The statute made the Director responsible for all child protection decisions ... and by statute the Director was a party to every child protection proceeding. It was this specific statutory responsibility that would have made the Director liable in contempt for not placing the child in accordance with the court order, and which he could not avoid by delegation.

[102] For his part, Mr. Phillips contended that: “Compliance with orders of courts or tribunals issued against the Ministry [including, of course, production orders] is part of the ‘operation of the Ministry’, and, as such, part of the deputy Minister’s statutory responsibility.” No jurisprudence was cited in support of that contention, and it is an interpretation of s. 29 of the *Public Service of Ontario Act* that strikes me as unworkable. Is that provision really to be read as requiring every deputy minister in the province to follow all the litigation in which his or her ministry is involved so as to brief ministry counsel on the arguably relevant documents the other parties are entitled to, and to make sure, as well, that they are produced in a timely fashion? And are Ontario’s deputy ministers burdened with that obligation even if, unlike the Director in *Ouellet*, they are not a party in the proceedings? I think not.

[103] Deputy Minister Hope is responsible for the operation of one of the largest ministries in the province, and it is one that seems endlessly involved in litigation before the OLRB, the HRTO and other tribunals and courts. Surely, Mr. Hope cannot be held responsible for compliance with disclosure obligations and orders in all those cases. Clearly, he is personally responsible for the observance of an order of a court or a tribunal expressly directed to him in clear and unequivocal terms, including disclosure orders if such be the case. However, he cannot be made responsible for compliance with disclosure requirements simply on the basis of s. 29(1) of the *Public Service of Ontario Act*.

[104] I turn next to the Complainant's allegations of contempt arising out of Mr. Hope's alleged failure to comply with the "substantive" orders made by this board in previous decisions. In that regard, in the Ministry's September 22, 2010 Response it is suggested (in paragraph 73) that "the motion material confuses compliance with the Tribunal's disclosure orders and compliance with Orders 5 and/or 13 [of the 2007 decision], which require the Ministry to keep Mr. McKinnon informed". In any case, the first of those orders is found in *Ontario Human Rights Commission v. Ontario (Correctional Services),* 2002 CanLII 46519 (ON H.R.T.). That order is as follows:

> 15. The Deputy Minister of the Ministry of Correctional Services shall bear the ultimate responsibility for the implementation of these orders.

[105] The other orders on which the Complainant relied are found in *McKinnon v. Ontario (Correctional Services)*, 2007 HRTO 4 (CanLII) under the heading "Orders as to Deputy Minister's Responsibility", and they are as follows:

> 4. That the Deputy Minister of Correctional Services, who bears the ultimate responsibility for the implementation of the Tribunal's orders, shall: co-operate with the Third Party; ensure that all Ministry staff understand and comply with the Tribunal's orders; institute an appropriate tracking system made known to the parties; and establish a transparent system of delegation to competent personnel to assist in carrying out such responsibilities.
>
> 5. That the Deputy Minister shall keep the parties (including the Third Party) informed of all matters that relate to the interests of the Complainant in the context of these reasons, and shall provide the Minister directly with executive summaries of the Third Party's quarterly reports, and of other relevant material and information.

[106] Since the Deputy Minister bears "ultimate responsibility for the implementation of these orders", the 2007 decision contains another order the responsibility for which rests with Mr. Hope, namely, Order 13, which appears under the heading "Orders as to Monitoring". That order is as follows:

> 13. That the Ministry, through the Workplace Effectiveness Branch [now the "Organizational Effectiveness Division"], shall inform the Complainant promptly of issues of safety and racism that it has reason to believe may

affect his and his wife's decision regarding the timing of their return to work.

[107] The Complainant contended that any failure to keep him informed as required by the above orders may amount to contempt, and he referred to a number of such failures for which he says Deputy Minister Hope is responsible. In my view, however, unless it hinders the board's current proceedings, non-compliance with substantive orders cannot be the basis of a contempt proceeding under s. 13(1) of the *SPPA*. While past and collateral transgressions might be pertinent in determining whether to exercise discretion to state a case of contempt, when determining whether there is a *prima facie* case to be stated in the first place, the focus must be on the current round of hearings. The question is whether there has been an abuse of the board's process coming within the ambit of s. 13(1) of the *SPPA*, and post-2007 failures to comply with "substantive orders" are not relevant unless they impinge on that process.

[108] In my opinion, if a failure to comply with a substantive order adversely affects the flow of evidence during the course of a hearing, then that failure would be behaviour coming within s. 13(1)(c) of the *SPPA*, provided the constituent elements of that offence are present. However, to state a case for contempt for other failures to comply with the board's substantive orders would be both unwarranted and unnecessary since the very purpose of the current hearings is to deal with allegations of bad faith and non-compliance with such orders. Because the resolution of those allegations is of fundamental importance to the final disposition of these matters they will no doubt be raised in final argument; following that, findings of fact will be made on the basis of which fresh orders may be issued in the ensuing decision.

[109] The Complainant's submissions regarding the substantive orders addressed to the Deputy Minister went beyond asserting the general responsibility to keep him informed. In his view, those orders made Mr. Hope personally responsible for all failures to comply with disclosure orders. The reasoning is this: Order 4 of the 2007 decision makes the Deputy Minister responsible for "the implementation of the *Tribunal's* orders";

its disclosure orders are "orders of the Tribunal"; therefore, the Deputy Minister is responsible for the implementation of (*i.e.*, compliance with) the disclosure orders.

[110] On behalf of OPSEU, Mr. Phillips made the same point as Ms. Hughes, offering (in paragraph 8 of his October 15 submission) the following interpretation of the 2002 and 2007 orders of the board:

> The Deputy Minister was under a specific legal duty to ensure compliance with the production orders of the Tribunal, just as the Deputy Minister has repeatedly been fixed with personal responsibility for compliance with other orders of this Tribunal. The complex history of these proceedings has, in the past, lead to confusion about who was to bear ultimate responsibility for securing compliance. To address this issue, beginning with its decision of November 29, 2002 setting out a vast number of compliance orders, the Tribunal clearly stipulated that "the Deputy Minister of the Ministry of Correctional Services shall bear the ultimate responsibility for the implementation of these orders". In 2007, when the Ministry continued to breach the various orders, this tribunal again fixed the Deputy Minister with "ultimate responsibility", this time for the implementation of "the Tribunal's orders".

[111] The Ministry takes a different view. Ms. McIntosh argues that Order 4 in the 2007 decision "makes the Deputy Minister responsible for the implementation of the Tribunal's substantive orders and not for disclosure orders". I think her observation is basically correct. I do not read the board's substantive orders as imposing a personal obligation on the Deputy Minister to identify arguably relevant documents and assure their production for the purposes of the board's hearings. However, the substantive orders set out earlier require more than simply the provision of information. To have the "ultimate responsibility" for implementation does not mean that upon the delegation of relevant tasks the Deputy Minister may wash his hands of the matter.

[112] Although what is vital in interpreting the orders is what I wrote and not what I may have meant to write, I happen to think the two are the same. In that regard, the structure of Order 4 of 2007 is crucial to its interpretation. It does not stipulate "The Deputy Minister shall bear ultimate responsibility". Rather, it says: "The Deputy Minister of Correctional Services, *who bears the ultimate responsibility for the implementation of*

the Tribunal's orders, shall" do a number of particular things. Having penned that order I can say that the clause I have emphasized was inserted as an intended reference back to Order 15 of 2002, and I think that such is its plain meaning. The phrase "who bears the responsibility" is clearly a reference to someone who already carries that burden by virtue of something anterior. Those words did not create a fresh obligation; nor were they a re-imposition upon the Deputy Minister of the 2002 obligation, as though it would otherwise have expired even though the board remains seized of the matters. Their import is that, "having been made responsible for the implementation of orders, it is expedient" that the Deputy Minister shall do certain other specified things as well.

[113] To put OPSEU's submission to rest, it may be noted that what was sought by the Complainant in 2007 was not an order imposing ultimate responsibility on the Deputy Minister (that having already been done in 2002), but simply clarification of the Deputy Minister's existing responsibility together with the imposition of ultimate responsibility upon the Minister himself. Although I declined to impose active obligations on the Minister, Orders 4 and 5 are intended to provide the clarification sought. (See paragraphs [143] to [153] of that 2007 decision.)

[114] The source of the Deputy Minister's responsibility for implementing the board's orders remains Order 15 of the 2002 decision. That standing order imposes upon the holder of that office responsibility "for the implementation of *these* orders", and "these orders" are the substantive orders made in the course of these proceedings. They do not include disclosure orders and procedural rulings.

[115] Finally, I come to the express disclosure orders made in the course of the present round of hearings, the first of which is found in the Interim Decision of April 22, 2009. That decision contains four orders, two of which relate to the production of documents. The first is clear and unequivocal and there is no suggestion that it was not complied with. The second order is as follows:

> 2. It is hereby ordered that, by May 15, 2009 at the latest, the Ministry provide all parties and the intervenor with the information requested by the Commission to enable the preparation of a report regarding all of the

> matters referred to (at page 3) in paragraph 4, subparagraphs (1) to (6), inclusively, of the July 30, 2008 letter from the Commission's Director of Legal Services to the Executive Director of METRAC (the Metropolitan Action Committee on Violence to Women and Children) regarding the "Retention of METRAC for provision of Consulting, Monitoring and Evaluation Services with respect to Human Rights Tribunal of Ontario Orders".

[116] In relation to the scope of that April order, it may be noted that the most important of the documents alleged not to have been provided in a timely way is Exhibit 40—a July 2009 Confidential Report to the Deputy Minister for Correctional Services purporting to be an "Operational Review" of the Organizational Effectiveness Division (OED) established (in large part) to bring about the implementation of the board's orders. That document is dealt with repeatedly in the Complainant's Request and is tied to METRAC by Ms. Hughes in her submissions of October 4. Nevertheless, for the reasons I have given, no responsibility to produce it rested on the Deputy Minister by virtue of that interim decision. Indeed, since it requires the production of material by May 15, 2009, the second order in that decision expired before Exhibit 40 came into existence. However, the review of the operations of the OED, then headed by Assistant Deputy Minister Ralph Agard, was commissioned by Mr. Hope on April 13 as the result of a number of unsettling emails contained in Exhibits 48 and 51 asserting the existence of a poisoned environment in that Division. Those emails were found to be relevant, and they are linked to Exhibit 40 and the string of circumstances leading to the firing of Dr. Agard part way through his cross-examination as the Ministry's principal witness, and less than two weeks before that cross-examination was to resume.

[117] In his initial Request that a case of contempt be stated, the complainant wrote in reference to Exhibits 48, 51 and parts of 79 (in paragraph 34) as follows:

> These documents were received by the Deputy Minister in the period of February to March 2009. The existence of these documents was known to the directing mind of the Ministry, the Deputy Minister, prior to the pre-hearing in this matter in April 2009 and all documents were received by him before the Ministry commenced its case. The documents were not disclosed as part of the pre-hearing disclosure, nor part of the Ministry's September 15th disclosure of "all arguably relevant documents" pursuant

> to the further disclosure order of July 8, 2009 from the Tribunal, nor at any point prior to October 28, 2009. They were not provided to the Tribunal, the Complainant, the OHRC, METRAC ... nor to OPSEU, the intervenor. The documents were disclosed only in cross-examination on October 29 (ex 48 and 49 [*sic*] and November 30, 2009 (Ex 79).

[118] In her October 4 submissions, Ms. Hughes pointed out that she had discovered on her own a number of documents that should have been provided to METRAC and the parties. It appears to have been assumed that those documents (or some of them) had already been provided by the Third Party appointed in 2002 (whose monitoring function was taken over by METRAC), and it seems that the Commission and METRAC for that reason agreed with the Ministry that they were not required. Ms. McIntosh's response was as follows (transcript, p. 9508):

> I note that there was no allegation in the original request, as I read it anyway, that the Ministry had breached that April 22nd order. It was raised for the first time in reply that the Ministry had not provided all that METRAC wanted as that April 22nd order requires, and if that's the case, then obviously you have to go outside the order, itself, to figure out what it is that was required and the order has to be clear and unambiguous with respect to that, and ... you have to go into the negotiations between the Ministry and METRAC to figure it out, and if the Ministry has for some reason not provided something that METRAC wanted, which we submit is not the case, then that order is not clear and unambiguous.

[119] Since the Complainant's "reply" was given some days after the above comment was made, I take it that Ms. McIntosh misspoke when she said that Ms. Hughes "raised for the first time *in reply* that the Ministry had not provided all that METRAC wanted". Presumably, she meant to refer to Ms. Hughes' October 4 submissions. Contrary to Ms. McIntosh's reading of it, the Complainant's original Request contained a reference to METRAC, and reference to that monitoring agency was made in Ms. Hughes' oral submissions as well. However, while it is relevant information that should have been disclosed to the Complainant pursuant to substantive orders, I am of the view that the disclosure orders made in the Interim Decision of April 22, 2009 were not themselves the source of any personal responsibility on the part of Mr. Hope to produce the full range of documents therein referred to.

[120] The second disclosure order made by the board was delivered orally on July 8, 2009. The Ministry is of the view that it was neither clear nor unequivocal as required by the first "prong" of the *Prescott-Russell* test. That order was made in the context of a protracted discussion of production issues. (See transcript pp. 685-715.) It was made because some clearly relevant documents had surfaced unexpectedly and Ms. Hughes wanted to be assured that all arguably relevant documents would be made available, for which purpose she said an oral ruling would suffice. Then, in the course of discussing timelines, the following exchange took place:

> Ms. McIntosh: I'm quite comfortable saying that I will produce within a month anything that is arguably relevant to the two issues that I think we're going to be, or however many issues I think we're going to be addressing on September 11th and 15th, but I may need a little bit more time to produce everything that's arguably relevant, and I'm going to use my friend's letter, I guess, as a guideline.
>
> Professor Hubbard: Well, the 30 days, I think, would have as the end date the particular day of the hearing at which the matter will be dealt with. So some of these matters won't be dealt with until October, October 27, maybe. So that pushes the start date for the 30 days to run further down the road.

[121] The letter to which Ms. McIntosh referred is Ms. Hughes' letter of December 10, 2008, setting forth the Complainant's concerns and raising many of the issues to be dealt with (Exhibit 1A). However, prior to the July 8 discussion of production matters the list of issues had been augmented and set out (on June 16) in *McKinnon v. Ontario (Correctional Services)*, 2009 HRTO 862 (CanLII) as follows (in paragraph 6):

> ... In addition to the seven issues set out in his December 10 letter, six additional issues were identified in Ms. Hughes' May 27 e-mail compliance with the stipulation that the parties endeavour to identify the outstanding issues by that date. The complainant's complete list of issues (as of June 3) is as follows:
>
> 1. Evidence of Bad Faith
> 2. Training Issues
> 3. Compliance Committee Issues
> 4. External Investigators and WDHP process and complaints
> 5. SAROCC
> 6. Financial Issues

7. Return to Work Plan
8. METRAC Consultants Matters
9. Accountability Issues
10. Aboriginal Issues
11. Allocation of Resources, Financial Issues and Ministry Structures
12. Devlin Recommendations and their Implementation
13. Project 800 Review and other Reviews Relevant to the Orders

[122] It seems to me that it had become clear that all documents of arguable relevance to that list of issues were to be produced within a month (30 days) of the anticipated date on which the issues would be dealt with. However, Ms. McIntosh submitted (in paragraph 22 of her September 22 Response) that the lack of clarity of that oral order is made apparent by the following remarks made by me during our discussion of these matters:

> Professor Hubbard: ... And one of the difficulties about an order that says, "Produce everything that's arguably relevant," is that one has to determine who it is who is going to say what is relevant, what is arguably relevant.
>
> I am sure that the Ministry would be willing to produce whatever the Ministry and their counsel thinks is relevant. They may not produce certain documents and, after the fact, if those documents happen to surface, someone else might say, "Well, I think they were relevant."
>
> Then one might say, "Well, you didn't produce them. You weren't acting in good faith." But how do they determine what is arguably relevant without the argument having occurred and somebody having made the decision that, "Yes, they are relevant"? So there are problems there. ... But I certainly would not be inclined later on to abjure anyone for having not produced a document that they did not think was relevant and that somebody else, after the fact, thinks was relevant.

[123] Those comments acknowledge that whether a particular document is arguably relevant may be a matter of dispute; they do not suggest that orders to produce arguably relevant documents are fuzzy and futile. After all, the HRTO's Rules require timely disclosure of arguably relevant documents and it is a routine requirement in litigation; moreover, all litigators know full well what it entails. Indeed, in the *Marsden* case (*supra*), in which the Ministry was also the respondent, it was not contended that a case of contempt for failing to disclose arguably relevant documents could not be stated

because the HRTO's Rules requiring it to be done are inherently unclear and/or equivocal.

[124] Ambiguity was not introduced into the July order simply because in the course of a lengthy discussion (requiring 30 pages of transcript to record) I happened to comment on the difficulty that arises in subsequent disputes as to whether the relevance of a particular document should have been known. An order requiring the production of arguably relevant documents does not lack clarity simply because the relevance of a particular document may not be clear to the person in whose possession it is. Nor does a stated reluctance "to abjure" a party for not having produced a document sincerely thought to have been irrelevant diminish the clarity of the order to produce arguably relevant documents. Certainly, a party caught withholding a document of vital significance cannot be heard to say that the order was not clear because the adjudicator acknowledged that in some cases there might be difficulties in determining relevance in a subsequent dispute. In my opinion, the disclosure order of July 8 cannot be considered to be unclear and/or equivocal, and I think the following extracts from the discussion of the matter confirm my view:

> Ms McIntosh: ... And I am just concerned about, because we are talking about other documents that are out there that I haven't, frankly, investigated because of the time, the shortness of time of this thing starting, I am concerned about saying, "Yes, we'll do it all in 30 days," over the summer when I don't know what there is. I don't want to agree to that under those circumstances.
>
> I certainly want to agree that anything I'm going to refer to on September the 11th or 15th be produced. Anything else, if I can do that by August 11th, I will, as well, but I just don't know. And that's my concern about the open-endedness of the request.
>
> Professor Hubbard: Well, I think that you will have to encourage your client, in all of its manifestations and all of its officers, to think about what it is that's arguably relevant. I suppose that one meaning of "arguably relevant" is that you would not have to produce documents that no one could conceivably argue would be relevant. But I think these documents have to be produced and they have to be produced in sufficient time for counsel for Mr. McKinnon and the Commission to study them, so that they can prepare themselves to deal with them. The next hearing date is September the 11th?

> Ms. Merali [the then Commission counsel]: Yes. That's right [and the] 15th of September. ... And then we're back in October; October 1st and 2nd.
>
> Professor Hubbard: ... I think that if there's any chance that there will be cross-examination of Dr. Agard on September the 15th, the documents should be produced by August the 15th ... I would say that it is dependent upon when it is that he is likely to be cross-examined. So I think that those documents should be produced 30 days before the time of cross-examination. Is there anything further?

[125] In the course of her oral argument, Ms. McIntosh enlarged upon her submission that the July 8 disclosure order was not clear and unambiguous. She had the following to say in that regard (at page 9509):

> That brings me to the July 8th order that Ms. Hughes read to you from the transcript, and in our respectful submission, that order is not clear and unambiguous in two important respects. No. 1, it is not clear and unambiguous with respect of the content of what is to be produced, and I'll take you to this reference, but on that very day and in the course of your ruling, you specifically said that you recognized that the content was not clear and unambiguous -- you don't use those words, but you recognized there could be disputes about what was arguably relevant ... And then secondly, the order of July 8th is not clear and unambiguous with respect to timing, and basically, as I read it, what it came down to was you wanted to be sure that any documents that the Ministry was going to rely on or that Ms. Hughes needed were provided in time to avoid the problems in the previous McKinnon cases, as I understood them, I was not there, and that is that I understood that there were occasions when the proceedings had to be adjourned or witnesses -- the hearing had to be stopped or witnesses had to be recalled and so on. So the object was: Make sure that anything needed is going to be produced in time so that those situations don't arise.

[126] I have dealt with the contention that the July 8 order was made unclear and/or ambiguous because I happened to allude to problems in determining what is arguably relevant. However, in support of her contention that the order lacked both the clarity of content and the specific compliance deadline that she says is necessitated by the "clear and unequivocal" requirement, Ms. McIntosh went on to discuss these cases: *Stratford (City) v. Stratford Professional Fire Fighters, Local 534, I.A.F.F.* 1981 CarswellOnt 401, 23 C.P.C. 250; *Berge v. Hughes Properties Ltd.*, [1988] 5 W.W.R. 355; *Rado-Mat Holdings Ltd. v. Peter Inn Enterprises Ltd.*, 65 O.R. (2d) 299.

[127] Those cases have to do with the imposition of specific acts to be carried out by the alleged contemnor and, in my opinion, are simply not apposite to the circumstances before me. What was required to be done by the orders in question in those cases was not clear and, in one of them, neither was the time in which it was to be done. In the *Stratford* case, the order was the arbitrator's award itself, which happened to be expressed in terms the court found unclear. In the *Berge* case, the order was for the payment out of court of certain funds, but no date having been specified it could hardly be said, on some particular day, that because the funds had not yet been paid out the order had been disobeyed; there is a difference between orders "not yet fulfilled" and orders "disobeyed". In the *Rado-Mat* case, a series of specific orders was made against a landlord, which orders were both unclear in scope and declaratory in nature (*e.g.*, "It is Ordered and Declared that the landlord has an obligation ... to provide washroom facilities"). And, of course, declaratory orders are not enforceable by way of contempt proceedings.

[128] The orders that were breached in the cases to which Ms. McIntosh referred were what she would surely call "substantive orders". They were not disclosure orders imposing testimonial obligations. Ms. McIntosh's view seems tantamount to saying that all orders to produce arguably relevant documents and information are too vague to be enforceable. However, whether such disclosure orders impose testimonial obligations cannot depend on a tribunal's having identified the very documents to be produced. The suggestion that because it does not specify the documents in question "the content" of an order to produce arguably relevant documents is unclear overlooks the very reason for such an order, namely, that the other parties do not even know what relevant documents exist until they are produced, much less have the capacity to describe them.

[129] Ms. McIntosh noted in her September Response that "the disclosure requests have been onerous and the Ministry has made voluminous disclosure". Thus, one of the Ministry's contentions seems to be that, given the vast number of documents involved (of which those complained about are but a fraction) there were bound to be some that would be produced later than the Complainant would have liked, and knowledge of the

existence and relevance of every one of those hundreds of documents so as to meet that demand cannot reasonably have been expected. Surely, however, when examining each of the 13 issues listed in the June 16 Interim Decision, those Ministry employees charged with the task can be expected to find the documents related thereto and to make some judgment as to relevance (and, hopefully, not on the principle "if in doubt, leave it out"). While a failure to notice and/or disclose documents of marginal relevance when culling through an enormous amount of material can hardly be chalked up to wilful and deliberate disobedience, the failure to disclose in a timely way documents of startlingly clear relevance is another matter. Although Ms. McIntosh noted as well that all the documents specifically complained about in the contempt motion have in fact been disclosed, the issue is as to whether they were intentionally withheld for a significant time.

[130] The Ministry submitted as well that the problem of identifying relevant documents was in part caused by the board's decision to have the Ministry provide evidence first, that is to say, "out of turn". In that regard, Ms. McIntosh notes (in paragraph 23 of her September 22 Response) that:

> Because the Ministry was required by the Order of the Tribunal dated April 22, 2009 to call its witnesses first, the Ministry was in the difficult position of having to surmise what documents might be considered relevant to issues not identified in Exhibit 1A. Ministry counsel noted on a number of occasions the difficulty that leading its evidence first would pose with respect to disclosure of documents.

[131] While the unusual order in which the evidence was required to be presented may appear to pose difficulties with respect to disclosure of documents, the need to reverse the order of presentation was in large part because the Ministry knew with sufficient particularity what the issues were and all the documents relevant to those issues were in its possession and control but were unknown to and inaccessible by the Complainant. The full explanation for proceeding in this manner is found in *McKinnon v. Ontario (Correctional Services)*, 2009 HRTO 862 (CanLII), which decision went unchallenged.

2. The Documents at Issue

[132] The documents of concern raised by the Complainant in his contempt motion are conveniently grouped by Ms. McIntosh (in paragraph 28 of the Ministry's September 22 Response) as follows:

> In the motion material, the Complainant complains about delayed disclosure of five documents or categories of documents:
>
> 1. Operational Review (Exhibit 40)
>
> 2. Anonymous emails (Exhibits 48, 51, and excerpts from Exhibit 79)
>
> 3. WDHP reports/complaints regarding Tribunal issues and Mr. McKinnon personally (Exhibits 285 and 275)
>
> 4. Documents regarding safe return to work (Exhibits 96, 219, 220, 263 and 129)
>
> 5. Documents relating to training sessions (Exhibit 10, Appendix B and Exhibit 8(1)

[133] As to items allegedly hidden or withheld that were discovered by Ms. Hughes through cross-examination or by rummaging through boxes of material to which she was given access, it can safely be said that "the Ministry" had an obligation to produce those documents in a timely way if they were arguably relevant (as, indeed, they clearly were). But since neither the Crown nor the Ministry can be held in contempt for unfulfilled obligations the question with which we are left is whether the Complainant has made out a *prima facie* case of contempt against Mr. Hope by reason of such failures.

[134] After considering the lengthy written submissions, the transcripts of three days of oral argument and the exhibits themselves, I have come to the conclusion that a *prima facie* case of contempt cannot be stated against Mr. Hope in relation to the untimely production of any of the documents referred to in items 3 to 5 of Ms. McIntosh's list of documents. In my opinion, it would add needlessly to the tedium of these reasons for me to rehash the evidence and arguments made in regard to them. For reasons already given, none of the board's orders placed Mr. Hope under a personal responsibility to

identify and disclose those particular documents, and, in any case, the evidence does not support a finding that he deliberately and wilfully withheld any of them or was reckless in that regard. Thus, nothing in his behaviour brings him within the scope either of clause (b) or of clause (c) of s. 13(1) of the *SPPA* in relation to the documents in items 3 to 5.

[135] The scope and application of the orders alleged to have been breached having been examined, the question remains as to whether Mr. Hope had a responsibility to produce the documents referred to in items 1 and 2 on Ms. McIntosh's list.

[136] I have already indicated that, in my opinion, neither s. 29(1) of the *Public Service of Ontario Act* or the HRTO's Rules requiring the production of arguably relevant documents imposes a personal testimonial obligation on the Deputy Minister. I have also pointed out that the board's substantive orders of 2002 and 2007 do not have that effect either. It is clear as well that the disclosure order of April 22, 2009 did not apply to Mr. Hope. Finally, I have concluded that, while the express disclosure order of July 8, 2009 applied to him in his role as a witness, it did not impose a personal obligation on him as Deputy Minister to produce documents. Thus, it remains to consider whether in his capacity as a witness Mr. Hope was in breach of any testimonial obligations in respect of items 1 and 2 on Ms. McIntosh's list of documents that would bring his behaviour within the scope of clause (b) of s. 13(1) of the *SPPA* and/or whether he did "some other thing" in his capacity as Deputy Minister regarding those items that would bring him within the scope of clause (c) of that provision.

3. The Setting in which Mr. Hope's Responsibilities must be placed

[137] In considering Mr. Hope's testimonial obligations regarding Exhibits 40, 48 and 51, it is instructive to review what it was that led to his being called as a witness in these proceedings. This background information is relevant as well in considering whether he had a responsibility as Deputy Minister to disclose the information in question.

[138] In accordance with the consent order set out in the board's unreported Interim Decision of November 6, 2007 the role of the Third Party appointed in 2002 was ended on the understanding that the Ministry had put in place an effective team of experts to see to the implementation of the board's substantive orders for which the Deputy Minister retained the ultimate responsibility. That team consisted of Ms. Fiona Crean, who was appointed for a two-year term as Assistant Deputy Minister of OED, and Dr. Ralph Agard, who was appointed a Director in that Division. The Deputy Minister at the time, Deborah Newman, gave the Complainant certain assurances as well.

[139] The current round of hearings was preceded by the pre-hearing conference of April 20, 2009 at which it was accepted that Dr. Agard, as the Assistant Deputy Minister in charge of the OED, would attend to address many of the issues raised by the complainant. Dr. Agard had given extensive evidence as an expert witness in the hearings leading up to the board's 2002 decision and, in the process, had gained Mr. McKinnon's confidence. Indeed, what persuaded the Complainant to agree to the consent order of November 2007 was the prospect that Dr. Agard's special expertise and experience in combination with that of Ms. Crean would hasten the McKinnons' return to their workplace. Dr. Agard was presumed to have more knowledge of the McKinnon file than anyone else, and the Ministry's hope (if not expectation) must have been that his evidence would demonstrate the progress that had been made and would set to rest the doubts raised by the Complainant's latest series of allegations. As might be expected, the position maintained by the Ministry throughout these current hearings has been that the board's substantive orders were being implemented as promptly and fully as possible; all was going well; the Complainant's allegations were totally unfounded.

[140] One of the allegations made in the Complainant's letter of December 10, 2008 (Exhibit 1A) was that Mr. Hope's sudden termination of Ms. Crean's employment after he replaced Ms. Newman as Deputy Minister was evidence of bad faith in the long-delayed implementation of the board's orders. I had occasion to refer to that matter as follows in the Interim Decision of June 16, 2009 (in paragraph 12):

> In her December 10 letter, Ms. Hughes indicates that the complainant and the Commission were persuaded to join in the request for the consent order made in November 2007 by promises made regarding the role to be played by Ms. Crean, the then newly-appointed Assistant Deputy Minister, Organization Effectiveness. According to the complainant, her assurances (along with those of the Deputy Minister) as to a more rapid and efficacious implementation of the orders led the other parties to agree to a new approach. ... As said in the December 10 letter:
>
> > … Ms. Crean was to meet personally with Mr. McKinnon and was to personally oversee the implementation of his Orders, including personally preparing and overseeing the training. … The result was that the Ministry convinced the Ontario Human Rights Commission and the Tribunal that they would be able to proceed more effectively and in a more timely manner with the ADM Ms. Crean working on overseeing the implementation instead of the Third Party ... Then the Ministry replaced their Deputy Minister who then quietly and unceremoniously terminated Ms. Crean.

[141] Following several days of direct evidence, Ms. Hughes' cross-examination of Dr. Agard began on October 1, 2009. It continued the next day and was scheduled to resume from October 27 to October 30. However, it transpired that Dr. Agard was dismissed as Assistant Deputy Minister on October 5, and a few days later the other parties were informed by the Ministry that Dr. Agard would be unable to appear. In an atmosphere of confusion and frustration, a flurry of emails back and forth disclosed that Dr. Agard's firing had led him to see a doctor because of emotional distress, and to retain a lawyer as well regarding his dismissal. (That lawyer appeared on his behalf when Dr. Agard finally returned in January of 2010 to complete his evidence.) A summons was eventually issued requiring Dr. Agard to attend at 10:00 a.m. on October 27, and the parties were given vague information regarding his medical issues. However, Dr. Agard did not attend when the hearing resumed on October 27.

[142] After spending the morning of October 27 hearing the submissions of the parties regarding this contretemps I ended that session as follows (beginning at p. 1306 of the transcript):

> Professor Hubbard: I am not suggesting that he [Deputy Minister Hope] come this afternoon if it is extremely difficult for him to gather together all of the information that he would need to impart to us, but I think that he

> ought to be able to gather that information together for tomorrow and, in the meantime, I think it rather demeans the process that we have been going through to hear someone else.
>
> I am extremely upset. I'm agitated by what has occurred, and I do not want to sit here as though it is business as usual. In normal circumstances, there would be no problem in hearing some other evidence because of some problem that has arisen. The sequence isn't all that important; but what is important, I think, is the dignity of the Tribunal and the dignity of the parties, and I am not prepared to hear other evidence until we get to the bottom of this.
>
> So I think the best thing to do, because it's 11:45, is not to anticipate that Mr. Hope can be here this afternoon but to expect him here tomorrow morning; and that I am ordering. I assume that I have the jurisdiction to make such an order, and if he is not here, then the consequences of failing to comply with that order will follow. That being said, I think, perhaps, we can stand adjourned until tomorrow morning at 10 o'clock.

[143] Thus it was that the Deputy Minister came to be a witness in these proceedings. When Mr. Hope appeared on October 28 to answer questions regarding Dr. Agard's dismissal he identified the documents marked as Exhibits 40, 48 and 51. Prior to his being ordered to appear, he had no testimonial obligations regarding those (or any other) documents, a failure to comply with which might run afoul of clause (b) of s. 13 of the *SPPA*. Since he appeared before the board on such short notice, bringing those documents with him, I see no basis for finding him in breach of his obligation as a witness to produce them. It follows that there can be no *prima facie* case of contempt to state against Mr. Hope, unless as Deputy Minister he was in breach of an obligation to inform the parties earlier about Exhibits 40, 48 and 51.

4. Were the Orders in Question Clear and Unambiguous?

[144] Exhibit 40 (described by Ms. Hughes as the "smoking gun") is the principal item in the Ministry's list. It is an 18-page document entitled "Confidential Report to the Deputy Minister for Correctional Services: Operational Review Organizational Effectiveness Division". That Report paints the OED in very negative terms, as revealed by the following excerpts from that document (at pages 8 to 11). Although the reported comments of the interviewees are not proof of the truth of their assertions, they clearly

demonstrate the scope of discontent, confusion and frustration of the staff and their perception of chaos and ineptitude in an organization dedicated to organizational effectiveness, and they led to recommendations and action intended to rectify an apparently dysfunctional Division:

> Strategic Direction: There were numerous concerns relating to the lack of a clear, shared understanding of OED's current vision, mandate, priorities, customers/clients and how best to serve them. ... Overall, people aren't sure how they fit into the new organization.
>
> Leadership: The overwhelming majority of interviewees expressed the belief that there is no accountable, principled and ethical leadership in OED at this time and that integrity is missing from management practices and behaviour. They believe that those in positions of power practise [*sic*] leadership through the use of positional power and intimidation. ... Almost all current and former staff to whom the review team spoke reported that at some time they had been subjected to rude, aggressive, disrespectful or bullying behaviours by either the ADM and/or one of his inner circle confidantes ... OED staff reported that Dr. Agard was consistently absent from the Division and therefore no one was in charge. As a result, it is almost impossible to get direction, clarification or assistance and consequently, issues persist long beyond what should be considered reasonable. ... The clients are thought to be suffering. ... There is no question that OED is an environment in which there has been considerable change and uncertainty in past months. Staff said that they were particularly taken off guard and shocked by the abruptness of the former ADM's [*i.e.*, Ms. Crean's] departure. They feared "they could be next" and there was little communication from the ADM to the contrary. ... Structural and staffing changes subsequent to the former ADM's departure caused many OED staff to feel anxious and confused about what lay in store for the Division and why it was all happening. Many reported that OED staff who used to love coming to work and believed in what they were doing now felt disheartened, jaded, cynical and suspicious of one another.
>
> Business Processes: OED members overwhelmingly reported that senior managers are dismissive of OPS policies and procedures such as staffing, procurement, performance management and business continuity [and] do not possess the willingness, experience or knowledge to follow even basic OPS systems.
>
> Structure/Staffing Model: Staff reported there was no consultation around the organizational restructuring and complained that it simply didn't make sense, e.g. mismatch of skills and classifications to new responsibilities. ...

> Communications: Many of the staff raised a broad range of concerns in the area of communications, e.g. people coming into the Division with no announcement as to their qualifications or any process as to how they arrived there, no explanation or communication in relation to people leaving ...

[145] For reasons already given, the only orders of the board that can be taken to have imposed on Mr. Hope as Deputy Minister an obligation to see to it that the documents in question were produced as soon as he knew of them are the substantive orders referred to above: Order 15 of 2002 and Orders 4, 5 and 13 of 2007. Those Orders made Mr. Hope, as Deputy Minister, personally responsible for the implementation of all the other substantive orders of the board. They also made him responsible to: (a) "ensure that all Ministry staff understand and comply with the Tribunal's orders", (b) "keep the parties informed of all matters that relate to the interests of the Complainant in the context of these reasons", and (c) "inform the Complainant promptly of issues of safety and racism that [there is] reason to believe may affect his and his wife's decision regarding the timing of their return to work".

[146] In my opinion, those orders are clear and unambiguous, and they imposed an obligation to see to it that the Complainant was informed of the situation in the OED.

5. The Matters of Knowledge of and Compliance with the Orders

[147] The evidence, including his own testimony, show unquestionably that Mr. Hope had actual knowledge of the orders addressed to the Deputy Minister and was fully aware of the responsibilities they imposed upon him, and it shows as well that he knew of the relevance of Exhibit 40. Although the obligation is to provide relevant information within a reasonable time of learning of it, the true state of the OED was not revealed during Dr. Agard's testimony, nor was the Operational Review Report produced until October 28, 2010. Quite clearly, the orders addressed to the Deputy Minister were not complied with regarding these matters.

[148] Mr. Hope was alerted by the emails in Exhibits 48 and 51 to the possibility of serious problems plaguing the OED under Dr. Agard's stewardship, and those problems

were of sufficient import that, having been instructed or advised by the Secretary of Cabinet to look into the matter, in April of 2009 the Deputy Minister commissioned an investigation of the situation. He learned in June of the contents of the Confidential Report and he had the final document in hand in July. Although it is long, I think it necessary to set out the following exchanges that occurred in the course of Mr. Hope's testimony on October 28, 2010 in relation to the production of Exhibit 40 (pp. 1444 ff.):

> Ms. Hughes: Let me ask you this. I'm going to continue to go through this, but you didn't send this report to METRAC, did you?
>
> A. That's correct.
>
> Q. And you didn't send it to the Tribunal, did you?
>
> A. That's correct.
>
> Q. And if you had read the Tribunal orders, you would read that there's a constant refrain from Professor Hubbard that he expects -- when there's issues, when there's problems, that he be notified promptly. Would you agree with me you didn't notify him at all other than when you were forced to come to give evidence here today? Is that right?
>
> A. Professor Hubbard was not notified of this particular document, that's correct.
>
> Q. And indeed, if Ralph Agard had agreed to play ball with you to settle his matters, this would never have come to light, would you agree with me? He's the author of his own misfortune. He didn't agree with you, and so therefore, this document comes out; is that right?
>
> A. I don't know if it would have come to light or not.

[I pause here to draw attention to two answers that belie the Ministry's suggestion that Mr. Hope believed that the document had been disclosed by Dr. Agard, relieving him of the need to do so. If that had been his belief, he would hardly have said that "Professor Hubbard was not notified" and that he did not know whether the document had "already come to light".]

> Q. Well, you certainly had no plans to give it to the Tribunal; is that right?
>
> A. That's correct.
>
> Q. You didn't instruct Ms. McIntosh to put it before the Tribunal; is that right?

A. That's correct, but the review was well known, and so you may have raised a question about it, and I would have answered that question forthrightly.

[I pause again to note that, although the staff of the OED, having been questioned by the investigators, knew of the review process, I find disingenuous the suggestion that the investigation was common knowledge and that the Complainant might therefore raise questions about that process and about the "confidential" report as well. In fact, Mr. McKinnon had no way of knowing about these matters. Furthermore, it was not explained how it was that Mr. Hope, who had no intention of attending voluntarily as a witness, thought that questions to which he said he would give forthright answers might be put to him regarding this (or any other) matter.]

Q. Yes, that's a -- I certainly may have asked you a question. I hope I would have asked you questions and it would have come out, but you weren't to give evidence until yesterday when it was ordered by Professor Hubbard that -- well, you were not put forward voluntarily as a witness. It was an order. You were here pursuant to an order of this Tribunal, is that correct, Mr. Hope?

A. Absolutely.

Q And certainly through Ralph Agard's evidence on behalf of the Ministry, and he gave evidence in July and he gave evidence in September and he gave evidence in October. No time on behalf of the Ministry did the evidence come in through him about this report; is that correct?

A. I'll take your word for it that it did not come into evidence.

Q. Thank you.

Professor Hubbard: Before you go on, I have a question, if you don't mind, about this matter. This document, Exhibit 40, has been around for some time, and there was an order of the Tribunal for full disclosure of any documents that might be relevant, and I'm just curious as to why this document was not amongst them.

You have indicated that you -- at least that's the inference I draw from your last answer -- that you were not going to volunteer this document, but if you had been asked about the matter, you would have forthrightly provided it. But it's not a question of volunteering, sir. It's a question of the Ministry having an obligation to inform its counsel as to all relevant documents of which it is aware so that counsel can provide them.

What I've experienced over 14 years [in these same proceedings] is that

counsel have -- for the Ministry -- have done their utmost, but they have not, themselves, received the things in order to pass them along.

The Witness: This -- I considered this report to really be a personnel matter, an issue that arose through the anonymous e-mails. I did not provide this report to frustrate the Tribunal in any way. This arose as a result of the anonymous e-mails, and I took immediate action to determine what was going on in OED to set it back on its right course.

Professor Hubbard: Okay. That provides an explanation, but I take it you would agree with me, from the questions that have been put to you and the answers that you have been giving and the contents of this document itself, that it really is highly relevant. It may not have appeared to you that way. It might have appeared to you as, "Well, this is a personnel matter. I don't have to tell Ms. McIntosh about it". But I think, on reflection, you might agree with me that it is relevant, highly relevant. Okay. You can go ahead, Ms. Hughes.

By Ms. Hughes:

Q. You nodded your head, so you agree it's highly relevant?

A. This is an important document for Professor Hubbard to hear, yes.

Q. And particularly given that Professor Hubbard's orders led to the OED and that we have ongoing issues about the OED. There's no way that this can be not relevant to it. It's all about the OED, is it not?

A. Absolutely. This is about OED.

6. The Matter of Delegation

[149] The following assertions deflecting responsibility from Mr. Hope for any failure to comply with the board's orders of 2002 and 2007 that were directed specifically at the Deputy Minister are made in the September 22, 2010 Response to the Request for an Order (paragraphs 29, 30, 31, 35 and 36):

> 29. The decision not to disclose the Operational Review was that of Dr. Agard. In doing so, he was not acting on the direction of the Ministry or of the Deputy Minister.

[As it is capitalized, presumably the "Operational Review" referred to is the report itself (Exhibit 40) and not the investigation.]

> 30. Dr. Agard was in charge of instructing counsel for the Ministry generally, and in charge of providing counsel with documents for disclosure in particular.

> 31. For example, in an e-mail to Deputy Hope dated June 11, 2009, Dr. Agard advised that he was “pulling together a small OED team” to respond to the Tribunal proceeding.
>
> 35. The Deputy Minister did not know that the Operational Review had not been disclosed. On the contrary, he testified that he thought it had been disclosed.
>
> 36. The Ministry did not suppress the Operational Review Report. Neither the fact of the operational review nor the Operational Review Report were secret. The operational review was announced to all staff. The fact that the Deputy received a draft Report and subsequently a final Report was announced to OED staff.

[150] The evidence in support of paragraph 35 referred to in the Ministry’s written Response is that of Mr. Hope, and it is as follows (transcript, pp. 2808 to 2809):

> Q. ... Now, you also told Ms. Hughes that you had another discussion with Dr. Agard about whether the Operational Review [Exhibit 40] came up, or another exchange with Dr. Agard. You remember talking to Ms. Hughes about that?
>
> A. About whether the Operational Review came up? You mean, over our course of time together?
>
> Q. Whether it came up in his testimony?
>
> A. Yes.
>
> Q. Yeah. All right. And so can you tell us roughly when that exchange would have happened?
>
> A. No, I can't tell you that.
>
> Q. All right. Well, you had your Operational Review meeting with Dr. Agard on July the 6th.
>
> A. Yes.
>
> Q. And he was testifying in the next couple of days here, the 7th and 8th. Would it have been around that time or would it have been at later hearing days in September or...? I guess not October, but in September?
>
> A. Yeah. I, I don't know when I would have had those conversations with him about it.
>
> Q. And what did you understand his response to be? Like, did he say it did come up and it had been dealt with satisfactorily or it didn't come up or what did you understand him to say?
>
> A. If you just give me a moment on this, I need to... Umm. My general recollection now was that it did come up and he did speak to it, umm, but

> he didn't give the specifics here, as I -- as I understand or recall his response, that he didn't give the specifics of the review and the e-mails and all the rest of that. It was really just around, I think it was about his leadership. That's all I can recall.

[151] As Ms. Hughes pointed out in her submissions, that exchange does not indicate that Mr. Hope believed that Exhibit 40 had been disclosed and that, therefore, his personal obligation to do so had been discharged. The proper inference to be drawn from that evidence even taken in isolation is that Mr. Hope knew that "the specifics of the review" had not been disclosed but had the impression that Dr. Agard might have said something about his (Dr. Agard's) leadership having been discussed. However, as seen, Mr. Hope said that "Professor Hubbard was not notified" and he did not know if that document would have come to light had he not been required to testify. Ms. Hughes went on to call to mind that when I questioned Mr. Hope about the failure to disclose Exhibit 40 sooner "his explanation wasn't, 'Oh, I thought it had been disclosed'. ... he gave you this 'Oh, it's a personnel matter' explanation, then you say 'but it's relevant' and then he agrees, it's not only relevant, but highly relevant". Ms. Hughes had the following to say regarding paragraph 36 of the Ministry's Response (transcript 9779):

> Now, I think for them to claim that OED staff knew about the report does not mean that it was disclosed to the Tribunal. The point is to bring this to the attention of the Tribunal, to bring it to the attention of the parties in these proceedings. The OED staff are not parties to the proceeding, and moreover, I would ask you to recall -- do you remember I asked Nils Riis and Devika Mathur about the actual matter, and they said, "Well, we've never seen the report. We've never been given the report". So they too -- even the OED staff had never seen the report, and what they were given is this meeting -- remember there was a meeting with a memoranda dated April 17th -- and so they were not given the particulars of it, and they were told that this new team was coming in to replace the IST. So I think it -- even on their characterization, the operational review report was never given to the OED, and it certainly was not given in these proceedings as part of the disclosure.

[152] Although it may be necessary to delegate detailed tasks involved in implementing board orders, the responsibility to ensure that it gets done remains that of the Deputy Minister. That responsibility entails the selection of reliable delegates and the continued confidence in their dependability to carry out the board's orders on his behalf. In that

regard, the following statement made by Justice Côté in *Alberta (Director, Child, Youth & Family Enhancement Act) v. M. (B.)*, 94 Admin. L.R. (4th) 295 (paragraph 27) is of considerable significance:

> But it is very different when a court judgment or order is given directing someone to do something. Then doing nothing is not an alternative. Simply doing nothing is itself contempt. Furthermore, it is not enough to take feeble and ineffective steps. For example, to simply ask someone else to follow the order without sufficient steps to ensure that that person is reliable, understands the task, will give it sufficient priority, has sufficient recourses and understanding, and so forth. In other words, negligent or inadequate attempts to obey the court order or to obey it in due course, are themselves contempt of court. Such a failure to obey by relying carelessly on others is in no sense vicarious liability. The duty is that of the person commanded.

[153] In *Ouellet* (*supra*) the Court of Appeal of Alberta confirmed the trial decision of Côté J. and made the same points regarding delegation, but in even stronger terms, as the following extracts from its decision show:

> ... An official cannot relieve himself of ultimate responsibility to comply with court orders by delegating that responsibility to others. When an order specifically directs the public officer to do something, that person is responsible regardless of any delegation.
>
> In this context, the Director retains the authority granted him in child protection matters, even though the day-to-day operational management of files has been delegated to others in the Authorities. As the chambers judge correctly noted, the Supreme Court of Canada has held that "delegation, as that word is generally used, does not imply a parting with powers by the person who grants the delegation" [citations omitted]. The delegator retains his or her full original powers. The Director continues to be named as a party to court proceedings and, in our view, the person occupying that office retains responsibility for compliance with orders made in those proceedings, assuming he or she has the knowledge of the order required by *Bhatnager*.
>
> …
>
> Delegation may be a reasonable step in one's exercise of due diligence, but it does not relieve the delegator of all responsibility. As was noted in *Michel v. Lafrentz*, 1998 ABCA 231, 219 A.R. 192 at para. 24, "[a]n order of a court to do an act requires reasonable care in doing the act personally, or in delegating the matter to suitable responsible persons,

> and then checking to see that it has been carried out in a prompt and proper fashion". If the subordinates who are instructed to implement the order do so, there will be no contempt. If the subordinates fail to do so, the delegator (who is ultimately responsible) must show that his or her selection and supervision of the subordinates reflected "due diligence", notwithstanding that failure.
>
> ... Delegation, without reasonable care and due diligence in following up to ensure compliance, would not provide the Director with an "adequate excuse" for failing to follow a court order.

[154] It is clear from the evidence already reviewed that by June of 2010 there was strong reason to doubt Dr. Agard's ability to lead the OED, and Mr. Hope testified that he had lost confidence in Dr. Agard by late August, long before he was scheduled to resume his direct evidence. (See transcript, pp. 1372 ff.) Yet, Mr. Hope did not report any of this to the parties or to the board as he knew he was required to do by the board's substantive orders. Instead, he permitted Dr. Agard to continue as the Ministry's spokesman until the following October—and then, not in order to put an end to his direct and misleading evidence (as Dr. Agard later admitted it to be), but only after a day and a half of cross-examination.

[155] In my opinion, Mr. Hope cannot claim that the obligation to decide whether to produce Exhibit 40 rested solely with Dr. Agard. A Deputy Minister may trust reliable subordinates to provide timely information to those to whom he is required to give it, and "if the subordinates who are instructed to implement the order do so, there will be no contempt". However, it is simply untenable for Mr. Hope, on whom the duty is directly imposed, to claim that he reasonably relied on Dr. Agard (whom he no longer trusted and contemplated firing) to disclose highly relevant and inflammatory information—information that reflected badly on the would-be messenger whose reluctance to convey it was therefore to be expected; information, moreover, that belied the Ministry's "all is well" posture, and which information Mr. Hope testified he had no intention of volunteering despite his obligation to do so.

[156] If, as was the case here, the obligation imposed by the board is not fulfilled, "the delegator (who is ultimately responsible) must show that his or her selection and

supervision of the subordinate reflected 'due diligence', notwithstanding that failure." Not only did the respondent Ministry fail to show that (assuming Mr. Hope chose him to be his emissary in this matter) his selection and supervision of Dr. Agard as his delegate reflected "due diligence", but the evidence is to the contrary.

[157] It is beyond question that Deputy Minister Hope failed to keep Mr. McKinnon informed as required by the board's clear and unambiguous orders. It is abundantly clear as well that some of the information that he knew about and failed to provide to the Complainant was of crucial importance in the current round of hearings and would affect its progress and the conclusions that might be reached. It is also clear that he knew of its importance in that regard: "this is an important document for Professor Hubbard to hear", he admitted.

[158] There is a final and telling point regarding whether Dr. Agard had taken over the sole responsibility to inform the Complainant about Exhibit 40. Although Dr. Agard knew a review had been conducted and was painfully aware that he had been stripped of much of his authority, it appears that he had not actually seen the Confidential Report itself and had no clear idea as to what it contained. That being so, he could not be expected to provide Ministry counsel with a document he had not yet seen so that it might be disclosed to the parties during the course of his testimony. Even assuming Dr. Agard had had a copy of the Operational Review Report all along, it would be fanciful at best to suggest that Mr. Hope expected and wanted him, as the Deputy Minister's delegate, to hand it over to the parties in fulfilment of the Deputy Minister's obligations under the board's orders.

[159] There are two extracts from the transcripts that lead to the conclusion that Dr. Agard did not have a copy of the document to provide to Ms. McIntosh, let alone to deliver to the parties in accordance with the board's orders and pursuant to some supposedly delegated duty to do so. The first is the following exchange (at page 9771 of the transcript) that occurred between counsel for the Complainant and counsel for the Ministry regarding paragraph 31 of the Ministry's written Response:

Ms. Hughes: And then they indicate [in paragraph 31] that: “For example, in an e-mail to Deputy Hope dated June 11, 2009, Dr. Agard advised that he was 'pulling together a small OED team' to respond to the Tribunal proceeding.” And that's all that they quote from that. I think when you read the whole thing, you'll see it is clear he's reporting to you what he's doing and then it's working with Legal. He is not acting on his own as this little rogue who then expresses evidence.

Ms. McIntosh: I'm not sure what my friend is getting at here, but Dr. Agard's evidence was that he didn't tell me about the operational review until September, so I certainly had no role in not bringing forward the report of the operational review.

[160] Had Dr. Agard told Ms. McIntosh that there was a confidential operational review report (now Exhibit 40) then, surely, she would have reminded him of the obligation to disclose it. Thus, I assume she was informed by Dr. Agard that a review was being (or had been) conducted, and that (since she questioned him in that regard in direct evidence) he told her as well about the role of the triumvirate that had been parachuted into the OED.

[161] The second extract from the evidence in relation to this matter (with irrelevant interjections removed) is from the transcript of Ralph Agard’s testimony on January 20 in which (at pp. 3431 ff.) he is being asked by Ms. Hughes about Exhibit 40:

Q. And you know it [Exhibit 40] is in existence?”

A. I only read, in detail, that document past October 5th [*i.e.*, “after” that date]. I did not know -- I knew it existed, but that it was shrouded in the Deputy Minister's office. I did not know the breadth of its circulation. For instance, I'm not sure whether other ADMs had that. I did not personally have a copy.

Q. I'm asking you who made the decision not to disclose it?

A. Well, I would have to assume that it's the, umm, Deputy Minister. He knew, he knew that we were supposed to be providing all relevant documents and --

Q. Just let me stop you there. How did he know that?

A. He was told that. When the, when the disclosure order came, I identified and I informed him that we had a disclosure order and that everything had to be brought forward.

Q. And what date ... because there's a letter of April from Professor

Hubbard and then there's an actual longer decision in June. Did you tell him about both? Just give us a date. ...

A. He would have known in April because, umm, the pre-hearing really determined that we had to go first. I gave him that information and I also told him that there's a disclosure order that we have to comply with.

Q. And what did you tell him the disclosure order was?

A. For all materials relevant to, umm, to this proceeding.

Q. ... We don't get the OED report until Jay Hope is forced to give evidence in these proceedings and your understanding is -- who made the decision not to release, that would be Jay Hope. Is that right?

A. It was in the Deputy's purview, if you know what I mean. Like, in April, the, umm, the operational review had just commenced. I was of the view, and I think that during that period of time with respect to the disclosure, there was some question about what's relevant and what's not relevant. I am not a legal mind to determine what's exactly relevant, but my common sense tells me that there are certain documents that are, that are relevant ... And the relevancy was, in particular, I think, at the Ministry, what we were considering was whether the relevance was to the items contained in your letter of December the 10th.

Q. In terms of relevance we had heard days of evidence about the OED, days of evidence when you went on about the structure, your roles, your responsibilities, etc. The -- there could be no doubt in anyone's mind and, in fact, I think Mr. Hope, at least, was forthright about this point, which is the operational review of the OED is relevant to these proceedings, and there could be no doubt about it. You gave evidence about the OED. Specifically, it talks about making changes to the OED. So if the OED is relevant, then a document that's about the OED and about changes to the OED is relevant. Would you not agree?

A. I'm -- yes, I agree. But I'm not, I'm not in any way suggesting that at the time that I testified, I had possession of, full knowledge of the contents of that particular document.

Q. And I've heard you say that. So you've said “I didn't have it”, and your understanding is that Deputy Hope knew that he had an obligation to disclose all arguably relevant documents?

A. Yes, he did.

Q. You're not taking issue that this document, Exhibit 40, is arguably relevant? You don't take issue with that, I take it? What you take issue with is who makes that decision?

A. I take issue with none of them. What I take issue with is, umm, is internal. The document certainly does not, umm, is not properly prepared, etc., etc. But I take no issue with, once it's prepared, that it has relevance.”

7. The "Deliberate and Wilful" Requirement

[162] The second "prong" of the *Prescott-Russell* test is that "the party who disobeys the order must do so deliberately and wilfully". Thus, the party alleging contempt must establish that the alleged contemnor intentionally did an act that is in violation of an order or knowingly failed to do that which was ordered. The Ministry did not contest the Complainant's view that what is required to satisfy that burden is to show that the act or omission was deliberate and not that the behaviour was meant to be in violation of the order. In support of that position, Ms. Hughes referred to two cases: *Sheppard v. Sheppard*, [1976] O.J. No. 2083 (C.A.) and *Peach Films Pty. Ltd. v. Cinemavault Releasing Inc.*, *supra*.

[163] In the *Sheppard* case the Ontario Court of Appeal said (in paragraph 15) that:

> We are all of the view, therefore, that in order to constitute a contempt it is not necessary to prove that the defendant intended to disobey or flout the order of the Court. The offence consists of the intentional doing of an act which is in fact prohibited by the order. The absence of the contumacious intent is a mitigating but not exculpatory circumstance.

[164] The following statements are found In the *Peach Films* case seen earlier in another connection (paragraphs 12 to 14):

> An order requiring a person to do an act may be enforced against the person by a contempt order. It must only be shown that the order clearly and unequivocally states what is to be done or not to be done, and that the person who disobeys the order did so deliberately wilfully. [*Prescott-Russell* cited.]
>
> It is not necessary for the person to have intended to breach or violate the court order to find contempt, although that will be an aggravating factor when determining the appropriate sanction. [*Sheppard v. Sheppard* cited.]
>
> The power and willingness of a court to punish for contempt of court is integral to the rule of law. The refusal and failure to obey the orders of the court strikes at the heart of the administration of justice, and disrespect for court orders, if permitted, will bring the administration of justice into scorn.

[165] It is worth recalling at this point the observations of Dickson, C.J.C. in the *British Columbia Government Employees' Union v. British Columbia (Attorney General)* case (*supra*): it is contempt if "a person, whether a party to a proceeding or not, does any act which may tend to hinder the course of justice or show disrespect to the court's authority". He also noted that the word "calculated [in the context of the 'deliberate and wilful' requirement] is not synonymous with the word 'intended'. The meaning it bears in this context is found in the Shorter Oxford English dictionary as fitted, suited, apt".

[166] This second constituent element of contempt of court is dealt with in paragraphs 24 and 25 of the Ministry's written Response, the first of which simply states that it is required that "the breach of the order in question be deliberate or intentional". The second paragraph states that: "Where the person to whom an order is directed believes in good faith that his or her actions are outside the ambit of the order, he or she is not guilty of contempt". The decision in *The Pas Transfer Ltd. v. Manitoba (Highway Traffic & Motor Transport Board)* (1974), 51 D.L.R. (3d) 292 (Man. C.A.) is referred to in support of that statement. However, since Mr. Hope testified that he knew of the orders and what they entail, he cannot be said to have been ignorant of his responsibility to keep the Complainant informed of what he knew to be a "highly relevant" document. He cannot be taken to have sincerely believed that he could in good faith withhold that information unless and until the Complainant got wind of it and confronted him with its existence—in which case he would have been "forthright" about it; otherwise, apparently, he would not have been "forthright". (According to my dictionary the opposite of "forthright" is "devious".)

[167] In the course of her oral submissions, Ms. McIntosh had the following to say regarding this requirement (transcript, page 9540):

> And let me say a couple of other things about requisite intention. It's different in my respectful submission for clauses (a) and (b) of section 13(1) than it is for (c), because under (a) and (b), you have to have that act of refusal to do one of your testimonial obligations, and in that case, you know, a refusal is a defying of authority, if I can put it that way. So it's not enough under (a) and (b) in my respectful submission to, for example, have reckless disregard. (a) and (b) require the actual deliberation both

> with respect to the act and the nature of the order. Under (c), the law seems to admit reckless disregard, and that may be so, and I'll let my friends argue that, but what the law does not admit of is a lack of knowledge of the existence of the order or more commonly what the order actually requires and that's, I think, made clear in the Bhatnager case.

[168] Of course, I have already found that Mr. Hope's conduct did not come within the scope of clauses (a) or (b) of s.13(1) of the *SPPA*. However, his behaviour does come within the scope of clause (c) of that provision, and at best it amounted to a "reckless disregard" of his obligation.

8. Conclusion as to the Establishment of a *Prima Facie* Case

[169] The board's orders are intended to rid the McKinnons' workplace of racism and to make it safe for them to resume careers that have been put on hold for several years. It is self-evident that the Deputy Minister's ultimate responsibility to implement those orders requires not only affirmative action, but carries with it the obligation not to undermine those orders by his own acts or omissions. In my opinion, he was remiss in both respects.

[170] The evidence given by Mr. Hope indicates that he had no intention to volunteer information about the true status of the OED, much less send a copy of Exhibit 40 or provide other relevant information (such as Exhibits 48 and 51) to the Complainant as required by the clear and unequivocal orders of the board. I find that his withholding of vital information was "deliberate", "wilful" and "calculated" within the meaning of the above cases. Although he is not a party to the proceeding, his conduct was clearly apt "to hinder the course of justice or show disrespect to the [board's] authority".

[171] It is well established that government officials, including ministers of the Crown, may be held personally liable for contempt for the breach of an order of a court or tribunal. Thus, as indeed the Ministry concedes, if the constituent elements of the offence are established, Deputy Minister Hope is not immune from such a finding.

[172] For all the above reasons I do not see how I could possibly not reach the conclusion that the Complainant has satisfied the burden that rests on him to establish a *prima facie* case that conduct on the part of Deputy Minister Hope as described in s.13(1)(c) of the *SPPA* occurred.

DISCRETION TO STATE A CASE TO THE DIVISIONAL COURT

[173] In its written Response, the Ministry submitted that "the Tribunal ought not to exercise its discretion to refer a case for contempt because of the following circumstances" (paragraph 81):

> (i) the Ministry has disclosed all of the documents complained about in the motion material;
>
> (ii) the requests for disclosure have been onerous and the Ministry has made voluminous disclosure; and
>
> (iii) despite repeated requests, the Complainant has not disclosed any documents in a timely way.

[174] Taking those submissions in reverse order, the third is totally unsupported by the evidence and the second is irrelevant in that the *prima facie* case that the Complainant succeeded in establishing (beyond a reasonable doubt, if my opinion in that regard is required) has nothing to do with clause (b) of s.13(1) of the *SPPA*. It has nothing to do with the long list of failures to disclose documents in a timely way for which the Ministry (had it not been immune) might have been found to be in contempt. Since all three submissions are premised on a finding that a *prima facie* case has been made out, the first of them pleads the fact of eventual disclosure as a mitigating condition and not, as earlier, as a complete defence. In the circumstances of this case I fail to see how that plea can be accepted.

[175] The OED had been established in part to see to the implementation of the board's orders, and the effectiveness of its work toward that end was of utmost importance to the Complainant. This is reflected in paragraph 40 of his Request, which is as follows:

> The Operational Review – Exhibit 40 contains shocking and extremely troubling allegations and findings that were highly relevant to the Tribunal proceedings. Its findings of the state of fear and confusion in the OED raise highly relevant concerns about the OED's ability to implement orders and address racism. The troubled state of the OED directly affected Mr. McKinnon and Ms. Shaw McKinnon as the staff were not able to implement the Tribunal orders, causing a setback to their implementation for many months, if not indefinitely.

[176] Mr. Hope knew that there were serious problems in the OED even before Dr. Agard was entrusted to give an accounting of the Ministry's successes and of its good faith endeavours to comply with the board's orders. Yet this task was placed in Dr. Agard's hands even while anonymous emails were circulating about racism, cronyism and unacceptable behaviour within the OED itself. During the course of the hearing, the accusations, feelings and beliefs of staff members described in Exhibit 40 were being gathered and unsavoury rumours of misconduct were swirling around the OED and its embattled Assistant Deputy Minister. Dr. Agard was not fired immediately, but he was effectively replaced in many essential functions by a triumvirate of former police officers in a *de facto* "reorganization" of the OED of which the parties were not advised and had no means to be aware of. Although Exhibit 40 was not disclosed until Mr. Hope took the stand, matters had reached the point when on October 1 (four days before he was fired) it was thought advisable to make an oblique and non-judgmental reference to the situation in the OED in order to disclose that change in Dr. Agard's authority.

[177] On the one hand, had Exhibit 40 never come to light, the outcome of the hearings might be very different than they are now likely to be, and a proper resolution of these matters might have been frustrated. On the other hand, had Exhibits 40, 48 and 51 been provided to the parties in accordance with the board's substantive orders, then Mr. Hope would certainly not have appeared before the board, Dr. Agard's evidence (assuming that he would have been put forward as the Ministry's spokesperson in that context) would have been quite different, and a less confrontational approach to dealing with the Complainant's allegations might have ensued. Most assuredly, the disclosure of that information in accordance with the Tribunal's substantive orders would have

avoided a great many days of evidence spread over months at great expense and considerable delay in bringing to an end this latest episode in a sorry saga.

[178] The following statement made by the adjudicator in the *Marsden* case (*supra*), should be revisited in the context of the board's discretion:

> The decision to state a case for contempt to the Divisional Court is one which is exercised by adjudicative tribunals in only the rarest of cases and where there are no other options available to appropriately respond to the actions of a party. The HRTO has never taken this step in its history.

[179] Of course, there is an immense difference between the long-running *McKinnon* case and the *Marsden* case, which involved but one failure to disclose an arguably relevant document early in the course of a first-time hearing. While it is noted in *Marsden* that the HRTO has never stated a case for contempt, it has certainly never had to consider doing so in a setting such as this. Moreover, the adjudicator in that case did not refer to previous decisions of the HRTO refusing to state a case, and I expect the Ministry would have drawn any such cases to my attention. There was nothing said as to whether the HRTO had ever been requested to state a case of contempt prior to *Marsden*, and it is not as though the HRTO has a history of steadfast refusal to do so.

[180] While it may be that the discretion to state a case ought to be exercised in only "the rarest of cases", the present case is undoubtedly such a case, and the history of broken promises over some fifteen years leaves no other meaningful option available. This is the fourth round of hearings into these matters. The second and third rounds arose as the result of allegations of bad faith and non-compliance with the board's orders—allegations that were vindicated before the board and confirmed by the Divisional Court and the Court of Appeal. The present round of hearings, which began in April of 2009 and has dragged on for two years, was brought about by similar allegations regarding which final submissions are imminent. One can but speculate as to whether the litigation in this marathon case, which began in 1996, would have ended long ago had the contempt process been recognized and applied.

[181] The position taken by the Complainant in the final paragraph of his Request for an Order During Proceedings does not appear to overstate the case:

> 114. It is our further submission that stating a case of contempt to the Divisional Court will facilitate the proper administration of the ongoing remedies which include monitoring of the Ministry. One cannot appropriately monitor the Ministry if it is not acting in good faith by disclosing the relevant documents and information. The failure to disclose has been the constant comment and admonishment by the Tribunal not only in orders but repeatedly at the hearing, over the course of several counsel acting on behalf of the Ministry. Such repeat admonishments have not worked. Unlike the *Marsden* human rights proceeding against the same respondent Ministry, this is a situation where respect for disclosure obligations and the Tribunal's process must be brought home by way of an order that will change the Ministry's approach to its obligations.

[182] One last point I would make regarding the exercise of discretion is a reference to Mr. Hope's memorandum of September 15, 2010 addressed to "All Correctional Services Division Staff". In the course of that memorandum, Mr. Hope makes this statement:

> Further to my memos of October 2009 and March 2010, where I spoke of the progress we were making on the implementation of these orders and my intention to be in full compliance by July 2010, I am very pleased to announce that following several months of diligent and concerted effort, we have collectively met that goal. The Ministry is now taking the position that we are in compliance with the HRTO orders but for those contingent on the employee's return to work.

[183] This memorandum was sent out without any vetting by METRAC, the monitor appointed for the purpose. It was circulated while hearings to determine extremely serious allegations were going on and while a motion to state a case of contempt against the Ministry and Mr. Hope was pending. Faced with the allegation that this memorandum, too, was shameful, the Ministry's reply was, in effect, "Well, we simply said that such was the position we are taking, and surely we're entitled to say that that was how it looked to us."

[184] One must pause to consider the actual harm and distress that memorandum caused the McKinnons—consequences that I think any reasonable person would have

foreseen. The Correctional Services Staff would not say to themselves: “This is simply the Ministry’s position and it may well be that some monitor (of whose existence they are probably ignorant) might disagree and that perhaps more is needed to be done before the long-suffering McKinnons can return safely to work”. Rather, they would most assuredly think, “What’s wrong with the McKinnons. Everything they asked for has been done. All that remains is for them to return. What are they, a couple of freeloaders?” That memorandum seems calculated (“apt”) to show Mr. McKinnon in a bad light and exacerbate his situation, not improve it.

[185] Mr. Hope’s memorandum is to be contrasted with Dr. Agard’s admissions made under cross examination that he had mislead the board about the successes allegedly achieved, and in the course of which the following exchange with Ms. Hughes occurred (transcript, page 3398):

> Q. ... you said in September, it's safe for Michael McKinnon to return to work.
>
> A. I believe, I believe it was at that time. And when I do provide my thinking, I think all of this will become clear.
>
> Q. But you don't think it's safe for him to return now. You couldn't even survive there, right?
>
> A. No, I couldn't -- I, I – my current opinion?
>
> Q. Yes.
>
> A. Is that what you're asking?
>
> Q. Yes.
>
> A. In my professional opinion, I would say no, it's not safe.

CONCLUSION

[186] Having concluded that the Complainant has established a *prima facie* case of conduct falling within s.13(1) of the *SPPA*, for the reasons set out in the last section, I have decided to exercise my discretion in the matter by requesting the Divisional Court to inquire into whether Deputy Minister Jay Hope is in contempt of the board's orders.

Dated at Toronto, this 8th day of February, 2011.

"Signed by"

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H. Albert Hubbard
Adjudicator