IN THE MATTER OF AN ARBITRATION

~BETWEEN~

THE CITY OF OTTAWA

("EMPLOYER or CITY")

~AND~

THE CIVIC INSTITUTE OF PROFESSIONAL PERSONNEL

("UNION")

AND IN THE MATTER OF AN INDIVIDUAL GRIEVANCE (COOPER)

Arbitrator: Deborah Leighton

APPEARANCES

For the Employer: Charles Hofley

For the Union: David Migicovsky

Hearings were held in this matter in Ottawa on: July 2, November 15 and December 17, 2013; February 26, March 5 and 6, June 23, September 16, October 14 and December 15, 2014; January 8 and 9, 2015.

AWARD

Introduction

[1] The City of Ottawa terminated Mr. Ted Cooper's employment on May 9, 2013, for just cause. The union grieves on his behalf that the termination is not warranted and "seeks reinstatement with full back pay, interest on unpaid amount, reimbursement for any special damages occasioned as a result of the termination, punitive damages and such further and other relief as may be required."

[2] Mr. Cooper is a professional engineer who was employed by the City from 2002 to the date of his termination as a Project Manager in the Policy Development and Urban Design Department. He worked on the Kanata West Development and Carp River Restoration Project (the Project) until 2004. In 2004, the grievor and another engineer at the City raised a concern about surface drainage in the Project. Subsequently, the grievor made a complaint as a private citizen to the City's Auditor General who concluded in a 2008 report that there was a problem. Consultants for the City made an egregious modeling error (EME). There had been a miscalculation on possible run-off from the development into the Carp River. In 2008, the Mayor of the City commended the grievor for raising the problem publicly. Because of the Auditor General's findings, the Ministry of the Environment and Climate Change (MOECC) ordered the City to stop plans for development of the Project until a new third party review (TPR) was conducted. By early 2013, "The Restoration Plan," designed to compensate for the

EME, had been approved by the Ministry of Natural Resources and Forestry (MNRF), the MOECC, the Mississippi Valley Conservation Authority (MVCA), City Staff and City Council.

[3] Although the grievor was not assigned to work on the Project as an employee after 2005, he continued to take a strong interest in the Project as a private citizen. In this capacity, he made applications about his concerns to various public bodies including the MNRF, the Ministry of Transportation (MTO), the MOECC and the Ontario Municipal Board (OMB). He also submitted two Part II order requests under the *Environmental Bill of Rights Act*.

[4] The grievor's concerns were triggered again in 2013 when he received documents through an MFIPPA request regarding the new TPR that, in his view, showed that there were several major unresolved issues affecting the infrastructure in the Project. He raised these concerns with his manager, Mr. Roman Diduch, in person and in an email dated April 8, 2013. When there was no response to this email, the grievor forwarded it one week later to Ms. Lee Ann Snedden, Manager of the Policy Development Department, Mr. Diduch's supervisor. In the email, the grievor expresses his concerns about calculations and the infrastructure issues as he sees them. He also requests specific information within a short time frame and asks if City Council has been informed or "whether I should be requesting another investigation to be undertaken by the Auditor General."

[5] It is the employer's position that the grievor's demand for information and the reference to reporting the matter to the Auditor General was insubordinate and unprofessional. After an investigation, the employer concluded that the grievor was acting in violation of the City's

Code of Conduct and was not being respectful to the City or City employees. The employer took the position that the grievor had been told not to discuss these matters with staff and that he ignored the employer's directions not to intervene in the Project. The grievor had been warned about criticizing the professional expertise of his colleagues or independent third parties acting for the City. Thus, the City decided the grievor's employment was no longer tenable. The employer submitted that if I find that the evidence does not warrant termination, pay in lieu of re-instatement should be ordered, given the complete breakdown of the employment relationship.

[6] It is the union's position that the grievor was not working as an employee of the City on the Project. However, he was continuing to criticize problems with the Project as a private citizen. When he reviewed the TPR documents received as a result of the privacy commissioner's order releasing them, he had genuine concerns that the Project as designed may not be safe for the public. He raised these concerns in his email to his supervisor on April 8 and then forwarded them to Ms. Snedden on April 15. The union's position is that the City seized on the April 8 email as an excuse to terminate the grievor. It relied on stale dated discipline documents to make the decision to terminate the grievor's employment. There is no just cause for discipline or if some is warranted, termination is excessive in the circumstances.

[7] The employer tendered evidence on the email, which led to the grievor's termination, the subsequent investigation and the decision to terminate Mr. Cooper from employment. Much

of the evidence is contested by the union. The union did not call evidence. Therefore, the record before me is the *viva voce* evidence of the employer's witnesses, vigorous cross-examination of those witnesses and extensive documents. Many of the documents relate to the Carp River Restoration and the development of Kanata West. However, for the reasons that will follow, it is not necessary to provide a fulsome summary of that evidence. I will refer to all relevant evidence made in the findings of fact and in my reasons.

Analysis

[8] The issue before me is whether the employer has proven just cause for the termination of Mr. Cooper. *Wm. Scott and Co Ltd. and Canadian Food & Allied Workers Union, Local P-162,* [1977] 1 Can L.R.B.R. 1, remains the leading case on the test that must be applied to answer this question. The first question is whether the alleged misconduct occurred. The second is whether the email amounts to misconduct. If it does, then the next question is whether sending the email deserves any discipline. If discipline is warranted then I must answer the question of whether discharge is the appropriate penalty. The more recent decision in *PSAC v. Commissionaires Nova Scotia,* 2014 NSSC 286, CarswellNS 568, reinforces the point that arbitrator's must determine whether the termination was appropriate before considering any mitigating factors. The onus is on the employer to prove just cause. It is well established law that discipline and discharge cases are largely decided on their facts.

[9] There is no doubt that Mr. Cooper sent an email to his supervisor on April 8, 2013. He forwarded it to Ms. Snedden on April 15. The question is, does it amount to misconduct? For the sake of completeness, I have set out the grievor's email to his supervisor in Appendix 1 of this award without attachments. For ease of reference I include the last part of the email here:

> The City needs to realize that there are several major unresolved issues affecting infrastructure in the design stage at the City:
>
> I. the lack of capacity of the restored main flow channel in the Restoration Plan;
> II. the failure to account for the hydraulic constraints imposed by the recreational pathway system and pathway bridge crossings on flood levels in the Calibration and Validation exercise;
> III. problems with the representation of the SWM ponds in the HECRAS model;
> IV. the lack of documentation of interim design conditions – such as the flood levels affecting the design of the Kanata West PS upstream of Maple Grove Road before the existing culvert crossing is replaced with the much larger bridge structure;
> V. the entire approach to stormwater management that has several SWM Ponds with storm sewer inlets that will be as much as 1.5 lower than the bed of the Carp River (and should these unsustainable designs actually be constructed, there is nothing included in the Class EA documentation that details the pumping / maintenance systems that should be furnished by the developers as Draft Plan conditions – so that the City is not left with this burden when taxpayers take over maintenance of these systems);
> VI. plus many, many other issues
>
> It is my understanding that the Restoration Plan is either in the process of being tendered, or the tender has been awarded. I would like to be informed by the end of the week about what specific action City Staff will be taking as a result of the discovery of what is actually behind the advice it has been receiving from the TPR consultant, so that I know whether Council has been

informed, and whether I should be requesting another investigation be undertaken by the Auditor General.

Ted Cooper, M.A. Sc., P.Eng.

[10] The Grievor forwarded the email to Ms. Snedden a week later:

From: Cooper, Ted
Sent: April 15, 2014 9:09 AM
To: Snedden, Lee Ann
Subject: FW: Carp River Restoration – Third Party Review
Importance: High

Lee Ann,

I sent the email below to Roman last week, hoping that I would receive a response from management by the end of the week, before deciding whether to ask the Auditor General to investigate this. Roman was busy on Friday getting things done before he headed out to Winnipeg and I didn't get a response other than he was going to contact Curtis about the situation.

Since Roman isn't back until Wednesday, I thought I would follow-up with you, uncertain whether he had brought the matter to your attention.

Thanks,

Ted.

[11] Ms. Snedden testified that when she began her position as Manager of the Department she was briefed on various issues, including some of the history of the Project. She was advised that Mr. Cooper was removed from the Project in 2004 and directed not to work on it. The employer transferred the grievor to other projects in 2005. Ms. Snedden was therefore somewhat surprised at receiving the grievor's email. She thought the tone and content was inappropriate coming from an insubordinate. She had never received a demand for

information from someone junior to her, nor had she ever been threatened by an employee. That is how she understood the grievor's question about whether he should report his concerns to the Auditor General.

[12] Ms. Snedden contacted Ms. Jennifer Kelso in the Human Resources Department about the email and an investigation followed. The union was advised and an investigation meeting set up for May 2. Ms. Kelso forwarded discipline letters issued to Mr. Cooper in 2005 and 2011 to Ms. Snedden and the evidence of both witnesses is that they were used to prepare the questions for the investigation meeting.

[13] Ms. Snedden testified that she hoped Mr. Cooper would show some insight into his actions and apologize at the May 2 meeting. Ms. Snedden noted that the email was done during work time and it was sent to three City employees. She was of the view that the grievor did this in spite of being told that he was not to work on the Project. He also criticized the work of the TPR.

[14] Ms. Snedden ran the May 2 meeting. Those in attendance were Ms. Snedden, Mr. Diduch, Ms. Kelso, Mr. Cooper, and his union representatives, Ms. Sheila Stanislawski and Ms. Laura Scott. Ms. Snedden told the grievor that the purpose of the meeting was to explore and understand why the grievor sent the email, when he had been directed not to work on the Project. Ms. Snedden said that he did not deny that he had been instructed not to work on the Project. In addition to Ms. Snedden's testimony, Ms. Kelso's notes of the meeting are

before me. Therefore, although Mr. Cooper did not testify, I have a reliable source as to his answers to the questions put to him during the May 2 meeting.

[15] When asked whether he had been assigned to work on the Kanata West Pump Station, he said not by his supervisor but "Joe," who was on the Project, asked for his advice on the matter and he gave it. Ms. Snedden then read out a prepared statement summarizing the instructions not to work on the Project:

> (Question 6) I understand you have been instructed a number of times not to involve yourself in projects that are not your responsibility, and to treat your colleagues with respect. Specifically:
>
> - In July 2005 you were directed to cease all work activities involving storm water management and surface area drainage issues in the Kanata West development area and the Carp River watershed; to refrain from discussions of these matters with management and professional staff; and to refrain from continued questioning of management authority once a decision has been taken.
> - In May 2005, and again in September, you were reminded of your obligations to treat colleagues with courtesy and respect as per the City's *Code of Conduct* and Workplace Harassment Policy. It was made very clear to you that continued questioning of colleagues would not be tolerated and you were to cease communication with staff with regard to these projects other than that required as part of a formal process.
> - In January 2011, instructions to you were broadened, and you were reminded of your obligations as a City employee. Under the *Code of Conduct*, you have duties to maintain impartiality, to demonstrate loyalty to the Employer, and respect to colleagues. It was clear in the revised letter you were given that regardless of your personal views and interests, criticism of development policy decisions taken by City Council, and criticism of your Branch and professional co-workers was inappropriate.

[16] Ms. Snedden goes on to question the grievor, given these instructions, as to why he sent the April email to his supervisor. The answer as recorded by Ms. Kelso is that he was bringing the manipulation of the TPR's modeling to management's attention. It was on this that City Council made its decision to approve the Restoration Plan. He went on to explain that he made an MFIPPA request for TPR documents in February 2010, but it took three years to get the information because the consultants appealed the decision to release them. In the meantime, construction on the Project began. To the question from Ms. Snedden, "Is this your Project?" Mr. Cooper answered referring to the City's policy that employee's should report incorrect or false information that might impact infrastructure to save taxpayer's money. The TPR documents had been reviewed by the MVCA and City staff. He said further, he did not blame them. They could not know that there were errors since they were not engineers.

[17] Mr. Cooper also referred to the City needing to correct construction on a bridge because of initial incorrect information. He pointed out that the errors cost all levels of government extra money and delayed construction. It was his view that this is not how professional engineering consultants should behave. He was also concerned about health and safety issues for the public.

[18] Ms. Snedden asked the grievor why he continued to involve himself with these matters. His answer, as recorded by Ms. Kelso, is that he does so as a private citizen. To further questions about emailing staff for information, he replied that he was directed not to go to City Council

so he had nowhere else to turn. He mentioned the urgency given the Project had started construction and noted that he had acted in good faith. Ms. Snedden read the prepared text for Question 13. "I find the tone of your last paragraph to Roman to be demanding and intimidating – bordering on bullying. Why have you taken this approach, given our past instructions to treat staff with courtesy and respect?" He said he thought that as a professional engineer he should bring his concerns to the employer. He said his primary duty was to the public, not the employer.

[19] Ms. Snedden then read from the prepared questions and statements as follows:

> (Question 14) Over the past number of years, your persistent actions in opposition to both management's and Council's policy direction and decisions on these projects have required:
>
> - Significant expenditure of Branch and City resources (both time and money);
> - not to mention resources expended by our consultants, various developers, City Legal Services, the Auditor General's Office, the Ministry of the Environment, Ministry of Transportation, and the Ontario Municipal Board;
> - and resulted in development delays impacting businesses and the public;
> - and, resources diverted away from other projects of importance to the taxpayers of this City.
>
> (Question 15) In my view, your continued pursuit of these matters is in direct contravention to our repeated directions, and constitutes insubordination. This behaviour also violates the City's *Code of Conduct*, in terms of your duties of impartiality and loyalty, in addition to the requirement to treat other staff with courtesy.
>
> (Question 16) We have truly struggled with how to make our expectations and directions any clearer. As to next steps, we'll certainly consider the answers

you've provided today before making a decision. Is there anything else you would like to add?
[Emphasis added]

[20] Mr. Cooper responded by stating that it was the consultants making the errors, not him. He is the messenger. Ms. Snedden said that he was not on the Project so in some cases he had taken the information out of context.

[21] At this point in the investigation meeting, Mr. Cooper was permitted to present his concerns about the Restoration Plan to those in attendance. Ms. Kelso testified that while she did not fully follow the presentation, she said that the grievor was clearly passionate about his concerns that the plan for the Project as approved would lead to flooding of some areas, posing a public health risk.

[22] Ms. Snedden asked how he obtained the information contained in his analysis. He told her he drew on information from the Master Plan and the documents obtained through the MFIPPA request. He noted that he did the work at home but did some editing that morning and printed his presentation at the City.

[23] Ms. Snedden asked at some point in the presentation whether certain information had already been reviewed by the OMB. Mr. Cooper answered no and that he had just found out about this information in March. He went on to note that 3 centimetres of sewage level can make a significant difference. He said that it was a huge public health issue a few years ago.

Ms. Kelso asked what Mr. Cooper thought the answers were. He answered that he honestly did not know. He was not blaming City staff. The consultant made errors. He said rather than dealing with the real issues affecting the City, they "fudged" the results. He said that he was bringing this to management's attention in the public interest, not to cause anyone grief.

[24] After the May 2 meeting, the grievor sent a follow-up email to those in attendance. He raised the City's inclusion of "Whistle-blowing" protection in the *Code of Conduct* as a reason for his actions and stated that the timeline for receiving documents in his email was not meant to be bullying or intimidating.

[25] Ms. Snedden's perception of this email was that the grievor was defending himself so he could continue his agenda. Mr. Cooper did not understand how he was insubordinate or that he had a duty to his employer, in her view. She concluded the grievor was not a team-player. Further, she was of the view that he did not work well with stakeholders, residents and City Council. His behaviour indicated to her that he could not change.

[26] Ms. Snedden said that the grievor was taken off the Project in 2004. He was given clear instructions in 2005 and 2011 that his obligation as an employee of the City was to respect decisions made by the Council. She said that these instructions were in place in 2013. However, she testified he continued to question the integrity of staff. Further, he issued orders on a Project that he was not permitted to work on. She viewed the email as a critique

of City Council's decision to approve the Project based on the TPR. Finally, he was clearly told not to work on the Project on City time.

[27] Ms. Snedden considered all that she had heard and decided to recommend the termination of the grievor's employment to her manager, who referred it to the City Manager, who approved it. She drafted the termination letter with the assistance of Ms. Kelso. The letter of May 9 reflects her conclusions and reasons for the grievor's termination:

> May 9, 2013
>
> Mr. Ted Cooper
> [Address omitted]
> Dear Mr. Cooper:
>
> **RE: Termination of Employment**
>
> This letter follows the investigation meeting held on May 2, 2013 in the presence of CIPP representatives Sheila Stanislawski and Laura Scott, to discuss your recent actions with respect to the Kanata West Environmental Assessment and the Carp River Restoration Plan approved by City Council.
>
> Since 2005 you have been provided direction to cease all work activities involving storm water management and surface drainage issues in the Kanata West Development area and the Carp River watershed; to refrain from discussions of these matters with management and professional staff; and to refrain from continued questioning of management authority once a decision has been taken. You were reminded of your obligations to treat colleagues with courtesy and respect per the City's *Code of Conduct* and Workplace Harassment Policy; informed that continued questioning of colleagues would not be tolerated, and instructed to cease communication with staff with regard to these projects other than that required as part of a formal process. You continued to intervene in Kanata West development as a private citizen, including filing applications and seeking to appear before the Ontario Municipal Board in opposition to the City. The City had allowed you some latitude in your public comments, recognizing the need to balance your obligations to the City and your right to express your views on matters of public interest.

However, in January 2011 instructions to you were broadened, emphasizing your duties and obligations as an employee of Planning and Growth Management at the City of Ottawa. Per the Employee *Code of Conduct*, employees have a duty of loyalty to their employer. In addition to treating colleagues with respect and courtesy, employees should carry out the will and decisions of City Council impartially, and exercise restraint in any criticism of City Policy. The City has undertaken independent reviews of the Kanata West development, and has always engaged in an open and public process in this matter, in consultation with all stakeholders. It was made very clear to you that, regardless of your personal views and interests, once a development policy has been adopted by City Council, it is the responsibility of City staff to give effect to that policy direction. To continue to criticize our Branch, professional co-workers and the independent professional staff engaged by the City was inappropriate. It was also communicated to you that failure to abide by these directions could lead to termination of employment.

Despite the above, this spring you have once again challenged the professional expertise and integrity of the external consultants engaged by the City to conduct the Third Party Review and serve as Model Keeper for the City; demanding that City staff including your Program Manager respond to your concerns, which have no connection to the work you perform for the City. You also threatened to take further action if your Program Manager did not respond within your short self-imposed deadline. In addition to maligning the consultants, you have criticized the Mississippi Valley Conservation Authority and others. At our investigation meeting on May 2, you asserted that you were acting in good faith, and claimed that as a professional engineer you felt that is was up to you to continue to bring concerns to the Employer. However, you also chose to take your matters up with the Ministry of Environment, the Ministry of Transportation and Mississippi Valley Conservation, claiming that poor decisions have been made on behalf of the City of Ottawa, your employer. You asserted that your primary duty was to the public, not to your employer.

The issues you raised with respect to the Carp River Restoration Plan have been raised in the past. They have already been addressed by professional City staff other than yourself who have been assigned to, and are responsible for, this project. You are not a member of the project team and are not privy to current discussions and information. Your persistent interference in matters outside of your assigned projects has once again required the expenditure of extra staff time and resources.

We can no longer tolerate this behaviour. We have made our expectations clear regarding your duties and responsibilities as a City employee. Despite our repeated attentions to provide guidance, you continue to ignore our directions

and intervene in matters relating to Carp River Stormwater management, causing additional work and stress for those responsible for the project, hindering deadlines, and diverting resources. Your recent actions constitute insubordination and are inconsistent with the duties of impartiality, loyalty and respect per the Employee *Code of Conduct*. No matter how strongly you believe in the veracity of your opinion, your continued challenging of the expertise and ethics of other professionals associated with this project, and persistent attempts to find fault in their work are obstructionist, very damaging to team morale, and ultimately no longer compatible with your City employment. Unfortunately, your demonstrated inability or unwillingness to modify your behaviour has also led key stakeholders to lose confidence in your impartiality and effectiveness, restricting management's ability to assign you work.

In light of the above, we have concluded that this employment relationship is no longer tenable. Therefore, confirming our discussion today, I regret to inform you that your employment with the City of Ottawa is terminated effective immediately.

Please ensure that any City property in your possession is returned to Roman Diduch by the end of day tomorrow, including your employee ID badge (now deactivated). Should you have any personal belongings at the workplace, please contact Roman at extension [number omitted], to arrange for their return.

A Record of Employment can be accessed at the following website. [Web site address omitted] Should you wish to do so, you may access the City's Employee Assistance Program on a limited basis within the next two week period. To make an appointment with this confidential counseling service, please call extension [number omitted].

I wish you success in your future endeavours.

Yours Sincerely,

Lee Ann Snedden
Manager
Policy Development and Urban Design

cc. Roman Diduch, Program Manager, Infrastructure Policy
John L. Moser, General Manager, Planning and Growth Management
Jennifer Kelso, Senior Relations Consultant
Karen Timko, Human Resources Consultant
Sheila Stanislawski, CIPP
Employee file

[28] In cross-examination, Ms. Snedden acknowledged that she had discipline letters before her, issued to Mr. Cooper in 2005 and 2011, when she prepared for the May 2 meeting and when she drafted the grievor's termination letter. The 2011 letter had an attachment, Appendix A, which the witness identified as the instructions read to the grievor by Mr. John Moser, then General Manager of the Planning and Growth Management Department. Mr. Moser confirmed this in his testimony. Mr. Moser read the instructions in Appendix A during a discipline meeting in February 2011. Mr. Moser testified that the reason for Mr. Cooper's termination was that he disobeyed the instructions in Appendix A.

[29] Ms. Snedden testified in examination-in-chief and in cross-examination, that she did not rely on the discipline in 2005 or 2011 to decide to terminate the grievor. However, she did rely on the letters as proof that the City had instructed the grievor not to work on the Project on City time, nor to speak to City Staff or Council. She also states in the termination letter that Mr. Cooper had been warned not to disparage City Staff or third party consultants in the earlier discipline. Further, she said that he was warned that if he disobeyed these instructions his employment might be terminated.

[30] The discipline in 2005 was the subject of a grievance and a decision was issued. The discipline in 2011 was also the subject of a grievance and was settled by a Minutes of Settlement (MOS) in February 2013, a few months before Mr. Cooper's termination. Ms. Snedden acknowledged in cross-examination that she reviewed Appendix A., during the investigation

process. Appendix A of the 2011 discipline letter that included instructions to Mr. Cooper not to have anything to do with the Project, not even as a private citizen, was substituted by Appendix B pursuant to the MOS in 2013. Ms. Snedden acknowledged there were no other instructions given to Mr. Cooper of which she was aware. Appendix B does not include the prohibition not to work on the Project even as a private citizen. There was no evidence that Mr. Cooper was given any instructions with regard to working on the Project after 2011.

[31] Counsel for the union argued that it was highly improper for the employer to use stale dated discipline letters to investigate and then terminate the grievor. Counsel for the employer argued that the City did not rely on the letters, but that they were a record of clear instruction. The grievor disobeyed these orders and therefore the employer discharged him.

[32] There are a number of problems with the employer's position. The letters are clearly stale dated and should not have been before Ms. Snedden. The collective agreement between the parties at Article 34.01 provides that the employer must remove disciplinary letters or letters of instruction after eighteen months, provided there is no further discipline in the interim. The pertinent part of the Article for the purposes of this decision is as follows:

> Clearing of Record
>
> Notices of disciplinary action or letters of instruction which may have been placed in the personal file of an employee shall be removed after not more than eighteen (18) months of worked employment have elapsed since the disciplinary action has been taken, provided that no further disciplinary action has been recorded.

> The employer shall not introduce as evidence in an arbitration hearing relating to disciplinary action any document from the file of an employee, the existence of which the employee was not aware of at the time of the filing or within a reasonable period thereafter.

Here Mr. Cooper was not disciplined between January 2011 and his termination in May 2013. Thus, the letters should not have been in his file.

Arbitral jurisprudence supports this view. In *Canada Post Corp v. C.U.P.W* 202 L.A.C. (4th) 375, the Arbitrator said:

> A sunset provision is but one example of the parties' ability to negotiate an employment record. The general purpose of a sunset provision is to restrict the disciplinary history that is available to both the Employer and the arbitrator. In other words, after a certain period of time (one year, two years, three years, etc.) an employee's disciplinary record begins afresh and no reliance may be placed upon a prior disciplinary record outside the period established in the sunset provision.

Further, in *Treasury Board and Pearce,* 20 L.A.C. (4th) 149 (PSSRB) the Board held that the employer is not permitted to rely on evidence that led to sunsetted discipline. The employer argued in the *Treasury* case that the applicable sunset clause in the agreement between the parties did not prevent the employer from tendering documents that had been removed from a grievor's personnel file. The employer argued that if a "document has been preserved elsewhere, then the employer may use that copy." (para. 38) Further, it argued that *viva voce* evidence regarding past discipline was also admissible. The Board rejected this, stating:

> Those arguments simply outline various means by which the employer could contrive to circumvent the intent of the collective agreement. This could be

> done by using copies of documents which were kept in places other than the employee's personnel file; by having recourse to the testimony of persons who remember past disciplinary action; or by using adjudication decisions which invariably recite the details of past misconduct and often quote the very documents which the employer is required to destroy.
>
> This cannot be permitted for a number of reasons. First, because it runs counter to the clear intent of the collective agreement.
>
> Second, because it would virtually invite the employer to engage in subterfuges for the purpose of frustrating the intent of the collective agreement. For example, the employer could use such devices as maintaining alternate files (*e.g.,* "Discipline File") on which documents will remain after the copies on personnel files have been destroyed.

I agree with this reasoning and adopt it here. The City cannot be permitted to rely on documents or *viva voce* evidence that is no longer part of the grievor's record. There was some suggestion by the City that the union had waived the right to claim that the grievor's previous discipline was protected by the sunset provisions in the collective agreement. However, I am not persuaded by this argument. As noted above, the evidence is clear that the employer relied on stale dated discipline in its investigation and subsequent termination. The references to 2005 and 2011 in the May 9, 2013 termination letter correspond to the discipline meted out in those years. Had the union denied that the grievor had ever been disciplined or if the grievor had testified as such, then the employer would be able to argue waiver. However, there was no evidence to suggest this. Finally it is well established law that evidence of the facts underlying a minutes of settlement may not be used in subsequent litigation by either party, unless there are particularly special circumstances. See *Professional Engineers Government of Ontario (Shannon) and the Crown in Right of Ontario (Ministry of the Environment),* 2005 CanLII 55174 (ON GSB)[PEGO].

[33] Thus, I am persuaded that the instructions did not survive the sunset clause in the collective agreement. Even if the instructions survived independently of the discipline, Appendix A was altered substantially in Appendix B, which is part of the MOS of 2013. Appendix B does not limit the grievor's right as a private citizen to pursue applications of appeal to various ministries and agencies connected to approval of the Project. Nowhere does it say the grievor could not contact employees of the City regarding the Project. Most importantly, the warning of further discipline up to and including termination obtained in the original Appendix A is not included in Appendix B to the MOS. Thus, even if I accepted the employer's argument that the instructions survive the sunset clause, Ms. Snedden relied on a document to terminate Mr. Cooper's employment with the City that was substantially altered. Since there was no further evidence from the City regarding instructions, there was no evidence before me that Mr. Cooper was obliged not to speak to his colleagues about the Project or to pursue his concerns with various ministries and agencies as a private citizen.

[34] Further, there are other problems with the employer's position that the instructions to the grievor were clear that he was expected not to contact City Staff about the Project. Mr. Cooper sent an email as a private citizen to Mr. Don Herweyer, Program Manager of the Suburban Services Branch of the City, expressing some concern about the Project. Mr. Herweyer emailed back stating the City shared the grievor's concerns. Moreover, when a City employee on the Project asked Mr. Cooper for advice, the grievor gave it. Ms. Kelso recorded this in her notes of the April 30 meeting to prepare for the investigation. She stated that the

grievor had been asked for input on an issue and had given good advice. These facts, coupled with the evidence of the MOS in 2013 substantially changing the 2011 discipline and "instructions," lead me to conclude that the instructions were not at all clear to the grievor by the spring of 2013.

[35] What is clear is that Mr. Cooper was not assigned to work on the Project, since he was transferred off it in 2004. However, there was nothing to stop Mr. Cooper from pursuing his concerns as a private citizen on his own time.

[36] The City terminated Mr. Cooper's employment in large part because they concluded that the email was insubordinate. The test for insubordination is well established in arbitral jurisprudence. In *Hunter Rose Co. v. G.A.U. et al.,* 27 L.A.C. (2d) 338 (1980) the Board summarized the test as follows:

> Insubordination is a common type of disciplinary action in labour relations matters and is considered to be of a serious nature because it strikes at the very heart of an employer's prerogative; the right to manage. Generally, it is felt that the right to order employees to carry out work activities without debate or action which causes loss of respect is essential to the role of management. In order to constitute insubordination in law, it has been held that there are three essential components which must be present in the proven version of the events. First, there must be a clear order understood by the Grievor; see *Re Holland Hitch,* 23 L.A.C. 378 (Brant, 1972). Second, the order must be given by a person in authority over the Grievor; see *Re: Municipality of Metropolitan Toronto,* 21 L.A.C. 330 (H.D. Brown, 1970). Finally, the order must be disobeyed; see *Re: Holland Hitch, supra.* (para. 22)

Given my analysis of the evidence that the instructions to the grievor were either no longer in place, or not clear to him, I cannot conclude that Mr. Cooper was disobeying a clear order

not to work on the Project as a private citizen. Further, there were no clear instructions not to talk to fellow City employees. Again, as stated earlier, a City employee contacted Mr. Cooper for advice on the Project during work hours.

[37] Although the employer removed Mr. Cooper from the Project in 2004 and assigned him to other work in 2005, he was clearly not prohibited from working on it on his own time. The issue then is by emailing his supervisor, on what would appear to be work time and using his work email was he insubordinate. It is hard to conclude that an email on work time was a breach of a clear order, given the evidence. The evidence shows that the grievor spoke to his supervisor, Mr. Diduch, about his concerns a week before he sent his email on April 8. When he forwarded this email to Ms. Snedden, Mr. Cooper referred to Mr. Diduch's statement that he would contact someone on the Project about the grievor's concerns. All of this evidence supports the finding that there was no clear existing order for the grievor not to bring concerns about the Project to the attention of the City in 2013. Further, there is no evidence before me that Mr. Diduch did anything to indicate to Mr. Cooper that his communication was inappropriate. Mr. Diduch did not testify.

[38] Even if I found that the grievor should have known he could not send an email regarding the Project on work time and this amounts to disobeying an order, I must look at the motivation behind the grievor's behavior in deciding whether it amounts to insubordination. In *Hunter, supra,* the board explains that arbitrators have examined the motive of a grievor's actions in not following an order:

> The final criteria to establish insubordination is that an order must have been disobeyed by an employee. The direct refusal of an employee to do something is considered to undermine the managerial functions and generally arbitrators have looked for an intention to undermine authority as an element of the offence. (para. 27)

Given all the circumstances, I cannot conclude that Mr. Cooper intended to undermine managerial authority in his email. The tone of the email was strident and demanding and I will comment further on this later. However, I am convinced that the email was well motivated in spite of its tone. Whether he is right or wrong in his views of the dangers of the current TPR, it is clear on the record that for years he has worked on his own time to ensure that Project is safe for the public. Moreover, he believed that he had a duty as a professional engineer to raise concerns about the TPR. As he noted himself in the investigation meeting he was not trying to cause anyone grief.

[39] The City also relied on instructions in Appendix A of the 2011 discipline and possibly Appendix B of the MOS of 2013 to conclude that Mr. Cooper had breached his duty to treat his colleagues with courtesy and respect. I have found that the City should not have relied on the instructions in stale dated discipline and that there were no further instructions given to the grievor on this matter. However, the *Code of Conduct* applies to all employees whether there are special instructions in place or not. The City also claimed that the email of April 8 was inconsistent with Mr. Cooper's duty to be an impartial and loyal employee. The City considered Mr. Cooper's criticism of the third party consultant's as contrary to its *Code of Conduct*. Thus, the question is, was the email disrespectful to Mr. Diduch, and as Ms. Snedden concluded "demanding and intimidating – bordering on bullying." Further, did it

display disloyalty to the City? There is no evidence that Mr. Diduch considered the email from the grievor as offensive. However, this is not dispositive of the issue. A close reading of the email is crucial. There is nothing in the email that suggests a threat to Mr. Diduch. There is no criticism of him. Further, close examination of the email shows only criticism of the third party consultant. There is nothing that criticizes City staff or Council. Thus, I cannot conclude that the email was disrespectful of Mr. Diduch or verges on bullying. Nor am I convinced that it shows a disloyalty to the City.

[40] The termination letter also references Mr. Cooper's raising issues with various ministries and agencies, therefore causing the City additional work and resources as grounds for his dismissal. The main problem with this reason for termination is that there is nothing in any instructions to the grievor that he could not object to or challenge the Project as a private citizen. The City purported to restrict the grievor's right to intervene as a private citizen in its instructions in the 2011 discipline. However, this was removed by the MOS of 2013, which of course was subsequently sunsetted. Thus, the criticism of intervening in front of various ministries and agencies cannot be a valid ground to terminate Mr. Cooper. Moreover, the City never brought these concerns to the grievor's attention, contrary to Article 34.

[41] Finally, the letter of termination states that key stakeholders have lost confidence in Mr. Cooper's "impartiality and effectiveness, restricting management's ability to assign him work." There is no evidence before me to support this allegation. Mr. Cooper's immediate supervisor did not testify. Mr. Moser testified that third party consultants were not happy

with Mr. Cooper, but he had not supervised the grievor since 2011. Ms. Snedden concluded that he was not a team player, but there was no evidence to support this or that he was not working well on his assigned projects within the City.

[42] So I must return to whether the April 8 email alone amounts to misconduct. While the parameters of instructions were certainly not clear, even on the point of whether he could use his work email, the tone and demand for information was not appropriate. It is deserving of some discipline. The email was unprofessional and showed bad judgement. As the employer argued, it is not only what a person does, but how one does it. However, I am not persuaded that the misconduct warrants dismissal.

[43] The employer argued that I should draw an adverse inference that the grievor's evidence is contrary to the union's position in this case, because he did not testify. A party's decision not to call a witness does not necessarily lead to an adverse inference. The rule is not absolute. The onus in this case is on the employer to prove just cause for the termination and as I have just indicated the employer has failed to do so. Therefore, there was no need for the union to call evidence. See *Jacobs Catalytic Ltd. and LIUNA, Local 1089*, 84 C.L.A.S. 245 (Albertyn).

[44] Given the nature of the misconduct and the fact that there was no discipline on Mr. Cooper's record in May of 2013, the employer should have considered progressive discipline. The arbitrator in *Canada Post Corp v. C.U.P.W.* 182 L.A.C. (4^{th}) 65 explains the well-entrenched principle of progressive discipline in arbitral jurisprudence:

> The progressive discipline doctrine is firmly embedded in arbitral jurisprudence. Arbitrators typically find that implicit in the concept of just cause for dismissal is an employer's requirement to take a progressive or corrective approach to discipline prior to imposing the ultimate penalty of discharge. The principle of progressive discipline is based on the notion that it would be unjust to dismiss an employee if the employer has not first attempted to correct the misconduct with a lesser penalty or penalties. It is also premised on the belief that discipline will better achieve its corrective purpose if the penalties are imposed on a progressive basis, from less severe ones for the first offense to more severe ones for repeated and serious infractions. Adherence to a disciplinary progression also avoids claims that employees were surprised or lacked warning of the seriousness with which the employer regarded their misconduct. At one time, arbitrators expressed the view that the rationale for applying progressive discipline did not apply to the most egregious forms of misconduct such as theft or assault; however, the more modern view is that the norms of progressive discipline, focusing on an employee's rehabilitative potential, should also apply to very serious misconduct. See Mitchnick and Etherington, *Labour Arbitration in Canada,* at 10.9.3. (para. 95)

The City was of the view that progressive discipline would have had no effect on Mr. Cooper. However, the City was relying on a record that I have found is not before me. As stated earlier, there was no discipline on Mr. Cooper's record in May 2013. Thus, there is no reason for me to conclude that a lesser penalty would not have sent a clear message to Mr. Cooper that his email to Mr. Diduch was out of line and unprofessional, no matter how urgent it was in his mind. Moreover, Mr. Cooper was not warned that if he brought concerns about the Project to the City's attention or criticized third-party consultants, his employment could be terminated. This kind of warning was included in 2011 discipline, but it was removed by the MOS in 2013.

[45] Counsel for the City argued that if I found that some discipline was warranted, I should not reinstate Mr. Cooper. Instead, I should order pay in lieu of reinstatement. He argued that the

trust between the grievor and the City was broken. Counsel for the union argued that this was not an appropriate case to order pay in lieu of reinstatement. He emphasized that arbitrators have generally found that it is a remedy that should only be ordered in exceptional cases. Finally, he submitted that there was little or no evidence to support this remedy.

[46] There was no dispute between the parties on the legal principles that apply to ordering pay in lieu of reinstatement. The question is whether the evidence before me justifies the exceptional order here. In *PEGO, supra,* the arbitrator explains the reasons for arbitrators' reticence in making these orders:

> There are sound reasons for arbitrators' general reticence to embrace this remedial approach absent truly exceptional circumstances. On its face, such a result is presumptively at odds with a fundamental bargain which underlies not only the instant collective agreement, but also the entire collective bargaining scheme on which it is constructed (para 11).

Further the decision states:

> The protection against discharge without just cause and the attendant availability of reinstatement where just cause is not established are twin historic features of the collective bargaining regime. They ought not to be lightly discarded. Indeed, the availability of reinstatement is a feature which is largely unique to the arbitration process and one which clearly distinguishes that process from the more traditional judicial approach to wrongful dismissal (para 113).

I agree with this reasoning. There must be clear evidence of exceptional circumstances to support this remedy.

[47] In deciding if a case warrants the denial of reinstatement the oft cited factors in *De Havilland Inc. and CAW,* 83 L.A.C. (4th) 157 are helpful:

1. The refusal of co-workers to work with the grievor.
2. Lack of trust between the grievor and the employer.
3. The inability or refusal of the grievor to accept responsibility for any wrongdoing.
4. The demeanor and attitude of the grievor at the hearing.
5. Animosity on the part of the grievor towards management or co-workers.
6. The risk of a "poisoned" atmosphere in the workplace.

[48] In the case before me there is no evidence that Mr. Cooper's co-workers will not work with him. As I observed earlier, I did not hear evidence from Mr. Cooper's supervisor or any of his co-workers. There is no evidence before me that the grievor distrusts management. There is some evidence that some senior managers do not trust the grievor not to continue raising issues about the Project. However, there is nothing to indicate a lack of trust between his supervisor and others that he worked with prior to his termination. There is certainly no evidence that there is a risk of a poisoned atmosphere in the workplace. There was evidence that the grievor cooperated during the investigation.

[49] The employer's decision to terminate Mr. Cooper's employment was based on the premise that the grievor had been told for years not to work on the Project, and that he repeatedly disobeyed this instruction. Thus, in the employer's estimation, Mr. Cooper was not amenable to correction and therefore the trust necessary in the employment relationship was irretrievably broken.

[50] I have two concerns here. The City did not establish this record, because as I have said earlier there is no evidence to support it. The grievor's disciplinary record was clean when his employment was terminated. To reiterate, the City cannot rely on sunsetted discipline or instructions, which form part of the discipline to justify the termination. Likewise, the City cannot rely on this argument to support its position that the employment relationship is irretrievably broken.

[51] Further, as the arbitrator stated in *PEGO, supra,* there is a significant problem with denying reinstatement when the employer has not proven just cause for termination. He goes on to explain that the remedy should not replace progressive discipline.

> The availability of such a remedy is not and ought not to be a proxy for progressive discipline. It does not and should not provide an opportunity for an employer to, effectively, sever the employment relationship and to deny an essential collective bargaining remedy in circumstances where the application of progressive discipline may have been less than complete. In the extreme cases, an employer might not impose any discipline at all for a series of culpable events and, ultimately, seek to rely on all of them to assert reinstatement ought not be granted even absent just cause for discharge. I do not mean to suggest that the instant matter is that extreme case, but I have grave concerns that it is the employer's less than fully vigilant commitment to principles of progressive discipline which, at least to some extent, drive the request in this case (para 122).

Further, merely asserting that the employer has lost all trust is not enough to justify denial of reinstatement. In *OPSEU and Integra,* 215 L.A.C. (4th) 398, (Cummings) the arbitrator opined as follows:

> Typically, when an employer terminates an employer, it has considered the alternatives and made, what for it, is a final reasoned decision that the employee had engaged in conduct which goes to the heart of the employment relationship. Participation in the grievance and arbitration procedure, coupled with the inevitable passage of too much time, can cement the employer's view

> that the employment relationship cannot be rehabilitated because it has lost trust and confidence in the grievor. An arbitration decision that finds termination of employment was not justified will not necessarily or even likely alter the employer's view. Put simply, I expect that most employers would honestly and sincerely continue to believe that they could not repair their relationship with the employee if he or she were reinstated. Placing emphasis on this factor would regularly undermine the availability of reinstatement as remedy (para 11).

I agree with this analysis. I have no doubt that the City honestly believes it would be best for both parties to part ways. That belief, absent clear evidence of a complete breakdown of the relationship is simply not enough to support the remedy. It is therefore denied

Punitive Damages

[52] The union seeks an order for punitive damages because the City relied on stale dated discipline to terminate Mr. Cooper's employment, thereby deliberately violating the sunset provision in the collective agreement. The union argues further that the investigation following the receipt of the April email was a sham. In its view, the decision to terminate the grievor was made on April 30 well before the decision letter was issued on May 9, 2013, because the grievor was an embarrassment to the City.

[53] The City submitted that there is no evidence to support a finding that it deliberately violated the collective agreement. The reasons given in the termination letter were the only grounds for Mr. Cooper's termination. Further, Ms. Snedden testified that the decision was not made by her until after the investigation meeting on May 4. Therefore there is no evidence to support an order for punitive damages.

[54] Having carefully considered the submissions of the parties on this issue, I am not persuaded that this is an appropriate case for punitive damages. The Divisional Court in Greater Toronto Airport Authority and P.S.A.C., Local 0004, 202 L.A.C. (4th) 205, the Ontario Divisional Court reviewed the Supreme Court of Canada's principles for awarding punitive damages in contract cases. In reviewing the arbitrator's decision to award punitive damages, the Divisional Court concluded that it was reasonable for the arbitrator to exercise his jurisdiction to do so. However, the Court emphasizes that punitive damages are exceptional. There must be an independent actionable wrong established, and even if this is proven, as the Supreme Court of Canada has stated: "punitive damages are restricted to advertent acts that are so malicious and outrageous that they are deserving of punishment on their own." See *Keayes v. Honda Canada Inc.* [2008] 2 S.C.R. 362.

[55] There is no convincing evidence that the City set out to get "rid" of Mr. Cooper. Ms. Snedden, who had to make the decision on discipline, testified that she did so after the investigation meeting on May 2. She was firm on this point in cross-examination. It is this evidence that decides the point in my view. Ms. Snedden should not have relied on the stale dated letters, but she had no way of knowing this. She is not an expert in Human Resources or Labour Law. She testified that she had never had to terminate someone's employment. It was clear that she took the exercise seriously and as counsel for the City argued, she was doing her best. Thus, I am not persuaded that punitive damages are appropriate in the circumstances of this case.

Order

[56] Having carefully considered the evidence and submissions of the parties and for the reasons above, I have decided to grant the grievance in part. The termination is excessive in all the circumstances. However, discipline is warranted and I have decided to exercise my discretion under Section 48 (16) of the *Labour Relations Act* to substitute a lesser penalty. I am of the view that five days is fair, given the nature of the misconduct, and that it is consistent with the principles of progressive discipline. The employer is hereby ordered to reinstate Mr. Cooper with full back pay and no loss of seniority, except for the five-day suspension. The termination letter should be removed from the file and a suspension letter dated May 9, 2013 should be substituted. I shall remain seized as requested by the union should there be a claim for special damages. I shall also remain seized should issues arise between the parties on the implementation of this award.

Dated at Kingston this 30th day of September, 2015

D Leighton

Deborah J. Leighton, Arbitrator

APPENDIX 1

From: Cooper, Ted
Sent: 2013/04/08 09:34
To: Diduch, Roman
CC: Newell, Wayne; Rampersad, Curtis; Herweyer, Don
Subject; Carp River Restoration – Third Party Review
Importance: High

Roman,

Last week I brought to your attention Attachments 1 and 2 that a member of the public had accessed through an MFIPPA request. For the benefit of those copied on this email, the documents in Attachments 1 and 2 are from files of the Carp River Third Party Review in December 2008 & January 2009 (i.e. about 4-5 months *before* Council approved the TPR on May 27, 2009).

> The January 19, 2009 email in Attachment 1 is the record of TSH/AECOM's delivery of the official 'corrected' floodplain modeling on which the TPR is based – through which Condition 1 of the MOE Minister's Order was met. Note the comments from the TSH/AECOM engineer about adjustments that he made to roughness values (Manning's n values) at road crossings upstream of Highway 417 "to eliminate impacts at 417". It appears that after the consultant corrected the model to properly account for the missing runoff hydrographs from the Kanata West development area in the calculation of flood levels, he proceeded to adjust the Manning's n values at Palladium Drive (0.1), Maple Grove Road (0.067) and Hazeldean Road (.187), changes that had the effect of making it appear existing flood levels at Highway 417 would not be aggravated despite the relaxed stormwater management controls and floodplain development proposed upstream of Highway 417. The problem with the changes made to Manning's n values at these structures is that the high roughness values by TSH/AECOM represent neither existing nor proposed conveyance conditions at these crossings. In other words the model had been adjusted to generate flood levels that were consistent with a hard target – no aggravation of flood levels at Highway 417 – thus resulting in an outcome to the TPR that made it appear no changes to any of the 22 Kanata West Class EAs would be required.

The documents in Attachment 1 also reveal that on January 21, 2009, the City forwarded the January 19, 2009 TSH/AECOM email to the MVCA: i.e. the MVCA was also aware of what was actually behind the favourable modelling results at Highway 417 documented in the TPR.

While the TPR report did contain comments about an inappropriately high Manning's n value used in the HECRAS model for the Richardson Side Road crossing – and a recommendation that the value should be revised – the TPR report made no reference whatsoever to the high Manning's n values at Palladium Drive, Maple Grove Road, and Hazeldean Road, with a need to correct them.

Attachment 2 contains the meeting notes of a December 2, 2008 presentation by the TPR consultant to Kent Kirkpatrick and the four Kanata West Councillors. The notes indicate that *more than six weeks **before*** the TPR consultant received the corrected model, he was already advising the City Manager and Councillors most affected by the outcome of the TPR that:

- "The modeling is sound, but recommendations will be made that will improve it for future use";
- "The fifteen approved EA projects are not directly impacted by the findings"; and
- "The MTO Highway 417 crossing remains viable under the restoration plan".

Since discussing this matter with you last week, it occurred to me that the City has already proceeded with construction of infrastructure based on the contrived flood elevations documented in Third Party Review: the modifications made to the design 01 of the Hazeldean Road bridge that has since been constructed over the Carp River.

On May 12, 2009 I sent the email in Attachment 3 to Councillor Hunter, who had raised a question at the Planning & Environment Committee meeting about the location where the pathways were to be constructed within the Carp River corridor. As noted in Attachment 3, the issue about the depth of flooding of the pathway system at the (then proposed) Hazeldean Road bridge pedestrian underpass was specifically raised. My concerns were based on the flood levels documented in the TPR, which until last week, I was unaware were based on contrived Manning's n parameters to make it appear flood levels at Highway 417 were not being aggravated.

On June 7, 2009 I wrote the email in Attachment 4 to Construction Services staff after learning that the Hazeldean Road Widening project was on the list of projects the City would be constructing as part of the Infrastructure Stimulus Fund program. On June 25, 2009 Bruce Mason informed me that Novatech (the City's consultant for the Hazeldean Road project) would be updating the design based on flood levels in the TPR.

Attachment 5 includes a number of slides that present the pre-TPR and post-TPR design configurations of the Hazeldean Road bridge, including documented flood levels in the CH2M Hill modelling, the TPR, and the July 2011 Calibration and Validation Report, also prepared by the TPR consultant. As a result of the flood levels documented in the TPR, the original design of the pathway was elevated 0.6m; and to maintain 3.6m clearance from the pathway to the bridge soffit, the entire profile of the bridge was also raised 0.6m. Changes to other design elements were also made based on the flood levels documented in the TPR, such as the elevation to which rip-rap was placed.

In July 2011 after the construction of the bridge had been completed (coincidently the same month that excessive deflections to the bridge occurred, when false work used during construction was removed), the TPR consultant released the results of his Calibration and Validation exercise which showed flood levels to be 0.6m lower than the flood levels he documented in the TPR that triggered the need to alter the original design by the same amount!

These changes to the design and construction of the Hazeldean Road bridge would have delayed advancing the preliminary design of the bridge, which likely resulted in delays in the construction of the bridge and most certainly would have driven design and construction costs up. These changes were entirely the result of the flood levels documented in the TPR that were based on non-documented contrived Manning's n values to satisfy a hard target in the TPR – no aggravation of flood levels at Highway 417.

A review of the thousand or so pages accessed through the MFIPPA request reveals that Curtis had also raised questions about flood levels at the Hazeldean Road crossing during the TPR. In the December 31, 2008 email in Attachment 6, Curtis commented that "the consultant should explain why there would be an increase in u/s water level when the bridge width is increased." He also commented that "I recall that TSH used a higher roughness at the culverts to trigger an increase in level so that the floodplain storage would be used to reduce downstream flows. My previous concern was the creek restoration was being used as a SWM Pond." Note that the Restoration Plan Class EA was identified as a flood and erosion control project not a sewage works / stormwater management.

Given that the TPR does comment about the inappropriate use of a high Manning's n value at the Richardson Side Road crossing, and recommended the value be reduced – but does not make any reference whatsoever to similar issues at other crossings – I have to presume that Curtis was mislead into thinking that all possible issues with questionable Manning's n values had been resolved through the TPR process.

I have long been on the record citing my concerns about flood levels that have been documented by the TPR consultant, and the methods that have been used – with the apparent support of the MVCA – to suggest the entire floodplain development and

relaxed stormwater management plan can possibly work. The discovery of what was actually behind the favourable results presented in the TPR is very disturbing.

While not knowing what the design configuration of the Hazeldean Road bridge should actually have been based on standard engineering practise, the TPR consultant, with the support of the MVCA, actually convinced Infrastructure Services to adjust the bridge configuration that could only serve to aggravate flood levels at the outlet of the Glen Cairn community at the very time the City was examining ways to relieve the flood risk in the community. It is beyond my comprehension that the MVCA would willingly participate in such a scheme that not only deceived the City, but worked against the public interest. And certainly this is not how Council would expect an independent Third Party Reviewer would be advising the City under such circumstances.

Over the last several months I have been waiting for a response from MTO to issues I have raised about the design of the Highway 417 bridges that are now under construction. To-date the MTO has been deferring to direction it has been receiving from the MVCA. Last week I brought to MTO's attention the documents in Attachments 1 and 2 to demonstrate that they should not be relying on review conducted by the MVCA. It is concerning that, not unlike the circumstances of the Hazeldean Road bridge, MTO has commenced construction of bridges over the Carp River, thinking all is okay with the Carp River Restoration Plan and relaxed SWM criteria Kanata West based on the outcome of the TPR.

The City needs to realize that there are several major unresolved issues affecting infrastructure in the design stage at the City:

VII. the lack of capacity of the restored main flow channel in the Restoration Plan;

VIII. the failure to account for the hydraulic constraints imposed by the recreational pathway system and pathway bridge crossings on flood levels in the Calibration and Validation exercise;

IX. problems with the representation of the SWM ponds in the HECRAS model;

X. the lack of documentation of interim design conditions – such as the flood levels affecting the design of the Kanata West PS upstream of Maple Grove Road before the existing culvert crossing is replaced with the much larger bridge structure;

XI. the entire approach to stormwater management that has several SWM Ponds with storm sewer inlets that will be as much as 1.5 lower than the bed of the Carp River (and should these unsustainable designs actually be constructed, there is nothing included in the Class EA documentation that details the pumping / maintenance systems that should be furnished by the developers as Draft Plan conditions – so

that the City is not left with this burden when taxpayers take over maintenance of these systems);

XII. plus many, many other issues

It is my understanding that the Restoration Plan is either in the process of being tendered, or the tender has been awarded. I would like to be informed by the end of the week about what specific action City Staff will be taking as a result of the discovery of what is actually behind the advice it has been receiving from the TPR consultant, so that I know whether Council has been informed, and whether I should be requesting another investigation be undertaken by the Auditor General.

Ted Cooper, M.A. Sc., P.Eng.