

MM160019

ONTARIO MUNICIPAL BOARD

BETWEEN:

KLEIN

(Appellant)

- and -

PRINCE EDWARD COUNTY (MUNICIPALITY)

(Respondent)

APPELLANT CLOSING REMARKS

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the Appellant**

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PART I:
INTRODUCTION

1. This case is an appeal to the Ontario Municipal Board under subsection 222(4) of the Municipal Act, S.O. 2001, c.25, of By-law No. 3719-2016 (Ward Boundary) being a By-law to Re-Divide The Corporation of the County of Prince Edward's Electoral Boundaries into 9 boundaries with 13 Councillors and the failure of Council to follow the criteria required to redistribute ward boundaries as supported in case law.

PART II
GROUND OF APPEAL

ISSUE ONE: LACKS VOTER PARITY

2. Municipal Staff reports identify that the 9-ward plan (formerly Plan 13) does not meet voter parity utilising the Municipality's own data sets. Repeatedly presented to Council were "Comparison of Ward Proposals" tables throughout the entirety of the Council process and presented as evidence at this hearing.
3. The table created from the data provided in the submission for the Ward 9 Plan reflects a variance in two wards of 38% in South Marysburgh and 28% in Sophiasburgh. This is beyond the tolerance that was found acceptable in the *Carter* decision and in OMB case law.
4. In *Hodson v. Township of Georgian Bay* OMB Case No. MM130031 Board Member Sills states in Paragraph 74:

"There is no dispute that the four ward option will result in a certain degree of variation in the number of electors in the wards, but as Justice McLachlan stated in the *Carter* decision, "absolute parity is impossible." In this respect, the Board is

satisfied that the option adopted by Council provides for voter parity that is well within the range of acceptable deviations (up to 25%).”

Further Member Sills states:

“[66] Notwithstanding that the Board does not agree that the matter of “electors versus population” is the determinate factor, in the interest of clarity, the Member will address this issue. In this regard, Dr. Williams is correct in his assertion that while the application of one category rather than the other (population versus electors) in a ward boundary review has not been specified in provincial legislation, OMB caselaw has upheld the use of population figures.”

5. In this regard, the testimony of Mr. Maddox regarding the elector counts as bringing the voter parity variances of South Marysburgh down from 38% to 30% as acceptable is irrelevant and not in line with *Carter* and OMB caselaw.
6. In *Calder et al. v. Municipality of Killarney* OMB Case No. MM130067 Board Member Sniezek states in Paragraph 7:

“The Board was presented with the seminal case on electoral boundaries and voting rights, the Supreme Court of Canada decision on *Reference Re: Provincial Electoral Boundaries (Sask.)* (191 S.C.J. No. 46), known as the *Carter* case. Justice McLachlan outlined the electoral boundaries question in terms of a Charter challenge that votes were not to be measured in terms of equality but in terms of effective representation, and that relative voter parity could justify electoral district imbalances of up to 25%.”

“This case has been referred to a number of times in recent Board cases and can be considered the gold standard against which the divisions of electoral boundaries are measured.”

7. There needs to be clarity on the issue of deviation from “absolute parity” as articulated by McLachlin. She states in *Carter: Page 2 paragraph 5*

“Relative parity of voting power is a prime condition of effective representation. Deviations from absolute voter parity, however, may be justified on the grounds of practical impossibility or the provision of more effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. Beyond this, dilution of one citizen's vote as compared with another's should not be countenanced.”

8. Firstly, one must address the issue as on the grounds of impossibility. Was it impossible to achieve voter parity? Perhaps, on the basis of only utilising existing Ward boundaries is there an impossibility but the question revolves around if there were other solutions that could have worked in achieving voter parity? I would contend there would be if existing Ward boundaries were adjusted. Which leads us to the second question does it create more effective representation? The argument we have heard in testimony in favour of the 9 ward plan adopted by Council is that it is justified under the “community history” factor listed in *Carter*. But this is to the exclusion of all other factors which I submit are part of a balancing act as testified to by Dr. Williams. I would submit to you that one factor cannot be considered without the others. However, McLachlin states clearly that the prime condition of effective representation is relative parity.
9. We heard no testimony to the fact that existing ward boundaries would enhance effective representation. The only testimony we heard was to the effect that somehow the continued existence of the existing ward boundaries was necessary for community identity.

10. Both experts for each side stated there is no firm percentage set in the *Carter* decision or other legislation. Rightly there is a vacuum in which the Board must navigate.

11. This is where the slippery slope is of issue. If the Board affirms the By-law with deviations of 28 and 38 percent, what happens when the next community bent on keeping historical ward boundaries (regardless of how long they have existed), from justifying a deviation of 42% or more?

12. As Dr. Williams testified to the justification that is necessary is from “absolute parity” and not starting from a deviation 25% which the Board considers the “gold standard”.

13. I respectfully submit that the municipality has failed to provide a justification for this large deviation from “absolute parity” and that affirming this By-law will set a very dangerous precedent by moving the goal post to a permissible 38% deviation from absolute parity to accomplish the maintenance of existing ward boundaries.

ISSUE TWO: FAILS TO PROVIDE REPRESENTATIVE ACCOUNTABILITY AND ACCESSIBILITY

14. The 9 Ward proposal creates two wards that elect two councillors and one ward that elects three councillors.

Two of these wards Ameliasburgh (3 councillors) and Bloomfield/Hallowell (2 councillors) cover very large geographic areas of the County. Each ward has a large population; each Councillor is responsible and accountable for all the constituents in its totality. In Ameliasburgh the three councillors will have to not only cover the entire geographic area of the ward but respond to the demands of 5651 residents (using municipal estimated population figures). This is three times that of the other one councillor wards. The constituents in these wards will be able to

influence the outcome of the election and in the case of Ameliasburgh - three individuals to sit on council based on their criteria on who to vote for and the bias the candidate has on a variety of issues. This provides these ward residents with an opportunity to have a greater voice at the Council table than other residents who can only vote for one councillor. This places constituents who elect one councillor in their ward in a minority position and at a disadvantage to influence the outcome and biases of those they elect.

As well the geographic area for the two large multiple councillor wards are such that the area to be represented is at a disadvantage than the more compact wards. Each Councillor for example in Ameliasburgh is not representing one-third of the geography but the entire expanse from the east to west and would be expected to respond to them all.

Dr. Williams testified to this matter and its effect it has on effective representation and asymmetrical representation and the concept of electoral equality. Stating:

“the inherent expectation is that each vote will have a reasonably equal impact on the election of a representative but also that each voter can exert an equivalent influence on the selection of the collection of representatives who will make decisions for the municipality.”

15. The urban envelope that extends beyond the ward of Picton provides a greater challenge to accountability and accessibility. The ward of Bloomfield/Hallowell extends from its rural area and surrounds the ward of Picton. The residents on one side of one street (John Street) are represented by urban councillors while the other is represented by councillors from a largely rural ward of Bloomfield/Hallowell. This is also true of “The Heights” subdivision, those residents on Lake street, and many others. What would one conclude if living on the end of Prospect Street and you have an issue with your road or services? Would you conclude that you would call the Councillor from Hallowell? There has to be some level of common sense in this regard.

16. The village of Consecon serviced by municipal water is divided in half between two wards Ameliasburgh and Hiller. Effectively splitting the community to be represented by three

councillors to the north and one to the south. This example, in particular, demonstrates some need to rationalise an imbalance of voting power.

ISSUE THREE: CREATES AN INCOHERENT COLLECTION OF COMMUNITIES

17. The urban envelope of Picton extends beyond the historical boundaries of the Old Town of Picton being the proposed ward boundary. It is incoherent to have half of one side of a street (John Street) and isolated streets (Owen) to the south west, dead ends of streets (Prospect Ave.) as well as those along and off Lake Street to the west, entire subdivisions (The Heights) to the south and the newly built 80-unit seniors building (The Wellings of Picton) to the north of Picton included in the large far flung rural ward of Bloomfield/Hallowell.

18. Dr. Williams referenced the rural areas of Bloomfield/Hallowell bordering the south and north of Picton have a greater connection with those communities adjacent to wards than the eastern areas bordering the ward of Wellington.

19. The village of Consecon is divided in half between two wards Ameliasburgh and Hiller. Effectively splitting the community in half and marrying them off with other communities. Those communities were identified in the ward of Ameliasburgh slide presentation as testified to by Ms. Alyea.

ISSUE FOUR: WARD BOUNDARIES

20. The criteria of keeping the existing ward boundaries as we have seen in the documents entered into evidence made the retention of the old township boundaries paramount in consideration to the exclusion of communities of interest, relative parity and effective representation.

21. McLachlin wrote in *Carter* paragraph 60:

“To return to the metaphor of the living tree, our system is rooted in the tradition of effective representation and not in the tradition of absolute or near absolute voter parity. It is this tradition that defines the general ambit of the right to vote. This is not to suggest, however, that inequities in our voting system are to be accepted merely because they have historical precedent. History is important in so far as it suggests that the philosophy underlying the development of the right to vote in this country is the broad goal of effective representation. It has nothing to do with the specious argument that historical anomalies and abuses can be used to justify continued anomalies and abuses, or to suggest that the right to vote should not be interpreted broadly and remedially as befits Charter rights. Departures from the Canadian ideal of effective representation may exist. Where they do, they will be found to violate s. 3 of the Charter.”

22. Mr. Maddox offered the opinion that at the time of amalgamation the creation of the ward system conformed to the *Carter* decision. Mrs. Vowinckel testifying in favour of the municipal decision stated she was a councillor on Sophiasburgh Council during the time of amalgamation. She further stated that to avoid threatening legal action between Sophiasburgh and Ameliasburgh an agreement was made where by each of the previous townships would receive one councillor plus an additional councillor for every 2500 residents. When the matter of Mrs. Vowinckel testimony was raised (at the time I incorrectly attributed this to Ms. Alyea) with Mr. Maddox he stated he did not know where that information came from. It will be to the board to judge the credibility of these two conflicting testimonies. If Mrs. Vowinckel's recollection as an elected official at the time is correct, then the creation of the ward system which includes Bloomfield, it could never have been based on the principles outlined in *Carter* on voter parity.
23. This is a direct parallel to this by-law. We heard testimony from Mr. Maddox that offered up the opinion that we are now better off within the 9-ward plan as it lessens the impact of deviations in voter parity over that of the current boundaries. Just because the current ward boundaries have deep rooted historic anomalies and abuses that somehow we are a little better off in the 9-ward plan, that it justifies the continuation of the historic anomalies and

abuses of voter parity.

24. This decision to quarantine the existing ward boundaries has placed a noose around the ability to have boundaries in the modern context of Prince Edward County. These, albeit are historic boundaries they do not reflect the reality the communities of today. The urban envelope of Picton is carved off around its periphery in illogical fashion rather than within the boundaries of its urban envelope. As stated by McLachlin and reiterated by Dr. Williams the utilisation of the historic wards as a basis for the development of the re-division of wards is a historic anomaly and abuse that can not be used to justify its continuance.

25. We heard a great deal of testimony both by participants and witnesses in support of the municipalities case. All of these spoke to the concept that the retention of existing ward boundaries were necessary to the identity of each of the original historical townships.

26. I draw the boards attention only to one. Ms. Alyea stated in her testimony that the eradication of the ward boundary of Bloomfield was an acceptable change while other ward boundaries needed to remain the same. When queried in cross examination and asked if Bloomfield would lose its identity by having its boundary disappear she stated that it would not and that the residents of Bloomfield would continue to identify as being from Bloomfield. She further stated that in her opinion that Bloomfield would benefit from being part of the larger newly constructed ward. When further queried about moving another ward boundary even incrementally she felt it would threaten the identity and community of interest of the areas contained in that old ward boundary. I submit that this contradiction does not stand up to scrutiny.

ISSUE FIVE: FAILS TO CONSIDER COMMUNITIES OF INTEREST

27. The ward of Picton is decidedly smaller than its urban envelope. As articulated in Issues Three, Four and Five, areas of Picton are outside of its ward boundaries. Illogical truncations that see a few urban homes on one dead end street, half of another street, whole subdivisions and

seniors housing not within the ward of Picton. These residents shop, walk, use the same water and waste water system as their neighbours across the street and beside them.

28. It is of interest to note that all witnesses for the municipality and the supportive participants spoke at length about their communities of interest, but no such testimony touched on Picton's community of interest.

29. In *Niro v. City of Vaughan*, OMB Case No. MM130047 Board Member Sniezek in paragraph 29 refers to the case of *Kilrea, Re*, [2005] 14 M.P.L. R. (4th) 292.

“Members Acker and Jackson heard the argument of the rural/urban split in a different ward division from Beccarea and Makuch in the City of Ottawa. They summarized the lessons learned in Osgoode as follows:

34. The third lesson is that the communities of interest must be identified and by incorrectly assuming the homogeneity of rural and suburban residents, the Board found that the previous task force failed to properly consider the importance of the communities of interest within the rural wards.”

37 ... He recognized that if the two major communities of interest, being urban and rural are combined, this can dilute the rural community resulting in disenfranchisement. ... He emphasized the need for analysis to consider development policies ...”

30. No such analysis was completed by staff or Council. Mr. Bar, from the municipal planning department, confirmed that no input was requested or provided in this regard.

31. The matter was raised regarding the planning of urban development as being not driven by wards but other planning considerations. There is no contention on this argument. However, the reverse is not true. The commonality of the fact that neighbours on the same street within the context of an urban envelope and services are not within the same community represented by the same councillor is a matter of community interest. We are not talking

about neighbours subdivided into two urban wards. We are talking about urban neighbours placed into a very predominately rural ward that reaches from Picton Bay to Wellington.

32. The fact that Mr. Bar testified to the Picton Hallowell Urban Area Secondary Plan as the urban envelope surrounding the ward of Picton is only a name and as a result of the current and historical ward boundaries. The reality is that the urban area is an extension of Picton itself as described in Mr. Fairbrother's cross examination of Mr. Bar that you develop on the basis of extending existing urban infrastructure.
33. Infrastructure was mentioned in the staff report of May 6, 2015, as a matter to consider but was not considered as per Mrs. White's testimony. Further, she testified that population growth was also not considered.
34. Case in point is the residences at the dead end of Prospect Avenue who are completely isolated and not within the ward of Picton. We heard testimony from the Mr. Bar, Prince Edward County's planner confirming this and other boundary divisions.
35. These residents linked by infrastructure have a community of interest if it's the roads they access to get home or the water that comes from their taps. They inexplicably are tied to each other as with other commonalities as well. They are primarily in fully serviced smaller lots within the urban envelope of Picton as testified to by Mr. Bar.
36. Yes, no one commissioned a study to ask those across the street or the end of a Prospect if they live in Picton and or identify with Hallowell. Neither party provided evidence that they went to that extraordinary step and cost. It is not relevant. What is relevant is the community of interest which Dr. Williams alluded to consisted of more than infrastructure with neighbours living beside each other but being separate and distinct from the rural ward of Hallowell.
37. The issue was raised in cross examination whether or not the mere provision or extension of water and sewer services create a community of interest. Dr. Williams stated they just might

but the context of Picton it is within a single municipality. This goes to the homogeneity in *Niro v. City of Vaughan*.

38. I need to address the lengthy testimony regarding the community of interest by the those in favour of the adopted By-law. The concept that community of interest is also tied to the historic ward boundaries. Do people from Milford say they are from South Marysburgh or do they say they are from Milford? Is community defined by artificial lines drawn on a map creating electoral districts for the purpose of elections? Or are communities defined otherwise?
39. We heard extensive evidence from predominately former councillors but all identified themselves as either life long residents or multiple decade residents as to the great community spirit in their wards. As the sky will not fall with the elimination of Bloomfield's ward boundaries. I respectfully submit that the community spirit in the other wards will not be diminished by changes in lines on a map for electoral purposes. To quote Ms. Alyea, "Bloomfield will still be Bloomfield".
40. Further, I need to touch on the Village of Consecon as a community of interest. Ms. Alyea interestingly testified to the fact that the residents of Consecon on both sides of the Consecon river that splits the Village into two separate wards have recently come together to create CARA – Consecon and Area Community Events Organization. This demonstrates our contention that this community identifies itself as one and as a result should be treated that way in a ward configuration that retains its community identity. There is no rationale offered that it is impossible to find another manner to draw an electoral boundary line rather than using the Consecon River other than its always been that way.

ISSUE SIX: LACKED INFORMED CRITERIA

41. Both Mrs. White, the Municipal Clerk and Mr. Thompson both testified to identifying that the 9-ward plan (formerly Plan 13 by John Thompson) as not meeting "voter parity". In Mrs.

White's testimony, she stated that voter parity meant the number of councillors one could vote for in a ward and Mr. Thompson confirmed that his comments on the Con/Weakness charts stated the same understanding how Voter Parity is defined. It should be noted that in the evidence submitted in the joint document demonstrates this definition of Voter Parity was the evaluation methodology for all plans under consideration by Council for the entirety of the process. This error was never rectified and stood til the final passing of the By-law.

42. The issue of Voter Parity is paramount in any such decision and for it to be so fundamentally misconstrued, creates a flawed process as a result of a flawed understanding of this criterion as set out in *Carter*.

43. Further in *Hambly v. Town of Innisfil OMB Case No. MM090039*, Board Member de Avellar Schiller states:

“In the case at hand, the Board similarly looks to three things: 1. the criteria used by the municipality, the studies undertaken to inform the application of those criteria, and the appropriateness of the proposed implementation of those criteria; 2. the process followed by the municipality, particularly in terms of the extent to which steps were taken to inform the public and provide an opportunity for public comment; 3. the grounds of the appeal against the municipality's decision and any additional grounds advanced at the hearing of the merits.”

44. Utilising the first two items identified in Schiller's decision, the criteria is flawed as previously articulated. We heard from Mrs. White the Clerk that no independent or staff studies were undertaken to inform the application of those criteria right through the end of the process, no analysis was done of the appropriateness of the implementation of the criteria on any of the ward plans brought forward and ultimately on the one selected by the council in its By-law.

45. The process followed by the municipality took many steps to inform the public and provided opportunities for public comment. However, the matter in question is the veracity of the information provided to the public. Mrs. White confirmed that no vetting of the information was completed. She further confirmed that the pros/strengths and cons/weaknesses included the erroneous attribution of what voter parity represented.
46. In *Hodson v. Township of Georgian Bay OMB Case No. MM130031* Board Member Sills agreed with the Municipality's choice of ward division based on the criteria meet in its RFP and the hiring of outside expertise to create a report.
47. On the contrary Prince Edward County staff created a chart to evaluate proposal with the following criteria in the May 6 and June 25 reports to Council:
- Plan provides for an odd number of Council members;
 - Does the proposal allow all electors to cast the same number of votes? (Voter parity);
 - Number of Councillors proposed;
 - Configuration of new electoral wards (using current ward reference)
 - Does the proposal distribute the population and electors equitably?
 - Does the proposals respect identifiable communities of interest?
 - Does the proposal utilize natural, physical boundaries that are locally recognized?
 - Does the proposal serve the larger public interest of all electors of the municipality in contrast to the interest of a small group?
48. Five of the eight so-called criteria digress significantly from those outlined in case law. An Odd number of Councillors, the number of Councillors, and voter parity defined as "electors cast the same number of votes" as examples.

49. During the intervening periods from April 16, 2015, and up to the presentation of the options to the public in September of 2015 and subsequently to the passing By-law 3719-2016, we heard testimony from the Clerk of the Municipality Mrs. White that no independent legal or expert analysis was carried out as to the viability of the four options proffered to the public including the final option selected by Council, or even by staff. Numerous attempts were made by Councillors, to have the selected option vetted with expert/legal advice as to its legal conformity up to and including the final motion to adopt By-law 3719-2016 to no avail. This In sharp contrast to the 2013 process headed by Dr. Rose and the Citizens Assembly Report and Recommendations.

50. In fact, Council deliberately ensured that no advice would be sought by evidence of: A memorandum dated October 19th from the Counsel for the Municipality only outlined the case law as it pertained to Ward boundary decisions and did not provide legal advice on any of the four options previously selected by the council and presented to the public in the September consultation meetings. The memorandum included an offer to analyse the four options if Council desired so; On October 29, 2015, Special Committee of the Whole meeting Council on motion CW-395-2015 to investigate if the two of the four plans meet a set of criteria as outlined was defeated; on November 10, 2015, Motion 2015-563 to further investigate (identical to the October 29th meeting motion) failed to receive support; at the same meeting Council (motion 2015-565) selected the 9 ward proposal without further investigation as to it meeting any criteria; and on January 26, 2016, Motion 2016-49 to seek legal opinion on the 9 Electoral Ward Boundary By-law was defeated.

ISSUE EIGHT: WAS CREATED AND RELIED ON INACCURATE AND MISLEADING DATA

51. The municipality utilised data provided by MPAC to create “estimated population” figures. It calculated that the estimated population total was 23,757 of which it identified 20,010 Resident Electors and 6115 Non-Resident Electors. This compared with the 2011 Census data of 25,258 and 2016 Census data of 24,735. Based on the Census numbers the municipal “estimated population” figures are out by 1,501 a variance of 6.32% and 978 a variance of

4.12% respectively. Where do these residents live and which wards are they not accounted for? This can inexplicably create additional dramatic fluctuations in the variance for wards well beyond the 38% variance in South Marysborough.

52. Mr. Hopkins, the municipal GIS Supervisor, indicated in his testimony that the figures shown were derived from MPAC and only attributed in the existing ward boundaries. He also stated he did not know where or how the numbers were derived. He interpreted the numbers as being population numbers, not elector counts. He also was unable to recall the methodology he utilised to create the "Municipal Estimated Population" figure.
53. Mr. Hopkins also stated that the Census figures are more accurate than the Mpac figures. Dr. Williams in his testimony concurred on the unreliability of the MPAC figures and when asked about his previous testimony in Township of Georgian Bay he distinguished it based on his recollection of the detail work he did in that specific case.
54. We heard testimony from Mr. Maddox on the question of growth and its attributes over time within Prince Edward County since amalgamation and concluded that very little variance has occurred in growth. When asked had he analysed the data by drilling down and identifying the impact of this on a ward basis to see if it influenced individual ward population numbers. Mr. Fairbrother interjected that it was not part of his review. Without an understanding of the separated impacts on each ward the information is of no consequence as it does not identify where growth or decline is happening throughout the municipality and what impact that could have on the variances in the population variances in each ward.
55. In *Hodson v. Township of Georgian Bay OMB Case No. MM130031* Board Member Sills states in Paragraph 26:

"...OMB case law has upheld the use of population figures, and the Carter decision's emphasis on "effective representation" (something that happens between elections rather than merely on voting day) adds support to the

application of population figures in fashioning an effective and equitable system of representation.”

56. I cite McLachlin in the Carter decision that each citizen is entitled to be represented:

“The Meaning of the Right to Vote

49 It is my conclusion that the purpose of the right to vote enshrined in s. 3 of the Charter is not equality of voting power per se, but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative; as noted in *Dixon v. B.C. (A.G.)*, [1989] 4 W.W.R. 393, at p. 413, elected representatives function in two roles -- legislative and what has been termed the "ombudsman role".”

ISSUE NINE: FAILED TO ANALYSE THAT THE DECISION TO RE-DIVIDE MEETS THE TESTS OF THE *CARTER* DECISION.

57. In *Milani v. Vaughan*, OMB Case No. MM090024 Board Member Denhez wrote on page 20:

“However, the problem is not just that the options were prepared before the guiding criteria were even submitted for approval. The larger issue is whether the factors itemised in Carter were ever analysed:

Though the Board was shown nine Clerk reports on the criteria (reproduced at Exhibit 5 for September 22, 2008; November 24, 2008; February 2, 2009; February 24, 2009; March 31, 2009; April 14, 2009; April 20, 2009; May 5, 2009; plus the Open House presentation of March 9, 2009), And although they all assert that the scenarios were prepared “having regard to the criteria” (with extensive references to population, and curt references to man-made boundaries and to the geographic communities like Maple and Woodbridge), -The Board was not shown a single sentence of analysis, indicating how any factor had been considered, other than population.”

Further, he states:

“That does not explain the absence of visible analysis. In *Ottawa v. Osgoode etc.*, despite the "elaborate" process, the outcome was struck down. As the Board later explained in *Kilrea v. Ottawa*, The terms of reference for the review were flawed resulting in a flawed conclusion. The terms of reference precluded the option to increase the number of wards, and the direction to staff was that little change would occur in the inner city wards.... The Board found that the task force put too much emphasis on the principle of representation by population instead of the principle of effective representation...

Specifically, the Board concluded in *Ottawa v. Osgoode etc.*, that there had been insufficient attention devoted to one important community of interest (also described in *Carter*) – namely the rural community:

The Board is loath to interfere with a decision made by a duly elected Council unless of course there are clear and compelling reasons to do so. In this case, however, the Board finds that the system established to alter the boundaries of some of the wards was flawed from the beginning in that the terms of reference as well as the process utilized by the Citizens’ Task Force did not properly take into consideration the concerns of the rural community and the protection of the communities of interest that exist within that segment of the City. The evidence in *Vaughan* was that such analysis was neither supplied nor requested. The Board was shown no documentation on how Council’s own rationale complied with the City’s criteria, let alone with criteria in *Carter*. The Clerk’s own advice was not solicited by Council: when the Clerk was asked on cross-examination whether any Councillor had asked for additional information, the answer was no.”

58. This mirrors the actions by this Council in so much as no analysis was done, a predetermination to current ward boundaries, no attention to other criteria, and in reverse, rather than rural areas in this matter it’s the urban community of interest.

ISSUE TEN: VIOLATION OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS – DEMOCRATIC RIGHTS (s. 3)

59. Section 3 of the *Charter* states:

- i. “Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.”

60. It does not state only those who are given the franchise to vote or those over the age of 18. It states, “every citizen of Canada”.

61. Section 32 of the *Charter* speaks to its application and that it applies to “all matters within the authority of the legislature of each province” and by that extension municipalities in Ontario.

62. Once an appellant has established that there is a probability of a violation of a *Charter* Right, the onus shifts to the limiter of that right and in this case, the Municipality of the County of Prince Edward.

63. The Municipality by its own admission within the supporting evidence included in the Document book demonstrates that two wards within the 9-ward proposal exceed 25% variance (one ward by 38%) and thus infringe on the S. 3 of the *Charter* in so much as there is a dilution of voting rights, as described in *Carter* as “relative voter parity”, a fundamental criteria for effective representation.

64. Thus, the onus has shifted to the Municipality to justify this dilution. Dr. Williams has testified that he can not find a single justification for this dilution.

65. This is beyond the 25% threshold seen as the gold standard in OMB Case Law and referred to in the *Carter* decision. This impairment is not as little as possible and not proportionate as it was not on the grounds of “practical impossibility” or the “provision of more effective

representation” as cited by McLachlan in the *Carter* decision.

APPLICATION TO THIS CASE

66. I believe the most profound statement heard during this hearing is the one made by Dr. Williams. He referred to that the Prince Edward County as one community and not ten separate parts.

67. In *Teno v. Town of Lakeshore OMB Case No. PL050678* a case cited by the municipality its self in exhibit 2 tab 6b page 77 the Board Member Rogers states on page 10:

“Thus, this Board accepts that there must be clear and compelling reasons for the Board to interfere in a municipal council’s decision on these matters and that it may have to be demonstrated that a municipal council has acted unfairly or unreasonably in making a decision on these issues. However, if the evidence demonstrates that the decision of the municipality operates to diverge from the overriding principal of voter equity and effective representation, then the Board can only conclude that the Council has acted unreasonably.”

68. Further on Page 12, the Board Member Rogers states:

- i. “That the Board finds that there is clear and compelling evidence to support a re-division of the ward boundaries, and that the municipality, ...acted unreasonably in deciding to maintain the current electoral boundary system, in the face of the information and recommendations made to them by their staff.”

69. In this matter, the Council’s overriding criteria was to maintain the current electoral boundaries of the old townships except that of Bloomfield. As well Council failed to act numerous times on fulfilling the recommendations of staff as to the process to follow. Even to the extraordinary extent, Council defeated numerous motions to seek the necessary advice do

so, including on the final adopted plan.

70. Milani v. Vaughan, OMB Case No. MM090024 Board Member Denhez wrote on page 20:

“Dr. Williams argued that "a process that is so crucial to electoral democracy cannot be done in a way that is so casual". Dr. Landes was particularly pointed about the absence of memoranda on the use of the criteria, notably pertaining to distinct communities and the urban-rural interface.”

71. This stands as a direct parallel to this matter.

72. To this end, the Municipality failed to do its due diligence required of it in this matter. As such the decision on By-law 3719-2016 is flawed as outlined in my letter of appeal dated March 4, 2015.

73. As stated by the Chair at the beginning of the hearing, the Board has the power to reorganise the wards of Prince Edward County that meet the criteria established in case law and if as a result the composition of council changes to meet the criterion required then that is supported by the following decision of Board Member Gates in Wager et al. v City of London OMB Decision PL050623:

74. In Wagar v. London (City), [2006] O.J. No. 769, Justice McDermid writes:

29 Further in the alternative, I go on to consider whether or not the Board also has the power to alter the composition of City Council and if so, in what circumstances. There is no appeal provided for in s. 217 from the decision of a local municipality regarding its decision to change the composition of its council. However, I reiterate that s. 223 provides for a very specific situation; one where a petition to divide, re-divide or dissolve the existing wards in a municipality has been presented to City Council and City Council has failed to pass a by-law in accordance with the petition.

30 It is entirely feasible that a decision by the Board speaking only to the re-division of wards might result in an order, made legitimately and on proper

grounds, that incidentally changes the number of wards so that they either exceed or fall short of the number of existing councillors. For example, in this case if the Board had ordered 20 wards when there are only 14 councillors, if each ward were to be represented by its own exclusive councillor, a minimum of 20 councillors would have to be elected. This would indeed change the composition or makeup of City Council. Yet the Board clearly has the power, "despite any Act," to divide, re-divide or dissolve the existing wards.

31 It follows logically then that the intention of the Legislature must have been that the Board, when acting under s. 223(5), has the power, incidental to its power to divide, re-divide or dissolve the existing wards, to thereby change the composition of City Council, even if the ultimate decision about that composition may be left by the Board to the City Council to exercise pursuant to s. 217. In effect, it may be argued that the Board can "do indirectly what it cannot do directly" if in exercising its power properly to re-divide wards in a municipality it incidentally affects the composition of a council.

32 Support for this position and the intention of the Legislature is found in s. 37(a) of the Ontario Municipal Board Act, R.S.O. 1990, c. O.28, which reads:

The Board has jurisdiction and power,

(a) to hear and determine all applications made, proceedings instituted and matters brought before it under this Act or any other general or special Act and for such purposes to make such orders, rules and regulations, give such directions, issue such certificates and otherwise do and perform all such acts, matters, deeds and things, as may be necessary or incidental to the exercise of the powers conferred upon the Board under such Act. [Emphasis added.]

PART III
ORDER REQUESTED

75. It is respectfully requested that Prince Edward County By-law No. 3719-2016 (Ward Boundary) be repealed.
76. That the Board order remedy that the ward boundaries for the County of Prince Edward be re-divided according to criteria outlined in the *Carter* decision meeting relative voter parity not to exceed a deviation of 25%; That communities of interest be respected and that the entire urban envelopes of Picton and Consecon be included in their respective electoral wards; In the case of Picton, either with the current practice of election of Councillors at large or subdivided into single representative urban wards; That the municipality be treated as a whole community rather than on the basis of the ward boundaries in place since amalgamation and that they play no defining role in this re-division; Further, that consideration be given to ensure that the decision of the Boards re-division includes population growth to allow this re-division to have longevity beyond a two election cycle.

ALL OF WHICH is respectfully submitted by

Pierre Klein, Appellant

DATED AT Picton this 22nd Day of **July 2017**