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Wednesday 12 December 2001

Standing committee on government agencies

Intended appointments

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Mercredi 12 décembre 2001

Comité permanent des organismes gouvernementaux

Nominations prévues

Chair: James J. Bradley Clerk: Donna Bryce Président : James J. Bradley Greffière : Donna Bryce

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STANDING COMMITTEE ON GOVERNMENT AGENCIES

Wednesday 12 December 2001

The committee met at 1034 in room 151.

SUBCOMMITTEE REPORT

The Vice-Chair (Michael Gravelle): Good morning. Welcome to the standing committee on government agencies. It's good to see you all, as always.

Before we have our selection that's been called, I know there is some other business, the report of the subcommittee on committee business dated Thursday, December 6, 2001.

Mr Bob Wood (London West): I move its adoption.

The Vice-Chair: Mr Wood moves adoption. Are all in agreement with this? All in favour? Carried.

Mr Wood: I wonder if I might ask for unanimous consent of the committee to extend the time for consideration of the proposed appointees set out in the report of the subcommittee of December 6, 2001, by 30 days.

The Vice-Chair: Any discussion on that?

Mr James J. Bradley (St Catharines): It's agreed.

The Vice-Chair: Everyone in agreement? So the extension will be made then. OK, thank you, Mr Wood.

Mr Bradley: Is there a motion to be made? Do we need a motion for that?

The Vice-Chair: Do we need a motion?

Mr Wood: I thought that was. If not, I'll move one, or you can move one.

Mr Bradley: No, no, you go ahead.

The Vice-Chair: All those in favour of the motion? All those opposed? None? Carried.

Mr Tony Martin (Sault Ste Marie): I'd like to move that we call in during the intercession the Ontario Lottery and Gaming Corp for a review.

The Vice-Chair: Mr Martin has moved that we call in the Ontario Lottery and Gaming Corp as an agency. Is there any discussion? Mr Martin has moved that motion. All those in agreement? All in favour? Seeing none opposed, that will be carried. I guess we'll have to determine when that happens, Mr Clerk.

Mr Joseph Spina (Brampton Centre): I'm opposed.

The Vice-Chair: It's too late.

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

COMITÉ PERMANENT DES ORGANISMES GOUVERNEMENTAUX

Mercredi 12 décembre 2001

INTENDED APPOINTMENTS

IAN D.C. McPHAIL

Review of intended appointment, selected by official opposition party: Ian D.C. McPhail, intended appointee as chair and member, Environmental Review Tribunal.

The Vice-Chair: We will then move to the selection of our interviewee today, Mr Ian D.C. McPhail, an intended appointee as member of the Environmental Review Tribunal. Mr McPhail, welcome. Thank you for joining us today. You will have an opportunity, if you like, to make some remarks in advance of the questioning, so please feel free to make a few remarks.

Mr Ian D.C. McPhail: Thank you, Mr Chairman and members of the committee, for inviting me here today. It gives me the opportunity to tell you a little about myself and, subject to your approval, why I am looking forward to this responsibility.

I was raised and educated in Sault Ste Marie. I graduated from Bishop's University and Osgoode Hall Law School. After graduation, I practised law in Toronto, primarily in the areas of wills and estates, real estate and small business issues.

I have always participated actively in the community. In recent years, I served as the first lay board chair of Toronto Grace Hospital. I was a director and then vicepresident of the Toronto Chinese Community Services Association. I taught estate planning and administration in the bar admission course. I mentored with the student legal aid society at Osgoode Hall on a program to provide estate counselling, including preparation of wills and powers of attorney to people in need suffering from AIDS and other terminal illnesses.

In 1996, I was appointed to the board of TVOntario and served as acting chair for the year 1999. I am proud to have instituted and managed a strategic planning process which led to beneficial change. We worked to encourage public interest broadcasting focusing on Ontario; for example, our series on the War of 1812. We increased the programming budget by reducing nonessential spending and by continuing to develop viewer participation and support.

For the past two years, I have served as chair of the Alcohol and Gaming Commission of Ontario. This has given me experience as an adjudicator and greater STANDING COMMITTEE ON GOVERNMENT AGENCIES

appreciation of the role of a tribunal in protecting the public interest.

Working with board members and staff, we fulfilled our governance responsibilities by establishing an effective and active committee structure. We embarked on a continuing education program, which included such things as decision-writing seminars. We are close to completing new conflict-of-interest guidelines, performance review measures and our first set of rules of practice. Our strategic planning process is well underway. Our caseload has increased by 75% but, without any increase in staff, we have eliminated our scheduling backlog and the board is delivering our decisions in a much more timely manner. This has been done with no compromise in quality, as evidenced by the fact that none of our decisions has been overturned by the courts.

I have enjoyed learning how to adjudicate in a public administrative tribunal. I believe that my experience in community activities and with these two agencies will enable me to deal with this exciting new challenge.

Over my lifetime, I have travelled throughout this province. I've marvelled at its diverse beauty. I believe in environmental protection, both for today and for future generations. The statutes which are the subject matter of the Environmental Review Tribunal are important to all Ontarians. I will uphold the protections contained in them for the benefit of us all. Thank you.

1040

The Vice-Chair: Thank you very much, Mr McPhail. We'll begin our questioning today with the third party.

Mr Martin: Thanks for coming before us. It's interesting that you have roots in the Soo. There are three of us here this morning; Mr Spina as well. So your chances are pretty good.

Mr McPhail: Good. That's very encouraging. Thank you.

Mr Spina: But only one of us went back home to work.

Mr McPhail: I see.

Mr Martin: Anyway, this is, in my view, a really important appointment. There's nothing more fundamental to the health of a populace and communities than the environment and making sure that decisions we make reflect some serious and intelligent understanding and support for initiatives that are environmentally intelligent. I guess first of all, why do you want this appointment? Of all the things that you could probably do, because you've got a very impressive resumé, why this one at this time?

Mr McPhail: There are several reasons why this tribunal was of particular interest. I enjoy it where I am now, but when I had the opportunity, I was intrigued because it deals with broader issues, which, as you say, Mr Martin, are of perhaps greater significance to the province. It deals with issues on an appeal level, which I think is significant. It gives me the opportunity to work in an area which, although I don't have specific experience, I find very interesting.

Mr Martin: Your understanding of the environment, do you see it as sort of separate entities, looking after the water, looking after the air, looking after the wildlife and trees? What would your concept of all of that be?

Mr McPhail: I would see all of these areas—wildlife, water, the air, soil—as being very much interrelated. What we do in one area, the philosophy we bring to one area, tends to be replicated or reflected in the other areas as well. I don't think that you can look at any one of those in isolation.

Mr Martin: I may have missed this, because I was going through some of your material here, but what, by way of background, do you bring, then, to those kinds of decisions that you may have to make?

Mr McPhail: The background I bring is not in environmentalism per se, but more in the area of understanding how tribunals work, how to adjudicate, how the tribunal should adjudicate, how the tribunal should carry out its public interest mandate, because it's one of the very interesting things and I think important things about administrative tribunals, as opposed to courts. Courts I see as being essentially passive in that they deal with matters which are brought before them. Administrative tribunals do that as well, but they've also got additional components to them, because they've got a public interest or stakeholder education component. One of the benefits, I believe, of administrative tribunals is that you learn from the hearings that members of the tribunal conduct so that you develop specialized expertise which can also then be helpful in terms of making recommendations to government, because you've got the opportunity of seeing how legislation works on the ground, as it were.

Mr Martin: So you've no background in environmental science or activity? Because it says here that two of the criteria for having appeals approved are, one, what you've just talked about, having regard to the law and to any relevant government policies, but there's also that the decision could result in significant harm to the environment. You'll have to make decisions with regard to that. What knowledge and background and experience will you bring to that kind of—

Mr McPhail: I think the knowledge, background and experience that I or, frankly, any tribunal member of this or other tribunals should bring is good judgment, balance and the ability to learn and to understand. For example, in my present position, I don't have a background in alcohol or gaming, but you learn the statutes and the parties bring the issues before you.

With this particular tribunal, there are more technical aspects, no question of that. In that, you're going to rely on lawyers, engineers, scientists and other experts who bring these before you. To answer your question, I think you have to bring a sense of balance, fair play and a sense of commitment to the issue, because it's important to remember that these statutes that you're reviewing are remedial in nature, and that has to inform the direction you follow.

Mr Martin: What in your view are some of the major issues out there today confronting us that you may have to make decisions about?

Mr McPhail: I think one of the key issues we'll have to deal with is the constant conflict in this province between growth, economic development and our desire to protect the environment and at the same time to ensure that growth can occur in a manner that doesn't harm the environment.

Mr Martin: What's your position on water-taking and the industry that seems to be growing in leaps and bounds in the area of selling off water?

Mr McPhail: In that respect, I understand that the policy of the government is not to allow bulk water-taking, and that makes sense to me. In terms of details of the policy, obviously that's something that I'm going to have to learn more about.

Mr Martin: What about the issue of waste management, in particular the most dramatic one of Toronto and the fact that its landfills are filling up? Right now we're shipping garbage to Michigan. What's your view on that issue of how we should manage our waste?

Mr McPhail: Again, that's such a complex issue. Obviously, I have an interest in it as a resident of the municipality. In terms of what is the best solution for the future, those are issues that may come before the tribunal. I will certainly be spending a lot of time informing myself in detail about these, but I think it would be difficult to offer any detailed opinion at this time.

Mr Martin: OK, thank you.

1050

The Vice-Chair: We now move to the government side. Any questions?

Mr Spina: Thank you, Mr McPhail. If I have trouble saying that, it's because I know you as Ian. I appreciate the opportunity to talk with you today.

If you had a priority in terms of the overall Ministry of the Environment—and this is perhaps a wee bit beyond the scope of the tribunal—what do you think its prime role should be: as a watchdog or as an implementer, perhaps, of regulatory controls?

Mr McPhail: I would think the first stage of the ministry should be as a vigilant watchdog. I think that's an important role in order to alert the government and the people of the province as to what it sees as being threats to the environment. If you want to take a look at that in stages, I think stage one would be that of a watchdog, stage two would be that of trying to develop open and transparent processes to encourage community and public support for environmental goals, and in certain areas, indeed, there is obviously a regulatory and enforcement function there as well. I think the watchdog and the public education functions should come first.

Mr Spina: Ian, thank you very much. I wish you well. **The Vice-Chair:** Any other questions?

Mr Wood: We'll waive the balance of our time.

The Vice-Chair: We now move to the official opposition.

Mr Bradley: Are you a member of the Conservative Party?

Mr McPhail: Yes, sir, I am.

Mr Bradley: You have supported Conservative candidates in years gone by?

Mr McPhail: Yes, I have.

Mr Bradley: OK. That's the first thing we always like to know on this side. Secondly, why are you leaving the Alcohol and Gaming Commission early? It would appear that you are midway through a term and you're now leaving the Alcohol and Gaming Commission. Why would that be?

Mr McPhail: Because I was approached about taking on this position. Obviously, I have mixed feelings because I enjoyed my term at the Alcohol and Gaming Commission and I think I've been able to make some beneficial changes. However, when I was approached about this, it seemed like a very exciting and interesting opportunity.

Mr Bradley: Did you encounter any problems at the Alcohol and Gaming Commission so the government would want to move you to another commission or would prompt you to want to move to another commission?

Mr McPhail: Not of that sort. Obviously, when you make changes there may be differences of opinion, but one of the things I was very happy about when I was there was that the board was very supportive in terms of what we'd done. By and large, I've found that staff have been quite supportive as well.

Mr Bradley: Were you in conflict with the minister, then? Because it's always odd when a person leaves. I know this may be an attractive alternative, but you have no background that I can see in environmental law and you're in the midst of a term at the Alcohol and Gaming Commission and they move you over here. I'm just wondering what happened at the Alcohol and Gaming Commission that would—

Mr McPhail: I worked with two ministers; there was never any conflict with either of the ministers.

Mr Bradley: So you don't get the feeling that you were shoved out of that position over to this position?

Mr McPhail: No, I do not.

Mr Bradley: OK. You are facing, as well, a situation where you do not have an environmental background. This is an environmental board which deals with environmental decisions virtually exclusively. It does not deal with other things. Do you not feel that that is a disadvantage, that you would not be immersed in environmental law and issues related to the environment, and you're going to be the chair of the most powerful environmental board we have, in fact the only environmental board we have today?

Mr McPhail: The chair of the board has a number of responsibilities. In addition to adjudication, the chair has the responsibility of managing the board and ensuring that the board members work together effectively. The chair has the responsibility for outreach to the public and to stakeholders and the responsibility to provide advice as appropriate in terms of what the tribunal learns. In my two previous experiences with both TVOntario and the Alcohol and Gaming Commission, I believe that I've developed the ability to do this well.

In terms of my years in law practice, I've learned to listen to people, to understand both sides of different positions and to try to be objective, while at the same

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time promoting things that either my clients or I believed in.

Mr Bradley: I'm going to go back, if I can, to another question, to the movement from one board to another. Are you telling the committee that it was your decision to leave the Alcohol and Gaming Commission and seek this position? It was your initiative and no one else's?

Mr McPhail: No, I'm saying that I was approached. I had the opportunity and I was very intrigued and excited by the opportunity.

Mr Bradley: Did you get the impression when the person approached you that it was because they no longer wanted you to sit on the Alcohol and Gaming Commission and wanted to put you somewhere else in government? Did you get that impression at all?

Mr McPhail: I did not.

Mr Bradley: You did not. OK. I think Ms Dombrowsky wants to ask some questions.

Mrs Leona Dombrowsky (Hastings-Frontenac-Lennox and Addington): I listened with some interest when you outlined your understanding of the responsibilities of chair. I have to say that I am somewhat concerned about the fact that your background does not include anything that would relate to environmental experiences. As chair, as my colleague has indicated, of the only quasi-judicial body that affects our environment, I believe you need to be seen as credible in that role. You've indicated, of course, that the role includes adjudication and managing the members of the board. I've been a chair of a board myself, so I have some appreciation of that responsibility.

You've also indicated, though, that there is a responsibility to outreach to the public and the stakeholders. I would suggest that in that particular capacity, you would need to be seen as a credible voice in that respect. I would suggest that for those people who are most concerned about the environment, you would have absolutely no background in that area and that would bring into question your credibility in speaking to those issues knowledgably. I appreciate that, yes, we can all do some homework and do some study, but I also appreciate that it's experience in the field that really brings to one recognition and respect by people in that particular area.

You've also indicated that it would be your role to provide advice. You also used the word earlier in your presentation about the importance of bringing balance to the position, but I would suggest that it would be rather difficult for you to do that, given that you don't have any environmental experiences in your background. I would suggest that would be quite a formidable challenge for you. So with regard to providing advice, I would suggest that it might be less than balanced.

I would also like to ask if you are familiar with the Ministry of the Environment's statement of environmental values?

Mr McPhail: Yes, I have read the statement.

Mrs Dombrowsky: You are, of course, familiar with one of the more recent issues that has been heard by the tribunal with regard to the Tay River?

Mr McPhail: Yes, I'm familiar with that.

Mrs Dombrowsky: Actually, my understanding is that the Ministry of the Environment defended the charge that it did not consider its own statement of environmental values because the statement was not a law so it didn't have to do that. Does it somehow seem incongruous to you that the ministry would have a statement of environmental values, but when a case comes to the tribunal and is challenged, you haven't considered your environmental values in making this decision and the ministry would offer as defence, "No, we didn't, but it's not a law, it's just a statement. There's no law that says we have to." Do you have an opinion about that? **1100**

Mr McPhail: It's not possible for me to say at this time that the ministry did or did not follow the law because, while that hearing has concluded, Pauline Browes, the vice-chair of the tribunal who conducted the hearing, is working on the decision and it has not yet been released. So I haven't had the benefit of being in her position of hearing the evidence and being able to come to any conclusions. Further, I—

Mrs Dombrowsky: I really wasn't asking for a comment on it because I know there hasn't been a decision made by the tribunal, but what I want to understand from you is, does it not somehow seem incongruous that a ministry would have a statement of environmental values—supposedly it should be a functional statement, one that they would use—but in this particular situation, it argued, "Yes, we have the statement but it isn't in law." In fact, this government voted against making it a law when it was introduced as private member's legislation. Does that seem incongruous to you? Does it seem strange that the ministry would argue, "We have the statement but there's nothing that says we have to follow it"?

Mr McPhail: I think a mission statement should inform the decisions made by any ministry or tribunal or organization. Mission statements don't customarily have the force of law unless, of course, they're incorporated into statutes. But as I say, whether that was the case with respect to the Tay River case or not, it just isn't possible to say.

Mrs Dombrowsky: Can you appreciate, however, that people who read a statement of environmental values by the Ministry of the Environment assume that is a guiding principle for the ministry? Can you understand how very surprised and disappointed the people who are governed by these laws are when they see the government arguing, "Yes, it's a statement, but it's not a law"?

Mr McPhail: I understand what you're saying and, indeed, I say a mission statement should be a guiding principle, or should reflect the guiding principles of any organization that has a mission statement. But it may well be that if the statement doesn't have the force of law, it might simply be a reflection of the reality, which is the case if it's not incorporated into statute.

Mrs Dombrowsky: We will have it because it sounds good, but don't make us follow it.

Mr McPhail: I think it should be. I think mission statements should be followed.

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The Vice-Chair: Thank you very much, Mr McPhail. That completes that part of the process. We will now be moving toward voting on your appointment. We will now move to the decision on approval.

Mr Wood: I move concurrence re Mr McPhail.

The Vice-Chair: Mr Wood moves concurrence. Is there any discussion?

Mr Bradley: I cannot support the appointment. I can support a number of appointments that have come before this committee, and there are varying reasons for that. It's usually the suitability of the person for the position. Mr McPhail is an individual who is involved very much in different kinds of law other than environmental law. When I look at the background, we have: practice oriented toward individuals and small businesses, fields of law include corporate real estate, wills and estates, received training in corporate and securities law.

For the chair of an environmental tribunal, I would prefer a person who had knowledge of environmental law. The best is probably somebody who has acted on behalf of both proponents and opponents because it is a quasi-judicial position where we would want a person to be able to take into consideration the arguments made on all sides. In other words, it's unlikely you would want a zealot on either side of these issues to be presiding over the hearings.

However, I do look for someone who would have a background in environmental law. These are environmental decisions. I'm sure there are a number of people who belong to the Conservative Party, even, who have extensive experience in environmental law and knowledge in this field. I would have hoped the government would have brought forward an individual of that kind for this position, because it's not just a member, it's a chair of the tribunal as well.

Also, I have some questions in my mind as to why an individual would leave one position in mid-term at the Alcohol and Gaming Commission—and I do not believe I received an answer which was as definitive as I would like it to be when I asked the question. The question remains, is this an attempt to move one person who may be annoying the government or who, for some reason, they don't want at the Alcohol and Gaming Commission, to another position? This is speculative, I understand that. I'll put that on the table. So we'll find another position for an individual who may not be suited for that. There may be other areas.

Mr McPhail has served in many capacities on a voluntary basis and a professional basis, and I respect that. I'm simply flummoxed by the fact that the government would bring forward a person without an environmental law background or an adjudicative background in terms of environmental law and place that person in the position of chair of the board. So I will be unable to support Mr McPhail's appointment to this particular position which is recommended today by the cabinet.

The Vice-Chair: Any further questions?

Mrs Dombrowsky: I share the concerns of my colleague Mr Bradley. I think I also indicated in my remarks that I have a very serious issue with the credibility of an

individual who is in a significant role. I have had the opportunity to speak with people, many of them my constituents, who have had the opportunity to participate at an appeal at the Environmental Review Tribunal. So I have some sense and understanding of what those individuals hope to find in the people they speak with at that body. I know it is their expectation that there will be people there who will have some background and understanding in environmental issues.

I could not agree more with the statement that Mr McPhail made when he suggested than an individual in that role should bring a balanced perspective. I agree with that. Mr Bradley has indicated that someone with a background in the field of law ideally would bring some experiences where he would have dealt with both proponents and opponents on environmental cases. That to me is balance. I would suggest that this individual, who may be very qualified for very many things, in my opinion is not qualified to serve as the spokesperson, the chair of the only environmental juridical body in this province. I will not be able to support this appointment.

Mr Martin: This is a really important appointment. There is nothing more fundamental to quality of life in today's world than how we look after the environment and how we deal with issues of the environment. They are very complicated and sensitive issues. I think it requires a certain degree of understanding, experience and knowledge in that field if you're going to do it properly, particularly as the chair of the tribunal. I didn't sense in Mr McPhail's responses that he had that level of understanding, experience and knowledge. So I won't be able to support this appointment either.

The Vice-Chair: Any further discussion?

Mrs Dombrowsky: A recorded vote.

The Vice-Chair: We will have a recorded vote.

Ayes

Johnson, Mazzilli, Spina, Wood.

Nays

Bradley, Dombrowsky, Martin.

The Vice-Chair: Mr McPhail's appointment is approved.

If I can just bring one other issue to the committee, in terms of our meetings during the intersession, would it be agreeable to the members to have the subcommittee determine the dates that we meet? I understand with the 30-day extension, we have to deal with those appointments by the end of January. Is there agreement that we have the subcommittee determine our meeting times?

Mr Wood: I'd be satisfied if the Chair determines them after consultation with the subcommittee.

The Vice-Chair: That's OK.

Thank you very much, everybody. The meeting is adjourned.

The committee adjourned at 1111.

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Vice-Chair / Vice-Président Mr Michael Gravelle (Thunder Bay-Superior North / -Nord L)

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