January 6, 2022 via Zoom video

Quinte et al v Eastwood Mall et al [Algo Centre Mall Collapse]

Motion by Ps (plaintiffs in the Foodland action and rep plaintiffs in the certified class action) for orders and directions that transcripts of witnesses (listed in Schedule "A") who gave evidence at the Belanger Inquiry into the Collapse of the Algo Centre Mall, as well as the documents filed as evidence at the Inquiry, be received in evidence at the trial or on motions for summary judgment in these proceedings.

Directions

1. I agree with Ds that Ps' request for a pre-emptive and blanket admissibility order as set out in their Notice of Motion is premature, unfair to Ds and contrary to the caselaw. The following direction, in my view, is more balanced and very much in the interests of both justice and efficiency. I direct that the transcripts of the examinations and cross-examinations of the list of witnesses who gave evidence at the Belanger Inquiry into the Collapse of the Algo Centre Mall (as set out in Schedule "A"), as well as the documents filed as evidence at the Inquiry, are *presumptively* receivable as sworn evidence at the trial or on a motion for summary judgment in these proceedings and can be used at that time as counsel see fit, *subject to specific objections about admissibility.*[1]

2. I agree with Ps, and in particular with the submissions of class counsel in their Reply Factum, that D's suggested interpretation of "participants" in s. 16 of the *Public Inquiries Act* is far too broad and would turn existing jurisprudence on its head. As this court noted in *ACI Brands Inc. v. Pow*,[2] "the Canadian approach of requiring a person with possibly self-incriminating evidence to testify and then neutralizing the use of that evidence in other proceedings has been applied to *witnesses* at civil, administrative, inquisitorial and criminal proceedings."

The caselaw is clear that corporations cannot be witnesses at any such proceeding. Human beings such as employees, officers and directors can be witnesses but they are not "mouthpieces" for the corporation. I suggested to Ds today that their interpretation of "participants" in s. 16, if correct, was so transformative in its implications that it would have at least merited some comment in the Legislative Debates when it was enacted. Ds advised the court today that they could find no such mention or discussion — probably because, in my view, no such radical change was intended.

In any event, it is sufficient for my purposes here to note that s. 16(b) only applies

[1] And subject, of course, to any and all protections provided by law, including s. 9 of the Ontario *Evidence Act* and s. 16 of the *Public Inquiry Act.*

[2] 2014 ONSC 2784, at para. 90. Emphasis added.

where potentially incriminatory questions are actually asked and must be answered. Here there is no evidence that any such questions were ever asked of any participant corporation (through their counsel) — whether in relation to possible written submissions that could have been permitted by the Commissioner under the "manner and scope" provision in s. 15(1) or during closing arguments (recall that Commissioner Belanger's ruling re 'standing' at the Inquiry allowed participant corporations to make closing arguments).

Ps are therefore wrong to say that the protection offered by s. 16 does not (ever) apply to participant corporations – it does apply, albeit in limited circumstances (two such circumstances were just noted) when questions are *actually asked* of the corporation through its counsel. Here there is no suggestion that any such questions were ever asked.

Ps are otherwise correct in their submissions about s. 16.

3. The two directions set out above in (1) and (2) should provide a workable basis for counsel to agree on and draft discovery plans and trial/SJ admissibility protocols. I direct counsel on both sides to make every effort to do so and to do so expeditiously and no later than the middle of February, 2022. Any difficulties in this regard can be addressed with further case conferences or motions for directions.

4. Success being divided, no costs are awarded.

Signed: *Justice Edward Belobaba*

Notwithstanding Rule 59.05, this Judgment [Order] is effective and binding from the date it is made and is enforceable without any need for entry and filing. Any party to this Judgment [Order] may submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.