

TAB 5

**Re Public Utilities Commission of the City of Brantford
and Corporation of the City of Brantford**

a

[Indexed as: Brantford (City) Public Utilities Commission
v. Brantford (City)]

*Court of Appeal for Ontario, Robins, Rosenberg and Moldaver J.J.A.
January 21, 1998*

b Municipal law — By-laws — Restructuring — Municipality enacting by-laws to dissolve public utilities commission — By-laws authorized by Public Utilities Act and Power Corporation Act — Public utilities commission challenging municipality's authority to dissolve the commission as being in conflict with regulations enacted under Municipal Act — No conflict between legislative schemes — Municipality having power to dissolve commission — Public Utilities Act, R.S.O. 1990, c. P.52, ss. 40, 45 — Power Corporation Act, R.S.O. 1990, c. P.18, s. 126 — Municipal Act, R.S.O. 1990, c. M.45, s. 210.4 — Savings and Restructuring Act, 1996, S.O. 1996, c. 1 — O. Regs. 25/96, 214/96.

d Municipal law — By-laws — Restructuring — Municipality enacting by-laws to dissolve public utilities commission — By-laws authorized by Public Utilities Act and Power Corporation Act — Public utilities commission challenging municipality's authority to dissolve commission as ultra vires as being contrary to s. 10 of Municipal Elections Act, s. 6 of Municipal Elections Act, 1996 and s. 5(1), para. 3 of O. Reg. 214/96 — Municipality having power to dissolve commission — Public Utilities Act, R.S.O. 1990, c. P.52, ss. 40, 45 — Power Corporation Act, R.S.O. 1990, c. P.18, s. 126 — Municipal Elections Act, R.S.O. 1990, c. M.56, s. 10 — Municipal Elections Act, 1996, S.O. 1996, c. 32, s. 6 — O. Reg. 214/96.

f Public utilities — Restructuring — Municipality enacting by-laws to dissolve public utilities commission — By-laws authorized by Public Utilities Act and Power Corporation Act — Public utilities commission challenging municipality's authority to dissolve commission as being in conflict with regulations enacted under Municipal Act — No conflict between legislative schemes — Municipality having power to dissolve commission — Public Utilities Act, R.S.O. 1990, c. P.52, ss. 40, 45 — Power Corporation Act, R.S.O. 1990, c. P.18, s. 126 — Municipal Act, R.S.O. 1990, c. M.45, s. 210.4 — Savings and Restructuring Act, 1996, S.O. 1996, c. 1 — O. Regs. 25/96, 214/96.

g Public utilities — Restructuring — Municipality enacting by-laws to dissolve public utilities commission — By-laws authorized by Public Utilities Act and Power Corporation Act — Public utilities commission challenging municipality's authority to dissolve commission as ultra vires as being contrary to s. 10 of Municipal Elections Act, s. 6 of Municipal Elections Act, 1996 and s. 5(1), para. 3 of O. Reg. 214/96 — Municipality having power to dissolve commission — Public Utilities Act, R.S.O. 1990, c. P.52, ss. 40, 45 — Power Corporation Act, R.S.O. 1990, c. P.18, s. 126 — Municipal Elections Act, R.S.O. 1990, c. M.56, s. 10 — Municipal Elections Act, 1996, S.O. 1996, c. 32, s. 6 — O. Reg. 214/96.

h Statutes — Interpretation — Conflicts — Principles of interpretation — Avoidance of conflict between statutes — Municipality enacting by-

laws to dissolve public utilities commission — By-laws authorized by Public Utilities Act and Power Corporation Act — Public utilities commission challenging municipality's authority to dissolve commission as being in conflict with regulations enacted under Municipal Act — No conflict between legislative schemes — Municipality having power to dissolve commission — Public Utilities Act, R.S.O. 1990, c. P.52, ss. 40, 45 — Power Corporation Act, R.S.O. 1990, c. P.18, s. 126 — Municipal Act, R.S.O. 1990, c. M.45, s. 210.4 — Savings and Restructuring Act, 1996, S.O. 1996, c. 1 — O. Regs. 25/96, 214/96.

In November 1996, the Council of the City of Brantford approved several resolutions and gave two readings to several by-laws to dissolve the existing Public Utilities Commission ("PUC") and to create an appointed Hydro-Electric Commission. The City relied upon ss. 40 and 45 of the *Public Utilities Act*, under which a municipality may dissolve a public utilities commission, and upon s. 126 of the *Power Corporation Act*, under which a municipality may appoint a Hydro-Electric Commission. The PUC, however, brought proceedings to challenge the legislative authority of the City, and it argued that, because of the combined operation of O. Regs. 25/96 and 214/96, which were enacted pursuant to s. 210.4(7)(d) of the *Municipal Act*, a municipality was prevented from dissolving a public utilities commission that was responsible for the distribution and supply of electrical power.

Section 210.4(7)(d) of the *Municipal Act* had been added to the *Municipal Act* by the *Savings and Restructuring Act, 1996*. Under s. 210.4(7)(d), the Minister was empowered to make regulations "despite any Act" to provide that a municipality does not have the power to dissolve a local board as specified in the regulations. Under the *Municipal Act*, a local board included a public utility commission.

On PUC's application, the motions court judge held that there was a conflict between the legislation relied upon by the City and the regulations enacted pursuant to s. 210.4(7)(d). He granted the PUC's application, and the City appealed. The PUC cross-appealed and argued that the City's by-laws were also *ultra vires* as being contrary to s. 10 of the *Municipal Elections Act*, s. 6 of the *Municipal Elections Act, 1996* and s. 5(1), para. 3 of O. Reg. 214/96 because the purported dissolution of the PUC would terminate the terms of the elected commissioners or alter the composition of a local board in violation of those enactments.

Held, the appeal should be allowed, and the cross-appeal should be dismissed.

The motions court judge erred in holding that the City did not have the power to dissolve the PUC under the *Public Utilities Act*. It is a fundamental principle of statutory interpretation that courts should attempt to avoid finding conflicts between two pieces of legislation. Subsection (7)(d) of s. 210.4 of the *Municipal Act* was part of a legislative scheme under which s-s. (2) gave a municipality the power to pass a by-law to dissolve a local board but s-s. (4) provided that the municipality did not have this power until a regulation under s-s. (7) for that type of local board was in force. In dissolving the PUC, the City, however, was not exercising any powers under the *Municipal Act*. It was acting under the *Public Utilities Act*, and that Act could not be excluded solely because it dealt somewhat differently with the dissolution power. The two pieces of legislation could stand together because, by its terms, the restrictive provisions of the *Municipal Act* and its regulations were limited to the exercise of powers granted by that legislation. Further, the regulations were carefully drafted so as to limit their application to the exercise of power under s. 210.4. The motions judge erred in finding a legisla-

a tive intent to suspend the City's power to dissolve found in the *Public Utilities Act* from the inclusion of the words "despite any Act" in s. 210.4(7)(d) of the *Municipal Act*. While this phrase implied a wide regulatory power, it was expressly limited to the purposes of s. 210.4. This interpretation of s. 210.4(7)(d) was reinforced by the principle that the court, in interpreting any provision of an Act, should look at the Act as a whole and attempt to find an interpretation that is in harmony with the entire legislative scheme. From this, it appeared that s. 210.4, rather than enacting a code of restructuring, was merely intended to give municipalities additional powers to deal with various local boards.

b As for the cross-appeal, the City's resolution and its by-law dissolving the Commission was not contrary to s. 10 of the *Municipal Elections Act* or s. 6 of the *Municipal Elections Act, 1996*. These enactments set the length of term of office, where that office exists. They had no application where the office had been abolished. Nor were the resolution and by-law contrary to s. 5(1), para. 3 of O. Reg. 214/96, which concerned a municipality's right to make certain changes in the composition of membership of a local board, since the City was not purporting to exercise any power under this regulation.

c **Cases referred to**

d *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1, [1992] 2 W.W.R. 193, 84 Alta. L.R. (2d) 129, 132 N.R. 321, 48 F.T.R. 160n; *Gray (Re)* (1918), 57 S.C.R. 150; *Lewicki v. Brantford (City)* (1998), 36 O.R. (3d) 439 (C.A.); *R. v. Mercure*, [1988] 1 S.C.R. 234, 48 D.L.R. (4th) 1, [1988] 2 W.W.R. 357, 83 N.R. 81, 65 Sask. R. 1, 39 C.C.C. (3d) 385; *Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550, 139 D.L.R. (4th) 415, 203 N.R. 60, 28 B.L.R. (2d) 121

e **Statutes referred to**

City of Brantford Act, 1934, S.O. 1934, c. 68, s. 3
City of Brantford Act, 1944, S.O. 1944, c. 72, s. 1
Department of the Environment Act, R.S.C. 1985, c. E-10
Municipal Act, R.S.O. 1990, c. M.45, ss. 25.2-25.4 [enacted 1996, c. 1, Sch. M, s. 1], 210.4 [enacted *idem*, s. 8], 257.7 [enacted *idem*, s. 22]
Municipal Affairs Act, R.S.O. 1990, c. M.46, s. 1
Municipal Elections Act, R.S.O. 1990, c. M.53, s. 10
Municipal Elections Act, 1996, S.O. 1996, c. 32, s. 6
Navigable Waters Protection Act, R.S.C. 1985, c. N-22
Power Corporation Act, R.S.O. 1990, c. P.18, s. 126
Public Sector Salary Disclosure Act, 1996, S.O. 1996, c. 1, Sch. A
Public Utilities Act, R.S.O. 1927, c. 249, ss. 33, 37, 40
Public Utilities Act, R.S.O. 1990, c. P.52, ss. 38, 40(5), 45, 67 [enacted 1996, c. 1, Sch. M, s. 33]
Savings and Restructuring Act, 1996, S.O. 1996, c. 1, Sch. A, M, ss. 8, 22, Q

f **Rules and regulations referred to**

O. Reg. 25/96 (*Savings and Restructuring Act, 1996*), s. 1, paras. 1, 6
 h O. Reg. 214/96 (*Savings and Restructuring Act, 1996*), ss. 1(1), (3), 5(1), paras. 1, 3, (2), (3)

APPEAL from an order declaring that certain resolutions and by-laws were contrary to regulations enacted pursuant to s. 210.4 of the *Municipal Act*, R.S.O. 1990, c. M.45.

Lynda C.E. Tanaka, for appellant.
Christian G. Schulze, Q.C., for respondent.

The judgment of the court was delivered by

ROSENBERG J.A.: — This is one of two appeals heard by this court dealing with an attempt by The Corporation of the City of Brantford to dissolve the Public Utilities Commission of the City of Brantford. The reasons in *Lewicki v. Brantford (City)* are being released with these reasons: reported at p. 439 *post*.

In 1996, the Legislative Assembly passed Bill 26, *An Act to achieve Fiscal Savings and to promote Economic Prosperity through Public Sector Restructuring, Streamlining and Efficiency and to implement other aspects of the Government's Economic Agenda*. This Act contains three sections and 17 schedules. Section 1 provides that all of the schedules are enacted. This appeal involves Schedule M, described as "Amendments to the *Municipal Act* and various other statutes related to municipalities, conservation authorities and transportation". In this schedule the Legislative Assembly has given the Executive power to dispense with the laws previously enacted by the Legislative Assembly. The specific provision in issue in this appeal is s. 210.4(7)(d) of the *Municipal Act*, R.S.O. 1990, c. M.45, which provides that:

210.4(7) For the purposes of this section the Minister may, *despite any Act*, make regulations,

(d) providing that a municipality does not have the power to dissolve or make a prescribed change to a local board specified in the regulation.

(Emphasis added)

The respondent, The Public Utilities Commission of the City of Brantford, argues that this provision and the regulations made pursuant to that provision have suspended the power given the City of Brantford by statute to dissolve its own Public Utilities Commission. For the reasons that follow I agree with the City of Brantford that it does have the power to dissolve the Commission and accordingly I would allow this appeal.

To appreciate the issue raised in this appeal it is necessary to set out at some length and in some detail the legislation that created the Public Utilities Commission and governs its possible dissolution. I will then set out the applicable statutory provisions and regulations enacted pursuant to Bill 26. Finally, I will discuss the relationship between the two legislative

- a schemes to explain why I have concluded that the latter has not impaired the City's statutory authority to dissolve its Public Utilities Commission.

THE LEGISLATION

Creation of the Public Utilities Commission of the City of Brantford

- b The Public Utilities Commission of the City of Brantford has had a somewhat tortured history. It was finally created in 1934 after three failed attempts, dating back to 1925, to amalgamate the three separate public utilities, water, hydro and transit. The amalgamation was accomplished through the *City of Brantford Act, 1934*, S.O. 1934, c. 68, which allowed City Council to create
- c the Public Utilities Commission without the assent of the electors as would ordinarily have been required by s. 33 of the *Public Utilities Act*, R.S.O. 1927, c. 249. This followed upon a referendum in 1933 in which the majority of electors had approved the creation of one commission to administer all the public utilities.
- d Section 3 of the *City of Brantford Act, 1934* provides as follows:

- e 3. It shall be lawful for the council of the said corporation to provide by by-law for a commission, to be known as "The Public Utilities Commission of the City of Brantford" and to entrust such commission with the management and control of all public utilities of the said corporation, and the provisions of *The Public Utilities Act* shall apply to such commission, except that such by-law shall not require the assent of the municipal electors.

The applicable provision of *The Public Utilities Act* at the time was s. 33 which provided as follows:

- f 33(1) Subject to the provisions of the following subsections of this section the council of a municipal corporation which owns or operates works for the production, manufacture or supply of any public utility or is about to establish such works, and the council of a township corporation which has entered into a contract with The Hydro-Electric Power Commission of Ontario for a supply of electrical power or energy in the township, may, by by-law passed with the assent of the municipal electors, provide for entrusting the construction of the works and the control and management of the same to a commission to be called "The Public Utilities Commission of the (naming the municipality)," . . .
- g

(Emphasis added)

- h As authorized by these two Acts, City Council passed By-law 2452 which created the respondent, the Public Utilities Commission of the City of Brantford. The by-law makes reference to both the *City of Brantford Act, 1934* and *The Public Utilities Act* as the authority for the by-law. In my view, the Public Utilities Commission was created by a by-law passed under s. 33 of *The Public Utilities Act*. The purpose of the *City of Brantford Act, 1934* was merely to dispense with the consent of the electors, which would

otherwise have been required by s. 33. Accordingly, City Council also had the power to dissolve the Commission. This power was expressly given to the Council by s. 40 of the *Public Utilities Act*, as follows:

40(1) The council may, by by-law passed *with the assent of the municipal electors*, repeal any by-law passed under sections 33, 34 and 35.

(Emphasis added)

However, as the emphasized portion of s. 40 indicates, the power to repeal the by-law and thus abolish the Commission was qualified by the requirement of the assent of the municipal electors. This power has been carried forward in virtually identical terms into the present *Public Utilities Act*, R.S.O. 1990, c. P.52, as s. 45. Section 45 now refers *inter alia* to the repeal of by-laws passed under ss. 38 and 40 which are the provisions in issue in this case. However, because this public utilities commission also manages electrical power obtained under contract from Ontario Hydro there is a further qualification on the Council's ability to dissolve the Commission. Under s. 40(5) of the present Act, the by-law creating the Commission shall not be repealed without the consent of Ontario Hydro. Further, should a municipality that has a contract with Ontario Hydro for the supply of electrical power wish to abolish its public utilities commission, it must create a separate hydro electric commission pursuant to s. 126 of the *Power Corporation Act*, R.S.O. 1990, c. P.18. This commission would consist of three members being the mayor, a person appointed by the municipal council, and a person appointed by Ontario Hydro. In contrast, a public utilities commission is an elected body.

The Public Utilities Commission of the City of Brantford consists of six members, five being elected (one from each ward in the City) with the mayor *ex officio* the sixth member. This structure is authorized by s. 1 of the *City of Brantford Act, 1944*, S.O. 1944, c. 72, and a by-law enacted pursuant thereto. Section 1 is in the following terms:

1. Notwithstanding section 3 of *The City of Brantford Act, 1934*, and section 37 of *The Public Utilities Act*, it shall be lawful for the council of the Corporation to provide by by-law or by-laws that The Public Utilities Commission of the City of Brantford shall on and after the 1st day of January, 1945, consist of six members, of whom the head of the council shall *ex officio* be one and the remaining five shall be elected at the same time and place and in the same manner as the members of the council, one for each ward in the City.

The purpose of this legislation was to allow for a different number of commissioners than that allowed by the *Public Utilities*

a Act, R.S.O. 1927, c. 249, s. 37. I am satisfied that it did not affect Council's power under the *Public Utilities Act* to dissolve the Commission subject to the qualifications referred to above.

The Recommendation to Dissolve the Public Utilities Commission

b In 1994, members of City Council began the attempt to reorganize the management of public utilities in the city. There was an initial setback when a proposal to place dissolution of the Commission on the 1994 municipal election ballot was defeated by City Council. Members of the Commission had spoken at the council meeting against this proposal. The issue was raised again in the fall of 1995 and in early 1996 when City Council c established terms of reference for a consultant's study. The consultant's report was received in October 1996 and indicated that approximately \$1 million could be saved through consolidation of certain functions of the Commission and the City. The Commission subsequently retained its own consultant to review the report. After studying these reports, staff of the City d recommended dissolution of the Commission. The Commission's powers relating to water and transit would be assumed by the City. Electrical power would be managed by a new Hydro-Electric Commission. By this time Bill 26 had been proclaimed into force.

e *Bill 26*

f The short title of Bill 26 is the *Savings and Restructuring Act, 1996*, S.O. 1996, c. 1. It was given royal assent on January 30, 1996. The provisions in issue in this appeal are found in Schedule "M" being amendments to the *Municipal Act*, R.S.O. 1990, c. M.45, and the *Public Utilities Act*, R.S.O. 1990, c. P.52. Section 8 of Schedule "M" adds s. 210.4 to the *Municipal Act*. The relevant provisions of the new s. 210.4 are as follows:

210.4(1) In this section,

g "local board" means a local board as defined in section 1 of the *Municipal Affairs Act* and any other body performing any public function prescribed by regulation but does not include a police services board, school board or conservation authority;

h "municipality" includes a regional, metropolitan and district municipality and the County of Oxford.

(2) Despite any Act, if a local board is the local board of a single municipality, the council of the municipality may by by-law dissolve or make prescribed changes to the local board.

(4) A municipality does not have the power to pass a by-law under subsection (2) or (3) to dissolve a local board until a regulation under subsection (7) relating to the dissolution of that type of local board is in force.

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(7) For the purposes of this section the Minister may, despite any Act, make regulations,

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- (c) prescribing changes that may be made to a local board;
- (d) providing that a municipality does not have the power to dissolve or make a prescribed change to a local board specified in the regulation;
- (e) imposing conditions and limitations on the powers of a municipality under this section;

c

(8) A regulation under this section may be general or specific in its application and may be restricted to those municipalities and local boards specified in the regulation.

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It should be noted that s. 1 of the *Municipal Affairs Act*, R.S.O. 1990, c. M.46, defines "local board" to include a public utility commission.

Section 33 of Schedule "M" also added a section to the *Public Utilities Act* as follows:

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67(1) A municipal corporation may pass a by-law to eliminate the requirement to obtain the assent of the electors before the corporation exercises a power under this Act.

(2) Subsection (1) does not apply to a municipal corporation exercising its power with respect to natural gas.

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The Minister made two regulations under s. 210.4 of the *Municipal Act* that are in issue in this appeal. Ontario Regulation 25/96 was filed on February 2, 1996 and provides, in part, as follows:

1. A municipality does not have the power under section 210.4 of the Act to dissolve the following local boards:

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- 6. A public utility commission established under the *Public Utilities Act* or any other Act which is responsible for the distribution and supply of electrical power or energy.

Ontario Regulation 214/96 was filed on May 29, 1996. The relevant provisions of that regulation are the following:

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1(1) For the purposes of subsection 210.4(4) of the Act this regulation applies to every type of local board to which section 210.4 of the Act applies except those set out in Ontario Regulation 25/96.

a (3) Despite subsection (1), sections 5, 6 and 7 of this Regulation apply to public utility commissions responsible for the distribution and supply of electrical power or energy to the extent prescribed in section 5.

b 5(1) A municipality may by by-law make the following changes to a local board:

b 1. It may assume one or more of the powers of the board except those powers of a public utility commission related to the distribution and supply of electrical power or energy.

c 3. It may dispense with any requirement to elect members to a board and replace those members, after their current term has expired, with members appointed to the board by the municipality.

d (2) The changes authorized by . . . subparagraph i of paragraph 5 of subsection (1) apply to a public utility commission responsible for the distribution and supply of electrical power or energy only where that commission is also responsible for the provision of another utility and only to the extent that a change made under one of those paragraphs does not directly or indirectly relate to or impact upon the public utility commission's responsibility for the distribution and supply of electrical power or energy.

e (3) Paragraphs 2 and 3 and subparagraphs ii and iii of paragraph 5 of subsection (1) do not apply to a public utility commission responsible for the distribution and supply of electrical power or energy.

f My understanding of this somewhat complex legislative scheme is as follows. The broad power given to a municipality under s. 210.4(2) of the *Municipal Act* to dissolve a local board, such as a public utilities commission, cannot be exercised until a regulation is in force relating to the dissolution of that type of local board (s. 210.4(4)). Section 210.4(7), portions of which I have set out above, give the Minister the power to make regulations relating to the dissolution of a local board. For example, under s. 210.4(7)(e) the Minister may impose conditions and limitations on the exercise of the powers of the municipality under s. 210.4. The Minister has exercised that power by enacting O. Reg. 214/96. With the coming into force of this regulation the limitation in s. 210.4(4) on the dissolution power no longer applies and in theory the municipality would be free to dissolve any local board, including a public utilities commission. However, s. 210.4(7)(d) gives the Minister the power to make a regulation preventing a municipality from dissolving specified boards. The Minister has done this with respect to public utilities commissions responsible for the distribution and supply of electrical power through the com-

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bined operation of O. Reg. 25/96 and s. 1(1) of O. Reg. 214/96. Accordingly, a municipality may not dissolve its public utility commission under s. 210.4(2) of the *Municipal Act*, if it is responsible for the distribution and supply of electrical power. It can, however, make some changes to its public utility commission. For example, the municipality may by by-law assume some powers of the commission except those powers relating to the distribution and supply of electrical power (O. Reg. 214/96, s. 5(1), para. 1). On the other hand, it may not exercise the power under O. Reg. 214/96, s. 5(1), para. 3 to dispense with the requirement to elect members to the commission and replace the elected members, after their current term has expired, with members appointed by the council (O. Reg. 214/96, s. 5(3)). This was the legislative scene when the City Council attempted to dissolve its public utilities commission, a commission that was responsible for the distribution and supply of electrical power, as well as water and transit.

The November 4, 1996 By-laws

On November 4, 1996 City Council passed a resolution approving the staff recommendations respecting dissolution of the Commission and creation of a hydro-electric commission. City Council then set about passing a number of by-laws to implement that resolution. The first was By-law 164-96. This by-law eliminated the requirement that the City obtain the assent of the electors before exercising any power under the *Public Utilities Act*, R.S.O. 1990, c. P.52. This by-law was purportedly enacted pursuant to s. 67 of the *Public Utilities Act*. By-law 164-96 received all three readings on November 4, 1996 and was passed.

On November 4, 1996, City Council gave two readings to By-law 165-96. This by-law purported to dissolve the Public Utilities Commission by repealing the City by-laws that created it. The by-law also purported to be an exercise of the power under s. 210.4 of the *Municipal Act* to allow the City to assume the powers relating to provision of water and public transit services. The City had previously obtained the consent of Ontario Hydro to dissolve the Commission as required by s. 40(5) of the *Public Utilities Act*. This consent was conditional on City Council passing a by-law to create a hydro-electric commission. City Council gave two readings to By-law 165-96. It has not been passed.

As required by Ontario Hydro and s. 126 of the *Power Corporation Act*, R.S.O. 1990, c. P.18, By-law 166-96 was presented at the November 4, 1996 meeting to create the Hydro-Electric Commission of the City of Brantford. This by-law as well was given two

- readings. Two other by-laws were given two readings on November 4, 1996. Those by-laws would appoint the City's member of the Hydro-Electric Commission (By-law 167-96) and allow the City's chief administrative officer to assume the role of general manager of the Hydro-Electric Commission (By-law 168-96). The Commission did not challenge the validity of By-law 164-96, the by-law dispensing with the assent of the electors.
- a**
- b** City Council intended to give third reading to the by-laws at a special council meeting on November 12, 1996. However, on November 8, 1996 the Public Utilities Commission brought an action for a declaration that the City had no power to dissolve the Commission, that the resolution was *ultra vires* the City, and that the City had no power to pass the proposed By-laws 165-96,
- c** 166-96 and 167-96. The Commission also sought an interlocutory and permanent injunction. This action was converted to an application on consent of the parties. The application was heard by Kent J. who, in reasons dated November 29, 1996, granted the Commission's application in part. The City appeals from that
- d** judgment and the Commission cross-appeals. I will expand upon the positions of the parties after a brief review of the reasons of the motions judge.

THE REASONS OF KENT J.

- e** The Commission challenged the City's action on three bases. It argued that the resolution and By-law 165-96 (the by-law dissolving the Commission) were *ultra vires* as being contrary to s. 10 of the *Municipal Elections Act*, R.S.O. 1990, c. M.53, and s. 6 of the *Municipal Elections Act, 1996*, S.O. 1996, c. 32. This legis-
- f** lation provides that "the term of office of all offices", the election of which is governed by the *Municipal Elections Act* shall be three years, commencing December 1 in an election year. The Commission argued that the City could not dissolve the Commission since this would amount to termination of the term of the elected commissioners in violation of this legislation. Kent
- g** J. held that the City's action did not violate the *Municipal Elections Act*. The Commission also argued that dissolution of the Commission violated s. 5(1), para. 3 of O. Reg. 214/96. It will be recalled that this provision allowed a municipality to dispense with any requirement to elect members to a board and replace
- h** those members with appointees after the current term of the elected members had expired. Kent J. did not expressly deal with this argument. It may be that it is subsumed in his more general treatment of the effect of s. 210.4 of the *Municipal Act* and regulations.

The final argument by the Commission before Kent J. was that the City had no power to enact the by-laws to dissolve the Public Utilities Commission and create the hydro-electric commission in view of the provisions of s. 210.4 of the *Municipal Act* and the regulations. The motions judge held that there was a "clear conflict" between the statutory provisions of the *Public Utilities Act* which appear to give the City the power to repeal a by-law creating a public utilities commission and O. Reg. 25/96 and O. Reg. 214/96. He interpreted these regulations as prohibiting the dissolution of a public utilities commission which is responsible for the distribution and supply of electric power or energy. In effect the regulations repealed the statutory provisions in the *Public Utilities Act*. To resolve this apparent conflict, Kent J. attempted to determine the legislative intent. He found that the Legislature's intention in passing the amendments to the *Municipal Act* in Bill 26 was to give flexibility to the municipalities so that they could restructure and provide savings for taxpayers. At the same time, however, the Legislature also intended to place some restrictions on this flexibility. Kent J. resolved the apparent conflict between the statutory grant of power under the *Public Utilities Act* and the regulations enacted under the *Municipal Act* by reference to the legislation that created the regulation-making power. He noted that under s. 210.4(7) the Minister was empowered to enact regulations "despite any Act". He therefore reasoned as follows:

The words "despite any Act" can only be interpreted as meaning that the provisions of any previous restructuring legislation are no longer operative if they conflict with restructuring regulations made by the minister. Any other meaning would be a distortion that went beyond a fair, large, liberal, even benevolent construction of those words. The regulation made "despite any Act" does not prohibit the restructuring that the amendments to the *Municipal Act* enabled. The Regulation, however, does require that the Minister make a specific regulation, or an amendment to the existing regulations, to facilitate a restructuring such as that contemplated by the City by-laws as they relate to the P.U.C.'s responsibility for the supply of electrical power. Without that amendment or regulation the City cannot proceed with its By-laws to create a new Hydro-Electric Commission responsible for the supply of electrical power.

Accordingly, the Commission's application was granted in part and a declaration made that the City had no power to alter or interfere with the existing powers, rights, authorities, and privileges of the Commission "relating to the distribution of electrical power or energy in the City of Brantford". Kent J. also enjoined the City from taking further steps regarding the supply of electrical power until the Minister made an appropriate amendment. As I understand it, the net result of this judgment is that while

a the City had the power to assume control of the water and transit operations of the Commission, the City could not interfere with the Commission's powers relating to electrical energy and hence it could not dissolve the Commission.

THE POSITIONS OF THE PARTIES

b The City's principal submission on its appeal is that Kent J. erred in holding that there is a conflict between the provisions of the *Public Utilities Act* and the regulations enacted under s. 210.4(7) of the *Municipal Act*. It also argues that Kent J. erred in holding that these regulations effectively repealed the statutory provisions. The Commission argues that the clear legislative intent of s. 210.4 was that dissolution and restructuring of all local boards was to be dealt with on a provincial basis by delegating to the Minister the power to regulate the restructuring process. The limitations on the dissolution power contained in s. 210.4 take precedence over the previous general power given municipalities by the *Public Utilities Act*. In effect, as I understand it, the Commission argues that in Bill 26 the Legislature intended to enact a code for restructuring and the municipalities are bound to follow this new code rather than rely upon any previous restructuring powers that have now been implicitly repealed by the new legislation. Finally, in its cross-appeal the Commission relies on its arguments based on the *Municipal Elections Act* and s. 5(1), para. 3 of O. Reg. 214/96.

ANALYSIS

f *The Conflict between the Public Utilities Act and the Municipal Act and Regulations*

In my view, the motions judge erred in holding that the City of Brantford had no power to dissolve the Public Utilities Commission under the *Public Utilities Act*. In outlining the legislation that led to the creation of the Commission I have explained g how the Commission was created by by-law enacted under (then) s. 33 of the *Public Utilities Act* (now s. 38). Section 45 of the present Act gives the City the power to repeal this by-law and thereby dissolve the Commission. The only two statutory conditions to the exercise of that power were the requirement that there be assent by the electors to the repeal (s. 45(1)) and h the consent of Ontario Hydro (s. 40(5)). Section 67 of the *Public Utilities Act* which was added by Bill 26 allowed the City to dispense with the assent of the electors. The City did so by passing By-law 164-96 and the validity of that by-law has not been chal-

lenged by the Commission.¹ The City also obtained the consent of Ontario Hydro and as required by Hydro and s. 126 of the *Power Corporation Act* proposed to establish an appointed Hydro-Electric Commission. a

In dissolving the Public Utilities Commission and establishing the Hydro-Electric Commission the City was not exercising any of the powers given to municipalities by Bill 26. More importantly, in my view, the exercise of those powers did not conflict with s. 210.4 or the regulations. In approaching this issue it is important to bear in mind a fundamental principle of statutory construction that courts should attempt to avoid finding a conflict between two pieces of legislation. Anglin J. expressed this principle in *Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488 at p. 499: b

It is not enough to exclude the application of the general Act that it deals somewhat differently with the same subject-matter. It is not "inconsistent" unless the two provisions cannot stand together. c

More recently, La Forest J. considered this issue in the context of a federal regulatory scheme. In *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1, it was argued that a Guidelines Order made by the Minister of the Environment under the *Department of the Environment Act*, R.S.C. 1985, c. E-10, was inconsistent with provisions of the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22, governing the approval process by the Minister of Transport. La Forest J. adopted the following test at pp. 38-39 and found that there was no inconsistency: d

The basic principles of law are not in doubt. Just as subordinate legislation cannot conflict with its parent legislation . . . so too it cannot conflict with other Acts of Parliament . . . unless a statute so authorizes . . . Ordinarily, then, an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation. However, as a matter of construction a court will, where possible, prefer an interpretation that permits reconciliation of the two. "Inconsistency" in this context refers to a situation where two legislative enactments cannot stand together; see *Daniels v. White*, [1968] S.C.R. 517. The rule in that case was stated in respect of two inconsistent statutes where one was deemed to repeal the other by virtue of the inconsistency. However, the underlying rationale is the same as where subordinate legislation is said to be inconsistent with another Act of Parliament — there is a presumption that the legislature did not intend to make or empower the making of contradictory enactments. e

(Emphasis added) f

¹ As indicated, this court also heard an appeal in *Lewicki v. Brantford (City)*. Mr. Lewicki is a citizen of Brantford and his application was for an order quashing By-law 164/96. In a judgment given on March 3, 1997, Sills J. dismissed this application. My reasons for dismissing Mr. Lewicki's appeal are contained in a separate judgment. g

h

a Applying this principle to the legislation in this case, application of the *Public Utilities Act* cannot be excluded solely because it deals somewhat differently with the dissolution power than do the new provisions of the *Municipal Act* and regulations. It is only if the two pieces of legislation cannot stand together that any question of conflict arises so as to possibly impair the operation of the earlier legislation. In my view, the two legislative

b schemes can stand together because, by its terms, the restrictive provisions of the *Municipal Act* and regulations are limited to the exercise of powers granted by that legislation. For convenience, I shall repeat the relevant statutory and regulatory provisions.

c *Section 210.4 of the Municipal Act*

210.4(2) Despite any Act, if a local board is the local board of a single municipality, the council of the municipality may by by-law dissolve or make prescribed changes to the local board.

d (4) *A municipality does not have the power to pass a by-law under subsection (2) or (3) to dissolve a local board until a regulation under subsection (7) relating to the dissolution of that type of local board is in force.*

e (7) *For the purposes of this section the Minister may, despite any Act, make regulations,*

(d) providing that a municipality does not have the power to dissolve or make a prescribed change to a local board specified in the regulation;

f (Emphasis added)

g As can be seen from the emphasized portions of the statute, the limitations on the municipality's powers of dissolution are restricted to an exercise of power under that section, *i.e.*, s. 210.4. I cannot interpret these provisions as purporting to limit an exercise of a power under other legislation so as to create a conflict. In view of the principle of interpretation referred to above, I do not think a court should struggle to create a conflict where none exists.

h I reach the same conclusion with respect to the regulations. In the first place, the enabling legislation, s. 210.4(7), limits the scope of the regulatory power to regulations made for "the purposes of this section". I would not easily find that any regulations made for that purpose could be interpreted to interfere with the exercise of powers given a municipality under other legislation. In any event, the regulations themselves are carefully drafted so

as to limit their application to the exercise of powers under s. 210.4 of the *Municipal Act*. Again for ease of reference, I will repeat portions of the regulations.

Ontario Regulation 25/96

1. A municipality does not have the power under section 210.4 of the Act to dissolve the following local boards:

6. A public utility commission established under the *Public Utilities Act* or any other Act which is responsible for the distribution and supply of electrical power or energy.

Ontario Regulation 214/96

1(1) For the purposes of subsection 210.4(4) of the Act, this Regulation applies to every type of local board to which section 210.4 of the Act applies except those set out in Ontario Regulation 25/96.

(Emphasis added)

As the emphasized portions show, these regulations relate solely to the exercise of powers under or for the purposes of s. 210.4. They cannot, in my view, be reasonably interpreted as affecting the exercise of the power under the *Public Utilities Act*. In *Friends of Oldman River*, La Forest J. was able to avoid an apparent conflict by holding that the Minister of Transport's duty under the Order was supplemental to his responsibility under the statute. Similarly, the apparent conflict between the regulations and the statute can be avoided by holding that the powers under the *Municipal Act* and regulations are in addition to the powers under the *Public Utilities Act*.

There is one further reason why I would hold that the City has not lost its power under the *Public Utilities Act*. Kent J. found, in effect, that the regulations had implicitly repealed the provisions of the *Public Utilities Act*. The City did not challenge the constitutionality of any of the Bill 26 provisions. These reasons should not be read as casting doubt on the validity of those provisions: see *Re Gray* (1918), 57 S.C.R. 150. Nevertheless, it seems to me that where the Legislative Assembly has expressly granted a power by a statute it should not lightly be assumed that it intended that this power could be suspended by the executive through regulation. I can find no such intent either in the wording of s. 210.4(7) or in the regulations enacted pursuant thereto, at least in relation to the statutory power granted under the *Public Utilities Act*. In my view, the motions judge erred in finding such an intent from the inclusion of the words "despite any Act" in the phrase "For the purposes of this section the Minister may,

a despite any Act, make regulations” in s. 210.4(7). While this phrase implies a wide grant of regulatory power, that power is expressly limited to the purposes of that section.

b I would also not give effect to the Commission’s argument based on the theory that s. 210.4 was intended to operate as a complete code impliedly abrogating or repealing all other “restructuring” provisions. In reaching that conclusion I place particular emphasis on the principle of interpretation that the court, in interpreting any provision of an Act, should look at the Act as a whole and attempt to find an interpretation that is in harmony with the entire legislative scheme. Iacobucci J. expressed this rule of interpretation as follows in *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550 at p. 559, 139 D.L.R. (4th) 415:

To state the obvious, the first step in a question of statutory interpretation is always an examination of the language of the statute itself. As E.A. Driedger wrote in his text, *Construction of Statutes* (2nd ed. 1983), at p. 87:

d Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament . . .

e It is impossible to fully give effect to this principle in interpreting Bill 26 because of the diverse subject-matter dealt with, from Schedule A: enactment of the *Public Sector Salary Disclosure Act, 1996*, to Schedule Q: amendments to various statutes with regard to interest arbitration. However, it is possible to take into account the other provisions of Schedule M.

f The first point to notice is that it is wise to avoid terms such as “restructuring” in considering the interpretation of these provisions. While the short title of Bill-26 is the *Savings and Restructuring Act, 1996*, the term “restructuring” is actually defined in Schedule M in s. 25.2 of the *Municipal Act* in terms relating to the amalgamation, separation or dissolution of all or part of municipalities. Sections 25.2 to 25.4 then deal in considerable detail with “restructuring proposals”. This reinforces my view that, rather than enacting a code of restructuring, s. 210.4 was merely intended to give municipalities additional powers to deal with their various boards. I agree with the submission made by counsel for the City that the fact that O. Reg. 25/96 specifically excludes a municipality from resorting to s. 210.4 when dealing with dissolution of a public utility commission which is responsible for the distribution and supply of electrical power and energy suggests not that the Legislature intended that a municipality would be powerless to dissolve its commission but that it was bound to follow the

procedure mandated by the *Public Utilities Act* and in particular the requirement of consent by Ontario Hydro.

I am strengthened in this view by s. 33 of Schedule M which, as already mentioned, adds s. 67 to the *Public Utilities Act* and allows the municipality to pass a by-law to eliminate the assent of the electors before exercising a power under that Act. I find it difficult to understand why the Legislature would, on the one hand, expressly make it easier for the municipality to exercise its powers under the *Public Utilities Act* by removing the need for elector assent and, on the other hand, impliedly repeal one of the most important powers. Again, the more reasonable interpretation is simply that the Legislature intended to give the municipality additional powers, not abrogate existing powers, especially in view of the stringent test applied by the courts before they will find that a statute has been impliedly repealed: *R. v. Mercure*, [1988] 1 S.C.R. 234 at p. 265, 48 D.L.R. (4th) 1.

Other parts of Schedule M also lend support for the presumption, referred to by La Forest J. in *Friends of Oldman River*, that the Legislature did not intend to empower the making of contradictory enactments as regards powers of the municipalities to dissolve their public utilities commissions. For example, s. 22 of Schedule M enacts a new Part XVII.1 to the *Municipal Act* under the heading "General Licensing Powers". Section 257.7 of this Part is as follows:

257.7 If there is a conflict between a provision in this Part and a provision of any other section of this Act or any other Act authorizing a local municipality to license a business, the section that is less restrictive of a local municipality's power prevails.

(Emphasis added)

It seems to me that if the Legislature was of the view that s. 210.4 conflicted with existing powers enjoyed by the municipality it would have addressed the issue directly and likely resolved the conflict in a similar manner in favour of greater, not lesser, powers for the municipality. Even if I am wrong in concluding that in enacting s. 210.4, the Legislature did not intend to abrogate the municipality's existing powers of dissolution but instead intended to create a uniform and comprehensive "restructuring" code, the Legislature simply has not used language that is capable of bearing that contraction.

To conclude, the City had the power to dissolve the Commission, as it attempted to do in the impugned by-laws, and to create a hydro-electric commission. After dissolving the Commission, I see no impediment to the City's assuming management of the water and transit functions. I did not understand the Commis-

a sion to argue otherwise except in relation to its arguments based on the *Municipal Elections Act* and s. 5 of O. Reg. 214/96, and I will now deal with those arguments.

The Municipal Elections Act

b As indicated above, the Commission argues that the resolution and By-law 165-96 (the by-law dissolving the Commission) were *ultra vires* as being contrary to s. 10 of the *Municipal Elections Act*, R.S.O. 1990, c. M.53, and s. 6 of the *Municipal Elections Act, 1996*, S.O. 1996, c. 32. For example, s. 10 of the former provides as follows:

c 10(1) Despite any other Act and except where otherwise specifically provided in this Act, the term of office of all offices, the election of which is governed by this Act, shall be three years, commencing on the 1st day of December in an election year.

(2) The holders of offices hold office until their successors are elected and the newly elected council or local board is organized.

d Thus, the Commission argues that the City could not dissolve the Commission since this would amount to termination of the term of the elected commissioners, in violation of this legislation. I agree with Kent J. that the resolution and by-law do not violate either the former or present *Municipal Elections Act*. As counsel e for the City pointed out, there is no inconsistency with the provisions of the *Municipal Elections Act*, which specify the term of office of elected commissioners as three years, and the power given to the municipality under the *Public Utilities Act* to terminate that three-year term early by the act of dissolution of the Commission. The *Municipal Elections Act* does not speak to the f creation of local bodies to which persons may be elected but only the method of election and how often the election is held, if an election is to be held. Put another way, the *Municipal Elections Act* sets the length of term of the office, where that office exists. It can have no application where the office has been abolished. The g *Municipal Elections Act, 1996* is to the same effect, notwithstanding the slightly different wording. On the other hand, s. 45 of the *Public Utilities Act* clearly contemplates the early termination of a commissioner's office by repeal of the by-law:

h 45(1) The council may, by by-law passed with the assent of the municipal electors, repeal any by-law passed under sections 38, 39 and 40.

(2) Where a by-law is repealed, the council shall apportion the current year's salary of the commissioners, and any officer or employee of the commission shall be continued until removed by council unless his or her engagement sooner terminates.

(Emphasis added)

Ontario Regulation 214/96

I would also reject the Commission's argument based on O. Reg. 214/96. For convenience, I shall repeat the relevant parts of this regulation:

1(1) *For the purposes of subsection 210.4(4) of the Act, this Regulation applies to every type of local board to which section 210.4 of the Act applies except those set out in Ontario Regulation 25/96.*

(3) *Despite subsection (1), sections 5, 6 and 7 of this Regulation apply to public utility commissions responsible for the distribution and supply of electrical power or energy to the extent prescribed in section 5.*

5(1) *A municipality may by by-law make the following changes to a local board:*

3. *It may dispense with any requirement to elect members to a board and replace those members, after their current term has expired, with members appointed to the board by the municipality.*

(2) *The changes authorized by . . . subparagraph i of paragraph 5 of subsection (1) apply to a public utility commission responsible for the distribution and supply of electrical power or energy only where that commission is also responsible for the provision of another utility and only to the extent that a change made under one of those paragraphs does not directly or indirectly relate to or impact upon the public utility commission's responsibility for the distribution and supply of electrical power or energy.*

(3) *Paragraphs 2 and 3 and subparagraphs ii and iii of paragraph 5 of subsection (1) do not apply to a public utility commission responsible for the distribution and supply of electrical power or energy.*

(Emphasis added)

The Commission's argument, as I understand it, is that under s. 5(1), para. 3 of the regulation, while a municipality may dispense with any requirement to elect members and may replace those members by appointees, it can only do so after the elected members' term expires. In any event, by virtue of s. 5(3), those changes may not be made to a public utility commission responsible for the distribution and supply of electrical power. In my view, the simple answer to this submission is that the City was not purporting to exercise the power under s. 5(1), para. 3 in dissolving the Commission, but rather the power under s. 45 of the *Public Utilities Act*. As the emphasized words of s. 1(1) make clear, the regulation applies for the purposes of s. 210.4 of the *Municipal Act*.

DISPOSITION

- a** Accordingly, I would allow the appeal by the City and set aside paras. 1 and 2 of the order of Kent J. declaring that the City has no power to alter or interfere with the powers of the Commission related to the distribution of electrical power and enjoining the City from taking any further steps to dissolve the Commission. I would dismiss the cross-appeal. It would appear that Kent J. did not make any order as to costs and I would not make any order as to costs of the appeal.

Appeal allowed.

c

**Re Lewicki and Corporation of the
City of Brantford et al.**

d

[Indexed as: *Lewicki v. Brantford (City)*]

*Court of Appeal for Ontario, Robins, Rosenberg and Moldaver J.J.A.
January 21, 1998*

- e** **Municipal law — By-laws — Restructuring — Municipality enacting by-laws to dissolve public utilities commission — By-laws authorized by Public Utilities Act and Power Corporation Act — Citizen bringing application to quash by-laws — City having power to dissolve public utilities commission — Public Utilities Act, R.S.O. 1990, c. P.52, ss. 38, 40, 45, 67 — Power Corporation Act, R.S.O. 1990, c. P.18, s. 126 — Municipal Act, R.S.O. 1990, c. M.45, ss. 24, 25.1-25.4, 210.4 — Savings and Restructuring Act, 1996, S.O. 1996, c. 1 — O. Regs. 25/96, 214/96.**

f

In November 1996, the Council of the City of Brantford approved several resolutions and gave two readings to several by-laws to dissolve the existing Public Utilities Commission ("PUC") and to create an appointed Hydro-Electric Commission. The City relied upon ss. 40 and 45 of the *Public Utilities Act*, under which a municipality may dissolve a public utilities commission, and upon s. 126 of the *Power Corporation Act*, under which a municipality may appoint a Hydro-Electric Commission. In carrying out this process, the City also enacted By-law 164-96, which eliminated the requirement of obtaining the assent of the electors before repealing a by-law creating a public utilities commission. The City relied on the authority of s. 67 of the *Public Utilities Act* in enacting By-law 164-96. L brought an application to quash By-law 164-96. The application was dismissed, and he appealed.

g

h **Held, the appeal should be dismissed.**

Several of the appellant's arguments were merely variations of arguments made in *Brantford (City) Public Utilities Commission v. Brantford (City)*. The judgment in that appeal was being released contemporaneously, and, for the reasons expressed there, these arguments should be rejected. For the reasons expressed in