

Judge will deliver verdict in Buck trial

By Brock Weir

Current and former members of Council involved in Councillor Buck's multimillion defamation suit will have a little bit longer to wait for a decision as the presiding judge ruled the decision was his and his alone.

Justice Edwards dismissed the six member jury from the case on Thursday morning, citing an improper submission in closing arguments made by Kevin Macdonald, lawyer for Councillor Buck. A motion to strike the jury was made earlier in the week by David Boghosian, lawyer for former mayor Phyllis Morris, incumbent Councillors Wendy Gaertner and John Gallo, and former councillors Stephen Granger, Evelina MacEachern and Al Wilson, after both lawyers made objections to each other's closings.

After weighing his options over the course of Tuesday afternoon and Wednesday, a primary sticking point emerged for Justice Edwards, and that was Mr. Macdonald's reliance on case law in making his final arguments.

“What gives this court the greatest concern are the submissions made by Mr. Macdonald to the jury about two cases that were decided by the Supreme Court of Canada,” said Justice Edwards. “Prior to counsel going to the jury with closings, I made it quite clear that counsel could not go to a jury with submissions about the range of damages they could award.”

Although Mr. Boghosian suggested in his closings that if the jury decided to award damages, only nominal awards in the range of \$1 to \$100 would be appropriate, Justice Edwards said getting specific with case law is what tripped Mr. Macdonald up.

Justice Edwards said he accepted that Mr. Macdonald might have made his submission based on “misunderstanding”, going to a jury with case law mentioning potential dollar figures for damages is a “fundamental” rule for lawyers to abide by and could have been averted by a simple read of guidelines.

Justice Edwards called the use of a case where a jury awarded damages to a plaintiff in the range of hundreds of thousands of dollars “particularly egregious.”

“While I accept what Mr. Macdonald did was in advertence and misunderstanding, there can be no doubt that in telling the jury in our case that the Hill Decision awarded \$350,000 in general damages, \$500,000 in aggravated damages, and \$800,000 in punitive damages, he was inviting the jury to do exactly the same thing,” said Justice Edwards in his ruling. “This is made even more obvious since counsel made clear to the jury in the case that the Hill award was in 1991 dollars, effectively inviting the jury to make at least a similar award, if not a higher award given the passage of time.

“Finding the invitation to our jury to make an award comparable to that made in Hill is made crystal clear, given Mr. Macdonald's emphasis that the jury award in Hill was not only upheld by the Ontario Court of Appeal but was, in the rarest of cases [that the] Supreme Court of Canada that hears an appeal, also upheld the Supreme Court of Canada.”

Weighing several options before him, Justice Edwards said that Mr. Macdonald's submission was a “violation” of his earlier ruling counsel could not suggest a dollar figure to a jury and it was not a misstep that could be cured by mere words to a jury to disregard it.

“It requires me to consider if there are other ways to save this jury,” he said. “In the context of a mistrial, the judge must consider all possible options before using what I described in an earlier motion as in this case for a mistrial as the ‘nuclear weapon’ so as to avoid a mistrial. From the perspective of [Councillor Buck], losing her right to a jury trial can be viewed not only as the loss of an important substantive right, but undoubtedly of a major and significant setback in the trial.”

Councillor Buck's right to a jury appeared to weigh heavily in Justice Edwards' decision but, at the end of the day, he said he was left with few options. Additional measures of recourse considered at the behest of Mr. Macdonald, said Justice Edwards, were throwing

out a jury decision if it was seen to have been unduly influenced by his submission of the Hill case, or simply letting the jury decide whether Councillor Buck had been defamed by the defendants and leaving all matters of monetary compensation up to the judge. Both sides failed to come to an agreement on the best way forward.

In all, both sides presented Justice Edwards with a laundry list of objections to each other's closings, ranging from 'inflammatory language' to the 'mischaracterization' of evidence. Some of the concerns were relevant, some were not, and some would require a corrective charge to the jury, said Justice Edwards, but an extensive corrective charge to the jury could leave jurors wondering whether they could have 'any confidence' in Mr. Macdonald whatsoever, he concluded.

'I have come to the conclusion that a correcting charge will not remove the prejudice caused by the plaintiff's counsel's closing remarks, particularly those relating to his invitation to the jury to award damages commensurate if not higher than those awarded in Hill.

'As well, I have considered the unique facts presented to me arising out of the plaintiff's closing. The only recourse, and I say this with the greatest reluctance, is to discharge the jury.'

After tendering his decision, Justice Edwards brought in the four men and two women who had been sitting in that courtroom every day for the better part of five weeks and reiterated his regret about dismissing the jurors, characterising his decision as something which could come as 'good news' to some and 'extremely bad news' to others.

'In the roughly three years I have been a trial judge, what I am about to say is one of the most difficult things I have ever had to say to a jury because you have been attentive, you have attended every day that you have been asked to attend, and it is clear to me you have taken your roles as jurors extremely seriously.'

Court was adjourned Friday until January 22 for a further two days of hearings.