CITATION: Minnow Lake Restoration Group Inc. v. Sudbury (City), 2022 ONSC 4084
DIVISIONAL COURT FILE NO.: DC-21-00002178-0000
DATE: 20220715

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Lederer, MacEachern, Krawchenko JJ

BETWEEN:	)	
	)	
MINNOW LAKE RESTORATION GROUP INC.	)	*Eric K. Gillespie*, *Natasha Papulkas* and *Yasmeen Peer*, for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
CITY OF GREATER SUDBURY	)	*Danielle Muse* and *Tom Halinski*, for the Respondent
	)	
Respondent	)	
	)	
	)	
	)	**HEARD BY VIDEO:** April 11, 2022

Lederer J.

Background

[1] Land use planning in Ontario is a complex and comprehensive process. The development of the appropriate mix, balance and location of uses (residential, commercial, industrial, institutional and recreational) is complicated and can be controversial. Ultimately, it is left to municipal councils, subject to appeals to administrative tribunals set up for the purpose and applications to the courts where the propriety of the process adopted is questioned, to decide where and what development will take place.

[2] On June 27, 2017, in furtherance of these responsibilities, the council of the City of Greater Sudbury dealt with resolutions concerning the planning for, and development of, what was referred to as an "arena/event centre," described as a 5,800 seat sports and entertainment complex. The first of the resolutions proposed that this facility be constructed at a "downtown site". It was defeated. The second resolution dealt with a proposal to locate the arena/event centre at the east end of Sudbury, outside of the downtown, in an area identified as the Kingsway Entertainment District. It passed but only after an amendment that would have required guarantees that additional

facilities, including a casino, a resort, a motorsport park, and a conference centre would also be built within the Kingsway Entertainment District was defeated.

[3] The zoning required to permit the arena/event centre, in company with an amendment to the Official Plan and two other zoning changes, all applicable to the Kingsway Entertainment District were adopted by the council of Greater Sudbury on April 10, 2018. The three zoning by-laws were the subject of an application that they be quashed as having been passed through a flawed process, by a biased council, in bad faith. The applications were dismissed. In reasons issued on September 4, 2020, the Superior Court of Ontario found:

> …I am satisfied that the decision as to where the arena/event centre would be located was made after a careful study of the potential effects of locating it there, as part of a robust democratic process in which the members of City Council were legally entitled to hold a view on behalf of their constituents. Council did not suffer disqualifying bias in the *Planning Act* process that followed Council's decision simply because the City entered into agreements to develop the KED after that decision was made or because Council ultimately approved the City's *Planning Act* applications. The by-laws were passed following a process that complied with both the letter and the spirit of the *Planning Act*, a process in which the applicant and other members of the public were given ample opportunity to persuade the Planning Committee and Council not to pass them. The fact that their efforts failed does not render the by-laws illegal.[1]

[4] Pursuant to an appeal brought, by among others, the Applicant (Minnow Lake Restoration Group Inc.), the decision of the council of Greater Sudbury approving the planning instruments supporting the arena/event centre were also reviewed by the Ontario Land Tribunal. On December 23, 2020, it released a decision in which it concluded that the development of the proposed arena/event centre represented good planning.[2]

[5] On September 8, 2020, four days after the issuance of the decision of the Superior Court of Ontario, two councillors presented a motion at a meeting of the council of the City of Greater Sudbury. The motion was directed to the undertaking of a study of a complete renovation of the Sudbury Community Arena, the existing arena located in the downtown. The motion stemmed from the idea of a local architectural firm that the existing arena could be converted into a multi-function event centre at a lower cost than building a new event centre in the Kingsway Entertainment District. This work would have been further to the consideration of this renovation within the site selection process that ended with the selection of the Kingsway site on June 27, 2017 as the location for an arena/event centre. The motion, as amended was voted on by the council December 15, 2020. It was defeated. There was some confusion. A member of council misunderstood the nature of the vote being taken. As a result, the motion was reconsidered at a meeting of council on July 14, 2021 and defeated again.

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[1] *Fortin v. Sudbury (City)* 2020 ONSC 5300 at para. 3
[2] *Duncanson-Hales v Greater Sudbury (City),* 2020 CanLII 103680 (ON LPAT)

[6] With the planning approvals in place and confirmed, one would expect the project would move on, any subdivision or site plan required applied for and processed, the design finalized and development and construction undertaken. That is not what has happened.

[7] On January 12, 2021 City Staff reported on the legal challenges to the council's planning approvals, presented an update on the status of the arena/event centre project and sought direction as to the next steps to be taken. At its meeting on February 9, 2021, council considered a staff report titled "Event Centre Update Report". The stated purpose was to seek the approval of council as to the scope of work and terms of reference for a further report which would compile all of the available information associated with the Kingsway Entertainment District project. Among other things, the staff recommended that, given continued community interest, the review should include information concerning two alternative, previously identified locations, for the arena/event centre. The factum filed on behalf of the Minnow Lake Restoration Group Inc., quotes exchanges between members of the municipal staff and several of the members of council. The staff assured the councillors that:

- the report coming back will be comprehensive ("if it's out there, we will consider it"[3]),
- that some consideration will be given to how this development proposal aligns with the City of Greater Sudbury's "CEEP Plan" which I understand refers to a "Community Energy and Emissions Plan" [4],
- some reporting (albeit not "explicit") as to the funding from the federal and provincial governments that may be available to assist with the renovation of "green buildings",[5]
- a more "robust" economic impact analysis was to be provided,[6]
- there would be a review of public concerns and "see how it can inform the report",[7]
- a review of the capital and operating cost assumptions from the "previous iterations" was to be part of the analysis,[8]

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[3] *Factum of the Appellant* at para. 7 (Mr. Wood) referencing *Transcript of Greater Sudbury Council Meeting dated February 9, 2021* at p. 17 (Caselines A67)
[4] *Factum of the Appellant* at para. 7 (Councillor McCausland and Mr. Wood) referencing *Transcript of Greater Sudbury Council Meeting dated February 9, 2021* at p. 17-18 (Caselines A67-A68)
[5] *Factum of the Appellant* at para. 7 (Councillor Montpellier, Mayor Bigger and Mr. Wood) referencing *Transcript of Greater Sudbury Council Meeting dated February 9, 2021* at pp. 19-20 (Caselines A68)
[6] *Factum of the Appellant* at para. 7 (Mr. Wood) referencing *Transcript of Greater Sudbury Council Meeting dated February 9, 2021* at p. 20 (Caselines A68-A69)
[7] *Factum of the Appellant* at para. 7 (Councillor McCausland and Mr. Wood) referencing *Transcript of Greater Sudbury Council Meeting dated February 9, 2021* at pp. 20-21 (Caselines A69)
[8] *Factum of the Appellant* at para. 7 (Councillor Landry-Altman and Mr. Wood) referencing *Transcript of Greater Sudbury Council Meeting dated February 9, 2021* at pp. 21-22 (Caselines A69)

- the intention was to provide up-to-date information on the commitments made by the "owner" of the hotel and the operator of the casino but not a business analysis of the casino. That was not part of the scope of work.[9]

[8] The staff representative summarized by saying that the staff was "always willing to consider what councillors have to say" and to provide reassurance that whatever issues were raised as the report was being prepared would be considered but that if something had to be added to the report there could be additional costs in time or money involved and that this might require a return to council to "ask for an additional consideration." The staff representative concluded by offering the opinion that "this is already fairly broad in terms of dealing with the parameters that we have had in front of us since 2017. So it is fairly broad already, so certainly – but we have an open door to council as we proceed."[10]

[9] A councillor asked whether the various issues raised required an amendment to the resolution that would confirm the instruction to prepare the report. At the subsequent meeting held on June 16, 2021 the staff representative was asked to recall his response. At that time, he said:

> No, I think, as I indicated positively, when requested, I think council can rely on us to incorporate those types of considerations within the report.[11]

[10] At the conclusion of this discussion the council of the City of Greater Sudbury passed the following resolution:

> THAT the City of Greater Sudbury direct staff to review and compile the facts associated with the Event Centre Project and, where necessary provide updated information based on events and subsequent to Council's June 2017 decision to proceed with the project in accordance with the Terms of Reference described in this report;
>
> AND THAT staff provide the compiled information in and information report at a Special Meeting of Council on June 16, 2021;
>
> AND THAT the Executive Director of Strategic Initiatives, Communications and Citizen Services the delegated authority to procure the required personal services to complete the work, subject to the upset limit of $125,000 from the Event the Centre Project Budget and on a single source basis if required, outlined in the report entitled Event Centre Update Report as presented to Council on February 9, 2021.[12]

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[9] *Factum of the Appellant* at para. 7 (Councillor Landry-Altman and Mr. Wood) referencing *Transcript of Greater Sudbury Council Meeting dated February 9, 2021* at p. 22 (Caselines A69-A70)
[10] *Factum of the Appellant* at para. 7 (Mr. Wood) referencing *Transcript of Greater Sudbury Council Meeting dated February 9, 2021* at pp. 23-24 (Caselines A70)
[11] *Factum of the Appellant* at para. 7 (Mr. Wood) referencing *Transcript of Greater Sudbury Council Meeting dated June 16, 2021* at p. 27 (Caselines A69)
[12] *Affidavit of Eric Labelle, sworn October 13, 2021* at para. 20 and Exhibit 8 (respectively Caselines B-1 -12 and B-1 -195)

[11] What is apparent is that council was asking for a compilation of the already available work done and an update of issues relevant to the arena/event centre and the decision taken to locate it in the Kingsway Entertainment District.

[12] As the resolution notes, the matter was to return to council at a special meeting to take place on June 16, 2021. A staff report was prepared in response to the direction of council made through the resolution adopted on February 9, 2021. It provided a summary of, and attached the update to the reports that were previously prepared by the consultant hired to advise council with respect to the location of the project. The updated report provided by the consultant was titled "Sudbury Events Centre Update Report (June 2021)" and included reports which considered the requirements, costs and benefits of refurbishing the existing Sudbury Community Arena as well as a comparative risk assessment, an economic benefits analysis of the three sites, and the anticipated impact of COVID-19 on the project.[13] On June 13, 2021, three days before the special meeting of council the staff circulated an email to the members of council for the purpose of providing additional context to the Event Centre Update Report and to respond to questions raised by members of council and the local media. This 7 page email covered the following topics:

A. Council Direction and the Basis for the Report;

B. Economic Impact;

C. "The Roaring 20s";

D. Federal Funding Opportunities

E. KED Hotel Meeting Facilities;

F. Parking;

G. Community Energy and Emissions Plan ("CEEP");

H. Alternate Casino Site; and,

I. Binding Commitment of Partners.[14]

[13] The special meeting was held, as scheduled, on June 16, 2021. The authors of the Update Report made a presentation to the council highlighting the key findings of the report. The members of council were given the opportunity to speak, comment on, and ask questions. The topics

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[13] *Affidavit of Eric Labelle, sworn October 13, 2021* at paras. 22-30 and Exhibits 9 and 10 (respectively Caselines B-1 -12 – B-1 -15 and B-1 -196-B-1 -293)
[14] *Affidavit of Eric Labelle, sworn October 13, 2021* at paras. 31-39 and Exhibit 11 (respectively Caselines B-1 -15 – B-1 -17 and B-1 -295 – B-1 -301)

discussed included, among others: comparable arena/event centre development sites in Canada, the data and assumptions on which the Update Report based its conclusions and the projected costs of a renovated arena in comparison to building a new arena. Some members of council voiced their disappointment with the outcome of the Update Report. Others praised the result noting that it addressed the council's earlier directions.

[14] At the conclusion of the special meeting, council passed resolution CC2021-190 which stated:

> THAT the discussion on the Event Centre Information matter be considered completed.[15]

[15] Two weeks later, on June 29, 2021, at a subsequent meeting of the council, two further motions were brought forward. The first focused on modernizing the existing Sudbury Community Arena and would have required the production of a report which would have considered the prospect of converting that facility into an up-to-date arena/event centre with the direction, inherent in the motion, that it be preferable to the proposal for the construction of a new arena/event centre. The motion was, as follows:

> THAT staff undertake an analysis of potential approaches modernizing the Sudbury Community Arena in a report to be produced no later than October 2021 that fulfills the following object:
>
> - Retains the required elements for the facility to serve as a contemporary sports venue for professional league play, an event centre that hosts paid performances such as concerts, trade shows and other similar community events and a community space available for year-round rental.
>
> - *Delivers a financing plan that requires no more than 70% of the anticipated construction cost required for a new event centre and a 5-year operating cost forecast that supports comparisons with a new event centre's operation.*
>
> - Clearly describes the changes needed to either the facilities required elements and/or the financing plan to produce a solution that effectively meets functionality and cost expectations.[16]
>
> [Emphasis added]

[16] The second motion, contrary to the resolution passed at the special meeting of June 16, 2021, sought further information related to the new Arena/event centre. It would have required:

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[15] *Affidavit of Eric Labelle, sworn October 13, 2021* at para. 45 and Exhibit 14 (respectively Caselines B-1 -19 and B-1 -309)

[16] *Affidavit of Eric Labelle, sworn October 13, 2021* at para. 49 and Exhibit 17 (respectively Caselines B-1 -20 and B-1 -356)

> THAT staff produce a report that provides additional comment detailed information to enhance Council's understanding of issues related to the construction of a new Event Centre includes, for each Event Centre development approach, the following:
>
> - An economic impact analysis completed by a suitable third-party that includes projections of the potential direct and indirect financial implications for the related to employment, productivity, competitiveness and operating costs;
>
> - An analysis of the alignment of all CEEP goals;
>
> - Further analysis of senior government funding opportunities;
>
> - Further analysis of transit implications, with an emphasis on projected costs and ability to provide equitable access;
>
> - An assessment, based on a review of public consultation already completed for the project, of the ability each approach has for meeting public expectations regarding desired amenities surrounding the Event Centre.
>
> AND THAT funding for the economic impact analysis be provided in an amount not to exceed the available funds in the existing project budget.[17]

[17] Both resolutions were defeated.

[18] Finally, on July 14, 2021, which is to say:

- four years after the acceptance of the proposed location by the council (June 27, 2017),
- more than 10 months following the decision of the Superior Court of Ontario that the location of the new arena/event centre was the result of careful study (September 4, 2020), and
- approximately 7 months after the Ontario Land Tribunal concluded the proposed development represented good planning (December 23, 2020),

the council of the City of Greater Sudbury passed resolution CC2021-227 to move forward with the arena/event centre, in the Kingsway Entertainment District:

> THAT staff proceed to advance the work required to develop the Event Centre without further delay in accordance with the existing, approved Cost Sharing

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[17] *Affidavit of Eric Labelle, sworn October 13, 2021* at para. 50 and Exhibit 17 (respectively Caselines B-1 -20 and B-1 -357)

> Agreement, a project schedule that produces a facility which is ready for use in 2024, and a regular progress reporting to City Council;
>
> AND THAT the Executive Director of Communications, Strategic Initiatives and Citizen Service be delegated authority to negotiate, execute and subsequently amend or extend any agreements to produce the work required for delivering the Event Centre Project in 2024, subject to Council's approval of the following three decision points:
>
> a) Confirmation of the site preparation contract, including the commencement date established with the development partners,
>
> b) Confirmation of the Venue Operator,
>
> c) Confirmation of the final budget based on the results of the Design/Build Request for Proposal.[18]

[19] It is this resolution which Minnow Lake Restoration Group Inc. seeks to quash.

[20] This was the meeting at which the motion to do a further study of the renovation of the Sudbury Community Arena, initially defeated by a vote of council on December 15, 2020, was reconsidered and again defeated.

[21] I pause to point out that on August 17, 2021, the council of the City of Greater Sudbury adopted By-law 2021-153 which was to implement resolution CC2021-227. The by-law served to delegate certain authority regarding the development of the Kingsway Entertainment District and the arena/event centre. This by-law has not been challenged. I presume that those representing Minnow Lake Restoration Group Inc. believe that if the underlying resolution is quashed the by-law would also fall. It is not clear to me that this is the case. As it transpires, it does not matter.

The issue and the answer

[22] The Minnow Lake Restoration Group Inc. submits that in passing the resolution on July 14, 2021 the council of the City of Greater Sudbury made what the Minnow Lake Restoration Group Inc. refers to as "numerous errors of law" including:

- failing to comply with the "rules of procedural fairness" including limiting discussion and questions during the Council proceedings;
- failing to disclose relevant and material information, that had it been known, would likely have affected the result;

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[18] *Affidavit of Eric Labelle, sworn October 13, 2021* at para. 54 and Exhibit 19 (respectively Caselines B-1 -21 and B-1 -363)

- making misleading statements that had the correct information been known, would likely have affected the result;
- proceeding hastily, without proper consideration of the matters in issue;
- proceeding unreasonably, including reaching an unreasonable conclusion;
- proceeding with a lack of candor, frankness and impartiality, including arbitrary and unfair conduct, and proceeding without the proper degree of fairness, openness and impartiality i.e. proceeding in bad faith as that term is known in law.[19]

[23] What is it that the Minnow Lake Restoration Group Inc. relies on in submitting that this litany of supposed errors is present in the actions taken by the council for the City of Greater Sudbury? From the factum filed and the submissions made, all these errors arise from the alleged failure of the staff to provide, as part of the Event Centre Update Report delivered at, and in preparation for, the special meeting of June 16, 2021, the information requested by members of council at the meeting of February 9, 2021; information which counsel for Minnow Lake Restoration Group Inc. says the staff committed to providing.

[24] What is it that the Minnow Lake Restoration Group Inc. relies on in taking this position? As has already been noted in these reasons, at the special meeting of June 16, 2021 some members of council indicated dissatisfaction with the substance of the Update Report. The factum attempts to bring forward the evidence that supports this proposition. It refers to comments made by two councillors, on that day, at that meeting. The first councillor said that:

- a request had been made for "between the energy plan"[*sic*]
- an "economic impact report" was asked for
- that government funding opportunities were sought[20]

and that none of these had been provided.

[25] The second councillor said that:

- the impact of the proposal to build the arena/event centre on the CEEP plan had been requested
- the public consultation results were "in the motion"[21]

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[19] *Factum of the Appellant* at para. 5 (Caseline A65)
[20] *Factum of the Appellant* at para. 8 (Councillor Signoretti) referencing *Transcript of Greater Sudbury Council Meeting dated June 16, 2021* at p. 17 (Caselines A71)
[21] *Factum of the Appellant* at para. 8 (Councillor McCausland) referencing *Transcript of Greater Sudbury Council Meeting dated June 16, 2021* at pp. 20-21 (Caselines A71-A72)

and that these were not part of the report.

[26] It is in the face of these expressions of concern, by two councillors, that the council, as a whole, passed the resolution determining that the discussion concerning the "Event Centre Information" was complete.

[27] There is nothing in this that supports, in any way, the allegations of improper conduct relied on by the Minnow Lake Restoration Group Inc. as demonstrating a foundation from which the resolution of July 14, 2021 should be quashed. There is no breach of procedural fairness, certainly directed at any procedural rights which this applicant could claim. This points to no demonstrated failure to disclose any relevant, material information or misleading statements that, had they been known, could have affected, much less have been likely to affect, the result. There is nothing that suggests the council moved forward in haste, did not consider the issues at hand, arrived at an "unreasonable conclusion" or proceeded in any way that could be found to be "in bad faith, as that term is known in law".

[28] A portion of a transcript reporting what was said at the special meeting was included in the record. A review of these pages reveals not just a concern for the content of the report, but an overarching disagreement with the decision, made in 2017, to locate the arena/event centre in the Kingsway Entertainment District as opposed to the downtown area:

> So the struggle I have, Mr. Mayor, is that when -- yes, council made the decision back in 2017, and I respected the decision. I stayed very quiet at that time. This is a new council. And you may think I didn't stay quiet, but I did stay quiet. So this is a new council, and a new council can reverse a decision and it can be done with a majority, not two-thirds of a majority. And Mr. Mayor, I just want to make it clear that we talk about opportunities for investment in our inner-city. Well, there is an investment that -- an opportunity that could have saved the taxpayers millions and millions of dollars. And we chose not to look at that or at least give it to the opportunity to have it that dissected.
>
> And you're saying right now, well, we are investing in the downtown core, we're putting in investments with the school of architecture. But look at our downtown master plan or our downtown vitalize Asian, we are ignoring that with the movement of the arena to the Kingsway site.
>
> …
>
> So all I want to finish off by saying is that we are not even looking at an opportunity to save the taxpayers tens of millions of dollars in their pocket in the time that we are in COVID, where businesses are struggling and small businesses are struggling and may not re-open, and we are turning a blind eye to that and a blind eye to the taxpayers. So that's all I want to say, and I want to go on record to say that is that

> our job as elected officials are supposed to take low-risk investment. And to me, irregardless (sic) of what the consultant says, this is a high-risk move. Thank you.[22]

[29] What happened is not an affront to the proper processing of a significant proposal by the council of the City of Greater Sudbury. Rather, it is consistent with what we expect of those we elect. There was a difference of opinion as to the decision made with respect to the location of the arena/event centre. Given the passage of time, a determination was made that the work done in furtherance of the decision that had been made should be updated. This was done to the satisfaction of the majority of the members of council, though not all. This is evidenced by the resolution that was passed which determined that the discussion of the issue was complete. Not surprisingly, those who expressed concern were the same councillors who brought forward the motions directed to a further review of the plan to renovate the existing downtown arena. Motions that were defeated.

The nature of the application (the concern)

[30] I begin this review by observing that the nature of the application being made is not clear. The originating document is titled: "Notice of Application for Judicial Review". It relies on the *Judicial Review Procedure Act*[23] and the *Rules of Civil Procedure.* The factum filed on behalf of the Applicant refers to quashing the by-law but, in doing so relies on s. 273 of the *Municipal Act, 2001*[24]:

> **273** (1) Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality.

[31] The principal submission made in furtherance of quashing the by-law is that the procedure adopted by council was unfair. The allegation of unfairness permeates each of the errors alleged to have been made by the council in the process that led to the adoption of the impugned resolution. While it is difficult to perceive the possibility of a procedure being unfair but the result, nonetheless legal, and thus not susceptible to being quashed pursuant to s. 273 of the *Municipal Act,* procedural unfairness is a concept generally understood in the context of judicial review. It is possible, in the presence of an available statutory process, for a party to maintain a right to seek judicial review. The difficulty is that a judicial review is heard by the Divisional Court (a panel of three judges) whereas an application brought under s. 273 of the *Municipal Act* is heard by the Superior Court of Justice (a single judge). This matter proceeded as a judicial review. For the moment, I observe only that judicial review is a discretionary remedy and that this court can and often does exercise that discretion by deciding not to grant judicial review where an alternative remedy remains available. It is important to recognize, as the Court of Appeal has recently observed, that the discretion applies not just to the granting of the relief but also to its decision to undertake a review. I will return to this issue and the decision of the Court of Appeal later in these reasons.

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[22] *Transcript of Greater Sudbury Council Meeting dated June 16, 2021* at p.18 (Caselines A31)
[23] R.S.O. 1990, c. J.1
[24] S.O. 2001, c. 25

Analysis

[32] In these circumstances, the legal premises on which the application relies simply do not arise. The factual foundation for the submission that there was a lack of procedural fairness in the process leading to the adoption of the resolution is the supposed failure of the Update Report to include material requested by councillors at the meeting of February 9, 2021. The majority of council accepted the report as sufficient. This application is brought by a party removed from council. The Minnow Lake Restoration Group Inc. describes itself as a community-based organization that has expressed concerns at numerous stages of development of an arena/event centre as part of the Kingsway Entertainment District. The problem with this is not difficult to see. This outside opponent to the location of the arena/event centre is asking the court to set aside the acceptance of the Update Report by council and quash the resulting resolution directed to moving the project forward. This is in circumstances where there is no suggestion that the resolution of concern was not adopted in accordance with the City of Greater Sudbury's procedural by-law.

[33] In *Shell Canada Products Ltd. v. Vancouver*[25] the City of Vancouver had passed resolutions that it would no longer do business with Shell Canada "until Royal Dutch Shell completely withdraws from South Africa". The British Columbia Supreme Court quashed the resolution as being *ultra vires* the municipality. The Court of Appeal reversed the judgment. The matter proceeded to the Supreme Court of Canada. This further appeal was allowed. Vancouver was seeking to use its powers to do business to affect matters in another part of the world. The authority of the municipality did not extend to include the imposition of a boycott based on matters external to the interests of its citizens. However, a dissenting judgment observed that the courts ought to adopt a deferential approach to the review of municipal decisions:

> Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold…[26]

[34] This comment was referred to and relied on in *Nanaimo (City) v. Rascal Trucking Ltd.*[27] In that case the City of Nanaimo granted a permit to deposit 15,000 cubic yards of soil at a particular location. Neighbouring residents complained. The council of the City passed a resolution, pursuant to a particular provision of the *Municipal Act* declaring the deposited soil to be a nuisance. It ordered that the soil be removed. The parties involved refused to comply. The municipality brought a petition seeking a declaration allowing it to enter the property and remove the soil. The parties involved responded by filing a second petition requesting that the court quash Nanaimo's resolutions on the basis that the City exceeded its jurisdiction by declaring the pile of soil to be a nuisance. The Court of Appeal quashed the resolutions and the court orders. The Supreme Court

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[25] [1994] 1 SCR 231, 1994 CanLII 115 (SCC), 20 MPLR (2d) 1, 20 Admin LR (2d) 202, [1994] 3 WWR 609, 110 DLR (4th) 1
[26] *Ibid* at para. 63
[27] 2000 SCC 13 (CanLII), [2000] 1 SCR 342, 9 MPLR (3d) 1, 20 Admin LR (3d) 1, [2000] 6 WWR 403, 183 DLR (4th) 1

of Canada allowed the subsequent appeal. Apart from quoting the dissent from *Shell Canada Products Ltd. v. Vancouver* the Court noted:

> In light of the conclusion that Nanaimo acted within its jurisdiction in passing the resolutions at issue, it is necessary to consider the standard upon which the courts may review those *intra vires* municipal decisions. Municipal councillors are elected by the constituents they represent and as such are more conversant with the exigencies of their community than are the courts. The fact that municipal councils are elected representatives of their community, and accountable to their constituents, is relevant in scrutinizing *intra vires* decisions. The reality that municipalities often balance complex and divergent interests in arriving at decisions in the public interest is of similar importance. In short, these considerations warrant that the *intra vires* decision of municipalities be reviewed upon a deferential standard.[28]

[35] The fact that a long-standing opponent to the project is unhappy with the information found in the Update Report is not a reason for the Court to step in and impose its sense of the complex balancing required of the council in adopting the resolution allowing the project to proceed.

[36] The problem is underscored by the position taken on behalf of the City of Greater Sudbury. It submits that each of the requests made of the staff was dealt with within the material provided in preparation for the special meeting of June 16, 2021. As referred to in its factum:

- Compilation of Previously Available Reports and Materials
- Update to the Assessment of a renovated Sudbury Community Arena
- Evaluation of How Each Site Aligns with the City's CEEP
- Availability of Government Funding for the Project
- More Robust Economic Impact Analysis
- Consideration of the Public Consultation Previously Performed
- Update of Capital and Operating Cost Assumptions found in earlier Reports
- Identity of the Hotel Proponent and the Financial Situation of Gateway

were all considered and were part of the work provided to council in preparation for the special meeting held on June 16, 2021.[29] This was discussed at length in the affidavit provided by the City solicitor in response to the application.[30] It is not for the court to review the substance and nature

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[28] *Ibid* at para. 35
[29] *Factum of the Respondent* at paras. 53-55 (Caselines B-1 -46 - B-1 -47)
[30] *Affidavit of Eric Labelle, sworn October 13, 2021* at paras. 56-75 (Caselines B-1 -417- B-1 -423)

of the work done to determine if it responds satisfactorily to the requests made by councillors and whether, in the circumstances, council is in a position to evaluate and determine if and how to proceed. The court should not attempt to second guess what councillors, elected to determine these issues, have decided.

[37] There are limits to the deference provided. In *Grosvenor v. East Luther Grand Valley (Township)*[31] the municipality purchased an abandoned railway right of way which it developed as a multi-purpose trailway. The owners of land bordering the trailway were concerned with the lack of fencing protecting their lands. The *Line Fences Act* provided that where a municipality acquired lands that had been part of a railway line it was responsible for constructing, keeping up and repairing the fences that marked the lateral boundaries of the land. The landowners submitted a demand for fencing. The municipality responded by enacting a by-law which designated the trailway as a "highway". "Highways" were an exception to the municipality's responsibility to provide fencing. The by-law was passed without notice to anyone and given first, second and third reading at one sitting, at the end of a council meeting. The land owners applied to quash the by-law. The application judge granted the application. He found that the by-law was passed to avoid the municipality's obligation to fence and to pay the cost of fencing.

[38] In *Grosvenor v. East Luther Grand Valley*, the Court of Appeal recognized the modern jurisprudence dictating deference by the courts to municipalities exercising statutory powers on behalf of electors:

> …the Township relies very heavily on recent jurisprudence from the Supreme Court of Canada and from this court re-emphasizing the principle that courts should afford generous deference -- undertake a "benevolent construction" -- to the decisions of democratically elected municipal councils exercising their powers on behalf of their electors. This principle has its origins in the decision of the Supreme Court of Canada in Hamilton (City) v. Hamilton Distillery Co. (1907), 1907 CanLII 1 (SCC), 38 S.C.R. 239, at p. 249, drawing upon the "benevolent construction" approach enunciated by Russell L.C.J. in Kruse v. Johnson, [1898] 2 Q.B. 91, [1895-1899] All E.R. Rep. 105 (Div. Ct.). The more liberal approach to statutory construction of municipal enabling legislation was adopted by this court in Re Howard and Toronto (City) (1928), 1928 CanLII 427 (ON CA), 61 O.L.R. 563, [1928] O.J. No. 146 (C.A.), at p. 575 O.L.R.[32]

[39] The Court of Appeal referred to both the dissent in *Shell Canada Products Ltd. v. Vancouver* and the adoption of a deferential approach to the enactment of by-laws by municipalities found in *Nanaimo (City) v. Rascal Trucking Ltd.* but went on to consider, in the face of requirement that afforded this generous deference to the decisions of elected councils, what role remained for the doctrine of good faith as a ground for quashing a by-law. The *Municipal Act* s. 272 states:

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[31] 2007 ONCA 55 (CanLII), 278 DLR (4th) 483, 84 OR (3d) 346, 154 ACWS (3d) 959
[32] *Ibid* at para. 29

> A by-law passed in good faith under any Act shall not be quashed or open to review in whole or in part by any court because of the unreasonableness or supposed unreasonableness of the by-law.

[40] In *Grosvenor v. East Luther Grand Valley (Township)* the Court of Appeal determined that good faith remains a central foundation for the validity of a municipal by-law enacted in conformity with a municipality's power. A by-law is enacted in bad faith where the council acted unreasonably and arbitrarily and without the degree of fairness, openness and impartiality required of a municipal government. The application judge had recognized that his role was not to second-guess what the council had done; rather, his findings led him to the conclusion that the municipality had acted for a collateral purpose and that the process followed had not been characterized by the frankness, openness, impartiality and regard for the rights of the respondents that was required of a municipality in the circumstances. His findings, and the inferences he drew from them, were all supportable on the record.

[41] The submission that the by-law (the resolution) instructing the staff to move forward with the arena/event centre in the Kingsway Entertainment District was subject of bad faith arises from nothing other than the singular proposition that the Update Report did not respond to the issues raised or questions asked by members of council at the meeting of February 9, 2021. In the presence of Council's acceptance of the report there is no bad faith. There is nothing arbitrary or unreasonable in the decision to proceed with the project.

[42] It is important to recognize that the process leading to the resolution of July 14, 2021 did not begin at the meetings of either January 12, 2021 or February 9, 2021. Rather, as reported in the decision of the Superior Court released on September 4, 2020 refusing to quash the by-law rezoning the Kingsway Entertainment District land, the consideration of whether to renovate existing arenas or build new ones began in April of 2010 and continued on to a report presented to council on March 31, 2015 showing the cost of renovating the existing Sudbury Community Arena to be significant. This investigation moved to a more general identification of "large projects" one of which was a proposal for a 6,000 seat sports and entertainment complex. It and 15 other proposals were presented to council at a "Public Input Meeting" on November 27, 2015. On April 26, 2016, Council endorsed four of the "large projects" one of which was an arena/event centre. The decision of the Superior Court noted that there appeared to be no question that three of the four "large projects" would be located in the downtown. The exception was the arena/event centre. On July 12, 2016, a consultant was hired to advise as to its location. On February 21, 2017, the consultant delivered a report recommending a "Site Evaluation Matrix" be created to assist in selecting a site for the arena/event centre and providing a draft of such a matrix. On March 7, 2017, council approved both the site evaluation criteria and the weights to be assigned to each of them. Even with these decisions having been taken, councillors expected a further review with the prospect of some adjustment. Accordingly, at a meeting on April 11, 2017, council of the City of Greater Sudbury considered four options put to it by the staff and chose one that organized and ranked the criteria in a particular way. The Event Centre Site Evaluation Team made up of members from the City's Economic Development, Planning, Engineering and Real Estate Departments, together with third parties including the consultant, architects and a special advisor to the City's Chief Administrative Officer had reviewed 23 potential sites. It narrowed this group to four. Using the criteria developed with council on April 11, 2017, the report concluded that the

downtown site ranked highest followed by the Kingsway site. The decision of the Superior Court noted that in terms of the criteria that were deemed by Council to be of the highest importance, the Kingsway site ranked highest overall.

[43] From there the City moved on to obtain option agreements allowing it to purchase the lands required for each of the four sites. Each of these agreements was conditional on the approval of council and was not to be binding unless approved by a by-law. This led to the meeting of June 27, 2017, referred to earlier in these reasons, where council first defeated a motion to locate the arena/event centre in the downtown and then approved its location in the Kingsway Entertainment District. From there the lands were rezoned and the rezoning the subject of the appeal to the Ontario Land Tribunal and to the application that the by-laws be quashed as the result of bias and improper process at council.

[44] If considering whether the decision made on July 14, 2021 to move forward with the arena/event centre in the Kingsway Entertainment District was made in bad faith, that is, that council in passing the resolution acted unreasonably and arbitrarily, one has to look at the process as a whole and not just the last step, that is the updating of the material and the resulting review. As it is, it remains the case that the Superior Court found the process to be "a careful study of the potential effects of locating it [in the Kingsway Entertainment District], as part of a robust democratic process" and the Ontario Land Tribunal determined the proposed development represented good planning. Moreover, the proposal for the Update Report was the subject of discussion at the meeting of February 9, 2021. The Report and the accompanying memorandum were considered, by a vote of council, to be sufficient to allow the closure of discussion of the proposal. Nonetheless, the issue was subject to debate and the two motions brought forward at the meeting of June 29, 2021 that further work be undertaken. Both of those motions were defeated. Finally, the issue of allowing the project to move forward was voted on and passed by council in the resolution of July 14, 2021. It cannot be said that the decision to move on was arbitrary or that council acted arbitrarily in passing the resolution the Minnow Lake Restoration Group Inc. now seeks to quash. It is worth remembering that in *Grosvenor v. East Luther Grand Valley (Township)* the finding of bad faith arose from a circumstance that the declaration of the trailway as a highway was done without notice to anyone, with the three readings of the by-law occurring at one sitting at the end of a council meeting and then being passed.[33] There is nothing like that here.

[45] Finally, while nothing is said of it in the factum filed, in his submissions, counsel for Minnow Lake Restoration Group Inc. submitted that there was a breach of procedural fairness in that not all the documents delivered to council in response to its direction of February 9, 2021 were made available to the public in advance of the special meeting of June 16, 2021. In particular, it was said that the 7-page memorandum prepared by the staff and delivered to members of the council 3 days prior to the special meeting was not made public. This is not referred to in the affidavit provided by the City solicitor or the transcript references relied on by the applicant (it filed no affidavit in support of this application). What was said, and has already been noted in these

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[33] This was the same as the bad faith demonstrated in *H.G. Winton Ltd. v. Borough of North York* 20 O.R. (2d) 737 where in response to a ratepayers' petition, without notice and three readings of the by-law being read at the same meeting, the municipality departed from its normal practice and rezoned a single parcel of land that had been purchased for use as a church which the pre-existing zoning allowed.

reasons, is that there has been no suggestion that the requirements of the procedural by-law of the City of Greater Sudbury were not followed and complied with.

[46] In the circumstances there is no evidence indicating that the failure to provide the 7-page memo to the public (if in fact it was not provided) had any impact on the consideration of the update reports and material or that there was any chance, much less a likelihood that it would have caused there to be any change in the decisions made by council:

- at the special meeting held on June 16, 2021 (supposedly closing down discussion of information respecting the arena /event centre),

- the meeting of June 29, 2021, when the two resolutions asking for further work to be undertaken in respect of the proposed renovation of the existing arena and, despite the resolution of June 16, 2021, for more work in furtherance of updating the material looking at the Kingsway Entertainment District site, and

- the resolution passed on July 14, 2021 directing the next steps in proceeding with the arena/event centre which is the subject of this application.

[47] There is nothing that requires every piece of information to be made available to the public. The memorandum was an adjunct to the reports provided and had a specific purpose. It was intended to respond to questions asked by Councillors and the media.

[48] In this regard, I make reference to the case of *Friends of Lansdowne Inc. v. Ottawa (City)*.[34] It bears a similarity to this case. The City of Ottawa sought to redevelop what the case report refers to as an important landmark: an area which included a football stadium, an arena and some important heritage buildings. The city considered holding a design competition but instead chose to consider an unsolicited proposal it had received. After two and a half years of discussion, the City of Ottawa passed a by-law advancing the development. The Friends of Lansdowne, a group formed to oppose the development moved to quash the by-law, not by judicial review alleging procedural unfairness, but in an application to the Superior Court brought pursuant to s. 273(1) of the *Municipal Act.* A great deal of the decision of the Court of Appeal concerns the allegation that the City had illegally bonused the developer (given the developer an unfair advantage) contrary to s. 106 of the *Municipal Act.* The application judge found that no improper bonusing had occurred and the Court of Appeal agreed. The application judge dealt with the allegation that the city had acted in bad faith in its approval of the development plan by noting that the argument on which it was based was largely an attempt to reargue its position that the plan was a poor deal for the city. The third proposition, the one with relevance in this case, was that the city, in passing the by-law had breached its own procurement by-laws in the manner it accepted the unsolicited proposal for development. Among other things, the application judge concluded that the detailed negotiations and evaluation which had taken place, addressed any technical failure on the part of the City in its consideration of the proposal and its approval of the plan. The problem, to the extent there was one in the initial taking up of the proposal, was overcome by the subsequent consideration and

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[34] 2012 ONCA 273 (CanLII), 98 MPLR (4th) 1, 349 DLR (4th) 41, 110 OR (3d) 1

reconsideration of the proposal. The Court of Appeal agreed and in so doing referred to the well-known text. Ian MacFee Rogers, *The Law of Canadian Municipal Corporations* which it quoted:

> The procedure adopted by a council in passing by-laws or in transacting any other business within its jurisdiction, in the absence of express statutory requirements, is a matter wholly of domestic concern and internal regulation. The courts will accordingly not give effect to objections based upon the failure of council to observe its established procedure, unless there is clear evidence of bad faith or fraudulent intent(s). . .[35]

[49] I go through this to say that if there was any error in the failure to provide the public with the memorandum delivered to the members of council three days before the special meeting of June 16, 2021, it was a technical error and not one that had any substantive effect on the determination to proceed with the development of the arena/event centre in the Kingsway Entertainment District. The fact remains that the concerns raised at the special meeting were raised again by the motions heard and considered by the council of the City of Greater Sudbury on June 29, 2021 and the reconsideration on July 14, 2021 of the motion first heard and defeated at the meeting of council on December 15, 2020.

[50] In summary, I repeat and conclude that there is no foundation from which allegations of procedural unfairness in the adoption of the resolution passed on July 16, 2021, allowing for the process leading to the development of the arena/event centre to move forward, could be made. In the presence of its acceptance by the council of the City of Greater Sudbury, there is no basis for the court to second guess that determination and find that the Update Report was, in any sense, deficient. In the absence of that supposed deficiency, and the presence of the consideration given to the substance of that report on June 16, 2021, again on June 29, 2021 and yet again, on July 14, 2021, there is no rationale that would justify a consideration that any bad faith was involved in the adoption of the resolution to proceed. And, finally, if there was any error in the failure to produce the staff memorandum to the public, it was a technical error which did not impact on the consideration or reconsideration on the issues concerning whether the arena/entertainment centre project could move forward.

The nature of the application (the explanation)

[51] I return to the concern as to the nature of this application: should it be dealt with as a judicial review and considered by this court or as an application to quash a by-law and the court's discretion exercised to refuse the application on the basis that such a motion was an available, adequate alternative remedy and, as such, is properly heard by the Superior Court. In the time since this case was argued, but prior to the preparation of these reasons, the Court of Appeal released its decision in *Yatar v. TD Insurance Meloche Monnex*.[36] The Licence Appeal Tribunal had determined that an application that had been made pursuant to the *Statutory Accident Benefits*

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[35] *Ibid* at para. 72
[36] 2022 ONCA 446 (CanLII)

Schedule (commonly "SABS")[37] was outside the two-year limitation set for its commencement. The appellant asked for a reconsideration of that decision. The decision was confirmed. The Divisional Court had considered both an appeal and an application for judicial review of the decision of the Licence Appeal Tribunal. Pursuant to s. 11(6) of the *Licence Appeal Tribunal Act*[38] appeals were to the Divisional Court and were limited to questions of law. The Divisional Court concluded that the decision of the Tribunal disclosed no such error and dismissed the appeal. This was not questioned. However, the Divisional Court went on to consider the application for judicial review. It determined that where there was an adequate alternative remedy (in that case, the statutory appeal that had been dismissed) particularly where that remedy limited access to the courts (i.e. only as to a question of law), it was only in "exceptional circumstances" that the court should exercise its discretion to consider a judicial review. There being no exceptional circumstances it dismissed the application. It was this determination that was taken up by the Court of Appeal.

[52] The Court of Appeal was concerned with the use of the phrase "only in exceptional circumstances" as the determinant of when a judicial review should proceed in the presence of an adequate alternative remedy. The Court recognized that in the circumstances the appellant still had the remedy of an application for judicial review available to her. In particular, the Court of Appeal referred to s. 2(1) of the *Judicial Review Procedure Act* which provides that "'a court may, despite any right of appeal, by order grant any relief' by way of judicial review". The court noted that "the case law also makes it clear that legislatures cannot shield administrative decision making from curial scrutiny entirely". In the result, the Court of Appeal "agreed with the Divisional Court's approach, which essentially concluded that judicial review should be restricted to those rare cases where the adequate alternative remedies of reconsideration, together with a limited right of appeal, are insufficient to address the particular circumstances of a given case. What constitutes such a rare case is for the Divisional Court to determine on a case-by-case basis".[39] It will be immediately evident that the case does not directly apply to the situation in this case. There is no right of appeal that accompanies this application for judicial review. An application made pursuant to s. 273 of the *Municipal Act* is an "originating process" and pursuant to s. 272 the ability to quash a by-law limited. Nonetheless, the principle is the same. The discretion in this court to consider a judicial review in the face of an adequate, alternative remedy remains, albeit to be exercised in rare circumstances.

[53] In this case, the court has exercised its discretion to hear the judicial review. To explain why, I return to the first paragraph of these reasons. The planning process can be long and complicated; in some cases, to the point where its efficacy becomes open to question. The effort to locate the arena/event centre began in 2010. In time, it was absorbed into the identification of "large projects" to be incorporated into the City of Greater Sudbury's overall planning and as part of the consideration and planning for the Kingsway Entertainment District. It took until 2017 for the council to resolve if, and where, the arena/event centre should go. This decision was not accepted. Rather it was the subject of both an application to quash on the basis that it was the result

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[37] O. Reg. 34/10
[38] S.O. 1999, c. 12, Sched. G
[39] *Yatar v. TD Insurance Meloche Monnex, supra* (fn. 35) at para. 45

of a flawed process, by a biased council and a review of the planning by the Ontario Land Tribunal. It took until, respectively, September 4, 2020 and December 23, 2020 (or to put it differently, in excess of another three years) for these processes to be completed. The Superior Court sustained the actions of the Council and the Tribunal recognized the quality of the planning. Almost immediately, at the meetings of January 21, 2021 and February 9, 2021, the council moved to update the available information, review and, as it has turned out, confirm the decision to locate a new arena/event centre in the Kingsway Entertainment District. Not surprisingly, the councillors who remain concerned with this decision, have continued to bring the downtown option forward to be considered by their colleagues. These motions have all been defeated. Now, by this application, a group opposed to the decision seeks to start again with a review by the courts based upon allegations of a flawed process. It is of note to point out that, in his submissions, counsel for the Applicant, said that the issue being raised was only with what began on January 21, 2021 and February 9, 2021, as if what happened before was of no import. To have exercised the court's discretion to refuse to hear this application and send the matter back for another application to quash the by-law would have resulted in more delay, perhaps, another three years. As it is, no objection was taken by the City of Greater Sudbury to this application proceeding. The court has found that there was no substance to the allegations being made. To allow this to go on would have accomplished nothing other than further delay. There is a point where delay makes the process not just too long, but meaningless, in that it requires more review. Circumstances can change. Whether, if the Court of Appeal decision in *Yatar v. TD Insurance Meloche Monnex* had been released before this matter was heard, the Court's discretion would have been dealt with differently is a matter of speculation but I believe not.

[54] I end by pointing out again that the basis for the application was the allegation that the process was unfair. No other issue of illegality was raised. Accordingly, there would be no basis upon which an application to quash the by-law could now be pursued. For whatever reason, and to whatever result, this application for judicial review, as brought on before the Divisional Court, referred to and relied on s. 273 of the *Municipal Act.* As noted by the Court of Appeal in *Yatar v. TD Insurance Meloche Monnex*:

> …if a party intends to utilize both their right of appeal and their right to seek judicial review, then those proceedings must be brought together. Put simply, a party cannot first exercise their right of appeal and then, if unsuccessful, bring a judicial review application. "Litigation is not to be conducted by instalment."[40]

[55] For the reasons reviewed the application is dismissed.

Costs

[56] The City of Greater Sudbury, as the successful party, seeks costs of $37,000. There are circumstances where public interest litigators, though unsuccessful, are not required to pay costs. I am not prepared to extend that advantage to Minnow Lake Restoration Group Inc. The application was entirely without merit. The impact was limited to more delay in a long-standing planning

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[40] *Ibid* at para. 55

process and the cost to the City of Greater Sudbury in having to respond. If an argument is to be made that a process was flawed and the subject of bad faith, there should be some evidence that justifies the allegation. Costs are awarded to the City of Greater Sudbury in the amount of $37,000.

Lederer, J.

I agree

MacEachern, J.

I agree

Krawchenko, J.

Released: July 15, 2022

CITATION: Minnow Lake Restoration Group Inc. v. Sudbury (City), 2022 ONSC 4084
DIVISIONAL COURT FILE NO.: DC-21-00002178-0000
DATE: 20220715

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Lederer, MacEachern, Krawchenko JJ

BETWEEN:

MINNOW LAKE RESTORATION GROUP INC.

Applicant

– and –

CITY OF GREATER SUDBURY

Respondent

REASONS FOR JUDGMENT

Lederer, J.

Released: July 15, 2022