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JUDICIAL CENTRE	CALGARY
APPLICANTS	STEPHEN ROSS, LESLIE SKINGLE, BRIAN TALBOT, DAVID TAYLOR, RALPH YOUNG, DEVONIAN DEVELOPMENT CORPORATION, and THREE SISTERS MOUNTAIN VILLAGE PROPERTIES LTD.
RESPONDENT	TOWN OF CANMORE
DOCUMENT	**VOLUME OF AUTHORITIES OF THE RESPONDENT FOR THE HEARING SCHEDULED ON APRIL 15, 2025**

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28. *R. v. Debaji Foods Ltd.,* 1981 ABCA 109

Minister of Citizenship and Immigration
Appellant

v.

Alexander Vavilov *Respondent*

and

Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Canadian Council for Refugees,
Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program,
Ontario Securities Commission,
British Columbia Securities Commission,
Alberta Securities Commission,
Ecojustice Canada Society,
Workplace Safety and Insurance Appeals Tribunal (Ontario),
Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut),
Workers' Compensation Appeals Tribunal (Nova Scotia),
Appeals Commission for Alberta Workers' Compensation,
Workers' Compensation Appeals Tribunal (New Brunswick),
British Columbia International Commercial Arbitration Centre Foundation,
Council of Canadian Administrative Tribunals,
National Academy of Arbitrators,
Ontario Labour-Management Arbitrators' Association,
Conférence des arbitres du Québec,
Canadian Labour Congress,
National Association of Pharmacy Regulatory Authorities,
Queen's Prison Law Clinic,
Advocates for the Rule of Law,
Parkdale Community Legal Services,
Cambridge Comparative Administrative Law Forum,

Ministre de la Citoyenneté et de l'Immigration *Appelant*

c.

Alexander Vavilov *Intimé*

et

Procureur général de l'Ontario,
procureure générale du Québec,
procureur général de la Colombie-Britannique,
procureur général de la Saskatchewan,
Conseil canadien pour les réfugiés,
Centre ontarien de défense des droits des locataires - Programme d'avocats de service en droit du logement,
Commission des valeurs mobilières de l'Ontario,
British Columbia Securities Commission,
Alberta Securities Commission,
Ecojustice Canada Society,
Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail (Ontario),
Workers' Compensation Appeals Tribunal (Territoires du Nord-Ouest et Nunavut),
Tribunal d'appel des décisions de la Commission des accidents du travail de la Nouvelle-Écosse,
Appeals Commission for Alberta Workers' Compensation,
Tribunal d'appel des accidents au travail (Nouveau-Brunswick),
British Columbia International Commercial Arbitration Centre Foundation,
Conseil des tribunaux administratifs canadiens,
National Academy of Arbitrators,
Ontario Labour-Management Arbitrators' Association,
Conférence des arbitres du Québec,
Congrès du travail du Canada,
Association nationale des organismes de réglementation de la pharmacie,
Queen's Prison Law Clinic,
Advocates for the Rule of Law,

Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Bar Association, Canadian Association of Refugee Lawyers, Community & Legal Aid Services Programme, Association québécoise des avocats et avocates en droit de l'immigration and First Nations Child & Family Caring Society of Canada *Interveners*

Parkdale Community Legal Services, Cambridge Comparative Administrative Law Forum, Clinique d'intérêt public et de politique d'internet du Canada Samuelson-Glushko, Association du Barreau canadien, Association canadienne des avocats et avocates en droit des réfugiés, Community & Legal Aid Services Programme, Association québécoise des avocats et avocates en droit de l'immigration et Société de soutien à l'enfance et à la famille des Premières Nations du Canada *Intervenants*

Indexed as: Canada (Minister of Citizenship and Immigration) *v.* Vavilov

2019 SCC 65

File No.: 37748.

2018: December 4, 5, 6; 2019: December 19.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

Répertorié : Canada (Ministre de la Citoyenneté et de l'Immigration) *c.* Vavilov

2019 CSC 65

N° du greffe : 37748.

2018 : 4, 5, 6 décembre; 2019 : 19 décembre.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe et Martin.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Judicial review — Standard of review — Proper approach to judicial review of administrative decisions — Proper approach to reasonableness review.

Citizenship — Canadian citizens — Registrar of Citizenship cancelling certificate of Canadian citizenship issued to Canadian-born son of parents later revealed to be Russian spies — Decision of Registrar based on interpretation of statutory exception to general rule that person born in Canada is Canadian citizen — Exception stating that Canadian-born child is not citizen if either parent was representative or employee in Canada of foreign government at time of child's birth — Whether Registrar's decision to cancel certificate of citizenship was reasonable — Citizenship Act, R.S.C. 1985, c. C-29, s. 3(2)(a).

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit administratif — Contrôle judiciaire — Norme de contrôle — Démarche appropriée pour le contrôle judiciaire des décisions administratives — Démarche appropriée pour l'application de la norme de la décision raisonnable.

Citoyenneté — Citoyens canadiens — Annulation par la greffière de la citoyenneté du certificat de citoyenneté canadienne délivré au fils né au Canada de parents qui se sont plus tard révélés être des espions russes — Décision rendue par la greffière sur son interprétation de l'exception prévue par la loi à l'égard de la règle générale suivant laquelle les personnes nées au Canada ont la citoyenneté canadienne — Exception précisant qu'un enfant né au Canada n'est pas citoyen canadien si, au moment de sa naissance, son père ou sa mère était représentant ou au service au Canada d'un gouvernement étranger — La décision de la greffière d'annuler le certificat de citoyenneté était-elle raisonnable? — Loi sur la citoyenneté, L.R.C. 1985, c. C-29, art. 3(2)a).

Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, "Proportionality and Justification" (2014), 64 *U.T.L.J.* 458, at pp. 467-70.

[15] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.

II. Determining the Applicable Standard of Review

[16] In the following sections, we set out a revised framework for determining the standard of review a court should apply when the merits of an administrative decision are challenged. It starts with a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions.

[17] The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard or set of standards to apply. This will be the case where the legislature explicitly prescribes the applicable standard of review. It will also be the case where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that

les plans de la rationalité et de l'équité » : la très honorable B. McLachlin, « The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law » (1998), 12 *R.C.D.A.P.* 171, p. 174 (italique omis); voir également M. Cohen-Eliya et I. Porat, « Proportionality and Justification » (2014), 64 *U.T.L.J.* 458, p. 467-470.

[15] Lorsqu'elle effectue un contrôle selon la norme de la décision raisonnable, la cour de révision doit tenir compte du résultat de la décision administrative eu égard au raisonnement sous-jacent à celle-ci afin de s'assurer que la décision dans son ensemble est transparente, intelligible et justifiée. Ce qui distingue le contrôle selon la norme de la décision raisonnable du contrôle selon la norme de la décision correcte tient au fait que la cour de justice effectuant le premier type de contrôle doit centrer son attention sur la décision même qu'a rendue le décideur administratif, notamment sur sa justification, et non sur la conclusion à laquelle elle serait parvenue à la place du décideur administratif.

II. La détermination de la norme de contrôle applicable

[16] Dans les sections qui suivent, nous exposons un cadre d'analyse révisé permettant à une cour de justice de déterminer la norme de contrôle applicable en cas de contestation qui porte sur le fond d'une décision administrative. Ce cadre d'analyse repose sur la présomption voulant que la norme de la décision raisonnable soit la norme applicable chaque fois qu'une cour contrôle une décision administrative.

[17] La présomption d'application de la norme de la décision raisonnable peut être réfutée dans deux types de situations. La première est celle où le législateur a indiqué qu'il souhaite l'application d'une norme différente ou d'un ensemble de normes différentes. C'est le cas lorsque le législateur a prescrit expressément la norme de contrôle applicable. C'est aussi le cas lorsque le législateur a prévu un mécanisme d'appel d'une décision administrative devant une cour, indiquant ainsi son intention que les cours de justice recourent, en matière de contrôle, aux normes applicables en appel. La deuxième situation où la présomption d'application de la norme

is [the choice of standard analysis]. . . . A victory before the reviewing court may be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome.

Regrettably, we find ourselves in a similar position following *Dunsmuir*. As Karakatsanis J. observed in *Edmonton East*, at para. 35, "[t]he contextual approach can generate uncertainty and endless litigation concerning the standard of review". While counsel and courts attempt to work through the complexities of determining the standard of review and its proper application, litigants "still find the merits waiting in the wings for their chance to be seen and reviewed": *Wilson*, at para. 25, per Abella J.

[22] As noted in *CHRC*, this Court "has for years attempted to simplify the standard of review analysis in order to 'get the parties away from arguing about the tests and back to arguing about the substantive merits of their case'": para. 27, quoting *Alberta Teachers*, at para. 36, citing *Dunsmuir*, at para. 145, per Binnie J. The principled changes set out below seek to promote the values underlying *stare decisis* and to make the law on the standard of review more certain, coherent and workable going forward.

A. *Presumption That Reasonableness Is the Applicable Standard*

[23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decision other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law.

arbitre plutôt un long et mystérieux débat sur [l'analyse du choix de la norme]. [. . .] La décision favorable rendue par la cour de révision peut être infirmée en appel au motif que la bonne « norme de contrôle » n'a pas été appliquée. La petite entreprise à qui on refuse un permis ou le professionnel qui fait l'objet d'une mesure disciplinaire devrait pouvoir demander le contrôle judiciaire de la décision sans miser son commerce ou sa maison sur l'issue de l'instance.

Malheureusement, nous nous retrouvons dans une situation semblable depuis l'arrêt *Dunsmuir*. Comme l'a fait remarquer la juge Karakatsanis dans l'arrêt *Edmonton East*, au par. 35, « [l]e recours à une analyse contextuelle peut être source d'incertitude et d'interminables litiges au sujet de la norme de contrôle applicable ». Bien que les avocats et les cours de justice tentent de surmonter la difficulté de déterminer la norme de contrôle et la bonne façon de l'appliquer, les plaideurs prennent note que, « [p]endant ce temps, l'analyse au fond attend en coulisses » : *Wilson*, par. 25, la juge Abella.

[22] Comme il a été souligné dans l'arrêt *CCDP*, « [d]epuis plusieurs années, notre Cour tente de simplifier l'analyse relative à la norme de contrôle applicable, afin de "faire en sorte que les parties cessent de débattre des critères applicables et fassent plutôt valoir leurs prétentions sur le fond" » : par. 27, citant *Alberta Teachers*, par. 36, citant *Dunsmuir*, par. 145, le juge Binnie. Les changements de principe exposés ci-dessous visent à promouvoir les valeurs qui sous-tendent la règle du *stare decisis* et à rendre le droit applicable en matière de norme de contrôle plus certain, cohérent et facile à appliquer à l'avenir.

A. *La présomption selon laquelle la norme applicable est celle de la décision raisonnable*

[23] Lorsqu'une cour examine une décision administrative sur le fond (c.-à-d. le contrôle judiciaire d'une mesure administrative qui ne comporte pas d'examen d'un manquement à la justice naturelle ou à l'obligation d'équité procédurale), la norme de contrôle qu'elle applique doit refléter l'intention du législateur sur le rôle de la cour de révision, sauf dans les cas où la primauté du droit empêche de donner

The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

[24] Parliament and the provincial legislatures are constitutionally empowered to create administrative bodies and to endow them with broad statutory powers: *Dunsmuir*, at para. 27. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to be able to fulfill its mandate and interpret the law as applicable to all issues that come before it. Where a legislature has not explicitly prescribed that a court is to have a role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended the administrative decision maker to function with a minimum of judicial interference. However, because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision making from curial scrutiny entirely: *Dunsmuir*, at para. 31; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at pp. 236-37; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090. Nevertheless, respect for these institutional design choices made by the legislature requires a reviewing court to adopt a posture of restraint on review.

[25] For years, this Court's jurisprudence has moved toward a recognition that the reasonableness standard should be the starting point for a court's review of an administrative decision. Indeed, a presumption of reasonableness review is already a well-established feature of the standard of review analysis in cases in which administrative decision makers interpret their home statutes: see *Alberta Teachers*, at para. 30; *Saguenay*, at para. 46; *Edmonton East*, at para. 22. In our view, it is now appropriate to hold that whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. While this presumption applies to the administrative decision maker's interpretation of its enabling statute, the

effet à cette intention. L'analyse a donc comme point de départ une présomption selon laquelle le législateur a voulu que la norme de contrôle applicable soit celle de la décision raisonnable.

[24] Le Parlement et les législatures provinciales sont habilités par la Constitution à créer des organismes administratifs et à les investir de larges pouvoirs légaux : *Dunsmuir*, par. 27. Si le législateur a constitué un décideur administratif dans le but précis d'administrer un régime législatif, il faut présumer que le législateur a également voulu que ce décideur soit en mesure d'accomplir son mandat et d'interpréter la loi qui s'applique à toutes les questions qui lui sont soumises. Si le législateur n'a pas prescrit expressément que les cours de justice ont un rôle à jouer dans le contrôle des décisions de ce décideur, on peut aisément présumer que le législateur a voulu que celui-ci puisse fonctionner en faisant le moins possible l'objet d'une intervention judiciaire. Toutefois, étant donné que le contrôle judiciaire bénéficie de la protection de l'art. 96 de la *Loi constitutionnelle de 1867*, le législateur ne peut soustraire le processus décisionnel administratif à tout examen judiciaire : *Dunsmuir*, par. 31; *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220, p. 236-237; *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, p. 1090. Il n'en demeure pas moins que le respect de ces choix d'organisation institutionnelle de la part du législateur oblige la cour de révision à adopter une attitude de retenue lors du contrôle judiciaire.

[25] Depuis plusieurs années, la jurisprudence de notre Cour évolue vers une reconnaissance du fait que la norme de la décision raisonnable devrait être le point de départ du contrôle judiciaire d'une décision administrative. En effet, la présomption d'application de la norme de la décision raisonnable est déjà une caractéristique bien établie de l'analyse relative à la norme de contrôle applicable dans les cas où le décideur administratif interprète sa loi constitutive : voir *Alberta Teachers*, par. 30; *Saguenay*, par. 46; *Edmonton East*, par. 22. À notre avis, il y a maintenant lieu d'affirmer que chaque fois qu'une cour examine une décision administrative, elle doit partir de la présomption que la norme de contrôle applicable à l'égard de tous les aspects de cette décision est celle de la décision raisonnable. Si cette

[81] Reasons facilitate meaningful judicial review by shedding light on the rationale for a decision: *Baker*, at para. 39. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the Court reaffirmed that "the purpose of reasons, when they are required, is to demonstrate 'justification, transparency and intelligibility'": para. 1, quoting *Dunsmuir*, at para. 47; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 126. The starting point for our analysis is therefore that where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts. It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.

B. *Reasonableness Review Is Concerned With the Decision-making Process and Its Outcomes*

[82] Reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law: see *Dunsmuir*, at paras. 27-28 and 48; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 10; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 10.

[83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what

[81] Les motifs favorisent un contrôle judiciaire valable en mettant en lumière la justification de la décision : *Baker*, par. 39. Dans l'arrêt *Newfoundland and Labrador Nurses' Union c. Terre-Neuve-et-Labrador (Conseil du Trésor)*, 2011 CSC 62, [2011] 3 R.C.S. 708, la Cour a réaffirmé que « l'objet des motifs, dans les cas où il faut en exposer, est d'établir "la justification de la décision [ainsi que] la transparence et [. . .] l'intelligibilité du processus décisionnel » : par. 1, citant *Dunsmuir*, par. 47; voir aussi *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3, par. 126. Notre analyse prend donc comme point de départ que, lorsque des motifs sont requis, ceux-ci constituent le mécanisme principal par lequel les décideurs administratifs démontrent le caractère raisonnable de leurs décisions, tant aux parties touchées qu'aux cours de révision. En conséquence, la communication des motifs à l'appui d'une décision administrative est susceptible d'avoir des répercussions sur sa légitimité, à la fois au regard de l'équité procédurale et du caractère raisonnable de ceux-ci sur le fond.

B. *Le contrôle selon la norme de la décision raisonnable porte sur le processus décisionnel et ses résultats*

[82] Le contrôle selon la norme de la décision raisonnable vise à donner effet à l'intention du législateur de confier certaines décisions à un organisme administratif, tout en exerçant la fonction constitutionnelle du contrôle judiciaire qui vise à s'assurer que l'exercice du pouvoir étatique est assujetti à la primauté du droit : voir *Dunsmuir*, par. 27-28 et 48; *Catalyst Paper Corp. c. North Cowichan (District)*, 2012 CSC 2, [2012] 1 R.C.S. 5, par. 10; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3, par. 10.

[83] Il s'ensuit que le contrôle en fonction de la norme de la décision raisonnable doit s'intéresser à la décision effectivement rendue par le décideur, notamment au raisonnement suivi et au résultat de la décision. Le rôle des cours de justice consiste, en pareil cas, à *réviser* la décision et, en général à tout le moins, à s'abstenir de trancher elles-mêmes la question en litige. Une cour de justice qui applique la norme de

decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[84] As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.

[85] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

[86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court

contrôle de la décision raisonnable ne se demande donc pas quelle décision elle aurait rendue à la place du décideur administratif, ne tente pas de prendre en compte l'« éventail » des conclusions qu'aurait pu tirer le décideur, ne se livre pas à une analyse *de novo*, et ne cherche pas à déterminer la solution « correcte » au problème. Dans l'arrêt *Delios c. Canada (Procureur général)*, 2015 CAF 117, la Cour d'appel fédérale a signalé que « le juge réformateur n'établit pas son propre critère pour ensuite jauger ce qu'a fait l'administrateur » : par. 28 (CanLII); voir aussi *Ryan*, par. 50-51. La cour de révision n'est plutôt appelée qu'à décider du caractère raisonnable de la décision rendue par le décideur administratif — ce qui inclut à la fois le raisonnement suivi et le résultat obtenu.

[84] Comme nous l'avons expliqué précédemment, les motifs écrits fournis par le décideur administratif servent à communiquer la justification de sa décision. Toute méthode raisonnée de contrôle selon la norme de la décision raisonnable s'intéresse avant tout aux motifs de la décision. Dans le cadre de son analyse du caractère raisonnable d'une décision, une cour de révision doit d'abord examiner les motifs donnés avec « une attention respectueuse », et chercher à comprendre le fil du raisonnement suivi par le décideur pour en arriver à sa conclusion : voir *Dunsmuir*, par. 48, citant D. Dyzenhaus, « The Politics of Deference : Judicial Review and Democracy », dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, p. 286.

[85] Comprendre le raisonnement qui a mené à la décision administrative permet à la cour de révision de déterminer si la décision dans son ensemble est raisonnable. Comme nous l'expliquerons davantage, une décision raisonnable doit être fondée sur une analyse intrinsèquement cohérente et rationnelle et est justifiée au regard des contraintes juridiques et factuelles auxquelles le décideur est assujetti. La norme de la décision raisonnable exige de la cour de justice qu'elle fasse preuve de déférence envers une telle décision.

[86] L'attention accordée aux motifs formulés par le décideur est une manifestation de l'attitude de respect dont font preuve les cours de justice envers le processus décisionnel : voir *Dunsmuir*, par. 47-49.

conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid*. In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

Il ressort explicitement de l'arrêt *Dunsmuir* que la cour de justice qui procède à un contrôle selon la norme de la décision raisonnable « se demande dès lors si la décision et sa justification possèdent les attributs de la raisonnabilité » : par. 47. Selon l'arrêt *Dunsmuir*, le caractère raisonnable « tient principalement à la justification de la décision, à la transparence et à l'intelligibilité du processus décisionnel, ainsi qu'à l'appartenance de la décision aux issues possibles acceptables pouvant se justifier au regard des faits et du droit » : *ibid*. En somme, il ne suffit pas que la décision soit *justifiable*. Dans les cas où des motifs s'imposent, le décideur doit également, au moyen de ceux-ci, *justifier* sa décision auprès des personnes auxquelles elle s'applique. Si certains résultats peuvent se détacher du contexte juridique et factuel au point de ne jamais s'appuyer sur un raisonnement intelligible et rationnel, un résultat par ailleurs raisonnable ne saurait être non plus tenu pour valide s'il repose sur un fondement erroné.

[87] This Court's jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the *outcome* of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with *both* outcome *and* process. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

[87] La jurisprudence de notre Cour depuis l'arrêt *Dunsmuir* ne doit pas être interprétée comme ayant délaissé le point de mire du contrôle selon la norme de la décision raisonnable axé sur le raisonnement pour dorénavant s'attarder presque exclusivement au *résultat* de la décision administrative sous examen. D'ailleurs, le contrôle en fonction de la norme de la décision raisonnable tient dûment compte à la fois du résultat de la décision et du raisonnement à l'origine de ce résultat, comme la Cour l'a récemment rappelé dans l'arrêt *Delta Air Lines Inc. c. Lukács*, 2018 CSC 2, [2018] 1 R.C.S. 6, par. 12. Dans cette affaire, même si le résultat de la décision n'était peut-être pas déraisonnable eu égard aux circonstances, la décision a été infirmée parce que l'analyse ayant débouché sur ce résultat était déraisonnable. Cette façon de voir s'inscrit dans la foulée de la directive de l'arrêt *Dunsmuir* voulant que le contrôle judiciaire porte *à la fois* sur le résultat *et* sur le processus. Une approche différente compromettrait le rôle institutionnel du décideur administratif plutôt que de le respecter.

C. *Reasonableness Is a Single Standard That Accounts for Context*

C. *La norme de la décision raisonnable est une norme unique qui tient compte du contexte*

[88] In any attempt to develop a coherent and unified approach to judicial review, the sheer variety of

[88] Lorsqu'on tente d'élaborer une méthode cohérente et unifiée de contrôle judiciaire, la diversité

decisions and decision makers that such an approach must account for poses an inescapable challenge. The administrative decision makers whose decisions may be subject to judicial review include specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more. Their decisions vary in complexity and importance, ranging from the routine to the life-altering. These include matters of "high policy" on the one hand and "pure law" on the other. Such decisions will sometimes involve complex technical considerations. At other times, common sense and ordinary logic will suffice.

[89] Despite this diversity, reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case. This is what it means to say that "[r]easonableness is a single standard that takes its colour from the context": *Khosa*, at para. 59; *Catalyst*, at para. 18; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364, at para. 44; *Wilson*, at para. 22, per Abella J.; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80, at para. 57, per Côté J., dissenting but not on this point; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293, at para. 53.

[90] The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The fact that the contextual constraints operating on an administrative decision maker may vary from one decision to another does not pose a

des décisions et des décideurs que doit prendre en compte cette méthode pose en soi un défi inéluctable. Les décideurs dont les décisions peuvent faire l'objet d'un contrôle judiciaire vont des tribunaux spécialisés exerçant des attributions judiciaires aux organismes de réglementation indépendants, aux ministres, aux décideurs de première ligne et plus encore. Leurs décisions varient en complexité et en importance, allant des décisions banales à celles qui changent le cours d'une vie. Elles visent, d'une part, des questions « hautement politiques » et, d'autre part, des questions de « droit pur ». Ces décisions font parfois intervenir des considérations techniques complexes. À d'autres moments, le bon sens et la logique ordinaire suffisent.

[89] Malgré cette diversité, la norme de la décision raisonnable demeure une norme unique, et les éléments du contexte entourant une décision n'altèrent pas cette norme ou le degré d'examen que doit appliquer une cour de révision. Le contexte particulier d'une décision circonscrit plutôt la latitude du décideur administratif en matière de décision raisonnable dans un cas donné. C'est ce que l'on entend quand on affirme que « [l]a raisonnabilité constitue une norme unique qui s'adapte au contexte » : *Khosa*, par. 59; *Catalyst*, par. 18; *Halifax (Regional Municipality) c. Nouvelle-Écosse (Human Rights Commission)*, 2012 CSC 10, [2012] 1 R.C.S. 364, par. 44; *Wilson*, par. 22, la juge Abella; *Canada (Procureur général) c. Igloo Vikski Inc.*, 2016 CSC 38, [2016] 2 R.C.S. 80, par. 57, la juge Côté, dissidente mais non sur ce point; *Law Society of British Columbia c. Trinity Western University*, 2018 CSC 32, [2018] 2 R.C.S. 293, par. 53.

[90] La méthode de contrôle selon la norme de la décision raisonnable que nous décrivons dans les présents motifs tient compte de la diversité des décisions administratives en reconnaissant que ce qui est raisonnable dans un cas donné dépend toujours des contraintes juridiques et factuelles propres au contexte de la décision particulière sous examen. Ces contraintes d'ordre contextuel cernent les limites et les contours de l'espace à l'intérieur duquel le décideur peut agir, ainsi que les types de solution qu'il peut retenir. Le fait que ces contraintes d'ordre contextuel imposées au décideur administratif puissent

problem for the reasonableness standard, because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.

D. *Formal Reasons for a Decision Should Be Read in Light of the Record and With Due Sensitivity to the Administrative Setting in Which They Were Given*

[91] A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.

[92] Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge — nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision — indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.

[93] An administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear: see *Dunsmuir*, at para. 49. In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons.

varier d'une décision à l'autre ne pose pas problème pour la norme de la décision raisonnable parce que chaque décision doit être à la fois justifiée par l'organisme administratif et évaluée par la cour de révision en fonction de son propre contexte particulier.

D. *Les motifs écrits d'une décision devraient être interprétés à la lumière du dossier et en tenant dûment compte du contexte administratif dans lequel ils sont fournis*

[91] Une cour de révision doit se rappeler que les motifs écrits fournis par un organisme administratif ne doivent pas être jugés au regard d'une norme de perfection. Le fait que les motifs de la décision « ne fassent pas référence à tous les arguments, dispositions législatives, précédents ou autres détails que le juge siégeant en révision aurait voulu y lire » ne constitue pas un fondement justifiant à lui seul d'infirmer la décision : *Newfoundland Nurses*, par. 16. On ne peut dissocier non plus le contrôle d'une décision administrative du cadre institutionnel dans lequel elle a été rendue ni de l'historique de l'instance.

[92] On ne peut pas toujours s'attendre à ce que les décideurs administratifs déploient toute la gamme de techniques juridiques auxquelles on peut s'attendre de la part d'un avocat ou d'un juge et il ne sera pas toujours nécessaire, ni même utile, de le faire. En réalité, les concepts et le vocabulaire employés par ces décideurs sont souvent, dans une très large mesure, propres à leur champ d'expertise et d'expérience, et ils influent tant sur la forme que sur la teneur de leurs motifs. Ces différences ne sont pas forcément le signe d'une décision déraisonnable; en fait, elles peuvent indiquer la force du décideur dans son champ d'expertise précis. La « justice administrative » ne ressemble pas toujours à la « justice judiciaire » et les cours de révision doivent en demeurer pleinement conscientes.

[93] Par ses motifs, le décideur administratif peut démontrer qu'il a rendu une décision donnée en mettant à contribution son expertise et son expérience institutionnelle : voir *Dunsmuir*, par. 49. Lors du contrôle selon la norme de la décision raisonnable, le juge doit être attentif à la manière dont le décideur administratif met à profit son expertise, tel qu'en font

Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.

[94] The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.

[95] That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.

[96] Where, even if the reasons given by an administrative decision maker for a decision are read with

foi les motifs de ce dernier. L'attention respectueuse accordée à l'expertise établie du décideur peut indiquer à une cour de révision qu'un résultat qui semble déroutant ou contre-intuitif à première vue est néanmoins conforme aux objets et aux réalités pratiques du régime administratif en cause et témoigne d'une approche raisonnable compte tenu des conséquences et des effets concrets de la décision. Lorsqu'établies, cette expérience et cette expertise peuvent elles aussi expliquer pourquoi l'analyse d'une question donnée est moins étoffée.

[94] La cour de révision doit également interpréter les motifs du décideur en fonction de l'historique et du contexte de l'instance dans laquelle ils ont été rendus. Elle peut considérer, par exemple, la preuve dont disposait le décideur, les observations des parties, les politiques ou lignes directrices accessibles au public dont a tenu compte le décideur et les décisions antérieures de l'organisme administratif en question. Cela peut expliquer un aspect du raisonnement du décideur qui ne ressort pas à l'évidence des motifs eux-mêmes; cela peut aussi révéler que ce qui semble être une lacune des motifs ne constitue pas en définitive un manque de justification, d'intelligibilité ou de transparence. Ainsi, les parties adverses ont pu faire des concessions pour éviter que le décideur n'ait à trancher une question. De même, un décideur a pu suivre une jurisprudence administrative bien établie sur une question qu'aucune partie n'a contestée au cours de l'instance. Ou encore, un décideur a pu adopter une interprétation énoncée dans une politique d'interprétation publiée par l'organisme administratif dont il fait partie.

[95] Cela dit, les cours de révision doivent garder à l'esprit le principe suivant lequel l'exercice de tout pouvoir public doit être justifié, intelligible et transparent non pas dans l'abstrait, mais pour l'individu qui en fait l'objet. Il serait donc inacceptable qu'un décideur administratif communique à une partie concernée des motifs écrits qui ne justifient pas sa décision, mais s'attende néanmoins à ce que sa décision soit confirmée sur la base de dossiers internes qui n'étaient pas à la disposition de cette partie.

[96] Lorsque, même s'ils sont interprétés en tenant compte du contexte institutionnel et à la lumière du

sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.

[97] Indeed, *Newfoundland Nurses* is far from holding that a decision maker's grounds or rationale for a decision is irrelevant. It instead tells us that close attention must be paid to a decision maker's written reasons and that they must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made. We agree with the observations of Rennie J. in *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, at para. 11:

> *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts

dossier, les motifs fournis par l'organisme administratif pour justifier sa décision comportent une lacune fondamentale ou révèlent une analyse déraisonnable, il ne convient habituellement pas que la cour de révision élabore ses propres motifs pour appuyer la décision administrative. Même si le résultat de la décision pourrait sembler raisonnable dans des circonstances différentes, il n'est pas loisible à la cour de révision de faire abstraction du fondement erroné de la décision et d'y substituer sa propre justification du résultat : *Delta Air Lines*, par. 26-28. Autoriser une cour de révision à agir ainsi reviendrait à permettre à un décideur de se dérober à son obligation de justifier, de manière transparente et intelligible pour la personne visée, le fondement pour lequel il est parvenu à une conclusion donnée. Cela reviendrait également à adopter une méthode de contrôle selon la norme de la décision raisonnable qui serait axée uniquement sur le résultat de la décision, à l'exclusion de la justification de cette décision. Dans la mesure où des arrêts comme *Newfoundland Nurses* et *Alberta Teachers* ont été compris comme appuyant une telle conception, cette compréhension est erronée.

[97] En effet, l'arrêt *Newfoundland Nurses* est loin d'établir que la justification donnée par le décideur à l'appui de sa décision n'est pas pertinente. Cet arrêt nous enseigne plutôt qu'il faut accorder une attention particulière aux motifs écrits du décideur et les interpréter de façon globale et contextuelle. L'objectif est justement de comprendre le fondement sur lequel repose la décision. Nous souscrivons aux observations suivantes du juge Rennie dans l'affaire *Komolafe c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2013 CF 431, par. 11 (CanLII) :

> L'arrêt *Newfoundland Nurses* ne donne pas à la [cour] toute la latitude voulue pour fournir des motifs qui n'ont pas été donnés, ni ne l'autorise à deviner quelles conclusions auraient pu être tirées ou à émettre des hypothèses sur ce que le tribunal a pu penser. C'est particulièrement le cas quand les motifs passent sous silence une question essentielle. Il est ironique que l'arrêt *Newfoundland Nurses*, une affaire qui concerne essentiellement la déférence et la norme de contrôle, soit invoqué comme le précédent qui commanderait [à la cour] ayant le pouvoir de surveillance de faire le travail omis par le décideur, de fournir les motifs qui auraient pu être donnés et de formuler les conclusions

to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn.

de fait qui n'ont pas été tirées. C'est appliquer la jurisprudence à l'envers. L'arrêt *Newfoundland Nurses* permet aux cours de [révision] de relier les points sur la page quand les lignes, et la direction qu'elles prennent, peuvent être facilement discernées.

[98] As for *Alberta Teachers*, it concerned a very specific and exceptional circumstance in which the reviewing court had exercised its discretion to consider a question of statutory interpretation on judicial review, even though that question had not been raised before the administrative decision maker and, as a result, no reasons had been given on that issue: paras. 22-26. Furthermore, it was agreed that the ultimate decision maker — the Information and Privacy Commissioner's delegate — had applied a well-established interpretation of the statutory provision in question and that, had she been asked for reasons to justify her interpretation, she would have adopted reasons the Commissioner had given in past decisions. In other words, the reasons of the Commissioner that this Court relied on to find that the administrative decision was reasonable were not merely reasons that *could* have been offered, in an abstract sense, but reasons that *would* have been offered had the issue been raised before the decision maker. Far from suggesting in *Alberta Teachers* that reasonableness review is concerned primarily with outcome, as opposed to rationale, this Court rejected the position that a reviewing court is entitled to "reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result": para. 54, quoting *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56. In *Alberta Teachers*, this Court also reaffirmed the importance of giving proper reasons and reiterated that "deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided": para. 54. Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility.

[98] En ce qui concerne l'arrêt *Alberta Teachers*, il concernait un contrôle judiciaire exercé dans des circonstances très précises et exceptionnelles : la question d'interprétation législative en litige n'avait jamais été soumise au décideur administratif et, en conséquence, ce dernier n'avait communiqué aucuns motifs à cet égard : par. 22-26. De plus, il avait été convenu que la décideuse — la déléguée du commissaire à l'information et à la protection de la vie privée — avait appliqué une interprétation bien établie de la disposition législative pertinente, et que si on lui avait demandé de motiver son interprétation, elle aurait souscrit aux motifs fournis par le commissaire dans des décisions antérieures. En d'autres termes, les motifs du commissaire invoqués par notre Cour pour conclure que la décision sous examen était raisonnable n'étaient pas simplement les motifs qui auraient *pu* être fournis, dans l'abstrait, mais ceux qui *auraient* été fournis si la question avait été soulevée devant la décideuse. Loin de suggérer dans l'arrêt *Alberta Teachers* que le contrôle selon la norme de la décision raisonnable porte principalement sur le résultat plutôt que sur la justification, notre Cour a rejeté la position selon laquelle la cour de révision a le pouvoir de « reformuler la décision en substituant à l'analyse qu'elle juge déraisonnable sa propre justification du résultat » : par. 54, citant *Petro-Canada c. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 276 B.C.A.C. 135, par. 53 et 56. Dans l'arrêt *Alberta Teachers*, notre Cour a aussi confirmé l'importance de motiver adéquatement une décision et rappelé que « la déférence inhérente à la norme de la raisonnabilité se manifeste optimalement lorsqu'une décision administrative est justifiée de façon intelligible et transparente et que la juridiction de révision contrôle la décision à partir des motifs qui l'étayent » : par. 54. Lorsque le décideur omet de justifier, dans les motifs, un élément essentiel de sa décision, et que cette justification ne saurait être déduite du dossier de l'instance, la décision ne satisfait pas, en règle générale, à la norme de justification, de transparence et d'intelligibilité.

E. *A Reasonable Decision Is One That Is Both Based on an Internally Coherent Reasoning and Justified in Light of the Legal and Factual Constraints That Bear on the Decision*

[99] A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.

[100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[101] What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is, however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.

E. *Une décision raisonnable est à la fois fondée sur un raisonnement intrinsèquement cohérent et justifiée à la lumière des contraintes juridiques et factuelles qui ont une incidence sur la décision*

[99] La cour de révision doit s'assurer de bien comprendre le raisonnement suivi par le décideur afin de déterminer si la décision dans son ensemble est raisonnable. Elle doit donc se demander si la décision possède les caractéristiques d'une décision raisonnable, soit la justification, la transparence et l'intelligibilité, et si la décision est justifiée au regard des contraintes factuelles et juridiques pertinentes qui ont une incidence sur celle-ci : *Dunsmuir*, par. 47 et 74; *Catalyst*, par. 13.

[100] Il incombe à la partie qui conteste la décision d'en démontrer le caractère déraisonnable. Avant de pouvoir infirmer la décision pour ce motif, la cour de révision doit être convaincue qu'elle souffre de lacunes graves à un point tel qu'on ne peut pas dire qu'elle satisfait aux exigences de justification, d'intelligibilité et de transparence. Les lacunes ou insuffisances reprochées ne doivent pas être simplement superficielles ou accessoires par rapport au fond de la décision. Il ne conviendrait pas que la cour de révision infirme une décision administrative pour la simple raison que son raisonnement est entaché d'une erreur mineure. La cour de justice doit plutôt être convaincue que la lacune ou la déficience qu'invoque la partie contestant la décision est suffisamment capitale ou importante pour rendre cette dernière déraisonnable.

[101] Qu'est-ce qui rend une décision déraisonnable? Il nous semble utile ici, d'un point de vue conceptuel, de nous arrêter à deux catégories de lacunes fondamentales. La première est le manque de logique interne du raisonnement. La seconde se présente dans le cas d'une décision indéfendable sous certains rapports compte tenu des contraintes factuelles et juridiques pertinentes qui ont une incidence sur la décision. Il n'est toutefois pas nécessaire que les cours de révision déterminent si les problèmes qui rendent la décision déraisonnable appartiennent à l'une ou à l'autre catégorie. Ces désignations offrent plutôt un moyen pratique d'analyser les types de questions qui peuvent révéler qu'une décision est déraisonnable.

(1) A Reasonable Decision Is Based on an Internally Coherent Reasoning

[102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan*, at para. 55; *Southam*, at para. 56. Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment": R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at p. 139; see also *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750, 27 Imm. L.R. (4th) 151, at paras. 57-59.

[103] While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis: see *Wright v. Nova Scotia (Human Rights Commission)*, 2017 NSSC 11, 23 Admin. L.R. (6th) 110; *Southam*, at para. 56. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken (see *Sangmo v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 17, at para. 21 (CanLII)) or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point (see *Blas v. Canada (Minister of Citizenship and Immigration)*,

(1) Une décision raisonnable est fondée sur un raisonnement intrinsèquement cohérent

[102] Pour être raisonnable, une décision doit être fondée sur un raisonnement à la fois rationnel et logique. Il s'ensuit qu'un manquement à cet égard peut amener la cour de révision à conclure qu'il y a lieu d'infirmer la décision. Certes, le contrôle selon la norme de la décision raisonnable n'est pas « une chasse au trésor, phrase par phrase, à la recherche d'une erreur » : *Pâtes & Papier Irving*, par. 54, citant *Newfoundland Nurses*, par. 14. Cependant, la cour de révision doit être en mesure de suivre le raisonnement du décideur sans buter sur une faille décisive dans la logique globale; elle doit être convaincue qu'« [un] mode d'analyse, dans les motifs avancés, [. . .] pouvait raisonnablement amener le tribunal, au vu de la preuve, à conclure comme il l'a fait » : *Ryan*, par. 55; *Southam*, par. 56. Les motifs qui [TRADUCTION] « ne font que reprendre le libellé de la loi, résumer les arguments avancés et formuler ensuite une conclusion péremptoire » permettent rarement à la cour de révision de comprendre le raisonnement qui justifie une décision, et « ne sauraient tenir lieu d'exposé de faits, d'analyse, d'inférences ou de jugement » : R. A. Macdonald et D. Lametti, « Reasons for Decision in Administrative Law » (1990), 3 *R.C.D.A.P.* 123, p. 139; voir également *Gonzalez c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2014 CF 750, par. 57-59 (CanLII).

[103] Bien que, comme nous l'avons déjà mentionné aux par. 89 à 96, il faille interpréter des motifs écrits eu égard au dossier et en tenant dûment compte du régime administratif dans lequel ils sont donnés, une décision sera déraisonnable lorsque, lus dans leur ensemble, les motifs ne font pas état d'une analyse rationnelle ou montrent que la décision est fondée sur une analyse irrationnelle : voir *Wright c. Nova Scotia (Human Rights Commission)*, 2017 NSSC 11, 23 Admin. L.R. (6th) 110; *Southam*, par. 56. Une décision sera également déraisonnable si la conclusion tirée ne peut prendre sa source dans l'analyse effectuée (voir *Sangmo c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2016 CF 17, par. 21 (CanLII)), ou qu'il est impossible de comprendre, lorsqu'on lit les motifs en corrélation avec le dossier, le raisonnement du décideur sur un point central (voir

2014 FC 629, 26 Imm. L.R. (4th) 92, at paras. 54-66; *Reid v. Criminal Injuries Compensation Board*, 2015 ONSC 6578; *Lloyd v. Canada (Attorney General)*, 2016 FCA 115, 2016 D.T.C. 5051; *Taman v. Canada (Attorney General)*, 2017 FCA 1, [2017] 3 F.C.R. 520, at para. 47).

[104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

(2) A Reasonable Decision Is Justified in Light of the Legal and Factual Constraints That Bear on the Decision

[105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

[106] It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely: the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements

Blas c. Canada (Ministre de la Citoyenneté et de l'Immigration), 2014 CF 629, par. 54-66 (CanLII); *Reid c. Criminal Injuries Compensation Board*, 2015 ONSC 6578; *Lloyd c. Canada (Procureur général)*, 2016 CAF 115; *Taman c. Canada (Procureur général)*, 2017 CAF 1, [2017] 3 R.C.F. 520, par. 47).

[104] De même, la logique interne d'une décision peut également être remise en question lorsque les motifs sont entachés d'erreurs manifestes sur le plan rationnel — comme lorsque le décideur a suivi un raisonnement tautologique ou a recouru à de faux dilemmes, à des généralisations non fondées ou à une prémisse absurde. Il ne s'agit pas d'inviter la cour de révision à assujettir les décideurs administratifs à des contraintes formalistes ou aux normes auxquelles sont astreints des logiciens érudits. Toutefois, la cour de révision doit être convaincue que le raisonnement du décideur « se tient ».

(2) Une décision raisonnable est justifiée au regard des contraintes juridiques et factuelles qui ont une incidence sur la décision

[105] En plus de la nécessité qu'elle soit fondée sur un raisonnement intrinsèquement cohérent, une décision raisonnable doit être justifiée au regard de l'ensemble du droit et des faits pertinents : *Dunsmuir*, par. 47; *Catalyst*, par. 13; *Nor-Man Regional Health Authority*, par. 6. Les éléments du contexte juridique et factuel d'une décision constituent des contraintes qui ont une influence sur le décideur dans l'exercice des pouvoirs qui lui sont délégués.

[106] Il est inutile de cataloguer toutes les considérations juridiques ou factuelles qui pourraient réduire la marge de manœuvre d'un décideur administratif dans un cas donné. Néanmoins, dans les sections qui suivent, nous nous penchons sur un certain nombre d'éléments qui sont généralement utiles pour déterminer si une décision est raisonnable. Il s'agit notamment du régime législatif applicable et de tout autre principe législatif ou principe de common law pertinent, des principes d'interprétation des lois, de la preuve portée à la connaissance du décideur et des faits dont le décideur peut prendre connaissance d'office, des observations des parties, des pratiques et décisions antérieures de l'organisme administratif

are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

[107] A reviewing court may find that a decision is unreasonable when examined against these contextual considerations. These elements necessarily interact with one another: for example, a reasonable penalty for professional misconduct in a given case must be justified *both* with respect to the types of penalties prescribed by the relevant legislation and with respect to the nature of the underlying misconduct.

(a) *Governing Statutory Scheme*

[108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 7; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at paras. 32-33; *Nor-Man Regional Health Authority*, at para. 6. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as

et, enfin, de l'impact potentiel de la décision sur l'individu qui en fait l'objet. Ces éléments ne doivent pas servir de liste de vérification pour l'exercice du contrôle selon la norme de la décision raisonnable et leur importance peut varier selon le contexte. L'objectif est simplement d'insister sur certains éléments du contexte pouvant amener la cour de révision à perdre confiance dans le résultat obtenu.

[107] Il est possible que la cour de révision estime qu'une décision est déraisonnable au regard de ces considérations contextuelles. Ces éléments interagissent forcément entre eux : par exemple, une sanction raisonnable infligée pour inconduite professionnelle dans un cas donné doit être justifiée *à la fois* au regard des sanctions prescrites par les dispositions législatives applicables et de la nature de l'inconduite en cause.

a) *Le régime législatif applicable*

[108] Comme les décideurs administratifs tiennent leurs pouvoirs d'une loi, le régime législatif applicable est probablement l'aspect le plus important du contexte juridique d'une décision donnée. Le fait que les décideurs administratifs participent, avec les cours de justice, à l'élaboration du contenu précis des régimes administratifs qu'ils administrent, ne devrait pas être interprété comme une licence accordée aux décideurs administratifs pour ignorer ou réécrire les lois adoptées par le Parlement et les législatures provinciales. Ainsi, bien qu'un organisme administratif puisse disposer d'un vaste pouvoir discrétionnaire lorsqu'il s'agit de prendre une décision en particulier, cette décision doit en fin de compte être conforme « à la raison d'être et à la portée du régime législatif sous lequel elle a été adoptée » : *Catalyst*, par. 15 et 25-28; voir aussi *Green*, par. 44. En effet, comme le faisait remarquer le juge Rand dans l'arrêt *Roncarelli c. Duplessis*, [1959] R.C.S. 121, p. 140, [TRADUCTION] « il n'y a rien de tel qu'une "discrétion" absolue et sans entraves », et tout exercice d'un pouvoir discrétionnaire doit être conforme aux fins pour lesquelles il a été accordé : voir aussi *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, par. 7; *Montréal (Ville) c. Administration portuaire de Montréal*, 2010 CSC 14, [2010] 1 R.C.S. 427, par. 32-33; *Nor-Man Regional Health Authority*,

the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paras. 38-40. The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see *Delta Air Lines*, at para. 18.

par. 6. De même, la décision doit tenir compte de toute contrainte plus spécifique clairement imposée par le régime législatif applicable, telle que les définitions, les formules ou les principes prévus par la loi qui prescrivent l'exercice d'un pouvoir discrétionnaire : voir *Montréal (Ville)*, par. 33 et 40-41; *Canada (Procureur général) c. Almon Equipment Limited*, 2010 CAF 193, [2011] 4 R.C.F. 203, par. 38-40. Le régime législatif oriente également les approches acceptables en matière de prise de décisions : par exemple, lorsque le décideur dispose d'un vaste pouvoir discrétionnaire, il serait déraisonnable de sa part d'entraver un tel pouvoir discrétionnaire : voir *Delta Air Lines*, par. 18.

[109] As stated above, a proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. As a result, there is no need to maintain a category of "truly" jurisdictional questions that are subject to correctness review. Although a decision maker's interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation. Reasonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it. Contrary to our colleagues' concern (at para. 285), this does not reintroduce the concept of "jurisdictional error" into judicial review, but merely identifies one of the obvious and necessary constraints imposed on administrative decision makers.

[109] Comme nous l'avons déjà mentionné, l'application appropriée de la norme de la décision raisonnable permet de dissiper la crainte que le décideur administratif puisse interpréter la portée de sa propre compétence de manière à étendre ses pouvoirs au-delà de ce que voulait le législateur. Il est ainsi inutile de conserver une catégorie de questions touchant « véritablement » à la compétence assujetties au contrôle selon la norme de la décision correcte. Si, en règle générale, il y a lieu de faire preuve de déférence envers l'interprétation que donne le décideur du pouvoir que lui confère la loi, ce dernier doit néanmoins justifier convenablement son interprétation. Le contrôle selon la norme de la décision raisonnable ne permet pas au décideur administratif de s'arroger des pouvoirs que le législateur n'a jamais voulu lui conférer. De la même manière, un organisme administratif ne saurait exercer un pouvoir qui ne lui a pas été délégué. Contrairement aux préoccupations exprimées par nos collègues (par. 285), cette démarche ne fait pas resurgir la notion d'« erreur de compétence » dans le contrôle judiciaire; elle ne fait que relever l'une des contraintes évidentes et nécessaires qui s'imposent aux décideurs administratifs.

[110] Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority. If a legislature wishes to precisely circumscribe an administrative decision maker's power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly

[110] La question de savoir si une interprétation est justifiée dépendra du contexte, notamment des mots choisis par le législateur pour décrire les limites et les contours du pouvoir du décideur. Si le législateur souhaite circonscrire avec précision le pouvoir d'un décideur administratif de façon ciblée, il peut se servir de termes précis et restrictifs et définir en détail les pouvoirs conférés, limitant ainsi strictement

constraining the decision maker's ability to interpret the provision. Conversely, where the legislature chooses to use broad, open-ended or highly qualitative language — for example, "in the public interest" — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language. Other language will fall in the middle of this spectrum. All of this is to say that certain questions relating to the scope of a decision maker's authority may support more than one interpretation, while other questions may support only one, depending upon the text by which the statutory grant of authority is made. What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.

(b) *Other Statutory or Common Law*

[111] It is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide: see *Dunsmuir*, at paras. 47 and 74. For example, an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers: see *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at paras. 45-48. Neither can a body instructed by legislation to determine what tax rate is applicable in accordance with an existing tax system ignore that system and base its determination on a "fictitious" system it has arbitrarily created: *Montréal (City)*, at para. 40. Where a relationship is governed by private law, it would be unreasonable for a decision maker to ignore that law in adjudicating parties' rights within that relationship: *Dunsmuir*, at para. 74. Similarly, where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding

les interprétations que le décideur peut donner de la disposition habilitante. À l'inverse, dans les cas où le législateur choisit d'utiliser des termes généraux, non limitatifs ou nettement qualitatifs — par exemple, l'expression « dans l'intérêt public » — il envisage manifestement que le décideur jouisse d'une souplesse accrue dans l'interprétation d'un tel libellé. D'autres formulations se retrouveront entre ces deux extrêmes. Bref, selon le libellé des dispositions législatives habilitantes, certaines questions touchant à la portée du pouvoir d'un décideur peuvent se prêter à plusieurs interprétations, alors que d'autres questions ne sauraient commander qu'une seule interprétation. Ce qui importe, c'est de déterminer si, aux yeux de la cour de révision, le décideur a justifié convenablement son interprétation de la loi à la lumière du contexte. Évidemment, il sera impossible au décideur administratif de justifier une décision qui excède les limites fixées par les dispositions législatives qu'il interprète.

b) *Les autres règles législatives ou de common law*

[111] Il coule de source que le droit — tant la loi que la common law — limitera l'éventail des options qui s'offrent légalement au décideur administratif chargé de trancher un cas particulier : voir *Dunsmuir*, par. 47 et 74. Par exemple, le décideur administratif qui interprète la portée de son pouvoir de réglementation dans le but de l'exercer ne peut retenir une interprétation incompatible avec les principes de common law applicables en ce qui concerne la nature des pouvoirs législatifs : voir *Katz Group Canada Inc. c. Ontario (Santé et Soins de longue durée)*, 2013 CSC 64, [2013] 3 R.C.S. 810, par. 45-48. Un organisme chargé par la loi d'évaluer un taux d'imposition applicable conformément à un régime fiscal existant en particulier ne peut non plus faire fi de ce régime ni baser ses calculs sur un système « fictif » qu'il a créé arbitrairement : *Montréal (Ville)*, par. 40. Lorsqu'une relation est régie par le droit privé, il serait déraisonnable de la part du décideur de faire abstraction de ce fait lorsqu'il se prononce sur les droits des parties dans le cadre de cette relation : *Dunsmuir*, par. 74. De la même manière, lorsque la loi habilitante prévoit l'application d'une norme bien connue en droit et dans la jurisprudence, une décision

of that standard: see, e.g., the discussion of "reasonable grounds to suspect" in *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006, at paras. 93-98.

[112] Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context: M. Biddulph, "Rethinking the Ramifications of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 *Alta. L.R.* 119, at p. 146. There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent. For instance, where an immigration tribunal is required to determine whether an applicant's act would constitute a criminal offence under Canadian law (see, e.g., *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 35 to 37), it would clearly not be reasonable for the tribunal to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it.

[113] That being said, administrative decision makers will not necessarily be required to apply equitable and common law principles in the same manner as courts in order for their decisions to be reasonable. For example, it may be reasonable for a decision maker to adapt a common law or equitable doctrine to its administrative context: see *Nor-Man Regional*

raisonnable sera généralement conforme à l'acception consacrée de cette norme : voir, p. ex., l'analyse des « motifs raisonnables de soupçonner » dans l'arrêt *Canada (Transports, Infrastructure et Collectivités) c. Farwaha*, 2014 CAF 56, [2015] 2 R.C.F. 1006, par. 93-98.

[112] Tout précédent sur la question soumise au décideur administratif ou sur une question semblable aura pour effet de circonscrire l'éventail des issues raisonnables. La décision d'un organisme administratif peut être déraisonnable en raison de l'omission d'expliquer ou de justifier une dérogation à un précédent contraignant dans lequel a été interprétée la même disposition. Si, par exemple, une cour de justice a examiné une disposition législative dans un jugement pertinent, il serait déraisonnable que le décideur administratif interprète ou applique celle-ci sans égard à ce précédent. Le décideur devrait être en mesure d'indiquer pourquoi il est préférable d'adopter une autre interprétation, par exemple en expliquant pourquoi l'interprétation de la cour de justice ne fonctionne pas dans le contexte administratif : M. Biddulph, « Rethinking the Ramifications of Reasonableness Review : *Stare Decisis* and Reasonableness Review on Questions of Law » (2018), 56 *Alta. L.R.* 119, p. 146. Il peut y avoir des circonstances dans lesquelles il est tout simplement déraisonnable que le décideur administratif n'applique ou n'interprète pas une disposition législative en conformité avec un précédent contraignant. Par exemple, dans les cas où une cour de justice compétente en matière d'immigration est appelée à décider si un acte constitue une infraction criminelle en droit canadien (voir, p. ex., la *Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, c. 27, art. 35 à 37), il serait à l'évidence déraisonnable que le tribunal retienne une interprétation d'une disposition pénale qui soit incompatible avec l'interprétation que lui ont donnée les cours criminelles canadiennes.

[113] Cela dit, les décideurs administratifs ne seront pas nécessairement tenus d'appliquer les principes d'equity et de common law de la même façon qu'une cour de justice pour que leurs décisions soient raisonnables. Par exemple, il serait raisonnable pour le décideur d'adapter une doctrine de common law ou d'equity au contexte administratif qui lui est propre :

Health Authority, at paras. 5-6, 44-45, 52, 54 and 60. Conversely, a decision maker that rigidly applies a common law doctrine without adapting it to the relevant administrative context may be acting unreasonably: see *Delta Air Lines*, at paras. 16-17 and 30. In short, whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

[114] We would also note that in some administrative decision making contexts, international law will operate as an important constraint on an administrative decision maker. It is well established that legislation is presumed to operate in conformity with Canada's international obligations, and the legislature is "presumed to comply with the values and principles of customary and conventional international law": *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 40. Since *Baker*, it has also been clear that international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power: *Baker*, at paras. 69-71
.

(c) *Principles of Statutory Interpretation*

[115] Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Although the general approach to reasonableness review described above applies in such cases, we recognize that it is necessary to provide additional guidance to reviewing courts on this point. This is because reviewing courts are accustomed to resolving questions of statutory interpretation in a context in which the issue is before them at first instance or on appeal, and where they are expected to perform their own independent analysis and come to their own conclusions.

[116] Reasonableness review functions differently. Where reasonableness is the applicable standard on

voir *Nor-Man Regional Health Authority*, par. 5-6, 44-45, 52, 54 et 60. En revanche, le décideur qui applique de manière rigide une doctrine de common law sans l'adapter au contexte administratif pertinent agit peut-être de manière déraisonnable : voir *Delta Air Lines*, par. 16-17 et 30. Bref, la question de savoir si le décideur administratif a agi raisonnablement en adaptant une règle de droit ou d'equity appelle un examen fondé dans une très large mesure sur le contexte.

[114] Nous tenons également à faire remarquer que le droit international représentera une contrainte importante pour un décideur administratif dans certains domaines du processus décisionnel administratif. Il est bien établi que la législation est réputée s'appliquer conformément aux obligations internationales du Canada et que l'organe législatif est « présumé respecter les valeurs et les principes du droit international coutumier et conventionnel » : *R. c. Hape*, 2007 CSC 26, [2007] 2 R.C.S. 292, par. 53; *R. c. Appulonappa*, 2015 CSC 59, [2015] 3 R.C.S. 754, par. 40. Depuis l'arrêt *Baker*, il est également établi que les conventions et les traités internationaux, même s'ils n'ont pas été mis en œuvre par une loi au Canada, s'avèrent utiles pour déterminer si une décision participe d'un exercice raisonnable du pouvoir administratif : *Baker*, par. 69-71.

c) *Les principes d'interprétation législative*

[115] Les questions d'interprétation de la loi ne reçoivent pas un traitement exceptionnel. Comme toute autre question de droit, on peut les évaluer en appliquant la norme de la décision raisonnable. Bien que la méthode générale de contrôle selon la norme de la décision raisonnable exposée précédemment s'applique dans ces cas, nous sommes conscients de la nécessité de fournir des indications supplémentaires aux cours de révision sur ce point. En effet, les cours de révision ont l'habitude de trancher les questions d'interprétation législative en première instance ou en appel, où elles doivent effectuer leurs propres analyses indépendantes et tirer leurs propres conclusions.

[116] Le contrôle selon la norme de la décision raisonnable s'effectue différemment. Si une question

a question of statutory interpretation, the reviewing court does not undertake a *de novo* analysis of the question or "ask itself what the correct decision would have been": *Ryan*, at para. 50. Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached.

[117] A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, R.S.C. 1985, c. I-21.

[118] This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.

d'interprétation législative fait l'objet d'un contrôle selon la norme de la décision raisonnable, la cour de révision ne procède pas à une analyse *de novo* de la question soulevée ni ne se demande « ce qu'aurait été la décision correcte » : *Ryan*, par. 50. Tout comme lorsqu'elle applique la norme de la décision raisonnable dans l'examen de questions de fait ou de questions concernant un pouvoir discrétionnaire ou des politiques, la cour de justice doit plutôt examiner la décision administrative dans son ensemble, y compris les motifs fournis par le décideur et le résultat obtenu.

[117] La cour qui interprète une disposition législative le fait en appliquant le « principe moderne » en matière d'interprétation des lois, selon lequel il faut lire les termes d'une loi « dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'économie de la loi, l'objet de la loi et l'intention du législateur » : *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21, et *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, par. 26, citant tous deux E. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87. Le Parlement et les législatures provinciales ont également donné certaines indications en adoptant des règles législatives qui encadrent explicitement l'interprétation des lois et des règlements : voir, p. ex., la *Loi d'interprétation*, L.R.C. 1985, c. I-21.

[118] Notre Cour a adopté ce « principe moderne » en tant que méthode appropriée d'interprétation des lois parce que c'est uniquement à partir du texte de loi, de l'objet de la disposition législative et du contexte dans son ensemble qu'il est possible de saisir l'intention du législateur : Sullivan, p. 7-8. Les personnes qui rédigent et adoptent des textes de loi s'attendent à ce que les questions concernant leur sens soient tranchées à la suite d'une analyse qui tienne compte du libellé, du contexte et de l'objet de la disposition concernée, que l'entité chargée d'interpréter la loi soit une cour de justice ou un décideur administratif. Une méthode de contrôle selon la norme de la décision raisonnable qui respecte l'intention du législateur doit donc tenir pour acquis que les instances chargées d'interpréter la loi — qu'il s'agisse des cours de justice ou des décideurs administratifs — effectueront cet exercice conformément au principe d'interprétation susmentionné.

[119] Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.

[119] Les décideurs administratifs ne sont pas tenus dans tous les cas de procéder à une interprétation formaliste de la loi. Comme nous l'avons déjà expliqué, il n'est pas toujours nécessaire de motiver formellement une décision. Dans les cas où il faut en fournir, les motifs peuvent revêtir diverses formes. Et même lorsque l'interprétation à laquelle se livre le décideur administratif est exposée dans des motifs écrits, elle pourrait sembler bien différente de celle effectuée par la cour de justice. L'expertise spécialisée et l'expérience des décideurs administratifs peuvent parfois les amener à s'en remettre, pour interpréter une disposition, à des considérations qu'une cour de justice n'aurait pas songé à évoquer, mais qui enrichissent et rehaussent bel et bien l'interprétation.

[120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

[120] Or, quelle que soit la forme que prend l'opération d'interprétation d'une disposition législative, le fond de l'interprétation de celle-ci par le décideur administratif doit être conforme à son texte, à son contexte et à son objet. En ce sens, les principes habituels d'interprétation législative s'appliquent tout autant lorsqu'un décideur administratif interprète une disposition. Par exemple, lorsque le libellé d'une disposition est « précis et non équivoque », son sens ordinaire joue normalement un rôle plus important dans le processus d'interprétation : *Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601, par. 10. Lorsque le sens d'une disposition législative est contesté au cours d'une instance administrative, il incombe au décideur de démontrer dans ses motifs qu'il était conscient de ces éléments essentiels.

[121] The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

[121] La tâche du décideur administratif est d'interpréter la disposition contestée d'une manière qui cadre avec le texte, le contexte et l'objet, compte tenu de sa compréhension particulière du régime législatif en cause. Toutefois, le décideur administratif ne peut adopter une interprétation qu'il sait de moindre qualité — mais plausible — simplement parce que cette interprétation paraît possible et opportune. Il incombe au décideur de véritablement s'efforcer de discerner le sens de la disposition et l'intention du législateur, et non d'échafauder une interprétation à partir du résultat souhaité.

[122] It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. Where such an omission is a minor aspect of the interpretive context, it is not likely to undermine the decision as a whole. It is well established that decision makers are not required "to explicitly address all possible shades of meaning" of a given provision: *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405, at para. 3. Just like judges, administrative decision makers may find it unnecessary to dwell on each and every signal of statutory intent in their reasons. In many cases, it may be necessary to touch upon only the most salient aspects of the text, context or purpose. If, however, it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances. Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker.

[122] Il se peut qu'au moment d'interpréter une disposition législative, le décideur administratif ne tienne aucunement compte d'un aspect pertinent de son texte, de son contexte ou de son objet. Lorsqu'il s'agit d'un aspect mineur du contexte interprétatif, cette omission n'est pas susceptible de compromettre la décision dans son ensemble. Il est bien établi que les décideurs ne sont pas tenus « de traiter expressément de toutes les interprétations possibles » d'une disposition donnée : *Construction Labour Relations c. Driver Iron Inc.*, 2012 CSC 65, [2012] 3 R.C.S. 405, par. 3. À l'instar des juges, les décideurs administratifs peuvent estimer qu'il n'est pas nécessaire de s'attarder, dans leurs motifs, au moindre signal d'une intention législative. Dans bien des cas, il peut se révéler nécessaire de ne prendre en compte que les aspects principaux du texte, du contexte ou de l'objet. Toutefois, s'il est manifeste que le décideur administratif aurait pu fort bien arriver à un résultat différent s'il avait pris en compte un élément clé du texte, du contexte ou de l'objet d'une disposition législative, le défaut de tenir compte de cet élément pourrait alors être indéfendable et déraisonnable dans les circonstances. Comme d'autres aspects du contrôle selon la norme de la décision raisonnable, les omissions ne justifient pas à elles seules l'intervention judiciaire : il s'agit principalement de savoir si l'aspect omis de l'analyse amène la cour de révision à perdre confiance dans le résultat auquel est arrivé le décideur.

[123] There may be other cases in which the administrative decision maker has not explicitly considered the meaning of a relevant provision in its reasons, but the reviewing court is able to discern the interpretation adopted by the decision maker from the record and determine whether that interpretation is reasonable.

[123] Par ailleurs, il se peut que le décideur administratif n'examine pas expressément dans ses motifs le sens d'une disposition pertinente, mais que la cour de révision soit en mesure de discerner l'interprétation adoptée à la lumière du dossier et de se prononcer sur le caractère raisonnable de cette interprétation.

[124] Finally, even though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision,

[124] Enfin, même si la cour qui effectue un contrôle selon la norme de la décision raisonnable *ne* doit *pas* procéder à une analyse *de novo* ni déterminer l'interprétation « correcte » d'une disposition contestée, il devient parfois évident, lors du contrôle de la décision, que l'interaction du texte, du contexte et de l'objet ouvrent la porte à une seule interprétation raisonnable de la disposition législative en

that is at issue: *Dunsmuir*, at paras. 72-76. One case in which this conclusion was reached was *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52, in which Laskin J.A., after analyzing the reasoning of the administrative decision maker (at paras. 26-61 (CanLII)), held that the decision maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision: para. 61. As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker.

(d) *Evidence Before the Decision Maker*

[125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.

[126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, at para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally

cause ou de l'aspect contesté de celle-ci : *Dunsmuir*, par. 72-76. Cette conclusion a été tirée notamment dans l'arrêt *Nova Tube Inc./Nova Steel Inc. c. Conares Metal Supply Ltd.*, 2019 CAF 52, où, après avoir analysé le raisonnement du décideur administratif (par. 26-61 (CanLII)), le juge Laskin a statué que l'interprétation de ce décideur était déraisonnable et, en outre, que les facteurs dont il a tenu compte militaient si fortement en faveur de l'interprétation contraire qu'elle constituait la seule interprétation raisonnable de la disposition en cause : par. 61. Comme nous l'expliquerons plus loin, il ne servirait à rien de renvoyer la question de l'interprétation au décideur initial en pareil cas. Par contre, les cours de justice devraient généralement hésiter à se prononcer de manière définitive sur l'interprétation d'une disposition qui relève de la compétence d'un décideur administratif.

d) *La preuve dont disposait le décideur*

[125] Il est acquis que le décideur administratif peut apprécier et évaluer la preuve qui lui est soumise et qu'à moins de circonstances exceptionnelles, les cours de révision ne modifient pas ses conclusions de fait. Les cours de révision doivent également s'abstenir « d'apprécier à nouveau la preuve prise en compte par le décideur » : *CCDP*, par. 55; voir également *Khosa*, par. 64; *Dr Q*, par. 41-42. D'ailleurs, bon nombre des mêmes raisons qui justifient la déférence d'une cour d'appel à l'égard des conclusions de fait tirées par une juridiction inférieure, dont la nécessité d'assurer l'efficacité judiciaire, l'importance de préserver la certitude et la confiance du public et la position avantageuse qu'occupe le décideur de première instance, s'appliquent également dans le contexte du contrôle judiciaire : voir *Housen*, par. 15-18; *Dr Q*, par. 38; *Dunsmuir*, par. 53.

[126] Cela dit, une décision raisonnable en est une qui se justifie au regard des faits : *Dunsmuir*, par. 47. Le décideur doit prendre en considération la preuve versée au dossier et la trame factuelle générale qui a une incidence sur sa décision et celle-ci doit être raisonnable au regard de ces éléments : voir *Southam*, par. 56. Le caractère raisonnable d'une décision peut être compromis si le décideur

misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: *ibid*.

(e) *Submissions of the Parties*

[127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

[128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para. 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker

s'est fondamentalement mépris sur la preuve qui lui a été soumise ou n'en a pas tenu compte. Dans l'arrêt *Baker*, par exemple, le décideur s'était fondé sur des stéréotypes dénués de pertinence et n'avait pas pris en compte une preuve pertinente, ce qui a mené à la conclusion qu'il existait une crainte raisonnable de partialité : par. 48. En outre, la démarche adoptée par le décideur permettait *également* de conclure au caractère déraisonnable de sa décision, car il avait démontré que ses conclusions ne reposaient pas sur la preuve dont il disposait en réalité : *ibid*.

e) *Les observations des parties*

[127] Les principes de la justification et de la transparence exigent que les motifs du décideur administratif tiennent valablement compte des questions et préoccupations centrales soulevées par les parties. Le principe suivant lequel la ou les personnes visées par une décision doivent avoir la possibilité de présenter entièrement et équitablement leur position est à la base de l'obligation d'équité procédurale et trouve son origine dans le droit d'être entendu : *Baker*, par. 28. La notion de « motifs adaptés aux questions et préoccupations soulevées » est inextricablement liée à ce principe étant donné que les motifs sont le principal mécanisme par lequel le décideur démontre qu'il a effectivement *écouté* les parties.

[128] Les cours de révision ne peuvent s'attendre à ce que les décideurs administratifs « répondent à tous les arguments ou modes possibles d'analyse » (*Newfoundland Nurses*, par. 25) ou « tire[nt] une conclusion explicite sur chaque élément constitutif du raisonnement, si subordonné soit-il, qui a mené à [leur] conclusion finale » (par. 16). Une telle exigence aurait un effet paralysant sur le bon fonctionnement des organismes administratifs et compromettrait inutilement des valeurs importantes telles que l'efficacité et l'accès à la justice. Toutefois, le fait qu'un décideur n'ait pas réussi à s'attaquer de façon significative aux questions clés ou aux arguments principaux formulés par les parties permet de se demander s'il était effectivement attentif et sensible à la question qui lui était soumise. En plus d'assurer aux parties que leurs préoccupations

to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

(f) *Past Practices and Past Decisions*

[129] Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by *stare decisis*. As this Court noted in *Domtar*, "a lack of unanimity is the price to pay for the decision-making freedom and independence" given to administrative decision makers, and the mere fact that some conflict exists among an administrative body's decisions does not threaten the rule of law: p. 800. Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.

[130] Fortunately, administrative bodies generally have a range of resources at their disposal to address these types of concerns. Access to past reasons and summaries of past reasons enables multiple individual decision makers within a single organization (such as administrative tribunal members) to learn from each other's work, and contributes to a harmonized decision-making culture. Institutions also routinely rely on standards, policy directives and internal legal opinions to encourage greater uniformity and guide the work of frontline decision makers. This Court has also held that plenary meetings of a tribunal's members can be an effective tool to "foster coherence" and "avoid . . . conflicting results": *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pp. 324-28. Where disagreement arises within an administrative body about how to appropriately resolve a given issue, that institution may also develop strategies

ont été prises en considération, le simple fait de rédiger des motifs avec soin et attention permet au décideur d'éviter que son raisonnement soit entaché de lacunes et d'autres failles involontaires : *Baker*, par. 39.

f) *Les pratiques et décisions antérieures*

[129] Les décideurs administratifs ne sont pas liés par leurs décisions antérieures au même titre que le sont les cours de justice suivant la règle du *stare decisis*. Comme l'a fait remarquer la Cour dans l'arrêt *Domtar*, « l'absence d'unanimité est [. . .] le prix à payer pour la liberté et l'indépendance décisionnelle » accordées aux décideurs administratifs, et la simple existence d'un certain conflit dans la jurisprudence d'un organisme administratif ne menace pas la primauté du droit : p. 800. Les décideurs administratifs et les cours de révision doivent toutefois se soucier de l'uniformité générale des décisions administratives. Les personnes visées par les décisions administratives sont en droit de s'attendre à ce que les affaires semblables soient généralement tranchées de la même façon et que les résultats ne dépendent pas seulement de l'identité du décideur — des attentes qui ne s'évaporent pas du simple fait que les parties ne comparaissent pas devant un juge.

[130] Heureusement, les organismes administratifs disposent généralement d'un éventail de ressources pour répondre à ce genre de préoccupations. La consultation des motifs antérieurs et de leurs résumés permet aux multiples décideurs au sein d'une même organisation (tels les membres d'un tribunal administratif) d'apprendre les uns des autres et de contribuer à l'édification d'une culture décisionnelle harmonisée. Les institutions se fient elles aussi régulièrement à des normes, à des directives stratégiques, ainsi qu'à des avis juridiques internes pour favoriser une plus grande uniformité et pour orienter le travail des décideurs de première ligne. La Cour a également conclu que les réunions plénières des membres d'un tribunal peuvent constituer un moyen efficace de « favoriser la cohérence » et d'« éviter [les] solutions incompatibles » : *SITBA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282, p. 324-328. Lorsque des désaccords

to address that divergence internally and on its own initiative. Of course, consistency can also be encouraged through less formal methods, such as the development of training materials, checklists and templates for the purpose of streamlining and strengthening institutional best practices, provided that these methods do not operate to fetter decision making.

[131] Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. In this sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: *Baker*, at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.

[132] As discussed above, it has been argued that correctness review would be required where there is "persistent discord" on questions on law in an administrative body's decisions. While we are not of the view that such a correctness category is required, we would note that reviewing courts have a role to play in managing the risk of persistently discordant or contradictory legal interpretations within an administrative body's decisions. When evidence of internal disagreement on legal issues has been put before a reviewing court, the court may find it appropriate to

surviennent au sein d'un organisme administratif sur la façon de trancher convenablement une question donnée, cette institution peut également prendre l'initiative de mettre au point des stratégies pour régler ses divergences à l'interne. Évidemment, l'uniformité peut être aussi encouragée par l'utilisation de méthodes moins formelles comme des outils de formation, des listes de vérification et des modèles, lesquels peuvent être élaborés afin de simplifier et de renforcer les pratiques exemplaires au sein de l'institution — pourvu que ces méthodes n'entravent pas le processus décisionnel.

[131] La question de savoir si une décision en particulier est conforme à la jurisprudence de l'organisme administratif est elle aussi une contrainte dont devrait tenir compte la cour de révision au moment de décider si cette décision est raisonnable. Lorsqu'un décideur *s'écarte* d'une pratique de longue date ou d'une jurisprudence interne constante, c'est sur ses épaules que repose le fardeau d'expliquer cet écart dans ses motifs. Si le décideur ne s'acquitte pas de ce fardeau, la décision est déraisonnable. En ce sens, les attentes légitimes des parties servent à déterminer à la fois la nécessité de motiver la décision et le contenu des motifs : *Baker*, par. 26. Nous le répétons, il ne s'ensuit pas pour autant que les décideurs administratifs sont liés par les décisions antérieures au même titre que les cours de justice. Cela veut plutôt dire qu'une décision dérogeant à une pratique de longue date ou à une jurisprudence interne établie sera raisonnable si cette dérogation est justifiée, ce qui réduit le risque d'arbitraire, lequel a un effet préjudiciable sur la confiance du public envers les décideurs administratifs et le système de justice dans son ensemble.

[132] Comme nous l'avons expliqué, certains ont soutenu qu'un contrôle selon la norme de la décision correcte s'imposerait dans les cas où des questions de droit « sèment constamment la discorde » dans les décisions d'un organisme administratif. Nous estimons que point n'est besoin d'une telle catégorie de questions où la norme de la décision correcte s'applique; nous devons toutefois souligner que les cours de révision ont un rôle à jouer lorsqu'il s'agit de réduire le risque d'interprétations juridiques constamment discordantes ou contradictoires dans les décisions

telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagreement. And if internal disagreement continues, it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord.

(g) *Impact of the Decision on the Affected Individual*

[133] It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.

[134] Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable. For example, this Court has held that the Immigration Appeal Division should, when exercising its equitable jurisdiction to stay a removal order under the *Immigration and Refugee Protection Act*, consider the potential foreign hardship a deported person would face: *Chieu v. Canada (Minister of*

d'un organisme administratif. Lorsqu'elle dispose d'une preuve concernant l'existence d'un désaccord au sein d'un organisme administratif sur la façon de trancher des questions de droit, une cour de révision pourrait estimer opportun d'en faire mention dans ses motifs et d'encourager le recours aux mécanismes internes pour résoudre le désaccord. Et si le désaccord interne persiste, il pourrait devenir de plus en plus difficile pour l'organisme administratif de justifier des décisions qui ne serviraient qu'à perpétuer la discorde.

g) *L'incidence de la décision sur l'individu visé*

[133] Il est bien établi que les individus ont droit à une plus grande protection procédurale lorsque la décision sous examen est susceptible d'avoir des répercussions personnelles importantes ou de leur causer un grave préjudice : *Baker*, par. 25. Toutefois, ce principe a également une incidence sur la manière dont une cour de justice effectue un contrôle selon la norme de la décision raisonnable. Le point de vue de la partie ou de l'individu sur lequel l'autorité est exercée est au cœur de la nécessité d'une justification adéquate. Lorsque la décision a des répercussions sévères sur les droits et intérêts de l'individu visé, les motifs fournis à ce dernier doivent refléter ces enjeux. Le principe de la justification adaptée aux questions et préoccupations soulevées veut que le décideur explique pourquoi sa décision reflète le mieux l'intention du législateur, malgré les conséquences particulièrement graves pour l'individu concerné. Cela vaut notamment pour les décisions dont les conséquences menacent la vie, la liberté, la dignité ou les moyens de subsistance d'un individu.

[134] En outre, les préoccupations relatives à l'arbitraire sont généralement plus prononcées dans les cas où la décision a des conséquences particulièrement graves ou sévères pour la partie visée et le défaut de traiter de ces conséquences peut fort bien se révéler déraisonnable. Par exemple, notre Cour a statué qu'au moment d'exercer sa compétence en equity pour ordonner un sursis à l'exécution d'une mesure de renvoi en vertu de la *Loi sur l'immigration et la protection des réfugiés*, la section d'appel de l'immigration devait tenir compte des difficultés que risque

Citizenship and Immigration), 2002 SCC 3, [2002] 1 S.C.R. 84.

[135] Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.

F. *Review in the Absence of Reasons*

[136] Where the duty of procedural fairness or the legislative scheme mandates that reasons be given to the affected party but none have been given, this failure will generally require the decision to be set aside and the matter remitted to the decision maker: see, e.g., *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 35. Also, where reasons are provided but they fail to provide a transparent and intelligible justification as explained above, the decision will be unreasonable. In many cases, however, neither the duty of procedural fairness nor the statutory scheme will require that formal reasons be given at all: *Baker*, at para. 43.

[137] Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst*; *Green*; *Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision: *Baker*, at para. 44. For example, as McLachlin C.J. noted in *Catalyst*, "[t]he reasons for

de connaître la personne concernée à l'étranger par suite de son expulsion : *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 3, [2002] 1 R.C.S. 84.

[135] Bon nombre de décideurs administratifs se voient confier des pouvoirs extraordinaires sur la vie de gens ordinaires, dont beaucoup sont parmi les plus vulnérables de notre société. Le corollaire de ce pouvoir est la responsabilité accrue qui échoit aux décideurs administratifs de s'assurer que leurs motifs démontrent qu'ils ont tenu compte des conséquences d'une décision et que ces conséquences sont justifiées au regard des faits et du droit.

F. *Le contrôle en l'absence de motifs*

[136] Lorsque l'obligation d'équité procédurale ou le régime législatif appellent la communication de motifs à la partie touchée mais qu'aucuns motifs n'ont été donnés, la décision doit généralement être infirmée et l'affaire, renvoyée au décideur : voir, p. ex., *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, par. 35. En outre, si des motifs sont communiqués, mais que ceux-ci ne justifient pas la décision de manière transparente et intelligible comme nous l'avons expliqué, la décision sera déraisonnable. Dans de nombreux cas toutefois, ni l'obligation d'équité procédurale ni le régime législatif applicable ne requerra la présentation de motifs écrits : *Baker*, par. 43.

[137] Certes, il est parfois difficile d'employer une méthode de contrôle judiciaire qui accorde la priorité à la justification, par le décideur, de ses décisions dans les cas où aucuns motifs écrits ne sont communiqués. Il en sera souvent ainsi dans le cas où le processus décisionnel ne se prête pas facilement à la production d'une seule série de motifs, par exemple lorsqu'une municipalité adopte un règlement ou lorsqu'un barreau rend une décision au moyen de la tenue d'un vote : voir, p. ex., *Catalyst*; *Green*; *Trinity Western University*. Toutefois, même en pareil cas, le raisonnement qui sous-tend la décision n'est normalement pas opaque. Il importe de rappeler qu'une cour de révision doit examiner le dossier dans son ensemble pour comprendre la décision et qu'elle découvrira alors souvent une justification claire pour la décision : *Baker*, par. 44. Par exemple, comme

a municipal bylaw are traditionally deduced from the debate, deliberations and the statements of policy that give rise to the bylaw": para. 29. In that case, not only were "the reasons [in the sense of rationale] for the bylaw . . . clear to everyone", they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.

[138] There will nonetheless be situations in which no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape.

G. *A Note on Remedial Discretion*

[139] Where a court reviews an administrative decision, the question of the appropriate remedy is multi-faceted. It engages considerations that include the reviewing court's common law or statutory jurisdiction and the great diversity of elements that may influence a court's decision to exercise its discretion in respect of available remedies. While we do not aim to comprehensively address here the issue of remedies on judicial review, we do wish to briefly address the question of whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons.

la juge en chef McLachlin l'a souligné dans l'arrêt *Catalyst*, « [l]es motifs qui sous-tendent un règlement municipal se dégagent habituellement du débat, des délibérations et des énoncés de politique d'où il prend sa source » : par. 29. Dans cette affaire, non seulement « les motifs qui sous-tendaient le règlement contesté étaient clairs pour tous », mais ils avaient en outre été exposés dans un plan quinquennal : par. 33. À l'inverse, même en l'absence de motifs, il se peut que le dossier et le contexte révèlent qu'une décision repose sur un mobile irrégulier ou sur un autre motif inacceptable, comme dans l'arrêt *Roncarelli*.

[138] Il existe néanmoins des situations dans lesquelles aucuns motifs n'ont été fournis et où ni le dossier ni le contexte général ne permettent de discerner le fondement de la décision en cause. En pareil cas, la cour de révision doit tout de même examiner la décision à la lumière des contraintes imposées au décideur afin de déterminer s'il s'agit d'une décision raisonnable. Toutefois, il est peut-être inévitable que faute de motifs, l'analyse soit alors centrée sur le résultat plutôt que sur le raisonnement du décideur. Il ne s'ensuit pas pour autant que le contrôle selon la norme de la décision raisonnable est moins rigoureux dans ces circonstances; il prend seulement une forme différente.

G. *Un mot sur le pouvoir discrétionnaire en matière de réparation*

[139] La question de la réparation qu'il convient d'accorder dans les cas où une cour procède au contrôle d'une décision administrative revêt de multiples facettes. Cela fait intervenir des considérations comme la common law ou la compétence que confère la loi à la cour de révision, ainsi que la grande diversité d'éléments pouvant influer sur la décision d'une cour d'exercer son pouvoir discrétionnaire à l'égard des réparations possibles. Bien que nous n'entendions pas procéder ici à une analyse complète de la question des réparations dans le cadre d'un contrôle judiciaire, nous souhaitons toutefois aborder brièvement la question de savoir si la cour qui casse une décision déraisonnable devrait exercer son pouvoir discrétionnaire de renvoyer l'affaire pour réexamen à la lumière des motifs donnés par la cour.

SUPREME COURT OF CANADA

CITATION: Auer *v.* Auer, 2024 SCC 36

APPEAL HEARD: April 25, 2024
JUDGMENT RENDERED: November 8, 2024
DOCKET: 40582

BETWEEN:

Roland Nikolaus Auer
Appellant

and

Aysel Igorevna Auer and
Attorney General of Canada
Respondents

- and -

Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Trial Lawyers Association of British Columbia,
HIV & AIDS Legal Clinic Ontario, Health Justice Program,
Canadian Council for Refugees, City of Calgary,
Chicken Farmers of Canada, Egg Farmers of Canada,
Turkey Farmers of Canada, Canadian Hatching Egg Producers,
National Association of Pharmacy Regulatory Authorities,
Association québécoise des avocats et avocates en droit de l'immigration,
Workers' Compensation Board of British Columbia,
Canadian Association of Refugee Lawyers,
Advocates for the Rule of Law and Ecojustice Canada Society
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 117)	Côté J. (Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. concurring)

V. Standard of Review

A. *Vavilov Is the Starting Point for Determining the Appropriate Standard of Review*

[19] *Vavilov* represented a "recalibration of the governing approach to the choice of standard of review analysis and a clarification of the proper application of the reasonableness standard" (para. 143). It "set out a holistic revision of the framework for determining the applicable standard of review" when conducting a substantive review of an administrative decision (*ibid.*). Our Court explained that *Vavilov* is the starting point: "A court seeking to determine what standard is appropriate in a case before it should look to these reasons first in order to determine how this general framework applies to that case" (*ibid.*).

[20] That said, *Vavilov* was not itself a case about the *vires* of subordinate legislation. It involved the judicial review of a decision by the Canadian Registrar of Citizenship to cancel Mr. Vavilov's certificate of citizenship on the basis that he was not a Canadian citizen under s. 3(1)(a) of the *Citizenship Act*, R.S.C. 1985, c. C-29, because he fell within the ambit of an exception set out at s. 3(2)(a). Thus, in *Vavilov*, our Court did not explicitly settle the standard of review that applies when reviewing the *vires* of subordinate legislation (J. M. Keyes, "Judicial Review of Delegated Legislation — The Road Beyond *Vavilov*" (2022), 35 *C.J.A.L.P.* 69, at p. 100). However, as I explain below, *Vavilov* provides the appropriate framework for

determining the standard of review in this context. Under that framework, I conclude that the reasonableness standard applies to the *vires* challenge in this case.

B. *The Vavilov Framework Applies When Reviewing the Vires of Subordinate Legislation*

[21] In *Vavilov*, our Court set out a comprehensive framework for determining the standard of review that applies to any substantive review of an administrative decision (para. 17). In doing so, this Court brought "greater coherence and predictability to this area of law" and eliminated the need for courts to engage in a contextual inquiry to determine the appropriate standard of review (paras. 10 and 17). Our Court recognized that "the sheer variety of decisions and decision makers" posed a challenge to developing a coherent and unified approach to judicial review (para. 88). We ensured that the revised framework "accommodates all types of administrative decision making, in areas that range from immigration, prison administration and social security entitlements to labour relations, securities regulation and energy policy" (para. 11). These include decisions of "specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more . . . vary[ing] in complexity and importance, ranging from the routine to the life-altering . . . includ[ing] matters of 'high policy' on the one hand and 'pure law' on the other" (para. 88).

[22] In setting out *Vavilov*'s comprehensive framework, our Court expressly contemplated questions of *vires*. Specifically, this Court ceased to recognize

jurisdictional questions — also referred to as "true questions of jurisdiction or *vires*" — as a distinct category of questions attracting correctness review (paras. 65-67 and 200). In doing so, we expressly referred to cases involving challenges to the *vires* of subordinate legislation, including *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360, and *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635 (*Vavilov*, at para. 66). This Court explained that "it is often difficult to distinguish between exercises of delegated power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute", especially where, as in *Green* and *West Fraser Mills*, "the legislature has delegated broad authority to an administrative decision maker that allows the latter to make regulations in pursuit of the objects of its enabling statute" (*Vavilov*, at para. 66, citing *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230, at para. 111, per Brown J., concurring).

[23] *Vavilov*'s framework applies to determining the standard for reviewing the *vires* of subordinate legislation. *Vavilov* set out a comprehensive framework for determining the applicable standard of review and, in doing so, contemplated questions of *vires*.

C. *Reasonableness Is the Presumptive Standard for Reviewing the Vires of Subordinate Legislation*

[24] *Vavilov*'s framework established a presumption of reasonableness review. It set out limited exceptions where the legislature has indicated that it intends a different standard to apply or where the rule of law requires that the correctness standard be applied (para. 17). The questions for which the rule of law requires that the correctness standard be applied include: (1) constitutional questions that require a final and determinate answer from the courts; (2) general questions of law of central importance to the legal system as a whole; and (3) questions related to the jurisdictional boundaries between two or more administrative bodies (para. 53).

[25] No exception to the presumption of reasonableness review applies in this case. The legislature has not indicated that the GIC's decision to establish the *Child Support Guidelines* must be reviewed on a standard other than reasonableness, nor does the rule of law require that the correctness standard be applied to a *vires* review of the *Child Support Guidelines*.

[26] In *Vavilov*, our Court explained that the rule of law does not require that questions of *vires*, in themselves, be reviewed for correctness (paras. 67-69 and 109; see also J. M. Keyes, *Executive Legislation* (3rd ed. 2021), at pp. 171-72). A robust reasonableness review is sufficient to ensure that statutory delegates act within the scope of their lawful authority (*Vavilov*, at paras. 67-69 and 109). Further, when explaining that reasonableness review can be conducted even in the absence of reasons, our Court cited *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012]

1 S.C.R. 5, and *Green*, both of which involved a review of the *vires* of subordinate legislation (*Vavilov*, at para. 137).

[27] All of this indicates that *Vavilov*'s robust reasonableness standard is the default standard when reviewing the *vires* of subordinate legislation (Keyes (2021), at p. 171; see also Keyes (2022); P. Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law* (2023), at pp. 146-47; M. P. Mancini, "One Rule to Rule Them All: Subordinate Legislation and the Law of Judicial Review" (2024), 55 *Ottawa L. Rev.* 245). However, in exceptional cases, a *vires* review may engage a question that the rule of law requires be reviewed for correctness. In such cases, the presumption of reasonableness review may be rebutted. For example, a challenge to the validity of subordinate legislation on the basis that it fails to respect the division of powers between Parliament and provincial legislatures would require that the correctness standard be applied.

[28] Reviewing the *vires* of the *Child Support Guidelines* does not engage a question that the rule of law requires be reviewed for correctness. Accordingly, the presumptive standard of reasonableness applies in this case.

D. *What Is the Role of Katz Group?*

(1) Many of the Principles From *Katz Group* Continue To Apply

[29] In *Katz Group*, our Court upheld the validity of Ontario regulations adopted by the Lieutenant Governor in Council that aimed to control the price of prescription drugs. Justice Abella, writing for our Court, did not discuss the applicable standard of review. However, she outlined the following principles for assessing the *vires* of subordinate legislation:

- "A successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate" (para. 24);

- "Regulations benefit from a presumption of validity . . . . This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations . . . and it favours an interpretive approach that reconciles the regulation with its enabling statute so that, where possible, the regulation is construed in a manner which renders it *intra vires*" (para. 25 (emphasis deleted));

- "Both the challenged regulation and the enabling statute should be interpreted using a 'broad and purposive approach . . . consistent with the Court's approach to statutory interpretation generally'" (para. 26, quoting *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 8);

- "This inquiry does not involve assessing the policy merits of the regulations to determine whether they are 'necessary, wise, or effective in practice'" (para. 27, quoting *Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595 (C.A.), at p. 604). "It is not an inquiry into the underlying 'political, economic, social or partisan considerations'" or an assessment of whether the regulations "will actually succeed at achieving the statutory objectives" (para. 28, quoting *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at pp. 112-13);

- The regulations "must be 'irrelevant', 'extraneous' or 'completely unrelated' to the statutory purpose to be found *ultra vires* on the basis of inconsistency with statutory purpose" (para. 28).

[30] For convenience, I will refer to the final principle as the "irrelevant", "extraneous" or "completely unrelated" threshold.

[31] In setting out *Vavilov*'s comprehensive framework for determining the applicable standard of review, our Court did not entirely discard prior jurisprudence. Rather, the Court explicitly stated that "past precedents will often continue to provide helpful guidance" (para. 143). This remains true even when considering cases involving "true questions of jurisdiction or *vires*", though they "will necessarily have less precedential force" because *Vavilov* ceased to recognize such questions as a

distinct category attracting correctness review (paras. 65 and 143). As Paul Daly explains, "past jurisprudence has not been 'ousted'" by *Vavilov* ((2023), at pp. 148-49, citing *Terrigno v. Calgary (City)*, 2021 ABQB 41, 1 Admin. L.R. (7th) 134, at para. 62). Since *Katz Group* involved a true question of jurisdiction or *vires*, the Court must carefully examine the role of that case going forward.

[32] In my view, all of the above-mentioned principles in *Katz Group*, except for the "irrelevant", "extraneous" or "completely unrelated" threshold, remain good law and continue to inform the review of the *vires* of subordinate legislation. As I will explain, the significant sea change brought about by *Vavilov* in favour of a presumption of reasonableness as a basis for review erodes the rationale for the "irrelevant", "extraneous" or "completely unrelated" threshold, and maintaining this threshold would perpetuate uncertainty in the law. Accordingly, there is sound basis for a narrow departure from *Katz Group* (see *Canada (Attorney General) v. Power*, 2024 SCC 26, at paras. 98 and 209; *R. v. Kirkpatrick*, 2022 SCC 33, at para. 202, per Côté, Brown and Rowe JJ., concurring). Otherwise, *Katz Group* continues to "provide valuable guidance on the application of the reasonableness standard" (Daly (2023), at p. 148). To the extent that the principles in *Katz Group* do not conflict with *Vavilov*, they "are to form part of the application of the reasonableness standard" (p. 149).

[33] For greater clarity, the principle that subordinate legislation "must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object" continues to apply when conducting a *vires* review (*References re*

Greenhouse Gas Pollution Pricing Act, 2021 SCC 11, [2021] 1 S.C.R. 175, at para. 87; see also *Vavilov*, at paras. 108 and 110; *Reference re Impact Assessment Act*, 2023 SCC 23, at para. 283, per Karakatsanis and Jamal JJ., dissenting in part, but not on this point). The principle that subordinate legislation benefits from a presumption of validity also continues to apply (*Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17, at para. 54). Further, the challenged subordinate legislation and the enabling statute should continue to be interpreted using a broad and purposive approach (*Green*, at para. 28; *West Fraser Mills*, at para. 12). Finally, a *vires* review does not involve assessing the policy merits of the subordinate legislation to determine whether it is "necessary, wise, or effective in practice". Courts are to review only the legality or validity of subordinate legislation (*West Fraser Mills*, at para. 59, per Côté J., dissenting, but not on this point; *La Rose v. Canada*, 2023 FCA 241, 488 D.L.R. (4th) 340, at para. 26; see also Mancini, at p. 276).

[34] These well-established principles are consistent with *Vavilov*, and they should continue to be applied in accordance with the foundational common law principle of *stare decisis*.

[35] As explained, *Vavilov* recognized the continued relevance and application of prior jurisprudence insofar as that jurisprudence is consistent with *Vavilov*'s framework for determining the appropriate standard of review and its principles governing robust reasonableness review. Nothing in *Vavilov* contradicts the principles that: (1) subordinate legislation "must be consistent both with specific provisions of the

enabling statute and with its overriding purpose or object", (2) the challenged subordinate legislation and the enabling statute are to be interpreted using a broad and purposive approach to statutory interpretation and (3) a review of the *vires* of subordinate legislation does not involve assessing policy merits.

[36] The principle that subordinate legislation benefits from a presumption of validity has been criticized by some for being inconsistent with *Vavilov* (see *Portnov v. Canada (Attorney General)*, 2021 FCA 171, [2021] 4 F.C.R. 501, at paras. 20-22; *Innovative Medicines Canada v. Canada (Attorney General)*, 2022 FCA 210, 8 Admin. L.R. (7th) 44, at para. 30). However, this criticism is mistaken.

[37] In *Katz Group*, our Court explained that this presumption has two aspects: (1) "it places the burden on challengers to demonstrate the invalidity of [subordinate legislation]"; and (2) "it favours an interpretive approach that reconciles the [subordinate legislation] with its enabling statute so that, *where possible*, the [subordinate legislation] is construed in a manner which renders it *intra vires*" (para. 25 (emphasis in original)).

[38] The first aspect — that the burden is on challengers to demonstrate the invalidity of subordinate legislation — is uncontroversial. Indeed, in *Vavilov*, our Court explained that where an administrative decision is reviewed for reasonableness, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (para. 100).

[39] The second aspect — that, *where possible*, subordinate legislation should be construed in a manner that renders it *intra vires* — is also consistent with *Vavilov*. This aspect does not heighten the burden that challengers would otherwise face pursuant to *Vavilov*. The burden on challengers depends on the applicable standard of review. If the reasonableness standard applies, to overcome the presumption of validity, challengers must demonstrate that the subordinate legislation does not fall within a *reasonable* interpretation of the delegate's statutory authority. If the correctness standard applies, challengers can overcome the presumption of validity by demonstrating that the subordinate legislation does not fall within the *correct* interpretation of the delegate's statutory authority.

[40] All of these principles from *Katz Group*, including the principle that subordinate legislation benefits from a presumption of validity, have been repeatedly affirmed by our Court (see *Vavilov*, at paras. 108 and 110; *References re Greenhouse Gas Pollution Pricing Act*, at para. 87; *Reference re Impact Assessment Act*, at para. 283; *Canadian Council for Refugees*, at para. 54; *Green*, at para. 28; *West Fraser Mills*, at paras. 12 and 59). In these circumstances, it would be inconsistent with the common law tradition and the principle of *stare decisis* to discard *Katz Group* and the continued application of these principles.

(2) The "Irrelevant", "Extraneous" or "Completely Unrelated" Threshold Is No Longer Relevant

[41] Writing for a majority of the Court of Appeal, Pentelechuk J.A. held that the *vires* of the *Child Support Guidelines* was to be reviewed on the basis of the "irrelevant", "extraneous" or "completely unrelated" threshold, instead of on the reasonableness standard in accordance with *Vavilov*. I disagree. As I explain in this section, the conceptual basis for the "irrelevant", "extraneous" or "completely unrelated" threshold does not hold in a legal landscape now organized by the principles set out in *Vavilov*, which centre around reasonableness review. This threshold from *Katz Group* is now out of step with these principles; maintaining it would perpetuate uncertainty in the law. Accordingly, the "irrelevant", "extraneous" or "completely unrelated" threshold does not provide a standalone rule for a *vires* review.

[42] Justice Pentelechuk distinguished between "true regulations", which create law through the exercise of a legislative function, such as those passed by the GIC, and "bylaws, rules, and regulations made by administrative tribunals or municipal governments" (paras. 20 and 34). She held that the *vires* of "true regulations" are not to be reviewed on the reasonableness standard; rather, the appropriate test is whether they are "irrelevant", "extraneous" or "completely unrelated" to the purpose of their enabling statute, as outlined in *Katz Group*. By contrast, the *vires* of bylaws, rules and regulations made by administrative tribunals or municipal governments are to be reviewed for reasonableness (para. 82). In making this distinction, Pentelechuk J.A. relied on the fact that "true regulations" are subject to a "consultation process culminating in parliamentary review" while "bylaws, rules, and regulations made by administrative tribunals or municipal governments" are not (para. 34).

[43] According to Pentelechuk J.A., the appropriate standard for reviewing the *vires* of subordinate legislation depends on the identity of the decision maker who enacted it. I disagree. The identity of the decision maker does not determine the standard of review. "Regulations 'derive their validity from the statute which creates the power, and not from the executive body by which they are made'" (*Canadian Council for Refugees*, at para. 51, citing *Reference as to the Validity of the Regulations in relation to Chemicals*, [1943] S.C.R. 1, at p. 13). In *Vavilov*, our Court noted the "sheer variety of [administrative] decisions and decision makers" and yet confirmed that reasonableness is a single standard that takes account of this diversity (para. 88).

[44] To summarize, unless the legislature has indicated otherwise or if a matter invokes an issue pertaining to the rule of law which would require a review on the basis of correctness, the *vires* of subordinate legislation are to be reviewed on the reasonableness standard regardless of the delegate who enacted it, their proximity to the legislative branch or the process by which the subordinate legislation was enacted. Introducing these distinctions into the standard of review framework would be "contrary to the *Vavilovian* purposes of simplification and clarity" (P. Daly, *Resisting which Siren's Call? Auer v Auer, 2022 ABCA 375 and TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs), 2022 ABCA 381*, November 24 2022 (online); Daly (2023), at p. 147).

[45] In concurring reasons, Feehan J.A. held that while the *vires* of subordinate legislation are to be reviewed for reasonableness pursuant to *Vavilov*, the "irrelevant",

"extraneous" or "completely unrelated" threshold informs that analysis. He explained that the presumption that subordinate legislation is valid may "be overcome if the regulation is 'irrelevant', 'extraneous' or 'completely unrelated' to the objectives of governing statutes" (para. 123(b)). The chambers judge was of a similar view (see paras. 17 and 78). I reject this approach. The "irrelevant", "extraneous" or "completely unrelated" threshold should not inform reasonableness review under the *Vavilov* framework. This is because that threshold is inconsistent with robust reasonableness review under that framework and because maintaining it would undermine *Vavilov*'s promise of simplicity, predictability and coherence.

[46] Reasonableness review ensures that courts intervene in administrative matters where it is truly necessary to do so to safeguard the legality, rationality and fairness of the administrative process (*Vavilov*, at para. 13). While reasonableness review "finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers", "[i]t remains a robust form of review" (*ibid.*). By contrast, the "irrelevant", "extraneous" or "completely unrelated" threshold connotes a very high degree of deference, one that is inconsistent with the degree of scrutiny required under a reasonableness review (see *British Columbia (Attorney General) v. Le*, 2023 BCCA 200, 482 D.L.R. (4th) 20, at para. 94).

[47] This inconsistency is of particular importance when considering "the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended" (*Vavilov*, at para. 109; see also

para. 68). In *Vavilov*, our Court explained that robust reasonableness review is "capable of allaying [this] concern" and allows "courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority" (paras. 67 and 109). By contrast, the very high degree of deference that the "irrelevant", "extraneous" or "completely unrelated" threshold accords statutory delegates in interpreting their authority under their enabling statute does not adequately address this concern. This is demonstrated by Abella J.'s comment that it would take an "egregious case" to strike down subordinate legislation on the basis that it is "irrelevant", "extraneous" or "completely unrelated" to the purpose of its enabling statute (*Katz Group*, at para. 28, citing *Thorne's Hardware*, at p. 111).

[48] Further, *Vavilov* sought to bring simplicity, predictability and coherence to the analysis for determining the appropriate standard of review. Our Court noted that reasonableness is a single standard that applies in different contexts (para. 89). *Vavilov*'s objective of providing simplicity, predictability and coherence would be undermined if different tests, such as the "irrelevant", "extraneous" or "completely unrelated" threshold, applied as part of the reasonableness standard. Even if different tests were sufficiently robust, the mere fact of applying them would create undue complexity and fragmentation (Keyes (2022), at pp. 75-76; see also *Innovative Medicines Canada*, at para. 35).

[49] Ultimately, we should depart from the "irrelevant", "extraneous" or "completely unrelated" threshold established in *Katz Group* because its rationale was

eroded by *Vavilov* and because continuing to maintain it would "create or perpetuate uncertainty in the law" (*Vavilov*, at para. 20; *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518, at p. 528).

E. *How To Conduct a Reasonableness Review of the Vires of Subordinate Legislation Under the Vavilov Framework*

[50] In conducting a reasonableness review, "the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99). Subordinate legislation benefits from a presumption of validity (*Katz Group*, at para. 25). The burden is on the party challenging the subordinate legislation to show that it is not reasonably within the scope of the delegate's authority (*Vavilov*, at paras. 100 and 109).

[51] *Vavilov* recognized two types of fundamental flaws that would make an administrative decision unreasonable: (1) there is a failure of rationality internal to the reasoning process; or (2) the decision is untenable in light of the factual and legal constraints that bear on it (para. 101). In what follows, I will explain how the principles outlined in *Vavilov* for conducting reasonableness review apply to a review of the *vires* of subordinate legislation.

(1) Reasonableness Review Is Possible in the Absence of Formal Reasons

[52] Most of the time formal reasons are not provided for the enactment of subordinate legislation (*Vavilov*, at para. 137). However, *Vavilov* contemplated reasonableness review in the absence of formal reasons, including in the context of a *vires* review of subordinate legislation (*ibid.*, referring to *Catalyst Paper* and *Green*). "[E]ven in such circumstances, the reasoning process that underlies the decision will not usually be opaque" (*Vavilov*, at para. 137). The reasoning process can often be deduced from various sources.

[53] In *Catalyst Paper*, our Court reviewed the validity of municipal taxation bylaws. Chief Justice McLachlin noted that "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations and the statements of policy that give rise to the bylaw" (para. 29). Courts can also look to regulatory impact analysis statements if they are available. As Mancini explains:

> . . . something akin to a form of justification — whether a record of submissions, an accompanying statement of purpose, or specific recitals — may sometimes accompany regulatory action. Specifically — especially in the modern era — the problem of having neither a record nor reasons is less likely to arise. As [John Mark] Keyes noted, the sources for the "reasoning process" of executive legislation "have become increasingly rich as the processes for making it have become more transparent in the latter part of the 20th century and into the 21st." At the federal level, statutory instruments, like regulations, "are accompanied by Regulatory Impact Analysis Statements outlining the reasons for regulations and their anticipated impact." Courts can use Regulatory Impact Analysis Statements to assess the reasonableness of executive legislation by providing insight into the interlocking purposes of the enabling statute and regulatory instrument.
>
> (pp. 278-79, citing J. M. Keyes, "Judicial Review of Delegated Legislation: The Long and Winding Road to Vavilov", in University of

Ottawa Faculty of Law, Working Paper No. 2020-14 (June 18, 2020), at p. 11, and J. M. Keyes, *Executive Legislation* (2nd ed. 2010), at ch. 4.)

[54] Even where such sources are not available, "it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli* [*v. Duplessis*, [1959] S.C.R. 121]" (*Vavilov*, at para. 137). However, importantly, as I explain below, the issue of whether the regulations is a reasonable decision depends on whether the regulations are justifiably (or reasonably) within the scope of the authority delegated by the enabling legislation.

(2) Reasonableness Review Is Not an Examination of Policy Merits

[55] Justice Pentelechuk was of the view that applying *Vavilov*'s reasonableness standard when reviewing the *vires* of subordinate legislation would violate the principle of separation of powers because the court would be examining the policy merits of the subordinate legislation (paras. 58-59 and 63; see also S. Blake, *Clarity on the standard of review of regulations*, December 20, 2022 (online)).

[56] With respect, this concern is misplaced. As Paul Salembier explains, "[t]he reasonableness standard does not assess the reasonableness of the rules promulgated by the regulation-making authority; rather, it addresses the reasonableness of the regulation-making authority's interpretation of its statutory regulation-making power" (*Regulatory Law and Practice* (3rd ed. 2021), at p. 159). A court's role is to review the

legality or validity of the subordinate legislation, not to review whether it is "necessary, wise, or effective in practice" (*Katz Group*, at para. 27, citing *Jafari*, at p. 604; see also Keyes (2021), at pp. 186-88). "It is not an inquiry into the underlying 'political, economic, social or partisan considerations'" (*Katz Group*, at para. 28, citing *Thorne's Hardware*, at pp. 112-13).

[57] A court must be mindful of its proper role when reviewing the *vires* of subordinate legislation, especially when it relies on the record, other sources or the context to ascertain the delegate's reasoning process. Mancini explains:

> Importantly courts must organize these various sources properly to preserve the focus on the limiting statutory language. Again, the reasonableness review should not focus on the content of the inputs into the process or the policy merits of those inputs. Rather, courts must key these sources to the analysis of whether the subordinate instrument is consistent with the enabling statute's text, context, and purpose. For example, Regulatory Impact Analysis Statements can inform a court as to the link between an enabling statute's purpose and a regulatory aim, much like Hansard evidence. These analyses can help show how the effects of a regulation which, at first blush appear unreasonable, are enabled by the primary legislation. [p. 279]

[58] The potential or actual consequences of the subordinate legislation are relevant only insofar as a reviewing court must determine whether the statutory delegate was reasonably authorized to enact subordinate legislation that would have such consequences. Whether those consequences are in themselves necessary, desirable or wise is not the appropriate inquiry.

(3) The Relevant Constraints

[59] In *Vavilov*, our Court explained that "[e]lements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers" (para. 105). Reviewing the *vires* of subordinate legislation is fundamentally an exercise of statutory interpretation to ensure that the delegate has acted within the scope of their lawful authority under the enabling statute (para. 108; Mancini, at pp. 274-75; see, e.g., *West Fraser Mills*, at para. 23).

[60] Accordingly, the governing statutory scheme, other applicable statutory or common law and the principles of statutory interpretation are particularly relevant constraints when reviewing the *vires* of subordinate legislation (Keyes (2021), at p. 175).

(a) *Governing Statutory Scheme*

[61] "Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision" (*Vavilov*, at paras. 108-9; Mancini, at p. 275).

[62] The language chosen by the legislature in an enabling statute describes the limits and contours of a delegate's authority (*Vavilov*, at para. 110). The legislature may use precise and narrow language to delineate the power in detail, thereby tightly constraining the delegate's authority. Alternatively, the legislature may use broad, open-ended or highly qualitative language, thereby conferring broad authority on the delegate (*ibid.*; see also Keyes (2021), at pp. 195-96). Statutory delegates must respect

the legislature's choice in this regard. They "must ultimately comply 'with the rationale and purview'" of their enabling statutory scheme in accordance with its text, context and purpose (*Vavilov*, at para. 108, citing *Catalyst Paper*, at paras. 15 and 25-28, and *Green*, at para. 44).

(b) *Other Statutory or Common Law*

[63] The scope of a statutory delegate's authority may also be constrained by other statutory or common law. Unless the enabling statute provides otherwise, when enacting subordinate legislation, statutory delegates must adopt an interpretation of their authority that is consistent with other legislation and applicable common law principles (*Vavilov*, at para. 111, referring to *Katz Group*, at paras. 45-48; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at para. 40; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 74; *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006, at paras. 93-98; Keyes (2021), at pp. 205-6).

(c) *Principles of Statutory Interpretation*

[64] Statutory delegates are empowered to interpret the scope of their authority when enacting subordinate legislation. Their interpretation must, however, be consistent with the text, context and purpose of the enabling statute (*Vavilov*, at paras. 120-21; Keyes (2021), at p. 193). They must interpret the scope of their authority in accordance with the modern principle of statutory interpretation. The words of the

enabling statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).

[65] In conducting a *vires* review, a court does not undertake a *de novo* analysis to determine the correct interpretation of the enabling statute and then ask whether, on that interpretation, the delegate had the authority to enact the subordinate legislation. Rather, the court ensures that the delegate's exercise of authority falls within a reasonable interpretation of the enabling statute, having regard to the relevant constraints.

[66] In what follows, I apply the reasonableness standard to review the *vires* of the *Child Support Guidelines*.

VI. Analysis

A. *Overview of the Child Support Guidelines*

[67] In Canada, child support has been legislated since 1855. Early statutory schemes vested judges with discretion to determine child support amounts based on need. Judges were thus required to decide upon a reasonable amount of child support for the care of the child (*Michel v. Graydon*, 2020 SCC 24, [2020] 2 S.C.R. 763, at para. 46). This discretionary approach was heavily criticized for being "uncertain,

SUPREME COURT OF CANADA

CITATION: TransAlta Generation Partnership *v.* Alberta, 2024 SCC 37

APPEAL HEARD: April 25, 2024
JUDGMENT RENDERED: November 8, 2024
DOCKET: 40570

BETWEEN:

TransAlta Generation Partnership and
TransAlta Generation (Keephills 3)
Appellants

and

His Majesty The King in Right of the Province of Alberta and
Minister of Municipal Affairs for the Province of Alberta
Respondents

- and -

Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Trial Lawyers Association of British Columbia,
HIV & AIDS Legal Clinic Ontario, Health Justice Program,
Chicken Farmers of Canada, Egg Farmers of Canada,
Turkey Farmers of Canada, Canadian Hatching Egg Producers,
Workers' Compensation Board of British Columbia,
Canadian Association of Refugee Lawyers,
Association québécoise des avocats et avocates en droit de l'immigration,
Advocates for the Rule of Law and
National Association of Pharmacy Regulatory Authorities
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 65)	Côté J. (Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. concurring)

TransAlta Generation Partnership and
TransAlta Generation (Keephills 3) *Appellants*

v.

His Majesty The King in Right of the Province of Alberta and
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and

Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Trial Lawyers Association of British Columbia,
HIV & AIDS Legal Clinic Ontario, Health Justice Program,
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Indexed as: TransAlta Generation Partnership *v.* Alberta

2024 SCC 37

File No.: 40570.

2024: April 25; 2024: November 8.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Administrative law — Judicial review — Standard of review — Subordinate legislation — Vires — Administrative discrimination — Property assessment guidelines challenged as ultra vires provincial minister — Standard of review applicable to review of vires of subordinate legislation — Whether guidelines within scope of authority delegated to minister by enabling statute — Whether guidelines violate common law rule against administrative discrimination — Municipal Government Act, R.S.A. 2000, c. M-26, ss. 322, 322.1 — 2017 Alberta Linear Property Assessment Minister's Guidelines, ss. 1.003, 2.003.

TransAlta owns coal-fired electric power generation facilities in Alberta. In 2016, TransAlta entered into an off-coal agreement with Alberta. Under that agreement, TransAlta agreed to cease coal-fired emissions on or before December 31, 2030, in exchange for substantial transition payments from Alberta for 14 years to compensate TransAlta for the loss resulting from the reduced life of its coal-fired facilities. TransAlta's coal-fired facilities are assessed as linear property for municipal taxation purposes. Sections 322 and 322.1 of Alberta's *Municipal Government Act* ("*MGA*") authorize the province's Minister of Municipal Affairs to establish guidelines for assessing the value of linear property.

In 2017, the Minister established the *2017 Alberta Linear Property Assessment Minister's Guidelines* ("*Linear Guidelines*") under the *MGA*. Sections 1.003 and 2.003 of the *Linear Guidelines* deprive TransAlta of the ability to claim additional depreciation on the basis of the reduction in its facilities' lifespan arising from the off-coal agreement. TransAlta challenged the *vires* of the *Linear Guidelines* on two bases: (1) they violate the common law rule against administrative discrimination; and (2) they are inconsistent with the purposes of the *MGA*.

The chambers judge upheld the validity of the *Linear Guidelines* and found that the *Linear Guidelines* did not discriminate against TransAlta. The Court of Appeal determined that the *Linear Guidelines* did not discriminate against TransAlta and held that the chambers judge did not err in finding that they were within the Minister's authority.

Held: The appeal should be dismissed.

As set out in the companion case *Auer v. Auer*, 2024 SCC 36, the reasonableness standard under *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, presumptively applies when reviewing the *vires* of subordinate legislation. In addition, certain principles from *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, continue to inform reasonableness review, but the threshold from *Katz Group* used to determine whether subordinate legislation is *ultra vires* on the basis that it is inconsistent with the purpose of the enabling statute — that it be irrelevant, extraneous

or completely unrelated to that statutory purpose — is no longer applicable to this analysis. As well, the governing statutory scheme, other applicable statutory or common law, and the principles of statutory interpretation are particularly relevant constraints when determining whether subordinate legislation falls reasonably within the scope of the delegate's authority. In the instant case, no exception to the presumption of reasonableness review applies and thus the reasonableness standard applies when reviewing the *vires* of the *Linear Guidelines*. Having regard to the governing statutory scheme, the principles of statutory interpretation, and the common law rule against administrative discrimination, the *Linear Guidelines* are *intra vires* the Minister.

Administrative discrimination arises when subordinate legislation expressly distinguishes among the persons to whom its enabling legislation applies. Administrative discrimination is different than discrimination in the context of the *Canadian Charter of Rights and Freedoms* or human rights legislation. It relates to the drawing of distinctions between persons or classes that are discriminatory in a non-pejorative sense, in that they simply do not apply equally to all those engaged in the activity that is the subject of the enactment. The common law rule against administrative discrimination provides that subordinate legislation that discriminates in the administrative law sense is invalid unless the discrimination is authorized — either expressly or by necessary implication — by the enabling statute. It is concerned with ensuring that statutory delegates act within the scope of their authority when they distinguish between the persons to whom the enabling legislation applies. The question

of statutory authorization to discriminate falls within the reasonableness review to be conducted in a *vires* challenge to subordinate legislation, unless the legislature has indicated otherwise or a question relating to the rule of law arises which should be reviewed for correctness.

In the instant case, the *Linear Guidelines* discriminate against TransAlta and other parties to off-coal agreements by singling them out as being ineligible to claim additional depreciation on the basis of the off-coal agreements. The fact that the *Linear Guidelines* treat all parties to off-coal agreements in the same way does not mean that they are not discriminatory; they treat all parties to off-coal agreements in the same discriminatory way, as compared with owners of linear property who are not parties to off-coal agreements and expressly distinguish between owners of linear property who are parties to off-coal agreements and those who are not parties to such agreements, though both are subject to the *MGA*.

The *MGA* does not expressly authorize the Minister to discriminate against TransAlta; however, that discrimination is statutorily authorized by necessary implication. To ensure that the assessment of TransAlta's coal-fired facilities was current, correct, fair and equitable in accordance with the purpose of the *MGA*, it falls within a reasonable interpretation of the Minister's statutory grant of power to conclude that he was authorized to deprive TransAlta of the ability to claim additional depreciation. Transition payments under the off-coal agreement account for some loss of value to TransAlta's coal-fired facilities due to their reduced life and the existence

of the off-coal agreement is a specification or characteristic of TransAlta's coal-fired facilities that the Minister was authorized to consider in establishing valuation standards for those facilities. The *Linear Guidelines* are consistent with the purposes of the *MGA* and do not violate the common law rule against administrative discrimination; they are therefore *intra vires* the Minister.

Cases Cited

Applied: *Auer v. Auer*, 2024 SCC 36; **referred to:** *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, [2021] 1 S.C.R. 175; *Reference re Impact Assessment Act*, 2023 SCC 23; *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17; *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635; *La Rose v. Canada*, 2023 FCA 241, 488 D.L.R. (4th) 340; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Fédération des producteurs de fruits et légumes du Québec v. Conserverie canadienne Ltée*, [1990] R.J.Q. 2866; *Sunshine Village Corp. v. Canada (Parks)*, 2004 FCA 166, [2004] 3 F.C.R. 600; *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368; *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90; *Shell Canada Products Ltd. v. Vancouver*

(City), [1994] 1 S.C.R. 231; *Edmonton (City) v. Army & Navy Department Stores Ltd.*, [2002] A.M.G.B.O. No. 126 (QL).

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APPEAL from a judgment of the Alberta Court of Appeal (Martin, Hughes and Kirker JJ.A.), 2022 ABCA 381, [2022] A.J. No. 1393 (Lexis), 2022 CarswellAlta 3387 (WL), affirming a decision of Price J., 2021 ABQB 37, [2021] A.J. No. 115 (Lexis), 2021 CarswellAlta 174 (WL). Appeal dismissed.

Michael J. Donaldson, K.C., *Michael Sobkin*, *Andrea Sam* and *Katie Sykes*, for the appellants.

Greg G. Plester, *Rebecca L. Kos* and *Alvin R. Kosak*, for the respondent.

Judie Im and *Michele Valentini*, for the intervener the Attorney General of Ontario.

Stéphane Rochette and *Francesca Boucher*, for the intervener the Attorney General of Quebec.

Emily Lapper and *Christine Bant*, for the intervener the Attorney General of British Columbia.

Kyle McCreary and *Jared Biden*, for the intervener the Attorney General for Saskatchewan.

Aubin P. Calvert and *Devin Eeg*, for the intervener the Trial Lawyers Association of British Columbia.

Mannu Chowdhury, for the intervener HIV & AIDS Legal Clinic Ontario and the Health Justice Program.

Alyssa Holland, *David Wilson* and *Julie Mouris*, for the interveners the Chicken Farmers of Canada, the Egg Farmers of Canada, the Turkey Farmers of Canada and the Canadian Hatching Egg Producers.

Johanna Goosen, for the intervener the Workers' Compensation Board of British Columbia.

Andrew J. Brouwer and *Erin V. Simpson*, for the intervener the Canadian Association of Refugee Lawyers.

Lawrence David and *Gjergji Hasa*, for the intervener Association québécoise des avocats et avocates en droit de l'immigration.

Ewa Krajewska, *Peter Henein* and *Brandon Chung*, for the intervener the Advocates for the Rule of Law.

William W. Shores, K.C., and *Annabritt N. Chisholm*, for the intervener the National Association of Pharmacy Regulatory Authorities.

The judgment of the Court was delivered by

CÔTÉ J. —

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I. Overview

[1] TransAlta Generation Partnership and TransAlta Generation (Keephills 3) (collectively, "TransAlta") own coal-fired electric power generation facilities in Alberta. In 2016, TransAlta entered into an agreement with the Crown in Right of Alberta entitled "Off-Coal Agreement". Under that agreement, TransAlta agreed to cease coal-fired emissions by December 31, 2030, in exchange for substantial

"transition payments" from Alberta for 14 years to compensate TransAlta for the loss resulting from the reduced life of its coal-fired facilities.

[2] TransAlta challenges the *vires* of the *2017 Alberta Linear Property Assessment Minister's Guidelines* (2018) ("*Linear Guidelines*") issued by the Minister of Municipal Affairs under the *Municipal Government Act*, R.S.A. 2000, c. M-26 ("*MGA*"). The *Linear Guidelines* set out the procedures for assessing all "linear property" for municipal taxation purposes. TransAlta's coal-fired facilities are considered "linear property". The *Linear Guidelines* provide that TransAlta and other parties to off-coal agreements are ineligible to claim additional depreciation to account for the reduced life of their coal-fired facilities.

[3] TransAlta submits that the *Linear Guidelines* are *ultra vires* the Minister on two bases: (1) they violate the common law rule against administrative discrimination by discriminating, without statutory authorization, against parties who have entered into off-coal agreements with Alberta; and (2) they are inconsistent with the purposes of the *MGA*.

[4] In the companion case, *Auer v. Auer*, 2024 SCC 36, our Court holds that, as established in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, the reasonableness standard presumptively applies when reviewing the *vires* of subordinate legislation. Given that no exception to that presumption applies here, this appeal provides our Court with an opportunity to illustrate how the reasonableness standard of review applies to a *vires* review of

subordinate legislation when the challenger invokes the common law rule against administrative discrimination.

[5] As I will explain, the *Linear Guidelines* discriminate against TransAlta and other parties to off-coal agreements by depriving them of the ability to claim additional depreciation reflecting the reduced lifespan of their coal-fired facilities. However, that discrimination is statutorily authorized by necessary implication. To ensure that the assessment of TransAlta's coal-fired facilities was "current, correct, fair and equitable" in accordance with the purposes of the *MGA* (*Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 46), it falls within a reasonable interpretation of the Minister's statutory grant of power to conclude that he was authorized to deprive TransAlta of the ability to claim additional depreciation. This is because the transition payments from Alberta to TransAlta under the Off-Coal Agreement already account for at least some loss of value to TransAlta's coal-fired facilities due to their reduced life. Further, the existence of the Off-Coal Agreement is a "specification" or "characteristic" of TransAlta's coal-fired facilities that the Minister was authorized to consider in establishing valuation standards for those facilities.

[6] Given my conclusion that it is a reasonable interpretation of the Minister's statutory grant of power to conclude that discrimination is statutorily authorized by necessary implication, it follows that the *Linear Guidelines* are consistent with the purposes of the *MGA*. To reiterate, the *Linear Guidelines* serve to ensure that tax

assessments are "current, correct, fair and equitable" in accordance with the purposes of the *MGA*.

[7] Thus, having regard to the governing statutory scheme, the principles of statutory interpretation, and the common law rule against administrative discrimination, I conclude that the *Linear Guidelines* are *intra vires* the Minister.

II. Facts

[8] TransAlta's coal-fired facilities are assessed as "linear property" for municipal taxation purposes. Section 284(1)(k) of the *MGA* defines "linear property", and ss. 322 and 322.1 authorize the Minister of Municipal Affairs to establish guidelines for assessing the value of linear property. In 2017, the Minister established the *Linear Guidelines*, which provide that "[t]here will be no recognition [of] or adjustment [to depreciation] in Schedule C or Schedule D as a result of the cessation or reduction of coal-fired emissions on or before December 31, 2030 arising from an Off-Coal Agreement or Provincial or Federal legislation" (s. 1.003(d)). TransAlta brought an application for judicial review challenging the *vires* of the *Linear Guidelines* on several bases, including that they discriminate against TransAlta by depriving it, without statutory authorization, of the right to claim a form of depreciation that is available to linear property that is not subject to an off-coal agreement.

III. Judicial History

A. *Court of Queen's Bench of Alberta, 2021 ABQB 37*

[9] The chambers judge upheld the validity of the *Linear Guidelines*. She noted that, following *Vavilov*, the reasonableness standard applies when assessing the *vires* of subordinate legislation. However, her application of the reasonableness standard was largely informed by *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810. In her view, the *Linear Guidelines* were not "irrelevant", "extraneous" or "completely unrelated" to the purposes of the *MGA* (para. 57, referring to *Katz Group*, at para. 28). The *MGA* granted the Minister broad authority to establish valuation standards for regulated property, such as TransAlta's coal-fired facilities. The Minister was not limited to adopting the market value standard.

[10] The chambers judge found that the *Linear Guidelines* did not discriminate against TransAlta for two reasons. First, they did not deprive TransAlta of a form of depreciation to which it was previously entitled. Second, they did not deprive TransAlta of a form of depreciation applicable to other types of linear property. However, she explained that even if the *Linear Guidelines* were discriminatory, the Minister was authorized by the *MGA* to discriminate against TransAlta because "the creation and implementation of an assessment regime necessarily includes drawing distinctions among various types of properties" (para. 73).

B. *Court of Appeal of Alberta, 2022 ABCA 381*

[11] The Court of Appeal unanimously dismissed TransAlta's appeal. Regarding the standard of review, the court held that the principles articulated in *Katz Group* were not overtaken or modified by *Vavilov*. Applying *Katz Group*, the court held that the chambers judge did not err in finding that the *Linear Guidelines* were within the Minister's authority.

[12] The court determined that the *Linear Guidelines* did not discriminate against TransAlta since the impugned provisions applied to all coal-fired facilities subject to off-coal agreements, not just to those owned by TransAlta. In the court's view, the Minister was authorized to distinguish between coal-fired facilities and other types of electric power generation properties because the Minister was generally authorized to make regulations respecting "any . . . matter considered necessary to carry out the intent of" the *MGA*, and drawing distinctions between different classes of properties was a "necessary incident" of the authority to establish a property valuation regime (paras. 84-85).

IV. Issues

[13] The issues on appeal are as follows:

1. What is the applicable standard of review when reviewing the *vires* of subordinate legislation?

2. Are the *Linear Guidelines ultra vires* the Minister under the *MGA*?

V. Standard of Review

[14] As set out in the companion case, *Auer*, the reasonableness standard under *Vavilov* presumptively applies when reviewing the *vires* of subordinate legislation. No exception to the presumption of reasonableness review applies in this case. Indeed, the legislature has not indicated that the *Linear Guidelines* must be reviewed on a different standard, and the rule of law does not require that the correctness standard apply. Thus, the reasonableness standard applies when reviewing the *vires* of the *Linear Guidelines*.

[15] As explained in *Auer*, *Katz Group* continues to provide helpful guidance and inform reasonableness review. In particular, the following principles from *Katz Group* continue to apply:

- Subordinate legislation "must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object" (*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, [2021] 1 S.C.R. 175 ("*GGPPA*"), at para. 87; see also *Vavilov*, at paras. 108 and 110; *Reference re Impact Assessment Act*, 2023 SCC 23, at para. 283, per Karakatsanis and Jamal JJ., dissenting in part, but not on this point).

- Subordinate legislation continues to benefit from a presumption of validity (*Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17, at para. 54).

- The challenged subordinate legislation and the enabling statute are to be interpreted using a broad and purposive approach to statutory interpretation (see *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360, at para. 28; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635, at para. 12).

- A review of the *vires* of subordinate legislation does not involve assessing policy merits. Courts are to review only the legality or validity of subordinate legislation (*West Fraser Mills*, at para. 59, per Côté J., dissenting, but not on this point; *La Rose v. Canada*, 2023 FCA 241, 488 D.L.R. (4th) 340, at para. 28).

[16] At the same time, for subordinate legislation to be *ultra vires* on the basis that it is inconsistent with the purpose of the enabling statute, it no longer needs to be "irrelevant", "extraneous" or "completely unrelated" to that statutory purpose (see *Auer*, at paras. 4, 41 and 49; see also *Katz Group*, at para. 28). Continuing to maintain this threshold from *Katz Group* would be inconsistent with the robust reasonableness review introduced by *Vavilov* and would undermine *Vavilov*'s promise of simplicity, coherence and predictability.

[17] Reviewing the *vires* of subordinate legislation is fundamentally an exercise of statutory interpretation to ensure that the delegate has acted within the scope of their

lawful authority under the enabling statute (*Vavilov*, at para. 108; M. P. Mancini, "One Rule to Rule Them All: Subordinate Legislation and the Law of Judicial Review" (2024), 55 *Ottawa L. Rev.* 245, at pp. 274-75; see, e.g., *West Fraser Mills*, at para. 23). This exercise must be carried out in accordance with the modern principle of statutory interpretation (*Vavilov*, at paras. 120-21; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). The governing statutory scheme, other applicable statutory or common law, and the principles of statutory interpretation are particularly relevant constraints when determining whether the subordinate legislation at issue falls reasonably within the scope of the delegate's authority (J. M. Keyes, *Executive Legislation* (3rd ed. 2021), at p. 175).

[18] Before I begin this analysis, I provide an overview of the Off-Coal Agreement and the relevant legislation.

VI. Overview of the Off-Coal Agreement, the *MGA* and the *Linear Guidelines*

A. *The Off-Coal Agreement*

[19] TransAlta entered into the Off-Coal Agreement with Alberta on November 24, 2016. TransAlta agreed to cease coal-fired emissions on or before December 31, 2030 (Off-Coal Agreement, s. 2, reproduced in A.R., at p. 151). In exchange, Alberta agreed to make 14 annual transition payments of $39,851,704.60 to TransAlta (s. 3(a)).

[20] The Off-Coal Agreement does not expressly refer to property taxes or depreciation. However, the amount of the transition payments was calculated by taking the net book value of the coal-fired facilities as provided by TransAlta, "[p]ro-rated by percentage of life remaining after 2030 to give proxy for 2030 [net book value]: divided by remaining years under federal end-of-life as of November 2016, then multiplied by years stranded" (Sch. A). This formula demonstrates that the transition payments account for at least some loss of value to TransAlta's coal-fired facilities arising from their reduced lifespan under the Off-Coal Agreement. As the Court of Appeal noted, "[i]t is evident on the face of the Off-Coal Agreements that the Province sought to address some loss of value arising from the reduced life of the appellants' coal-fired electricity generation plants and to treat affected companies equivalently" (para. 23).

[21] Further, it is noteworthy that the Off-Coal Agreement provides that it runs with the facilities. Indeed, TransAlta may transfer title to or ownership interest in its facilities with Alberta's consent, but only if any new owner agrees to be bound by the terms of the Off-Coal Agreement (s. 11(n)).

B. *The Municipal Government Act*

[22] The *MGA* regulates property assessment and taxation in Alberta (*Capilano,* at para. 9; Alberta Municipal Affairs, *Guide to Property Assessment and Taxation in Alberta* (2018) ("*Guide*"), at p. 2). Property assessment is the process of estimating a property's dollar value for taxation purposes (*Guide*, at p. 3). Under the *MGA,* "assessment" means "a value of property determined in accordance with this Part [(i.e.,

Part 9 ‘Assessment of Property’)] and the regulations” (s. 284(1)(c)). Property taxation is the process of applying a tax rate to a property’s assessed value to determine the tax payable (*Guide*, at p. 3).

[23] The *MGA* sets out two types of valuation standards: the market value standard and the regulated standard (*Guide*, at p. 3). Most properties are assessed using the market value standard. The market value of a property is “the price a property might reasonably be expected to sell for if sold by a willing seller to a willing buyer after appropriate time and exposure in an open market” (p. 5; see also *MGA*, s. 1(1)(n)).

[24] There are three approaches to determining the market value of a property: the sales comparison approach, the cost approach, and the income approach (*Guide*, at p. 6). Under the sales comparison approach, the market value of a property is determined by considering the sale price of similar properties. Under the cost approach, the market value of a property is determined by aggregating the market value of the land and the net cost of improvements. This approach assumes that a buyer would not pay more to purchase a property than what it would cost to buy the land and rebuild the same improvements. Under the income approach, the market value of a property is determined on the basis of its income-earning potential. This approach is used to assess the value of rental properties (p. 7).

[25] The regulated standard is a property assessment standard based on rates and procedures prescribed by the Ministry of Municipal Affairs (*Guide*, at p. 29). It is used to assess properties that are difficult to assess under the market value standard

because they seldom trade in the marketplace, they cross municipalities and municipal boundaries or they are of a unique nature (p. 7).

[26] Under s. 284(1)(k) of the *MGA*, TransAlta's coal-fired facilities are considered "linear property", which is a subset of "designated industrial property" under s. 284(1)(f.01). Sections 322 and 322.1 of the *MGA* authorize the Minister to establish guidelines for assessing the value of linear property. TransAlta's facilities are thus assessed using the regulated standard. As noted by the Court of Appeal, "market value is not intended to be the standard for determining the value of [TransAlta's] linear properties. . . . [T]here is no mention of 'market value' in any of the linear property assessment provisions of the *MGA*" (para. 59).

[27] Assessments of linear property must be prepared by the provincial assessor (*MGA*, s. 292(1)). Each assessment must reflect the valuation standard as well as the specifications and characteristics of the linear property as specified in the regulations (s. 292(2)). In preparing an assessment of linear property, the assessor must follow the procedures set out in the Minister's guidelines (*Matters Relating to Assessment and Taxation Regulation*, Alta. Reg. 220/2004, s. 8(2)).

[28] Section 322(1) of the *MGA* delegates regulation-making power to the Minister. More specifically, it authorizes the Minister to make regulations "establishing valuation standards for property", "respecting the assessment of linear property", "respecting designated industrial property, including, without limitation, regulations respecting the specifications and characteristics of designated industrial property",

"respecting processes and procedures for preparing assessments", and "respecting any other matter considered necessary to carry out the intent of [the *MGA*]". Under s. 322(2), the Minister may make an order establishing guidelines respecting any matter for which the Minister may make a regulation under s. 322(1). The *Linear Guidelines* are deemed to be guidelines established under s. 322(2) (s. 322.1(1) and (3)).

[29] As the Court of Appeal recognized, "[t]he language used in s. 322(1) to describe the Minister's regulation-making power in relation to property assessment is indisputably broad" (para. 57). The question is whether ss. 1.003 and 2.003 of the *Linear Guidelines* are reasonably within the scope of the Minister's authority.

C. *The Linear Guidelines*

[30] On December 19, 2017, the Minister made Ministerial Order No. MAG:021/17 establishing the *Linear Guidelines*. They became effective for taxation in 2018 and subsequent years.

[31] The *Linear Guidelines* set out the procedures for calculating all linear property assessments. They require assessors to multiply the values determined under four schedules. TransAlta's challenge focuses on ss. 1.003 and 2.003 of the *Linear Guidelines*.

[32] Section 1.003 of the *Linear Guidelines* describes the schedules used in the assessment of linear property. Schedules C and D are the schedules relevant to this appeal.

[33] Schedule C provides the process for determining depreciation or lists the applicable depreciation factors. Section 1.003(c) states that "[t]he depreciation factors prescribed in Schedule C are fixed and certain and must be applied as listed in the applicable Schedule C depreciation table, without adjustment or modification" (emphasis deleted).

[34] Schedule D provides the process for determining additional depreciation or lists the applicable additional depreciation factors. Under Sch. D, "the assessor may allow additional depreciation (Schedule D) on a case-by-case basis and only if the operator provides acceptable evidence to the assessor" (s. 2.004(e)). However, the *Linear Guidelines* specify that "[t]here will be no recognition or adjustment in Schedule C or Schedule D as a result of the cessation or reduction of coal-fired emissions on or before December 31, 2030 arising from an Off-Coal Agreement or Provincial or Federal legislation" (s. 1.003(d)).

[35] Section 2.003 of the *Linear Guidelines* addresses Schs. C and D depreciation as it applies to TransAlta. It too provides that "[t]here will be no recognition or adjustment in Schedule C or Schedule D as a result of the cessation or reduction of coal-fired emissions on or before December 31, 2030 arising from an Off-Coal Agreement or Provincial or Federal legislation."

[36] The practical effect of these provisions is that an assessor cannot allow TransAlta additional depreciation for its coal-fired facilities on the basis that those facilities are subject to the Off-Coal Agreement (see *Linear Guidelines*, ss. 1.003(d) and 2.004(e)).

VII. Analysis

[37] TransAlta challenges the validity of the *Linear Guidelines* on two bases. First, it invokes the common law principle that a statutory delegate has no authority to make discriminatory distinctions unless the statute either expressly, or by necessary implication, grants them such authority. TransAlta argues that the *Linear Guidelines* discriminate against it by denying it the ability to seek additional depreciation for its coal-fired facilities and that the Minister did not have the statutory authority to establish guidelines that discriminate in this manner. Second, it asserts that the *Linear Guidelines* are inconsistent with the overarching purposes of the assessment and taxation regime under the *MGA*.

[38] In what follows, I will assess whether the *Linear Guidelines* fall reasonably within the scope of the Minister's authority under the *MGA*, having regard to the relevant constraints: (1) the common law rule against administrative discrimination; (2) the *MGA*, which is the governing statutory scheme; and (3) the principles of statutory interpretation. I will begin by outlining the common law rule against administrative discrimination. I will then consider whether the *Linear Guidelines* violate this rule.

[39] As I will explain, the *Linear Guidelines* do not violate the common law rule against administrative discrimination. This is because the *MGA* authorizes the Minister, by necessary implication, to discriminate against TransAlta and other parties to off-coal agreements by depriving them of the ability to claim additional depreciation. It follows that the *Linear Guidelines* are consistent with the purposes of the *MGA*. As will become clear, the *Linear Guidelines* serve to ensure that tax assessments are "current, correct, fair and equitable" in accordance with the purposes of the *MGA*.

A. *The Common Law Rule Against Administrative Discrimination*

[40] Administrative discrimination "arises when [subordinate] legislation expressly distinguishes among the persons to whom its enabling legislation applies" (Keyes, at pp. 370-71, citing L.-P. Pigeon, *Drafting and Interpreting Legislation* (1988), at p. 42; *Fédération des producteurs de fruits et légumes du Québec v. Conserverie canadienne Ltée*, [1990] R.J.Q. 2866 (Sup. Ct.), at p. 2871; *Sunshine Village Corp. v. Canada (Parks)*, 2004 FCA 166, [2004] 3 F.C.R. 600, at para. 13).

[41] Administrative discrimination is different than discrimination in the context of the *Canadian Charter of Rights and Freedoms* or human rights legislation: "When we speak of administrative discrimination, we are not speaking of discrimination based on personal characteristics, such as sex, race or religion, that is proscribed by many human rights statutes" (P. Salembier, *Regulatory Law and Practice* (3rd ed. 2021), at p. 303). Rather, administrative discrimination "relates to the drawing of distinctions between persons or classes that are discriminatory in a

‘non-pejorative but most neutral sense of the word’, in that they simply ‘do not apply equally to all those engaged in the activity that is the subject of the enactment’” (p. 303, quoting *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368, at p. 406, and *Sunshine Village Corp.*, at para. 13, citing D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf), at para. 15:3212).

[42] The common law rule against administrative discrimination provides that subordinate legislation that discriminates in the administrative law sense is invalid unless the discrimination is authorized by the enabling statute (*Arcade Amusements*, at p. 404; *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90, at pp. 105-6; *Katz Group*, at para. 47; Keyes, at p. 371; Salembier, at pp. 307-8). The enabling statute may authorize administrative discrimination, either expressly or by necessary implication (*Arcade Amusements*, at p. 413; *Forget*, at pp. 105-6; *Katz Group*, at para. 47).

[43] As McLachlin J. (as she then was), dissenting, but not on this point, explained when reviewing the validity of a municipal bylaw in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 259, the rule against administrative discrimination is concerned with ensuring that statutory delegates act within the scope of their authority when they distinguish between the persons to whom the enabling legislation applies:

> The rule pertaining to municipal discrimination is essentially concerned with the municipality’s power. Municipalities must operate within the powers conferred on them under the statutes which create and empower them. Discrimination itself is not forbidden. What is forbidden is discrimination which is beyond the municipality’s powers as defined by its

> empowering statute. Discrimination in this municipal sense is conceptually different from discrimination in the human rights sense; discrimination in the sense of the municipal rule is concerned only with the ambit of delegated power.

[44] With this in mind, I turn to the question of whether the *Linear Guidelines* discriminate against TransAlta.

B. *The Linear Guidelines Discriminate Against Parties to Off-Coal Agreements*

[45] The chambers judge found that the *Linear Guidelines* did not discriminate against TransAlta because they did not deprive TransAlta of a form of depreciation to which it was previously entitled or which applied to other types of linear property (para. 72). The Court of Appeal also held that the *Linear Guidelines* did not discriminate against TransAlta. It held so on the basis that the impugned provisions apply to all coal-fired facilities subject to off-coal agreements, not just to those owned by TransAlta (para. 86).

[46] I disagree with the courts below. The *Linear Guidelines* discriminate against TransAlta and other parties to off-coal agreements by singling them out as being ineligible to claim additional depreciation on the basis of the off-coal agreements and to have the assessor consider that claim (see ss. 1.003(d) and 2.004(e)). Owners of linear property who are not parties to off-coal agreements are eligible to make claims for additional depreciation and to have those claims considered by the assessor without exclusion.

[47] The chambers judge was correct in stating that TransAlta was not entitled to additional depreciation. However, but for the impugned provisions of the *Linear Guidelines*, TransAlta would have been eligible to claim additional depreciation and to have that claim considered by the assessor. Section 2.004(e) of the *Linear Guidelines* provides that "[s]ubject to section 1.003(d) and section 2.003(b), the assessor may allow additional depreciation (Schedule D) on a case-by-case basis and only if the operator provides acceptable evidence to the assessor." TransAlta is not eligible to advance a claim for additional depreciation for consideration by the assessor on the basis of the reduction in its facilities' lifespan arising from the Off-Coal Agreement because s. 1.003(d) states that "[t]here will be no recognition or adjustment in Schedule C or Schedule D as a result of the cessation or reduction of coal-fired emissions . . . arising from an Off-Coal Agreement".

[48] The fact that the *Linear Guidelines* treat all parties to off-coal agreements in the same way does not mean that they are not discriminatory. The *Linear Guidelines* treat all parties to off-coal agreements in the same *discriminatory* way, as compared with owners of linear property who are not parties to off-coal agreements. As explained, administrative discrimination arises when subordinate legislation expressly distinguishes among the persons to whom its enabling legislation applies (Keyes, at pp. 370-71). The *Linear Guidelines* expressly distinguish between owners of linear property who are parties to off-coal agreements and those who are not parties to such agreements, though both are subject to the *MGA*.

[49] The next question is whether the *MGA* authorizes the Minister to discriminate against TransAlta on the basis of the Off-Coal Agreement, having regard to the purposes of the *MGA* and the principles of statutory interpretation. If the *MGA* does so, either expressly or by necessary implication, the *Linear Guidelines* will not be invalid for being discriminatory.

C. *The Minister Is Statutorily Authorized To Discriminate Against Parties to Off-Coal Agreements*

[50] The question of statutory authorization to discriminate falls within the reasonableness review to be conducted in a *vires* challenge to subordinate legislation, unless the legislature has indicated otherwise or a question relating to the rule of law arises which should be reviewed for correctness (*Vavilov*, at para. 53).

[51] The *MGA* does not expressly authorize the Minister to discriminate against TransAlta by distinguishing between parties who have entered into off-coal agreements with Alberta and those who have not. However, the *MGA*, by necessary implication, authorizes the Minister to draw this distinction.

[52] When a court reviews the *vires* of subordinate legislation, the challenged legislation and the enabling statute must be interpreted using a broad and purposive approach (*Katz Group*, at para. 26). TransAlta's coal-fired facilities are deemed to be linear property (*MGA*, s. 284(1)(k)). The Minister has broad authority to make regulations establishing valuation standards for linear property, respecting the

assessment of linear property, respecting the processes and procedures for preparing assessments and respecting any matter considered necessary to carry out the intent of the *MGA* (s. 322(1)(c.1), (d), (e) and (i)). The legislation is clear: the valuation standard for linear property is the one established by the Minister (ss. 322 and 322.1; *Matters Relating to Assessment and Taxation Regulation*, s. 8(2)).

[53] In establishing a valuation standard for linear property, the Minister is authorized to make regulations "respecting designated industrial property, including, without limitation, regulations respecting the specifications and characteristics of designated industrial property" (*MGA*, s. 322(1)(d.3)). The "specifications and characteristics" that the Minister sets out must be taken into account by the assessor when assessing the value of the property for taxation purposes (s. 292(2)(b)). This grant of authority is articulated in very broad terms — "without limitation" — and specifically empowers the Minister to identify and make regulations respecting the "specifications and characteristics" of industrial property. It is not possible to construe s. 322(1)(d.3) without contemplating the drawing of distinctions between types of properties on the basis of their specifications and characteristics.

[54] Additionally, it follows from the *MGA*'s purpose of ensuring "that assessments are 'current, correct, fair and equitable'" (*Capilano*, at para. 46, quoting *Edmonton (City) v. Army & Navy Department Stores Ltd.*, [2002] A.M.G.B.O. No. 126 (QL), at para. 114) that the Minister has the authority to draw distinctions on the basis of the specifications and characteristics of properties where ignoring them would create

a risk of inappropriate assessments. The inverse is also true: where appropriate, the Minister must have authority to pronounce that certain specifications and characteristics are *not* relevant to an assessment, as he did in this case. The statute, by necessary implication, grants the Minister the authority to discriminate in the manner that he did.

D. *The Linear Guidelines Are Consistent With the Scheme and Purposes of the MGA*

[55] Since I have found that the Minister had the authority to discriminate between different types of property, the next question is whether he exercised that authority in a manner that is consistent with the scheme and purposes of the *MGA*. The *MGA* has two purposes: (1) "to establish and maintain a property assessment system that fairly and equitably distributes taxes, and promotes transparency, predictability and stability for municipalities and taxpayers" (*Guide*, at p. 2); and (2) "to ensure that assessments are 'current, correct, fair and equitable'" (*Capilano*, at para. 46, quoting *Army & Navy*, at para. 114).

[56] TransAlta submits that the discrimination against it resulted in a valuation of its coal-fired facilities that was both incorrect and unfair (A.F., at paras. 49, 68, 77 and 85; transcript, at pp. 57, 67, 70-71 and 159). It submits that the Off-Coal Agreement does not account for depreciation, which is essential to an accurate valuation of its property. In its view, the transition payments compensate it purely for loss of profits (transcript, at p. 57). TransAlta also submits that the Minister was not entitled to distinguish between parties to off-coal agreements and others because being a party to

an off-coal agreement is a characteristic of the owner, not of the property itself. In other words, it is not a "specification" or "characteristic" of the linear property as contemplated in ss. 292(2)(b) and 322(1)(d.3) of the *MGA* (A.F., at para. 68).

[57] I disagree. As I will explain, ss. 1.003 and 2.003 of the *Linear Guidelines*, which deprive TransAlta of the ability to claim additional depreciation on the basis of the reduction in its facilities' lifespan arising from the Off-Coal Agreement, are consistent with the purpose of ensuring "current, correct, fair and equitable" assessments and accord with the language in ss. 292(2)(b) and 322(1)(d.3) of the *MGA*.

[58] The formula used to calculate the transition payments in the Off-Coal Agreement accounts for at least some loss of value arising from the reduced life of TransAlta's coal-fired facilities. It does so by prorating the net book value of the facilities by the percentage of life remaining after 2030 (Off-Coal Agreement, Sch. A). Even if the payments are characterized as compensation for loss of profits, because the payments promise additional revenues that run with the assets, their effect is to offset the decrease in value caused by the facilities' reduced lifespan. To be current and correct, an assessment of TransAlta's coal-fired facilities must consider the fact that the transition payments mitigate at least some depreciation that would otherwise result from the early retirement of the facilities. Therefore, in light of the *MGA*'s purpose of ensuring that assessments are current and correct, it was reasonable for the Minister to interpret his statutory grant of power as authorizing him to deprive TransAlta of the ability to claim additional depreciation under the *Linear Guidelines*.

[59] To deprive TransAlta of the ability to claim additional depreciation is also consistent with the *MGA*'s purpose of ensuring that assessments are fair and equitable. Since the transition payments already account for at least some loss of value resulting from the reduced life of TransAlta's coal-fired facilities, there would be a real risk of "double dipping" if TransAlta were able to receive additional depreciation for that same loss of value under the *Linear Guidelines*. That would not be fair or equitable.

[60] TransAlta's assertion that the existence of the Off-Coal Agreement is a characteristic of the owner — not of the property itself — is inaccurate. The Off-Coal Agreement runs with the facilities. A transfer of title to or ownership interest in the facilities requires Alberta's consent and requires the new owner to agree to be bound by the terms of the Off-Coal Agreement:

> Transfer of Ownership of Plants. The Company or the Plant Owners may transfer title to or ownership interest in all the Plants with the consent of the Province, not to be unreasonably withheld, provided that the new owner agrees to be bound by the terms of this Agreement, in which case the Company and the Plant Owners shall be released from their obligations hereunder. [s. 11(n)]

[61] While TransAlta, as the owner, entered into the Off-Coal Agreement, being subject to the Off-Coal Agreement is not merely a "characteristic" of TransAlta. Rather, because any subsequent owner of TransAlta's coal-fired facilities must agree to be bound by the terms of the Off-Coal Agreement, being subject to the Off-Coal Agreement is also properly considered a "specification" or "characteristic" of those facilities. Under s. 322(1)(d.3) of the *MGA*, the Minister may make regulations

"respecting designated industrial property, including, without limitation, regulations respecting the specifications and characteristics of designated industrial property". Since TransAlta's coal-fired facilities are deemed "designated industrial property" under s. 284(1)(f.01)(ii) of the *MGA*, the Minister was authorized to make regulations designating an off-coal agreement as a "specification" or "characteristic" of those facilities to ensure that assessments thereof would be "current, correct, fair and equitable".

VIII. Conclusion

[62] TransAlta has not met its burden of proving that the *Linear Guidelines* are *ultra vires* the Minister (*Vavilov*, at para. 100; *Katz Group*, at para. 25; *Canadian Council for Refugees*, at para. 54).

[63] The Minister is authorized under the *MGA*, by necessary implication, to discriminate against TransAlta. The Minister has indisputably broad authority to establish valuation standards for linear property under s. 322(1) of the *MGA*. This includes the authority to determine the "specifications and characteristics" of the property that an assessment must reflect in order to be "current, correct, fair and equitable" (*Capilano*, at para. 46). To properly make regulations respecting "specifications and characteristics", the Minister must therefore have the authority to contemplate the drawing of distinctions as between types of properties.

[64] Accordingly, the *Linear Guidelines* fall within a reasonable interpretation of the enabling statute having regard to the relevant constraints, and are *intra vires* the Minister. They are "consistent both with specific provisions of the enabling statute and with its overriding purpose or object" (*GGPPA*, at para. 87). They also do not contravene the common law rule against administrative discrimination.

[65] The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Lawson Lundell, Calgary; Michael Sobkin, Ottawa; TransAlta Corporation, Calgary.

Solicitors for the respondents: Brownlee, Edmonton.

Solicitor for the intervener the Attorney General of Ontario: Ministry of the Attorney General, Crown Law Office — Civil, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Ministère de la Justice du Québec, Québec.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of Attorney General of British Columbia, Legal Services Branch, Vancouver.

Solicitor for the intervener the Attorney General for Saskatchewan: Saskatchewan Ministry of Justice and Attorney General, Regina.

Solicitors for the intervener the Trial Lawyers Association of British Columbia: Hunter Litigation Chambers, Vancouver.

Solicitors for the intervener HIV & AIDS Legal Clinic Ontario and the Health Justice Program: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the interveners the Chicken Farmers of Canada, the Egg Farmers of Canada, the Turkey Farmers of Canada and the Canadian Hatching Egg Producers: Conway Baxter Wilson, Ottawa.

Solicitor for the intervener the Workers' Compensation Board of British Columbia: Workers' Compensation Board of British Columbia, Richmond.

Solicitors for the intervener the Canadian Association of Refugee Lawyers: Refugee Law Office, Toronto; Landings, Toronto.

Solicitors for the intervener Association québécoise des avocats et avocates en droit de l'immigration: Hasa Avocats Inc., Montréal.

Solicitors for the intervener the Advocates for the Rule of Law: Henein Hutchison Robitaille, Toronto.

Solicitors for the intervener the National Association of Pharmacy Regulatory Authorities: Shores Jardine, Edmonton.

In the Court of Appeal of Alberta

Citation: Westcan Recyclers Ltd v Calgary (City), 2025 ABCA 67

Date: 20250227
Docket: 2301-0194AC
Registry: Calgary

Docket: 2101-09833

Between:

Westcan Recyclers Ltd and 664078 Alberta Ltd

Respondents
(Plaintiffs)

- and –

The City of Calgary

Appellant
(Defendant)

Docket: 2201-10049

Between:

Westcan Recyclers Ltd and 664078 Alberta Ltd

Respondents
(Applicants)

- and –

The City of Calgary

Appellant
(Respondent)

The Court:

The Honourable Justice Jolaine Antonio
The Honourable Justice Kevin Feehan
The Honourable Justice Alice Woolley

Memorandum of Judgment of the Honourable Justice Antonio and the Honourable Justice Woolley

Dissenting Memorandum of Judgment of the Honourable Justice Feehan

Appeal from the Orders of
The Honourable Justice E.J. Sidnell
Dated the 20th day of July, 2023
Filed the 13th day of October, 2023

nature of those submissions were such that they "eradicated the City's impartiality": *Chambers Decision* at para 184.

[51] As earlier explained, in our view, the submissions made to the Infrastructure and Planning Committee and to Council were not misleading. Even if they were, however, we have been provided with no authority establishing that submissions by a party or counsel can, in and of themselves, demonstrate bias in a decision-maker. Deliberately false or misleading submissions made to a decision-maker could, depending on the circumstances, the nature and extent of the misrepresentation, and whether they were accepted, render the resulting decision invalid or improper. It is not, however, apparent how false or misleading submissions would lead an objective observer to question the impartiality or openness to persuasion of the decision-maker who heard them, absent some information or evidence to suggest that they had in fact created bias in the decision-maker (as can occur – see, for example, *Report of the Inquiry Committee concerning the Hon Paul Cosgrove*, November 27, 2008 at paras 144-147). A decision-maker cannot control what a party submits and should not be at risk of being considered biased simply by virtue of having heard something that ought not to have been said. There is nothing in the record to support the suggestion that the City councillors were not open to persuasion.

iii. Legitimate Expectations

[52] We also see no basis for the assertion in the chambers decision that the City created and breached a legitimate expectation of the respondents with respect to procedure.

[53] The chambers decision finds a legitimate expectation that the closure by-law would be brought forward "in a manner that would clearly outline that it was a developer's condition that was conflicting with Westcan's operations": *Chambers Decision* at para 178. It does not, however, identify the "clear, unambiguous and unqualified" representation that would give rise to such an expectation: *Agraira* at paras 95-96. Further, as already explained, the submissions before the Infrastructure and Planning Committee and Council clearly outlined that the expansion of 68th Street SE was a condition of the subdivision approval and that the respondents objected to the City's approach. The submissions identified the role of REDS and the background of the dispute between the parties. Even if this legitimate expectation existed, it was satisfied by the procedure followed.

iv. Conclusion on Procedural Fairness

[54] The enactment of the closure by-law was procedurally fair.

IV. Is the Closure By-Law Substantively Valid

a. Decision Below

[55] To assess the substantive validity of the closure by-law the chambers decision applies the standard of review established by the Supreme Court in *Catalyst* at para 12, that municipal by-

laws can be set aside where they fall outside the scope of the empowering legislative scheme: *Chambers Decision* at para 186.

[56] The chambers decision finds the by-law to be substantively invalid on the basis that it was passed for an improper purpose, furthering the interests of the City as a developer rather than as part of its good governance mandate. It characterizes the closure by-law as a matter of private development not public infrastructure. The decision concludes that "no reasonable body understanding that the developer was obtaining the benefit to the detriment of a landowner would pass the Closure Bylaw" and, as such, it must be quashed: *Chambers Decision* at paras 192-193.

b. Grounds of Appeal

[57] The City submits that the chambers decision errs by finding that the City had an improper purpose in enacting the closure by-law as a result of REDS' involvement, and given the terms of the subdivision approval and alternative access design approval. It argues that the chambers decision improperly treats the subdivision and design approvals as fettering the City's regulatory authority, improperly considers whether the by-law was wise or reasonable, contrary to section 539 of the *MGA*, and does not consider the clear evidence before City Council of the public interest in enacting the closure by-law.

[58] The respondents submit that the chambers judge appropriately found that the City enacted the by-law for an improper collateral purpose to evade the operation of the subdivision and design approvals, and exercised its municipal authority in bad faith.

c. Standard of Review

[59] As previously noted, this Court must determine whether the chambers decision selected the correct standard of review and properly applied it. After the chambers decision was issued, the Supreme Court released its decision in *Auer v Auer*, 2024 SCC 36 [*Auer*] which establishes that the *vires* of subordinate legislation must be assessed on a reasonableness standard. The assessment must be informed by subordinate legislation's "presumption of validity" and by considering whether the subordinate legislation is consistent "with specific provisions of the enabling statute and with its overriding purpose or object", interpreted using a broad and purposive approach. Reasonableness review does not consider the policy merits of the impugned subordinate legislation; it does not consider whether it is "necessary, wise, or effective in practice": *Auer* at paras 3, 23, 27, 32-36. In this sense, the "reasonableness" review in *Auer* accords with the statutory direction provided by section 539 of the *MGA*, which specifically precludes a by-law being "challenged on the ground that it is unreasonable".

d. Analysis

[60] Section 28(3) of the *HDPA* provides broad authority to a municipality to close access to a road: "The council of an urban municipality may by bylaw remove any direct physical means of access between a controlled street and land adjacent to the controlled street". The provision does

not set out any conditions that must be satisfied, or circumstances in which closure cannot be granted. As the chambers decision correctly notes, the *HDPA* eliminates the common law right of access to a road, allowing urban municipalities to close access to a road in their discretion, and granting limited rights to compensation when closure takes place. Compensation is payable where access is removed entirely, but where "a direct means of access is removed and a service or frontage road or other alternative means of access exists or is provided, no compensation is payable": *HDPA*, ss 29(1), (4).

[61] Section 3 of the *MGA* sets out the purposes of a municipality, establishing the framework for municipal conduct. That framework informs the exercise of discretion under the *HDPA*:

> The purposes of a municipality are:
>
> (a) to provide good government,
>
> (a.1) to foster the well-being of the environment,
>
> (a.2) to foster the economic development of the municipality,
>
> (b) to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or part of the municipality,
>
> (c) to develop and maintain safe and viable communities, and
>
> (d) to work collaboratively with neighboring municipalities to plan, deliver and fund intermunicipal services.

[62] Given the broad authority granted by the *HDPA*, the purposes of a municipality set out in the *MGA*, the presumption of validity and the restrictions on judicial review in section 539 of the *MGA*, we are satisfied that the closure by-law was reasonable. The comments by City councillors at the Infrastructure and Planning Committee and at Council connected the closure by-law to the orderly development of City infrastructure and to the City's economic growth, purposes explicitly contemplated by section 3 of the *MGA*.

[63] The chambers decision rests on the position that Council had an improper purpose in passing the closure by-law. Specifically, the decision finds that the closure by-law was passed to avoid the commercial obligations imposed on REDS by the subdivision approval and to avoid the need for the respondents' consent to the alternative access points purportedly required by the alternative access design approval: *Chambers Decision* at paras 79, 160, 171, 176, 183. It concludes that the "City in passing the Closure Bylaw was acting in its own best interests as developer and using the power of the *HDPA* to ensure that it achieved its goals": *Chambers Decision* at para 191. The decision finds that complying with a subdivision condition satisfies a private obligation rather than accomplishing a public purpose:

In the Court of Appeal of Alberta

Citation: Kozak v Lacombe (County), 2017 ABCA 351

Date: 20171026
Docket: 1601-0238-AC
Registry: Calgary

Between:

Wade Kozak

Respondent
(Applicant)

- and -

Lacombe County

Appellant
(Respondent)

- and -

Minister of Justice and Solicitor General of Alberta

Respondent
(Respondent)

- and -

City of Edmonton

Intervener

The Court:

The Honourable Mr. Justice Peter Martin
The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Madam Justice Sheila Greckol

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Madam Justice C.A. Kent
Dated the 24th day of August, 2016
(2016 ABQB 385, Docket: 1501 13788)

Memorandum of Judgment

The Court:

[1] The respondent, Wade Kozak, filed an originating application for a declaration that parts of the Lacombe County Bylaw 1203/15 (the *Bylaw*) regulating communal sanitary sewage collection systems in an area of Lacombe County (the County) are *ultra vires* the powers delegated to the County by the *Municipal Government Act*, RSA 2000, c M-26 (the *MGA*). The chambers judge agreed and declared parts of the *Bylaw* invalid: *Kozak v Lacombe (County)*, 2016 ABQB 385 (the Decision). The County now appeals.

[2] We conclude that the impugned provisions of the *Bylaw* are *intra vires* the County's powers under the *MGA*. For the reasons that follow, the appeal is allowed.

I. Facts

[3] Mr. Kozak and his wife live in a part of the County known as Blissful Beach. Their home has its own sewage disposal system, installed in 2013. Waste goes from the Kozak home by pipe into a tank under the property and periodically, Mr. Kozak hires a waste haulage company to remove the waste from the tank and dispose of it. The system installed by Mr. Kozak has passed safety inspections under the *Safety Codes Act*, RSA 2000, c S-1 [*Safety Codes Act*]. When Mr. Kozak installed his private sewage collection system, there was no public sewage system available.

[4] In May 2015, the County enacted the *Bylaw* to provide sewage collection services to residents in Blissful Beach and other areas of the County. The *Bylaw's* origins lie in a 2002 plan to develop a regional wastewater collection and treatment system to "protect water quality in Sylvan Lake". In 2010, the County adopted a statutory plan under the *MGA* requiring all new residences (but not older ones such as Mr. Kozak's) to connect to the County sewage line.

[5] The *Bylaw* provides for connection to, and provision of, County sewage services (sometimes called "the County wastewater system") for residents of the Sylvan Lake area. It also includes provisions regulating the use of private sewage collection and disposal systems:

- Section 4.2 states that only the County may operate a sewage disposal system in the area, unless otherwise permitted by the *Bylaw* or the County.

- Section 4.3 states that if an owner's land is adjacent to the pipes constituting the County sewage system, the County may require an owner (1) to connect to the County's sewage disposal system and (2) disconnect from any other sewage disposal system, both at the owner's expense.

- Sections 4.4 and 4.5 require all owners of premises within the Sylvan Lake Communal Subdivisions to connect to the County sewage system by October 31, 2020.

- Section 4.6 states that if an owner has failed to connect to the County sewage system by October 31, 2020, the County may enter onto the owner's land and take the necessary actions at the owner's expense.

- Section 4.7 provides that all owners in the area must pay a connection fee set out in Schedule F of the *Bylaw*.

[6] From July 2014 onwards, the County wrote to Mr. Kozak advising him of its intention to install the County sewage system. It told Mr. Kozak he would need to connect to the County sewage system and that it had decided to make land owners responsible for the costs of construction of the part of the service connection "from the mainline to the boundary of the road", in addition to other costs: Decision at para 4.

[7] In April 2015, Mr. Kozak agreed to pay for a "partial" connection to the County sewage system because he was offered an attractive price: Decision at para 5. A line was connected from the County sewage system to Mr. Kozak's land, close to his sewage holding tank. To complete the connection would require installation of an expensive grinder pump. Mr. Kozak is unwilling to complete this connection. On November 15, 2015, Mr. Kozak issued an originating application for a declaration that ss 4.2 – 4.6 of the *Bylaw* are *ultra vires* the powers given to the County under the *MGA*, and inoperative as in conflict with the *Safety Codes Act*.

[8] On appeal, all parties agree that s 4.2 of the *Bylaw* is valid, leaving ss 4.3 – 4.6 in dispute. These sections compel owners of premises to connect to the County sewage system by October 20, 2020, to disconnect from any other sewage system and pay a service connection fee. If the owner does not connect to the County's sewage system, s 4.6 authorizes the County to enter onto private lands to construct the service connection at the owner's cost

II. Decision Below

[9] The chambers judge held ss 4.3 – 4.6 to be *ultra vires* the powers granted to the County under the *MGA*. She divided the authorizing provisions of the *MGA* into two categories: ss 3, 7, 8 and 9, which "deal with the purposes, powers and general capacity of municipalities to pass bylaws" and ss 28-39 which deal specifically with public utilities.

[10] The chambers judge's reasons did not treat the general provisions in ss 3, 7, 8 and 9 as potential sources of the County's authority to enact the impugned sections of the *Bylaw*. Her reasons only addressed ss 33, 34 and 35 of the *MGA*, which set out specific municipal powers relating to public utilities, as possible sources of the County's authority to enact ss 4.2 – 4.6 of the *Bylaw*. She held that she must interpret these provisions broadly, relying on *United Taxi Drivers'*

Fellowship of Southern Alberta v Calgary (City), [2004] 1 SCR 485, 2004 SCC 19 and ss 7 and 8 of the *MGA*.

[11] The chambers judge held that s 34 of the *MGA* does not authorize the impugned provisions of the *Bylaw* because it deals with a different situation: it requires a municipality to provide a utility service to a landowner, in certain circumstances, if the *landowner requests it*. By contrast, ss 4.3 – 4.6 of the *Bylaw* require an owner to connect to the County sewage system, and pay part of the costs of doing so, whether the owner wants to or not. The chambers judge then found that s 35 was an "extension" of s 34, and s 35, too, must only authorize a municipality to charge costs to the owner if the owner requests the utility service.

[12] Finally, the chambers judge considered whether s 33 of the *MGA* authorizes the County to enact the impugned parts of the *Bylaw*. The County argued that the section expressly authorized it to prohibit owners from hiring private waste haulage companies to dispose of sewage and by implication (since the owner had no practical alternative) authorized it to require landowners to connect to the County sewage disposal system. The chambers judge rejected that argument. She found that it authorized a municipality to prohibit a person from providing the same utility service as the municipality only if the person was in the business of providing the service to "the public generally". In this case, the waste hauling company simply had a contract with Mr. Kozak.

[13] Accordingly, the chambers judge found s 33 did not expressly authorize the County to prohibit the haulage company from taking away Mr. Kozak's waste and did not implicitly authorize it to enact bylaws compelling him to connect into the public system at his own expense.

[14] The chambers judge declared that to the extent the provisions of the *Bylaw* purported to apply the overly broad interpretation of ss 34 and 35, they were struck down. She did not find it necessary to consider the alternative argument that the impugned provisions of the *Bylaw* are inoperative because they conflict with the *Safety Codes Act*.

III. Issues

[15] The following questions are raised on appeal:

1. Did the chambers judge misinterpret the provisions of the *MGA* when she concluded the impugned provisions of the *Bylaw* are *ultra vires* the County?

2. Do the impugned provisions of the *Bylaw* conflict with the *Safety Codes Act*?

IV. Standard of Review and Principles of Interpretation

[16] The first question is whether the impugned provisions of the *Bylaw* are *ultra vires* the County's powers under the *MGA*. In general, when faced with a question of *vires*, the reviewing court must determine whether the subordinate enactments were authorized by the enabling

legislation: *Katz Group Canada Inc. v Ontario (Health and Long Term Care)*, 2013 SCC 64 at paras 24-28, [2013] 3 SCR 810 [*Katz*].

[17] The Court should identify the scope of the mandate conferred on the subordinate rule maker by interpreting the enabling legislation broadly and purposively: *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19 at para 8, [2004] 1 SCR 485 [*United Taxi*]; *Katz* at para 27. More recently, the Supreme Court has instructed reviewing courts to interpret enabling legislation as authorizing the subordinate enactment where it is possible to do so: *Katz* at para 25-26.

[18] On appeal, the issue is whether the chambers judge erred in interpreting the enabling legislation. This is a question of law, reviewable for correctness: *Housen v Nikolaisen*, 2002 SCC 33 at para 8, [2002] SCR 235. No deference is owed to the chambers judge's, or the County's, interpretation of the enabling legislation.

[19] There is some disagreement among appellate courts about the standard of review applicable to subordinate enactments. *United Taxi* and *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 59, [2008] 1 SCR 190, indicate that the standard of review is correctness, while recent decisions of the Supreme Court and this Court state that it is reasonableness: *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2 at para 24, [2012] 1 SCR 5; *Green v Law Society of Manitoba*, 2017 SCC 20 at para 20; *Alberta College of Pharmacists v Sobeys West Inc.*, 2017 ABCA 306 at para 63. We need not enter that debate in this appeal because s 538 of the *MGA* expressly excludes reasonableness as a ground for reviewing municipal bylaws: "No bylaw may be challenged on the ground that it is unreasonable." Accordingly, the standard of review must be correctness.

V. Analysis

1. Did the chambers judge misinterpret the provisions of the MGA when she concluded the impugned provisions of the Bylaw are ultra vires the County?

[20] Mr. Kozak submits that ss 34, 37, 650 and 655 of the *MGA* mean that the County lacks authority to require him to connect to the County sewage system, to require him to pay the costs of doing so, and to enter his land to construct the connection if he has not done so.

[21] The County submits that, correctly interpreted, ss 7, 8 and 33 of the *MGA* authorize the County to pass bylaws requiring owners to participate in a municipal sewage system at the owner's cost. The City of Edmonton's (Edmonton) position mirrors that of the County, except that it argues that ss 7, 8 and 37 of the *MGA* provide the requisite authority.

Sections 7 and 8 of the *MGA*

[22] The starting point of the County's argument is that municipalities no longer need to rely on specific authorization in the *MGA* to pass bylaws in relation to specific subject matters.

[23] Since 1994, the *MGA* has used broad language to confer authority to make bylaws over generally defined subject matters, for general municipal purposes: see ss 3, 7 and 8. Section 9 of the *MGA* explicitly recognizes that expressing the power to pass bylaws in general terms was not an accident; it was done consciously to give municipalities broad powers to govern "in whatever way the councils consider appropriate, within the jurisdiction given to them".

[24] Adopting this approach to municipal governance, Alberta has subscribed to the modern method of drafting municipal legislation whereby municipalities have broad authority to legislate in respect of generally described powers, as recognized by the Supreme Court of Canada in *United Taxi* at paras 6-7:

> 6. The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. This notable shift in the nature of municipalities was acknowledged by McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at pp. 244-45. The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced: *Nanaimo*, supra, at para. 18. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters: *The Municipal Act*, S.M. 1996, c. 58, C.C.S.M. c. M225; *Municipal Government Act*, S.N.S. 1998, c. 18; *Municipal Act*, R.S.Y. 2002, c. 154; *Municipal Act*, 2001, S.O. 2001, c. 25; *The Cities Act*, S.S. 2002, c. C-11.1. This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes: *Shell Canada*, at pp. 238 and 245.
>
> 7. Alberta's *Municipal Government Act* follows the modern method of drafting municipal legislation. The legislature's intention to enhance the powers of its municipalities by drafting the bylaw passing provisions of the Act in broad and general terms is expressly stated in s. 9. Accordingly, to determine whether a municipality is authorized to exercise a certain power, such as limiting the issuance of taxi plate licences, the provisions of the Act must be construed in a broad and purposive manner.

legislation: *Katz Group Canada Inc. v Ontario (Health and Long Term Care)*, 2013 SCC 64 at paras 24-28, [2013] 3 SCR 810 [*Katz*].

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Sections 7 and 8 of the *MGA*

[22] The starting point of the County's argument is that municipalities no longer need to rely on specific authorization in the *MGA* to pass bylaws in relation to specific subject matters.

[23] Since 1994, the *MGA* has used broad language to confer authority to make bylaws over generally defined subject matters, for general municipal purposes: see ss 3, 7 and 8. Section 9 of the *MGA* explicitly recognizes that expressing the power to pass bylaws in general terms was not an accident; it was done consciously to give municipalities broad powers to govern "in whatever way the councils consider appropriate, within the jurisdiction given to them".

[24] Adopting this approach to municipal governance, Alberta has subscribed to the modern method of drafting municipal legislation whereby municipalities have broad authority to legislate in respect of generally described powers, as recognized by the Supreme Court of Canada in *United Taxi* at paras 6-7:

> 6. The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. This notable shift in the nature of municipalities was acknowledged by McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at pp. 244-45. The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced: *Nanaimo*, supra, at para. 18. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters: *The Municipal Act*, S.M. 1996, c. 58, C.C.S.M. c. M225; *Municipal Government Act*, S.N.S. 1998, c. 18; *Municipal Act*, R.S.Y. 2002, c. 154; *Municipal Act*, 2001, S.O. 2001, c. 25; *The Cities Act*, S.S. 2002, c. C-11.1. This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes: *Shell Canada*, at pp. 238 and 245.
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[25] *United Taxi* provides an example of a *general* power-conferring provision authorizing a *specific* bylaw provision on a specific subject matter. There, the Supreme Court held that the municipality had the power to enact a bylaw limiting the number of available taxi licence plates under s 7 (which gave it the power to pass bylaws in respect of business) and under s 8(a) or (b) of the *MGA* (which gave it the power to regulate and provide for a system of licences). More specific authority was not needed. The pre-1994 version of the *MGA* specifically granted authority to municipalities to limit the number of taxi licence plates and the post-1994 version did not; yet the Supreme Court rejected the argument that the power had been abolished.

[26] Like the legislative history of the power to limit taxi licences in *United Taxi*, municipal legislation provided specific authority to compel connection to sewer and water mains from as early as 1913 until the changes in 1994: the *Edmonton Charter*, 1913 SA c 23 s 235; the *Municipal Government Act*, 1980 RSA c M-26, s 251; the *City Act*, 1955 RSA c 42, s 329. As was found in *United Taxi* at para 11, "[...] s. 9(b) indicates the legislature did not intend to curtail the powers exercised by municipalities but rather sought to enhance those powers under the new Act".

[27] Despite the change in legislative approach acknowledged and endorsed in *United Taxi*, the chambers judge did not consider whether the *MGA* provisions conferring general power, authorize the impugned sections of the *Bylaw*, focussing instead on the specific powers governing the provision of public utilities.

[28] The County submits that a particular bylaw need not be authorized by a specific provision in the enabling legislation; that ss 3, 7 and 8 of the *MGA* confer broad authority to pass bylaws regulating utilities in whatever way it regards as appropriate, subject to the requirement that it must do so for a permissible object.

[29] Section 3 of the *MGA* states the purposes of a municipality: to provide good government; to provide services or facilities that are necessary or desirable for the municipality; and to develop and maintain safe and viable communities. The information on the record indicates that the County initiated the communal sewage and wastewater system in order to protect the water quality of Sylvan Lake and to maintain safe and viable communities adjacent to the lake.

[30] Section 7 of the *MGA* sets out the general authority of municipal councils to pass bylaws in relation to various general subject matters, including "public utilities". The term "public utility" means "... a system or works used to provide one or more of the following for public consumption, benefit, convenience or use": s 1(y)(i) of the *MGA*. It is clear that the *Bylaw* in question regulates public utilities, for the purposes of safeguarding water quality and providing for safe and viable communities, both permissible purposes under s 3 of the *MGA*.

[31] Section 8 of the *MGA* addresses the extent of a municipal council's power to achieve its objectives by passing a *Bylaw* in relation to a subject matter set out in s 7. Without restricting section 7, a council may, in a bylaw passed under Division 2 of the *MGA*, "regulate or prohibit": s 8(a). The impugned *Bylaw* provisions purport to compel connection to the County sewage

system at the owner's expense, to disconnect from their private sewage systems and, in the event of non-connection, to allow the County to enter onto private land to construct a service connection at the owner's expense. The impugned provisions of the *Bylaw* "regulate and prohibit" conduct in relation to a public utility (i.e. the public sewage system) and are, to this extent, authorized by s 8(a) of the *MGA*.

[32] We agree that the broad authority conferred on the County by ss 7, 8(a) and 9 authorized it to pass the impugned provisions of the *Bylaw*. It is not clear that Mr. Kozak disagrees at this point. The disagreement between the parties is largely directed at whether specific sections of the *MGA* that address public utilities (in particular, ss 33, 34, 35, 37, 650 and 655) derogate from or enhance the County's broad powers to enact bylaws respecting public utilities.

Section 33 of the *MGA*

[33] The first issue is whether s 33 of the *MGA* limits the County's general authority to regulate public utilities by bylaw. Section 33 authorizes a municipality that provides a "municipal utility service" to prohibit persons from providing the same or similar type of service in the municipality.

[34] Section 33 of the *MGA* provides:

> 33. When a municipality provides a municipal utility service, the council may by bylaw prohibit any person other than the municipality *from providing the same or a similar type of utility service* in all or part of the municipality. (emphasis added)

[35] The County submits that s 33 empowers a municipality to prohibit *any* private person from providing sewage disposal services where the municipality provides a municipal sewage disposal system. It also argues that this implies a *further* power to require owners to connect to the municipal system. If the County may prohibit all private waste disposal services, then owners must connect to the municipal sewage system to have their sewage removed, so by implication, the County may require owners to connect to the municipal system. In the County's view, s 33 authorizes both ss 4.2 (no one else may operate a sewage system in the area) and 4.4 (owners must connect to the County sewage system). The County submits that the authority delegated by s 33 is parallel to the authority derived from the ss 7 and 8 to regulate public utilities.

[36] The County's interpretation of s 33 is problematic because it does not address the defined terms that specify who may be prohibited under s 33. The class that may be prohibited is "any person" who provides "the same, or a similar, type of utility service" to that provided by the municipality. A "utility service" is defined as "*the thing*" (service) that "is provided by the *system or works of a public utility*": s 28(f) *MGA*. In other words, a utility service is not just a service (in this case, sewage disposal) but also a means of providing a service (by the system or works of a public utility). Further, "public utility" is defined as "… a system or works used to provide one or more of the following for public consumption, benefit, convenience or use: … sewage disposal":

s 1 (1) (y) *MGA*. The definition of "public utility" makes it clear that "the system or works" must be provided for "public consumption, benefit, convenience or use".

[37] It follows that the class of persons who may be prohibited under s 33 are persons who provide a service *by a system or works for public consumption or benefit* that is the same or similar in type to the service provided by the municipality.

[38] Based on that interpretation, the County lacks authority under s 33 to prohibit private providers of waste haulage services for two reasons. First, because those persons do not provide their services through a "system or works". Although that phrase is not defined in the *MGA*, it is used in several sections (ss 29, 35, 36 and 40) whose context indicates that it refers to pipes or main lines which are constructed, maintained and attached to buildings. Second, because providers of waste haulage services do not provide them for public consumption, benefit or use.

[39] The private sewage disposal service used by Mr. Kozak is not caught by the terms of s 33 that appear to be directed at an interloping utility service providing the same or similar service as the "system or works of a public utility".

[40] Our conclusion has no implications for whether a municipality may, by bylaw, require a land owner to connect to a municipal sewage system at his or her own cost. It is true that municipalities cannot, under s 33, coerce land owners into connecting to the municipal sewage system by eliminating the option of hiring private waste disposal services. However, that conclusion is quite consistent with municipalities having authority to require owners to connect to a municipal sewage system at their own expense under ss 7, 8 or another section of the *MGA*.

[41] Section 33 does contemplate that the municipality has the power to monopolize the provision of a municipal utility service. While consistent with the County's broad powers to enact bylaws in relation to public utilities, including the power to compel owners to connect to a public utility at the owners' own cost, s 33 does not derogate from those broad powers.

Sections 34 and 35 of the *MGA*

[42] The parties agree that neither s 34 nor s 35 of the *MGA* authorize the County to compel connection to the County sewage system, but disagree as to the consequential implications of these sections.

[43] The County submits that these sections have no effect on its general power derived from ss 7 and 8 to pass the impugned provisions of the *Bylaw* that compel connection to the County sewage system at the owner's cost. It recognizes that s 35 provides that the municipality *may* make owners responsible for costs of construction, maintenance and repair of the connection from the main lines to the boundary of the road where the municipality provides the service to land adjacent to the road. However, it appears that the County does not rely on s 35 as authority for the parts of

ss 4.3 and 4.7 of the *Bylaw* that allow it to impose costs and fees; instead, it relies on its general power to make bylaws in relation to public utilities.

[44] Mr. Kozak submits these sections limit municipalities' broad power to regulate public utilities by taking away authority (1) to require owners to connect to the municipal public utility against their will, and (2) to require owners who do not want the public utility to pay part of the costs of connecting to the utility.

[45] Section 34 provides for a landowner's entitlement to connect to a municipal public utility when a municipal public utility runs adjacent to the owner's parcel of land and the owner *requests* to be connected, subject to availability and other conditions. In our view, s 34 does not address the power of municipalities to compel connection to connect to a municipal utility system.

[46] Section 35 addresses responsibility for costs of connecting to a municipal utility when the municipality "provides the municipal utility service to a parcel of land" that is adjacent to a road or easement where the main lines of a public utility system are located. In that case, the municipality is responsible for the construction, maintenance and repair of the portion of the service connection from the main lines of the system or works to the boundary of the road or easement *but* it has authority to make the owner of the adjacent land parcel responsible for costs of the service connection as a term of supplying the municipal utility service. On a literal interpretation of s 35, it applies when the County provides a municipal utility service (whether requested or not).

[47] Section 35 does not explicitly address how or when owners' land parcels come to be connected to the municipal utility system. Mr. Kozak argues that s 35 implies that the only way a municipality comes to provide a public utility service to an owner's land parcel (and charge connection costs for it) is when the owner has requested it, for two reasons.

[48] First, Mr. Kozak argues that s 35(3) of the *MGA* states that a municipal council may make the owner responsible for certain costs of connecting to a municipal utility "as a term of supplying the municipal public service to the parcel of land". In his submission, the word "term" presupposes agreement or mutuality: a request for service and payment as a condition of supplying it.

[49] We reject this argument. It overlooks the flexibility of the word "term". A "term" may mean a part of a contract or it may be a condition, as in terms of licenses, approvals and permits that are conferred rather than agreed upon. One definition of "term" in the *Oxford English Dictionary*, Second Edition (Oxford, Clarendon Press, 1989), vol XVII is "8(b). conditions or stipulations limiting what is granted or proposed to be done". The municipality has authority to require an owner to pay costs as a term of the municipality supplying a service, even if the owner has no choice about whether to receive the service.

[50] Second, Mr. Kozak argues s 35 applies if, among other things, the municipality "provides the municipal service to a parcel of land adjacent to the road or easement". It is unclear whether "provides" means a completed connection between the municipal utility system and the owner's "private" system or whether it is sufficient that the utility service is provided to the land, without a connection to a building or pipe having been made. Mr. Kozak submits that section 34 raises the same problem about the meaning of "provides" but the uncertainty is solved because the owner must first request the service. He argues that the uncertainty in s 35 should be cured by reading in language to the effect that it applies only if the owner has requested the service.

[51] We also reject this argument. Section 34 offers no more clarity than s 35 about the meaning of "provides". Both sections say that the municipality must "provide the municipal utility service to [the] parcel [of land]" in certain circumstances and neither specifies whether a utility is provided if the municipal utility is connected to the land only or whether it requires a completed service connection. The words "on the request of the owner" in s 34 do not disambiguate the meaning of "provide" in that section, although they state one circumstance in which a municipality must "provide" a service.

[52] In conclusion, section 35 does not address the question of when, if ever, an owner must connect to the County sewage system. As such, it does not reduce the authority of a municipality to compel connection under its general powers to regulate public utilities.

Section 37 of the *MGA*

[53] The chambers judge did not consider whether s 37 authorized the County to enact the impugned provisions of the *Bylaw* but Mr. Kozak and Edmonton raise it on appeal.

[54] Section 37(1) makes owners "responsible" for the construction, maintenance and repair of the portion of the service connection to a municipal public utility that is located on or below their land parcel. If the municipality is not satisfied, it may give instructions to the owner (s 37(2)) and if it remains unsatisfied, the municipality may enter onto the owner's property to construct, maintain or repair the service connection (s 37(3)).

[55] Edmonton submits that s 37 authorizes the municipality to require the owner to pay for part of the costs of connecting to the municipal public utility. Section 37 does not refer to cost, but states that the owner is responsible for the "construction, maintenance and repair of a service connection of a utility located "above, on or underneath" the parcel. However, s 39(2) provides that the municipality's costs relating to these elements, as well as restoration costs, are an amount owed by the owner of the parcel of land.

[56] Further, s 37(1) by implication requires owners to connect to the municipal public utility. This obligation is implied by the statement that owners are "responsible" for the construction of the service connection located on their parcel of land. It is difficult to see how an owner could be responsible for construction of the service connection, and be required to pay for it (s 39(2))

without having a duty to connect to the public system. Of course, this is subject to the qualification that in this context, service connection means only the connection located on or under the owner's parcel of land.

[57] Section 37 purports to authorize the municipality to enter onto the owner's land parcel if the owner has not taken care of construction, repair or maintenance of the service connection on the owner's land to its satisfaction. Mr. Kozak argues that s 37(3) authorizes the municipality to enter onto private land to construct a service connection only if there is already a service connection in place. There is obviously a whiff of paradox about this argument and it relies on a very literal interpretation of the definition of service connection in s 28(e) of the *MGA*. Its effect, if correct, would be that a municipality never has the authority to enter onto private land to construct part of the service connection.

[58] The gist of Mr. Kozak's argument is that s 37(3) gives the municipality authority, in certain circumstances, to enter private land to construct the service connection on that land, but since "service connection" as defined in s 28(e) of the *MGA* means a completed service connection, the municipality may only enter the land if the service connection is already in place.

[59] The evident intention of s 37 is to make the owner responsible for part of the service connection and to authorize the municipality to enter to complete the work if the owner does not meet his responsibility. The very literal reading of "service connection" that Mr. Kozak advocates would completely dissolve the municipality's power under s 37(3) to enter private land to construct the service connection, if the owner has not met his responsibility to do so. That would defeat one of the purposes of s 37(3) and produce an absurd result.

[60] The proper reading of s 37(3) is that the municipality may enter onto a private land parcel to construct a portion of the service connection described in s 37(1), provided that the other conditions set out in ss 37(2) and (3) are satisfied, and the owner must bear the cost under s 39.

Sections 650 and 655

[61] Part 17 of the *MGA* contains provisions allowing conditions to be attached to a development or subdivision approval: s 650 and s 655 of the *MGA*. That is, sections 650 and 655 authorize a municipal council to require, by bylaw, a person who has applied for a development or subdivision permit (respectively) to enter into an agreement with the municipality "to install or pay for the installation of a public utility", which includes sewage disposal.

[62] Mr. Kozak submits that ss 650 and 655 exhaustively state the circumstances in which a municipality may require a person to connect, install or pay for the connection or installation of public utilities. In his view, the general power to regulate public utilities under ss 7 and 8(c) is limited by ss 650 and 655, so that municipalities lack the authority to require owners to connect to public utilities at their own expense *unless* the conditions of the application of ss 650 or 655 are met. In other words, based on the maxim of interpretation called implied exclusion, if the

Legislature had intended that municipalities should be empowered to require landowners to install or connect to public utilities at their own costs in circumstances other than ss 650 and 655, it would have said so expressly. If this argument is correct, the impugned sections of the *Bylaw* would be *ultra vires* because they require owners to connect to the public sewage system at their own cost without meeting the conditions of ss 650 or 655.

[63] Sections 650 and 655 are found in Part 17 of the *MGA*, which is concerned with planning for, and regulation of, land development. We note that a historical review of these provisions suggests they are remnants of the old land planning statutory regime that predates the modern approach brought about by the 1994 amendments: *Planning Act*, RSA 1980, c P-9, ss 77, 92 [repealed *Municipal Government Amendment Act*, SA 1995, c 24, s 103]. In light of the distinct historical roots of Part 17, as well as the modern method of drafting and interpreting municipal legislation as set out above, we reject the proposition that ss 650 and 655 negate the general power of the municipality to compel connection to a municipal sewage system. The express reference to municipal powers to require participation in infrastructure in ss 650 and 655 and the lack of express reference elsewhere in the statute does not imply that the municipal powers to require participation are limited to the circumstances in ss 650 and 655.

2. Do the impugned provisions of the *Bylaw* conflict with the *Safety Codes Act*?

[64] Mr. Kozak alleges a conflict between s 4.3 of the *Bylaw* and s 2(1)(g) of the *Safety Codes Act* because s 4.3 of the *Bylaw* purports to regulate a "matter" that is also regulated by the *Safety Codes Act*. In such a situation, s 66 of the *Safety Codes Act* states that the *Bylaw* is inoperative.

[65] Section 4.3 of the *Bylaw* regulates private sewage disposal systems by requiring an owner to disconnect from his or her own sewage disposal system at his or her own expense, if the owner's land is adjacent to land on which pipes of the County sewage system are situated. The *Safety Codes Act* also regulates private sewage disposal systems: see s 2(1)(g). Mr. Kozak has a "Private Sewage System Permit", issued by the Government of Alberta, Municipal Affairs under the *Private Sewage Disposal Systems Regulation*, AR 229/1997, a regulation made under the *Safety Codes Act*. He characterizes the permit as authorizing him to use and operate a private sewage disposal system.

[66] The issue is whether s 4.3 of the *Bylaw* is inoperative because it regulates "a matter" (i.e. use of private sewage disposal systems) that is also regulated by the *Safety Codes Act*. In our view, it does not.

[67] The *Safety Codes Act* regulates the *safety* of the design, manufacture, construction, installation, use, operation, occupancy and maintenance of various facilities, buildings and services, including private sewage disposal systems. It does so by prescribing standards (*the Alberta Private Sewage Systems Standard of Practice 2015*) for the safe use and operation of, *inter alia*, private sewage disposal systems. In light of the purpose and method of regulation, it is

appropriate to say that the "matter" regulated by the *Safety Codes Act*, as it relates to private sewage systems, is the *safe use* of private sewage disposal systems (among other things).

[68] By contrast, the *Bylaw* does not purport to regulate the safe use of private sewage systems. Rather, it purports to determine whether private sewage systems can be used at all, in furtherance of the object of providing a communal sewage system. The "matter" of the *Bylaw* is the circumstances in which private sewage disposal systems are permitted and when an owner must connect to the County sewage system, and at whose cost. We accept the County's argument that the *Safety Codes Act* does not regulate the circumstances when private sewage disposal systems are to be permitted; rather, it sets out the standards to be met once they have been permitted.

[69] It follows that the *Bylaw* does not purport to regulate the same matter that is regulated by the *Safety Codes Act* and the conflict rule in s 66 of the *Safety Codes Act* does not apply. As a result, s 4.3 of the *Bylaw* is not made inoperative by s 66 of the *Safety Codes Act*.

[70] Mr. Kozak asserts that the permit issued under the *Safety Codes Act* allows him to continue to operate his private sewage system in the face of s 4.3 of the *Bylaw*, which requires him to disconnect if his land is adjacent to land on which pipes of the County sewage system are situated. Section 43(4) of the *Safety Codes Act* states that "[a] permit under this Act does not authorize a person to do any thing, implement any process or engage in any activity that does not comply with any other enactment". Since a bylaw is an "enactment", Mr. Kozak's permit does not immunize him from compliance with s 4.3 of the *Bylaw*. He is required to disconnect from his private sewage disposal system in the circumstances set out in s 4.3 of the *Bylaw*.

VI. Conclusion

[71] The public policy goals of the *MGA* support a broad and purposive interpretation of the *MGA*. The *MGA* contains a complex web of rules for orderly governance by democratically elected municipal councils in the interest of their citizens. The purposes of a municipality are as set out in s 3 of the *MGA*: to provide good government; to provide services, facilities and other things that, in the opinion of council, are necessary or desirable for the municipality; and ultimately, to develop and maintain safe and viable communities. As noted by McLachlin CJ in *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 19, 2012 1 SCR 5, municipal bylaws "involve an array of social, economic, political and other non-legal considerations."

[72] It would be inimical to viable community infrastructure such as sewage systems if individual homeowners could opt out and follow what they view as their own best interests. Public policy considerations support the broad interpretation of powers granted to the municipalities under ss 8 and 9 of the *MGA*.

[73] The appeal is allowed. The impugned provisions of the *Bylaw* are *intra vires* the County's powers under the *MGA*. In particular, the provisions are authorized by ss 7(g), 8(a) and 9 of the *MGA*, and by implication, s 37 of the *MGA*. A declaration shall issue that the challenged sections of the *Bylaw* are valid.

Appeal heard on September 14, 2017

Memorandum filed at Calgary, Alberta
this 26th day of October, 2017

Martin J.A.

Wakeling J.A.

Greckol J.A.

Appearances:

C.S. Davis
for the Respondent Wade Kozak

S.C. McNaughtan, Q.C.
for the Appellant

M. Gunther
for the Intervener

Relevant Legislation

***Municipal Government Act*, RSA 2000, c M-26**

2 The purposes of a municipality are

(a) to provide good government,

(b) to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality,

(c) to develop and maintain safe and viable communities.

…

7 A council may pass bylaws for municipal purposes respecting the following matters:

…

(g) public utilities;

…

8 Without restricting section 7, a council may in a bylaw under this Division

(a) regulate or prohibit

9 The power to pass bylaws under this Division is stated in general terms to

(a) give broad authority to councils and to respect their right to govern municipalities in whatever way the councils consider appropriate, within the jurisdiction given to them under this or any other enactment, and

(b) enhance the ability of councils to respond to present and future issues in their municipalities.

…

33 When a municipality provides a municipal utility service, the council may by bylaw prohibit any person other than the municipality from providing the same or a similar type of utility service in all or part of the municipality.

34(1) If the system or works of a municipal public utility that provide a municipal utility service are adjacent to a parcel of land, the municipality must, when it is able to do so and subject to any terms, costs or charges established by council, provide the municipal utility service to the parcel on the request of the owner of the parcel.

35(1) This section applies when the main lines of the system or works of a municipal public utility are located above, on or underneath a road or easement and the municipality provides the municipal utility service to a parcel of land adjacent to the road or easement.

(2) The municipality is responsible for the construction, maintenance and repair of the portion of the service connection from the main lines of the system or works to the boundary of the road or easement.

(3) Despite subsection (2), the council may as a term of supplying the municipal utility service to the parcel of land make the owner responsible for the costs of the construction, maintenance and repair of the portion of the service connection from the main lines of the system or works to the boundary of the road or easement.

(4) If the owner is responsible for the costs of the construction, maintenance or repair referred to in subsection (3), those costs are an amount owing to the municipality by the owner.

37(1) The owner of a parcel of land is responsible for the construction, maintenance and repair of a service connection of a municipal public utility located above, on or underneath the parcel.

(2) If the municipality is not satisfied with the construction, maintenance or repair of the service connection, the municipality may require the owner of the parcel of land to do something in accordance with its instructions with respect to the construction, maintenance or repair of the system or works by a specified time.

(3) If the thing has not been done to the satisfaction of the municipality within the specified time or in an emergency, the municipality may enter on any land or building to construct, maintain or repair the service connection.

38(1) Despite section 37, the council may as a term of providing a municipal utility service to a parcel of land give the municipality the authority to construct,

maintain and repair a service connection located above, on or underneath the parcel.

(2) A municipality that has the authority to construct, maintain or repair a service connection under subsection (1) may enter on any land or building for that purpose.

39(1) After the municipality has constructed, maintained or repaired the service connection located above, on or underneath a parcel of land under section 37 or 38, the municipality must restore any land entered on as soon as practicable.

(2) The municipality's costs relating to the construction, maintenance or repair under section 37 or 38 and restoration costs under this section are an amount owing to the municipality by the owner of the parcel.

650(1) A council may in a land use bylaw require that, as a condition of a development permit's being issued, the applicant enter into an agreement with the municipality to do any or all of the following:

> [...]
>
> (c) to install or pay for the installation of a public utility described in section 616(v)(i) to (ix) that is necessary to serve the development, whether or not the public utility is, or will be, located on the land that is the subject of the development;

655(1) A subdivision authority may impose the following conditions or any other conditions permitted to be imposed by the subdivision and development regulations on a subdivision approval issued by it:

[...]

> (b) a condition that the applicant enter into an agreement with the municipality to do any or all of the following:
>
> [...]
>
> (iii) to install or pay for the installation of a public utility described in section 616(v)(i) to (ix) that is necessary to serve the subdivision, whether or not the public utility is, or will be, located on the land that is the subject of the subdivision approval;

Court of Queen's Bench of Alberta

Citation: Brodylo Farms Ltd v Calgary (City), 2019 ABQB 123

Date: 20190222
Docket: 1601 01681
Registry: Calgary

Between:

Brodylo Farms Ltd. and Margaret Brodylo by her litigation representative Leslie Chisholm

Applicants

- and -

City of Calgary

Respondent

Memorandum of Decision of the Honourable Mr. Justice W.P. Sullivan

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A. Summary

[1] This is an originating application requesting an order in the nature of *certiorari* quashing the Calgary City Council's (the "Council") enactment of Bylaw 48P2015 (the "Bylaw"). The Bylaw adopts an Area Structure Plan ("ASP") for the proposed community of Providence in the City of Calgary (the "City").

[2] The application is brought by Brodylo Farms Ltd. and Margaret Brodylo, by her litigation representative, Leslie Chisholm (the "Applicants"). The City (the "Respondent") resists the application.

[3] The Bylaw is quashed on the grounds that the Council's decision to approve the Providence ASP is patently unreasonable.

B. Background Facts

[4] Brodylo Farms Ltd. is a corporation owned by Margaret Brodylo and her children, Leslie Chisholm, Reid Brodylo, John Brodylo, and Ellen Brodylo (the "Brodylos"). The Brodylos own a farm property (the "Brodylo Farm") located at the edge of the southwest limits of the City which is approximately 320 acres in size. The Brodylo Farm contains a wetland which is approximately 50 acres in size (the "Wetland").

[5] The proposed community of Providence is located directly to the east and the south of the Brodylo Farm and contains approximately 2000 acres of land.

[6] The City commenced the Providence ASP in October 2014. The Providence ASP is a developer-funded ASP, which means that developers entered into a funding agreement with the City to cover the costs and collaborate on the ASP.

[7] The Brodylos first heard about Providence through a media report in February 2015. Upon learning of the proposed community, the Brodylos expressed concerns to the City that the ASP would not account for drainage patterns in the area, which could impact the Brodylo Farm and its Wetland.

[8] On October 22, 2015, the ASP was provided to the Calgary Planning Commission for review in advance of a December 7, 2015 public hearing (the "Hearing"). The ASP did not include a Master Drainage Plan, a Staged Master Drainage Plan, or a description of the general location of drainage or irrigation systems or works.

[9] Prior to the Hearing, the Council reviewed *in camera* a briefing memorandum (the "Memorandum") from the City's legal counsel, which referenced the Brodylos and their actions since learning of Providence.

[10] At the Hearing, the Brodylos addressed the Council with their concerns. At the conclusion of the Hearing, the Council voted to adopt the ASP and to give three readings to and enact the Bylaw.

[11] On February 18, 2016, the Applicants filed the originating application requesting that this Court quash the Bylaw.

C. Positions of the Parties

[12] The Applicants seek judicial review of the Council's decision to enact the Bylaw on the following bases:

1. the Council lacked the jurisdiction to enact the Bylaw because the ASP did not comply with the statutory requirements in section 633(2) of the *Municipal Government Act*, RSA 2000, c M-26 ("*MGA*");
2. the Council failed to provide an appropriate means for the Brodylos to make suggestions and representations, as required by section 636(1) of the *MGA*; and
3. the Council failed to meet the requisite duty of procedural fairness by:
    a. failing to provide the Brodylos with notice and a meaningful opportunity to be heard; and
    b. being biased against the Brodylos so as to not constitute an open-minded decision-maker.

[13] The position of the Respondent is as follows:

1. the originating application constitutes an appeal pursuant to section 536 of the *MGA*;
2. the portions of the originating application alleging procedural defects are statute-barred by the 60-day limitation period prescribed by section 537 of the *MGA*;
3. the Council's enactment of the Bylaw was both within its jurisdiction and reasonable in the circumstances; and
4. if the procedural allegations are not statute-barred, the Applicants received sufficient opportunity to present their concerns to the Council.

D. Issues

[14] The issues this Court must address are:

1. Whether the originating application constitutes an appeal pursuant to section 536 of the *MGA* or an application for judicial review;
2. Whether any portion of the originating application is statute-barred by the limitation period in section 537 of the *MGA*;
3. The applicable standard of review for the substantive review of the Council's decision to enact the Bylaw, which requires determinations of:
    a. whether the Legislature has specified the appropriate standard of review; and
    b. whether the substantive grounds raised constitute a true question of jurisdiction;
4. The applicable standard of review for the alleged issues of procedural fairness;
5. Whether the Council's enactment of the Bylaw meets the substantive and procedural standards of review.

E. Statutory Framework

Alberta Rules of Court

[15] Rule 3.15(2) of the *Alberta Rules of Court*, Alta Reg 124/2010 ("*Rules*") establishes a six-month time limit in which an originating application for judicial review must be filed and served.

MGA

[16] Section 536 of the *MGA* provides that a party may challenge a bylaw by application to this Court:

> 536(1) A person may apply to the Court of Queen's Bench for
>
> (a) a declaration that a bylaw or resolution is invalid, or
>
> (b) an order requiring a council to amend or repeal a bylaw as a result of a vote by the electors on the amendment or repeal.

[17] Section 537 sets a 60-day limitation period for certain section 536 applications:

> 537 A person who wishes to have a bylaw or resolution declared invalid on the basis that
>
> (a) the proceedings prior to the passing of the bylaw or resolution, or
>
> (b) the manner of passing the bylaw or resolution
>
> does not comply with this or any other enactment must make an application within 60 days after the bylaw or resolution is passed.

[18] Section 633 governs the adoption and contents of area structure plans:

633(1) For the purpose of providing a framework for subsequent subdivision and development of an area of land, a council may by bylaw adopt an area structure plan.

633(2) An area structure plan

(a) must describe

...

(iv) the general location of major transportation routes and public utilities, [emphasis added]

[19] Section 616(v) defines "public utility":

"public utility" means a system or works used to provide one or more of the following for public consumption, benefit, convenience or use:

(i) water or steam;

(ii) sewage disposal;

...

(iv) irrigation;

(v) drainage;

...

[20] Section 636(1) sets out the process by which a municipality must prepare a statutory plan:

636(1) While preparing a statutory plan a municipality must

(a) provide a means for any person who may be affected by it to make suggestions and representations,

(b) notify the public of the plan preparation process and of the means to make suggestions and representations referred to in clause (a),

... [emphasis added]

[21] Section 616(dd) defines "statutory plan" to include an area structure plan.

F. Analysis

1. Does the originating application constitute an appeal or an application for judicial review?

[22] This originating application was filed and argued as an application for judicial review. However, the Respondent submits that this application constitutes an appeal under section 536(1)(a) of the *MGA*, which permits a party to apply to this Court for a declaration that a bylaw is invalid.

[23] As set out below, in this case there is no effective difference between characterizing this application as a judicial review or as a statutory appeal. The applicable limitation periods would be the same; the standards of review would be the same; and, the remedy requested by the

Applicants – an order quashing the Bylaw – would have the same effect as the remedy available under section 536(1)(a) – a declaration that the Bylaw is invalid.

2. Is any portion of the application barred by the limitation period in section 537 of the *MGA*?

[24] The Respondent has raised the issue of whether certain portions of the application are barred by a statutory limitation period. Specifically, the Respondent argues that section 537 of the *MGA* bars any portion of the application seeking review on procedural grounds.

[25] The Bylaw was enacted on December 8, 2015 and the Applicants filed this application on February 16, 2016 – more than 60 days but less than six months after the Bylaw was passed. The parties agree that the six-month limitation period in rule 3.15(2) applies to the substantive grounds raised; however, they disagree about whether a six-month or 60-day limitation period applies to the alleged procedural grounds.

[26] Pursuant to section 537 of the *MGA*, an application to have a bylaw declared invalid because the proceedings prior to the bylaw's passage failed to comply with the *MGA* or any other enactment must be made within 60 days of its passing. Section 537 applies to both an appeal under section 536 and to an application for judicial review: ***Simonelli v Rockyview (Municipal District No 44)***, 2004 ABQB 45 at para 47 [***Simonelli***]. If an application under section 536 is not caught by the 60-day limit in section 537, it will be subject to the six-month limit in rule 3.15(2): ***Okotoks (Town) v Foothills (Municipal District) No 31***, 2013 ABCA 222 at para 20 [***Okotoks***].

[27] As this application was made more than 60 days after the Bylaw's enactment, any allegations that proceedings prior to its passing are non-compliant with the *MGA* or another enactment will be barred by section 537.

[28] The Applicants recognise the time limit in section 537, but argue that the alleged breaches of procedural fairness are grounded in principles of natural justice, principles which are not exhausted by the *MGA*'s or any other enactment's procedural requirements. Thus, the six-month limit in rule 3.15(2) should apply.

[29] This Court in ***Simonelli*** determined that procedural grounds for judicial review that fall outside of section 537, but fit under the principles of natural justice, will be subject to the six-month time limit in the predecessor to rule 3.15(2) (rule 753.11(1), *Alberta Rules of Court*, Alta Reg 390/1968): at paras 47-50.

[30] The City alleges that the following procedural grounds raised by Applicants the should be statute-barred by the limitation period in section 537:

1. Council reviewed and considered the Memorandum, which contained defamatory and misleading information about the Applicants and their proposed submissions to City Council, was drafted by City planning staff members, and was inappropriately marked as lawyer-client privileged to prevent its disclosure to the Applicants and the public;
2. Council reviewed and considered the Memorandum *in camera* prior to the Hearing;
3. Council did not afford the Applicants an opportunity to review the Memorandum prior to the Hearing or to address the allegations and information relayed in the Memorandum;

4. One of the City planning staff members who drafted the Memorandum proceeded, after the Memorandum was reviewed, to make oral submissions before Council at the Hearing;
5. Council was improperly influenced by City staff members through the use of the Memorandum; and
6. The process followed by the City failed to provide any, or any appropriate, means for the Applicants who were persons "affected by" the ASP to make suggestions or representations in any meaningful way, since they were not included in the ASP, nor were they provided with any, or any sufficient, reports to reflect potential impacts to the Brodylo Farm which would allow them to make representations or suggestions in relation to such impacts, contrary to section 636(1)(a) of the *MGA*;

[31] These grounds can be divided into two categories. Paragraphs two through six relate to allegations of a reasonable apprehension of bias. Paragraph one relates to allegations of breaches of the Applicants' right to be given notice and right to be heard.

[32] The reasonable apprehension of bias grounds are not barred by the limitation period in section 537, as they are not based in non-compliance with the *MGA* or any other enactment. Rather, they engage the *nemo judex in causa sua* principle of natural justice: that an adjudicator be disinterested and unbiased. Thus, the six-month time limit applies to these grounds.

[33] Regarding the grounds raised in paragraph one, at issue is which portion of the grounds constitutes a challenge based in the City's breach of section 636(1). This portion will be barred by section 537.

[34] The grounds raised in paragraph one engage the *audi alteram partem* principle of natural justice: that parties be given adequate notice and opportunity to be heard. These grounds also reference the procedural requirement found in section 636(1), which provides:

> (1) While preparing a statutory plan a municipality must
>
> > (a) provide a means for any person who may be affected by it to make suggestions and representations,
> >
> > (b) notify the public of the plan preparation process and of the means to make suggestions and representations referred to in clause (a)
> >
> > ...

[35] Pursuant to section 616(dd) of the *MGA*, the ASP constitutes a statutory plan.

[36] Although I recognize that the Legislature has the authority to exclude or limit the operation of common law rules of natural justice by express statutory language or necessary implication, I do not find that the language in section 636(1) exhausts the Applicants' rights to be given notice and to be heard: ***Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control & Licensing Branch)***, 2001 SCC 52 at paras 20-22. Section 636(1) requires that a municipality provide a forum in which affected parties can be heard and certain notifications to the public. It does not explicitly exhaust the duty of fairness that owed to the Applicants under principles of natural justice.

[37] Thus, I find that the portion of the application based in the Council's failure to meet the procedural requirements in section 636(1) (to provide a means by which the Applicants could make suggestions and representations and to notify the Applicants of the ASP preparation

process and the means by which they could make suggestions and representations) is barred by section 537. However, the portion of the application based in breaches of the Applicants' broader rights to notice and to be heard are not statute-barred, and are subject to the six-month time limit.

3. What is the applicable standard of review for the substantive review?

[38] The parties are in disagreement about the appropriate standard of review. The Applicants submit that a correctness standard applies to the Council's interpretation of sections 633(2)(a) and 636(1) of the *MGA*. The Respondent submits that the Legislature has specified in section 539 that a patent unreasonableness standard applies.

[39] I note that since the portion of the application alleging a breach of section 636(1) is statute-barred, I will only address the standard of review applicable to the City's interpretation of section 633(2)(a).

[40] In ***Dunsmuir v New Brunswick***, 2008 SCC 9 [***Dunsmuir***], the Supreme Court of Canada established the current standard of review analysis and held that there are two standards of review at common law: correctness and reasonableness: at paras 62 and 45. However, these common law standards of review can be displaced by specific legislative direction: ***R v Owen***, 2003 SCC 33 [***Owen***]; ***Canada (Minister of Citizenship and Immigration) v Khosa***, 2009 SCC 12 at paras 18 and 51 [***Khosa***].

[41] I will first consider the Respondent's argument that the section 539 specifies the appropriate standard of review. If section 539 does not specify the appropriate standard, I will apply the two-step analysis set out in ***Dunsmuir***: (1) determine whether the jurisprudence has already identified the appropriate standard of review; (2) if the jurisprudence has not, undertake a contextual analysis to determine the appropriate standard of review: at para 62.

i. Has the Legislature specified the appropriate standard of review?

[42] Section 539 of the *MGA* provides: "No bylaw or resolution may be challenged on the ground that it is unreasonable." At issue is whether this section prescribes a patent unreasonableness standard of review. For the reasons below, I find that section 539 imposes a patent unreasonableness standard of review when a municipality's decision is challenged based on the content of that decision.

[43] In ***Khosa***, the Supreme Court of Canada confirmed that Parliament may by legislation specify a particular standard of review, stating:

> 50 I readily accept, of course, that the legislature can by clear and explicit language oust the common law in this as in other matters...
>
> 51 ... a legislature has the power to specify a standard of review, as held in *Owen*, if it manifests a clear intention to do so. However, where the legislative language permits, the courts (a) will not interpret grounds of review as standards of review,...

The Alberta Court of Appeal has interpreted ***Khosa*** as demonstrating "that the courts will not quickly find that a legislative provision is intended to set a standard of review": ***UFCW, Local 401 v Alberta (Information and Privacy Commissioner)***, 2012 ABCA 130 at para 33.

[44] I recognize that this Court's jurisprudence is divided on whether section 539 prescribes a patent unreasonableness standard of review.

[45] Justice Graesser in ***Nor-Chris Holdings Inc v Sturgeon (County)***, 2013 ABQB 184 [***Nor-Chris***] considered how to interpret section 539 following ***Dunsmuir***, and concluded that the statute ousted the reasonableness standard because the legislature wanted a higher standard: patent unreasonableness: at paras 64-68. More recently, Justice K.D. Nixon in ***Gendre v Fort MacLeod (Town)***, 2015 ABQB 623 [***Gendre***] agreed that the Legislature intended to preserve patent unreasonableness as the standard of review when the content of a bylaw is challenged: at para 24.

[46] Justice Shelley in ***Bergman v Innisfree (Village),*** 2018 ABQB 326 [***Bergman***] disagrees with Graesser J and Nixon J's interpretation of section 539, finding that, in the wake of ***Dunsmuir***, the deferential standard of reasonableness applies to municipal decisions made with a municipality's jurisdiction:

> 15 Thus, given the undisputed premise that the Respondent is acting within its statutory powers, I conclude that the applicable standard of review on the issue raised by the Applicant is the deferential standard of reasonableness: Prairie Communities Development *Corp. v. Okotoks (Town)*, 2011 ABCA 315 (Alta. C.A.) at para 23, (2011), 515 A.R. 93 (Alta. C.A.), citing *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13 (S.C.C.) at para 35, [2000] 1 S.C.R. 342 (S.C.C.). See also, *Gendre v. Fort Macleod (Town)*, 2015 ABQB 623 (Alta. Q.B.) at para 59, (2015), 45 M.P.L.R. (5th) 1 (Alta. Q.B.) [*Gendre*].
>
> 16 In *Nor-Chris Holdings Inc. v. Sturgeon (County)*, 2013 ABQB 184 (Alta. Q.B.), at para 67, (2013), 559 A.R. 159 (Alta. Q.B.) [*Nor-Chris*], Graesser J expressed his view that, "[t]he legislature obviously wanted something higher than reasonableness per se, as a basis for review [of municipal resolutions and bylaws], and that [is] satisfied by perpetuating, for the purposes of a review under s. 536 of the *MGA*, the concept of patent unreasonableness." However, that position must be considered in light of a combination of recent jurisprudence from the Supreme Court: i.e. *Dunsmui*r; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.), [*Khosa*]; and *Catalyst*.
>
> 17 In my view, *Dunsmuir*, at para 34, changed the law on judicial review by prescribing the application of two standards of review (correctness and reasonableness) when scrutinizing actions and decisions of administrative officials and municipalities, subject to the Legislature's express indication to the contrary: *Khosa* at para 18; citing *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779 (S.C.C.).
>
> 18 For example, where the Alberta Legislature intended to perpetuate the "patent unreasonableness" standard, it clearly indicated so by using express language to that effect: see (i) the *MGA*, s 548(1)(b) ("A person affected by the decision of a council under section 547 may appeal to the Court of Queen's Bench if [the] decision is patently unreasonable); and (ii) the *Traffic Safety Act*, RSA 2000, c T-6, s 47.1(3) ("On an application for judicial review under subsection (2), the standard of review is patent unreasonableness").

> 19 In this context, I note that in *Khosa* at para 51, Binnie J, for the majority of the Supreme Court, observed that, "where the legislative language permits, the courts [will] *not* interpret *grounds* of review as *standards* of review" [*emphasis added*].

[47] Notwithstanding the reasoned position of Shelley J, I agree with Graesser J and Nixon J that section 539 indicates a sufficiently clear legislative intention that, when a bylaw is challenged based on the contents of the passing municipality's decision, courts show a higher level of deference than a reasonableness standard. This increased deference requires a patent unreasonableness standard of review.

[48] Although I am prepared to find that section 539 prescribes a patent unreasonableness standard of review, I must consider whether the substantive grounds alleged by the Applicants fall under the purview of section 539. Specifically, I must determine whether, as argued by the Applicants, the alleged grounds constitute a true question of jurisdiction. If so, the grounds fall outside the purview of section 539 and the patent unreasonableness standard does not apply: ***Nor-Chris*** at para 72, ***Gendre*** at paras 22-26, and ***Bergman*** at para 12.

ii. Do the substantive grounds raised constitute a true question of jurisdiction?

[49] If the Applicants are challenging the Bylaw on grounds that fall into the category of a true question of jurisdiction, the patent unreasonableness standard of review prescribed by section 539 does not apply. Instead, a correctness standard applies: ***Dunsmuir*** at para 59; ***Alliance Pipeline Ltd v Smith***, 2011 SCC 7 at para 26; ***ATA v Alberta (Information & Privacy Commissioner)***, 2011 SCC 61 at para 18 [***ATA***].

[50] The Applicants submit that they have raised a true question of jurisdiction. They argue that the statutory requirements in section 633(2) of the *MGA* act as preconditions to the Council's exercise of its power to approve an ASP under section 633(1). As the ASP did not include the statutorily required locations for drainage or irrigation, the Applicants assert that the Council lacked the jurisdiction to approve the ASP. In support of this position, the Applicants cite this Court's decision in ***Argyll Community League (1978) v Edmonton (City)***, 2009 ABQB 66 [***Argyll***].

[51] I do not agree with the Applicants' position for two reasons. First, the facts of this case can be distinguished from those in ***Argyll***. Second, Supreme Court of Canada jurisprudence gives direction that questions of jurisdiction are extremely rare.

[52] In ***Argyll***, the Court states that the issue of whether Council complied with a bylaw's preconditions when passing a motion is largely a question of law "involving questions of procedure and process which go to the proper exercise of jurisdiction": at para 36. In the case, the applicants contested the City of Edmonton's approval of the redevelopment of a recreation facility on the grounds that the City did not meet the preconditions required by bylaw. The applicable bylaw provides:

> It is a policy of this Plan that major public facilities shall not be constructed or expanded unless their location within the River Valley is deemed essential and approved by City Council.

Plainly read, this bylaw expresses a policy that prohibits the construction or expansion of public facilities **unless** they are deemed essential and approved by City Council.

[53] However, the facts of ***Argyll*** case are distinguishable from the case at hand. The bylaw in ***Argyll*** set preconditions that had to be met before the certain facilities could be built or expanded. In contrast, section 633(1) of the *MGA* unconditionally authorizes a council to adopt an ASP and section 633(2) provides what an ASP must contain. The *MGA* does not indicate that the contents of an ASP are a precondition to the council's authority to adopt the plan.

[54] Furthermore, Supreme Court of Canada jurisprudence has severely limited the circumstances in which a question will be considered a true question of jurisdiction.

[55] The Court in ***Dunsmuir*** at paragraph 59 explained the circumstances under which true questions of jurisdiction arise:

> "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be ultra vires or to constitute a wrongful decline of jurisdiction [citations excluded].

[56] The Court in ***ATA*** at paragraph 33 addressed the category of true questions of jurisdiction since ***Dunsmuir***:

> Experience has shown that the category of true questions of jurisdiction is narrow indeed. Since *Dunsmuir*, this Court has not identified a single true question of jurisdiction (see *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3 (S.C.C.), at paras 33-34; *Alliance Pipeline Ltd. v. Smith*, at paras. 27-32; *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, 2009 SCC 39, [2009] 2 S.C.R. 678 (S.C.C.), at paras. 31-36).

[57] Most recently, in ***Canada (Human Rights Commission) v Canada (Attorney General)***, 2018 SCC 31 at paragraph 41, Justice Gascon for the majority states:

> The reality is that true questions of jurisdiction have been on life support since Alberta Teachers. No majority of this Court has recognized a single example of a true question of vires, and the existence of this category has long been doubted. Absent full submissions by the parties on this issue and on the potential impact, if any, on the current standard of review framework, I will only reiterate this Court's prior statement that it will be for future litigants to establish either that the category remains necessary or that the time has come, in the words of Binnie J., to "euthanize the issue" once and for all (*Alberta Teachers*, at para. 88). [emphasis added]

[58] Guided by the Supreme Court of Canada's narrow characterization of true questions of jurisdiction, I find that the substantive grounds raised by the Applicants do not constitute a true question of jurisdiction. Section 633(1) of the *MGA* authorizes the Council to approve an ASP. This authority is not contingent on the ASP meeting the requirements listed in section 633(2). As the substantive grounds raised do not constitute a true question of jurisdiction, the standard of review of patent unreasonableness applies.

[59] I have reviewed the Applicants' argument that the Council lacks expertise in interpreting the *MGA* and that this is a question of central importance to the legal system. However, these arguments apply to the common law contextual analysis laid out in ***Dunsmuir***, and do not apply

because section 539 of the *MGA* governs the standard of review in this case. Therefore, I do not need to consider them.

4. What is the applicable standard of review for the procedural review?

[60] Canadian case law clearly establishes that the correctness standard applies when determining whether a decision-maker complied with the duty of procedural fairness: ***Khela v Mission Institution***, 2014 SCC 24 at para 79; ***Springfield Capital Inc v Grande Prairie (City) Subdivision and Development Appeal Board***, 2016 ABCA 136 at para 10.

5. Does the Bylaw's enactment meet the substantive and procedural standards of review?

i. Substantive review

[61] The Applicants have requested substantive review of the Bylaw on the grounds that, due to the Bylaw's non-compliance with sections 633(2)(a) and 636(1)(a) of the *MGA*, the Council lacked the jurisdiction to enact it. My above determinations have altered the availability and applicability of these grounds.

[62] First, the portion of the application based in the Council's alleged failure to meet the requirement in section 636(1)(a) is barred by section 537. Second, the Council's authority to approve an ASP is not in question, as it is not contingent on the ASP meeting the requirements listed in section 633(2). However, the Council's interpretation of section 633(2)(a) is reviewable on the grounds that it is patently unreasonable.

[63] The standard of patent unreasonableness lies at the most deferential end of the review spectrum. Although no longer a common law standard of review, its interpretation is still influenced by common law: ***Gateway Charters Ltd v Edmonton (City)***, 2012 ABCA 93 at para 21, citing ***Khosa*** at para 19.

[64] The Supreme Court of Canada defined the patent unreasonableness standard in ***Ryan v Law Society (New Brunswick)***, 2003 SCC 20 at paragraphs 52-53:

> [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" ... [citation excluded] ... A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.
>
> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" ... [citation excluded] ... the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

[65] When a tribunal is interpreting a legislative provision, as in the case at hand, the test is:

> ... was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?

: ***Toronto (City) Board of Education v OSSTF District 15***, [1997] 1 SCR 487, 1997 CanLII 378 at para 42, citing ***New Brunswick Liquor Corp v CUPE, Local 963***, [1979] 2 SCR 227 at 237.

[66] Section 633(2)(a) of the *MGA* requires that an ASP "must describe" the general location of public utilities, which include drainage and irrigation systems or works. When the Council approved the Providence ASP on December 8, 2015, it did not include a Master Drainage Plan, a Staged Master Drainage Plan, or a description of the general location of drainage or irrigation systems or works. As of the date of this hearing, a Master Drainage Plan was still not complete.

[67] The City argues that the Council's approval of the ASP is reasonable and consistent with the purpose, nature, and scope of ASPs within Alberta's planning process. It submits that ASPs are high-level planning documents that reflect broad planning and policy considerations, not technical specifications. The City emphasizes that section 633 of the *MGA* permits, not requires, a council to adopt an ASP when subdividing and developing an area of land and that, if adopted, an ASP does not require the municipality to undertake any of the projects referred to therein: *MGA*, s 637.

[68] The City submits that potential issues concerning storm-water drainage will be analyzed and further evaluated at later stages of the planning process. As evidence of its intention to address these issues, the City points to Sections 8.0 and 8.3 of the ASP. Section 8.0 includes specific policy statements relating to water servicing, sanitary servicing, and storm water management that contemplate further study and analysis. Section 8.3 requires the Providence Master Drainage Plan to be approved prior to Outline Plan/Land Use Amendment approval.

[69] While I appreciate the high-level planning purpose and non-binding nature of ASPs, as well as the high level of deference to be afforded to a tribunal's interpretation of its home statute, the Council's interpretation of section 633(1)(a) cannot be rationally supported by the language of the *MGA*.

[70] The *MGA* permits a council to adopt an ASP. It does not permit a council to decide what the ASP includes. Rather, the *MGA* lists what an ASP "must describe", including the general location of drainage and irrigation systems or works. Policy statements that contemplate further study and analysis of water servicing, sanitary servicing, and storm water management do not constitute a description of the general location of drainage and irrigation systems or works. A statement that the Master Drainage Plan will be required at a future date does not constitute a description of the general location of drainage and irrigation systems or works. The Legislature explicitly requires that an ASP include the descriptions listed in section 633(1)(a). An interpretation that treats the phrase "must describe" as "may describe" is clearly irrational and therefore patently unreasonable. As a result, the Bylaw approving the Providence ASP must be quashed.

ii. Procedural review

[71] Having decided that the Bylaw must be quashed on substantive grounds, I decline to undertake judicial review of the Bylaw on the procedural grounds raised by the Applicants.

6. Wetland ownership

[72] The Respondent briefly raised the issue of ultimate ownership of the Wetland, arguing that the Applicants' concerns regarding potential impacts on the Wetland should take into account that the Province of Alberta owns and is ultimately responsible for the stewardship of

the Wetland. As the Respondent provided no evidence to support a finding that the Wetland constitutes "water in the Province" pursuant to section 3(2) of the *Water Act*, RSA 2000, c W-3, or the "beds and shores" referred to in section 3(1) of the *Public Lands Act*, RSA 2000, c P-40, I decline to consider this line of argument.

G. Remedy

[73] The Applicants' request to quash the Bylaw is granted on the grounds that Council's interpretation of section 633(1)(a) of the *MGA*, and therefore its passing of the Bylaw, is patently unreasonable.

H. Costs

[74] If the parties are unable to agree on costs, they may bring the issue before me within 60 days of this judgment.

Heard on the 10th day of October, 2018.
Dated at the City of Calgary, Alberta this 22nd day of February, 2019.

W.P. Sullivan
J.C.Q.B.A.

Appearances:

John K. Phillips
for the Applicants

Henry Chan
for the Respondent

Court of Queen's Bench of Alberta

Citation: Kissel v Rocky View (County), 2020 ABQB 406

Date: 20200716
Docket: 1901 11027
Registry: Calgary

Between:

Crystal Kissel, Samanntha Wright and Kevin Hanson

Applicants

- and -

Rocky View County, also known as the Municipal District of Rocky View No. 44 and Alastair Hoggan, Chief Administrative Officer of Rocky View County

Respondents

Reasons for Decision
of the
Honourable Mr. Justice J.T. Eamon

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sanction is set aside, the compensation sanction must also be set aside. Counsel did not submit that the compensation sanction has become moot, or is not ongoing until October 20, 2020 or some later date pursuant to Council's discretion (built into that sanction) to change the fixed term.

(c) The removal, and representation and travel, sanctions impact the Appellants' reputations as elected officials. The public would likely think that the severity of the sanctions reflects grave misconduct and unwillingness of the target to comply with their obligations in future. The sanctions have an ongoing impact on the Applicants' reputations.

(d) In the case of the Applicants Wright and Hanson, the representation and travel sanction was imposed along with the staff communication sanction for writing the letter to the editor. These sanctions may need to be considered together to decide whether they are so grossly disproportionate that they are unreasonable under the highly deferential standard of review. The representation and travel sanction remains a live issue and is not hypothetical.

IV Review standard for procedural fairness issues

[38] The court decides as a matter of law the required standard of fairness (***Institute of Chartered Accountants of Alberta (Complaints Inquiry Committee) v Barry***, 2016 ABCA 354 at para 5; ***Ho v Alberta Association of Architects***, 2015 ABCA 68 at para 19, leave to SCC refused 36395 (April 20, 2015)), by applying the test in ***Baker v Canada (Minister of Citizenship and Immigration)***, 1999 CanLII 699, [1999] 2 SCR 817 at paras 21 to 28. However, depending on the line of inquiry, some deference may be needed; for example, on questions of fact (*ibid*). The ***Baker*** factors require the Court to consider the decision-maker's choices of procedure in assessing the required fairness.

[39] The Court in ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 summarized the ***Baker*** test as follows:

> [77] ... The duty of procedural fairness in administrative law is "eminently variable", inherently flexible and context-specific .... Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker*, at para. 21. In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: *Baker*, at paras. 23-27....

V Review standard for merits of decision

[40] In deciding the standard by which to review the merits of a decision of an administrative decision-maker such as Council, a Court starts with the presumption that the applicable standard is reasonableness (***Vavilov*** at para 16). This presumption can be rebutted, including where the legislature has indicated that it intends a different standard or set of standards to apply by using clear statutory language (*ibid* at paras 17, 33-35).

[41] The presumptive standard applies to the CAO's communication restrictions, if reviewable.

[42] A higher review standard applies to the resolutions of Council. Section 539 of the *Act* provides:

> 539 No bylaw or resolution may be challenged on the ground that it is unreasonable.

[43] Generally, Alberta case law interprets section 539 as a legislative prescription of the applicable review standard (***Nor-Chris Holdings Inc v Sturgeon (County)***, 2013 ABQB 184 at paras 63-70; ***Gendre v Fort Macleod (Town)***, 2015 ABQB 623 at paras 24-26, 59; ***Brodylo Farms Ltd v Calgary (City)***, 2019 ABQB 123 at para 47; ***Koebisch v Rocky View (County)***, 2019 ABQB 508 at paras 53-65; but see ***Bergman v Innisfree (Village)***, 2019 ABQB 326 at paras 24-27, 61).

[44] That standard requires a high degree of deference by the Courts, akin to the concept of patent unreasonableness. That standard no longer has general application in Canadian administrative law, but the concept is useful to understanding the higher degree of deference when a court conducts a review under section 539. The patent unreasonableness standard focussed on the magnitude and obviousness of the defect (***Dunsmuir v New Brunswick***, 2008 SCC 9 at para 40). ***Dunsmuir*** approved the following description from ***Law Society of New Brunswick v Ryan***, 2003 SCC 20 at paras 52-53:

> [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" . . . . A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.
>
> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" ... Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

[45] The "precise degree of deference" the reasonableness standard requires is "calibrated" according to general principles of administrative law or the context of the decision (***Canada (Citizenship and Immigration) v Khosa***, 2009 SCC 12 at para 19; ***Gateway Charters Ltd (Sky Shuttle) v Edmonton (City)***, 2012 ABCA 93 at paras 21, 23). A legislative stipulation of the patent unreasonableness standard indicates the Courts should "accord the utmost deference" to the decision-maker's decision (***West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)***, 2018 SCC 22, [2018] 1 SCR 635 at para 29). I agree with

Graesser J in ***Nor-Chris*** (at para 69) that the standard is best described for the purpose of the present review in ***Catalyst Paper Corp v North Cowichan (District)***, [2012] 1 SCR 5, 2012 SCC 2 at para 20: "... courts have refused to overturn municipal bylaws unless they were found to be 'aberrant', 'overwhelming', or if 'no reasonable body' could have adopted them".

[46] ***Vavilov*** reaffirms that the courts, in conducting reasonableness review, must consider both the reasoning process of the decision-maker and the outcome under review. It emphasized that the Court's jurisprudence "should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the *outcome* of the administrative decision under review." (*ibid* at para 87 [emphasis in original]). The Court observed at para 86:

> … It is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.
>
> [Emphasis in original]

[47] Where the decision-maker is required to give reasons, the following principle from ***Vavilov*** applies:

> [136] Where the duty of procedural fairness or the legislative scheme mandates that reasons be given to the affected party but none have been given, this failure will generally require the decision to be set aside and the matter remitted to the decision maker: see, e.g., *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 35. Also, where reasons are provided but they fail to provide a transparent and intelligible justification as explained above, the decision will be unreasonable. In many cases, however, neither the duty of procedural fairness nor the statutory scheme will require that formal reasons be given at all: *Baker*, at para. 43.
>
> [Emphasis is mine]

[48] The Applicants did not argue that Council was required to give reasons, and during oral submissions on June 9, 2020 Mr Niven QC stated Council is not required to give reasons.

[49] In situations where reasons are not required, the Court in ***Vavilov*** recognized two situations: (1) where the record and context permit the Court to deduce reasons or shed light on the basis for the decision, and (2) where the record and the context do not shed light on the basis for the decision. The Court stated:

> [137] Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst*; *Green*; *Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a

In the Court of Appeal of Alberta

Citation: Koebisch v Rocky View (County), 2021 ABCA 265

Date: 20210720
Docket: 1901-0311-AC
Registry: Calgary

Between:

Keith Koebisch and Harry Hodgson

Respondents
(Applicants)

- and -

Rocky View County, also known as the Municipal District of Rocky View No. 44

Appellant
(Respondent)

- and -

Summit Aggregates Limited, 14102066 Alberta Ltd., McNair Sand and Gravel Ltd., Buckley Ranch Aggregate Development Ltd., LaFarge Canada Inc.

Not Parties to the Appeal
(Intervenors)

The Court:

The Honourable Justice Frederica Schutz
The Honourable Justice Elizabeth Hughes
The Honourable Justice Kevin Feehan

Reasons for Judgment Reserved

Appeal from the Order by
The Honourable Justice J.T. Eamon
Dated the 16th day of September, 2019
Filed on the 11th day of October, 2019

(2019 ABQB 508, Docket: 1701 12053)

Reasons for Judgment Reserved

The Court:

I. Overview

[1] Rocky View County appeals the order of a chambers judge dated September 16, 2019 setting aside four County bylaws:

(a) Bylaw C-7585-2016 (Summit bylaw), passed July 11, 2017;
(b) Bylaw C-7588-2016 (McNair bylaw), passed July 25, 2017;
(c) Bylaw C-7583-2016 (LaFarge bylaw), passed July 25, 2017; and
(d) Bylaw C-7739-2017 (Summit Expansion bylaw), passed April 24, 2018.

[2] Each of those bylaws amended the County's Land Use Bylaw, C-4841-97.

[3] Keith Koebisch and Harry Hodgson are residents of the County who own land located on the same highway, Highway 567 near Range Road 40, and in the same areas as the lands affected by the bylaws. They opposed the bylaws and sought judicial review.

[4] Each bylaw redesignated lands from "Ranch and Farm District" to "Natural Resource Industrial District" to facilitate the development of gravel extraction. Each application for redesignation was accompanied by a Master Site Development Plan, as required by ss 15.6 and 29.8, and Appendix C, s 4 of the Rocky View County Plan, a municipal development plan under s 632(1) of the *Municipal Government Act*, RSA 2000, c M-26 (*MGA*).

[5] In setting aside the bylaws, the chambers judge concluded (2019 ABQB 508, para 10):

> Council had jurisdiction to decide whether to pass the bylaws. In respect of the July 2017 bylaws, it proceeded on seriously and obviously deficient MSDPs and failed to consider cumulative aspects of extraction in the area. In doing so, Council undermined the purposes of the County Plan and acted contrary to the objectives of good government under the *Act*. The outcome was patently unreasonable. Section 539 does not bar review of that matter. The April 2018 bylaw amends the July 2017 Summit bylaw. It is so closely connected to the earlier bylaw that it must be set aside. The Applicants did not demonstrate that the bylaws should be set aside for lack of procedural fairness.

[6] For the reasons below, the appeal is allowed.

II. Facts

[7] In 2014 the County began receiving redesignation and Master Site Development Plan applications from developers proposing land use redesignations from "Ranch and Farm District" to "Natural Resource Industrial District" to facilitate the development of gravel (aggregate) extraction.

[8] The developers in this case, Mountain Ash Limited Partnership and Summit Aggregates Ltd, McNair Sand and Gravel Ltd, and Lafarge Canada Inc, made such applications in 2016, 2017 and 2018. The original Summit redesignation and Master Site Development Plan applications before council on June 14, 2016 were "tabled sine die pending the completion of the aggregate resource management plan and any supplementary supporting information as deemed necessary by the County"[1].

[9] In March 2017, Summit requested that its application be decided by council despite non-completion of a delayed County aggregate resource management plan. The application continued on June 27, 2017, at which time the bylaw received first and second readings, the third and final reading being held July 11, 2017. On July 11, 2017, the McNair and Lafarge bylaws received first and second readings, the third and final readings being held July 25, 2017. Mountain Ash and Summit submitted further applications on August 25 and November 21, 2017 to expand their gravel operations as permitted by the Summit bylaw; first, second, and third readings were held April 24, 2018.

[10] On July 11, 2017, council did not approve the Master Site Development Plans submitted with the Summit, McNair or Lafarge applications. It instead passed five motions directing Administration to work collaboratively with the developers to revise the plans to identify consistent minimum standards to which all three sites would adhere, to identify joint measures to minimize and monitor cumulative impacts on the local area, including identifying mitigation strategies for affected properties within a mile and a half of the gravel pits, to review and adapt transportation access and egress to Highway 567, and to bring revised plans back for consideration prior to the municipal election of October 16, 2017.

[11] Council approved revised Master Site Development Plans with amendments, for the Summit, McNair, and LaFarge bylaws on September 26, 2017, and approved the Master Site Development Plan for the Summit Expansion bylaw on April 24, 2018, at the same time it approved that bylaw.

[12] Mr Koebisch and Mr Hodgson brought four separate Originating Applications challenging these bylaws on September 8 and December 19, 2017, and June 21, 2018. Those applications were

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[1] Despite the wording of that motion, it constituted a motion to postpone definitely: Henry M Robert III et al, *Robert's Rules of Order, Newly Revised*, 11th ed (Philadelphia: Da Capo Press, 2011), pp 179-190; or a motion to defer (Geoffrey H Stanford, ed, *Bourinot's Rules of Order*, 4th ed (Toronto: McClelland & Stewart, 1995), pp 51-52.

consolidated into this action by orders of April 24 and July 5, 2018. The judicial review application was held May 23 and 24, 2019, and reasons for judgment were delivered September 16, 2019.

III. Legislative and Municipal Provisions

[13] The relevant provisions of the *Act* are:

> 3 The purposes of a municipality are
> (a) to provide good government,
> (a.1) to foster the well-being of the environment,
> (b) to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality,
> (c) to develop and maintain safe and viable communities ... .
>
> …
>
> 536(1) A person may apply to the Court of Queen's Bench for
> (a) a declaration that a bylaw ... is invalid ... .
>
> …
>
> 539 No bylaw or resolution may be challenged on the ground that it is unreasonable.
>
> …
>
> 617 The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted
> (a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and
> (b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta,
>
> without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.
>
> …
>
> 632(1) Every council of a municipality must by bylaw adopt a municipal development plan.

[14] The relevant provisions of the County Plan are:

> 3.0 **PLAN ORGANIZATION AND PROJECT OVERVIEW**
>
> …
>
> *GOALS* are specific objectives and/or targets for individual policy sections that achieve the County's vision and principles.
>
> *POLICY* provides guidance to decision makers and the public throughout the life of the Plan. Policy provides direction and/or evaluation criteria that allow the County to achieve specific goals.
>
> …

SHALL: a directive term that indicates that the actions outlined are mandatory and therefore must be complied with, without discretion, by administration, the developer, the Development Authority and the Subdivision Authority.
SHOULD: a directive term that indicates or directs a strongly preferred course of action by Council, administration and/or the developer, but one that is not mandatory.
…
4.0 **THE PLANNING FRAMEWORK**
…
COUNTY PLAN: The County's principal statutory plan. It is the County's Municipal Development Plan prepared in accordance with the Municipal Government Act. The County Plan is adopted by bylaw and provides strategic growth direction, overall guidance for land use planning, and service delivery policy.
…
MASTER SITE DEVELOPMENT PLAN: A non-statutory plan that is adopted by Council resolution. A master site development plan accompanies a land use redesignation application and provides design guidance for the development of a large area of land with little or no anticipated subdivision ....
A master site development plan addresses … site design with the intent to provide Council and the public with a clear idea of the final appearance of the development.
…
15.0 **NATURAL RESOURCES**
Natural resource extraction is an important land use in the County that satisfies local, regional, and provincial resource needs. However, these activities may have significant impact on adjacent land uses and the environment. Aggregate (sand and gravel) ... extraction often cause community concern.
… A number of significant gravel resources are located in the county. Potential natural resource extraction impacts include: noise, air quality, truck traffic, aesthetics, and reclamation.
The County is responsible for approving land use and issuing development permits for all aggregate extractions … .

GOAL

- Support the extraction of natural resources in a manner that balances the needs of residents, industry, and society.

- Support the environmentally responsible management and extraction of natural resources.

POLICY

Aggregate Extraction

15.1 Minimize the adverse impact of aggregate resource extraction on existing residents, adjacent land uses, and the environment.

15.2 Encourage collaboration between the County, the aggregate extraction industry, and affected residents to develop mutually agreeable solutions to mitigate impacts of extraction activities.

…

15.6 Until such time as a County aggregate extraction policy is prepared, applications for aggregate extraction shall prepare a master site development plan that addresses the development review criteria identified in section 29.

…

Master Site Development Plans

…

29.8 A master site development plan for aggregate development shall address all matters identified in Appendix C, sections … 4.

…

Appendix C

4. **AGGREGATE MASTER SITE DEVELOPMENT PLAN SUBMISSIONS**

Applications for aggregate extraction shall include a master site development plan that addresses the following:

…

9. Identification of impacts to surrounding lands and mitigation strategies … .
10. Assessment of cumulative aspects of extraction activities in the area.

…

13. A technical summary of the proposal with supporting documentation that addresses:
    (a) transportation and access management (submission of a traffic impact assessment);
    …
    (e) noise and dust mitigation strategies and reports ….

IV. Grounds of Appeal

[15] The appellant County appeals on four grounds, contending the chambers judge erred:

1. in interpreting the *MGA* and the County Plan;

2. when applying the patent unreasonableness standard of review;

3. in proceeding to review the reasonability (or patent unreasonability) of the bylaws despite s 539 of the MGA; and

4. in failing to properly consider, in law, the Master Site Development Plans approved by resolution.

Further, the County submits this Court has the opportunity in this appeal to clarify conflicting case law with respect to s 539 of the *MGA*.

V. Appellate Standard of Review

[16] An appellate court must determine whether the chambers judge properly chose the correct standard of review and applied it correctly, a decision on which the appellate court affords no deference: ***Dr Q v College of Physicians and Surgeons of British Columbia***, 2003 SCC 19, para 43, [2003] 1 SCR 226; ***Agraira v Canada (Public Safety and Emergency Preparedness)***, 2013 SCC 36, para 45, [2013] 2 SCR 559; ***ARW Development Corporation v Beaumont (Town)***, 2011 ABCA 382, paras 25-27, 52 Alta LR (5th) 219.

[17] On appeal from judicial review, the appellate court in effect "steps into the shoes" of the chambers judge in reviewing the determination made by the decision-maker, such that the "appellate court's focus is, in effect, on the *administrative* decision" (emphasis in original): ***Merck Frosst Canada Ltd v Canada (Health)***, 2012 SCC 3, para 247, [2012] 1 SCR 23; ***Zenner v Prince Edward Island College of Optometrists***, 2005 SCC 77, paras 29-45, [2005] 3 SCC 645; ***Buterman v Greater St Albert Roman Catholic Separate School District No 734***, 2017 ABCA 196, paras 23-24, 54 Alta LR (6th) 256; ***Wheatland County v Federated Co-Operatives Limited***, 2019 ABCA 513, para 22.

VI. Analysis

[18] Although the chambers judge rendered his decision prior to the Supreme Court's decision in ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65, 441 DLR (4th) 1, ***Vavilov*** re-affirmed the court's earlier decisions in ***Catalyst Paper Corp v North Cowichan (District)***, 2012 SCC 2, [2012] 1 SCR 5; ***Green v Law Society of Manitoba***, 2017 SCC 20, [2017] 1 SCR 360; and ***West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)***, 2018 SCC 22, [2018] 1 SCR 635 **[*West Fraser Mills*]**: see ***Vavilov***, paras 82, 89, 99, 105, 108, 137, 273, 292 and 312.

[19] In ***Catalyst***, the court affirmed that in the context of municipal bylaws, "reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable" and that courts will not "overturn municipal bylaws unless they are found to be 'aberrant', 'overwhelming', or if 'no reasonable body' could have adopted them", paras 19, 20.

[20] McLachlin CJ writing for the Court said, para 24:

> It is thus clear that courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws. The applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside. The fact that wide deference is owed to municipal councils does not mean that they have *carte blanche*.

[21] In ***West Fraser Mills***, at paras 8, 9, the Supreme Court affirmed it had adopted "a flexible standard of reasonableness in situations where the enabling statute grants a large discretion to the subordinate body to craft appropriate regulations"; further, reasonableness review "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime".

[22] ***Vavilov*** did not change the applicable judicial review standard; if anything, ***Vavilov*** reinforced the proper application of the reasonableness standard of review: see also ***1120732 BC Ltd v Whistler (Resort Municipality)***, 2020 BCCA 101, para 51; ***1193652 BC Ltd v New Westminster (City)***, 2021 BCCA 176, para 60.

[23] Section 539 of the *MGA* applied to County Council's decisions to enact the impugned bylaws. This section is part of the statutory context, and wider margin of appreciation, that must be taken into account by a reviewing judge when there is a challenge to a bylaw. Section 539 prevents challenges to a bylaw on the *ground* of unreasonableness. It does not articulate the *standard* of review: ***Bergman v Innisfree (Village)***, 2020 ABQB 661, paras 108-114. Whether a bylaw is wise is for a municipal council to decide, not the courts: Frederick A Laux & Gwendolyn Stewart-Palmer, *Planning Law and Practice in Alberta*, 4th ed (Edmonton: Juriliber, 2019) (loose-leaf), 16-38.

[24] As Professor Paul Daly, in "*Patent Unreasonableness* after *Vavilov*" (January 13, 2021), Ottawa Faculty of Law Working Paper No 2021-04, p 7, and Professor John Mark Keyes, "*Judicial Review of Delegated Legislation: The Long and Winding Road to Vavilov*" (June 18, 2020), Ottawa Faculty of Law Working Paper No 2020-14, p 6, n 41 provide, "[r]eviewing courts in Alberta could simply take s. 539 as forming part of the applicable governing statutory scheme and indicating that municipalities have a wider margin of appreciation when making decisions to which s. 539 applies": Daly, 7-8.

[25] More generally, the purposes of a municipality are to provide good government, foster the well-being of the environment, provide services, facilities or other things that are necessary or desirable, and develop and maintain safe and viable communities: *MGA, s* 3. These are accomplished through the preparation and adoption of plans to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and to maintain and improve the quality of the physical environment: *MGA*, s 617.

[26] Municipal development plans provide broad direction and as statutory plans pursuant to s 616(dd) of the *MGA*, are policy documents which state goals but may not regulate in a prescriptive manner: Laux & Stewart-Palmer, 5-6 – 5-18. It is open to a reviewing court, therefore, to conclude that a certain development project is not illegal merely because it is at variance with a municipal development plan. However, this approach must "not be taken too far lest statutory plans be ineffectualized": Laux & Stewart-Palmer, 5-20 – 5-21.

[27] A Master Site Development Plan, on the other hand, is a non-statutory plan which contains relevant planning considerations, while not having the status and legal effect of a statutory plan: see ***Dalhousie Station Ltd v Calgary (City)*** (1991), 83 Alta LR (2d) 228, para 27, 123 AR 203 (QB).

[28] At all stages of its planning function, a municipal council continues to exercise discretion and to be bound by its overarching obligation to balance private rights and the long-term public interest within the municipality: ***Hosford v Strathcona County***, 2019 ABQB 871, para 121, 95 MPLR (5th) 194.

[29] However, the County's contention that its development plan does not require *any* mandatory action on its part because s 637 of the *MGA* provides, "[t]he adoption by a council of a statutory plan does not require the municipality to undertake any of the projects referred to in it", is misplaced. This appeal does not relate to any proposed project the County failed to undertake.

[30] The County also argued that ***Prairie Crocus Ranching Coalition Society v Cardston (County of)***, 2002 ABCA 189, 6 Alta LR (4th) 216 stands for the broad proposition that despite containing mandatory provisions, a development plan is merely aspirational and non-binding. Rather, ***Prairie Crocus*** held only that s 633 makes the *adoption* of an area structure plan optional; nothing more can be drawn from the case.

[31] Here, the County's development plan includes a section entitled, "Organization and Project Overview, s 3.0" which expressly provides that whenever the Plan uses the word "shall", the mentioned actions "are mandatory and therefore must be complied with, without discretion."

[32] The County's development plan further recognizes that natural resource development, and in particular aggregate (sand and gravel) extraction, "may have significant impact on adjacent land uses and the environment." With respect to aggregate extraction, the County's development plan imposes a mandatory requirement that applicants for aggregate extractions "shall include" a Master Site Development Plan. It also provides, in the mandatory language of s 29.8, that a Master Site Development Plan "shall address" the matters identified in Appendix C, ss 1 and 4.

[33] Section 4 of Appendix C, in turn, requires a Master Site Development Plan to address 17 distinct topics, including "technical requirements and supporting information", and, *inter alia*, an "assessment of cumulative aspects of extraction activities in the area"; "impacts to surrounding lands and mitigation strategies"; and a technical summary of the proposal "with supporting documentation that addresses: a) transportation and access management (submission of traffic

impact assessment); b) stormwater management; (c) ground and surface water hydrological analysis; d) environmental overview (submission of a biophysical overview); (e) noise and dust mitigation strategies and reports; and (f) erosion and weed management control.

[34] While a municipal development plan generally is to be interpreted in a flexible, broad, and aspirational manner, where, as here, the County chose to impose certain mandatory requirements in its overarching municipal development plan, those requirements "must be complied with, without discretion." Given the County's self-imposed mandatory requirements in its development plan, in the context of approving a redesignation application relating to aggregate extraction, as was cautioned by Laux & Stewart-Palmer, 5-20 –5-21, applying an unduly flexible approach to interpreting it would make it ineffectual.

[35] While s 15.6 of the County Plan falls under the subtitle "Policy", and s 29.8 and Appendix C both fall under the title "Technical Requirements and Submissions", in our view, the explicit language must properly be interpreted in the entire context of the *MGA*, in its grammatical and ordinary sense, harmoniously with its scheme, the object of the *MGA*, and the intention of the Legislature: ***Rizzo & Rizzo Shoes Ltd (Re)***, [1998] 1 SCR 27, para 21, 154 DLR (4th) 193; ***Montréal (City) c 2952-1366 Québec Inc***, 2005 SCC 62, para 10, [2005] 3 SCR 141; thus, "shall" means what the County Plan says it means: "must be complied with, without discretion".

[36] We conclude it was a mandatory requirement that a redesignation application for aggregate extraction in the County include a Master Site Development Plan, to address the impact on surrounding lands and mitigation strategies, assess the cumulative aspect of extraction activities, and address transportation, access management, and noise and dust mitigation strategies.

[37] However, the municipality reasonably followed the mandatory requirements of the County Plan. The next question, whether its decisions to enact the bylaws were aberrant, overwhelming, or decisions that no reasonable municipality would have taken, must be answered "no".

[38] The Master Site Development Plan for the Summit application was before County Council June 14, 2016; July 11 and September 26, 2017. The Master Site Development Plans for the McNair and Lafarge applications were before County Council July 11 and September 26, 2017. The Master Site Development Plan for the Summit Expansion application was before County Council April 24, 2018. All of this occurred at the redesignation stage of the process, which could not conclude until passage of the redesignation bylaws and approval of the required Master Site Development Plans.

[39] On July 11, 2017, County Council passed five motions with respect to the Master Site Development Plans to ensure all complied with the requirements of the County development plan. Eventually, having satisfied itself by the respective approval dates that each Master Site Development Plan was then in compliance with the County development plan, County Council approved each of them. Further, on the dates the Master Site Development Plans were approved, it does not appear anyone was of the view the Master Site Developments Plans remained deficient.

[40] While the participatory interests of the respondents may have been better served had County Council withheld passage of the bylaws until approval of the related Master Site Development Plans, and arguably it was inappropriate sequencing for the Summit, McNair and Lafarge bylaws to pass before their Master Site Development Plans were approved, the requirements of the County Plan were met.

[41] The respondents were aware the Master Site Development Plans needed to be addressed collaboratively with the County's administration for multiple improvements; this occurred. The sequence of events did not prejudice the respondents. We decline to quash the bylaws on this basis, leaving open for another day the question whether similar sequencing in a different factual matrix might underpin prejudice.

[42] It is not the role of this Court to weigh the policy choices or social, economic, or political factors that were before council.

[43] We conclude the decisions of the Rocky View County Council were transparent, intelligible and justified. Despite what a given judge or court may envision as being in the best interests of the County, the bylaws cannot be challenged on the ground of unreasonableness.

VII. Disposition

[44] The appeal is allowed, the chambers judge's decision is set aside, and the following bylaws are declared valid:

(a) Bylaw C-7585-2016 (Summit bylaw), passed July 11, 2017;
(b) Bylaw C-7588-2016 (McNair bylaw), passed July 25, 2017;
(c) Bylaw C-7583-2016 (LaFarge bylaw), passed July 25, 2017; and
(d) Bylaw C-7739-2017 (Summit Expansion bylaw), passed April 24, 2018.

Appeal heard February 10, 2021

Memorandum filed at Calgary, Alberta
this 20th day of July, 2021

Authorized to sign for: Schutz J.A.

Authorized to sign for: Hughes J.A.

Feehan J.A.

Appearances:

M.B. Niven, Q.C./M.A. Custer
for the Respondents

J.H.J. Gescher/ B.A. Dzioba
for the Appellant

Court of Queen's Bench of Alberta

Citation: Terrigno v Calgary (City), 2021 ABQB 41

Date: 20210115
Docket: 2001 01854
Registry: Calgary

Between:

Mike Terrigno

Applicant

- and -

The City of Calgary

Respondent

Corrected judgment: A corrigendum was issued on May 5, 2021; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Mr. Justice P.R. Jeffrey

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[1] This application considers whether certain powers were validly sub-delegated by the City of Calgary to its City Solicitor. The Applicant says Calgary's City Council sub-delegated the powers at issue by resolution, therefore the sub-delegation is invalid. The Respondent says the powers were sub-delegated by bylaw and are therefore valid.

Background

[2] The specific powers at issue (collectively, the "**Impugned Powers**") speak of the City Solicitor's sole discretion to decide:

> (i) whether Members of Council, or other persons appointed by them, may be indemnified by the City for any liability, losses or expenses arising out of performing their public duties in good faith (the "**Indemnity Power**"); and
>
> (ii) whether the City will pay any reasonable external legal fees such indemnified Council Member or other person might incur (the "**Reimbursement Power**").

[3] Most of the City's submissions appear to operate on the belief that only the Reimbursement Power is challenged by the Applicant. I address this in more detail below under the heading "Scope of the Review". For purposes of these background comments, I refer to both the Impugned Powers.

[4] The Applicant says City Council sub-delegated the Impugned Powers to the City Solicitor as part of some amendments it made to City of Calgary Council Policy CC010 (the "**Amendments**"). He says the Impugned Powers portion of the amendments are invalid because they were approved by Council resolution, not by bylaw. He says that under the Alberta *Municipal Government Act*, RSA 2000, c M-26, (the "***MGA***") they could only be sub-delegated by bylaw.

[5] As an aside, I was told the difference between a City Council approval by resolution and a City Council approval by bylaw is significant, since the process to create a bylaw is more robust and accords opportunity for public participation and comment before approval. The Impugned Powers amendments, for example, might attract such public participation since they may affect: the private pecuniary interests of Members of Council, the price a citizen may have to pay after serving in a public office or appointed civic role in facing law suits naming them in their personal capacity, and the possible deterrent effect the absence of such indemnity may have upon citizens' willingness to serve in such public roles in the future.

[6] The specific wording of the part of the Amendments that the Applicant challenges, that City Council approved by resolution, say:

> In situations in which the City Solicitor has determined that Council members or Counsel citizen appointees to Council established Boards, Commissions, Authorities and Committees should receive the benefit of these policies, if external legal fees and disbursements are incurred, the City Solicitor has the authority to pay external legal fees and disbursements which, in the sole discretion of the City Solicitor, are reasonable;

(in this decision I refer to those "Counsel citizen appointees to Council established Boards, Commissions, Authorities and Committees" as "**Citizen Appointees**").

[7] The City agrees with the Applicant that Council may only sub-delegate the Impugned Powers to the City Solicitor by way of bylaw, not by resolution. However, the City says that the Impugned Powers were not sub-delegated by the Amendments. The City says they were sub-delegated to the City Solicitor by Council years before the Amendments, by bylaw 48M2000 (the "**Designation Bylaw**"). The City says the resolution containing the Amendments merely "shapes and helps define" the earlier sub-delegation in the Designation Bylaw.

[8] The City says the Council approved a valid resolution, because the Designation Bylaw sub-delegated the Impugned Powers to the City Solicitor many years prior to the Amendments. It is not at all evident from the Certified Record of Proceedings that that was the City Council's belief or understanding when approving the resolution,[1] but such a prior sub-delegation to the City Solicitor by bylaw is the way the City says the Impugned Powers portion of the Amendments should survive this review. The City's position on this review necessarily entails that the City Council interpreted the Designation Bylaw as sub-delegating the Impugned Powers to the City Solicitor long before the Amendments resolution.

[9] The City says the Impugned Powers are within the scope of the Designation Bylaw that sub-delegated powers to the City Solicitor; the Applicant says they are not within the scope of the Designation Bylaw. That is the core of this dispute. It is the City Council's interpretation of the Designation Bylaw, implicit in its resolution approving the Amendments, that is being reviewed, under the appropriate standard of review.

[10] The Designation Bylaw states:

> **WHEREAS** Section 210 of the *Municipal Government Act* allows Council to create positions of designated officer and specify the powers, duties and functions of that officer;
>
> **AND WHEREAS** the City Solicitor and General Counsel has a professional responsibility to act in the best interests of the municipality, which is governed by its Council;
>
> **AND WHEREAS** the City Solicitor and General Counsel reports in a professional capacity to Council and Council wishes to establish the position of City Solicitor and General Counsel as a designated officer;
>
> **NOW THEREFORE THE COUNCIL OF THE CITY OF CALGARY ENACTS AS FOLLOWS:**
>
> 1. Council hereby establishes the position of City Solicitor and General Counsel as a designated officer.
>
> 2. The City Solicitor and General Counsel shall have the following powers, duties and functions:
>
> A. to initiate, prosecute, maintain or defend any action, claim or other proceeding at law or in equity deemed in the best interest of The City of Calgary;

[1] Interestingly, the Designation Bylaw was not included in the Certified Record of Proceedings, therefore it must not have been placed before the City Council in the course of Council Members' discussion on the resolution. Further, the Designation Bylaw did not arise during the City Solicitor's explanatory comments to the Council Members. The City Clerk certifying to the completeness of that Certified Record said there was not "anything else in our possession relevant to the" resolution, therefore at the time of the assembly of the Record for this Court's review, the City Clerk did not consider the Designation Bylaw to be relevant to the Amendments resolution.

B. to settle any action, claim or other proceeding provided the amount does not exceed $250,000.00;

C. to retain outside counsel when the City Solicitor and General Counsel deems it to be in the best interests of The City of Calgary;

D. to report to Council with respect to any legal matter where in the City Solicitor and General Counsel's independent judgement a Council decision is necessary.

3. The City Solicitor and General Counsel shall, subject to Subsection 2(D), report to the City Manager.

3.1 The City Clerk and the Chief Security Officer shall be subject to the supervisor of and accountable to the City Solicitor and General Counsel.

4. The City Solicitor and General Counsel may further delegate any of the authority given by this Bylaw.

5. This Bylaw comes into force on the day it is passed.

[11] Mr. Terrigno does not argue in this application that the Designation Bylaw is invalid. He says the Impugned Powers are outside its scope and, therefore, their inclusion in the Amendments resolution is not valid, since in result the Amendments would have the effect of sub-delegating those Powers by resolution not bylaw. In this application Mr. Terrigno does not challenge the merit of the policy of the City indemnifying or the City reimbursing legal costs. He challenges the legality of the way the City proceeded to realize that policy.

[12] The Applicant commenced this action by way of judicial review on February 3, 2020, in respect of the Amendments approved March 14, 2016. The Designation Bylaw was approved December 11, 2000, and amended at various times since, most recently May 30, 2017. No issue was raised that the Applicant is out of time either for the declaration he requests in his prayer for relief, or to proceed by judicial review (see R 3.15, *Alberta Rules of Court*, AR 124/2010 as amended; s 537, *MGA*). Accordingly, I have not considered or ruled on whether the Applicant is out of time to bring this application.

Issues

[13] I address the Application under the following outline:

1. Standing
2. Standard of review
3. Meaning of the standard
4. Scope of the review
5. Conducting the review
6. Implications of the review

Analysis

1. Standing

[14] I conclude that Mr. Terrigno has standing to bring this application, for the following reasons.

[15] The test for public interest standing was summarized in *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, at para 37. It states:

> In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious issue to be tried; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts [*case citations omitted*].

[16] The three factors in the test are not to be treated as a check list, but as "interrelated considerations to be weighed cumulatively, not individually, and in light of their purpose" (*Downtown Eastside Workers*, at para 36). They are to be applied "purposively and flexibly" (at para 37).

[17] The Supreme Court of Canada summarized the test for the purposes of a constitutional case (*Downtown Eastside Workers*, at para 1). The Alberta Court of Appeal applied this test in a non-constitutional case (*Zoocheck Canada Inc v Alberta (Minister of Agriculture and Forestry)*, 2019 ABCA 208). Therefore, it has broader application than just to constitutional cases.

[18] In applying that test, I am persuaded that Mr. Terrigno has raised a genuine issue warranting the Court's attention. Given that the issue affects the validity of a decision made by persons elected to public office affecting their own interests, given that it reviews whether their approach to the use of public funds to their personal advantage was lawful, and given that the ultimate outcome of the issue may affect the willingness of other citizens to serve in public office, it is a serious and an important issue.

[19] If I deny Mr. Terrigno standing, there is a very real risk the serious issue he raises would not come before the Court in the future.

[20] I note that Mr. Terrigno resides in and owns property within the geographic boundaries of the City of Calgary. As a result, he is an elector of City Council and is obliged to pay property taxes to the City. He is as directly affected as any other resident elector and ratepayer.

[21] Further, Mr. Terrigno has a genuine interest in the outcome of this challenge. He is plaintiff in an outstanding civil suit against a Member of Council. While he may not like the defendant Council Member perhaps avoiding paying any of her legal costs, or her being relieved of the pressure that having to pay legal costs may bring to her conduct of their litigation, if he succeeds in his lawsuit he likely prefers that any City indemnity for a damage award in his favour be valid.

[22] Finally, judicial review is a reasonable and effective way to bring the matter before the Court. The conduct of a municipality is subject to judicial review (*Baker v Rural Municipality of Sherwood No 159*, 2015 SKQB 301).

[23] The *MGA* permits a challenge to the validity of a bylaw or resolution by application for declaration (s 536). But that is not prescriptive, just permissive. Commencing the challenge by judicial review is not prohibited nor is it inappropriate. Judicial review on an existing record is also an efficient way to bring the underlying public interest concerns before the Court; the core issue is a matter of statutory interpretation which requires no process for adducing and testing evidence.

[24] These three factors all militate in favour of the Court granting Mr. Terrigno standing.

[25] Regrettably, the City first revealed it was challenging Mr. Terrigno's standing in its response brief. The City chose to remain silent about this position throughout the parties' communications between commencement of the Application and the filing of its response brief. It chose to spring the challenge on the self-representing Applicant only *after* his opportunity to address the matter up front had passed and the oral hearing was imminent.

[26] The City said orally to the Court that it was not bringing any motion on the issue. This was semantic only. The City raised the matter in its brief. The City did not support Mr. Terrigno having standing and suggested his standing was "questionable at best". The City argued Mr. Terrigno had an ulterior motive not a "genuine interest". The City spoke of what the Court "must consider". Clearly the City was urging the Court to deny Mr. Terrigno standing. Clearly Mr. Terrigno had to scramble to address the surprise issue when appearing in person. Clearly the Court was being called upon to rule on the issue.

[27] I also note that the City did not similarly raise, 'merely for the Court to be aware', any issue as to its own standing. The City's lawyer did not seek leave to address the scope of its decision under review (the Designation Bylaw) before doing so. The City's lawyer did not raise the question of whether I should exercise my discretion to grant the City standing to defend its interpretation of its own bylaw and, if so, whether the scope of its standing to do so should be subject to any limits (see *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 at paras 41–59). Even though in this case the Court was highly likely to grant permission, it should not have been presumed.

2. Standard of Review

[28] The standard of review in this case is reasonableness, for the following reasons.

[29] The standard of review in a judicial review is determined by ascertaining the legislature's intended degree of deference to be accorded by courts reviewing discretionary decisions of the tribunal it created. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, said that reasonableness is presumed in all cases to be the legislative intent, unless the rule of law requires a correctness standard (at para 53) or the legislature indicates that a different standard should apply (at para 33).

[30] Neither of those exceptions applies here:

a) Mr. Terrigno's ground of challenge does not engage the rule of law. It does not raise a constitutional question, a general question of law of central importance to the legal system as a whole, or a question regarding the jurisdictional boundaries between two or more administrative bodies, or in any other way engage the rule of law.

b) Mr. Terrigno's ground of challenge also does not trigger anything in the *MGA* indicating that a standard different than reasonableness should apply. A legislature may indicate that a standard other than reasonableness should apply in either of two ways: first, it may "explicitly prescribe through statute what standard courts should apply" or, second, it may provide "for a statutory appeal mechanism from an administrative decision maker to a court" (both quotes from *Vavilov*, at para 33). The *MGA* does not explicitly prescribe the intended standard of review of a bylaw, nor does it dictate any appeal to a court for a challenge to the scope of a bylaw.

Therefore, I am to presume the Alberta Legislative Assembly (the "**Legislature**") intended that I apply the reasonableness standard when reviewing the City of Calgary's interpretation of its Designation Bylaw.

[31] Further, the ground of Mr. Terrigno's challenge is an issue of statutory interpretation – City Council's interpreting its Designation Bylaw as having already sub-delegating the Impugned Powers to the City Solicitor. *Vavilov* said that even when the administrative decision maker is interpreting legislation that defines the scope of its own jurisdiction in a manner that exceeds what the legislature intended, which under *Dunsmuir* was referred to as a possible "true question of jurisdiction" attracting a correctness standard, review on the reasonableness standard "properly applied" is appropriate (*Vavilov*, at para 109). That is, now all questions of statutory interpretation by the administrative decision maker are reviewed on the reasonableness standard unless the exceptions in paragraphs 29 and 30 above apply.

[32] Some Alberta courts have interpreted section 539 of the *MGA* as expressly prescribing the standard to be applied by a court reviewing a municipal council bylaw or resolution (*Nor-Chris Holdings Inc v Sturgeon (County)*, 2013 ABQB 184; *Gendre v Fort Macleod (Town)*, 2015 ABQB 623; *Kozak v Lacombe (County)*, 2017 ABCA 351; *Brodylo Farms Ltd v Calgary (City)*, 2019 ABQB 123; *Ponoka Right to Farm Society v Ponoka (County)*, 2020 ABQB 273; *Kissel v Rocky View (County)*, 2020 ABQB 406). Section 539 states:

> No bylaw or resolution may be challenged on the ground that it is unreasonable.

[33] With respect, I disagree with those cases' conclusion that this section of the *MGA* expresses the Legislature's intended degree of deference to be accorded by courts in a judicial review of a resolution or bylaw.

[34] In *Kozak*, the Alberta Court of Appeal said the effect of section 539 is to require reviewing courts to apply the correctness standard. Its comments on the point were brief, as follows from paragraph 19:

> There is some disagreement among appellate courts about the standard of review applicable to subordinate enactments. ... We need not enter that debate in this appeal because s 538 [*sic*] of the *MGA* expressly excludes reasonableness as a

> ground for reviewing municipal bylaws: "No bylaw may be challenged on the ground that it is unreasonable." Accordingly, the standard of review must be correctness.

[35] In addition to that decision of the Court of Appeal, some Queen's Bench decisions also concluded that section 539 constituted the express intention of the Legislature. However, they interpreted the section as dictating not a correctness standard but the "patently unreasonable" standard, or a degree of deference akin to patent unreasonableness, such as "reasonableness with great deference" (*Nor-Chris Holdings Inc* at para 72; *Gendre* at paras 24, 58; *Brodylo Farms* at paras 42–48; *Ponoka* at paras 6–13; *Kissel* at paras 43–44).

[36] In my view section 539 does not express the Legislature's intended standard of review in a judicial review of a resolution or bylaw. I reach this conclusion for the following reasons.

[37] First, with respect, those decisions conflate a ground of review with a standard of review. Section 539 addresses the former not the latter. In *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 51, the Supreme Court of Canada acknowledged the difference between the two (emphasis in original):

> […] a legislature has the power to specify a standard of review, as held in [*R v Owen*, 2003 SCC 33], if it manifests a clear intention to do so. However, where the legislative language permits, the courts (a) will *not* interpret grounds of review as standards of review...

Accordingly, I agree with the approaches to section 539 in the following cases, in that they do not regard it as addressing the Legislature's expectation as to standard of review: *Northland Material Handling Inc v Parkland (County)*, 2012 ABQB 407 at paras 35–43; *Bulger v Rocky View (County)*, 2013 ABQB 603 at para 47; *Bergman v Innisfree (Village)*, 2018 ABQB 326 at para 24; and *Bergman v Innisfree (Village)*, 2020 ABQB 661 at paras 108–114.

[38] Second, the very next section of the *MGA* identifies additional "grounds" that cannot be relied upon in challenging a bylaw or resolution, reinforcing the inference that the reference to "unreasonableness" in section 539 is not to a standard of review but to a basis for a challenge. Section 540 states (underlining added):

> No bylaw, resolution or proceeding of a council and no resolution or proceeding of a council committee may be challenged <u>on the ground that</u>
>
> (a) a person sitting or voting as a councillor
>
> (i) is not qualified to be on council,
>
> (ii) was not qualified when the person was elected, or
>
> (iii) after the election, ceased to be qualified, or became disqualified,
>
> (b) the election of one or more councillors is invalid,
>
> (c) a councillor has resigned because of disqualification,
>
> (d) a person has been declared disqualified from being a councillor,
>
> (e) a councillor did not take the oath of office,

> (f) a person sitting or voting as a member of a council committee
>
> (i) is not qualified to be on the committee,
>
> (ii) was not qualified when the person was appointed, or
>
> (iii) after being appointed, ceased to be qualified, or became disqualified,
>
> or
>
> (g) there was a defect in the appointment of a councillor or other person to a council committee.

[39] Further reinforcing the inference that the reference to "unreasonableness" in section 539 is not to a standard of review but to a basis for a challenge, in section 548(1) of the *MGA* the Legislature made explicit the standard of review on an appeal from a decision of a council under section 547 (*Gateway Charters Ltd. (Sky Shuttle) v Edmonton (City)*, 2012 ABCA 93 at para 9). Section 548(1) of the *MGA* says:

> 548(1) A person affected by the decision of a council under section 547 may appeal to the Court of Queen's Bench if
>
> (a) the procedure required to be followed by this Act is not followed, or
>
> (b) the decision is patently unreasonable.

[40] These other sections of the *MGA* all compel the conclusions that the Legislature knows how to make explicit its expectation on the standard of any court review and that the use of the word "unreasonable" in reference to a ground of review in section 539 is not about a standard of review.

[41] Third, I find it difficult to conceive that this "on the ground that it is unreasonable" wording, and the wording like it in the series of predecessor enactments to the *MGA* going back over 75 years, represents the intention of the Legislature as to the standard of review, when that "ground that it is unreasonable" type of wording entered the predecessor legislation decades before Canadian administrative law first started recognizing such categories of judicial deference, like correctness, reasonableness simpliciter and patent unreasonableness.

[42] The predecessor wording was carried over into the *MGA*, SA 1968, c 68, s 111, from the *City Act*, SA 1951, c 9, s 269. The predecessor wording remained constant in both statutes (underlining added):

> A by-law or resolution passed by a council in the exercise of any of the powers conferred and in accordance with this Act, and in good faith, is not open to question, nor shall it be quashed, set aside or declared invalid, either wholly or partly, <u>on account of the unreasonableness</u> or supposed unreasonableness of its provisions or any of them.

Prior to that 1951 statute, which consolidated into a single statute the charters of seven Alberta cities, virtually identical wording was contained in the charter statutes of both Calgary and

Edmonton (*An Act to amend The Acts and Ordinances constituting the Charter of the City of Calgary*, SA 1945, c 73, s 13, and *An Act to amend the Acts constituting The Edmonton Charter and to validate certain by-laws authorizing the borrowing of money*, SA 1936, c 106, s 12).

[43] Almost half a century later the now familiar categories of deference on judicial review developed in Canadian administrative law, through cases such as *Canadian Union of Public Employees, local 963 v New Brunswick Liquor Corp*, [1979] 2 SCR 227; *Union des Employés de Service, Local 298 v Bibeault* [1988] 2 SCR 1048; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, *Dunsmuir v New Brunswick*, 2008 SCC 9 and now *Vavilov*.

[44] Fourth, this predecessor "on account of" wording, now phrased as "on the ground of", reflected the then state of municipal law, that municipal decisions were not to be challenged in court for displaying unreasonable policy choices, though other grounds of unreasonableness challenge remained permissible. The case frequently referred to as reflecting, if not leading, this change is *Kruse v Johnson*, [1898] 2 QB 91, where at pp 99-100 Lord Russell of Killowen, CJ wrote (underlining added):

> […] I think courts of justice ought to be slow to condemn as invalid any by-laws … on the ground of supposed unreasonableness. … I do not mean to say that there may not be cases in which it would be the duty of the court to condemn by-laws made as invalid because unreasonable. <u>But unreasonable in what sense</u>? If, for instance, they were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent, or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges.

[45] Fifth, more recently, as the current era of categories of judicial deference to administrative tribunals was taking shape, the law still recognized these types of permissible and impermissible challenges to bylaws based on *grounds* of unreasonableness. For example, the Supreme Court of Canada in *R v Bell*, [1979] 2 SCR 212, found that the distinction expressed in *Kruse*, between different grounds of unreasonableness, still exists. At p 223 the Court held:

> In view of the many possible inequitable applications of the definition of "family" which I have mentioned above, I am of the opinion that the by-law in its device of adopting "family" as being the only permitted occupants of a self-contained dwelling unit comes exactly within Lord Russell's words as to be found to be "such

> oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men" and, therefore, as Lord Russell said, the legislature never intended to give authority to make such rules and the device of zoning by reference to the relationship of occupants rather than the use of the building is one which is *ultra vires* of the municipality under the provisions of *The Planning Act*.

[46] In *Bell* a by-law was challenged as *ultra vires* the municipality. In force at the time of the challenge was a section of *The Municipal Act*, RSO 1970, c 284, which read identically to the Alberta *MGA* then in force and as quoted above. It was at section 241(2), stating:

> A by-law passed by a council in the exercise of any of the powers conferred by and in accordance with this Act, and in good faith, shall not be open to question, or be quashed, set aside, or declared invalid, either wholly or partly, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them.

My point is simply that the term "unreasonableness" in section 539 of the *MGA* is not now, as it was not then through the middle decades of the last century, a reference to a standard of review as contemplated by *Vavilov*. I am not saying that section 539 is not *relevant* to the determination of the Legislature's intended standard of court review of a resolution or bylaw, but that it is not expressly dictating that standard. It is doing something quite different by that section.

[47] In any event, the Alberta Court of Appeal's conclusion at paragraph 19 in *Kozak*, that section 539 dictates a standard of review of correctness, is no longer binding on me. I am "to determine what standard is appropriate" by looking first to the general "holistic" framework in *Vavilov* (*Vavilov*, at para 143). Prior judicial precedents offer only "helpful guidance" on "subsidiary questions" about the appropriate standard of review (*Vavilov*, at para 143).

[48] In any event further, if I am incorrect in my interpretation of section 539, and it *is* the Legislature's attempt to signal the degree of deference to be accorded on judicial review of a municipal resolution or bylaw, it falls short of the requisite degree of explicitness described in *Vavilov*. By section 539 the *MGA* does not "explicitly prescribe" the standard of review (*Vavilov*, at paras 17, 33); it only says what is the standard is not. It lacks the "clear legislative direction" as to the standard other than reasonableness that it intends (*Vavilov*, at para 32). This is unlike other provisions in the *MGA* where the Legislature saw fit to use clear and explicit language to signal its intended standard of review. See for example, subsection 548(1) quoted at paragraph 39 above.

[49] Finally on reasonableness being the appropriate standard of review here, since the dispute between the parties is whether the City Council's interpretation of its own enactment (the Designation Bylaw) survives judicial review, it merits mention that a reasonableness standard of review is capable of protecting against an administrative decision maker interpreting statutory enactments in a manner that extends its "own authority beyond what the legislature intended" (*Vavilov*, at para 109). If that type of (potentially self-serving) statutory interpretation issue need not attract the more exacting correctness standard, then the potentially self-serving statutory interpretation here of the Designation Bylaw similarly need not attract the correctness standard.

3. Meaning of the standard

[50] What does "reasonableness" as a standard of review mean in these circumstances?

[51] A reasonableness review is characterized by both respect for the administrative decision maker and judicial restraint.

[52] From *Vavilov*, reasonableness assesses whether the decision is reasoned; it relates to the justification for the outcome. In this way, reasonableness considers both the reasoning process and the outcome. Justification, intelligibility and transparency to those affected by the decision are the hallmarks of reasonableness. The legal and factual context of a decision, and the history of the matter, constrain what will be reasonable in a given case (*Vavilov*, at paras 73–100).

[53] *Vavilov* identifies as unreasonable an administrative decision containing a fundamental flaw. It identifies two types. The first is a failure of rationality internal to the reasoning process. The second is an untenable decision in light of the factual and legal constraints (*Vavilov*, at para 101).

[54] Often the "most salient" legal constraint will be the governing statutory scheme (*Vavilov*, at para 108). As the Court says there:

> …while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28… Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paras. 38-40.

[55] Reasonableness determinations are highly contextual. As the Federal Court of Appeal summarized at paragraph 30 of *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34, leave to appeal to SCC refused [2020] SCCA No. 183:

> […] The Supreme Court emphasized in *Vavilov* that reasonableness is a single standard that must account for context. In its words, "the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case" (*Vavilov*, para. 89). Thus, reasonableness "takes its colour from the context" and "must be assessed in the context of the particular type of decision-making involved and all relevant factors" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, para. 59; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, para. 18 [*Catalyst*]; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770, para. 22). In other words, the circumstances, considerations and factors in particular cases influence how courts go about assessing the acceptability and defensibility of administrative decisions (*Catalyst*, para. 18; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, para. 54; *Halifax (Regional*

> *Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364, para. 44).

[56] Four of the contextual factors in this case are the subject of prior case law, which informs the approach to the reasonableness review in this case. First, the decision under review turned on the administrative decision makers' interpretation of a statutory enactment (the Designation Bylaw under the *MGA*). Second, the statutory enactment being interpreted is municipal legislation. Third, the decision maker is an elected governing body. Fourth, and largely as a consequence of the third, there are no formal reasons from the decision maker for the decision being challenged.

[57] Regarding the first of those four contextual factors, in reviewing a decision makers' statutory interpretation for reasonableness (see *Vavilov*, at paras 115–24) the reviewing court must not start with its own interpretation, but rather must examine the decision "as a whole, including the reasons provided by the decision maker and the outcome that was reached" (at para 116). The Court in *Vavilov* went on, in paras 118, 120–21, saying (underlining added):

> […] Those who draft and enact statutes expect that <u>questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose</u>, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.
>
> […]
>
> But whatever form the interpretive exercise takes, <u>the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision</u>. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.
>
> <u>The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose</u>, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

[58] Therefore, the City Council was to interpret the Designation Bylaw with due regard to its "text, context and purpose" and I am to assume that it did (*Vavilov*, at para 118). The assumption is not dispositive, but the deferential starting point. I am then to assess the merits of City Council's interpretation for consistency with the text, context and purpose of the Designation Bylaw

(*Vavilov*, at paras 120–21). The burden of persuasion is on the Applicant, who is challenging the decision maker's interpretation of the enactment.

[59] Regarding the second, the interpretation of municipal legislation calls for a broad and purposive approach (*Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231 at 244–45, *Nanaimo (City) v Rascal Trucking Ltd*, 2000 SCC 13 at para 18*; United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19 at para 6; *Prairie Communities Development Corp v Okotoks (Town)*, 2011 ABCA 315 at para 23).

[60] And, of course, at section 10, Alberta's *Interpretation Act*, RSA 2000, c I-8, provides that every provincial enactment must be given a fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

[61] In *Nanaimo* the Court elaborated on the proper approach to the interpretation of municipal legislation, at paras 17–20:

> The first step is to consider the approach the courts should take when construing municipal legislation. As noted by Iacobucci J. in *R v Sharma*, 1993 CanLII 165 (SCC), [1993] 1 SCR 650, at p. 668:
>
> > . . . as statutory bodies, municipalities "may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation".
>
> The process of delineating municipal jurisdiction is an exercise in statutory construction. There is ample authority, on the interpretation of statutes generally and of municipal statutes specifically, to support a broad and purposive approach.
>
> While *R v Greenbaum*, [1993] 1 SCR 674, favoured restricting a municipality's jurisdiction to those powers expressly conferred upon it by the legislature, the Court noted that a purposive interpretation should be used in determining what the scope of those powers are. See Iacobucci J (at pp. 687-88):
>
> > As Davies J wrote in his reasons in *City of Hamilton v Hamilton Distillery Co* (1907), 38 SCR 239, at p 249, with respect to construing provincial legislation enabling municipal by-laws:
> >
> > > In interpreting this legislation I would not desire to apply the technical or strict canons of construction sometimes applied to legislation authorizing taxation. I think the sections are, considering the subject matter and the intention obviously in view, entitled to a broad and reasonable if not, as Lord Chief Justice Russell said in *Kruse* v. *Johnson*, [1898] 2 QB 91, at p. 99, a "benevolent construction", and if the language used fell short of expressly conferring the powers claimed, but did confer them by a fair and reasonable implication I

> would not hesitate to adopt the construction sanctioned by the implication.
>
> Accordingly, a court should look to the purpose and wording of the provincial enabling legislation when deciding whether or not a municipality has been empowered to pass a certain by-law . . . [A] somewhat stricter rule of construction than that suggested above by Davies J is in order where the municipality is attempting to use a power which restricts common law or civil rights.
>
> This conclusion follows recent authorities dictating that statutes be construed purposively in their entire context and in light of the scheme of the Act as a whole with a view to ascertaining the legislature's true intent. See *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27, at paras. 21-23, *M & D Farm Ltd v Manitoba Agricultural Credit Corp*, 1999 CanLII 648 (SCC), [1999] 2 SCR 961, at para. 25, and the BC *Interpretation Act*, s 8.

[62] This established body of law applicable to the interpretation of an enactment of a municipality has not been ousted by *Vavilov*. *Vavilov* has supplanted the binding effect of prior contrary court decisions applicable to determining the standard of review, but not the binding effect of other prior court decisions (at paras 143–44). This is comparable to the conclusion of the Supreme Court of Canada in *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2, where it was argued that the decision in *Dunsmuir* had "changed the law and that the traditional deferential approach to the review of municipal bylaws no longer holds" (at para 22). The Court disagreed, saying (*Catalyst*, at para 23):

> This argument misreads *Dunsmuir*. … Here the context is the adoption of municipal bylaws. The cases dealing with review of such bylaws relied on by the trial judge and discussed above continue to be relevant and applicable. To put it succinctly, they point the way to what is reasonable in the particular context of bylaws passed by democratically elected municipal councils.

[63] Regarding the third, that the decision under challenge is the decision of a municipal council, the Supreme Court of Canada summarized the resulting approach in *Catalyst*, at paras 19–20, in the context of a challenge to the validity of a taxing bylaw (underlining added):

> The case law suggests that review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. Rather, they involve an array of social, economic, political and other non-legal considerations. "Municipal governments are democratic institutions", *per* LeBel J. for the majority in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919, at para. 33. In this context, reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.
>
> The decided cases support the view of the trial judge that, historically, courts have refused to overturn municipal bylaws unless they were found to be "aberrant", "overwhelming", or if "no reasonable body" could have adopted them (para. 80,

> *per* Voith J.). See *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.); *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.); *Lehndorff United Properties (Canada) Ltd. v. Edmonton (City)* (1993), 146 A.R. 37 (Q.B.), aff'd (1994), 157 A.R. 169 (C.A.).

[64] As I indicated near the outset of this decision (see para 11 above), here the challenge to the City Solicitor's indemnity deciding power is not to *whether* Council Members and Citizen Appointees can or should be indemnified by the City. It is not even about *whether* the City Solicitor should be making decisions about people qualifying for that indemnity and, perhaps further, having their legal expenses reimbursed. The challenge is to *how* City Council proceeded to accomplish that objective. It is not a challenge to the merits of the objective, but to the legality of how Council proceeded to realize that objective.

[65] Regarding the fourth, that the decision under challenge is a decision without formal reasons, the Court in *Vavilov* stated, at para 137:

> Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst*; *Green*; *Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision: *Baker*, at para. 44. For example, as McLachlin C.J. noted in *Catalyst*, "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw": para. 29. In that case, not only were "the reasons [in the sense of rationale] for the bylaw . . . clear to everyone", they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.

4. Scope of the review

[66] Early in these reasons for my decision (at para 3 above) I alluded to the fact that the City's response to this application appeared to construe the Applicant's challenge to be only to the Reimbursement Power. Most all of the City Brief addresses only the Reimbursement Power Amendment. At the end of an early paragraph of its Brief (Brief of the Defendant at para 11), the City says:

> The only question is whether the scope of that authority – specifically in section 2 [of 48M2000] – includes decisions relating to the payment of external legal fees as contemplated in Council Policy CC010.

West Fraser Mills Ltd. *Appellant*

v.

Workers' Compensation Appeal Tribunal and Workers' Compensation Board of British Columbia *Respondents*

and

Workers' Compensation Board of Alberta *Intervener*

Indexed as: West Fraser Mills Ltd. *v.* British Columbia (Workers' Compensation Appeal Tribunal)

2018 SCC 22

File No.: 37423.

2017: December 4; May 18, 2018.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Administrative law — Boards and tribunals — Jurisdiction — Workers' Compensation Board of British Columbia — Regulation adopted by Board imposing duty on owners of forestry operation to ensure that their operations are planned and conducted in accordance with safe work practices — Whether regulation ultra vires — Applicable standard of review to exercise of Board's delegated regulatory authority — Workers Compensation Act, R.S.B.C. 1992, c. 492, s. 225 — Occupational Health and Safety Regulation, B.C. Reg. 296/97, s. 26.2(1).

Workers' compensation — Forestry operation — Offences and enforcement — Administrative penalty — Interpretation — Owner — Employer — Tree faller fatally struck by rotting tree while working within forestry operation — Owner of forestry operation employed site supervisor — Tree faller employed by independent contractor — Workers' Compensation Board found that owner had failed to ensure that all forestry operations were planned and conducted consistent with Occupational

West Fraser Mills Ltd. *Appelante*

c.

Workers' Compensation Appeal Tribunal et Workers' Compensation Board of British Columbia *Intimés*

et

Workers' Compensation Board of Alberta *Intervenante*

Répertorié : West Fraser Mills Ltd. *c.* Colombie-Britannique (Workers' Compensation Appeal Tribunal)

2018 CSC 22

N° du greffe : 37423.

2017 : 4 décembre; 2018 : 18 mai.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit administratif — Organismes et tribunaux administratifs — Compétence — Workers' Compensation Board de la Colombie-Britannique — Adoption par cette Commission d'un règlement obligeant les propriétaires d'entreprises d'exploitation forestière à faire en sorte que leurs activités soient planifiées et exercées conformément aux pratiques de travail sécuritaires — Le règlement était-il ultra vires? — Norme de contrôle applicable à l'exercice du pouvoir de réglementation délégué à la Commission — Workers Compensation Act, R.S.B.C. 1992, c. 492, art. 225 — Occupational Health and Safety Regulation, B.C. Reg. 296/97, art. 26.2(1).

Accidents du travail — Exploitation forestière — Infractions et exécution — Sanction administrative — Interprétation — Propriétaire — Employeur — Abatteur frappé mortellement par un arbre en décomposition pendant qu'il travaillait dans une exploitation forestière — Embauche d'un surveillant des lieux par le propriétaire de l'entreprise d'exploitation forestière — Embauche de l'abatteur par un entrepreneur indépendant — Conclusion de la Workers' Compensation Board selon laquelle

II. The Validity of Section 26.2(1) of the Regulation

[6] Section 225 of the Act gives the Board broad powers to make regulations for workplace safety. It states, in relevant part:

225 (1) In accordance with its mandate under this Part, the Board may make regulations the Board considers necessary or advisable in relation to occupational health and safety and occupational environment.

(2) Without limiting subsection (1), the Board may make regulations as follows:

(a) respecting standards and requirements for the protection of the health and safety of workers and other persons present at a workplace and for the well-being of workers in their occupational environment;

(b) respecting specific components of the general duties of employers, workers, suppliers, supervisors, prime contractors and owners under this Part;

. . .

[7] Pursuant to s. 225 of the Act, the Board adopted the Regulation at issue in this case. Section 26.2(1) of the Regulation imposes a duty on owners to ensure that forestry operations are planned and conducted in accordance with the Regulation and safe work practices:

26.2 (1) The owner of a forestry operation must ensure that all activities of the forestry operation are both planned and conducted in a manner consistent with this Regulation and with safe work practices acceptable to the Board.

[8] This Court summarized the approach courts should take to judicial review of the exercise of delegated administrative powers in *Dunsmuir v. New*

II. Validité du par. 26.2(1) du Règlement

[6] L'article 225 de la Loi confère à la Commission un vaste pouvoir de réglementation en matière de sécurité au travail. Il dispose notamment ce qui suit :

[TRADUCTION]

225 (1) Conformément au mandat que lui confère la présente partie, la Commission peut prendre les règlements qu'elle juge nécessaires ou souhaitables relativement à la santé et à la sécurité au travail et à l'environnement de travail.

(2) Sans que soit limitée la portée du paragraphe (1), la Commission peut prendre des règlements sur ce qui suit :

a) les normes et les exigences relatives à la protection de la santé et de la sécurité des travailleurs et des autres personnes se trouvant dans un lieu de travail et au bien-être des travailleurs dans leur environnement de travail;

b) des éléments précis des obligations générales des employeurs, travailleurs, fournisseurs, superviseurs, entrepreneurs principaux et propriétaires suivant la présente partie;

. . .

[7] En vertu de l'art. 225 de la Loi, la Commission a pris le règlement contesté en l'espèce — le par. 26.2(1) du Règlement — selon lequel le propriétaire est tenu de faire en sorte que les activités d'exploitation forestière soient planifiées et exercées conformément au Règlement et aux pratiques de travail sécuritaires :

[TRADUCTION]

26.2 (1) Le propriétaire d'une entreprise d'exploitation forestière doit faire en sorte que toutes les activités d'exploitation forestière soient planifiées et exercées conformément au présent règlement et aux pratiques de travail sécuritaires jugées acceptables par la Commission.

[8] Dans l'arrêt *Dunsmuir c. Nouveau-Brunswick,* 2008 CSC 9, [2008] 1 R.C.S. 190, la Cour résume la démarche que doit suivre la cour de révision lors

Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190. For situations where the jurisprudence has not already determined in a satisfactory manner the degree of deference to be accorded, this Court emphasized the importance of referring to the legislative and administrative context to determine the level of discretion the Legislature conferred on a board or tribunal. In most cases, a contextual assessment leads to the conclusion that the appropriate standard of review is reasonableness.

[9] Applying this central teaching of *Dunsmuir*, this Court has adopted a flexible standard of reasonableness in situations where the enabling statute grants a large discretion to the subordinate body to craft appropriate regulations: see *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at paras. 13, 18 and 24; *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360, at para. 20. Those authorities point us to reasonableness as the applicable standard of review. Reasonableness review "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93, cited with approval in *Dunsmuir*, at para. 49.

[10] The question before us is whether s. 26.2(1) of the Regulation represents a reasonable exercise of the Board's delegated regulatory authority. Is s. 26.2(1) of the Regulation within the ambit of s. 225 of the Act? Section 225 of the Act is very broad. Section 225(1) empowers the Board to make "regulations the Board considers necessary or advisable in relation to occupational health and safety and occupational environment". This makes it clear that the Legislature wanted the Board to decide what was necessary or advisable to achieve the goal of healthy and safe worksites and pass regulations to accomplish just that. The opening words of s. 225(2) — "Without limiting subsection (1)" — confirm that this plenary power is not limited by anything that

du contrôle judiciaire de l'exercice d'un pouvoir administratif délégué. Lorsque la jurisprudence n'établit pas déjà de manière satisfaisante le degré de déférence qui s'impose dans une situation donnée, la Cour insiste sur l'importance de s'en remettre au contexte législatif et administratif pour déterminer l'étendue du pouvoir discrétionnaire conféré par le législateur à l'organisme ou au tribunal administratif. Dans la plupart des cas, l'analyse contextuelle mène à la conclusion que la norme de contrôle applicable est celle de la décision raisonnable.

[9] Conformément à ce principal enseignement de *Dunsmuir*, la Cour applique une norme de raisonnabilité souple dans le cas où la loi habilitante accorde à l'organisme subordonné un grand pouvoir discrétionnaire pour la conception de règlements appropriés (voir *Catalyst Paper Corp. c. North Cowichan (District)*, 2012 CSC 2, [2012] 1 R.C.S. 5, par. 13, 18 et 24; *Green c. Société du Barreau du Manitoba*, 2017 CSC 20, [2017] 1 R.C.S. 360, par. 20). Selon les arrêts *Catalyst* et *Green*, la norme de contrôle applicable est celle de la raisonnabilité. L'application de cette norme [TRADUCTION] « reconnaît que dans beaucoup de cas, les personnes qui se consacrent quotidiennement à l'application de régimes administratifs souvent complexes possèdent ou acquièrent une grande connaissance ou sensibilité fine à l'égard des impératifs et des subtilités de ces régimes » (D. J. Mullan, « Establishing the Standard of Review : The Struggle for Complexity? » (2004), 17 *R.C.D.A.P.* 59, p. 93, cité avec approbation dans *Dunsmuir*, par. 49).

[10] La Cour doit décider si le par. 26.2(1) du Règlement résulte d'un exercice raisonnable du pouvoir de réglementation délégué à la Commission. Le paragraphe 26.2(1) du Règlement relève-t-il du pouvoir délégué par l'art. 225 de la Loi? Ce dernier est libellé de façon très générale. Le paragraphe 225(1) confère à la Commission le pouvoir de prendre les « règlements qu'elle juge nécessaires ou souhaitables relativement à la santé et à la sécurité au travail et à l'environnement de travail ». À l'évidence, le législateur a voulu confier à la Commission le soin de décider de ce qui est nécessaire ou souhaitable pour atteindre l'objectif lié à la santé et à la sécurité dans les lieux de travail et de prendre des règlements en conséquence. L'énoncé liminaire du

workplace safety. In my view, it is inconsistent with a purposive interpretation of the scheme to read the phrase "to the extent of each party's authority and ability to do so" from s. 107(2)(e) — which my colleague finds to be dispositive — in a formalistic manner that disregards the scheme's focus on shared responsibility.

[19] Finally, two additional external contextual factors are relevant for this inquiry: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59; *Catalyst*, at paras. 18 and 24. These considerations are both within the expertise and capacity of the Board.

[20] First, the Board adopted s. 26.2(1) of the Regulation in its present form in 2008 in response to a concern in the province about the growing rate of workplace fatalities in the forestry sector. This concern is plainly one of "occupational health and safety and occupational environment", the focus of s. 225. The Board's adoption of s. 26.2(1) of the Regulation in response to this significant workplace safety concern provides a clear illustration of why a legislature chooses to delegate regulation-making authority to expert bodies — so that gaps can be addressed efficiently.

[21] Second, s. 26.2(1) is a natural extension of an owner's duty under s. 119(a) to maintain the worksite. Forestry worksites are constantly changing due to weather and other natural occurrences. To maintain the worksite in the face of the dynamic interaction of natural forces and work practices, the owner must ensure that the work in question is planned and conducted safely. Therefore, to fulfill the duty of maintaining a safe worksite under s. 119 of the Act, the owner must ensure that the work is planned and conducted safely. The two go hand in hand.

consultation » en matière de sécurité au travail. À mon sens, l'interprétation téléologique du régime est incompatible avec toute lecture formaliste de l'énoncé « dans la mesure où ils ont le pouvoir et la capacité de le faire » qui figure à l'al. 107(2)e) — jugé déterminant par ma collègue — qui ne tiendrait pas compte de l'importance que le régime accorde au partage de l'obligation.

[19] Enfin, deux autres éléments contextuels externes doivent être pris en compte en l'espèce (*Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, par. 59; *Catalyst*, par. 18 et 24). Ces considérations de principe relèvent toutes deux de l'expertise et des compétences de la Commission.

[20] D'abord, la Commission a adopté le par. 26.2(1) du Règlement dans sa version actuelle en 2008 par suite de l'inquiétude exprimée par le gouvernement provincial face à l'augmentation du nombre de décès au travail dans le secteur forestier, une inquiétude clairement liée à l'objet principal de l'art. 225, soit « la santé et [. . .] la sécurité au travail et [. . .] l'environnement de travail ». Cette mesure prise en réponse à cette préoccupation majeure en matière de sécurité au travail illustre bien la raison pour laquelle le législateur délègue un pouvoir de réglementation à un organisme spécialisé, c'est-à-dire afin que toute lacune puisse être comblée efficacement.

[21] Ensuite, le par. 26.2(1) est le prolongement naturel de l'obligation que l'al. 119a) fait au propriétaire de veiller à l'entretien du lieu de travail. Dans le domaine de l'exploitation forestière, le lieu de travail change constamment en fonction des conditions météorologiques et d'autres phénomènes naturels. Pour entretenir le lieu de travail malgré l'interaction dynamique des forces de la nature et des pratiques de travail, le propriétaire doit faire en sorte que ses activités soient planifiées et exercées de façon sécuritaire. Pour s'acquitter de son obligation d'assurer la sécurité des lieux de travail conformément à l'art. 119 de la Loi, le propriétaire doit veiller à ce que les activités soient planifiées et exercées de façon sécuritaire. Les deux vont de pair.

[22] I conclude that s. 26.2(1) represents a reasonable exercise of the delegated power conferred on the Board by s. 225 of the Act to "make regulations [it] considers necessary or advisable in relation to occupational health and safety and occupational environment".

[23] It is true that this Court, in *Dunsmuir*, referred to prior jurisprudence to indicate that true questions of jurisdiction, which some suggest the present matter raises, are subject to review on a standard of correctness — noting, however, the importance of taking a robust view of jurisdiction. Post-*Dunsmuir*, it has been suggested that such cases will be rare: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 33. We need not delve into this debate in the present appeal. Where the statute confers a broad power on a board to determine what regulations are necessary or advisable to accomplish the statute's goals, the question the court must answer is not one of *vires* in the traditional sense, but whether the regulation at issue represents a reasonable exercise of the delegated power, having regard to those goals, as we explained in *Catalyst* and *Green*, two recent post-*Dunsmuir* decisions of this Court where the Court unanimously identified the applicable standard of review in this regard to be reasonableness. In any event, s. 26.2(1) of the Regulation plainly falls within the broad authority granted by s. 225 of the Act as an exercise of statutory interpretation. This is so even if no deference is accorded to the Board and if we disregard all of the external policy considerations offered in support of its position.

III. The Penalty Under Section 196(1) of the Act

[24] West Fraser Mills argues that it was not open to the Board to issue a penalty against the company under s. 196(1) of the Act because it was not acting

[22] Je conclus que l'adoption du par. 26.2(1) résulte d'un exercice raisonnable du pouvoir délégué que l'art. 225 de la Loi confère à la Commission de « prendre les règlements qu'elle juge nécessaires ou souhaitables relativement à la santé et à la sécurité au travail et à l'environnement de travail ».

[23] Dans *Dunsmuir*, la Cour invoque certes des décisions antérieures pour affirmer qu'une véritable question de compétence — la présente affaire en soulèverait une selon certains — fait l'objet d'un contrôle selon la norme de la décision correcte, mais elle signale qu'il importe de considérer la compétence avec rigueur. Dans la foulée de cet arrêt, elle a laissé entendre que pareil cas se présenterait rarement (*Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654, par. 33). Le présent pourvoi n'exige pas que nous approfondissions le sujet. Lorsque la loi confère à un organisme un large pouvoir de décider des règlements qui sont nécessaires ou souhaitables pour la réalisation des objectifs législatifs, la question que la cour de révision doit trancher n'a pas trait à la compétence au sens traditionnel, mais au fait que le règlement en cause résulte ou non d'un exercice raisonnable du pouvoir délégué, eu égard à ces objectifs, comme nous l'expliquons dans les arrêts *Catalyst* et *Green*, deux arrêts récents postérieurs à *Dunsmuir* dans lesquels la Cour conclut à l'unanimité que la norme de contrôle applicable dans ce cas est celle de la raisonnabilité. Quoi qu'il en soit, l'application des règles d'interprétation législative mène à la conclusion que le par. 26.2(1) du Règlement ressortit clairement au large pouvoir que confère l'art. 225 de la Loi. C'est également le cas si l'on ne manifeste pas de déférence à l'endroit de la Commission et que l'on ne tient pas compte des considérations de principe externes invoquées à l'appui de sa décision.

III. La sanction suivant le par. 196(1) de la Loi

[24] West Fraser Mills soutient qu'elle n'était pas un « employeur » au moment des faits constitutifs de l'infraction, de sorte qu'elle ne peut se voir infliger

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Coldwater Indian Band, Squamish Nation, Tsleil-Waututh Nation, and **Aitchelitz, Skowkale, Shxwhá:y Village, Soowahlie, Squiala First Nation, Tzeachten, Yakweakwioose** (*Applicants*)

v.

Attorney General of Canada, Trans Mountain Pipeline ULC and **Trans Mountain Corporation** (*Respondents*)

and

Attorney General of Alberta, Attorney General of Saskatchewan and Canadian Energy Regulator (*Interveners*)

Indexed as: Coldwater First Nation v. Canada (Attorney General)

Federal Court of Appeal, Noël C.J., Pelletier and Laskin JJ.A.—Vancouver, December 16–18, 2019; Ottawa, February 4, 2020.

Aboriginal Peoples — Duty to consult — Judicial review challenging second approval of Trans Mountain Pipeline Expansion Project (Project) by Governor in Council (GIC) — Approval challenged on environmental grounds, Crown's alleged continued failure to fulfil its duty to consult — Project first approved in 2016 — Successfully challenged in Tsleil-Waututh Nation v. Canada (Attorney General) (TWN 2018) — GIC approving Project for second time in June 2019 (Order in Council P.C. 2019-820) — GIC considering that consultation efforts made after TWN 2018 adequately remedying identified flaws, sufficient to meet duty to consult — Applicants submitting that Project could not be approved until all concerns resolved, including impact on aquifer, risk of spills of diluted bitumen, marine shipping — Applicants also contending, inter alia, that Canada having to engage in R. v. Sparrow-type justification analysis as part of consultation process — Whether GIC reasonably concluding that flaws identified in TWN 2018 adequately remedied by renewed consultation process — GIC entitled to give government actors leeway in assessing whether

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Bande indienne Coldwater, Nation Squamish, Tsleil-Waututh Nation et **Aitchelitz, Skowkale, Shxwhá :y Village, Soowahlie, Première Nation Squiala, Tzeachten** et **Yakweakwioose** (*demanderesses*)

c.

Procureur général du Canada, Trans Mountain Pipeline ULC et **Trans Mountain Corporation** (*défendeurs*)

et

Procureur général de l'Alberta, procureur général de la Saskatchewan et **Régie de l'énergie du Canada** (*intervenants*)

Répertorié : Première Nation Coldwater c. Canada (Procureur général)

Cour d'appel fédérale, juge en chef Noël, juges Pelletier et Laskin, J.C.A.—Vancouver, 16 au 18 décembre 2019; Ottawa, 4 février 2020.

Peuples autochtones — Obligation de consulter — Contrôle judiciaire contestant la seconde approbation du projet d'agrandissement du réseau de Trans Mountain (projet) par le gouverneur en conseil — Cette approbation a été contestée pour des raisons environnementales et au motif que la Couronne manquait toujours à son obligation de consulter — Le projet a été approuvé pour la première fois en 2016 — Cette approbation a été contestée avec succès dans l'arrêt Tsleil-Waututh Nation c. Canada (Procureur général) (TWN 2018) — Pour une seconde fois, le gouverneur en conseil a approuvé le projet (décret C.P. 2019-820) en juin 2019 — Le gouverneur en conseil a jugé que les consultations tenues après l'arrêt TWN 2018 avaient adéquatement pallié les lacunes mises au jour et avaient suffi pour permettre à la Couronne de s'acquitter de son obligation de consulter — Les demanderesses ont fait valoir qu'on ne peut approuver le projet avant que l'on ne résolve toutes leurs préoccupations, à savoir l'incidence du projet sur l'aquifère, le risque de déversement du bitume dilué et le transport maritime — Les demanderesses ont fait

> In the evidentiary record before the Court, there is none. Without evidence, suggestions of bias or conflict of interest are just idle speculations or bald allegations and cannot possibly satisfy the test of a "fairly arguable case"....
>
> Some applicants have noted public statements on the part of certain federal politicians in support of the project as proof of disqualifying bias. This issue is not "fairly arguable." In law, statements of this sort do not trigger disqualifying bias…. [Citations omitted.]

[23] The bias argument, having been excluded at the leave stage, is not properly before us. However, we believe it useful to nevertheless confirm that based on the record before us, there is no evidence that the Governor in Council's decision was reached by reason of Canada's ownership interest rather than the Governor in Council's genuine belief that the Project was in the public interest. While the assessment that was ultimately made may benefit the Crown as owner of the Project, nothing suggests that the Governor in Council was not guided by the public interest throughout.

II. The standard of review

A. *General considerations*

[24] After the hearing in this matter, the Supreme Court released its decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 438 D.L.R. (4th) 745 (*Vavilov*), concerning the standard of review that governs in matters such as this. This Court called for further submissions in writing from the parties concerning *Vavilov*. We have received their submissions and have considered them.

[25] All are agreed that *Vavilov* does not bring a material change to the standard of review in this litigation. However, *Vavilov* does bring together and clarify a number of principles in a useful way.

[26] This is a statutory judicial review, not a statutory appeal. In such circumstances, there is a presumption that the standard of review is reasonableness (*Vavilov*,

> défendable », il doit être un tant soit peu étayé. Dans le dossier dont la Cour est saisie, pareille preuve brille par son absence. Dans ce cas, les arguments portant sur la partialité et les conflits d'intérêts ne sont rien d'autre que des conjectures et de simples prétentions non étayées qui ne sauraient être « raisonnablement défendables » […]
>
> Certains demandeurs avancent comme preuve de partialité fatale des déclarations publiques en faveur du projet prononcées par des politiciens fédéraux. Cette question n'est pas « raisonnablement défendable ». En droit, de telles déclarations ne révèlent pas une partialité fatale […] [Renvois omis.]

[23] La Cour n'a pas eu à se pencher sur l'argument de la partialité, puisqu'il a été exclu à l'étape de l'autorisation, mais elle estime néanmoins utile de confirmer que, selon le dossier devant elle, rien ne permet de croire que la décision du gouverneur en conseil repose sur la participation du Canada au projet et non sur la conviction véritable du gouverneur en conseil que le projet était dans l'intérêt public. Bien que, en fin de compte, l'évaluation qui a été faite ait pu profiter à la Couronne en tant que propriétaire du projet, rien ne permet de croire que le gouverneur en conseil ait perdu l'intérêt public de vue tout au long du processus.

II. Norme de contrôle

A. *Considérations d'ordre général*

[24] Après avoir entendu l'affaire *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, 2019 CSC 65 (*Vavilov*), la Cour suprême a rendu sa décision au sujet de la norme de contrôle applicable dans les cas tel celui-ci. Notre Cour a invité les parties à lui faire part de leurs observations par écrit sur cet arrêt. Elle a reçu ces observations et en a tenu compte.

[25] Toutes les parties conviennent que l'arrêt *Vavilov* est d'une incidence limitée sur la norme de contrôle en l'espèce. Quoi qu'il en soit, cet arrêt réunifie et clarifie de façon utile un bon nombre de principes.

[26] La présente instance est un contrôle judiciaire prévu par la loi, et non un appel prévu par la loi. Dans les circonstances, il est présumé que la norme de contrôle

paragraphs 23–32), and none of the exceptions to reasonableness review identified in *Vavilov* apply.

[27] In *Vavilov*, the Supreme Court held that questions as to "the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982* … require a final and determinate answer from the courts" and, thus, must be reviewed for correctness (*Vavilov*, paragraph 55). But, as mentioned, the scope of the duty to consult under section 35 is not in issue before us. Thus, reasonableness is the standard of review (see also *TWN 2018*, paragraphs 225–226). That said, we are dealing with a constitutional duty of high significance to Indigenous peoples and indeed the country as a whole. This is part of the context that informs the conduct of the reasonableness review.

[28] In conducting this review, it is critical that we refrain from forming our own view about the adequacy of consultation as a basis for upholding or overturning the Governor in Council's decision. In many ways, that is what the applicants invite us to do. But this would amount to what has now been recognized as disguised correctness review, an impermissible approach (*Vavilov*, paragraph 83):

> It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether

est celle de la décision raisonnable (*Vavilov*, paragraphes 23 à 32), et aucune des exceptions relevées dans l'arrêt *Vavilov* ne s'applique.

[27] Dans l'arrêt *Vavilov*, la Cour suprême a établi que les questions touchant à « la portée des droits ancestraux et droits issus de traités reconnus à l'art. 35 de la *Loi constitutionnelle de 1982* […] nécessite[nt] une réponse décisive et définitive des cours de justice », d'où l'application de la norme de la décision correcte (*Vavilov*, paragraphe 55). Mais, comme il a été mentionné plus tôt, la portée de l'obligation de consulter prévue à l'article 35 n'étant pas en cause en l'espèce, la norme de la décision raisonnable s'applique (voir aussi l'arrêt *TWN 2018*, paragraphes 225 et 226). Cela dit, il s'agit ici d'une obligation constitutionnelle d'une grande importance pour les peuples autochtones et, en fait, pour le pays tout entier. Voilà le cadre dans lequel s'inscrit le contrôle selon la norme de la décision raisonnable.

[28] Pour mener à bien le contrôle, il est essentiel de s'abstenir de former sa propre opinion sur le caractère adéquat des consultations et de fonder sur celle-ci sa décision de confirmer ou d'infirmer la décision du gouverneur en conseil. C'est en quelque sorte ce que les demanderesses invitent la Cour à faire. Toutefois, pareil procédé, qui s'apparente à ce qu'il est maintenant convenu d'appeler un contrôle déguisé selon la norme de la décision correcte, n'est pas permis (*Vavilov*, paragraphe 83) :

> Il s'ensuit que le contrôle en fonction de la norme de la décision raisonnable doit s'intéresser à la décision effectivement rendue par le décideur, notamment au raisonnement suivi et au résultat de la décision. Le rôle des cours de justice consiste, en pareil cas, à *réviser* la décision et, en général à tout le moins, à s'abstenir de trancher elles-mêmes la question en litige. Une cour de justice qui applique la norme de contrôle de la décision raisonnable ne se demande donc pas quelle décision elle aurait rendue à la place du décideur administratif, ne tente pas de prendre en compte l'« éventail » des conclusions qu'aurait pu tirer le décideur, ne se livre pas à une analyse *de novo*, et ne cherche pas à déterminer la solution « correcte » au problème. Dans l'arrêt *Delios c. Canada (Procureur général)*, 2015 CAF 117, la Cour d'appel fédérale a signalé que « le juge réformateur n'établit pas son propre critère pour ensuite jauger ce qu'a fait l'administrateur » : par. 28; voir aussi *Ryan*, par. 50-51. La cour

the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable. [Emphasis in original.]

[29] Rather, our focus must be on the reasonableness of the Governor in Council's decision, including the outcome reached and the justification for it. The issue is not whether the Governor in Council could have or should have come to a different conclusion or whether the consultation process could have been longer or better. The question to be answered is whether the decision approving the Project and the justification offered are acceptable and defensible in light of the governing legislation, the evidence before the Court and the circumstances that bear upon a reasonableness review.

[30] There are many such circumstances. The Supreme Court emphasized in *Vavilov* that reasonableness is a single standard that must account for context. In its words, "the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case" (*Vavilov*, paragraph 89). Thus, reasonableness "takes its colour from the context" and "must be assessed in the context of the particular type of decision making involved and all relevant factors" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, paragraph 59; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 (*Catalyst*), paragraph 18; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770, paragraph 22). In other words, the circumstances, considerations and factors in particular cases influence how courts go about assessing the acceptability and defensibility of administrative decisions (*Catalyst*, paragraph 18; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, paragraph 54; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364, paragraph 44).

[31] In *Vavilov*, the Supreme Court emphasized that reasonableness review is to be conducted by appreciating the decision, the reasons for it, and the context in which it was made. This requires us to consider the

de révision n'est plutôt appelée qu'à décider du caractère raisonnable de la décision rendue par le décideur administratif — ce qui inclut à la fois le raisonnement suivi et le résultat obtenu. [Italiques dans l'original.]

[29] La Cour doit donc concentrer son attention sur la raisonnabilité de la décision du gouverneur en conseil, y compris l'issue et le justificatif. Il ne s'agit pas de savoir si le gouverneur en conseil aurait pu ou aurait dû arriver à une conclusion différente ni si les consultations auraient pu durer plus longtemps ou mieux se dérouler. Il s'agit de répondre à la question de savoir si la décision d'approuver le projet et le justificatif offert sont acceptables et défendables compte tenu de la législation applicable, de la preuve présentée à la Cour et des circonstances ayant une incidence sur le contrôle selon la norme de la décision raisonnable.

[30] Il existe de nombreuses telles circonstances. La Cour suprême a souligné dans l'arrêt *Vavilov* que la norme de la décision raisonnable est une norme unique qui tient compte du contexte. Elle s'est exprimée ainsi : « Le contexte particulier d'une décision circonscrit plutôt la latitude du décideur administratif en matière de décision raisonnable dans un cas donné » (*Vavilov*, paragraphe 89). Ainsi, la raisonnabilité « s'adapte au contexte » et « s'apprécie dans le contexte du type particulier de processus décisionnel en cause et de l'ensemble des facteurs pertinents » (*Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, paragraphe 59; *Catalyst Paper Corp. c. North Cowichan (District)*, 2012 CSC 2, [2012] 1 R.C.S. 5 (*Catalyst*), paragraphe 18; *Wilson c. Énergie Atomique du Canada Ltée*, 2016 CSC 29, [2016] 1 R.C.S. 770, paragraphe 22). En d'autres mots, les facteurs, considérations et circonstances dans des cas donnés influent sur la façon dont les cours de justice évaluent le caractère acceptable et justifiable des décisions administratives (*Catalyst*, paragraphe 18; *Doré c. Barreau du Québec*, 2012 CSC 12, [2012] 1 R.C.S. 395, paragraphe 54; *Halifax (Regional Municipality) c. Nouvelle-Écosse (Human Rights Commission)*, 2012 CSC 10, [2012] 1 R.C.S. 364, paragraphe 44).

[31] Dans l'arrêt *Vavilov*, la Cour suprême a indiqué clairement que les contrôles selon la norme de la décision raisonnable doivent reposer sur l'appréciation de la décision, les motifs donnés à l'appui et le contexte dans

City of Calgary *Appellant*

v.

United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal, Haringer Singh Dhesi, Aero Cab Ltd. and Air Linker Cab Ltd. *Respondents*

and

Attorney General of Alberta *Intervener*

Ville de Calgary *Appelante*

c.

United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal, Haringer Singh Dhesi, Aero Cab Ltd. et Air Linker Cab Ltd. *Intimés*

et

Procureur général de l'Alberta *Intervenant*

INDEXED AS: UNITED TAXI DRIVERS' FELLOWSHIP OF SOUTHERN ALBERTA *v.* CALGARY (CITY)

Neutral citation: 2004 SCC 19.

File No.: 29321.

2003: December 8; 2004: March 25.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Municipal law — Bylaws — Jurisdiction to pass bylaws — Municipal bylaw regulating taxi industry by stipulating licence requirements and freezing number of licences — Proper approach to interpretation of statutes empowering municipalities — Whether bylaw ultra vires municipality under its governing legislation — Municipal Government Act, S.A. 1994, c. M-26.1, ss. 7, 8, 9.

Administrative law — Judicial review — Standard of review applicable to decision of municipality delineating its jurisdiction.

The City of Calgary regulates its taxi industry by virtue of the *Taxi Business Bylaw* which requires that all taxis have a taxi plate licence. In 1993, the bylaw froze the number of taxi plate licences issued. The following year, the provincial government enacted a new *Municipal Government Act*. The respondents challenged the validity of the freeze on the issuance of taxi plate licences on the basis that the freeze is *ultra vires* the City under its governing legislation, the *Municipal Government Act*. The trial judge held that the City had authority under the new

RÉPERTORIÉ : UNITED TAXI DRIVERS' FELLOWSHIP OF SOUTHERN ALBERTA *c.* CALGARY (VILLE)

Référence neutre : 2004 CSC 19.

N^{o} du greffe : 29321.

2003 : 8 décembre; 2004 : 25 mars.

Présents : La juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit municipal — Règlements — Compétence en matière d'adoption de règlement — Règlement municipal régissant le secteur des taxis en prévoyant des exigences en matière de permis et le gel du nombre de permis — Démarche à adopter pour l'interprétation des lois habilitant les municipalités — Le règlement outrepasse-t-il la compétence conférée à la municipalité par la loi habilitante? — Municipal Government Act, S.A. 1994, ch. M-26.1, art. 7, 8, 9.

Droit administratif — Contrôle judiciaire — Norme de contrôle applicable à la décision de la municipalité de définir sa compétence.

La Ville de Calgary réglemente son secteur des taxis en l'assujettissant au *Taxi Business Bylaw*, qui exige que tous les taxis aient une plaque de taxi. En 1993, le règlement gèle le nombre de plaques de taxi pouvant être délivrées. L'année suivante, le gouvernement de la province a édicté une nouvelle *Municipal Government Act*. Les intimés contestent la validité du gel de la délivrance de plaques de taxi au motif qu'il outrepasse la compétence conférée à la municipalité par la loi habilitante, la *Municipal Government Act*. Selon le juge de première

the nature of the terms and conditions and who may impose them;

(v) setting out the conditions that must be met before a licence, permit or approval is granted or renewed, the nature of the conditions and who may impose them;

(vi) providing for the duration of licences, permits and approvals and their suspension or cancellation for failure to comply with a term or condition of the bylaw or for any other reason specified in the bylaw;

. . .

9 The power to pass bylaws under this Division is stated in general terms to

(a) give broad authority to councils and to respect their right to govern municipalities in whatever way the councils consider appropriate, within the jurisdiction given to them under this or any other enactment, and

(b) enhance the ability of councils to respond to present and future issues in their municipalities.

. . .

715 A bylaw passed by a council under the former *Municipal Government Act* . . . continues with the same effect as if it had been passed under this Act.

énoncer ces conditions et préciser qui peut les imposer;

(v) définir les conditions d'octroi ou de renouvellement de licences, permis ou agréments et préciser qui peut les imposer;

(vi) prévoir la durée de validité des licences, permis ou agréments et leur suspension ou annulation pour défaut de se conformer à une condition du règlement ou pour tout autre motif prévu par le règlement;

. . .

9 Le pouvoir de prendre des règlements en vertu de la présente section est formulé en termes généraux dans les buts suivants :

a) conférer un pouvoir général aux conseils et respecter leur droit de gouverner les municipalités de la façon qu'ils jugent appropriée, dans les limites de la compétence qui leur est conférée par la présente loi ou tout autre texte;

b) renforcer la capacité des conseils de régler les questions qui se posent et se poseront dans leur municipalité.

. . .

715 Tout règlement pris par le conseil en vertu de l'ancienne *Municipal Government Act* . . . continue à s'appliquer comme s'il avait été pris en vertu de la présente loi.

III. Analysis

A. *The Standard of Review*

5 The only question in this case is whether the freeze on the issuance of taxi plate licences was *ultra vires* the City under the *Municipal Government Act*. Municipalities do not possess any greater institutional competence or expertise than the courts in delineating their jurisdiction. Such a question will always be reviewed on a standard of correctness: *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 29. There is no need to engage in the pragmatic and functional approach in a review for *vires*; such an inquiry is

III. Analyse

A. *La norme de contrôle*

En l'espèce, il faut seulement se demander si, en vertu de la *Municipal Government Act*, la Ville a commis un excès de pouvoir en gelant la délivrance des plaques de taxi. Les municipalités ne possèdent pas une expertise ou compétence institutionnelle plus grande que les tribunaux pour délimiter leur compétence. L'examen d'une telle question devra toujours se faire selon la norme de la décision correcte : *Nanaimo (Ville) c. Rascal Trucking Ltd.*, [2000] 1 R.C.S. 342, 2000 CSC 13, par. 29. Il n'est pas nécessaire de procéder à une analyse

only required where a municipality's adjudicative or policy-making function is being exercised.

B. *The Proper Approach to the Interpretation of Municipal Powers*

The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. This notable shift in the nature of municipalities was acknowledged by McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at pp. 244-45. The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced: *Nanaimo*, *supra*, at para. 18. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters: *The Municipal Act*, S.M. 1996, c. 58, C.C.S.M. c. M225; *Municipal Government Act*, S.N.S. 1998, c. 18; *Municipal Act*, R.S.Y. 2002, c. 154; *Municipal Act, 2001*, S.O. 2001, c. 25; *The Cities Act*, S.S. 2002, c. C-11.1. This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes: *Shell Canada*, at pp. 238 and 245.

Alberta's *Municipal Government Act* follows the modern method of drafting municipal legislation. The legislature's intention to enhance the powers of its municipalities by drafting the bylaw passing provisions of the Act in broad and general terms is expressly stated in s. 9. Accordingly, to determine whether a municipality is authorized to exercise a certain power, such as limiting the issuance of taxi plate licences, the provisions of the Act must be construed in a broad and purposive manner.

pragmatique et fonctionnelle pour déterminer s'il y a eu excès de pouvoir; une telle démarche ne s'impose que dans le cas où une municipalité exerce une fonction juridictionnelle ou une fonction de prise de décisions de principe.

B. *L'interprétation correcte des pouvoirs municipaux*

6 L'évolution de la municipalité moderne a entraîné un virage dans la démarche à adopter pour interpréter les lois habilitant les municipalités. Dans *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231, p. 244-245, la juge McLachlin (plus tard Juge en chef) reconnaît ce virage notable dans la nature des municipalités. La dichotomie entre interprétation « bienveillante » et interprétation « stricte » fait place à une interprétation téléologique large des pouvoirs municipaux : *Nanaimo*, précité, par. 18. Cette méthode d'interprétation s'est développée en même temps que la méthode moderne de rédaction des lois sur les municipalités. Plusieurs provinces, au lieu de conférer aux municipalités des pouvoirs précis dans des domaines particuliers, préfèrent leur accorder un pouvoir général dans des domaines définis en termes généraux : *Loi sur les municipalités*, L.M. 1996, ch. 58, C.P.L.M. ch. M225; *Municipal Government Act*, S.N.S. 1998, ch. 18; *Loi sur les municipalités*, L.R.Y. 2002, ch. 154; *Loi de 2001 sur les municipalités*, L.O. 2001, ch. 25; *Cities Act*, S.S. 2002, ch. C-11.1. Ce virage en matière de rédaction législative reflète la véritable nature des municipalités modernes, qui ont besoin de plus de souplesse pour réaliser les objets de leur loi habilitante : *Shell Canada*, p. 238 et 245.

7 La *Municipal Government Act* de l'Alberta suit la méthode moderne de rédaction des lois sur les municipalités. L'intention du législateur d'accroître les pouvoirs des municipalités en formulant en termes larges et généraux les dispositions de la loi relatives à la prise de règlements est expressément énoncée à l'art. 9. De ce fait, pour déterminer si une municipalité est habilitée à exercer un pouvoir donné, comme celui de limiter le nombre de plaques de taxi, il faut donner une interprétation téléologique large aux dispositions de la loi.

8 A broad and purposive approach to the interpretation of municipal legislation is also consistent with this Court's approach to statutory interpretation generally. The contextual approach requires "the words of an Act . . . to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26. This approach is also consistent with s. 10 of Alberta's *Interpretation Act*, R.S.A. 2000, c. I-8, which provides that every provincial enactment must be given a fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

Une interprétation téléologique large des lois sur les municipalités est également compatible avec l'approche générale adoptée par la Cour en matière d'interprétation législative. Selon l'analyse contextuelle, il faut interpréter [TRADUCTION] « les termes d'une loi dans leur contexte global selon le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur » : E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26. Cette approche concorde également avec l'art. 10 de l'*Interpretation Act* de l'Alberta, R.S.A. 2000, ch. I-8, qui prévoit que tout texte de la province s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

C. *The City's Power to Limit the Number of Licences*

9 The respondents argue that the City does not have the power to limit the number of taxi plate licences under the Act. They submit that the authority to regulate has never implied numerical limits and that ss. 7 and 8 of the current *Municipal Government Act*, unlike s. 234 of the previous *Municipal Government Act*, neither expressly nor impliedly grant a municipality the power to limit the number of taxi plate licences. The respondents argue that while the Act expands the "matters" over which municipalities may enact bylaws under s. 7, the Act limits the "powers" exercisable by municipalities to those expressly specified. As the power to limit the number of taxi plate licences is not expressly specified in s. 8, the respondents allege it has been abolished.

C. *Le pouvoir de la Ville de limiter le nombre de permis*

Les intimés soutiennent que la Ville n'a pas le pouvoir de limiter le nombre de plaques de taxi en vertu de la loi. Ils font valoir que le pouvoir de réglementer n'a jamais impliqué le pouvoir d'imposer des limites quantitatives et que les art. 7 et 8 de la *Municipal Government Act* actuelle, contrairement à l'art. 234 de l'ancienne *Municipal Government Act*, n'accordent ni expressément ni implicitement aux municipalités le droit de limiter le nombre de plaques de taxi. Selon eux, alors qu'elle élargit les « domaines » dans lesquels les municipalités peuvent prendre des règlements en vertu de l'art. 7, la loi limite les « pouvoirs » pouvant être exercés par les municipalités à ceux qu'elle prévoit expressément. Comme le pouvoir de limiter le nombre de plaques de taxi n'est pas expressément prévu par l'art. 8, les intimés affirment qu'il a été supprimé.

10 In my respectful opinion, the respondents' argument must fail.

À mon avis, l'argument des intimés doit être rejeté.

11 It is well established that the legislature is presumed not to alter the law by implication: *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 395. Rather, where it intends to depart from prevailing law, the legislature will do so expressly. Here, there is no indication in the Act that the legislature intended to remove the municipality's

Il est bien établi que le législateur est présumé ne pas modifier implicitement le droit : *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 395. Lorsqu'il a l'intention de s'écarter du droit existant, le législateur le fait expressément. En l'espèce, rien dans la loi n'indique que le législateur avait l'intention de supprimer le pouvoir des

Catalyst Paper Corporation *Appellant*

v.

Corporation of the District of North Cowichan *Respondent*

Indexed as: Catalyst Paper Corp. *v.* North Cowichan (District)

2012 SCC 2

File No.: 33744.

2011: October 18; 2012: January 20.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Municipal law — Bylaws — Validity — Standard of review applicable to municipal taxation bylaw — What standard of reasonableness requires in context of judicial review of taxation bylaw — Community Charter, S.B.C. 2003, c. 26, s. 197.

One of C's four mills is located in the District of North Cowichan on Vancouver Island. C seeks to have a municipal taxation bylaw set aside on the basis that it is unreasonable having regard to objective factors such as consumption of municipal services. The District argued that reasonableness must take into account not only matters directly related to the treatment of a particular taxpayer, but a broad array of social, economic and demographic factors relating to the community as a whole. The chambers judge upheld the bylaw. The Court of Appeal dismissed the appeal.

Held: The appeal should be dismissed.

The applicable standard of review is reasonableness. The power of the courts to set aside municipal bylaws is a narrow one, and cannot be exercised simply because a bylaw imposes a greater share of the tax burden on some ratepayers than on others. The critical question is what factors the court should consider in determining what lies within the range of possible reasonable outcomes. Courts reviewing bylaws for reasonableness

Catalyst Paper Corporation *Appelante*

c.

Corporation of the District of North Cowichan *Intimée*

Répertorié : Catalyst Paper Corp. *c.* North Cowichan (District)

2012 CSC 2

N^o^ du greffe : 33744.

2011 : 18 octobre; 2012 : 20 janvier.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit municipal — Règlements — Validité — Norme de contrôle applicable à un règlement municipal en matière de taxation — Exigence de la norme de la décision raisonnable dans le contexte du contrôle judiciaire d'un tel règlement — Community Charter, S.B.C. 2003, ch. 26, art. 197.

L'une des quatre papeteries de C se trouve dans le district de North Cowichan, sur l'île de Vancouver. C demande l'annulation d'un règlement municipal en matière de taxation au motif qu'il est déraisonnable eu égard à des facteurs objectifs telle la consommation de services municipaux. Le district avance que selon la norme de la décision raisonnable il faut tenir compte non seulement de questions se rapportant directement au traitement réservé à un contribuable en particulier, mais également de toute une gamme de facteurs sociaux, économiques et démographiques qui touchent la collectivité dans son ensemble. Le juge de première instance a confirmé la validité du règlement. La Cour d'appel a rejeté l'appel.

Arrêt : Le pourvoi est rejeté.

La norme de contrôle à appliquer est celle de la décision raisonnable. Le pouvoir d'un tribunal d'annuler un règlement municipal est limité et il ne peut être exercé pour la seule raison que le règlement impose un plus grand fardeau fiscal à certains contribuables par rapport à d'autres. La question cruciale est de savoir quels facteurs le tribunal doit prendre en compte pour déterminer en quoi consiste l'éventail d'issues

must approach the task against the backdrop of the wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws, including broad social, economic and political issues. Only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside.

The fact that wide deference is owed to municipal councils does not mean that they have *carte blanche*. Reasonableness limits municipal councils in the sense that the substance of their bylaws must conform to the rationale of the statutory regime set up by the legislature. The range of reasonable outcomes is circumscribed by the purview of the legislative scheme that empowers a municipality to pass a bylaw. Municipal councils must also adhere to appropriate processes and cannot act for improper purposes.

The bylaw falls within a reasonable range of outcomes. The bylaw does not constitute a decision that no reasonable elected municipal council could have made. The District Council considered and weighed all relevant factors. The process of passing the bylaw was properly followed. The reasons for the bylaw were clear and the District's policy had been laid out in a five-year plan. The District's approach complies with the *Community Charter*, which permits municipalities to apply different tax rates to different classes of property. The *Community Charter* does not support C's contention that property value taxes ought to be limited by the level of service consumed. Although the bylaw favours residential property owners, it is not unreasonably partial to them.

Cases Cited

Applied: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **referred to:** *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106; *Bell v. The Queen*, [1979] 2 S.C.R. 212; *O'Flanagan v. Rossland (City)*, 2009 BCCA 182, 270 B.C.A.C. 40; *Westcoast Energy Inc. v. Peace River (Regional District)* (1998), 54 B.C.L.R. (3d) 45; *Canadian National Railway Co. v. Fraser-Fort George (Regional District)* (1996), 26 B.C.L.R. (3d) 81; *Hlushak v. Fort McMurray (City)* (1982), 37 A.R. 149; *Ritholz v. Manitoba Optometric Society* (1959), 21 D.L.R. (2d) 542; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919; *Kruse v. Johnson*, [1898] 2 Q.B. 91; *Associated Provincial*

possibles raisonnables. Le tribunal appelé à réviser le caractère raisonnable d'un règlement municipal doit le faire au regard de la grande variété de facteurs dont les conseillers municipaux élus peuvent légitimement tenir compte lorsqu'ils adoptent des règlements, y compris des facteurs généraux d'ordre social, économique et politique. Le règlement ne sera annulé que s'il s'agit d'un règlement qui n'aurait pu être adopté par un organisme raisonnable tenant compte de ces facteurs.

Le fait qu'il faille faire preuve d'une grande retenue envers les conseils municipaux ne signifie pas qu'ils ont carte blanche. La norme de la décision raisonnable restreint les conseils municipaux en ce sens que la teneur de leurs règlements doit être conforme à la raison d'être du régime mis sur pied par la législature. L'éventail des issues raisonnables est circonscrit par la portée du schème législatif qui confère à la municipalité le pouvoir de prendre des règlements. Les conseils municipaux doivent également adopter des processus convenables et ils ne peuvent agir à des fins illégitimes.

Le règlement s'inscrit dans un éventail d'issues raisonnables. Il ne constitue pas une décision qu'aucun conseil municipal élu raisonnable n'aurait pu prendre. Le conseil du district a examiné et soupesé tous les facteurs pertinents. Le processus d'adoption du règlement a été correctement suivi. Les motifs qui sous-tendaient le règlement étaient clairs et le district avait exposé sa politique dans un plan quinquennal. L'approche du district respecte la *Community Charter*, qui autorise les municipalités à imposer un taux d'impôt foncier propre à chaque catégorie d'immeubles. La *Community Charter* ne permet pas à C d'affirmer que les taxes foncières à payer devraient être proportionnelles au niveau de consommation des services. Le règlement favorise certes les propriétaires d'immeubles résidentiels, mais il n'est pas déraisonnablement partial envers eux.

Jurisprudence

Arrêt appliqué : *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; **arrêts mentionnés :** *Thorne's Hardware Ltd. c. La Reine*, [1983] 1 R.C.S. 106; *Bell c. La Reine*, [1979] 2 R.C.S. 212; *O'Flanagan c. Rossland (City)*, 2009 BCCA 182, 270 B.C.A.C. 40; *Westcoast Energy Inc. c. Peace River (Regional District)* (1998), 54 B.C.L.R. (3d) 45; *Canadian National Railway Co. c. Fraser-Fort George (Regional District)* (1996), 26 B.C.L.R. (3d) 81; *Hlushak c. Fort McMurray (City)* (1982), 37 A.R. 149; *Ritholz c. Manitoba Optometric Society* (1959), 21 D.L.R. (2d) 542; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339; *Pacific National Investments Ltd. c. Victoria (Ville)*, 2000 CSC 64, [2000] 2 R.C.S. 919; *Kruse c. Johnson*, [1898] 2

Picture Houses, Ltd. v. Wednesbury Corp., [1948] 1 K.B. 223; *Lehndorff United Properties (Canada) Ltd. v. Edmonton (City)* (1993), 146 A.R. 37, aff'd (1994), 157 A.R. 169; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326.

Statutes and Regulations Cited

Community Charter, S.B.C. 2003, c. 26, ss. 197, 199(b).
District of North Cowichan, Bylaw No. 3385, *Tax Rates Bylaw, 2009.*
Municipal Finance Authority Act, R.S.B.C. 1979, c. 292, s. 14.1(3)(b) [ad. 1983, c. 24, s. 35].
Municipal Finance Authority Act Regulation, B.C. Reg. 63/84.

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Huddart and Saunders JJ.A.), 2010 BCCA 199, 286 B.C.A.C. 149, 484 W.A.C. 149, 5 B.C.L.R. (5th) 203, 318 D.L.R. (4th) 350, 92 R.P.R. (4th) 1, 69 M.P.L.R. (4th) 163, [2010] 7 W.W.R. 259, [2010] B.C.J. No. 700 (QL), 2010 CarswellBC 958, affirming a decision of Voith J., 2009 BCSC 1420, 98 B.C.L.R. (4th) 355, 88 R.P.R. (4th) 203, 66 M.P.L.R. (4th) 35, [2010] 7 W.W.R. 220, [2009] B.C.J. No. 2033 (QL), 2009 CarswellBC 2763. Appeal dismissed.

Roy W. Millen, *Joanne Lysyk* and *Alexandra Luchenko*, for the appellant.

Sukhbir Manhas and *Reece Harding*, for the respondent.

The judgment of the Court was delivered by

[1] The Chief Justice — Catalyst Paper is the largest specialty paper and newsprint producer in western North America. One of its four mills is located in the District of North Cowichan, on the southeastern shore of Vancouver Island. Nearby forests offer a plentiful supply of wood for Catalyst's operations, while proximity to the ocean offers cheap transportation of supply and product. Labour was historically supplied by small neighbouring communities. Catalyst footed a large portion of the District's modest property tax levy, without demur.

Q.B. 91; *Associated Provincial Picture Houses, Ltd. c. Wednesbury Corp.*, [1948] 1 K.B. 223; *Lehndorff United Properties (Canada) Ltd. c. Edmonton (City)* (1993), 146 A.R. 37, conf. par (1994), 157 A.R. 169; *Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 R.C.S. 326.

Lois et règlements cités

Community Charter, S.B.C. 2003, ch. 26, art. 197, 199b).
District of North Cowichan, Bylaw No. 3385, *Tax Rates Bylaw, 2009.*
Municipal Finance Authority Act, R.S.B.C. 1979, ch. 292, art. 14.1(3)b) [aj. 1983, ch. 24, art. 35].
Municipal Finance Authority Act Regulation, B.C. Reg. 63/84.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Huddart et Saunders), 2010 BCCA 199, 286 B.C.A.C. 149, 484 W.A.C. 149, 5 B.C.L.R. (5th) 203, 318 D.L.R. (4th) 350, 92 R.P.R. (4th) 1, 69 M.P.L.R. (4th) 163, [2010] 7 W.W.R. 259, [2010] B.C.J. No. 700 (QL), 2010 CarswellBC 958, qui a confirmé une décision du juge Voith, 2009 BCSC 1420, 98 B.C.L.R. (4th) 355, 88 R.P.R. (4th) 203, 66 M.P.L.R. (4th) 35, [2010] 7 W.W.R. 220, [2009] B.C.J. No. 2033 (QL), 2009 CarswellBC 2763. Pourvoi rejeté.

Roy W. Millen, *Joanne Lysyk* et *Alexandra Luchenko*, pour l'appelante.

Sukhbir Manhas et *Reece Harding*, pour l'intimée.

Version française du jugement de la Cour rendu par

[1] La Juge en chef — La société Catalyst Paper est le plus gros producteur de papier pour usages spéciaux et de papier à journal de l'ouest du continent nord-américain. L'une de ses quatre papeteries se trouve dans le district de North Cowichan, sur la côte sud-est de l'île de Vancouver. Grâce aux forêts avoisinantes, elle dispose de tout le bois dont elle a besoin, et sa proximité à l'océan lui permet de transporter à peu de frais le matériel nécessaire ainsi que ses produits. Sa main d'œuvre provient traditionnellement des petites collectivités des environs, et c'est sans hésiter qu'elle a toujours payé une grande partie des taxes foncières modestes perçues par le district.

[2] In recent decades, the picture has changed. Attracted by the beauty of the Cowichan coast and the benignity of its climate, new residents began flocking to the District. One after another, new subdivisions sprang up. As the population increased, so did the need for new roads, water lines, schools, hospitals and the usual array of municipal services that accompany urban growth.

[3] As more people came to the District, residential property values skyrocketed, while the value of Catalyst's property remained relatively stable. The District was concerned that taxing residential property at a rate that reflected its actual value relative to the value of other classes of property in the District would result in unacceptable tax increases to residents, hitting long-term fixed-income residents hard. Instead, the District responded to the demographic shift by keeping residential property taxes low and increasing the relative tax rate on Catalyst's property. The total assessed value of residential property in North Cowichan increased 271% between 1992 and 2007, when the mean assessed value of a home in the District reached about $300,000. While residential properties account for almost 90% of the total value of property in the District, the taxes payable in respect thereof constitute only 40% of tax revenue. The tax rate for Class 1 (residential) property in 2009 was set at $2.1430 per $1,000, while the tax rate for Class 4 property (major industry), such as Catalyst's, was set at $43.3499 per $1,000. The ratio between residential property and major industrial property was thus 1:20.3 — dramatically higher than the 1:3.4 ratio that until 1984 was prescribed by regulation for all municipalities in British Columbia. The rate currently is among the highest in the province.

[2] Mais au cours des dernières décennies, les choses ont changé. Attirés par la beauté de la côte de Cowichan et son doux climat, de plus en plus de nouveaux résidents y ont élu domicile. L'une après l'autre, de nouvelles zones domiciliaires ont fait leur apparition. La croissance de la population a mené à la construction de routes, conduites d'eau, écoles et hôpitaux ainsi qu'au développement de toute la gamme des services municipaux qui vont de pair avec la croissance urbaine.

[3] Cette croissance a fait monter en flèche la valeur des immeubles résidentiels, alors que celle des immeubles de Catalyst est demeurée relativement stable. Le district craignait que l'imposition des immeubles résidentiels à un taux correspondant à leur valeur réelle par rapport à la valeur d'autres catégories d'immeubles dans le district ferait subir aux résidents des augmentations inacceptables qui pénaliseraient les résidents de longue date dont le revenu était fixe. C'est pourquoi la réponse du district à ce changement démographique a été de maintenir l'impôt foncier sur les immeubles résidentiels à un niveau faible et d'augmenter le taux relatif de l'impôt foncier sur la valeur des immeubles de Catalyst. Au total, la valeur imposable des immeubles résidentiels dans le district de North Cowichan a augmenté de 271 p. 100 entre 1992 et 2007, la valeur imposable moyenne d'une résidence atteignant près de 300 000 $. Bien que la valeur des immeubles résidentiels compte pour presque 90 p. 100 de la valeur totale des immeubles dans le district, les taxes foncières perçues à leur égard ne constituent que 40 p. 100 des recettes fiscales. Le taux d'imposition des immeubles de catégorie 1 (immeubles résidentiels) en 2009 a été fixé à 2,1430 $ par tranche de 1 000 $, alors que celui des immeubles de catégorie 4 (immeubles de grande industrie), tels ceux de Catalyst, s'élevait à 43,3499 $. Le rapport entre l'impôt foncier payé au titre des immeubles résidentiels et celui payé au titre des immeubles de grande industrie était donc de 1:20,3 — un rapport considérablement plus grand que celui que prévoyait la réglementation pour l'ensemble des municipalités de la Colombie-Britannique jusqu'en 1984, à savoir 1:3,4. Il compte parmi les rapports les plus élevés au sein de la province.

[4] Catalyst, not surprisingly, was unhappy with this state of affairs. Not only is it required to foot a grossly disproportionate part of the District's property tax levy, it obtains little in exchange in terms of services. It has its own sewer and water systems, and its own deep-sea port. Exacerbating the situation is the fact that in recent years, Catalyst's operation has been losing money. Catalyst cannot pick up its operation and move elsewhere. Its choices are to stay and pay, or to close the mill.

[5] To avert this fate, Catalyst has been pressuring the District to lower its tax assessment since 2003. It has had modest success. The District has conducted studies into the problem. It accepts that existing Class 4 tax rates in North Cowichan are at undesirable levels. The work of the District's Property Tax Restructuring Committee, the reports of its financial officer, Mr. Frame, and the District's Financial Plan Bylaw, all recognized that existing Class 4 rates are significantly higher than they should be. As Mr. Frame put it, they "have gotten off track".

[6] Acknowledging the problem, the District has embarked on a gradual program to reduce the rates on Class 4 property, has shifted some special costs to residents ($400,000 for a swimming pool), and in 2008 allocated a $300,000 budget reduction to Class 4 alone. This resulted in the property taxes paid by Catalyst declining from 48% in 2007 to 44% in 2008, to the current 37%. However, for Catalyst, this gradual approach is too little. Having exhausted recourse to the District, its only alternative, it says, is to seek relief from the courts.

[7] This raises the issues of when courts of law can review municipal taxation bylaws and what

[4] Il n'est donc pas étonnant que Catalyst soit mécontente de cette situation, car non seulement doit-elle payer une part exagérément disproportionnée des taxes foncières perçues par le district, mais elle reçoit très peu de services en échange. En effet, elle dispose de ses propres systèmes d'égouts et d'aqueduc, et de son propre port en eau profonde. Qui plus est, l'exploitation de Catalyst est déficitaire depuis quelques années, mais il lui est impossible de s'installer ailleurs. De deux choses l'une : ou bien elle reste dans le district et s'efforce de payer les taxes foncières, ou bien elle ferme la papeterie.

[5] Pour s'en sortir, Catalyst fait pression sur le district depuis 2003 pour qu'il diminue la valeur imposable de ses immeubles, ce qu'elle est parvenue à faire dans une certaine mesure. Le district a mené des études sur le problème. Il reconnaît que les taux de l'impôt foncier payé au titre des immeubles de catégorie 4 ont atteint un niveau indésirable. Le comité de restructuration de l'impôt foncier du district, les rapports de son agent financier, M. Frame, ainsi que le règlement du district en matière de planification financière reconnaissent tous que ces taux d'impôt foncier sont considérablement plus élevés qu'ils ne devraient l'être. Comme l'a dit M. Frame, ils [TRADUCTION] « ont atteint un niveau démesuré ».

[6] Reconnaissant l'ampleur du problème, le district a commencé à réduire graduellement ces taux, il a déchargé Catalyst de certains frais extraordinaires pour les imposer aux résidents (400 000 $ pour une piscine), et, en 2008, il a accordé une baisse d'impôt foncier de 300 000 $ à l'égard des seuls immeubles de catégorie 4. Tout cela a eu pour résultat que les taxes foncières payées par Catalyst, qui constituaient 48 p. 100 des recettes fiscales du district en 2007, sont passées à 44 p. 100 en 2008 avant d'atteindre la proportion actuelle, soit 37 p. 100. Cependant, pour Catalyst, cette approche graduelle est insatisfaisante. Ayant épuisé toutes les possibilités qui s'offraient à elle d'influencer le district, elle dit n'avoir d'autre choix que de s'adresser aux tribunaux.

[7] Ceci soulève les questions de savoir dans quelles circonstances les cours de justice peuvent

principles guide that review. Catalyst argues that courts can set aside municipal bylaws on the ground that they are unreasonable, having regard to objective factors such as consumption of municipal services. The District of North Cowichan, on the other hand, argues that the judicial power to overturn a municipal tax bylaw is very narrow; in its view, courts cannot overturn a bylaw simply because it places a disproportionate burden on a taxpayer.

réviser les règlements municipaux en matière de taxation et quels principes il convient d'appliquer à cet égard. Catalyst soutient que les tribunaux peuvent annuler des règlements municipaux au motif qu'ils sont déraisonnables eu égard à des facteurs objectifs tels la consommation de services municipaux. Pour sa part, le district de North Cowichan fait valoir que le pouvoir d'un tribunal d'annuler un tel règlement est très limité; selon lui, le tribunal ne peut exercer ce pouvoir pour la seule raison que le règlement impose un fardeau disproportionné à un contribuable.

[8] The British Columbia Supreme Court (2009 BCSC 1420, 98 B.C.L.R. (4th) 355) and the Court of Appeal (2010 BCCA 199, 286 B.C.A.C. 149) upheld the impugned bylaw. Catalyst now appeals to this Court.

[8] La Cour suprême de la Colombie-Britannique (2009 BCSC 1420, 98 B.C.L.R. (4th) 355) et la Cour d'appel (2010 BCCA 199, 286 B.C.A.C. 149) ont toutes les deux confirmé la validité du règlement contesté. C'est pourquoi Catalyst se pourvoit devant notre Cour.

[9] I conclude that the power of the courts to set aside municipal bylaws is a narrow one, and cannot be exercised simply because a bylaw imposes a greater share of the tax burden on some ratepayers than on others.

[9] Je conclus que le pouvoir d'un tribunal d'annuler un règlement municipal est limité et qu'il ne peut être exercé pour la seule raison que le règlement impose un plus grand fardeau fiscal à certains contribuables par rapport à d'autres.

Analysis

Analyse

A. *Judicial Review of Municipal Bylaws*

A. *Contrôle judiciaire des règlements municipaux*

[10] It is a fundamental principle of the rule of law that state power must be exercised in accordance with the law. The corollary of this constitutionally protected principle is that superior courts may be called upon to review whether particular exercises of state power fall outside the law. We call this function "judicial review".

[10] La primauté du droit pose comme principe fondamental que le pouvoir de l'État doit être exercé en conformité avec la loi. Ce principe protégé par la Constitution a pour corollaire que les cours supérieures peuvent être appelées à examiner si un exercice particulier du pouvoir de l'État est conforme à la loi ou non. C'est ce que nous appelons le « contrôle judiciaire ».

[11] Municipalities do not have direct powers under the Constitution. They possess only those powers that provincial legislatures delegate to them. This means that they must act within the legislative constraints the province has imposed on them. If they do not, their decisions or bylaws may be set aside on judicial review.

[11] Les municipalités ne jouissent d'aucun pouvoir leur étant directement accordé par la Constitution. Elles n'ont que les pouvoirs que leur délèguent les législatures provinciales. Cela signifie qu'elles doivent s'en tenir aux contraintes législatives que la province leur impose, à défaut de quoi leurs décisions et leurs règlements peuvent être annulés à l'issue d'une procédure de contrôle judiciaire.

[12] A municipality's decisions and bylaws, like all administrative acts, may be reviewed in two ways. First, the requirements of procedural fairness and legislative scheme governing a municipality may require that the municipality comply with certain procedural requirements, such as notice or voting requirements. If a municipality fails to abide by these procedures, a decision or bylaw may be invalid. But in addition to meeting these bare legal requirements, municipal acts may be set aside because they fall outside the scope of what the empowering legislative scheme contemplated. This substantive review is premised on the fundamental assumption derived from the rule of law that a legislature does not intend the power it delegates to be exercised unreasonably, or in some cases, incorrectly.

[13] A court conducting substantive review of the exercise of delegated powers must first determine the appropriate standard of review. This depends on a number of factors, including the presence of a privative clause in the enabling statute, the nature of the body to which the power is delegated, and whether the question falls within the body's area of expertise. Two standards are available: reasonableness and correctness. See, generally, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 55. If the applicable standard of review is correctness, the reviewing court requires, as the label suggests, that the administrative body be correct. If the applicable standard of review is reasonableness, the reviewing court requires that the decision be reasonable, having regard to the processes followed and whether the outcome falls within a reasonable range of alternatives in light of the legislative scheme and contextual factors relevant to the exercise of the power (*Dunsmuir*, at para. 47).

[14] Against this general background, I come to the issue before us — the substantive judicial

[12] Les décisions et les règlements d'une municipalité, à l'instar de tout acte administratif, peuvent être révisés de deux façons. D'abord, les exigences en matière d'équité procédurale et le régime législatif qui régit la municipalité peuvent l'obliger à respecter certaines exigences de nature procédurale, notamment en matière d'avis ou de vote, et sa décision ou son règlement peut être jugé invalide si elle néglige de suivre ces procédures. Mais en plus de pouvoir être annulés au motif que ces exigences légales minimales n'ont pas été respectées, il se peut que les actes d'une municipalité le soient parce qu'ils outrepassent ce que le régime législatif permettait de faire. Cette révision sur le fond est fondée sur la présomption fondamentale, découlant de la primauté du droit, selon laquelle le législateur ne peut avoir voulu que le pouvoir qu'il a délégué soit exercé de façon déraisonnable, ou, dans certains cas, incorrecte.

[13] Un tribunal procédant à la révision sur le fond de l'exercice de pouvoirs délégués doit d'abord déterminer la norme de contrôle qu'il convient d'appliquer. Cela dépend d'un certain nombre de facteurs, notamment l'existence ou non d'une clause privative (aussi appelée disposition d'inattaquabilité) dans la loi habilitante, la nature du délégataire, et la question de savoir si la décision relève du domaine d'expertise de ce dernier. Il existe deux normes de contrôle : celle de la décision raisonnable et celle de la décision correcte. Voir, de façon générale, *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, au par. 55. Dans le cas où la norme qu'il convient d'appliquer est celle de la décision correcte, le tribunal de révision exige que l'entité administrative ait agi correctement, comme l'indique l'appellation de la norme. Dans le cas où la norme applicable est plutôt celle de la décision raisonnable, il exige que la décision soit raisonnable en considérant les processus suivis et si le résultat s'inscrit dans un éventail raisonnable d'issues possibles, compte tenu du régime législatif et des facteurs contextuels pertinents quant à l'exercice du pouvoir (*Dunsmuir*, par. 47).

[14] C'est sur cette toile de fond que j'aborde la question que nous sommes appelés à trancher :

review of municipal taxation bylaws. In *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at p. 115, the Court, referring to delegated legislation, drew a distinction between policy and legality, with the former being unreviewable by the courts:

> The Governor in Council quite obviously believed that he had reasonable grounds for passing Order in Council P.C. 1977-2115 extending the boundaries of Saint John Harbour and we cannot enquire into the validity of those beliefs in order to determine the validity of the Order in Council.

(See also pp. 111-13.) However, this attempt to maintain a clear distinction between policy and legality has not prevailed. In passing delegated legislation, a municipality must make policy choices that fall reasonably within the scope of the authority the legislature has granted it. Indeed, the parties now agree that the tax bylaw at issue is not exempt from substantive review in this sense.

[15] Unlike Parliament and provincial legislatures which possess inherent legislative power, regulatory bodies can exercise only those legislative powers that were delegated to them by the legislature. Their discretion is not unfettered. The rule of law insists on judicial review to ensure that delegated legislation complies with the rationale and purview of the statutory scheme under which it is adopted. The delegating legislator is presumed to intend that the authority be exercised in a reasonable manner. Numerous cases have accepted that courts can review the substance of bylaws to ensure the lawful exercise of the power conferred on municipal councils and other regulatory bodies (*Bell v. The Queen*, [1979] 2 S.C.R. 212; *O'Flanagan v. Rossland (City)*, 2009 BCCA 182, 270 B.C.A.C. 40; *Westcoast Energy Inc. v. Peace River (Regional District)* (1998), 54 B.C.L.R. (3d) 45 (C.A.); *Canadian National Railway Co. v. Fraser-Fort George (Regional District)* (1996), 26 B.C.L.R. (3d) 81 (C.A.); *Hlushak v. Fort McMurray (City)* (1982), 37 A.R. 149 (C.A.); *Ritholz v.*

la révision judiciaire sur le fond des règlements municipaux en matière de taxation. Dans *Thorne's Hardware Ltd. c. La Reine*, [1983] 1 R.C.S. 106, p. 115, la Cour, faisant référence à la législation déléguée, a établi une distinction entre la politique et la légalité, la première ne pouvant être révisée par les tribunaux :

> Le gouverneur en conseil a manifestement cru avoir des motifs raisonnables de prendre le décret C.P. 1977-2115 qui étendait les limites du port de Saint-Jean et nous ne pouvons nous enquérir de la validité de ces motifs afin de déterminer la validité du décret.

(Voir aussi p. 111-113.) Cependant, cette tentative de conserver une distinction claire entre la politique et la légalité n'a pas été maintenue. En exerçant son pouvoir législatif délégué, une municipalité doit faire des choix de politique qui relèvent raisonnablement de l'étendue de l'autorité que la législature lui a octroyée. De fait, les parties conviennent maintenant que le règlement en matière de taxation en cause dans la présente affaire n'est pas, en ce sens, soustrait à la révision sur le fond.

[15] Contrairement au Parlement et aux législatures provinciales, qui jouissent d'un pouvoir législatif inhérent, les organismes de réglementation ne peuvent exercer que les pouvoirs législatifs qui leur ont été délégués. Leur pouvoir discrétionnaire n'est pas sans limites. La primauté du droit exige que le contrôle judiciaire de la législation déléguée s'assure que celle-ci est bien conforme à la raison d'être et à la portée du régime législatif sous lequel elle a été adoptée. Il faut présumer que le législateur qui délègue un pouvoir s'attend à ce que celui-ci soit exercé de manière raisonnable. Il a été reconnu dans de nombreux cas que les tribunaux peuvent réviser le contenu des règlements municipaux afin d'assurer l'exercice légitime du pouvoir conféré aux conseils municipaux et à d'autres organismes de réglementation (*Bell c. La Reine*, [1979] 2 R.C.S. 212; *O'Flanagan c. Rossland (City)*, 2009 BCCA 182, 270 B.C.A.C. 40; *Westcoast Energy Inc. c. Peace River (Regional District)* (1998), 54 B.C.L.R. (3d) 45 (C.A.); *Canadian National Railway Co. c. Fraser-Fort George (Regional*

Manitoba Optometric Society (1959), 21 D.L.R. (2d) 542 (Man. C.A.)).

[16] This brings us to the standard of review to be applied. The parties agree that the reasonableness standard applies in this case. The question is whether the bylaw at issue is reasonable having regard to process and whether it falls within a range of possible reasonable outcomes (*Dunsmuir*, at para. 47).

[17] Where the parties differ is on *what the standard of reasonableness requires in the context of this case*. This is the nub of the dispute before us. Catalyst argues that the issue is whether the tax bylaw falls within a range of reasonable outcomes, having regard to objective factors relating to consumption of municipal services, factors Catalyst has outlined in a study called the "Consumption of Services Model". The District of North Cowichan, on the other hand, argues that reasonableness, in the context of municipal taxation bylaws, must take into account not only matters directly related to the treatment of a particular taxpayer in terms of consumption, but a broad array of social, economic and demographic factors relating to the community as a whole. The critical question is what factors the court should consider in determining what lies within the range of possible reasonable outcomes. Is it the narrow group of objective consumption-related factors urged by Catalyst? Or is it a broader spectrum of social, economic and political factors, as urged by North Cowichan?

[18] The answer lies in *Dunsmuir*'s recognition that reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially

District) (1996), 26 B.C.L.R. (3d) 81 (C.A.); *Hlushak c. Fort McMurray (City)* (1982), 37 A.R. 149 (C.A.); *Ritholz c. Manitoba Optometric Society* (1959), 21 D.L.R. (2d) 542 (C.A. Man.)).

[16] Cela nous amène à la norme de contrôle qu'il convient d'appliquer. Les parties conviennent qu'il s'agit de la norme de la décision raisonnable en l'espèce. La question est donc de savoir si le règlement contesté est raisonnable, eu égard au processus qui a mené à son adoption, et s'il s'inscrit dans un éventail d'issues possibles raisonnables (*Dunsmuir*, par. 47).

[17] Là où les parties divergent d'opinion, c'est sur *ce que la norme de la décision raisonnable impose dans le contexte de la présente affaire*. C'est ici que se situe le nœud de l'affaire. Catalyst soutient que la question est de savoir si le règlement s'inscrit dans un éventail d'issues raisonnables eu égard à des facteurs objectifs se rapportant à la consommation de services municipaux, facteurs que Catalyst a décrits dans une étude intitulée « *Consumption of Services Model* » (« Le modèle basé sur la consommation de services »). De son côté, le district de North Cowichan avance que la norme de la décision raisonnable impose, dans le contexte des règlements municipaux en matière de taxation, que l'on tienne compte non seulement de questions se rapportant directement au traitement réservé à un contribuable en particulier selon qu'il consomme ou non des services municipaux, mais également de toute une gamme de facteurs sociaux, économiques et démographiques qui touchent la collectivité dans son ensemble. La question cruciale est de savoir quels facteurs le tribunal de révision doit prendre en compte pour déterminer quelles sont les issues possibles raisonnables. S'agit-il du groupe restreint de facteurs objectifs ayant trait à la consommation que propose Catalyst? Ou s'agit-il plutôt d'un éventail plus large de facteurs sociaux, économiques et politiques, comme le prétend le district de North Cowichan?

[18] La réponse réside dans le fait que *Dunsmuir* reconnaît que le caractère raisonnable de la décision s'apprécie dans le contexte du type particulier de processus décisionnel en cause et de l'ensemble des

contextual inquiry (*Dunsmuir*, at para. 64). As stated in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59, *per* Binnie J., "[r]easonableness is a single standard that takes its colour from the context." The fundamental question is the scope of decision-making power conferred on the decision-maker by the governing legislation. The scope of a body's decision-making power is determined by the type of case at hand. For this reason, it is useful to look at how courts have approached this type of decision in the past (*Dunsmuir*, at paras. 54 and 57). To put it in terms of this case, we should ask how courts reviewing municipal bylaws pre-*Dunsmuir* have proceeded. This approach does not contradict the fact that the ultimate question is whether the decision falls within a range of reasonable outcomes. It simply recognizes that reasonableness depends on the context.

[19] The case law suggests that review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. Rather, they involve an array of social, economic, political and other non-legal considerations. "Municipal governments are democratic institutions", *per* LeBel J. for the majority in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919, at para. 33. In this context, reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.

[20] The decided cases support the view of the trial judge that, historically, courts have refused

facteurs pertinents. Il s'agit essentiellement d'une analyse contextuelle (*Dunsmuir*, par. 64). Comme l'a dit le juge Binnie dans *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, par. 59, « [l]a raisonnabilité constitue une norme unique qui s'adapte au contexte. » La question fondamentale est de savoir quelle est la portée du pouvoir décisionnel que la loi a conféré au décideur. La portée du pouvoir décisionnel d'un organisme est déterminée par le type de situation en question. Pour cette raison, il est utile d'examiner comment les tribunaux ont déjà traité de ce type de décisions (*Dunsmuir*, par. 54 et 57). Pour revenir à l'affaire qui nous occupe, nous devons nous demander comment les tribunaux procédaient pour réviser les règlements municipaux avant l'arrêt *Dunsmuir*. Cette approche ne contredit pas le fait qu'en définitive il s'agit de savoir si la décision s'inscrit dans un éventail d'issues raisonnables. Elle reconnaît simplement que la question de savoir si une décision est raisonnable ou non dépend du contexte.

[19] Il ressort de la jurisprudence que la révision des règlements municipaux doit refléter le large pouvoir discrétionnaire que les législateurs provinciaux ont traditionnellement conféré aux municipalités en matière de législation déléguée. Les conseillers municipaux qui adoptent des règlements accomplissent une tâche qui a des répercussions sur l'ensemble de leur collectivité et qui est de nature législative plutôt qu'adjudicative. Les règlements municipaux ne sont pas des décisions quasi judiciaires. Ils font plutôt intervenir toute une gamme de considérations non juridiques, notamment sur les plans social, économique et politique. Comme l'a dit le juge LeBel au nom de la majorité dans *Pacific National Investments Ltd. c. Victoria (Ville)*, 2000 CSC 64, [2000] 2 R.C.S. 919, par. 33, « [l]es administrations municipales forment des institutions démocratiques. » Dans ce contexte, la norme de la décision raisonnable signifie que les tribunaux doivent respecter le devoir qui incombe aux représentants élus de servir leurs concitoyens, qui les ont élus et devant qui ils sont ultimement responsables.

[20] Les causes déjà jugées appuient le point de vue du juge de première instance selon lequel les

to overturn municipal bylaws unless they were found to be "aberrant", "overwhelming", or if "no reasonable body" could have adopted them (para. 80, *per* Voith J.). See *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.); *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.); *Lehndorff United Properties (Canada) Ltd. v. Edmonton (City)* (1993), 146 A.R. 37 (Q.B.), aff'd (1994), 157 A.R. 169 (C.A.).

[21] This deferential approach to judicial review of municipal bylaws has been in place for over a century. As Lord Russell C.J. stated in *Kruse v. Johnson*:

> . . . courts of justice ought to be slow to condemn as invalid any by-law, so made under such conditions, on the ground of supposed unreasonableness. Notwithstanding what Cockburn C.J. said in *Bailey v. Williamson* [(1873), L.R. 8 Q.B. 118, at p. 124], an analogous case, I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires." But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. [Emphasis added; pp. 99-100.]

These are the general indicators of unreasonableness in the context of municipal bylaws. It must be remembered, though, that what is unreasonable will depend on the applicable legislative framework. For instance, Lord Russell C.J.'s reference to inequality in operation as between different classes is inapt in the context of many modern municipal

tribunaux ont traditionnellement refusé d'invalider des règlements municipaux à moins qu'ils n'aient été jugés [TRADUCTION] « aberrants » ou « choquants », ou si « aucun organisme raisonnable » n'aurait pu les adopter (par. 80, le juge Voith). Voir *Kruse c. Johnson*, [1898] 2 Q.B. 91 (C. div.); *Associated Provincial Picture Houses, Ltd. c. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.); *Lehndorff United Properties (Canada) Ltd. c. Edmonton (City)* (1993), 146 A.R. 37 (B.R.), conf. par (1994), 157 A.R. 169 (C.A.).

[21] Cette retenue dans la façon d'aborder la révision des règlements municipaux existe depuis plus d'un siècle. Comme l'a affirmé le juge en chef lord Russell dans *Kruse c. Johnson* :

> [TRADUCTION] . . . les cours de justice doivent faire preuve de circonspection avant de déclarer invalide un règlement pris dans ces conditions au motif qu'il serait déraisonnable. Malgré ce que le juge en chef Cockburn dit dans une affaire analogue, *Bailey c. Williamson* [(1873), L.R. 8 Q.B. 118, p. 124], je ne veux pas dire qu'il ne peut y avoir de cas où la Cour aurait le devoir d'invalider des règlements, pris en vertu du même pouvoir que ceux-ci l'ont été, en se fondant sur leur caractère déraisonnable. Mais déraisonnable en quel sens? On peut penser, par exemple, à des règlements partiaux et d'application inégale pour des catégories distinctes, à des règlements manifestement injustes, à des règlements empreints de mauvaise foi, à des règlements entraînant une immixtion abusive ou gratuite dans les droits des personnes qui y sont assujetties, au point d'être injustifiables aux yeux d'hommes raisonnables; la Cour pourrait alors dire « le Parlement n'a jamais eu l'intention de donner le pouvoir de faire de telles règles; elles sont déraisonnables et *ultra vires.* » C'est en ce sens et uniquement en ce sens qu'il faut, à mon avis, considérer la question du caractère raisonnable. Un règlement n'est pas déraisonnable simplement parce que certains juges peuvent estimer qu'il va au-delà ce qui est prudent ou nécessaire ou commode, ou parce qu'il n'est pas assorti d'une réserve ou d'une exception qui devrait y figurer de l'avis de certains juges. [Je souligne; p. 99-100.]

Il s'agit là des indicateurs généraux de ce qui est déraisonnable dans le contexte des règlements municipaux. Il faut cependant garder à l'esprit que ce qui est déraisonnable dépendra du cadre législatif applicable. Par exemple, l'application inégale pour des catégories distinctes dont parle le juge en chef lord Russell ne convient guère au

statutes, which contain provisions that expressly allow for such inequality. Subsection 197(3) of the *Community Charter*, S.B.C. 2003, c. 26, which allows municipalities to set different tax rates for different property classes, is such a provision.

[22] Catalyst argues that *Dunsmuir* has changed the law and that the traditional deferential approach to the review of municipal bylaws no longer holds. The bylaw, it argues, must be demonstrably reasonable, having regard to objective criteria relating to taxation. The reasonableness standard in *Dunsmuir*, it says, means that all municipal decisions, including bylaws, must meet the test of demonstrable rationality in terms of process and outcome. It follows, Catalyst argues, that a municipality cannot tax major industrial property owners at a substantially higher rate than residential property owners, in order to avoid hardship to long-term or fixed-income residents in a rising housing market. Rather, the municipality should confine itself to objective factors, such as those set forth in Catalyst's "Municipal Sustainability Model", in fixing the property tax rates of different classes of property owners.

[23] This argument misreads *Dunsmuir*. As discussed above, *Dunsmuir* described reasonableness as a flexible deferential standard that varies with the context and the nature of the impugned administrative act. In doing so, *Dunsmuir* expressly stated that the approaches to review developed in particular contexts in previous cases continue to be relevant (*Dunsmuir*, at paras. 54 and 57). Here the context is the adoption of municipal bylaws. The cases dealing with review of such bylaws relied on by the trial judge and discussed above continue to be relevant and applicable. To put it succinctly, they point the way to what is reasonable in the particular

contexte de plusieurs lois municipales contemporaines, qui contiennent des dispositions permettant expressément une telle inégalité. Le paragraphe 197(3) de la *Community Charter*, S.B.C. 2003, ch. 26, qui permet aux municipalités de fixer des taux d'impôt variant en fonction des catégories d'immeubles, est un exemple d'une telle disposition.

[22] Catalyst soutient que *Dunsmuir* a modifié le droit et que la retenue traditionnelle des tribunaux en ce qui concerne le contrôle des règlements municipaux n'a plus sa place. Selon elle, le caractère raisonnable du règlement doit pouvoir se démontrer au regard de critères objectifs en matière d'impôt foncier. Elle affirme que la norme de la décision raisonnable énoncée dans *Dunsmuir* signifie que toutes les décisions municipales, y compris les règlements, doivent satisfaire au critère de la rationalité démontrable du processus décisionnel et du résultat. Il s'ensuit, selon Catalyst, qu'une municipalité ne peut imposer aux propriétaires d'immeubles de grande industrie des taxes foncières beaucoup plus élevées que celles que payent les propriétaires d'immeubles résidentiels, et ce afin d'éviter de mettre en difficulté les résidents de longue date ou ceux dont le revenu est fixe, dans le contexte d'un marché de l'habitation inflationniste. La municipalité doit plutôt s'en tenir à des facteurs objectifs, tels ceux énoncés dans le modèle de développement durable des municipalités proposé par Catalyst, pour fixer les taux de l'impôt foncier que payent diverses catégories de propriétaires d'immeubles.

[23] Il s'agit là d'une lecture erronée de *Dunsmuir*. Comme je l'ai déjà mentionné, *Dunsmuir* affirme que la norme de la décision raisonnable est une norme de déférence souple qui varie selon le contexte et la nature de la mesure administrative contestée. Ainsi, *Dunsmuir* déclare expressément que les approches de révision judiciaire élaborées précédemment par les tribunaux dans des contextes particuliers demeurent pertinentes (*Dunsmuir*, par. 54 et 57). En l'espèce, le contexte est celui de l'adoption de règlements municipaux. Les causes relatives à la révision de tels règlements que le juge de première instance a invoquées et qui ont

context of bylaws passed by democratically elected municipal councils.

[24] It is thus clear that courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws. The applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside. The fact that wide deference is owed to municipal councils does not mean that they have *carte blanche*.

[25] Reasonableness limits municipal councils in the sense that the substance of their bylaws must conform to the rationale of the statutory regime set up by the legislature. The range of reasonable outcomes is thus circumscribed by the purview of the legislative scheme that empowers a municipality to pass a bylaw.

[26] Here the relevant legislation is the *Community Charter*. Section 197 gives municipalities a broad and virtually unfettered legislative discretion to establish property tax rates in respect of each of the property classes in the municipality, unless limited by regulation. The intended breadth of the legislative discretion under the current legislative scheme is highlighted by the fact that the government of British Columbia ceased to impose regulatory limits on the ratios between tax rates in 1985. Section 199(b) of the *Community Charter* allows the Lieutenant Governor in Council to make regulations on the relationships between Class 1 and Class 4 tax rates, and no regulation of this sort has been reintroduced since the repeal of the 1984 regulation, which prescribed a 1 to 3.4 ratio between residential and major industry tax rates (B.C. Reg. 63/84, adopted pursuant to s. 14.1(3)(b) of the *Municipal Finance Authority Act*, R.S.B.C. 1979, c. 292, the predecessor of s. 199(b)

été analysées ci-dessus restent donc pertinentes et applicables. Bref, ces causes indiquent ce qui est raisonnable dans le contexte particulier de règlements adoptés par des conseils municipaux élus démocratiquement.

[24] Il est donc clair que les tribunaux appelés à réviser le caractère raisonnable de règlements municipaux doivent le faire au regard de la grande variété de facteurs dont les conseillers municipaux élus peuvent légitimement tenir compte lorsqu'ils adoptent des règlements. Le critère applicable est le suivant : le règlement ne sera annulé que s'il s'agit d'un règlement qui n'aurait pu être adopté par un organisme raisonnable tenant compte de ces facteurs. Le fait qu'il faille faire preuve d'une grande retenue envers les conseils municipaux ne signifie pas qu'ils ont carte blanche.

[25] La norme de la décision raisonnable restreint les conseils municipaux en ce sens que la teneur de leurs règlements doit être conforme à la raison d'être du régime mis sur pied par la législature. L'éventail des issues raisonnables est donc circonscrit par la portée du schème législatif qui confère à la municipalité le pouvoir de prendre des règlements.

[26] La loi applicable en l'espèce est la *Community Charter*. Son article 197 confère aux municipalités un pouvoir discrétionnaire large et quasi illimité de fixer les taux de l'impôt foncier à payer au titre de chacune des catégories d'immeubles se trouvant sur son territoire, sous réserve des limites prescrites par règlement. La portée de ce pouvoir que le régime législatif actuellement en vigueur confère aux municipalités ressort du fait que le gouvernement de la Colombie-Britannique a cessé, en 1985, d'imposer des limites réglementaires aux rapports permis entre les taux d'imposition. L'alinéa 199b) de la *Community Charter* donne au lieutenant-gouverneur en conseil le pouvoir de prendre des règlements sur le rapport entre le taux d'imposition des immeubles de catégorie 1 et celui des immeubles de catégorie 4, et aucun règlement de ce genre n'a été pris depuis l'abrogation du règlement de 1984, qui prévoyait un rapport de 1:3,4 entre le taux d'impôt foncier sur les immeubles

of the *Community Charter*). Special provisions of the *Community Charter* relating to parcel taxation, local area services, business improvement areas, or property value tax exemptions address particular concerns and do not detract from the broad power of British Columbia municipalities to vary rates between different classes of property.

[27] Nor does the *Community Charter* support the contention that property value taxes ought to be limited by the level of service consumed. Section 197 authorizes the imposition of a tax, not a fee. The distinguishing feature between the two is that a tax need bear no relationship to the costs of the service being provided, while the opposite is true for a fee. The ratio of service consumption to the different property classes will differ depending on the service. In light of this, a requirement that municipalities impose property value taxes having in mind the level of services consumed would prevent municipalities from ever exercising their authority under s. 197(3)(b).

[28] Another set of limitations on municipalities passing bylaws flows from the need for reasonable processes. In determining whether a particular bylaw falls within the scope of the legislative scheme, factors such as failure to adhere to required processes and improper motives are relevant. Municipal councils must adhere to appropriate processes and cannot act for improper purposes. As Gonthier J. stated for the Court in *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, "[a] municipal act committed for unreasonable or reprehensible purposes, or purposes not covered by legislation, is void" (p. 349).

[29] It is important to remember that requirements of process, like the range of reasonable outcomes, vary with the context and nature of the

résidentiels et celui applicable aux immeubles de grande industrie (B.C. Reg. 63/84, adopté en vertu de l'al. 14.1(3)b) de la *Municipal Finance Authority Act*, R.S.B.C. 1979, ch. 292, la disposition qui a précédé l'al. 199b) de la *Community Charter*). Des dispositions spéciales de la *Community Charter* en matière d'imposition de biens-fonds, de services locaux, de zones d'amélioration commerciale ou d'exemptions fiscales en fonction de la valeur des immeubles répondent à des besoins particuliers et n'enlèvent rien au large pouvoir des municipalités de la Colombie-Britannique de modifier le rapport entre les taux applicables à diverses catégories d'immeubles.

[27] La *Community Charter* ne permet pas non plus d'affirmer que les taxes foncières à payer devraient être proportionnelles au niveau de consommation des services. L'article 197 autorise l'imposition d'un impôt, et non de frais. Or, ce qui distingue l'impôt des frais, c'est que l'impôt n'a pas à correspondre au coût du service fourni. Le rapport entre le niveau de consommation des services et les diverses catégories d'immeubles dépendra des services en question. Cela signifie que si les municipalités devaient imposer des taxes foncières en fonction du niveau de consommation des services, elles ne pourraient jamais exercer le pouvoir que leur confère l'al. 197(3)b).

[28] La nécessité de suivre des processus raisonnables impose d'autres limites aux municipalités en matière d'adoption de règlements. Pour établir si un règlement relève de la portée du régime législatif, il faut tenir compte de facteurs tels l'omission de suivre les processus établis et la poursuite de fins illégitimes. Les conseils municipaux doivent adopter des processus convenables et ils ne peuvent agir à des fins illégitimes. Comme l'a affirmé le juge Gonthier au nom de la Cour dans *Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 R.C.S. 326, « [u]n acte municipal posé à des fins déraisonnables ou condamnables ou à des fins non prévues par la loi est nul » (p. 349).

[29] Il importe de se rappeler que, tout comme l'éventail des issues raisonnables, le processus à suivre varie selon le contexte et la nature du

decision-making process at issue. Formal reasons may be required for decisions that involve quasi-judicial adjudication by a municipality. But that does not apply to the process of passing municipal bylaws. To demand that councillors who have just emerged from a heated debate on the merits of a bylaw get together to produce a coherent set of reasons is to misconceive the nature of the democratic process that prevails in the council chamber. The reasons for a municipal bylaw are traditionally deduced from the debate, deliberations and the statements of policy that give rise to the bylaw.

[30] Nor, contrary to Catalyst's contention, is the municipality required to formally explain the basis of a bylaw. As discussed above, municipal councils have extensive latitude in what factors they may consider in passing a bylaw. They may consider objective factors directly relating to consumption of services. But they may also consider broader social, economic and political factors that are relevant to the electorate.

[31] This is not to say that it is wrong for municipal councils to explain the rationale behind their bylaws. Typically, as in this case, modern municipal councils provide information in the form of long-term plans. Nor is it to say that municipalities performing decisional or adjudicative functions are exempt from giving reasons as discussed above.

B. *Application: Is the Bylaw Unreasonable?*

[32] To summarize, the ultimate question is whether the taxation bylaw falls within a reasonable range of outcomes. This must be judged on the approach the courts have traditionally adopted in reviewing bylaws passed by municipal councils. Municipal councils passing bylaws are entitled to consider not merely the objective considerations bearing directly on the matter, but broader social,

processus décisionnel en cause. La municipalité qui rend une décision dans l'exercice de ses fonctions quasi judiciaires doit parfois motiver sa décision par écrit. Mais cela ne s'applique pas au processus d'adoption des règlements municipaux. C'est se méprendre sur la nature du processus démocratique qui s'opère dans la salle du conseil municipal que d'exiger de conseillers municipaux sortant d'un vif débat sur le bien-fondé d'un règlement qu'ils produisent ensemble des motifs cohérents. Les motifs qui sous-tendent un règlement municipal se dégagent habituellement du débat, des délibérations et des énoncés de politique d'où il prend sa source.

[30] Contrairement à ce que prétend Catalyst, les municipalités n'ont pas non plus à justifier formellement leurs règlements. Rappelons que les conseils municipaux disposent d'une grande latitude quant aux facteurs à prendre en compte dans l'adoption de leurs règlements. En effet, ils peuvent prendre en considération non seulement des facteurs objectifs directement liés à la consommation de services, mais aussi des facteurs plus généraux d'ordre social, économique et politique qui touchent l'électorat.

[31] Il ne faut pas en conclure pour autant que les conseils municipaux ont tort d'expliquer la raison d'être de leurs règlements. En général, de nos jours, les conseils municipaux fournissent des renseignements sous la forme de plans à long terme, comme cela a été fait en l'espèce. Il ne faut pas non plus en conclure que les municipalités sont dispensées de l'obligation de fournir des motifs dans l'exercice de leurs fonctions décisionnelles ou adjudicatives, comme je l'ai déjà expliqué.

B. *Application : Le règlement est-il déraisonnable?*

[32] En résumé, il faut déterminer en définitive si le règlement contesté s'inscrit dans un éventail raisonnable d'issues possibles en suivant l'approche que les tribunaux ont adoptée au fil des ans en matière de révision des règlements adoptés par des conseils municipaux. Les conseils municipaux ne sont pas tenus, dans le cadre du processus d'adoption de règlements, de s'en remettre aux

economic and political issues. In judging the reasonableness of a bylaw, it is appropriate to consider both process and the content of the bylaw.

[33] I turn first to process. Catalyst does not allege that the voting procedures of the District were incorrect; nor does it allege bad faith. Its contention is rather that the District's process is flawed because it provided neither formal reasons for the bylaw, nor a rational basis (viewed in terms of Catalyst's "Consumption of Services Model") for its decision. This contention cannot succeed. As discussed above, municipal councils are not required to give formal reasons or lay out a rational basis for bylaws. In any event, as the trial judge found, the reasons for the bylaw at issue here were clear to everyone. The District's policy had been laid out in a five-year plan. Discussions and correspondence between the District and Catalyst left little doubt as to the reasons for the bylaw. The trial judge found that the District Council considered and weighed all relevant factors in making its decision. If Catalyst has a complaint, it is not with the procedures followed, but with the substance of the bylaw.

[34] This brings us to the content of the bylaw at issue. There can be no doubt that the impact of the bylaw on Catalyst is harsh. The ratio between major industrial rates and residential rates imposed is among the highest in British Columbia (only two municipalities exceed it) and far outside the pre-1985 norm. In Catalyst's present economic situation, the consequences are serious — indeed, Catalyst suggests that the industrial rate threatens the continued operation of its mill in the District.

seules considérations objectives ayant une incidence directe sur l'affaire; ils peuvent aussi prendre en compte des enjeux plus généraux d'ordre social, économique et politique. Pour apprécier le caractère raisonnable d'un règlement, il convient donc d'examiner le processus qui a mené à son adoption ainsi que sa teneur.

[33] Je me pencherai d'abord sur le processus. Catalyst ne prétend pas que la procédure de scrutin du district était incorrecte, et elle n'invoque pas non plus la mauvaise foi. Elle prétend plutôt que le processus suivi par le district est vicié parce que ce dernier n'a ni motivé par écrit le règlement, ni fourni de fondement logique (considéré sous l'angle du modèle basé sur la consommation de services élaboré par Catalyst) à sa décision. Cette prétention ne saurait être retenue. Comme je l'ai déjà mentionné, les conseils municipaux ne sont pas tenus de motiver par écrit leurs règlements ou d'en fournir un fondement logique. Quoi qu'il en soit, comme l'a conclu le juge de première instance, les motifs qui sous-tendaient le règlement contesté étaient clairs pour tous. Le district avait exposé sa politique dans un plan quinquennal. Les pourparlers et la correspondance entre le district et Catalyst ne laissaient guère de doute quant à ces motifs. Selon le juge de première instance, le conseil du district a examiné et soupesé tous les facteurs pertinents au moment de prendre sa décision. Si Catalyst a des reproches à faire, c'est au sujet de la teneur du règlement, et non des procédures qui ont mené à son adoption.

[34] Cela nous amène au contenu du règlement contesté. Il ne fait aucun doute que le règlement porte un dur coup à Catalyst. Le rapport entre les taux de l'impôt foncier à payer au district sur les immeubles de grande industrie, d'une part, et les immeubles résidentiels, d'autre part, compte parmi les plus élevés en Colombie-Britannique (ce rapport est plus grand seulement dans deux municipalités) et dépasse considérablement la norme en vigueur avant 1985. Vu la situation financière dans laquelle se trouve Catalyst, les conséquences sont graves, cette dernière affirmant que le taux de l'impôt foncier à payer sur les immeubles de grande industrie menace l'exploitation même de sa papeterie située dans le district.

[35] However, countervailing considerations exist — considerations that the District Council was entitled to take into account. The Council was entitled to consider the impact on long-term fixed-income residents that a precipitous hike in residential property taxes might produce. The Council has decided to reject a dramatic increase and gradually work toward greater equalization of tax rates between Class 4 major industrial property owners and Class 1 residential property owners. Acknowledging that the rates from Class 4 are higher than they should be, the Council is working over a period of years toward the goal of more equitable sharing of the tax burden. Its approach complies with the *Community Charter*, which permits municipalities to apply different tax rates to different classes of property. Specifically, nothing in the *Community Charter* requires the District to apply anything like Catalyst's "Consumption of Services Model". Indeed, the compelling submission made by Mr. Manhas, counsel for the respondent, was that it would be "statutorily *ultra vires* for [the municipality] to impose property value taxes on the basis of consumption alone under section 197(3)(b)" (transcript, at p. 54). The bylaw favours residential property owners, to be sure. But it is not unreasonably partial to them.

[35] Toutefois, le conseil du district était en droit de prendre en compte certaines considérations faisant contrepoids à ces arguments. Par exemple, il pouvait prendre en considération l'incidence qu'une hausse soudaine de l'impôt foncier sur les immeubles résidentiels était susceptible d'avoir sur les résidents de longue date dont le revenu était fixe. Le conseil a décidé de rejeter une hausse draconienne, optant plutôt pour une réduction graduelle de l'écart entre les taux de l'impôt foncier que doivent payer les propriétaires d'immeubles de grande industrie de catégorie 4, d'une part, et les propriétaires d'immeubles résidentiels de catégorie 1, d'autre part. Reconnaissant que le taux de l'impôt foncier à payer sur les immeubles de catégorie 4 est trop élevé, le conseil s'est donné pour objectif de répartir plus équitablement le fardeau fiscal au cours des prochaines années. Son plan respecte la *Community Charter*, qui autorise les municipalités à imposer un taux d'impôt foncier propre à chaque catégorie d'immeubles. Plus précisément, la *Community Charter* n'oblige aucunement le district à suivre un quelconque modèle s'apparentant au modèle basé sur la consommation de services que propose Catalyst. En effet, M. Manhas a fait valoir de façon convaincante que [TRADUCTION] « l'imposition [par la municipalité], en vertu de l'alinéa 197(3)b), de taxes foncières sur la seule base de la consommation de ses services serait *ultra vires* » (transcription, p. 54). Le règlement favorise certes les propriétaires d'immeubles résidentiels, mais il n'est pas déraisonnablement partial envers eux.

[36] Taking all these factors into account, the trial court, affirmed by the Court of Appeal, concluded that the bylaw fell within a reasonable range of outcomes. I agree. The adoption of the *Tax Rates Bylaw, 2009*, Bylaw No. 3385, does not constitute a decision that no reasonable elected municipal council could have made.

[36] Tenant compte de tous ces éléments, la cour de première instance est parvenue à la conclusion que le règlement s'inscrivait dans un éventail raisonnable d'issues possibles, conclusion que la Cour d'appel a confirmée. Je suis du même avis. L'adoption du règlement n^{o} 3385 en matière de taxation, le *Tax Rates Bylaw, 2009*, ne constitue pas une décision qu'aucun conseil municipal élu raisonnable n'aurait pu prendre.

[37] I would dismiss the appeal with costs.

[37] Je suis d'avis de rejeter le pourvoi, avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: Blake, Cassels & Graydon, Vancouver.

Solicitors for the respondent: Young, Anderson, Vancouver.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante : Blake, Cassels & Graydon, Vancouver.

Procureurs de l'intimée : Young, Anderson, Vancouver.

Court of Queen's Bench of Alberta

Citation: Canadian Natural Resources Limited v Fishing Lake Métis Settlement, 2022 ABQB 53

Date: 20220118
Docket: 1903 17590
Registry: Edmonton

Between:

Canadian Natural Resources Limited, Husky Oil Operations Ltd., Crescent Point Energy Corp., Altagas Ltd., Altagas Holdings Inc. and Altagas Processing Partnership

Applicants

- and -

Fishing Lake Métis Settlement and The Métis Settlements General Council

Respondents

Reasons for Judgment
of the
Honourable Madam Justice M. Hayes-Richards

I. Introduction

[1] The Métis Settlements General Council ("MSGC") acts as the collective government for the eight Métis Settlements (the "Settlements" or "Métis Settlements") in Alberta. Fishing Lake Métis Settlement ("Fishing Lake") is one of those eight Settlements. It is a small Métis community approximately 52 kilometres south of Cold Lake with a population of approximately 500 residents.

enabling legislation is only insisted upon when a municipality is exercising extraordinary powers or passing "by-laws concerning taxation, expropriation, or other interference with private rights."

[131] At para 39 of ***Janzen***, Gallant J concluded that where a municipality is not exercising extraordinary powers or interfering with private rights, courts may overlook a deviation from the mandatory requirements if:

(a) there was not a clear omission of some condition precedent;

(b) there was a mistake or omission done in good faith with intent to uphold the law; and

(c) where the mistake was wholly technical and nothing had occurred to create bias or suspicion of unfairness and the results would not have been different.

[132] Fishing Lake's position is that a review of the three factors set out in ***Janzen*** leads to the conclusion that this Court should overlook its deviation from the mandatory notice provisions. However, ***Janzen*** specifically relies on ***Costello***, where the Supreme Court held that strict compliance is *insisted* upon when a municipality is exercising extraordinary powers or passing "by-laws concerning taxation, expropriation, or other interference with private rights." That is exactly what Fishing Lake was doing in passing the Tax Bylaw, and therefore according to ***Costello*** and ***Janzen***, strict compliance with the *MSA* is required. Even if strict compliance was not required, I would not agree with Fishing Lake's position that the Court should overlook its failure to comply with the mandatory notice provisions.

[133] Fishing Lake's overall position with respect to the failure to adhere to the notice requirements of the *MSA* appears to be that it was already aware of the Applicants' displeasure with the previous years increases in the tax rate and there was nothing the Applicants could have said more than what Fishing Lake already knew. Fishing Lake argues that if the Applicants had valid reasons other than simply not liking a higher tax rate, that might have been useful for Fishing Lake to hear before the May 29th vote, presumably they would have made those same arguments in this application. Instead, the Applicants have failed to provide any evidence in this application that the tax rate would have an adverse effect on their business. Consequently, Fishing Lake argues that the notice deficiency had no effect on the ultimate passing of the Tax Bylaw and therefore this Court should decline to declare it void.

[134] I disagree. As affected persons, the Applicants are entitled to make submissions on the Tax Bylaw, which may include what effect its passage may have on the Applicants' operations. I find the Tax Bylaw is void for failure to comply with the mandatory notice provisions of the *MSA*. In particular, I find that where the pool of "affected persons" is so small, and so well-known to the taxing authority, there is a duty to ensure that notice is posted in a way that it is likely to come to their attention. There is no evidence in this case that the notice was posted at all, let alone in four widely separated and conspicuous areas of the Settlement.

[135] If, after proper notice is given, and after the Applicants have their opportunity to be meaningfully heard, Fishing Lake still decides a tax bylaw with an 8.88% tax rate is reasonable in all the circumstances, its decision will be entitled to a high level of deference, subject of course to any reasonableness argument made by the Applicants.

Issue 4: Is the Tax Bylaw substantively unreasonable?

[136] As was the case in ***Elizabeth***, quashing the Tax Bylaw for its procedural defects is dispositive of this judicial review application. However, like Devlin J in ***Elizabeth***, I am of the view that the parties would benefit from knowing whether taxation at the impugned rate of 8.88% would be reasonable if properly enacted, given that property tax is a recurring annual event: ***Elizabeth*** at para 90. My comments are obviously limited to the information known to the Court at this time.

a. The standard of reasonableness

[137] As stated above, ***Vavilov*** established reasonableness as the presumptive standard of review in administrative law. Reasonableness "remains a single standard" which "takes its colour from the context": ***Vavilov*** at paras 88-89. Therefore, the context and nature of the decision-maker's act constrains what will be reasonable for the decision-maker to decide.

[138] Reasonableness is a "robust" form of review which requires the reviewing court to examine whether the decision as well as the reasons justifying the decision are reasonable. In the context of bylaw creation, it is not likely that formal reasons will be available for scrutiny. In such cases, the reasonableness review will be no less robust but will take on a "different shape", with the focus being on the reasonableness of the decision itself: ***Vavilov*** at paras 137-138.

[139] Historically, municipal bylaws were considered a decision for which greater deference was owed on judicial review. The Supreme Court previously articulated a test for reasonableness in this context in ***Catalyst Paper***:

> [24] It is thus clear that courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal counsellors may legitimately consider in enacting bylaws. The applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside. The fact that wide deference is owed to municipal councils does not mean that they have *carte blanche*.
>
> ...
>
> [32] To summarize, the ultimate question is whether the taxation bylaw falls within a reasonable range of outcomes. This must be judged on the approach the courts have traditionally adopted in reviewing bylaws passed by municipal councils. Municipal councils passing bylaws are entitled to consider not merely the objective considerations bearing directly on the matter, but broader social, economic and political issues. In judging the reasonableness of a bylaw, it is appropriate to consider both process and the content of the bylaw.

[140] Post-***Vavilov***, courts have continued to treat the ***Catalyst Paper*** test as good law, granting greater deference to elected municipal decision-makers (see: ***Koebisch* v *Rocky View (County)***, 2021 ABCA 265 at para 22 [***Koebisch***], citing ***1120732 BC Ltd* v *Whistler (Resort Municipality)***; 2020 BCCA 101; ***Bergman* v *Innisfree (Village)***, 2020 ABQB 661 at para 127; ***Elizabeth*** at para 97; ***Ferguson Point Restaurants Inc* v *Vancouver Board of Parks and Recreation***, 2021 BCSC 1888).

[141] In ***Koebisch***, our Court of Appeal reviewed a pre-***Vavilov*** chambers decision which set-aside four bylaws for "patent unreasonableness." The Court stated that ***Vavilov*** "re-affirmed" the Supreme Court's decision in ***Catalyst Paper*** and did not change the applicable standard of review (at paras 19, 22). Rather, the Court found that "if anything, ***Vavilov*** reinforced the proper application of the reasonableness standard of review": para 22.

[142] In reviewing the impugned bylaw, the Court went on to ask whether the Council's decisions to enact the bylaws was "aberrant, overwhelming, or decisions that no reasonable municipality would have taken": at para 37 (borrowing the language from ***Catalyst Paper***, para 20). In concluding "no", the Court stated that the decisions of the Council were found to be transparent, intelligible and justified: at para 43.

[143] This analysis by our Court of Appeal suggests that the ***Vavilov*** test of reasonableness that requires decisions to exhibit the requisite degree of justification, intelligibility and transparency (at para 100) is to be applied when reviewing bylaws. However, ***Catalyst Paper*** continues to colour the reasonableness review in the context of bylaw judicial review, where the "requisite degree" of justification is impacted by the elected nature of the decision-makers and the lack of formal reasons that generally accompany bylaws.

[144] In ***Elizabeth***, Devlin J also addressed the impact of ameliorative legislation involving the Métis and First Nations on the issue of reasonableness:

> [98] An additional layer of context is added to the analysis of 'reasonableness' when reviewing administrative acts of Métis Settlements. In such cases, it is appropriate for the Court to take into account the unique role, structure, and mandate of the Settlements in preserving and promoting Metis life and culture. This is an additional component of the "context and nature of the impugned administrative act" under consideration and may, in certain cases, mean that the flexible deferential standard the court should apply will result in greater leeway being given to Settlement decisions: ***Catalyst Paper*** at para 23.
>
> [99] This approach honours the principle of prioritizing protection of Indigenous interests when interpreting legislation dealing with their rights. As explained by the Supreme Court of Canada in ***Osoyoos Indian Band* v *Oliver (Town)***, 2001 SCC 85 at para 49, citing La Forest J in ***Mitchell* v *Peguis Indian Band***, [1990] 2 SCR 85 at 143:
>
> > ... it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the Indian Act, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them ....
> >
> > At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote. [Emphasis in ***Osoyoos***]

Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. and Pharmx Rexall Drug Stores Ltd. *Appellants*

v.

Minister of Health and Long-Term Care, Lieutenant Governor-in-Council of Ontario and Attorney General of Ontario *Respondents*

- and -

Shoppers Drug Mart Inc., Shoppers Drug Mart (London) Limited and Sanis Health Inc. *Appellants*

v.

Minister of Health and Long-Term Care, Lieutenant Governor-in-Council of Ontario and Attorney General of Ontario *Respondents*

Katz Group Canada Inc., Pharma Plus Drug Marts Ltd. et Pharmx Rexall Drug Stores Ltd. *Appelantes*

c.

Ministre de la Santé et des Soins de longue durée, Lieutenant-gouverneur en conseil de l'Ontario et procureur général de l'Ontario *Intimés*

- et -

Shoppers Drug Mart Inc., Shoppers Drug Mart (London) Limited et Sanis Health Inc. *Appelantes*

c.

Ministre de la Santé et des Soins de longue durée, Lieutenant-gouverneur en conseil de l'Ontario et procureur général de l'Ontario *Intimés*

Indexed as: Katz Group Canada Inc. *v.* Ontario (Health and Long-Term Care)

2013 SCC 64

File Nos.: 34647, 34649.

2013: May 14; 2013: November 22.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Food and drugs — Regulations — Validity — Province of Ontario enacting Regulations to effectively ban the sale of private label drugs by pharmacies — Purpose of Regulations to reduce drug prices — Whether Regulations are ultra vires on the ground that they are inconsistent with the statutory scheme and mandate — Drug Interchangeability and Dispensing Fee Act Regulation, R.R.O. 1990, Reg. 935, s. 9 — Ontario Drug Benefit Act Regulation, O. Reg. 201/96, s. 12.0.2.

Répertorié : Katz Group Canada Inc. *c.* Ontario (Santé et Soins de longue durée)

2013 CSC 64

N^os^ du greffe : 34647, 34649.

2013 : 14 mai; 2013 : 22 novembre.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Moldaver et Wagner.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Aliments et drogues — Règlements — Validité — Adoption, par la province de l'Ontario, de règlements ayant pour effet d'interdire effectivement la vente, par les pharmacies, de médicaments sous marque de distributeur — Règlements ayant pour objectif de réduire les prix des médicaments — Les règlements sont-ils ultra vires au motif qu'ils sont incompatibles avec l'objet et le mandat de la loi? — Drug Interchangeability and Dispensing Fee Act Regulation, R.R.O. 1990, Règl. 935, art. 9 — Ontario Drug Benefit Act Regulation, O. Reg. 201/96, art. 12.0.2.

Analysis

[24] A successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate (Guy Régimbald, *Canadian Administrative Law* (2008), at p. 132). This was succinctly explained by Lysyk J.:

> In determining whether impugned subordinate legislation has been enacted in conformity with the terms of the parent statutory provision, it is essential to ascertain the scope of the mandate conferred by Parliament, having regard to the purpose(s) or objects(s) of the enactment as a whole. The test of conformity with the Act is not satisfied merely by showing that the delegate stayed within the literal (and often broad) terminology of the enabling provision when making subordinate legislation. The power-conferring language must be taken to be qualified by the overriding requirement that the subordinate legislation accord with the purposes and objects of the parent enactment read as a whole.

(*Waddell v. Governor in Council* (1983), 8 Admin. L.R. 266, at p. 292)

[25] Regulations benefit from a presumption of validity (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 458). This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations, rather than on regulatory bodies to justify them (John Mark Keyes, *Executive Legislation* (2nd ed. 2010), at pp. 544-50); and it favours an interpretative approach that reconciles the regulation with its enabling statute so that, *where possible*, the regulation is construed in a manner which renders it *intra vires* (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 3 (loose-leaf), at 15:3200 and 15:3230).

[26] Both the challenged regulation and the enabling statute should be interpreted using a "broad and purposive approach . . . consistent with this Court's approach to statutory interpretation generally" (*United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 8; see also Brown and Evans, at 13:1310; Keyes, at pp. 95-97; *Glykis v.*

Analyse

[24] Pour contester avec succès la validité d'un règlement, il faut démontrer qu'il est incompatible avec l'objectif de sa loi habilitante ou encore qu'il déborde le cadre du mandat prévu par la Loi (Guy Régimbald, *Canadian Administrative Law* (2008), p. 132). Ainsi que le juge Lysyk l'a expliqué de manière succincte :

> [TRADUCTION] Pour déterminer si le texte législatif subordonné contesté est conforme aux exigences de la loi habilitante, il est essentiel de cerner la portée du mandat conféré par le législateur en ce qui a trait à l'intention ou à l'objet de la loi dans son ensemble. Le simple fait de démontrer que le délégataire a respecté littéralement le libellé (souvent vague) de la loi habilitante lorsqu'il a pris le texte législatif subordonné n'est pas suffisant pour satisfaire au critère de la conformité à la loi. Le libellé de la disposition habilitante doit être interprété comme comportant l'exigence primordiale selon laquelle le texte législatif subordonné doit respecter l'intention et l'objet de la loi habilitante prise dans son ensemble.

(*Waddell c. Governor in Council* (1983), 8 Admin. L.R. 266, p. 292)

[25] Les règlements jouissent d'une présomption de validité (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 458). Cette présomption comporte deux aspects : elle impose à celui qui conteste le règlement le fardeau de démontrer que celui-ci est invalide, plutôt que d'obliger l'organisme réglementaire à en justifier la validité (John Mark Keyes, *Executive Legislation* (2e éd. 2010), p. 544-550); ensuite, la présomption favorise une méthode d'interprétation qui concilie le règlement avec sa loi habilitante de sorte que, *dans la mesure du possible*, le règlement puisse être interprété d'une manière qui le rend *intra vires* (Donald J. M. Brown et John M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 3 (feuilles mobiles), 15:3200 et 15:3230).

[26] Il convient de donner au règlement contesté et à sa loi habilitante une « interprétation téléologique large [. . .] compatible avec l'approche générale adoptée par la Cour en matière d'interprétation législative » (*United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, 2004 CSC 19, [2004] 1 R.C.S. 485, par. 8; voir également Brown et Evans, 13:1310; Keyes, p. 95-97; *Glykis c.*

Hydro-Québec, 2004 SCC 60, [2004] 3 S.C.R. 285, at para. 5; Sullivan, at p. 368; *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, s. 64).

[27] This inquiry does not involve assessing the policy merits of the regulations to determine whether they are "necessary, wise, or effective in practice" (*Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595 (C.A.), at p. 604). As explained in *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (Ont. C.A.):

> . . . the judicial review of regulations, as opposed to administrative decisions, is usually restricted to the grounds that they are inconsistent with the purpose of the statute or that some condition precedent in the statute has not been observed. The motives for their promulgation are irrelevant. [para. 41]

[28] It is not an inquiry into the underlying "political, economic, social or partisan considerations" (*Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at pp. 112-13). Nor does the *vires* of regulations hinge on whether, in the court's view, they will actually succeed at achieving the statutory objectives (*CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2, at p. 12; see also *Jafari*, at p. 602; Keyes, at p. 266). They must be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose (*Alaska Trainship Corp. v. Pacific Pilotage Authority*, [1981] 1 S.C.R. 261; *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164 (Div. Ct.); *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 280; *Jafari*, at p. 604; Brown and Evans, at 15:3261). In effect, although it is possible to strike down regulations as *ultra vires* on this basis, as Dickson J. observed, "it would take an egregious case to warrant such action" (*Thorne's Hardware*, at p. 111).

[29] The grants of authority relevant to the private label regulations are, under the *Drug Interchangeability and Dispensing Fee Act*:

Hydro-Québec, 2004 CSC 60, [2004] 3 R.C.S. 285, par. 5; Sullivan, p. 368; *Loi de 2006 sur la législation*, L.O. 2006, ch. 21, ann. F, art. 64).

[27] Cette analyse ne comporte pas l'examen du bien-fondé du règlement pour déterminer s'il est « nécessaire, sage et efficace dans la pratique » (*Jafari c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1995] 2 C.F. 595 (C.A.), p. 604). Comme le tribunal l'a expliqué dans l'arrêt *Ontario Federation of Anglers & Hunters c. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (C.A. Ont.) :

> [TRADUCTION] . . . le contrôle judiciaire des règlements, contrairement à celui des décisions administratives, se limite normalement à la question de leur incompatibilité avec l'objet de la loi ou à l'inobservation d'une condition préalable prévue par la loi. Les raisons qui ont motivé la prise du règlement ne sont pas pertinentes. [par. 41]

[28] L'analyse ne s'attache pas aux considérations sous-jacentes « d'ordre politique, économique ou social [ni à la recherche, par les gouvernements, de] leur propre intérêt » (*Thorne's Hardware Ltd. c. La Reine*, [1983] 1 R.C.S. 106, p. 113). La validité d'un règlement ne dépend pas non plus de la question de savoir si, de l'avis du tribunal, il permettra effectivement d'atteindre les objectifs visés par la loi (*CKOY Ltd. c. La Reine*, [1979] 1 R.C.S. 2, p. 12; voir également *Jafari*, p. 602; Keyes, p. 266). Pour qu'il puisse être déclaré *ultra vires* pour cause d'incompatibilité avec l'objet de la loi, le règlement doit reposer sur des considérations « sans importance », doit être « non pertinent » ou être « complètement étranger » à l'objet de la loi (*Alaska Trainship Corp. c. Administration de pilotage du Pacifique*, [1981] 1 R.C.S. 261; *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164 (Cour div.); *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231, p. 280; *Jafari*, p. 604; Brown et Evans, 15:3261). En réalité, bien qu'il soit possible de déclarer un règlement *ultra vires* pour cette raison, comme le juge Dickson l'a fait observer, « seul un cas flagrant pourrait justifier une pareille mesure » (*Thorne's Hardware*, p. 111).

[29] Les dispositions de la *Loi sur l'interchangeabilité des médicaments et les honoraires de préparation* qui confèrent le pouvoir de prendre des règlements relatifs aux produits sous marque de distributeur sont formulées comme suit :

In the Court of Appeal of Alberta

Citation: Howse v Calgary (City), 2023 ABCA 379

Date: 20231221
Docket: 2201-0215AC
Registry: Calgary

KB No 2101 11785

Between:

Wayne Howse and Laura Sharp

Appellants
(Applicants)

- and -

Rolland Lequier

Not Party to the Appeal
(Applicant)

- and -

The City of Calgary

Respondent
(Respondent)

KB No 1901 12441

And Between:

Twenty3 Ltd, Twenty4 Ltd, Harjinder S Kundan and Harjinder K Kundan

Respondents
(Applicants)

- and -

Flosa Homes Ltd and Harvest Hills Professional Centre Ltd

Not Parties to the Appeal
(Applicants)

- and –

Wayne Howse

Appellant
(Respondent)

- and –

See Attached Schedules "A", "B" and "C"

Not Parties to the Appeal
(Respondents)

KB No 1901 12224

And Between:

Wayne Howse

Appellant
(Applicant)

-and -

Harjindar S Kundan, Harjindar K Kundan, Twenty3 Ltd, and Twenty4 Ltd

Respondents
(Respondents)

- and -

Flosa Homes Ltd, Harvest Hills Professional Centre Ltd

Not Parties to the Appeal
(Respondents)

The Court:

The Honourable Justice Michelle Crighton
The Honourable Justice Kevin Feehan
The Honourable Justice Bernette Ho

Memorandum of Judgment

Appeal from the Order of
The Honourable Justice D.A. Labrenz
Dated the 15th day of August, 2022
(2022 ABQB 551, Docket: 2101 11785, 1901 12441, 1901 12224)

and on questions of mixed law and fact it is palpable and overriding error unless there is an extricable error of law: ***Housen v Nikolaisen***, 2002 SCC 33, paras 7-37, [2002] 2 SCR 235.

[15] On the appeal from judicial review, the appellate court must determine whether the chambers judge properly chose the correct standard of review and applied it correctly, a decision on which the appellate court affords no deference: ***Dr Q v College of Physicians and Surgeons of British Columbia***, 2003 SCC 19, para 43, [2003] 1 SCR 226; ***Agraira v Canada (Public Safety and Emergency Preparedness)***, 2013 SCC 36, para 45, [2013] 2 SCR 559; ***ARW Development Corporation v Beaumont (Town)***, 2011 ABCA 382, paras 25-27, 52 Alta LR (5th) 219.

[16] The appellate court then in effect "steps into the shoes" of the chambers judge in reviewing the determination made by the decision-maker, such that the "appellate court's focus is, in effect, on the *administrative* decision" (emphasis in original): ***Merck Frosst Canada Ltd v Canada (Health)***, 2012 SCC 3, para 247, [2012] 1 SCR 23; ***Zenner v Prince Edward Island College of Optometrists***, 2005 SCC 77, paras 29-45, [2005] 3 SCR 645; ***Buterman v Greater St Albert Roman Catholic Separate School District No 734***, 2017 ABCA 196, paras 23-24, 54 Alta LR (6th) 256; ***Wheatland County v Federated Co-Operatives Limited***, 2019 ABCA 513, para 22; ***Koebisch v Rocky View (County)***, 2021 ABCA 265, paras 16, 17, 460 DLR (4th) 119.

VI. Analysis

(a) Legislation and Municipal Plans

[17] This appeal involves the interplay between legislation, beginning with the *Land Titles Act* and the *Municipal Government Act*, and municipal bylaws and plans including Intermunicipal Development Plans, Municipal Development Plans, Area Structure Plans, Area Redevelopment Plans, and specific bylaws such as the ones in question here.

[18] The *Municipal Government Act*, s 3, sets out the basic purposes of a municipality: to provide good government, foster the well-being of the environment, foster the economic development of the municipality, provide services, facilities, or other things that are necessary or desirable for all or a part of the municipality, develop and maintain safe and viable communities, and work collaboratively with neighboring municipalities to plan, deliver and fund intermunicipal services. A municipality strives to fulfill those purposes by passing bylaws, s 7, including for the safety, health, and welfare of its citizens, the protection of people and property, activities and things in or near public places, transport and transportation systems, businesses, business activities, and persons engaged in business, and services provided on behalf of the municipality. The power to pass bylaws, s 9, is intended to give broad authority to municipal councils and to respect their right to govern their municipality "in whatever way the councils consider appropriate, within the jurisdiction given to them" and to enhance their ability to respond to present and future issues within the municipality.

[19] However, such bylaws must comply with provincial legislation, s 13, in this case primarily the *Land Titles Act* and *Municipal Government Act*.

[20] Section 539 of the *Municipal Government Act* prevents challenges to a bylaw on the ground of unreasonableness. It does not articulate the standard of review. Whether a bylaw is wise is for a municipal council to decide, not the courts: ***Koebisch***, para 23; ***Bergman v Innisfree (Village)***, 2020 ABQB 661, paras 108-114; Frederick A Laux & Gwendolyn Stewart-Palmer, *Planning Law and Practice in Alberta*, 4th ed (Edmonton: Juriliber, 2019) (loose-leaf), 16-38.

[21] Part 17 of the *Municipal Government Act* addresses planning and development. The purpose of this part and any regulations and bylaws passed under this part, is to provide a means whereby plans and related matters may be prepared and adopted to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and to maintain and improve the quality of the physical environment, without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest, s 617. The *Municipal Government Act* provides, s 635, for the passage of area redevelopment plans and, s 640(1.1), land use bylaws, to address population densities, development of buildings, and other matters necessary to regulate the use of land within the municipality. The municipality must establish land use districts, s 640(2), determining the uses of land or buildings that are or may be permitted, and applications for and issuing of development permits.

[22] Section 641(2) of the *Municipal Government Act* addresses the designation of Direct Control Districts. If the municipality wishes to exercise particular control over land or buildings it may designate the area as a direct control district that permits the municipality to "regulate and control the use or development of land or buildings in the district in any manner it considers necessary".

[23] Calgary's Land Use Bylaw was passed under the authority of the *Municipal Government Act*. The bylaw provides in part, s 20:

> 1. Direct Control Districts must only be used for the purpose of providing for *developments* that, due to their unique characteristics, innovative ideas or unusual site constraints, require specific regulation unavailable in other land use districts.
>
> 2. Direct Control Districts must not be used:
>
> (a) in substitution of any other land use district in this Bylaw that could be used to achieve the same result either with or without relaxations of this Bylaw; or
>
> (b) to regulate matters that are regulated by subdivision or *development permit* approval conditions.

[24] Interpretation of these provisions must be conducted using the well-established approach to statutory interpretation requiring that the words of the Act be read "in their entire context, in their grammatical and ordinary sense and in harmony with the legislative scheme, its object and the intention of the legislature": ***Rizzo & Rizzo Shoes Ltd (Re)***, [1998] 1 SCR 27, para 21, 154 DLR (4th) 193. That approach applies to the interpretation of a municipal bylaw: ***Love v Flagstaff (County of) Subdivision and Development Appeal Board***, 2002 ABCA 292, para 19, 222 DLR (4th) 538; ***Edmonton (City of) Library Board v Edmonton (City of)***, 2021 ABCA 355, para 29.

(b) The Standard of Review before the Chambers Judge

[25] The chambers judge correctly identified the standard of review from the determinations of the City on the judicial review before him as reasonableness: ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65, paras 82, 89, 99, 105, 108, 137, 273, 292, 312, [2019] 4 SCR 653. See also ***Catalyst Paper Corp v North Cowichan (District)***, 2012 SCC 2, paras 19, 20, 24, [2012] 1 SCR 5; ***Green v Law Society of Manitoba***, 2017 SCC 20, paras 20-26, [2017] 1 SCR 360; and ***West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)***, 2018 SCC 22, paras 8, 9, [2018] 1 SCR 635. In the private litigation the standard of review was as set out in ***Housen***.

(c) Authority to Pass the Bylaws

[26] Mr Howse and Ms Sharp submit the City acted outside its statutory authority granted by the *Municipal Government Act*, because it failed to balance private rights with the long-term public interest and therefore infringed upon individual rights more than was necessary, contrary to s 617. They say part 17 of the *Municipal Government Act* is intended:

> to regulate the planning and development of land in Alberta in a manner as consistent as possible with community values. In so doing, it strikes an appropriate balance between the rights of property owners and the larger public interest inherent in the planned, orderly and safe development of lands. [***Love***, para 23]

[27] They submit that private interests can only be eroded "in favour of a public interest and only to the extent necessary for the overall public interest" and any "encroachments on individual rights . . . should be strictly construed", citing ***Love***, paras 32, 33, 34, 36. They say the restrictive covenant protects their individual rights and cannot be overridden by the five City bylaws because they are not "necessary for the greater public interest". They argue the passage of the City's Municipal Development Plan, Transit Oriented Development Policy Guidelines, and Area Redevelopment Plan all ignore the registration of the restrictive covenant and that the City's policy for densification should be achievable in other parts of the City or parts of the Banff Trail neighborhood not encumbered by the restrictive covenant. They argue that the five City bylaws were "enacted to further the private interests of the Developers . . . at the expense of individual contractual rights".

Shell Canada Products Limited *Appellant*

v.

City of Vancouver *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario and the Attorney General of Quebec *Interveners*

INDEXED AS: SHELL CANADA PRODUCTS LTD. *v.* VANCOUVER (CITY)

File No.: 22789.

1993: April 27; 1994: February 24.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Municipal law — Municipal resolutions — Validity — Vancouver passing resolutions that it would not do business with Shell until Shell "completely withdraws from South Africa" — Whether actions of city council as embodied in resolutions reviewable — Whether resolutions ultra vires city in that they do not relate to a municipal purpose — Whether resolutions constitute unauthorized discrimination — Vancouver Charter, S.B.C. 1953, c. 55.

The appellant is a subsidiary of Shell Canada Ltd. and is involved in retail and wholesale marketing of petroleum products in Vancouver. It was periodically invited to tender bids for municipal contracts to supply petroleum products until Vancouver City Council passed resolutions that the City would not do business with Shell Canada "until Royal Dutch/Shell completely withdraws from South Africa". Vancouver purchases petroleum products from another company which, through one of its subsidiaries, also does business with South Africa. The British Columbia Supreme Court quashed the reso-

Produits Shell Canada Limitée *Appelante*

c.

Ville de Vancouver *Intimée*

et

Le procureur général du Canada, le procureur général de l'Ontario et le procureur général du Québec *Intervenants*

RÉPERTORIÉ: PRODUITS SHELL CANADA LTÉE *c.* VANCOUVER (VILLE)

N° du greffe: 22789.

1993: 27 avril; 1994: 24 février.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit municipal — Résolutions municipales — Validité — La ville de Vancouver a décidé, par voie de résolutions, qu'elle s'abstiendrait de traiter avec Shell jusqu'à ce que celle-ci «se retire complètement de l'Afrique du sud» — Les actes du conseil municipal que représentent les résolutions adoptées peuvent-ils faire l'objet d'un contrôle? — Les résolutions excèdent-elles la compétence de la ville en ce sens qu'elles n'ont pas trait à un objet municipal? — Les résolutions constituent-elles une forme de discrimination non autorisée? — Vancouver Charter, S.B.C. 1953, ch. 55.

L'appelante, une filiale de Shell Canada Ltée, fait, à Vancouver, le commerce de détail et de gros de produits pétroliers. Avant que le conseil municipal de la ville de Vancouver n'adopte des résolutions selon lesquelles la ville cesserait de traiter avec Shell Canada jusqu'à ce que le groupe Royal Dutch-Shell «se retire complètement de l'Afrique du Sud», l'appelante était périodiquement invitée à présenter des soumissions en vue de conclure des contrats avec la municipalité pour la fourniture de produits pétroliers. La ville de Vancouver achète des produits pétroliers à une autre société, qui, par l'entremise d'une filiale, fait également affaire avec l'Afrique du Sud. La Cour suprême de la Colombie-Britannique a annulé les résolutions pour le motif qu'elles excédaient

C. Are the Resolutions Invalid on the Ground of Discrimination?

The City has conceded that the Resolutions discriminate against Shell. The only issue is whether the discrimination is authorized by the *Vancouver Charter*.

The rule pertaining to municipal discrimination is essentially concerned with the municipality's power. Municipalities must operate within the powers conferred on them under the statutes which create and empower them. Discrimination itself is not forbidden. What is forbidden is discrimination which is beyond the municipality's powers as defined by its empowering statute. Discrimination in this municipal sense is conceptually different from discrimination in the human rights sense; discrimination in the sense of the municipal rule is concerned only with the ambit of delegated power.

It follows that when it is alleged that a municipality has improperly discriminated against a citizen, the question for the court is whether the discrimination was authorized by the statute from which the municipality draws its powers. If the legislation authorizes the impugned distinction, the rule is not breached: *R. v. Sharma*, [1993] 1 S.C.R. 650. As my colleague Sopinka J. puts it, "[t]he appropriate question is whether discrimination is expressly or impliedly authorized" (p. 282).

Discrimination in the granting of licences, taxes and municipal privileges is generally viewed as requiring express authorization by the empowering legislation because of the presumption that the legislature intends all citizens to be treated equally on such matters. Therefore, unless the statute clearly provides the contrary, the municipality has no power to discriminate. The *Vancouver Charter* does so provide, in s. 203:

C. Les résolutions sont-elles invalides pour cause de discrimination?

La ville a reconnu que les résolutions sont discriminatoires à l'égard de Shell. Il s'agit donc seulement de déterminer si la Charte de Vancouver autorise cette discrimination.

La règle relative à la discrimination par une municipalité concerne essentiellement les pouvoirs qu'elle possède. Les municipalités sont tenues de fonctionner dans les limites des pouvoirs que leur attribuent leur loi constitutive et habilitante. La discrimination n'est pas interdite en soi. Ce qui est interdit, c'est la discrimination qui excède les pouvoirs de la municipalité définis par sa loi habilitante. La discrimination dans ce contexte municipal est donc un concept différent de la notion de discrimination dans le contexte des droits de la personne; pour les fins de la règle applicable en matière municipale, la discrimination ne porte que sur l'étendue d'une délégation de pouvoir.

Il s'ensuit que, lorsqu'on prétend qu'une municipalité a irrégulièrement agi de façon discriminatoire envers un citoyen, la question qui se pose aux tribunaux est de savoir si la discrimination est autorisée par la loi habilitante de municipalité. Si cette loi autorise la distinction reprochée, il n'y a aucune violation de la règle: *R. c. Sharma*, [1993] 1 R.C.S. 650. Comme le dit mon collègue le juge Sopinka, «[c]e qu'il faut se demander c'est si la discrimination est expressément ou implicitement autorisée» (p. 282).

La discrimination en matière de délivrance de permis, de taxation et d'attribution de privilèges municipaux est généralement considérée comme requérant une autorisation expresse de la loi habilitante, en raison de la présomption que le législateur veut que tous les citoyens soient traités sur un pied d'égalité à ces égards. Par conséquent, à moins que la loi ne prévoie clairement le contraire, la municipalité n'est pas habilitée à faire preuve de discrimination. C'est ce que prévoit l'art. 203 de la Charte de Vancouver:

Mark Donald Benner *Appellant*

v.

The Secretary of State of Canada and the Registrar of Citizenship *Respondents*

and

The Federal Superannuates National Association *Intervener*

INDEXED AS: BENNER *v.* CANADA (SECRETARY OF STATE)

File No.: 23811.

1996: October 1; 1997: February 27.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Equality rights — Citizenship — Children born abroad before February 15, 1977 of Canadian fathers granted citizenship on application but those of Canadian mothers required to undergo security check and to take citizenship oath — U.S.-born son of a Canadian mother denied citizenship because of criminal charges — Whether applying s. 15(1) of Charter involves illegitimate retroactive or retrospective application — If not, whether the treatment accorded to children born abroad to Canadian mothers before February 15, 1977 by the Citizenship Act offending s. 15(1) — If so, whether saved by s. 1 — Canadian Charter of Rights and Freedoms, ss. 1, 15(1) — Citizenship Act, R.S.C., 1985, c. C-29, ss. 3(1), 4(3), 5(1)(b), (2)(b), 12(2), (3), 22(1)(b), (d), (2)(b) — Citizenship Regulations, C.R.C., c. 400, s. 20(1).

The appellant, who was born in 1962 in the United States of a Canadian mother and an American father, applied for Canadian citizenship and perfected his application on October 27, 1988. The *Citizenship Act* provided that persons born abroad before February 15, 1977, would be granted citizenship on application if born of a Canadian father but would be required to undergo a security check and to swear an oath if born of

Mark Donald Benner *Appelant*

c.

Le secrétaire d'État du Canada et le greffier de la citoyenneté *Intimés*

et

L'Association nationale des retraités fédéraux *Intervenante*

RÉPERTORIÉ: BENNER *c.* CANADA (SECRÉTAIRE D'ÉTAT)

N° du greffe: 23811.

1996: 1er octobre; 1997: 27 février.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Droits à l'égalité — Citoyenneté — Citoyenneté attribuée sur demande aux enfants nés à l'étranger avant le 15 février 1977 d'un père canadien, alors que ceux nés d'une mère canadienne sont tenus de se soumettre à une enquête de sécurité et de prêter le serment de citoyenneté — Refus, en raison de l'existence d'accusations criminelles, d'accorder la citoyenneté à un enfant né aux États-Unis d'une mère canadienne — Le fait d'appliquer le par. 15(1) de la Charte entraîne-t-il l'application rétroactive ou rétrospective illégitime de ce texte — Si la réponse est non, le traitement appliqué par la Loi sur la citoyenneté aux enfants nés à l'étranger d'une mère canadienne avant le 15 février 1977 viole-t-il le par. 15(1)? — Dans l'affirmative, peut-il être sauvegardé par l'article premier? — Charte canadienne des droits et libertés, art. 1, 15(1) — Loi sur la citoyenneté, L.R.C. (1985), ch. C-29, art. 3(1), 4(3), 5(1)b), (2)b), 12(2), (3), 22(1)b), d), (2)b) — Règlement sur la citoyenneté, C.R.C., ch. 400, art. 20(1).

L'appelant, qui est né aux États-Unis en 1962 d'une mère canadienne et d'un père américain, a présenté une demande de citoyenneté canadienne, demande qu'il a complétée le 27 octobre 1988. La *Loi sur la citoyenneté* prévoyait que les personnes nées à l'étranger d'un père canadien avant le 15 février 1977 acquéraient la citoyenneté sur demande, mais que si c'était leur mère qui était canadienne les demandeurs devaient se soumettre à une

under subsection 29(2) or (3) or to an indictable offence under any Act of Parliament;

. . .

(2) Notwithstanding anything in this Act, but subject to the *Criminal Records Act*, a person shall not be granted citizenship under section 5 or subsection 11(1) or take the oath of citizenship if,

(*a*) during the three year period immediately preceding the date of the person's application . . .

the person has been convicted of an offence under subsection 29(2) or (3) or of an indictable offence under any Act of Parliament.

36 I note that the appellant's application for citizenship in this case was rejected because of his outstanding criminal charges.

37 To sum up, then, the new Act created three classes of "applicants" for Canadian citizenship based on parental lineage:

1. *Children born abroad after February 14, 1977.* These children will be citizens at birth if either of their parents is Canadian: ss. 3(1)(*b*);

2. *Children born abroad before February 15, 1977, of a Canadian father or out of wedlock of a Canadian mother.* These children are automatically entitled to Canadian citizenship upon registration of their birth within two years of that birth or within an extended period authorized by the Minister: ss. 3(1)(*e*) (continuing ss. 5(1)(*b*) of the old Act).

3. *Children born abroad before February 15, 1977, of a Canadian mother.* These children must apply to become citizens and are required to swear an oath and pass a security check in order to qualify for citizenship: ss. 5(2)(*b*), 3(1)(*c*), 12(2), (3), 22(2) and (3).

38 Having outlined the statutory context within which the appellant's application was rejected and

prévu par une loi fédérale, et ce jusqu'à la date d'épuisement des voies de recours;

. . .

(2) Malgré les autres dispositions de la présente loi, mais sous réserve de la *Loi sur le casier judiciaire*, nul ne peut recevoir la citoyenneté au titre de l'article 5 ou du paragraphe 11(1) ni prêter le serment de citoyenneté s'il a été déclaré coupable d'une infraction prévue au paragraphe 29(2) ou (3) ou d'un acte criminel prévu par une loi fédérale:

a) au cours des trois ans précédant la date de sa demande;

Je souligne que la demande de citoyenneté de l'appelant a, en l'espèce, été rejetée en raison des accusations criminelles qui pesaient contre lui.

Bref, la nouvelle Loi créait trois catégories de «demandeurs» de la citoyenneté canadienne, fondées sur la filiation de l'intéressé:

1. *les enfants nés à l'étranger après le 14 février 1977.* Ces enfants seront citoyens de naissance si leur père ou leur mère a qualité de citoyen canadien: al. 3(1)*b*);

2. *les enfants nés à l'étranger, avant le 15 février 1977, d'un père canadien ou, hors du mariage, d'une mère canadienne.* Ces enfants ont droit d'office à la citoyenneté canadienne si leur naissance est enregistrée dans les deux ans suivant leur naissance ou dans le délai plus long accordé par le ministre: al. 3(1)*e*) (qui maintient en vigueur l'al. 5(1)*b*) de l'ancienne loi);

3. *les enfants nés à l'étranger, avant le 15 février 1977, d'une mère canadienne.* Ces enfants doivent présenter une demande pour devenir citoyens; ils sont tenus de prêter un serment et de se soumettre à une enquête de sécurité pour être admissibles à la citoyenneté: art. 5(2)*b*), 3(1)*c*), 12(2), (3), 22(2) et (3).

Après avoir exposé le contexte législatif dans lequel la demande de l'appelant a été rejetée et

having briefly canvassed the development of the relevant statutory provisions, I should now like to address the issues raised by this appeal, beginning with the questions of retroactivity and retrospectivity.

B. *Retroactivity and/or Retrospectivity*

The terms, "retroactivity" and "retrospectivity", while frequently used in relation to statutory construction, can be confusing. E. A. Driedger, in "Statutes: Retroactive Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264, at pp. 268-69, has offered these concise definitions which I find helpful:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original.]

The *Charter* does not apply retroactively and this Court has stated on numerous occasions that it cannot apply retrospectively: see, e.g., *R. v. Stevens*, [1988] 1 S.C.R. 1153, at p. 1157; *R. v. Stewart*, [1991] 3 S.C.R. 324, at p. 325; *Reference re Workers' Compensation Act, 1983 (Nfld.)*, *supra*; *Dubois v. The Queen*, [1985] 2 S.C.R. 350.

At the same time, however, the Court has also rejected a rigid test for determining when a particular application of the *Charter* would be retrospective, preferring to weigh each case in its own factual and legal context, with attention to the nature of the particular *Charter* right at issue. Not every situation involving events which took place before the *Charter* came into force will necessarily involve a retrospective application of the *Charter*.

avoir brièvement examiné l'établissement des dispositions législatives pertinentes, je vais maintenant aborder les questions soulevées par le présent pourvoi, en commençant par celles touchant la rétroactivité et la rétrospectivité.

B. *La rétroactivité et la rétrospectivité*

Les mots «rétroactivité» et «rétrospectivité», bien que fréquemment utilisés dans le domaine de l'interprétation des lois, peuvent porter à confusion. E. A. Driedger, dans «Statutes: Retroactive Retrospective Reflections» (1978), 56 *R. du B. can.* 264, aux pp. 268 et 269, en a proposé des définitions concises, que j'estime utiles. Voici ces définitions:

> [TRADUCTION] Une loi rétroactive est une loi dont l'application s'applique à une époque antérieure à son adoption. Une loi rétrospective ne dispose qu'à l'égard de l'avenir. Elle vise l'avenir, mais elle impose de nouvelles conséquences à l'égard d'événements passés. Une loi rétroactive agit *à l'égard du passé*. Une loi rétrospective *agit pour l'avenir*, mais elle jette aussi un regard vers le passé en ce sens qu'elle attache de nouvelles conséquences *à l'avenir* à l'égard d'un événement qui a eu lieu avant l'adoption de la loi. Une loi rétroactive modifie la loi par rapport à ce qu'elle était; une loi rétrospective rend la loi différente de ce qu'elle serait autrement à l'égard d'un événement antérieur. [En italique dans l'original.]

La *Charte* ne s'applique pas rétroactivement et notre Cour a déclaré, à de nombreuses reprises, qu'elle ne pouvait pas s'appliquer rétrospectivement: voir, par exemple, *R. c. Stevens*, [1988] 1 R.C.S. 1153, à la p. 1157; *R. c. Stewart*, [1991] 3 R.C.S. 324, à la p. 325; *Reference re Workers' Compensation Act, 1983 (T.-N.)*, précité; *Dubois c. La Reine*, [1985] 2 R.C.S. 350.

Parallèlement, toutefois, notre Cour a rejeté un critère rigide de détermination des situations particulières dans lesquelles l'application de la *Charte* serait rétrospective, préférant apprécier chaque affaire selon le contexte factuel et législatif qui lui est propre, en portant son attention sur la nature du droit garanti par la *Charte* qui est en cause. Une situation comportant des événements antérieurs à l'entrée en vigueur de la *Charte* n'entraînera pas

In *Gamble*, *supra*, Wilson J. wrote at pp. 625-27 for the majority that:

> In approaching this crucial question it seems to me preferable . . . to avoid an all or nothing approach which artificially divides the chronology of events into the mutually exclusive categories of pre and post-*Charter*. Frequently an alleged current violation will have to be placed in the context of its pre-*Charter* history in order to be fully appreciated. . . .
>
> Another crucial consideration will be the nature of the particular constitutional right alleged to be violated. . . . Such an approach seems to me to be consistent with our general purposive approach to the interpretation of constitutional rights. Different rights and freedoms, depending on their purpose and the interests they are meant to protect, will crystallize and protect the individual at different times.

42 In considering the application of the *Charter* in relation to facts which took place before it came into force, it is important to look at whether the facts in question constitute a discrete event or establish an ongoing status or characteristic. As Driedger has written in *Construction of Statutes* (2nd ed. 1983), at p. 192:

> These past facts may describe a status or characteristic, or they may describe an event. It is submitted that where the fact-situation is a status or characteristic (the being something), the enactment is not given retrospective effect when it is applied to persons or things that acquired that status or characteristic before the enactment, if they have it when the enactment comes into force; but where the fact-situation is an event (the happening of or the becoming something), then the enactment would be given retrospective effect if it is applied so as to attach a new duty, penalty or disability to an event that took place before the enactment.

43 I believe this is consistent with Wilson J.'s comments in *Gamble*, *supra*, particularly with regard to the use of s. 15. Wilson J. wrote at p. 628:

toujours l'application rétrospective de la *Charte*. Dans l'arrêt *Gamble*, précité, le juge Wilson, s'exprimant pour la majorité, a écrit ceci, aux pp. 625 à 627:

> En abordant cette question cruciale, il me semble préférable [. . .] [d']évite[r] d'adopter l'approche tout ou rien qui divise artificiellement la chronologie des événements dans les catégories mutuellement exclusives d'avant et d'après la *Charte*. Pour l'évaluer pleinement, il faut souvent replacer une prétendue violation actuelle de la *Charte* dans le contexte des événements qui lui ont donné naissance avant la *Charte*. . . .
>
> Une autre considération cruciale est la nature du droit constitutionnel particulier qui serait violé. [. . .] Ce point de vue me semble conforme à la façon générale d'interpréter les droits constitutionnels, qui consiste à examiner l'objet visé. Des droits et des libertés différents, selon leur objet et les intérêts qu'ils visent à protéger, se cristalliseront et protégeront l'individu à différents moments.

Pour analyser l'application de la *Charte* relativement à des faits survenus avant son entrée en vigueur, il est important de se demander si les faits en cause constituent un événement précis et isolé ou s'ils décrivent un statut ou une caractéristique en cours. Comme l'a écrit Driedger, dans *Construction of Statutes* (2e éd. 1983), à la p. 192:

> [TRADUCTION] Ces faits passés peuvent décrire soit un statut ou une caractéristique, soit un événement. On avance que, dans le cas où la situation factuelle en cause constitue un statut ou une caractéristique (le fait d'être quelque chose), on n'attribue aucun effet rétrospectif à un texte de loi lorsqu'il est appliqué à des personnes ou à des choses qui ont acquis ce statut ou cette caractéristique avant l'édiction du texte en question, pourvu qu'elles possèdent toujours le statut ou la caractéristique au moment de l'entrée en vigueur du texte; par contre, dans le cas où la situation factuelle est un événement (le fait que quelque chose survienne ou le fait de devenir quelque chose), on attribuerait un effet rétrospectif au texte de loi s'il était appliqué pour imposer une nouvelle obligation, peine ou incapacité par suite d'un événement survenu avant son édiction.

J'estime que ce raisonnement est compatible avec les observations formulées par le juge Wilson dans *Gamble*, précité, plus particulièrement en ce qui a trait au recours à l'art. 15. Le juge Wilson a écrit ce qui suit, à la p. 628:

Some rights and freedoms in the *Charter* seem to me to be particularly susceptible of current application even although such application will of necessity take cognizance of pre-*Charter* events. Those *Charter* rights the purpose of which is to prohibit certain conditions or states of affairs would appear to fall into this category. Such rights are not designed to protect against discrete events but rather to protect against an ongoing condition state of affairs. . . . Section 15 may . . . fall into this category.

Certains droits et certaines libertés contenus dans la *Charte* me semblent particulièrement susceptibles d'être appliqués actuellement même si cette application oblige nécessairement à prendre connaissance d'événements antérieurs à la *Charte*. Les droits garantis par la *Charte* qui ont pour objet d'interdire certaines conditions ou situations sembleraient relever de cette catégorie. De tels droits visent à protéger non pas contre des événements précis et isolés, mais plutôt contre des conditions ou une situation en cours. . . . L'article 15 peut . . . relever de cette catégorie.

Section 15 cannot be used to attack a discrete act which took place before the *Charter* came into effect. It cannot, for example, be invoked to challenge a pre-*Charter* conviction: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Gamble*, *supra*. Where the effect of a law is simply to impose an on-going discriminatory status or disability on an individual, however, then it will not be insulated from *Charter* review simply because it happened to be passed before April 17, 1985. If it continues to impose its effects on new applicants today, then it is susceptible to *Charter* scrutiny today: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

44 L'article 15 ne peut être invoqué pour contester un acte précis et isolé survenu avant l'entrée en vigueur de la *Charte*. Par exemple, il ne peut être invoqué pour attaquer une déclaration de culpabilité antérieure à la *Charte*: *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *Gamble*, précité. Toutefois, un texte de loi qui a simplement pour effet d'imposer à une personne une incapacité ou un statut discriminatoires en cours n'est pas à l'abri d'un examen fondé sur la *Charte* pour l'unique raison qu'il a été édicté avant le 17 avril 1985. Si ce texte continue aujourd'hui d'imposer ses effets aux nouveaux demandeurs, il est susceptible d'examen en regard de la *Charte*: *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143.

The question, then, is one of characterization: is the situation really one of going back to redress an old event which took place before the *Charter* created the right sought to be vindicated, or is it simply one of assessing the contemporary application of a law which happened to be passed before the *Charter* came into effect?

45 La question à trancher consiste donc à caractériser la situation: s'agit-il réellement de revenir en arrière pour corriger un événement passé, survenu avant que la *Charte* crée le droit revendiqué, ou s'agit-il simplement d'apprécier l'application contemporaine d'un texte de loi qui a été édicté avant l'entrée en vigueur de la *Charte*?

I realize that this distinction will not always be as clear as one might like, since many situations may be reasonably seen to involve both past discrete events and on-going conditions. A status or on-going condition will often, for example, stem from some past discrete event. A criminal conviction is a single discrete event, but it gives rise to the on-going condition of being detained, the status of "detainee". Similar observations could be made about a marriage or divorce. Successfully determining whether a particular case involves applying the *Charter* to a past event or simply to a

46 Je suis bien conscient que cette distinction n'est pas toujours aussi nette qu'on le souhaiterait, car bien des situations peuvent raisonnablement être considérées comme mettant en jeu à la fois des événements précis et isolés et des conditions en cours. Ainsi, un statut ou une condition en cours découlera souvent d'un événement passé précis et isolé. Une déclaration de culpabilité en matière criminelle constitue un événement unique précis et isolé, mais elle crée une condition en cours, celle d'être en détention, ou le statut de «détenu». Des observations semblables vaudraient également en

Georges Reid *Appellant*

v.

Épiciers Unis Métro-Richelieu Inc., division "Économgros" *Respondent*

INDEXED AS: ÉPICIERS UNIS MÉTRO-RICHELIEU INC., DIVISION "ÉCONOGROS" *v.* COLLIN

Neutral citation: 2004 SCC 59.

File No.: 29394.

2004: June 17; 2004: October 1.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel and Fish JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Suretyship — Suretyship attached to performance of special duties — Termination of suretyship — Transitional law — Suretyship contracted and surety ceasing to perform duties before coming into force of Civil Code of Québec — Action to enforce suretyship brought after coming into force of new Code — Whether art. 2363 of Civil Code of Québec applicable — Effect and application of s. 131 of Act respecting the implementation of the reform of the Civil Code, S.Q. 1992, c. 57.

Suretyship — Termination of suretyship — Discharge of surety upon cessation of performance of his duties — Interpretation and application of art. 2363 of Civil Code of Québec, S.Q. 1991, c. 64.

In 1992, the appellant acquired 35 percent of the shares in Services Alimentaires B.S.L. Inc. ("B.S.L.") and became both a director and the secretary of that company. He also agreed to stand surety for B.S.L. in relation to a contract with the respondent. The following year, the appellant transferred his shares in B.S.L. and resigned from his positions as director and secretary of the company. His resignation was effective September 1, 1993. Over a year after his resignation, the respondent demanded that the appellant discharge B.S.L.'s debts amounting to approximately $43,400. The Quebec Superior Court dismissed the respondent's action to enforce the suretyship. It found that the appellant had contracted his suretyship in connection with the duties he performed for B.S.L. and that, since the debts were contracted after he had ceased to perform his duties, the appellant could not be liable for

Georges Reid *Appelant*

c.

Épiciers Unis Métro-Richelieu Inc., division « Économgros » *Intimée*

RÉPERTORIÉ : ÉPICIERS UNIS MÉTRO-RICHELIEU INC., DIVISION « ÉCONOGROS » *c.* COLLIN

Référence neutre : 2004 CSC 59.

N^{o} du greffe : 29394.

2004 : 17 juin; 2004 : 1er octobre.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel et Fish.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Cautionnement — Cautionnement attaché à l'exercice de fonctions particulières — Fin du cautionnement — Droit transitoire — Cautionnement consenti et caution cessant d'exercer ses fonctions avant l'entrée en vigueur du Code civil du Québec — Action sur cautionnement intentée après l'entrée en vigueur du nouveau Code — L'article 2363 du Code civil du Québec est-il applicable? — Effet et application de l'art. 131 de la Loi sur l'application de la réforme du Code civil, L.Q. 1992, ch. 57.

Cautionnement — Fin du cautionnement — Libération d'une caution à la cessation de l'exercice de ses fonctions — Interprétation et application de l'art. 2363 du Code civil du Québec, L.Q. 1991, ch. 64.

En 1992, l'appelant acquiert 35 pour 100 des actions de Services Alimentaires B.S.L. Inc. (« B.S.L. ») et devient administrateur et secrétaire de cette compagnie. Il accepte également de cautionner B.S.L. dans le cadre d'un contrat conclu avec l'intimée. L'appelant cède l'année suivante ses actions de B.S.L. et démissionne de ses postes d'administrateur et de secrétaire de la compagnie. Cette démission prend effet le 1er septembre 1993. Plus d'un an après sa démission, l'intimée réclame à l'appelant le remboursement des dettes de B.S.L., soit environ 43 400 $. La Cour supérieure du Québec rejette l'action sur cautionnement de l'intimée. Elle conclut que l'appelant a fourni son cautionnement en raison des fonctions qu'il exerçait au sein de B.S.L. et, puisque les dettes ont été contractées après la cessation de l'exercice de ses fonctions, l'appelant ne peut donc être tenu au

of public order; rather, it supplements the parties' intention within the meaning of art. 9 C.C.Q. To justify a narrow reading of art. 2363 C.C.Q., the respondent contended that the provision was in fact of public order because of the Minister of Justice's commentary regarding s. 131 A.I.R.C.C., which reads as follows:

[TRANSLATION] This section is of the same nature as the section preceding it. In existing contractual situations, the section provides for the immediate application of the imperative provisions of the new legislation requiring that a suretyship contracted in connection with special duties performed by the surety or the principal debtor terminate upon cessation of the duties. The suretyship will be terminated, except with respect to debts already existing at the time, when the new provisions come into force provided that the special duties constituting the fundamental element of the agreement have already ceased at that time.

This section is also consistent with the principle laid down in section 5. [Emphasis added.]

(*Loi sur l'application de la réforme du Code civil et Commentaires du ministre de la Justice* (1994), at p. 348)

For reasons that I will also present in analysing s. 131 A.I.R.C.C., I think this argument is unsound. The wording of art. 2363 C.C.Q. is very different from that of art. 2361 C.C.Q., in which the legislature expressly provided that the death of the surety would terminate the suretyship "[n]otwithstanding any contrary provision". The fact that the legislature did not include such a clarification in art. 2363 C.C.Q. indicates that its intention was not for this provision to be one of public order. There is therefore an error in the Minister of Justice's commentary regarding s. 131 A.I.R.C.C., since it does not take into account the clear difference in wording between arts. 2361 and 2363 C.C.Q. Thus, art. 2363 C.C.Q. applies in all cases where the parties have not overridden it by contract. As the academic commentators have noted, the parties are always free to include in their suretyship contract the stipulations needed to exclude or alter the application of art. 2363 C.C.Q. The creditor might agree with the surety on a clause regarding, *inter alia*, the term of the suretyship or a notification procedure, in order to enhance the protection

l'art. 2363 C.c.Q. n'est pas d'ordre public, mais est supplétif de la volonté des parties en vertu de l'art. 9 C.c.Q. Pour justifier une interprétation étroite de l'art. 2363 C.c.Q., l'intimée a prétendu que la disposition était plutôt d'ordre public en raison des commentaires du ministre de la Justice concernant l'art. 131 L.a.r.C.c., qui se lisent comme suit :

Cet article est de même nature que l'article précédent. Il prévoit l'application immédiate, aux situations contractuelles en cours, des dispositions impératives de la loi nouvelle voulant qu'un cautionnement consenti en raison de fonctions particulières exercées par la caution ou par le débiteur principal, prenne fin lorsque cessent ces fonctions. Ce cautionnement s'éteindra, sauf à l'égard des dettes alors existantes, avec l'entrée en vigueur des dispositions nouvelles, dès lors qu'avaient déjà cessé, à ce moment, les fonctions particulières qui constituaient l'élément fondamental de l'engagement.

Cet article est également conforme au principe énoncé à l'article 5. [Je souligne.]

(*Loi sur l'application de la réforme du Code civil et Commentaires du ministre de la Justice* (1994), p. 348)

43 Pour les raisons que j'exposerai lors de l'analyse de l'art. 131 L.a.r.C.c., cette prétention me paraît mal fondée. En effet, le texte de l'art. 2363 C.c.Q. diffère nettement de celui de l'art. 2361 C.c.Q., où le législateur a expressément prévu que le décès de la caution mettait fin au cautionnement « malgré toute stipulation contraire ». N'ayant pas apporté une telle précision à l'art. 2363 C.c.Q., le législateur n'avait pas l'intention d'en faire une disposition d'ordre public. Les commentaires du ministre de la Justice concernant l'art. 131 L.a.r.C.c. comportent donc une erreur, puisqu'ils ne tiennent pas compte de la différence claire de formulation des art. 2361 et 2363 C.c.Q. Ainsi, l'art. 2363 C.c.Q. s'applique dans tous les cas où les parties n'y ont pas dérogé contractuellement. Comme le souligne la doctrine, les parties sont toujours libres d'inclure les stipulations nécessaires dans leur contrat de cautionnement afin d'écarter l'application de l'art. 2363 C.c.Q. ou de le moduler. Le créancier peut alors convenir avec la caution de dispositions relatives au terme du cautionnement ou à la procédure d'avis notamment, afin d'améliorer la

he or she obtains in requiring this personal security (Claxton, *supra*, at p. 309; Poudrier-LeBel, *supra*, at p. 12; L. Poudrier-LeBel, "L'extinction du cautionnement", in Collection de droit, vol. 5, *Obligations et contrats* (2003), 321, at p. 323; Bélanger, *supra*, at p. 144).

44 As Chamberland J.A. correctly pointed out, the effect of art. 2363 C.C.Q. is to discharge the surety but not the principal debtor (para. 96). Moreover, under art. 2364 C.C.Q., the surety is discharged only from debts arising after the cessation of performance of his or her duties and remains liable for debts existing at that time (para. 99).

B. *The Transitional Law*

45 The respondent submits that the effect of the above interpretation of art. 2363 C.C.Q. is that the article applies retroactively in light of s. 131 A.I.R.C.C., which is contrary to the principle established by s. 2 A.I.R.C.C. that the provisions of the *Civil Code of Québec* do not have retroactive effect. The respondent argued before this Court that, when the suretyship contract was signed, the rule in *Swift* was the law. The respondent added that the parties could not have foreseen that art. 2363 C.C.Q. would have the effect of terminating the suretyship upon cessation of the performance of the appellant's duties and that the provision accordingly could not supplement their intention. I cannot agree with this argument.

46 The principles of retroactivity, immediate application and retrospectivity of new legislation must not be confused with each other. New legislation does not operate retroactively when it is applied to a situation made up of a series of events that occurred before and after it came into force or with respect to legal effects straddling the date it came into force (Côté, *supra*, at p. 175). If events are under way when it comes into force, the new legislation will apply in accordance with the principle of immediate application, that is, it governs the future development of the legal situation (Côté, *supra*, at pp. 152 *et seq.*). If the legal effects of the situation are already occurring when the new

protection qu'il reçoit en exigeant cette sûreté personnelle (Claxton, *op. cit.*, p. 309; Poudrier-LeBel, *loc. cit.*, p. 1052; L. Poudrier-LeBel, « L'extinction du cautionnement », dans Collection de droit, vol. 5, *Obligations et contrats* (2003), 321, p. 323; Bélanger, *loc. cit.*, p. 144).

Comme l'a bien souligné le juge Chamberland, l'art. 2363 C.c.Q. a pour effet de libérer la caution, mais non le débiteur principal (par. 96). De plus, en vertu de l'art. 2364 C.c.Q., la caution n'est libérée que des dettes subséquentes à la cessation de l'exercice de ses fonctions, et demeure tenue des dettes existantes à ce moment (par. 99).

B. *Le droit transitoire*

L'intimée prétend que l'interprétation de l'art. 2363 C.c.Q. qui vient d'être dégagée rend son application rétroactive en raison de l'art. 131 L.a.r.C.c., contrairement au principe de la non-rétroactivité des dispositions du *Code civil du Québec* prévu à l'art. 2 L.a.r.C.c. L'intimée a ainsi plaidé devant notre Cour que, lors de la conclusion du contrat de cautionnement, l'état du droit était régi par l'arrêt *Swift*. Elle ajoute que les parties ne pouvaient pas prévoir que l'art. 2363 C.c.Q. aurait pour effet de mettre fin au cautionnement lors de la cessation de l'exercice des fonctions de l'appelant et qu'en conséquence cette disposition ne pouvait être supplétive de leur volonté. Je ne puis souscrire à cette prétention.

En effet, les principes de rétroactivité, d'application immédiate et de rétrospectivité des lois nouvelles ne doivent pas être confondus. Il n'y a pas de rétroactivité lorsqu'une loi nouvelle s'applique à une situation constituée d'un ensemble de faits survenus avant et après l'entrée en vigueur du nouveau texte de loi ou à des effets juridiques qui chevauchent cette date (Côté, *op. cit.*, p. 220). Lorsque des faits sont en cours au moment de son entrée en vigueur, la loi nouvelle s'applique selon le principe de l'application immédiate, c'est-à-dire qu'elle régit le déroulement futur de la situation juridique (Côté, *op. cit.*, p. 191 et suiv.). Si les effets juridiques sont en cours au moment de

legislation comes into force, the principle of retrospective effect applies. According to this principle, the new legislation governs the future consequences of events that happened before it came into force but does not modify effects that occurred before that date (Côté, *supra*, at pp. 133 *et seq*. and pp. 194 *et seq*.). When new legislation modifies those prior effects, its effect is retroactive (Côté, *supra*, at pp. 133 *et seq*.). Professor Driedger gave a good explanation of this distinction between retroactive and retrospective effect:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original.]

(E. A. Driedger, "Statutes: Retroactive Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264, at pp. 268-69)

l'entrée en vigueur de la loi nouvelle, le principe de la rétrospectivité s'applique. Selon ce principe, la loi nouvelle régit les conséquences futures de faits accomplis avant son entrée en vigueur, sans toutefois modifier les effets qui se sont produits avant cette date (Côté, *op. cit.*, p. 167 et suiv., et p. 245 et suiv.). Dans le cas où elle vient modifier ces effets antérieurs, la loi nouvelle a un effet rétroactif (Côté, *op. cit.*, p. 167 et suiv.). Le professeur Driedger a bien mis en évidence cette distinction entre les effets rétroactif et rétrospectif :

> [TRADUCTION] Une loi rétroactive est une loi qui s'applique à une époque antérieure à son adoption. Une loi rétrospective ne dispose qu'à l'égard de l'avenir. Elle vise l'avenir, mais elle impose de nouvelles conséquences à l'égard d'événements passés. Une loi rétroactive agit *à l'égard du passé*. Une loi rétrospective *agit pour l'avenir*, mais elle jette aussi un regard vers le passé en ce sens qu'elle attache de nouvelles conséquences *à l'avenir* à l'égard d'un événement qui a eu lieu avant l'adoption de la loi. Une loi rétroactive modifie la loi par rapport à ce qu'elle était; une loi rétroactive rend la loi différente de ce qu'elle serait autrement à l'égard d'un événement antérieur. [En italique dans l'original.]

(E. A. Driedger, « Statutes : Retroactive Retrospective Reflections » (1978), 56 *R. du B. can.* 264, p. 268-269)

47 In the case at bar, s. 131 A.I.R.C.C. has retrospective effect. It applies to an event that has already happened, namely the signing of the suretyship contract, but governs only the future effects of the contract. Thus, under this provision, the suretyship is terminated upon cessation of the performance of the surety's duties, except as regards debts already in existence when the new legislation came into force. As s. 131 A.I.R.C.C. does not modify legal effects that occurred before it came into force, its effect is merely retrospective, not retroactive.

47 En l'espèce, l'art. 131 L.a.r.C.c. a un effet rétrospectif. En effet, cette disposition s'applique à un fait déjà accompli, soit la conclusion du contrat de cautionnement, mais elle ne régit que les effets futurs de ce contrat. Ainsi, en vertu de cette disposition, le cautionnement s'éteint à la cessation de l'exercice des fonctions de la caution, sauf quant aux dettes existantes lors de l'entrée en vigueur de la loi nouvelle. L'article 131 L.a.r.C.c. ne modifiant pas les effets juridiques survenus avant son entrée en vigueur, il n'a alors qu'un effet rétrospectif et non rétroactif.

48 This application of the new legislation might have been avoided by applying the principle of survival of the former legislation (Côté, *supra*, at pp. 152 *et seq*.). As Professor Côté points out, the signing of a contract usually creates rights and obligations, which are considered vested rights and which, generally speaking, remain subject

48 Cette application de la loi nouvelle aurait pu être mise de côté en vertu du principe de la survie de la loi ancienne (Côté, *op. cit.*, p. 191 et suiv.). Comme le souligne le professeur Côté, la conclusion d'un contrat emporte généralement des droits et obligations qui sont considérés comme des droits acquis et qui, en règle générale, demeurent régis par loi

to the former legislation (Côté, *supra*, at p. 163). This specific case of survival of the former legislation has even been addressed in the first paragraph of s. 4 A.I.R.C.C. However, this principle is not absolute and may be subject to certain exceptions expressly or implicitly provided for by the legislature (*Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 S.C.R. 271, at p. 282; *Acme Village School District No. 2296 (Board of Trustees of) v. Steele-Smith*, [1933] S.C.R. 47). For example, in the second paragraph of s. 4 A.I.R.C.C., the legislature provided that the exercise of rights and performance of obligations, and the proof, transfer, alteration or extinction thereof, would be governed by the new legislation rather then the former legislation. Section 131 A.I.R.C.C. is another exception that applies specifically to the case at bar. In the case before us, the former legislation has not survived, so the new legislation applies retrospectively. Section 131 A.I.R.C.C. expresses the legislature's clear intention, namely that, by the operation of s. 131, art. 2363 C.C.Q. applies to suretyship contracts in effect when the new code came into force.

49 As I noted above, to apply art. 2363 C.C.Q. retrospectively like this does not make the provision an imperative one. The legislature intended merely to rectify certain abuses so as to better protect sureties who contract suretyships in connection with the performance of their duties and to adopt a consistent approach to situations of this nature in the future.

C. *Application of Article 2363 C.C.Q. and Section 131 A.I.R.C.C. to the Facts of the Case at Bar*

50 Article 2363 C.C.Q. applies in the case at bar, as it has been shown that the appellant's suretyship was contracted in connection with the duties he performed for B.S.L. After investing in the company through Prodier, the appellant became a director and the secretary of B.S.L. The trial judge found that the appellant had contracted the suretyship in connection with the duties he performed. Cohen J. accepted the testimony of Mr. Charette, the respondent's representative,

ancienne (Côté, *op. cit.*, p. 205). Ce cas particulier de survie de la loi ancienne a même été prévu au premier alinéa de l'art. 4 L.a.r.C.c. Ce principe n'est toutefois pas absolu, mais peut souffrir certaines exceptions expressément ou implicitement prévues par le législateur (*Gustavson Drilling (1964) Ltd. c. M.R.N.*, [1977] 1 R.C.S. 271, p. 282; *Acme Village School District No. 2296 (Board of Trustees of) c. Steele-Smith*, [1933] R.C.S. 47). Par exemple, au deuxième alinéa de l'art. 4 L.a.r.C.c., le législateur a prévu que l'exercice des droits, l'exécution des obligations, leur preuve, leur transmission, leur mutation et leur extinction sont régis par la loi nouvelle et non par la loi ancienne. L'article 131 L.a.r.C.c. constitue une autre exception qui vise spécifiquement le cas d'espèce. Dans le cas qui nous occupe, il n'y a donc pas de survie de la loi ancienne au profit d'une application rétrospective de la loi nouvelle. L'article 131 L.a.r.C.c. exprime donc l'intention claire du législateur, c'est-à-dire qu'il a pour effet de rendre l'art. 2363 C.c.Q. applicable aux contrats de cautionnement en vigueur lors de l'entrée en vigueur du nouveau code.

Comme je l'ai souligné précédemment, une telle application rétrospective de l'art. 2363 C.c.Q. n'a pas pour effet de rendre la disposition impérative. Le législateur ne voulait que remédier à certains abus afin de mieux protéger les cautions qui fournissent des cautionnements dans le cadre de l'exercice de leur fonction et d'uniformiser toutes les situations de cette nature pour l'avenir.

C. *Application des art. 2363 C.c.Q. et 131 L.a.r.C.c. aux faits de la présente affaire*

L'article 2363 C.c.Q. s'applique en l'espèce, car il a été démontré que le cautionnement de l'appelant a été consenti en raison des fonctions qu'il exerçait au sein de B.S.L. Après avoir investi dans celle-ci par l'intermédiaire de Prodier, l'appelant est devenu administrateur et secrétaire de cette compagnie. La juge de première instance a conclu que l'appelant avait consenti son cautionnement en raison des fonctions qu'il exerçait. La juge Cohen a effectivement retenu le témoignage

Thanh Tam Tran *Appellant*

v.

Minister of Public Safety and Emergency Preparedness *Respondent*

and

Attorney General of British Columbia, Canadian Association of Refugee Lawyers, British Columbia Civil Liberties Association and African Canadian Legal Clinic *Interveners*

Indexed as: Tran *v.* Canada (Public Safety and Emergency Preparedness)

2017 SCC 50

File No.: 36784.

2017: January 13; 2017: October 19.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Immigration — Inadmissibility and removal — Permanent residents — Serious criminality — Permanent resident convicted of federal offence receiving 12-month conditional sentence — Maximum sentence for offence increased after offence committed but before conviction and sentencing — Whether conditional sentence is "term of imprisonment" for purposes of assessing permanent resident's inadmissibility to Canada on grounds of serious criminality under s. 36(1)(a) of Immigration and Refugee Protection Act — Whether "maximum term of imprisonment" referred to in s. 36(1)(a) is maximum sentence that could have been imposed at time of commission of offence or of admissibility determination — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 36(1)(a).

Thanh Tam Tran *Appelant*

c.

Ministre de la Sécurité publique et de la Protection civile *Intimé*

et

Procureur général de la Colombie-Britannique, Association canadienne des avocats et avocates en droit des réfugiés, British Columbia Civil Liberties Association et Clinique juridique africaine canadienne *Intervenants*

Répertorié : Tran *c.* Canada (Sécurité publique et Protection civile)

2017 CSC 50

N° du greffe : 36784.

2017 : 13 janvier; 2017 : 19 octobre.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Immigration — Interdiction de territoire et renvoi — Résidents permanents — Grande criminalité — Résident permanent déclaré coupable d'une infraction fédérale et condamné à une peine d'emprisonnement avec sursis de 12 mois — Peine maximale accrue après la commission de l'infraction, mais avant la déclaration de culpabilité et l'infliction de la peine — Une peine d'emprisonnement avec sursis constitue-t-elle un « emprisonnement » pour l'évaluation de l'interdiction de territoire au Canada pour grande criminalité en application de l'art. 36(1)a) de la Loi sur l'immigration et la protection des réfugiés? — L'« emprisonnement maximal » dont il est question à l'art. 36(1)a) correspond-il à la peine maximale qui aurait pu être infligée au moment de la commission de l'infraction ou de la décision relative à l'interdiction de territoire? — Loi sur l'immigration et la protection des réfugiés, L.C. 2001, c. 27, art. 36(1)a).

(a) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;

(b) to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada;

. . .

(c) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;

(d) to see that families are reunited in Canada;

(e) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society;

. . .

(h) to protect public health and safety and to maintain the security of Canadian society;

(i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and

(j) to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society.

a) de permettre au Canada de retirer de l'immigration le maximum d'avantages sociaux, culturels et économiques;

b) d'enrichir et de renforcer le tissu social et culturel du Canada dans le respect de son caractère fédéral, bilingue et multiculturel;

. . .

c) de favoriser le développement économique et la prospérité du Canada et de faire en sorte que toutes les régions puissent bénéficier des avantages économiques découlant de l'immigration;

d) de veiller à la réunification des familles au Canada;

e) de promouvoir l'intégration des résidents permanents au Canada, compte tenu du fait que cette intégration suppose des obligations pour les nouveaux arrivants et pour la société canadienne;

. . .

h) de protéger la santé et la sécurité publiques et de garantir la sécurité de la société canadienne;

i) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;

j) de veiller, de concert avec les provinces, à aider les résidents permanents à mieux faire connaître leurs titres de compétence et à s'intégrer plus rapidement à la société.

[40] As stated above, the *IRPA* aims to permit Canada to obtain the benefits of immigration, while recognizing the need for security and outlining the obligations of permanent residents. The Minister emphasizes the *IRPA*'s security objective. Yet, as the Chief Justice explained in *Medovarski*, the security objective in the *IRPA* "is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada" (para. 10). The obligation under the *IRPA* to behave lawfully includes not engaging in "serious criminality" as defined in s. 36(1). So long as this obligation is met, the *IRPA*'s objectives related to "successful

[40] Comme je l'ai mentionné, la *LIPR* vise à permettre au Canada de profiter des avantages de l'immigration, tout en reconnaissant la nécessité d'assurer la sécurité et d'énoncer les obligations des résidents permanents. Le ministre met l'accent sur l'objectif de sécurité visé par la *LIPR*. Or, comme la Juge en chef l'a expliqué dans *Medovarski*, pour réaliser cet objectif, « il faut empêcher l'entrée au Canada des demandeurs ayant un casier judiciaire et renvoyer ceux qui ont un tel casier, et insister sur l'obligation des résidents permanents de se conformer à la loi pendant qu'ils sont au Canada » : par. 10. L'obligation prévue dans la *LIPR* de se conformer à la loi comprend celle de ne pas se livrer à des activités de « grande criminalité » comme le prévoit le

integration" will remain relevant to permanent residents, and the *IRPA*'s objectives related to the "benefits of immigration" and "security" will be furthered.

[41] A similar interaction between the mutual obligations of the state and of individuals, in the criminal law context, has been described as follows:

> The state's duty to provide a framework for security may be presented as part of a bargain between the state and its citizens, a bargain in which a measure of security is provided in return for a measure of obedience. . . .
>
> . . .
>
> . . . The fundamental duty of justice requires the state to recognise certain rights of individuals in its dealings with them; notably, in the sphere of criminal law, the state should respect the rule of law and the principle of legality, so that citizens as rational agents may plan their lives so as to avoid criminal conviction.

(A. Ashworth, *Positive Obligations in Criminal Law* (2013), at pp. 100-101)

This description is apposite in the immigration law context. Permanent residents too must be able to "plan their lives". Their obligations must be communicated to them in advance. As Lon Fuller warned, a legal system must "publicize, or at least . . . make available to the affected party, the rules he is expected to observe" (*The Morality of Law* (rev. ed. 1969), at p. 39). When Mr. Tran committed his offence, he could not have been aware that doing so was an act of "serious criminality" that might breach his obligations and lead to deportation.

[42] The Minister relies on *Medovarski*, at para. 47, for the proposition that permanent residents cannot expect that "the law will not change from time to time". The Minister argues that admissibility under s. 36(1)(a) must be tested against Parliament's views

par. 36(1). Aussi longtemps que cette obligation est respectée, les objectifs de la *LIPR* liés à l'« intégration » demeurent applicables aux résidents permanents, et la réalisation des objectifs portant sur les « avantages de l'immigration » et la « sécurité » est favorisée.

[41] Une interaction similaire entre les obligations mutuelles de l'État et d'individus, dans le contexte du droit criminel, a été décrite de la façon suivante :

> [TRADUCTION] L'obligation de l'État d'établir un cadre de sécurité peut être vue comme la part d'un marché entre l'État et ses citoyens, dans le cadre duquel une certaine sécurité est assurée en échange de l'obéissance. . .
>
> . . .
>
> . . . En effet, l'obligation fondamentale de justice exige que l'État reconnaisse certains droits aux particuliers dans ses négociations avec eux; en particulier, dans le domaine du droit criminel, l'État doit respecter la primauté du droit et les principes de légalité, de sorte que les citoyens, en tant qu'agents rationnels, puissent organiser leur vie de façon à éviter une condamnation criminelle.

(A. Ashworth, *Positive Obligations in Criminal Law* (2013), p. 100-101)

Cette description est pertinente dans le contexte du droit de l'immigration. Les résidents permanents doivent aussi être en mesure d'« organiser leur vie ». Ils doivent être informés à l'avance de leurs obligations. La mise en garde suivante de Lon Fuller le précise : un système juridique doit [TRADUCTION] « publiciser, ou à tout le moins [. . .] mettre à la disposition de la partie visée, les règles qu'elle doit observer » : *The Morality of Law* (éd. rév. 1969), p. 39. Lorsque M. Tran a commis l'infraction, il ne pouvait pas savoir que cette infraction représentait un acte de « grande criminalité » pouvant contrevenir à ses obligations et mener à son renvoi.

[42] Le ministre invoque *Medovarski*, par. 47, plus précisément la proposition selon laquelle les résidents permanents doivent s'attendre à ce que « la loi change à l'occasion ». Il soutient que l'interdiction de territoire aux termes de l'al. 36(1)a)

of the seriousness of the offence at the time of the admissibility decision. I do not agree. While Parliament is entitled to change its views on the seriousness of a crime, it is not entitled to alter the mutual obligations between permanent residents and Canadian society without doing so clearly and unambiguously. In this case, it has failed to do so. As such, s. 36(1)(a) must be interpreted in a way that respects these mutual obligations. The right to remain in Canada is conditional, but it is conditional on complying with *knowable* obligations. Accordingly, the relevant date for assessing serious criminality under s. 36(1)(a) is the date of the commission of the *offence*, not the date of the admissibility decision.

doit être évaluée à l'aune des positions du législateur concernant la gravité de l'infraction au moment de la décision concernant l'interdiction de territoire. Je ne suis pas d'accord. Bien que le législateur puisse changer de position au sujet de la gravité d'un crime, il ne peut changer les obligations mutuelles entre les résidents permanents et la société canadienne sans le faire clairement et sans équivoque. Il ne l'a pas fait. Il faut plutôt interpréter l'al. 36(1)a) d'une manière qui respecte ces obligations mutuelles. Le droit de demeurer au Canada est conditionnel, mais il dépend du respect des obligations qui *peuvent être connues*. Par conséquent, la date pertinente pour évaluer la grande criminalité dont il est question à l'al. 36(1)a) est la date de la commission de l'*infraction*, et non la date de la décision quant à l'interdiction de territoire.

[43] The presumption against retrospectivity lends further support to this conclusion. While I agree with the Court of Appeal that s. 11(*i*) of the *Charter* does not apply to the decision of the Minister's delegate because the proceedings were neither criminal nor penal, the presumption against retrospectivity is a rule of statutory interpretation that is available in the instant case. The purpose of this presumption is to protect acquired rights and to prevent a change in the law from "look[ing] to the past and attach[ing] new prejudicial consequences to a completed transaction" (Driedger (1983), at p. 186). The presumption works such that "statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act" (*Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, at p. 279; see also *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 71).

[43] La présomption du caractère non rétrospectif confirme la justesse de cette conclusion. Bien que je partage l'opinion de la Cour d'appel selon laquelle l'al. 11*i*) de la *Charte* ne s'applique pas à la décision du délégué du ministre, parce que la procédure n'est ni criminelle ni pénale, la présomption du caractère non rétrospectif est une règle d'interprétation législative applicable dans la présente affaire. Cette présomption vise à protéger les droits acquis et à éviter une modification de la loi qui découle d'un regard [TRADUCTION] « orient[é] vers le passé et [qui] joi[gne] de nouvelles conséquences préjudiciables à une transaction complétée » : Driedger (1983), p. 186. Selon cette présomption, « les lois ne doivent pas être interprétées comme ayant une portée rétroactive à moins que le texte de la Loi ne le décrète expressément ou n'exige implicitement une telle interprétation » : *Gustavson Drilling (1964) Ltd. c. Ministre du Revenu national*, [1977] 1 R.C.S. 271, p. 279; voir aussi *Colombie-Britannique c. Imperial Tobacco Canada Ltée*, 2005 CSC 49, [2005] 2 R.C.S. 473, par. 71.

[44] The presumption against retrospectivity engages the rule of law. Lord Diplock explained that the rule of law "requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it" (*Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*,

[44] La présomption du caractère non rétrospectif fait intervenir la primauté du droit. Comme le lord Diplock l'a expliqué, la primauté du droit [TRADUCTION] « exige qu'un citoyen, avant d'adopter une ligne de conduite, puisse connaître à l'avance les conséquences qui en découleront sur le plan juridique » : *Black-Clawson International Ltd. c.*

[1975] A.C. 591 (H.L.), at p. 638). As this Court explained in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 70, the rule of law "vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs".

[45] The presumption against retrospectivity also bespeaks fairness (*R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 25). For example, sentencing judges are required to consider immigration consequences (*R. v. Pham*, 2013 SCC 15, [2013] 1 S.C.R. 739). It would raise issues of fairness to introduce a new collateral consequence *after* sentencing that would have been relevant *before* sentencing. As Mr. Tran points out, a permanent resident convicted of marihuana production 25 years ago would suddenly find themselves inadmissible years after having served the associated sentence. Such an outcome would not only offend fairness and the rule of law, but would also undermine the decision of the sentencing judge who decades ago crafted an appropriate sentence without knowledge of additional deportation consequences.

[46] The Minister argues that the presumption against retrospectivity cannot assist Mr. Tran because this Court's decision in *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, precludes its application. I disagree.

[47] In *Brosseau*, this Court held that the presumption will not apply if the new prejudicial consequence at issue is designed to protect the public rather than as a punishment for a prior event. The fact that s. 36(1)(a) of the *IRPA* reflects "an intent to prioritize security" (*Medovarski*, at para. 10) is not, in itself, sufficient to bring it within the "public protection" exception contemplated in *Brosseau*. To interpret the public protection exception as inclusive of *all* legislation that can be said to be *broadly* aimed at public protection would ignore the purpose underlying the presumption against retrospectivity.

Papierwerke Waldhof-Aschaffenburg A.G., [1975] A.C. 591 (H.L.), p. 638. Comme la Cour l'a expliqué dans le *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 70, la primauté du droit « assure aux citoyens et résidents une société stable, prévisible et ordonnée où mener leurs activités ».

[45] La présomption du caractère non rétrospectif est également un signe d'équité : *R. c. K.R.J.*, 2016 CSC 31, [2016] 1 R.C.S. 906, par. 25. Par exemple, les juges qui déterminent une peine doivent tenir compte des conséquences en matière d'immigration : *R. c. Pham*, 2013 CSC 15, [2013] 1 R.C.S. 739. Adopter une nouvelle conséquence indirecte *après* le prononcé de la peine, conséquence qui aurait été pertinente *avant* le prononcé, soulèverait des questions d'équité. Comme M. Tran le fait remarquer, un résident permanent déclaré coupable de production de marihuana il y a 25 ans se retrouverait soudainement interdit de territoire des années après avoir purgé sa peine. Un tel résultat irait non seulement à l'encontre de l'équité et de la primauté du droit, mais minerait également la décision du juge chargé de la détermination de la peine qui a façonné, il y a plusieurs décennies, une peine appropriée sans savoir qu'il y aurait des conséquences additionnelles quant à la déportation.

[46] Selon le ministre, la présomption du caractère non rétrospectif n'est d'aucun secours pour M. Tran en raison de la décision de la Cour dans *Brosseau c. Alberta Securities Commission*, [1989] 1 R.C.S. 301, qui en empêche l'application. Je ne suis pas d'accord.

[47] Dans *Brosseau*, la Cour a conclu que la présomption ne s'applique pas si les nouvelles conséquences préjudiciables en cause visent à protéger le public plutôt qu'à punir pour un fait passé. Le fait que l'al. 36(1)a) de la *LIPR* reflète « une intention de donner priorité à la sécurité » (*Medovarski*, par. 10) n'est pas suffisant, en soi, pour qu'il soit visé par l'exception de la « protection du public » envisagée dans *Brosseau*. Si l'on interprétait cette exception de telle sorte qu'elle englobe *toute* la législation dont on peut dire qu'elle vise *globalement* la protection du public, cela reviendrait à faire fi de l'objectif sous-jacent à la présomption du caractère non rétrospectif.

City of Montréal *Appellant*;

and

Arcade Amusements Inc. *Respondent*;

and

Attorney General of Quebec *Mis en cause.*

and between

City of Montréal *Appellant*;

and

The Fountainhead Fun Centres Ltd., Nivel Sales (1969) Limited, Boules de Miel Carnaval Inc. and Louis Zuckerman *Respondents*;

and

Attorney General of Quebec *Mis en cause*;

and

Attorney General of Canada *Intervener.*

File No.: 16708.

1983: March 22, 23, 24; 1985: April 24.

Present: Ritchie*, Dickson, Beetz, Estey, McIntyre, Chouinard and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Municipal law — By-law on amusement machines and halls — Validity — Access to amusement halls prohibited to persons under eighteen — Whether by-law prohibitory, vague or discriminatory — Charter of the City of Montreal, 1959-60 (Que.), c. 102, as amended, arts. 516, 517g., s., 521(4), (7), (33), 524(2)a., b. — By-law of the City of Montréal, No. 5156.

Constitutional law — Municipal by-law on amusement machines and halls — Validity — Whether by-law ultra vires as invasion of federal criminal law powers — By-law of the City of Montréal, No. 5156.

By petitions to annul, respondents challenged the validity of By-law 5156 of the City of Montréal regard-

* Ritchie J. took no part in the judgment.

Ville de Montréal *Appelante*;

et

Arcade Amusements Inc. *Intimée*;

et

Le procureur général du Québec *Mis en cause.*

et entre

Ville de Montréal *Appelante*;

et

The Fountainhead Fun Centres Ltd., Nivel Sales (1969) Limited, Boules de Miel Carnaval Inc. et Louis Zuckerman *Intimés*;

et

Le procureur général du Québec *Mis en cause*;

et

Le procureur général du Canada *Intervenant.*

N° du greffe: 16708.

1983: 22, 23, 24 mars; 1985: 24 avril.

Présents: Les juges Ritchie*, Dickson, Beetz, Estey, McIntyre, Chouinard et Wilson.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit municipal — Règlement sur les appareils et les salles d'amusement — Validité — Accès aux salles d'amusement interdit au moins de 18 ans — Le règlement est-il prohibitif, imprécis ou discriminatoire? — Charte de la Ville de Montréal, 1959-60 (Qué.), chap. 102 et modifications, art. 516, 517g), s), 521(4), (7), (33), 524(2)a), b) — Règlement de la Ville de Montréal, n° 5156.

Droit constitutionnel — Règlement municipal sur les appareils et les salles d'amusement — Validité — Le règlement empiète-t-il sur la compétence fédérale en matière de droit criminel? — Règlement de la Ville de Montréal, n° 5156.

Par requêtes en annulation, les intimés ont attaqué la validité du Règlement 5156 de la ville de Montréal

* Le juge Ritchie n'a pas pris part au jugement.

ing amusement machines and halls on the grounds that the By-law was prohibitory, vague, discriminatory and unconstitutional. The petition of respondents Fountainhead *et al.* asked that all the provisions of the By-law be annulled, while that of respondent Arcade was directed only at s. 8, which prohibits persons less than eighteen years of age from using amusement machines or being in amusement halls. The Superior Court dismissed the petitions. The Court of Appeal reversed the two judgments, allowed the petitions and annulled the By-law.

Held: The appeal relating to the petition of respondent Arcade Amusements Inc. should be dismissed. The appeal relating to the petition of Fountainhead Fun Centres Ltd. *et al.* should be allowed in part. The By-law of the City of Montréal on amusement machines and halls is invalid in part: s. 8 and para. D of s. 12 are *ultra vires* and should be annulled.

The By-law is not disguised legislation which, under colour of being a zoning by-law, both in its effects and purpose prohibits amusement machines. Though s. 7 limits the operation of amusement halls to a tiny part of the City's territory, this limitation does not amount to a prohibition. The By-law permits the free operation of amusement machines and halls in the premises and sectors authorized. Additionally, respondents did not show that the By-law had the effect of preventing them from doing business. Section 3, which locates amusement machines in amusement halls, is not a zoning provision. That section and ss. 4, 5 and 6 are provisions which regulate commerce enacted in accordance with paras. 4, 7 and 33 of art. 521 of the *Charter of the City of Montreal*. These sections are in no way prohibitory. Section 4 even safeguards rights acquired in connection with amusement machines operated outside of amusement halls. Such safeguarding is in general inconsistent with a prohibitory provision.

The By-law is also not illegal because it is too vague. The concept of "young children" in s. 2, which provides that an "apparatus designed to amuse or entertain young children" is not an "amusement machine", is not so vague that residents of the City, and in particular individuals already operating or wishing to operate amusement halls, cannot understand the meaning and scope of the By-law. If any vagueness does exist in the definition, it will at most produce certain difficulties in interpretation, which is not a sufficient reason for declaring the By-law to be invalid.

relatif aux appareils et aux salles d'amusement aux motifs que ce règlement est prohibitif, imprécis, discriminatoire et inconstitutionnel. Alors que la requête des intimés Fountainhead et autres demande l'annulation de toutes les dispositions du Règlement, celle de l'intimée Arcade ne vise que son art. 8 qui interdit aux personnes âgées de moins de 18 ans l'usage des appareils d'amusement et l'accès aux salles d'amusement. La Cour supérieure a rejeté les requêtes. La Cour d'appel a infirmé les deux jugements, accueilli les requêtes et annulé le Règlement.

Arrêt: Le pourvoi relatif à la requête de l'intimée Arcade Amusements Inc. est rejeté. Le pourvoi relatif à la requête de Fountainhead Fun Centres Ltd. et autres est accueilli en partie. Le Règlement de la ville de Montréal sur les appareils et les salles d'amusement est invalide en partie: l'article 8 et l'al. D de l'art. 12 sont *ultra vires* et doivent être annulés.

Le Règlement n'est pas, sous le couvert d'un règlement de zonage, une législation déguisée qui, dans ses effets comme dans son but, prohibe les appareils d'amusement. Quoique l'art. 7 restreigne l'exploitation des salles d'amusement à une portion infime du territoire de la Ville, cette restriction n'équivaut pas à une prohibition. Le Règlement permet la libre exploitation des appareils et des salles d'amusement dans les lieux et les secteurs autorisés. De plus, il n'a pas été démontré par les intimés que le Règlement avait pour effet de les empêcher de faire commerce. Quant à l'article 3, qui regroupe les appareils d'amusement dans les salles d'amusement, il ne s'agit pas d'une disposition de zonage. Cet article, de même que les art. 4, 5, 6, sont des dispositions de réglementation du commerce édictées conformément aux par. 4°, 7° et 33° de l'art. 521 de la *Charte de la Ville de Montréal*. Ces articles ne sont nullement prohibitifs. L'article 4 sauvegarde même les droits acquis relativement aux appareils d'amusement exploités hors des salles d'amusement. Une telle sauvegarde est généralement incompatible avec une disposition prohibitive.

Le Règlement n'est pas non plus illégal pour cause d'imprécision. La notion d'«enfant en bas âge» à l'art. 2 qui prévoit qu'un «appareil destiné à l'amusement d'un enfant en bas âge» n'est pas un «appareil d'amusement» n'est pas imprécise au point que les citoyens de la Ville et, plus particulièrement, les individus qui exploitent déjà ou qui désirent exploiter des salles d'amusement ne puissent comprendre le sens et la portée du Règlement. S'il existe une imprécision au niveau de cette définition, celle-ci n'entraîne tout au plus que certaines difficultés d'interprétation. Cela ne constitue pas un motif suffisant pour que le Règlement soit déclaré invalide.

Section 8, however, is discriminatory and must be annulled. That section, which is severable from the rest of the By-law, contravenes the rule of administrative law that the power to make by-laws does not include a power to enact discriminatory provisions unless the authorizing legislation provides the contrary. The provisions of the *Charter* regarding the general powers of the City and its police powers, in particular paras. *g.* and *s.* of art. 517, do not authorize the City, expressly or by necessary inference, to make distinctions based on age. This also applies to the specific powers of the City. Paragraph D of s. 12, which prohibits persons under eighteen years of age from being admitted to billiard halls, is also *ultra vires* for the same reasons.

Finally, the By-law does not trench on federal legislative authority over the criminal law. The purpose of the By-law is not to prohibit gaming on grounds of public morals and to fill in what are perceived as gaps in the *Criminal Code*. The By-law in general deals with commerce and zoning and was also adopted for policing purposes to protect youth and prevent deliquency. The regulation of local commerce, zoning, the protection of youth and the prevention of crime are all areas within the authority of the province.

Cases Cited

In re Barclay and the Municipality of the Township of Darlington (1854), 12 U.C.R. 86; *Regina v. Levy* (1899), 30 O.R. 403; *Re T. W. Hand Fireworks Co. and the City of Peterborough*, [1962] O.R. 794; *Fountainhead Fun Centres Ltd. v. Ville St-Laurent*, [1979] C.S. 132; *Re Leavey and City of London* (1979), 107 D.L.R. (3d) 411; *Re Hamilton Independent Variety & Confectionery Stores Inc. and City of Hamilton* (1983), 143 D.L.R. (3d) 498, followed; *Kruse v. Johnson*, [1898] 2 Q.B. 91; *Jonas v. Gilbert* (1881), 5 S.C.R. 356; *Rex v. Paulowich*, [1940] 1 W.W.R. 537; *Re Ottawa Electric Railway Co. and Town of Eastview* (1924), 56 O.L.R. 52; *Rex ex rel. St-Jean v. Knott*, [1944] O.W.N. 432; *Regina v. Flory* (1889), 17 O.R. 715; *Phaneuf v. Corporation du Village de St-Hugues* (1936), 61 Que. K.B. 83; *City of Montreal v. Civic Parking Center Ltd.*, [1981] 2 S.C.R. 541; *Forst v. City of Toronto* (1923), 54 O.L.R. 256; *S.S. Kresge Co. v. City of Windsor* (1957), 7 D.L.R. (2d) 708; *City of Calgary v. S.S. Kresge Co.* (1965), 52 D.L.R. (2d) 617; *Regina v. Varga* (1979), 106 D.L.R. (3d) 101; *Entreprises Anicet Gauthier Inc. v. Ville de Sept-Îles*, [1983] C.S. 709, applied; *Re Bright and City of Langley* (1982), 131 D.L.R. (3d) 445, disapproved; *Hanson v. Ontario Universities Athletic Association* (1975), 65 D.L.R. (3d) 385; *Medicine Hat v. Wahl*, [1979] 2 S.C.R. 12, revers-

L'article 8, toutefois, est discriminatoire et doit être annulé. Cet article, qui est séparable du reste du Règlement, transgresse la règle de droit administratif qui veut que le pouvoir de faire des règlements ne permet pas d'édicter des dispositions discriminatoires à moins que le texte législatif qui l'autorise ne prescrive le contraire. Les dispositions de la *Charte* relatives aux pouvoirs généraux de la Ville et à ses pouvoirs de police, particulièrement les par. *g*) et *s*) de l'art. 517, n'habilitent pas la Ville, explicitement ou par inférence nécessaire, à faire des distinctions fondées sur l'âge. Il en va de même des pouvoirs spécifiques de la Ville. L'alinéa D de l'art. 12, qui interdit l'accès aux salles de billard aux moins de 18 ans, est également *ultra vires* pour les mêmes raisons.

Finalement, le Règlement n'empiète pas sur la compétence législative fédérale relative au droit criminel. Ce règlement n'a pas pour fonction de prohiber le jeu dans un but de moralité publique et de remédier à ce que l'on estime être des lacunes du *Code criminel*. Le Règlement dans son ensemble porte sur le commerce et le zonage et a également été adopté à des fins de police pour la protection de la jeunesse et la prévention de la délinquance. Or la réglementation d'un commerce local, le zonage, la protection de la jeunesse et la prévention du crime sont tous des domaines qui relèvent de l'autorité provinciale.

Jurisprudence

Arrêts suivis: *In re Barclay and the Municipality of the Township of Darlington* (1854), 12 U.C.R. 86; *Regina v. Levy* (1899), 30 O.R. 403; *Re T. W. Hand Fireworks Co. and the City of Peterborough*, [1962] O.R. 794; *Fountainhead Fun Centres Ltd. v. Ville St-Laurent*, [1979] C.S. 132; *Re Leavey and City of London* (1979), 107 D.L.R. (3d) 411; *Re Hamilton Independent Variety & Confectionery Stores Inc. and City of Hamilton* (1983), 143 D.L.R. (3d) 498; arrêts appliqués: *Kruse v. Johnson*, [1898] 2 Q.B. 91; *Jonas v. Gilbert* (1881), 5 R.C.S. 356; *Rex v. Paulowich*, [1940] 1 W.W.R. 537; *Re Ottawa Electric Railway Co. and Town of Eastview* (1924), 56 O.L.R. 52; *Rex ex rel. St-Jean v. Knott*, [1944] O.W.N. 432; *Regina v. Flory* (1889), 17 O.R. 715; *Phaneuf c. Corporation du Village de St-Hugues* (1936), 61 B.R. 83; *Ville de Montréal c. Civic Parking Center Ltd.*, [1981] 2 R.C.S. 541; *Forst v. City of Toronto* (1923), 54 O.L.R. 256; *S.S. Kresge Co. v. City of Windsor* (1957), 7 D.L.R. (2d) 708; *City of Calgary v. S.S. Kresge Co.* (1965), 52 D.L.R. (2d) 617; *Regina v. Varga* (1979), 106 D.L.R. (3d) 101; *Entreprises Anicet Gauthier Inc. c. Ville de Sept-Îles*, [1983] C.S. 709; arrêt désapprouvé: *Re Bright and City of Langley* (1982), 131 D.L.R. (3d) 445; arrêts examinés: *Hanson v. Ontario Universities Athletic Association* (1975), 65 D.L.R. (3d) 385; *Medicine Hat c. Wahl*,

ing (1977) 5 Alta. L.R. (2d) 70, considered; *Landreville v. Ville de Boucherville*, [1978] 2 S.C.R. 801; *Toronto v. Virgo*, [1896] A.C. 88; *City of Prince George v. Payne*, [1978] 1 S.C.R. 458; *Re London Drugs Ltd. v. City of North Vancouver* (1972), 24 D.L.R. (3d) 305; *City of Montreal v. Morgan* (1920), 60 S.C.R. 393; *Johnson v. Attorney General of Alberta*, [1954] S.C.R. 127; *Regent Vending Machines Ltd. v. Alberta Vending Machines Ltd.* (1956), 6 D.L.R. (2d) 144; *Parkway Amusement Co. v. Cité de Montréal*, [1958] C.S. 209; *Westendorp v. The Queen*, [1983] 1 S.C.R. 43; *Goldwax v. City of Montréal*, [1984] 2 S.C.R. 525; *Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. 96; *Bédard v. Dawson*, [1923] S.C.R. 681; *Reference re the Adoption Act*, [1938] S.C.R. 398; *Di Iorio v. Warden of Montreal Jail*, [1978] 1 S.C.R. 152; *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662; *Attorney General for Canada and Dupond v. City of Montreal*, [1978] 2 S.C.R. 770; *Attorney General of Quebec v. Lechasseur*, [1981] 2 S.C.R. 253; *Schneider v. The Queen*, [1982] 2 S.C.R. 112; *Township of Scarborough v. Bondi*, [1959] S.C.R. 444; *City of Hamilton v. Hamilton Distillery Co.* (1907), 38 S.C.R. 239, referred to.

Statutes and Regulations Cited

By-law on Amusement Machines and Halls, By-law of the City of Montréal, No. 5156.
Charter of the City of Montreal, 1960, 1959-60 (Que.), c. 102 as amended, art. 516, 517*f*., *g*., *s*., 518, 520(6), (7), 521(3), (4), (7), (33), 524(2)*a*., *b*.
Constitutional Act, 1867.
Criminal Law Amendment Act, 1975, 1974-75-76 (Can.), c. 93, s. 180(3).

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APPEAL from two judgments of the Quebec Court of Appeal, [1981] C.A. 468, 128 D.L.R. (3d) 579, reversing two judgments of the Superior Court (1978), 4 M.P.L.R. 193, dismissing the petitions to annul filed by respondents. The appeal relating to the petition of the respondent Arcade

[1979] 2 R.C.S. 12 infirmant (1977) 5 Alta. L.R. (2d) 70; arrêts mentionnés: *Landreville c. Ville de Boucherville*, [1978] 2 R.C.S. 801; *Toronto v. Virgo*, [1896] A.C. 88; *Ville de Prince George c. Payne*, [1978] 1 R.C.S. 458; *Re London Drugs Ltd. v. City of North Vancouver* (1972), 24 D.L.R. (3d) 305; *City of Montreal v. Morgan* (1920), 60 R.C.S. 393; *Johnson v. Attorney General of Alberta*, [1954] R.C.S. 127; *Regent Vending Machines Ltd. v. Alberta Vending Machines Ltd.* (1956), 6 D.L.R. (2d) 144; *Parkway Amusement Co. c. Cité de Montréal*, [1958] C.S. 209; *Westendorp c. La Reine*, [1983] 1 R.C.S. 43; *Goldwax c. Ville de Montréal*, [1984] 2 R.C.S. 525; *Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. 96; *Bédard v. Dawson*, [1923] R.C.S. 681; *Reference re the Adoption Act*, [1938] R.C.S. 398; *Di Iorio c. Gardien de la prison de Montréal*, [1978] 1 R.C.S. 152; *Nova Scotia Board of Censors c. McNeil*, [1978] 2 R.C.S. 662; *Procureur général du Canada et Dupond c. Ville de Montréal*, [1978] 2 R.C.S. 770; *Procureur général du Québec c. Lechasseur*, [1981] 2 R.C.S. 253; *Schneider c. La Reine*, [1982] 2 R.C.S. 112; *Township of Scarborough v. Bondi*, [1959] R.C.S. 444; *City of Hamilton v. Hamilton Distillery Co.* (1907), 38 R.C.S. 239.

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Charte de la Ville de Montréal, 1960, 1959-60 (Qué.), chap. 102 et modifications, art. 516, 517*f*), *g*), *s*), 518, 520(6), (7), 521(3), (4), (7), (33), 524(2)*a*), *b*).
Loi constitutionnelle de 1867.
Loi de 1975 modifiant le droit criminel, 1974-75-76 (Can.), chap. 93, art. 180(3).
Règlement sur les appareils et les salles d'amusement, Règlement de la Ville de Montréal, nº 5156.

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Rogers, Ian M. *The Law of Canadian Municipal Corporations*, vol. 1, 2nd ed., Toronto, Carswell, 1971.

POURVOI contre deux arrêts de la Cour d'appel du Québec, [1981] C.A. 468, 128 D.L.R. (3d) 579, qui ont infirmé deux jugements de la Cour supérieure (1978), 4 M.P.L.R. 193, qui rejetaient les requêtes en annulation présentées par les intimés. Le pourvoi relatif à la requête de l'intimée

Amusements Inc. is dismissed. The appeal relating to the petition of respondents Fountainhead Fun Centres Ltd. *et al.* is allowed in part.

Neuville Lacroix and *Jean Rochette*, for the appellant.

Sydney Phillips, Q.C., for respondent Arcade Amusements Inc.

André Tremblay, Michel Côté, Q.C., and *Jacques Jeansonne*, for respondents The Fountainhead Fun Centres Ltd., Nivel Sales (1969) Limited, Boules de Miel Carnaval Inc. and Louis Zuckerman.

Jean-K. Samson and *Réal A. Forest*, for the mis en cause.

James M. Mabbutt, for the intervener.

English version of the judgment of the Court delivered by

BEETZ J.—

I—The Proceedings and Regulatory and Legislative Enactments at Issue

This case concerns the validity of By-law 5156 adopted by the council of the City of Montréal—the "City"—on September 27, 1977. It reads as follows:

1. This by-law may be referred to as "By-law on amusement machines and halls".

2. In this by-law,

"amusement machines" designates a game apparatus or amusement device authorized by law, the use of which is obtained upon payment of a sum of money, but does not include an apparatus designed to amuse or entertain young children or sound reproducing equipment.

"amusement hall" designates a hall occupied or used essentially for amusement purposes, where amusement machines are put at the disposal of the public and where a sum of money is charged for the right to use such apparatus, but does not include a billiards, pool or snooker hall or a bowling hall.

3. No amusement machine shall be put at the disposal of the public in an establishment other than an amusement hall.

4. Upon the coming into force of this by-law, the number of amusement machines which, pursuant to a

Arcade Amusements Inc. est rejeté. Le pourvoi relatif à la requête des intimés Fountainhead Fun Centres Ltd. et autres est accueilli en partie.

Neuville Lacroix et *Jean Rochette*, pour l'appelant.

Sydney Phillips, c.r., pour l'intimée Arcade Amusements Inc.

André Tremblay, Michel Côté, c.r., et *Jacques Jeansonne*, pour les intimés The Fountainhead Fun Centres Ltd., Nivel Sales (1969) Limited, Boules de Miel Carnaval Inc. et Louis Zuckerman.

Jean-K. Samson et *Réal A. Forest*, pour le mis en cause.

James M. Mabbutt, pour l'intervenant.

Le jugement de la Cour a été rendu par

LE JUGE BEETZ—

I—Les procédures et les textes réglementaires et législatifs en litige

Il s'agit de la validité du Règlement 5156 adopté par le conseil de la ville de Montréal—la «Ville»—le 27 septembre 1977. En voici le texte:

1. Ce règlement peut être cité: «Règlement sur les appareils et les salles d'amusement.»

2. Dans le présent règlement,

«appareil d'amusement" désigne un appareil de jeu ou dispositif d'amusement permis par la loi, pour l'utilisation duquel une somme est exigée, mais ne comprend pas un appareil destiné à l'amusement ou à la récréation d'un enfant en bas âge ou un appareil à reproduire le son.

«salle d'amusement» désigne une salle occupée ou utilisée essentiellement pour fins d'amusement, où des appareils d'amusement sont mis à la disposition du public et où une somme est exigée pour le droit d'utiliser les appareils, mais ne comprend pas une salle de billard, pool ou snooker, ni une salle de quilles.

3. Aucun appareil d'amusement ne peut être mis à la disposition du public dans un établissement autre qu'une salle d'amusement.

4. Le nombre d'appareils d'amusement qui, lors de l'entrée en vigueur du présent règlement, étaient, en

permit, were put at the disposal of the public in an establishment other than an amusement hall, shall not be increased.

5. Notwithstanding any other by-law provision, all permits for the operation of an amusement machine or hall shall be issued in the name of a natural individual, be it for himself or on behalf of a corporation or society.

6.1.0 No other activity shall be authorized in an amusement hall except for the operation of

6.1.1 a snack-bar or non-alcoholic beverages or prepared foods vending machines;

6.1.2 a maximum number of two pool, billiards or snooker tables.

6.2 A pool, billiards or snooker table shall constitute an amusement machine when operated in an amusement hall.

7.1.0 Notwithstanding any other by-law, no amusement hall shall be built, fitted out, occupied or used in

7.1.1 a building which is used or can be used in part for housing purposes;

7.1.2 in an establishment where another activity is pursued;

7.1.3 within the historical district of the city of Montreal;

7.1.4.0 in an establishment built on a lot located less than two hundred (200) meters

7.1.4.1 from the land of an elementary, high school or college level teaching institution;

7.1.4.2 from a public park or playground.

7.2 The distance referred to at paragraph 7.1.4.0 shall be measured from the areas closest to the lots covered by the said provision.

7.3 A building, which is entirely occupied for commercial or industrial purposes and where an amusement hall is operated, shall not be occupied for housing purposes as long as the said amusement hall shall remain in operation.

8.0 It shall be forbidden

8.1 for the holder of an amusement hall permit and for any responsible party on the premises to admit, or to tolerate the presence of a person less than eighteen (18) years of age in an amusement hall;

8.2 for the holder of a permit to operate an amusement machine and for any responsible party on the premises, to allow or tolerate the use of an amusement

vertu d'un permis, mis à la disposition du public dans un établissement autre qu'une salle d'amusement, ne peut être augmenté.

5. Nonobstant toute autre disposition d'un règlement, tout permis relatif à l'exploitation d'un appareil ou d'une salle d'amusement doit être émis au nom d'une personne physique, que ce soit pour son propre compte, ou pour le bénéfice d'une corporation ou société.

6.1.0 Aucune autre activité n'est autorisée dans une salle d'amusement à l'exception de l'exploitation

6.1.1 d'un comptoir de casse-croûte ou d'appareils de distribution de boissons non alcooliques et d'aliments préparés;

6.1.2 d'un maximum de deux tables de pool, billard ou snooker.

6.2 Une table de pool, billard ou snooker constitue un appareil d'amusement lorsqu'elle est exploitée dans une salle d'amusement.

7.1.0 Nonobstant tout autre règlement, aucune salle d'amusement ne peut être construite, aménagée, occupée ou utilisée

7.1.1 dans un bâtiment servant ou pouvant servir en partie à l'habitation;

7.1.2 dans un établissement où une autre activité est exercée;

7.1.3 à l'intérieur de l'arrondissement historique de la ville de Montréal;

7.1.4.0 dans un établissement bâti sur un terrain situé à moins de deux cents (200) mètres

7.1.4.1 du terrain d'une institution d'enseignement des niveaux élémentaire, secondaire et collégial;

7.1.4.2 d'un parc ou terrain de jeux public.

7.2 La distance mentionnée au paragraphe 7.1.4.0 se mesure à compter des parties les plus rapprochées des terrains visés par cette disposition.

7.3 Un bâtiment entièrement occupé pour des fins commerciales ou industrielles et dans lequel est exploitée une salle d'amusement ne peut être occupé pour des fins d'habitation tant que dure l'exploitation de ladite salle d'amusement.

8.0 Il est interdit,

8.1 pour un détenteur de permis de salle d'amusement et toute personne responsable sur les lieux, d'admettre ou de tolérer la présence d'une personne âgée de moins de dix-huit (18) ans dans les salles d'amusement;

8.2 pour un détenteur de permis d'exploitation d'un appareil d'amusement et toute personne responsable sur les lieux, de permettre ou tolérer l'usage d'un appareil

machine by a person less than eighteen (18) years of age;

8.3 for any person less than eighteen (18) years of age to enter an amusement hall or to use an amusement machine in an establishment where the operation of such an apparatus is authorized.

9.0 Anyone who contravenes this by-law shall be liable

9.1 for a first infringement, to a fine of one hundred (100) dollars at the most, with or without costs,

9.2 for a second infringement to the same provision of this by-law, within a period of twelve (12) months, to a fine of at least one hundred (100) dollars and five hundred (500) dollars at the most, with or without costs,

9.3 for any subsequent infringement within the same period, to a fine of at least five hundred (500) dollars and one thousand (1,000) dollars at the most, with or without costs,

9.4 and, failing the immediate payment of the fine or of the fine and costs within a period of ninety (90) days at the most, to imprisonment for sixty (60) days at the most, such imprisonment to cease immediately, however, upon payment of the fine or of the fine and costs, as the case may be.

10. This by-law shall not be interpreted as restricting the application of any other inconsistent by-law provision.

11. Section 21 of By-law 2820 concerning permits and special or personal taxes on businesses, occupations and activities, is amended by repealing therein the fourth paragraph of the remark.

12. Section 22 of the said by-law is amended

A—by replacing therein the first paragraph of the remark with the following:

""Place of amusement" means premises used for amusement purposes, open to the public, which include a combination of facilities, games, rides or other entertainment devices authorized by law.";

B—by repealing therein the second paragraph of the said remark;

C—by replacing therein, the period with a semi-colon in the eighth paragraph of the said remark and by inserting thereafter the following sentence:

"however, such closing hours shall apply to a bowling hall when an amusement machine is put therein at the disposal of the public.";

D—by replacing therein the ninth paragraph of the remark with the following:

d'amusement par une personne âgée de moins de dix-huit (18) ans;

8.3 à toute personne âgée de moins de dix-huit (18) ans d'entrer dans une salle d'amusement ou de faire usage d'un appareil d'amusement dans un établissement dans lequel l'exploitation d'un tel appareil est autorisée.

9.0 Quiconque contrevient au présent règlement est passible

9.1 pour une première infraction d'une amende d'au plus cent (100) dollars, avec ou sans frais,

9.2 pour une deuxième infraction à la même disposition du présent règlement, dans une période de douze (12) mois, d'une amende d'au moins cent (100) dollars et d'au plus cinq cents (500) dollars, avec ou sans frais,

9.3 pour toute infraction subséquente dans la même période, d'une amende d'au moins cinq cents (500) dollars et d'au plus mille (1,000) dollars, avec ou sans frais,

9.4 et d'un emprisonnement d'au plus soixante (60) jours, à défaut du paiement de l'amende ou de l'amende et des frais dans un délai d'au plus quatre-vingt-dix (90) jours, ledit emprisonnement devant toutefois cesser dès le paiement de l'amende ou de l'amende et des frais, selon le cas.

10. Le présent règlement ne doit pas s'interpréter comme limitant l'application de toute autre disposition réglementaire non incompatible.

11. La section 21 du règlement 2820 concernant les permis et taxes spéciales ou personnelles sur les commerces, occupations et activités est modifiée par l'abrogation du quatrième alinéa de la remarque.

12. La section 22 dudit règlement est modifiée

A—par le remplacement du premier alinéa de la remarque par le suivant:

«"Place d'amusement» désigne un lieu d'amusement ouvert au public comprenant un ensemble d'installations, jeux, manèges ou moyens de divertissement autorisés par la loi»;

B—par l'abrogation du deuxième alinéa de ladite remarque;

C—par le remplacement au huitième alinéa de ladite remarque du point par un point-virgule et par l'insertion de la phrase suivante:

«toutefois, ces heures de fermeture s'appliquent à une salle de quilles lorsqu'un appareil d'amusement y est mis à la disposition du public.»;

D—par le remplacement du neuvième alinéa de la remarque par le suivant:

"Persons under eighteen (18) years of age shall not be admitted to a billiards, pool or snooker hall.".

13. By-law 2223 to prohibit pin-ball machines or bagatelle games as well as By-law 2229 which amends it are repealed.

14. The expression "amusement hall" shall be substituted for the expression "amusement gallery" wherever the latter expression appears in any by-law.

By a petition to annul a municipal by-law on the ground of illegality, based on art. 515 of the *Charter of the City of Montreal*, 1959-60 (Que.), c. 102, as amended—the "*Charter*"—respondents The Fountainhead Fun Centres Ltd., Nivel Sales (1969) Limited, Boules de Miel Carnaval Inc. and Louis Zuckerman—"Fountainhead *et al.*"—asked on December 27, 1977 that By-law 5156 be annulled in its entirety.

By another petition based on the same provision of the *Charter*, respondent Arcade Amusements Inc.—"Arcade"—asked on December 28, 1977 that s. 8 of By-law 5156 be annulled, including subss. 8.1, 8.2 and 8.3.

The two petitions were joined for proof and hearing before Gervais J. of the Superior Court, who dismissed both with costs in two judgments dated April 7, 1978: 4 M.P.L.R. 193.

Respondents appealed from these two judgments. In their inscription in appeal, respondents Fountainhead *et al.* asked the Court of Appeal alternatively to declare paras. 4, 7 and 33 of art. 521 of the *Charter* unconstitutional to the extent that they authorize the adoption of By-law 5156. The Attorney General of Quebec defended the constitutionality of these provisions in the Court of Appeal.

In two judgments dated June 25, 1981, written by Beauregard J.A. and concurred in by Bernier and Monet JJ.A., the Court of Appeal reversed the two Superior Court judgments, allowed the two petitions with costs and annulled By-law 5156, without ruling on the alternative argument of unconstitutionality: [1981] C.A. 468, 128 D.L.R. (3d) 579.

«Les personnes âgées de moins de dix-huit (18) ans ne doivent pas être admises dans une salle de billard, pool ou snooker.».

13. Le règlement 2223, prohibant les jeux de boules (pin ball machines) ou les jeux de bagatelle, ainsi que le règlement 2229 qui le modifie, sont abrogés.

14. L'expression «salle d'amusement» est substituée à celle de «galerie d'amusement» partout où cette dernière apparaît dans un règlement.

Par une requête en annulation d'un règlement municipal pour motif d'illégalité, fondée sur l'art. 515 de la *Charte de la Ville de Montréal*, 1959-1960 (Qué.), chap. 102 et ses modifications—la «*Charte*»—les intimés The Fountainhead Fun Centres Ltd., Nivel Sales (1969) Limited, Boules de Miel Carnaval Inc. et Louis Zuckerman—«Fountainhead et autres»—demandent, le 27 décembre 1977, l'annulation de tout le Règlement 5156.

Par une autre requête fondée sur la même disposition de la *Charte*, l'intimée Arcade Amusements Inc.—«Arcade»—demande, le 28 décembre 1977, l'annulation de l'art. 8 du Règlement 5156, y compris les sous-art. 8.1, 8.2 et 8.3.

Les deux requêtes sont réunies pour enquête et audition devant le juge Gervais de la Cour supérieure qui les rejette toutes deux avec dépens par deux jugements en date du 7 avril 1978: 4 M.P.L.R. 193.

Les intimés interjettent appel de ces deux jugements. Dans leur inscription en appel, les intimés Fountainhead et autres demandent subsidiairement à la Cour d'appel de déclarer inconstitutionnels les par. 4°, 7° et 33° de l'art. 521 de la *Charte* dans la mesure où ils autorisent l'adoption du Règlement 5156. Le procureur général du Québec défend la constitutionnalité de ces dispositions devant la Cour d'appel.

Par deux arrêts en date du 25 juin 1981, pour des motifs écrits par le juge Beauregard, auxquels souscrivent les juges Bernier et Monet, la Cour d'appel infirme les deux jugements de la Cour supérieure, accueille les deux requêtes avec dépens et annule le Règlement 5156, sans statuer cependant sur le moyen subsidiaire d'inconstitutionnalité: [1981] C.A. 468, 128 D.L.R. (3d) 579.

The City is appealing from these two judgments. On September 20, 1982 the late Laskin C.J., at the request of respondents, stated the following constitutional question under s. 32 of the Rules of this Court:

Are article 516, paragraphs *f.*, *g.* and *s.* of article 517, article 518, paragraphs 3, 4, 7 and 33 of article 521 and paragraphs 2*a.* and *b.* of article 524 of the *Charter of the City of Montreal*, 1959-60, 8-9 Eliz. II, c. 102, as amended on September 27, 1977, unconstitutional, as *ultra vires* the provincial legislature of Quebec or inoperative in so far as they give the City of Montréal the power to adopt by-law 5156, dated September 27, 1977 and titled:

"By-law concerning the conditions governing the occupancy of buildings for the operation of amusement machines, the amendment of By-law 2820 concerning permits and special or personal taxes on businesses, occupations and activities, as already amended by By-laws 2843, 2939, 2944, 3031, 3098, 3117, 3184, 3226, 3297, 3310, 3450, 3478, 3497, 3537, 3592, 3666, 3675, 3694, 3788, 3816, 3848, 3894, 4028, 4119, 4238, 4261, 4285, 4433, 4485, 4590, 4762, 4876, 4963, and the repeal of By-laws 2223 and 2229 prohibiting pin-ball machines or bagatelle games."

The provisions of the *Charter* affected by the constitutional question are those cited by the trial judge, on which he relied in deciding that the council of the City has the power to adopt By-law 5156. They are the following:

TITLE IX
Power to Make By-laws

CHAPTER I
General Powers

516. The council shall have power to enact by-laws to ensure the peace, order and good government of the city, the welfare of its citizens and the proper administration of its affairs, and to pronounce upon any matter calculated to affect or interest the city and its people in any way, provided that such by-laws be not repugnant to the laws of the Province or of Canada, or to any special provision of this charter.

517. For greater certainty as to the powers conferred on the council by article 516, but without restricting the scope thereof and subject to the reservations which it contains, and without restricting the scope of the powers otherwise conferred on the council by this charter, the

Ce sont ces deux arrêts que la Ville attaque par son pourvoi. Le 20 septembre 1982, le regretté juge en chef Laskin fixe, à la demande des intimés, la question constitutionnelle suivante, en vertu de l'art. 32 des Règles de cette Cour:

L'article 516, les paragraphes *f*, *g* et *s* de l'article 517, l'article 518, les paragraphes 3° 4°, 7° et 33° de l'article 521 et les paragraphes 2° *a*) et *b*) de l'article 524 de la Charte de la Ville de Montréal, 1959-60, 8-9 Eliz. II, c. 102, tels que modifiés au 27 septembre 1977, sont-ils inconstitutionnels, *ultra vires* de la législature provinciale du Québec ou inopérants dans la mesure où ils donnent à la Ville de Montréal le pouvoir d'adopter le règlement 5156 daté le 27 septembre 1977 et intitulé:

«Règlement relatif aux conditions d'occupation de bâtiments aux fins d'exploitation d'appareils d'amusement, à la modification du règlement 2820 concernant les permis et taxes spéciales ou personnelles sur les commerces, occupations et activités, déjà modifié par les règlements 2843, 2939, 2944, 3031, 3098, 3117, 3184, 3226, 3297, 3310, 3450, 3478, 3497, 3537, 3592, 3666, 3675, 3694, 3788, 3816, 3848, 3894, 4028, 4119, 4238, 4261, 4285, 4433, 4485, 4590, 4762, 4876, 4963, et à l'abrogation des règlements 2223 et 2229 prohibant les jeux de boules ou les jeux de bagatelle.»

Les dispositions de la *Charte* que vise la question constitutionnelle sont celles que cite le premier juge et sur lesquelles il se fonde pour décider que le conseil de la Ville a le pouvoir d'adopter le Règlement 5156. Ce sont les dispositions suivantes:

TITRE IX
Pouvoirs de réglementation

CHAPITRE I
Pouvoirs Généraux

516. Le conseil a le pouvoir d'adopter des règlements pour assurer la paix, l'ordre, le bon gouvernement, le bien-être des citoyens et la bonne administration des affaires de la ville, et pour statuer sur toute matière pouvant intéresser ou affecter de quelque manière celle-ci et sa population, pourvu que ces règlements ne soient pas inconciliables avec les lois de la province ou du Canada ou avec quelque disposition particulière de la présente charte.

517. Pour plus ample certitude sur les pouvoirs conférés au conseil par l'article 516, mais sans en restreindre la portée et sous les réserves qu'il contient, sans restreindre non plus l'étendue des pouvoirs que cette charte attribue par ailleurs au conseil, l'autorité et la juridic-

of North Vancouver (1972), 24 D.L.R. (3d) 305, from which he cited the following passage:

In my view the wording objected to in the by-law before me does not have that quality of vagueness and uncertainty which is such as to render the by-law invalid in part or in whole. It may be that the by-law here will occasion some difficulty in interpretation. But difficulty of interpretation is not to be confused with vagueness and uncertainty to the point of invalidity.

I consider that the trial judge properly dismissed this argument.

Almost but not quite all the cases and writers agree that a municipal by-law can be annulled because it is too vague, but first there has to be agreement on the kind or degree of vagueness necessary; thus Mr. P. A. Côté, in an article titled "Le règlement municipal indéterminé" (1973), 33 *R. du B.* 474, summarizes the matter by saying (at p. 482):

[TRANSLATION] All judges are not agreed that any vagueness which may occur in the wording of a by-law should render it invalid. Not every instance of vagueness in wording may have the effect of invalidating a by-law: if that were the case, we know of few by-laws whose validity would be beyond question. The courts have held that this vagueness must be such that a reasonable effort at interpretation is unable to determine the meaning of the council: . . .

In the second edition of their book *Principes de contentieux administratif* (1982), Messrs. Pépin and Ouellette write (at p. 126):

[TRANSLATION] In short, the vagueness must be so serious that the judge concludes that a reasonably intelligent man, sufficiently well-informed if the by-law is technical in nature, is unable to determine the meaning of the by-law and govern his actions accordingly.

Mere uncertainty as to the scope of a by-law will not suffice to make it void. In the decision by this Court in *City of Montreal v. Morgan* (1920), 60 S.C.R. 393, at p. 404, Anglin J. wrote:

I fully recognize the force of the general rules that the language of by-laws should be explicit and free from

London Drugs Ltd. v. City of North Vancouver (1972), 24 D.L.R. (3d) 305, dont il cite le passage suivant:

[TRADUCTION] À mon avis, le texte contesté du règlement qui m'est soumis n'a pas le degré d'imprécision et d'incertitude propre à invalider le règlement en totalité ou en partie. Il est possible que le règlement en l'espèce soit un peu difficile à interpréter. Mais cette difficulté ne doit pas être assimilée à l'imprécision et à l'incertitude qui emportent l'invalidité du règlement.

À mon avis, c'est à bon droit que le premier juge rejette ce moyen.

Les arrêts et les auteurs s'accordent presque tous, mais non pas tous, pour tenir qu'un règlement municipal peut être annulé pour cause d'imprécision, mais il faut d'abord s'entendre sur le genre ou le degré d'imprécision nécessaires; ainsi M. P. A. Côté, dans un article intitulé «Le règlement municipal indéterminé» (1973), 33 *R. du B.* 474, résume la question en disant (à la p. 482):

Tous les juges ne sont pas d'accord pour sanctionner de nullité l'imprécision qui peut se glisser dans la rédaction d'un règlement. En effet, toute imprécision de rédaction ne peut pas avoir l'effet de rendre nul un règlement si tel était le cas, nous connaissons peu de règlements dont la validité serait à l'abri de tout soupçon. Il faut, selon la jurisprudence, que cette imprécision soit telle qu'un effort raisonnable d'interprétation n'arrive pas à déterminer l'intention du Conseil: . . .

Quant à MM. Pépin et Ouellette, dans la seconde édition de leur livre *Principes de contentieux administratif* (1982), ils écrivent (à la p. 126):

Somme toute, il faut que l'imprécision atteigne un degré tel de gravité que le juge en vienne à la conclusion qu'un homme raisonnablement intelligent, suffisamment informé compte tenu le cas échéant du caractère technique du règlement, est dans l'impossibilité de déterminer le sens du règlement et de régler en conséquence sa conduite.

La simple incertitude quant au champ d'application d'un règlement ne suffit pas à le faire annuler. Le juge Anglin écrivait dans l'arrêt rendu par cette Cour dans l'affaire *City of Montreal v. Morgan* (1920), 60 R.C.S. 393 à la p. 404:

[TRADUCTION] J'admets entièrement la validité de règles générales portant que le texte des règlements doit

ambiguity, and that by-laws in restraint of rights of property as well as penal by-laws should be strictly construed. But the very statement of the latter rule implies that a by-law is not necessarily invalid because its terms call for construction—as does also another well recognized rule, viz., that a by-law of a public representative body clothed with ample authority should be "benevolently" interpreted and supported if possible. *Kruse* v. *Johnson* [1898] 2 Q.B. 91, at p. 99. It may be a counsel of perfection that in drafting by-laws the use of words susceptible of more than one interpretation should be avoided; but it is too much to exact of municipal councils that such a degree of certainty should always be attained. It would be going quite too far to say that merely because a term used in a by-law may be susceptible of more than one interpretation the by-law is necessarily bad for uncertainty.

Respondents and the City cited several judgments in support of their respective arguments: in each of them the courts had to determine whether some provision or certain words in a by-law were so vague as to make the by-law void. Each case is practically unique, and the courts have to determine each time whether the true meaning of the by-law in question can be understood by the persons to whom it applies.

In the case at bar, therefore, the question is whether the vagueness alleged by respondents is such that the residents of the City, and in particular individuals already operating or wishing to operate amusement halls, cannot understand the meaning and scope of the By-law as regards what constitutes an "amusement machine" referred to therein.

The testimony of Jack Lerner is significant in this regard. To the question of what type of customers his amusement machines attract, he answered:

> My equipment appeals to everybody, there is absolutely no distinction between any certain type of equipment that will go for a, that is designated specifically for younger or older people.
>
> Likely, it could interest a six (6) year old or an eighty-six (86) year old, they can play the same machine

être explicite et exempt d'ambiguïté et que les règlements qui limitent les droits de propriété et ceux d'ordre pénal doivent recevoir une interprétation stricte. Mais l'énoncé même de cette dernière règle signifie qu'un règlement n'est pas nécessairement invalide parce que ses termes prêtent à interprétation—comme le fait également une autre règle bien établie, savoir qu'un règlement édicté par un organisme qui représente le public et qui est investi d'un pouvoir étendu doit être interprété «avec bienveillance» et maintenu dans la mesure du possible. *Kruse* v. *Johnson* [1898] 2 Q.B. 91, à la p. 99. Il se peut qu'idéalement, dans la rédaction de règlements, il faille éviter l'emploi de mots susceptibles de recevoir plus d'une interprétation; mais c'est trop exiger des conseils municipaux que d'atteindre toujours un tel degré de certitude. Ce serait aller beaucoup trop loin que d'affirmer que la simple possibilité qu'un terme utilisé dans un règlement ait plus d'un sens emporte la nullité de ce dernier pour cause d'imprécision.

Les intimés et la Ville on invoqué de nombreux arrêts à l'appui de leurs prétentions respectives; dans chacun de ces arrêts les tribunaux ont eu à déterminer si une disposition quelconque ou certains termes d'un règlement étaient imprécis au point d'entraîner la nullité de ce règlement. Chaque cas est pratiquement un cas d'espèce et il incombe aux tribunaux de déterminer à chaque fois si le sens véritable du règlement en question peut être perçu par les citoyens auxquels il s'adresse.

Dans le cas présent, il s'agit donc de voir si l'imprécision alléguée par les intimés est telle que les citoyens de la Ville et particulièrement les individus qui exploitent déjà ou qui désirent exploiter des salles d'amusement ne peuvent comprendre le sens et la portée du Règlement quant à ce qui constitue un «appareil d'amusement» visé par celui-ci.

Le témoignage de Jack Lerner est significatif à cet égard. À la question lui demandant quel type de clientèle est attiré par ses appareils d'amusement, il répond:

> [TRADUCTION] Mes appareils attirent tout le monde. Il n'y a absolument aucune distinction entre un certain type d'appareil qui s'adresse, c'est-à-dire qui est destiné précisément aux plus jeunes ou aux plus vieux.
>
> Ils pourraient tout aussi bien intéresser un enfant de six (6) ans qu'une personne de quatre-vingt-six (86) ans.

or a grandmother can play, a grandchild can play the same machine, competition on themselves and there would be no difference other than a kiddy car or a kiddy horse where an older person will not get on it, but what would be specifically for young ones.

(Emphasis added.)

Mr. Lerner thus illustrated precisely the distinction which s. 2 of By-law 5156 seeks to establish. His testimony confirmed the existence and knowledge by a reasonable man involved in this type of business of certain amusement devices for which a sum of money is required, which are designed for the amusement or entertainment of very young children, in terms of the size of the devices and the lack of interest which children who have more or less attained the age of reason are likely to feel for such amusements. These are not machines intended for the newborn nor for children who attend school alone, beyond the kindergarten level.

A reasonable individual reading By-law 5156 is undoubtedly able to distinguish between, for example, an electronic video game and a toy car or horse, intended primarily for pre-school children, which the witness referred to as a "kiddy car" and "kiddy horse", and which could in no case be regarded as intended to amuse anyone other than young children, or as the witness Lerner observed, children six years of age or less who are usually accompanied by their parents. It is this type of machine which the City intended to exclude from the restrictions imposed by its By-law 5156, and this is what it did, by s. 2 of that by-law, in language which leaves as little room as possible for the arbitrary and subjective. A reasonable individual such as Mr. Lerner knows at once what an amusement machine intended for young children is.

In any case, if any vagueness does exist in the definition contained in s. 2, it will at most produce certain difficulties in interpretation, which is not a sufficient reason for declaring By-law 5156 to be

Ils peuvent jouer avec la même machine. Une grand-mère peut jouer ou un petit-fils peut jouer avec la même machine, se concurrençant eux-mêmes et la seule différence est que c'est comme une voiturette (*kiddy car*) ou un cheval à bascule (*kiddy horse*) sur lesquels une personne plus âgée ne montera pas, mais qui serait destinés spécialement aux jeunes.

(C'est moi qui souligne.)

Monsieur Lerner illustre ainsi précisément la distinction que l'art. 2 du Règlement 5156 cherche à établir. Son témoignage confirme l'existence et la connaissance par un homme raisonnable impliqué dans ce type de commerce, de certains dispositifs d'amusement pour lesquels une somme est exigée, qui sont destinés à l'amusement ou à la récréation des très jeunes enfants, compte tenu des dimensions de ces dispositifs et du manque d'intérêt que les enfants qui ont plus ou moins atteint l'âge de raison sont susceptibles d'éprouver pour ces amusements. Il ne s'agit pas d'appareils destinés à des nourrissons non plus qu'à des enfants qui fréquentent l'école seuls, au-dessus du niveau de la maternelle.

Le citoyen raisonnable peut certainement, dans le contexte du Règlement 5156, faire la différence entre, par exemple, un jeu vidéo électronique et une voiturette ou un cheval à bascule destinés principalement aux enfants d'âge préscolaire, ce que le témoin désigne sous le nom de *kiddy horse* et *kiddy car*, et qui en aucun cas ne peuvent être perçus comme étant destinés à divertir d'autres personnes que des enfants en bas âge c'est-à-dire, comme le remarque le témoin Lerner, à des enfants de six ans ou moins qui sont habituellement accompagnés de leurs parents. C'est ce genre d'appareils que la Ville a l'intention d'exclure des restrictions imposées par son Règlement 5156, et c'est ce qu'elle fait, par l'art. 2 de ce règlement, dans un langage qui laisse aussi peu de place que possible à l'arbitraire et à la subjectivité. Un citoyen raisonnable, comme M. Lerner, perçoit aisément dès le premier abord ce qui constitue un appareil d'amusement destiné aux enfants en bas âge.

De toute manière, s'il existe quelque imprécision au niveau de la définition de l'art. 2, celle-ci n'entraîne tout au plus que certaines difficultés d'interprétation, ce qui constitue un motif insuffi-

void. It must be concluded, therefore, that By-law 5156 is not void for imprecision and accordingly does not involve any subdelegation of powers to those responsible for applying it.

VI—Section 8 of the By-law

I refer here only to s. 8 of the By-law, but what I have to say about it applies also to para. D of s. 12.

It should also be mentioned at the outset that, in reply to questions by the Court, counsel for the City argued that s. 8 is severable from the rest of the By-law. Counsel for the respondents did not so concede, since as I have already said they erroneously argued that s. 8 is the cardinal provision on which the others simply depend. However, respondent Arcade in its petition only asked that s. 8 be invalidated.

In any case, I think it is clear that the municipal council would have enacted the By-law even without s. 8, which is therefore severable from the remainder.

The argument of illegality made by respondents against s. 8 also has two branches.

The first is that s. 8 contravenes the rule of administrative law that the power to make by-laws does not include a power to enact discriminatory provisions unless the authorizing legislation provides the contrary.

The second branch is that s. 8 infringes the provisions of the *Charter of human rights and freedoms*, R.S.Q., c. C-12, which prohibits discrimination based on civil status.

The trial judge dismissed both branches.

The Court of Appeal did not rule on either: as I indicated above, it invalidated s. 8 on the ground *inter alia* that this provision relates to the capacity of minors and is inconsistent with the *Civil Code*. I have serious doubts concerning both of these conclusions: s. 8 does not impose an incapacity to perform legal acts, with the nullities that may result, it simply prohibits certain physical or ma-

sant pour que le Règlement 5156 soit déclaré invalide. Il faut donc conclure que le Règlement 5156 n'est pas imprécis, et par le fait même, n'est attributif d'aucune sous-délégation de pouvoirs aux personnes chargées de l'appliquer.

VI—L'article 8 du Règlement

Je ne réfère ici qu'à l'art. 8 du Règlement mais ce que j'en dis vise également l'al. D de l'art. 12.

Il importe de mentionner aussi, à titre préliminaire, au début de ce chapitre, qu'en réponse aux questions posées par la Cour, les procureurs de la Ville ont soutenu que l'art. 8 est séparable du reste du Règlement. Les procureurs des intimés n'ont rien reconnu de tel puisqu'ils plaident, à tort, je l'ai déjà dit, que l'art. 8 est la disposition cardinale dont les autres ne seraient que l'accessoire. Cependant, l'intimée Arcade n'a demandé dans sa requête que l'annulation de l'art. 8.

De toute façon, il me paraît clair que le conseil municipal aurait édicté le Règlement même amputé de l'art. 8 qui est donc séparable du reste.

Le motif d'illégalité invoqué par les intimés à l'encontre de l'art. 8 comporte lui aussi deux volets.

Le premier volet, c'est que l'art. 8 transgresserait la règle de droit administratif qui veut que le pouvoir de faire des règlements ne permet pas d'édicter des dispositions discriminatoires à moins que le texte législatif qui l'autorise ne prescrive le contraire.

Le second volet, c'est que l'art. 8 violerait les dispositions de la *Charte des droits et libertés de la personne*, L.R.Q., chap. C-12, qui interdisent la discrimination fondée sur l'état civil.

Le premier juge a rejeté ces deux volets.

La Cour d'appel ne se prononce sur aucun des deux: comme je l'ai indiqué plus haut, elle invalide l'art. 8 au motif, entre autres, que cette disposition est relative à la capacité des personnes mineures et est inconciliable avec le *Code civil*. Je doute beaucoup de ces deux conclusions: ce n'est pas une incapacité de poser des actes juridiques, avec les nullités qui peuvent s'ensuivre, que décrète l'art. 8,

Nova Scotia Pharmaceutical Society, Pharmacy Association of Nova Scotia, Lawtons Drug Stores Limited, William H. Richardson, Empire Drugstores Limited, Woodlawn Pharmacy Limited, Nolan Pharmacy Limited, Christopher D.A. Nolan, Blackburn Holdings Limited, William G. Wilson, Woodside Pharmacy Limited and Frank Forbes *Appellants*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General for Ontario and the Attorney General for Alberta *Interveners*

and

The Association québécoise des pharmaciens propriétaires, Cumberland Drugs (Merivale) Ltd., Kane's Super Drugmart Corp. Ltd., Les Entreprises Norpharm Inc., Escompte Chez Lafortune Inc., Famili-Prix Inc., Le Groupe Jean Coutu (P.J.C.) Inc., Groupe Pharmaceutique Focus Inc., Les Magasins Koffler de l'Est Inc., McMahon Essaim Inc., Super Escompte Brouillet Inc., B. Mayrand Inc., Superpharm (Montréal) Ltée, Uniprix Inc., Pierre Bossé, François-Jean Coutu, Claude Gagnon, Guy Lanoue, Michel Lesieur, Guy-Marie Papillon and Jean-Guy Prud'Homme *Interveners*

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File No.: 22473.

1991: December 4; 1992: July 9.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.

ON APPEAL FROM THE NOVA SCOTIA SUPREME COURT, APPEAL DIVISION

Nova Scotia Pharmaceutical Society, Pharmacy Association of Nova Scotia, Lawtons Drug Stores Limited, William H. Richardson, Empire Drugstores Limited, Woodlawn Pharmacy Limited, Nolan Pharmacy Limited, Christopher D.A. Nolan, Blackburn Holdings Limited, William G. Wilson, Woodside Pharmacy Limited et Frank Forbes *Appelants*

c.

Sa Majesté la Reine *Intimée*

et

Le procureur général de l'Ontario et le procureur général de l'Alberta *Intervenants*

et

L'Association québécoise des pharmaciens propriétaires, Cumberland Drugs (Merivale) Ltd., Kane's Super Drugmart Corp. Ltd., Les Entreprises Norpharm Inc., Escompte Chez Lafortune Inc., Famili-Prix Inc., Le Groupe Jean Coutu (P.J.C.) Inc., Groupe Pharmaceutique Focus Inc., Les Magasins Koffler de l'Est Inc., McMahon Essaim Inc., Super Escompte Brouillet Inc., B. Mayrand Inc., Superpharm (Montréal) Ltée, Uniprix Inc., Pierre Bossé, François-Jean Coutu, Claude Gagnon, Guy Lanoue, Michel Lesieur, Guy-Marie Papillon et Jean-Guy Prud'Homme *Intervenants*

RÉPERTORIÉ: R. *c.* NOVA SCOTIA PHARMACEUTICAL SOCIETY

N° du greffe: 22473.

1991: 4 décembre; 1992: 9 juillet.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory et Iacobucci.

EN APPEL DE LA SECTION D'APPEL DE LA COUR SUPRÊME DE LA NOUVELLE-ÉCOSSE

tice. Outside of these cases, the proper place of a vagueness argument is under s. 1 *in limine*.

I would therefore conclude that:

1. What is referred to as "overbreadth", whether it stems from the vagueness of a law or from another source, remains no more than an analytical tool to establish a violation of a *Charter* right. Overbreadth has no independent existence. References to a "doctrine of overbreadth" are superfluous.

2. The "doctrine of vagueness", the content of which will be developed shortly, is a principle of fundamental justice under s. 7 and it is also part of s. 1 *in limine* ("prescribed by law").

3. The Content of the "Doctrine of Vagueness"

As was said by this Court in *Osborne* and *Butler*, the threshold for finding a law vague is relatively high. So far discussion of the content of the notion has evolved around intelligibility.

The two rationales of fair notice to the citizen and limitation of enforcement discretion have been adopted as the theoretical foundations of the doctrine of vagueness, here (*Prostitution Reference* and *Committee for the Commonwealth of Canada*) as well as in the United States (see *Grayned v. City of Rockford*, 408 U.S. 104 (1972), at pp. 108-9) and in Europe, as will be seen later. These two rationales have been broadly linked with the corpus of principles of government known as the "rule of law", which lies at the core of our political and constitutional tradition.

justice fondamentale. Ces cas mis à part, la place tout indiquée de l'argument tiré de l'imprécision serait l'analyse requise par l'article premier *in limine*.

Je conclurais donc ainsi:

1. Ce que l'on a appelé la «portée excessive», qu'elle découle de l'imprécision de la loi ou d'une autre cause, reste tout au plus un outil analytique servant à établir une atteinte à un droit garanti par la *Charte*. La portée excessive n'a pas d'existence indépendante. Les renvois à une «théorie de la portée excessive» sont superflus.

2. La «théorie de l'imprécision», dont je vais maintenant étudier le contenu, est un principe de justice fondamentale au sens de l'art. 7 et elle est en outre un élément de l'analyse fondée sur l'article premier *in limine* (restriction prescrite par «une règle de droit»).

3. Le contenu de la «théorie de l'imprécision»

Comme l'a dit notre Cour dans les arrêts *Osborne* et *Butler*, le critère selon lequel une loi sera jugée imprécise est assez exigeant. Jusqu'à maintenant, l'analyse du contenu de la notion était centrée sur l'intelligibilité.

Tant dans notre pays (voir le *Renvoi sur la prostitution* et l'arrêt *Comité pour la République du Canada*) qu'aux États-Unis (voir *Grayned c. City of Rockford*, 408 U.S. 104 (1972), aux pp. 108 et 109), et en Europe, comme nous le verrons plus loin, on a adopté comme fondements logiques de la théorie de l'imprécision l'exigence d'un avertissement raisonnable aux citoyens et la limitation du pouvoir discrétionnaire dans l'application de la loi. Ces deux motifs ont été reliés d'une manière générale à l'ensemble de principes de gouvernement désigné comme «primauté du droit», qui forme le cœur de notre tradition politique et constitutionnelle.

(a) *Fair Notice to the Citizen*

Fair notice to the citizen, as a guide to conduct and a contributing element to a full answer and defence, comprises two aspects.

First of all, there is the more formal aspect of notice, that is acquaintance with the actual text of a statute. In the criminal context, this concern has more or less been set aside by the common law maxim "Ignorance of the law is no excuse", embodied in s. 19 of the *Criminal Code* (see *R. v. MacDougall*, [1982] 2 S.C.R. 605). In the civil context, the maxim does not apply with equal force (see J.-L. Baudouin, *Les obligations* (3rd ed. 1989), at p. 122, and *Chitty on Contracts* (25th ed. 1983), at paras. 314 and 353). Some authors have expressed the opinion that this maxim contradicts the rule of law, and should be revised in the light of the growing quantity and complexity of penal legislation (see E. Colvin, "Criminal Law and The Rule of Law", in P. Fitzgerald, ed., *Crime, Justice & Codification* (1986), 125, at p. 151, and J. C. Jeffries, Jr., "Legality, Vagueness, and the Construction of Penal Statutes" (1985), 71 *Va. L. Rev.* 189, at p. 209). Since this argument was not raised in this case, I will refrain from ruling on this issue. In any event, given that, as this Court has already recognized, case law applying and interpreting a particular section is relevant in determining whether the section is vague, formal notice is not a central concern in a vagueness analysis.

As Lamer J. pointed out in *Re B.C. Motor Vehicle Act*, *supra*, principles of fundamental justice, such as the doctrine of vagueness, must have a substantive as well as procedural content. Indeed the idea of giving fair notice to citizens would be rather empty if the mere fact of bringing the text of the law to their attention was enough, especially when knowledge is presumed by law. There is also a substantive aspect to fair notice, which could be described as a notice, an understanding that some

a) *Avertissement raisonnable aux citoyens*

L'avertissement raisonnable aux citoyens, à titre de guide pour la conduite et d'élément d'une défense pleine et entière, comporte deux aspects.

En premier lieu, il y a l'aspect formel de l'avis, c'est-à-dire la connaissance du texte même d'une loi. En droit pénal, cet élément a plus ou moins été écarté par la maxime de common law «nul n'est censé ignorer la loi», consacrée à l'art. 19 du *Code criminel* (voir l'arrêt *R. c. MacDougall*, [1982] 2 R.C.S. 605). En droit civil, la maxime ne s'applique pas avec la même force (voir J.-L. Baudouin, *Les obligations* (3e éd. 1989), à la p. 122, et *Chitty on Contracts* (25e éd. 1983), aux par. 314 et 353). Certains auteurs ont émis l'avis que cette maxime contredit la primauté du droit et qu'il y a lieu de la réexaminer à la lumière de la quantité et de la complexité croissantes de la législation pénale (voir E. Colvin, «Criminal Law and The Rule of Law», dans P. Fitzgerald, dir., *Crime, Justice & Codification* (1986), 125, à la p. 151, et J. C. Jeffries, Jr., «Legality, Vagueness, and the Construction of Penal Statutes» (1985), 71 *Va. L. Rev.* 189, à la p. 209). Puisque cet argument n'a pas été invoqué en l'espèce, je m'abstiens de me prononcer là-dessus. De toute façon, étant donné, comme notre Cour l'a déjà reconnu, que la jurisprudence appliquant et interprétant une disposition particulière est pertinente lorsqu'il s'agit de décider si elle est imprécise, l'avertissement formel n'est pas un élément principal de l'analyse relative à l'imprécision.

Comme l'a souligné le juge Lamer dans le *Renvoi: Motor Vehicle Act de la C.-B.*, précité, il faut donner aux principes de justice fondamentale, telle la théorie de l'imprécision, une acception qui vise le fond autant que la forme. En fait, l'idée de donner un avertissement raisonnable aux citoyens serait plutôt dénuée de sens s'il suffisait simplement d'attirer leur attention sur le texte de loi, surtout si la connaissance est présumée en droit. La question de l'avertissement raisonnable porte aussi sur le fond: cet avertissement peut être défini comme un avis ou la conscience qu'une conduite est répréhensible en droit. Jeffries, *loc. cit.*,

conduct comes under the law. Jeffries, *supra*, calls this the "core concept of notice" (p. 211).

Let me take homicide as an example. The actual provisions of the *Criminal Code* dealing with homicide are numerous (comprising the core of ss. 222-240 and other related sections). When one completes the picture of the *Code* with case law, both substantive and constitutional, the result is a fairly intricate body of rules. Notwithstanding formal notice, it can hardly be expected of the average citizen that he know the law of homicide in detail. Yet no one would seriously argue that there is no substantive fair notice here, or that the law of homicide is vague. It can readily be seen why this is so. First of all, everyone (or sadly, should I say, almost everyone) has an inherent knowledge that taking the life of another human being is wrong. There is a deeply-rooted perception that homicide cannot be tolerated, whether one comes to this perception from a moral, religious or sociological stance. Therefore it is expected that homicide will be punished by the State. Secondly, homicide is indeed punished by the State, and homicide trials and sentences receive a great deal of publicity.

I used homicide as an example, because it lies so at the core of our criminal law and our shared values that substantive notice is easy to demonstrate. Similar demonstrations could be made, at greater length, for other legal provisions. The substantive aspect of fair notice is therefore a subjective understanding that the law touches upon some conduct, based on the substratum of values underlying the legal enactment and on the role that the legal enactment plays in the life of the society.

I do not wish to suggest that the State can only intervene through law when some non-legal basis for intervention exists. Many enactments are relatively narrow in scope and echo little of society at large; this is the case with many regulatory enactments. The weakness or the absence of substantive

emploie le terme [TRADUCTION] «concept central de l'avertissement» (p. 211).

Prenons l'exemple de l'homicide. Les dispositions du *Code criminel* relatives à l'homicide sont nombreuses (elles sont concentrées dans les art. 222 à 240 mais se trouvent aussi dans d'autres articles connexes). Quand on ajoute aux textes du *Code* la jurisprudence, tant sur les règles de fond que sur la constitutionnalité, on se retrouve avec un ensemble de règles assez complexe. En dépit de l'avis formel, on peut difficilement s'attendre à ce que le citoyen moyen connaisse en détail le droit régissant l'homicide. Et pourtant, personne ne saurait affirmer sérieusement qu'aucun avertissement raisonnable quant au fond n'a été donné ou que le droit en matière d'homicide est imprécis. On peut facilement en comprendre les raisons. Premièrement, chacun (ou malheureusement, dirais-je, presque tout le monde) a une connaissance innée que de tuer un être humain est blâmable. L'homicide est fermement perçu comme intolérable, que ce soit du point de vue moral, religieux ou sociologique. Par conséquent, on s'attend à ce que l'homicide soit puni par l'État. Deuxièmement, l'homicide est en effet puni par l'État et les médias se font abondamment l'écho des procès pour homicide ainsi que des peines infligées.

J'ai cité l'exemple de l'homicide parce qu'il représente une infraction à ce point fondamentale dans notre droit pénal et dans le système des valeurs que nous partageons, qu'il est facile de démontrer l'existence de l'avertissement quant au fond. On pourrait en faire aussi la démonstration, plus approfondie, à l'égard d'autres dispositions législatives. Du point de vue du fond, l'avertissement raisonnable réside donc dans la conscience subjective de l'illégalité d'une conduite, fondée sur les valeurs qui forment le substrat du texte d'incrimination et sur le rôle que joue le texte d'incrimination dans la vie de la société.

Je ne veux pas dire que l'État ne peut intervenir par le moyen d'une loi que si le fondement de son intervention comporte un aspect non juridique. Bon nombre de textes de loi ont une portée assez limitée et reflètent peu la société dans son ensemble; c'est le cas de nombreux textes réglemen-

notice before the enactment can be compensated by bringing to the attention of the public the actual terms of the law, so that substantive notice will be achieved. Merit point and driving license revocation schemes are prime examples of this; through publicity and advertisement these schemes have been "digested" by society. A certain connection between the formal and substantive aspects of fair notice can be seen here.

Fair notice may not have been given when enactments are in somewhat general terms, in a way that does not readily permit citizens to be aware of their substance, when they do not relate to any element of the substratum of values held by society. It is no coincidence that these enactments are often found vague. For instance, the vagrancy ordinance invalidated by the United States Supreme Court in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), or the compulsory identification statute struck down in *Kolender v. Lawson*, 461 U.S. 352 (1983), fall in this group.

Hence, aside from a formal aspect which is in our current system often presumed, fair notice to the citizen comprises a substantive aspect, that is an understanding that certain conduct is the subject of legal restrictions.

(b) *Limitation of Law Enforcement Discretion*

Lamer J. in the *Prostitution Reference* used the phrase "standardless sweep", first coined by the United States Supreme Court in *Smith v. Goguen*, 415 U.S. 566 (1974), at p. 575, to describe the limitation of enforcement discretion rationale for the doctrine of vagueness. It has become the prime concern in American constitutional law (*Kolender*, at pp. 357-58). Indeed today it has become paramount, given the considerable expansion in the discretionary powers of enforcement agencies that

taires. La faiblesse ou l'absence de l'avertissement quant au fond avant l'adoption du texte législatif peut être compensée en attirant l'attention du public sur le libellé de la loi, de sorte qu'il y aura avertissement quant au fond. Les lois portant attribution de points d'inaptitude et révocation de permis de conduire en sont d'excellents exemples; grâce à la publicité et aux avis publiés, la société a «digéré» ces lois. On peut constater dans ce cas un certain lien entre le fond et la forme de l'avertissement raisonnable.

Il se peut qu'il n'y ait pas d'avertissement raisonnable si la loi est couchée dans des termes assez généraux, de sorte qu'elle ne permet pas aux citoyens de prendre facilement connaissance de son fond, lorsqu'elle ne peut être rattachée à aucun élément du substrat de valeurs partagées par la société. Ce n'est pas par coïncidence que de telles lois sont souvent jugées imprécises. Par exemple, l'ordonnance sur le vagabondage que la Cour suprême des États-Unis a déclaré invalide dans l'arrêt *Papachristou c. City of Jacksonville*, 405 U.S. 156 (1972), ou la loi portant obligation de s'identifier qui a été annulée dans l'arrêt *Kolender c. Lawson*, 461 U.S. 352 (1983), entrent dans cette catégorie.

Ainsi, mis à part la question de l'avis formel, lequel est souvent présumé dans notre système actuel, l'avertissement raisonnable donné aux citoyens porte aussi sur le fond, c'est-à-dire la conscience qu'une certaine conduite est assujettie à des restrictions légales.

b) *Limitation du pouvoir discrétionnaire dans l'application de la loi*

Dans le *Renvoi sur la prostitution*, le juge Lamer a employé l'expression «large place à l'arbitraire», formule lancée par la Cour suprême des États-Unis dans l'arrêt *Smith c. Goguen*, 415 U.S. 566 (1974), à la p. 575, pour définir, à propos de la théorie de l'imprécision, la raison d'être de la limitation du pouvoir discrétionnaire dans l'application de la loi. C'est devenu l'élément fondamental en droit constitutionnel américain (*Kolender*, aux pp. 357 et 358). En effet, cet élément est aujourd'hui primor-

has followed the creation of the modern welfare State.

A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. Such is the crux of the concern for limitation of enforcement discretion. When the power to decide whether a charge will lead to conviction or acquittal, normally the preserve of the judiciary, becomes fused with the power to prosecute because of the wording of the law, then a law will be unconstitutionally vague.

For instance, the wording of the vagrancy ordinance invalidated by the United States Supreme Court in *Papachristou* and quoted at length in the *Prostitution Reference*, at pp. 1152-53, was so general and so lacked precision in its content that a conviction would ensue every time the law enforcer decided to charge someone with the offence of vagrancy. The words of the ordinance had no substance to them, and they indicated no particular legislative purpose. They left the accused completely in the dark, with no possible way of defending himself before the court.

(c) *European Court of Human Rights Case Law*

I would also note that the European Court of Human Rights (hereinafter "ECHR") has adopted the same approach to issues of vagueness, in the course of its treatment of words such as "prescribed by law", found in many limitation clauses of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222 (hereinafter the "Convention"), such as Articles 8(2), 9(2), 10(2), 11(2) or Article 2(3) of Protocol No. 4 to the Convention, Europ. T.S. No. 46. The ECHR gave this phrase a substantive content, which went beyond a mere inquiry as to whether a law existed or not.

dial, compte tenu de l'extension considérable des pouvoirs discrétionnaires des organismes responsables de l'application de la loi qui a suivi la création, à l'ère moderne, de l'État-providence.

Une loi ne doit pas être dénuée de précision au point d'entraîner automatiquement la déclaration de culpabilité dès lors que la décision de poursuivre a été prise. Voilà l'élément essentiel du souci de limiter le pouvoir discrétionnaire en matière d'application de la loi. Quand le pouvoir de décider si une inculpation donnera lieu à une déclaration de culpabilité ou à un acquittement—apanage ordinaire du pouvoir judiciaire—se confond avec le pouvoir d'engager des poursuites, à cause du libellé de la loi, alors la loi est d'une imprécision inconstitutionnelle.

Par exemple, le libellé de l'ordonnance sur le vagabondage invalidée par la Cour suprême des États-Unis dans l'arrêt *Papachristou* et reproduite au long dans le *Renvoi sur la prostitution*, aux pp. 1152 et 1153, était tellement général et imprécis qu'il y aurait eu déclaration de culpabilité chaque fois que la personne responsable de son application aurait décidé d'inculper quelqu'un de cette infraction. Les mots employés dans l'ordonnance étaient vides de substance et n'indiquaient aucun objectif législatif particulier. Ils tenaient l'accusé complètement dans l'ignorance et absolument incapable de se défendre devant un tribunal.

c) *Jurisprudence de la Cour européenne des Droits de l'Homme*

Je ferai aussi observer que la Cour européenne des Droits de l'Homme («CEDH») a adopté le même point de vue au sujet des questions touchant l'imprécision, dans son examen des mots «prévues par la loi» que l'on trouve dans nombre de clauses de la *Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales*, 213 R.T.N.U. 223 (la «Convention»), qui énoncent des restrictions, tels les par. 8(2), 9(2), 10(2), 11(2) ou le par. 2(3) du Protocole nº 4 à la Convention, S.T. Europ. nº 46. La CEDH a estimé que cette expression se rapporte au fond du texte de loi et commande que la cour aille au-delà de la simple question de savoir si une loi existe ou non.

The ECHR developed its conception of "prescribed by law" in the course of two famous cases, the *Sunday Times* case, judgment of 26 April 1979, Series A No. 30, and the *Malone* case, judgment of 2 August 1984, Series A No. 82. In the former, the ECHR drew attention to the two aspects of fair notice, namely formal notice ("accessibility") and substantive notice ("foreseeability"). It wrote at p. 31:

In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

In the latter, the ECHR added the limitation of enforcement discretion to the range of interests underpinning its interpretation of "prescribed by law" at p. 32:

The phrase thus implies . . . that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 [of article 8 of the Convention].

(See also the *Kruslin* case, judgment of 24 April 1990, Series A No. 176-A, at pp. 24-25, and the *Huvig* case, judgment of 24 April 1990, Series A No. 176-B, at p. 56.)

In my opinion, the case law of the ECHR is a very valuable guide on this issue, and it will be relied on further below.

La CEDH a développé sa conception du contenu des mots «prévues par la loi» dans deux affaires célèbres: l'affaire *Sunday Times*, arrêt du 26 avril 1978, série A nº 30, et l'affaire *Malone*, arrêt du 2 août 1984, série A nº 82. Dans le premier, la CEDH a attiré l'attention sur deux aspects de l'avertissement raisonnable, savoir l'avertissement visant la forme («accessibilité») et l'avertissement concernant le fond («prévisibilité»). Elle écrit, à la p. 31:

Aux yeux de la Cour, les deux conditions suivantes comptent parmi celles qui se dégagent des mots «prévues par la loi». Il faut d'abord que la «loi» soit suffisamment accessible: le citoyen doit pouvoir disposer de renseignements suffisants, dans les circonstances de la cause, sur les normes juridiques applicables à un cas donné. En second lieu, on ne peut considérer comme une «loi» qu'une norme énoncée avec assez de précision pour permettre au citoyen de régler sa conduite; en s'entourant au besoin de conseils éclairés, il doit être à même de prévoir, à un degré raisonnable dans les circonstances de la cause, les conséquences de nature à dériver d'un acte déterminé. Elles n'ont pas besoin d'être prévisibles avec une certitude absolue: l'expérience la révèle hors d'atteinte. En outre la certitude, bien que hautement souhaitable, s'accompagne parfois d'une rigidité excessive; or le droit doit savoir s'adapter aux changements de situation. Aussi beaucoup de lois se servent-elles, par la force des choses, de formules plus ou moins vagues dont l'interprétation et l'application dépendent de la pratique.

Dans le second, la CEDH a ajouté la limitation du pouvoir discrétionnaire dans l'application de la loi à la gamme d'intérêts sur lesquels repose son interprétation des mots «prévues par la loi» (à la p. 32):

[Le membre de phrase] implique ainsi [. . .] que le droit interne doit offrir une certaine protection contre des atteintes arbitraires de la puissance publique aux droits garantis par le paragraphe 1 [de l'article 8 de la Convention].

(Voir en outre l'affaire *Kruslin*, arrêt du 24 avril 1990, série A nº 176-A, aux pp. 24 et 25, et l'affaire *Huvig*, arrêt du 24 avril 1990, série A nº 176-B, à la p. 56.)

À mon avis, la jurisprudence de la CEDH sert de guide précieux sur cette question. Je m'appuierai de nouveau sur elle plus loin.

(d) *The Scope of Precision*

This leads me to synthetize these remarks about vagueness. The substantive notice and limitation of enforcement discretion rationales point in the same direction: an unintelligible provision gives insufficient guidance for legal debate and is therefore unconstitutionally vague.

Legal provisions by stating certain propositions outline certain permissible and impermissible areas, and they also provide some guidance to ascertain the boundaries of these areas. In his survey article "La teneur indécise du droit" (1991), 107 *Rev. dr. publ.* 1199, P. Amselek rightly underlines the etymological and metaphorical relationship between law and geometry and writes at pp. 1200-1201:

[TRANSLATION] Legal rules are mental tools ... authoritatively introduced, given effect, by public authorities placed at the head of human communities to govern them: such rules are thought content with a specific purpose, to be used as a tool to guide conduct, thought content which determines the boundaries of possible action depending on the circumstances—for the Romans, these boundaries were the meaning of the very concept of *jus* in its earliest sense and are also reflected in our concept of "law", implying the very idea of possibility, of latitude. These boundaries impose limits on the will of those to whom they apply, serving as a support, a yardstick enabling them to remain within the area of right conduct, of rectitude, within the parameters of conduct which the concept lays down and which it then gives effect to, setting the process in motion.

These rules, as Amselek later points out, are characterized by their unresolved nature, inasmuch as they are neither objective nor complete.

Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal

d) *La portée de la précision*

Voilà qui m'amène à faire la synthèse de ces observations touchant l'imprécision. Les raisons d'être de l'avertissement quant au fond et de la limitation du pouvoir discrétionnaire dans l'application de la loi tendent à la même conclusion: une disposition inintelligible n'est pas un guide suffisant pour un débat judiciaire et est donc d'une imprécision inconstitutionnelle.

En énonçant certaines propositions, les dispositions législatives exposent les grandes lignes de ce qui est acceptable et de ce qui ne l'est pas, et elles donnent aussi certaines indications quant aux limites à respecter à cet égard. Offrant une vue générale de la question dans son article «La teneur indécise du droit» (1991), 107 *Rev. dr. publ.* 1199, P. Amselek met en évidence avec raison le rapport étymologique et métaphorique entre le droit et la géométrie; il écrit, aux pp. 1200 et 1201:

Les règles juridiques sont des outils mentaux [...] autoritairement mis en service, en vigueur, par les pouvoirs publics institués à la tête des populations humaines pour les gouverner: il s'agit de contenus de pensée finalisés, instrumentalisés, chargés de servir à diriger les conduites; ces contenus de pensée fixent des marges de possibilité d'action en fonction des circonstances—marges qu'évoquait précisément chez les Romains la notion même de «jus» dans son sens le plus originaire et que traduit aussi d'ailleurs notre notion de «droit» qui dénote l'idée même de possibilité, de latitude. Ces marges servent à encadrer la volonté de ceux auxquels elles sont adressées, à lui servir de support, d'étalon de mesure pour rester à l'intérieur de la droiture, de la rectitude, dans le tracé des lignes de conduite qu'elle arrête et qu'elle fait ensuite exécuter, dont elle déclenche le passage à l'acte.

Comme Amselek le souligne plus loin, ces règles sont caractérisées par leur nature non résolue, en ce sens qu'elles ne sont ni objectives ni complètes.

Les règles juridiques ne fournissent qu'un cadre, un guide pour régler sa conduite, mais la certitude n'existe que dans des cas donnés, lorsque la loi est actualisée par une autorité compétente. Entre temps, la conduite est guidée par l'approximation. Le processus d'approximation aboutit parfois à un ensemble assez restreint d'options, parfois à un

dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.

By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.

Indeed no higher requirement as to certainty can be imposed on law in our modern State. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective. The ECHR has repeatedly warned against a quest for certainty and adopted this "area of risk" approach in *Sunday Times*, *supra*, and especially the case of *Silver and others*, judgment of 25 March 1983, Series A No. 61, at pp. 33-34, and *Malone*, *supra*, at pp. 32-33.

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient

ensemble plus large. Les dispositions législatives délimitent donc une sphère de risque et ne peuvent pas espérer faire plus, sauf si elles visent des cas individuels.

En énonçant les limites de ce qui est acceptable et de ce qui ne l'est pas, ces normes donnent lieu à un débat judiciaire. Elles comportent une substance et permettent la discussion sur leur actualisation. Elles limitent donc le pouvoir discrétionnaire en introduisant des lignes de démarcation et elles délimitent suffisamment une sphère de risque pour que les citoyens soient prévenus quant au fond de la norme à laquelle ils sont assujettis.

On ne saurait vraiment pas exiger davantage de certitude de la loi dans notre État moderne. Les arguments sémantiques, fondés sur une conception du langage en tant que moyen d'expression sans équivoque, ne sont pas réalistes. Le langage n'est pas l'instrument exact que d'aucuns pensent qu'il est. On ne peut pas soutenir qu'un texte de loi peut et doit fournir suffisamment d'indications pour qu'il soit possible de prédire les conséquences juridiques d'une conduite donnée. Tout ce qu'il peut faire, c'est énoncer certaines limites, qui tracent le contour d'une sphère de risque. Mais c'est une caractéristique inhérente de notre système juridique que certains actes seront aux limites de la ligne de démarcation de la sphère de risque; il est alors impossible de prédire avec certitude. Guider, plutôt que diriger, la conduite est un objectif plus réaliste. La CEDH a maintes fois mis en garde contre la recherche de la certitude et adopté cette conception de la «sphère de risque» dans l'affaire *Sunday Times*, précitée, et surtout dans l'affaire *Silver et autres*, arrêt du 25 mars 1983, série A nº 61, aux pp. 33 et 34, et dans l'affaire *Malone*, précitée, aux pp. 32 et 33.

Une disposition imprécise ne constitue pas un fondement adéquat pour un débat judiciaire, c'est-à-dire pour trancher quant à sa signification à la suite d'une analyse raisonnée appliquant des critères juridiques. Elle ne délimite pas suffisamment une sphère de risque et ne peut donc fournir ni d'avertissement raisonnable aux citoyens ni de limitation du pouvoir discrétionnaire dans l'application de la loi. Une telle disposition n'est pas

indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this Court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law.

intelligible, pour reprendre la terminologie de la jurisprudence de notre Cour, et ne donne par conséquent pas suffisamment d'indication susceptible d'alimenter un débat judiciaire. Elle ne donne aucune prise au pouvoir judiciaire. C'est là une norme exigeante, qui va au-delà de la sémantique. Le terme «débat judiciaire» n'est pas utilisé ici pour exprimer une nouvelle norme ou pour s'écarter de celle que notre Cour a déjà énoncée. Au contraire, elle traduit et englobe la même norme et le même critère d'avertissement raisonnable et de limitation du pouvoir discrétionnaire dans l'application de la loi considérés dans le contexte plus global d'une analyse de la qualité et des limites de la connaissance et de la compréhension qu'ont les particuliers de l'application de la loi.

(e) *Vagueness and the Rule of Law*

The criterion of absence of legal debate relates well to the rule of law principles that form the backbone of our polity. Here one must see the rule of law in the contemporary context. Continental European studies on the "*État de droit*" or "*Rechtsstaat*" are relevant (see L. C. Blaau, "The Rechtsstaat Idea Compared with the Rule of Law as a Paradigm for Protecting Rights" (1990), 107 *S. Afr. L.J.* 76, at pp. 88-92, for an exposition of the historical differences between these concepts).

e) *L'imprécision et la primauté du droit*

Le critère de l'absence de débat judiciaire se rattache naturellement aux principes de la primauté du droit qui forment le pivot de notre régime. Sous ce rapport, il faut considérer la primauté du droit dans le contexte contemporain. Les études européennes sur l'«État de droit» ou «*Rechtsstaat*» sont pertinentes (pour une analyse des différences historiques entre les deux notions, voir L. C. Blaau, «The Rechtsstaat Idea Compared with the Rule of Law as a Paradigm for Protecting Rights» (1990), 107 *S. Afr. L.J.* 76, aux pp. 88 à 92).

J.-P. Henry, "Vers la fin de l'État de droit?" (1977), 93 *Rev. dr. publ.* 1207, gives the following definition of the "*État de droit*" at p. 1208:

[TRANSLATION] In theoretical terms, the *État de droit* is a system of organization in which all social and political relations are subject to the law. This means that relations between individuals and authority, as well as relations between individuals themselves, are part of a legal interchange involving rights and obligations.

J.-P. Henry, «Vers la fin de l'État de droit?» (1977), 93 *Rev. dr. publ.* 1207, donne la définition suivante de l'«État de droit», à la p. 1208:

Dans une formulation théorique, l'état de droit est un système d'organisation dans lequel l'ensemble des rapports sociaux et politiques sont soumis au droit. C'est dire qu'alors, les rapports entre individus mais aussi les rapports entre individus et pouvoirs, s'inscrivent dans un commerce juridique fait de droits et d'obligations.

See also J. Chevallier, "L'État de droit" (1988), 104 *Rev. dr. publ.* 313, at pp. 330-31, and R. Carré de Malberg, *Contribution à la théorie générale de l'État* (1920), vol. 1, at pp. 488-90. At the core of the "*État de droit*", as under the rule of law, lies the proposition that the relationship of the State to the individuals is regulated by law.

Voir aussi J. Chevallier, «L'État de droit» (1988), 104 *Rev. dr. publ.* 313, aux pp. 330 et 331, et R. Carré de Malberg, *Contribution à la théorie générale de l'État* (1920), vol. 1, aux pp. 488 à 490. Au cœur de l'«État de droit», comme dans l'application de la primauté du droit, se trouve la proposition que les rapports entre l'État et les individus sont régis par le droit.

One must move away from the non-interventionist attitude that surrounded the development of the doctrine of the rule of law to a more global conception of the State as an entity bound by and acting through law. The modern State intervenes in almost every field of human endeavour, and it plays a role that goes far beyond collecting taxes and policing. The State has entered fields where the positions are not so clear-cut; in the realm of social or economic policy, interests diverge, and the State does not seek to enforce a definite and limited social interest in public order, for instance, against an individual. Often the State attempts to realize a series of social objectives, some of which must be balanced against one another, and which sometimes conflict with the interests of individuals. The modern State, while still acting as an enforcer, assumes more and more of an arbitration role.

Il faut écarter l'attitude de non-intervention qui a imprégné le développement de la théorie de la primauté du droit et privilégier une conception plus globale de l'État, considéré comme une entité soumise au droit et agissant par l'intermédiaire du droit. L'État moderne intervient dans presque tous les domaines de l'activité humaine et son rôle va bien au-delà de la levée d'impôts et du maintien de l'ordre. L'État s'est engagé dans des domaines où les fonctions ne sont pas aussi nettement définies; dans la sphère de la politique sociale ou économique, les intérêts divergent et l'État ne cherche pas à faire respecter un intérêt bien déterminé et limité de la société dans l'ordre public, par exemple, à l'encontre d'un particulier. Souvent l'État essaie de réaliser une série d'objectifs sociaux, dont certains doivent être soupesés les uns par rapport aux autres et qui parfois s'opposent aux intérêts de particuliers. Tout en agissant encore comme responsable du respect de la loi, l'État moderne assume de plus en plus le rôle d'arbitre.

This arbitration must be done according to law, but often it reaches such a level of complexity that the corresponding enactment will be framed in relatively general terms. In my opinion the generality of these terms may entail a greater role for the judiciary, but unlike some authors (see F. Neumann, *The Rule of Law* (1986), at pp. 238-39), I fail to see a difference in kind between general provisions where the judiciary would assume part of the legislative role and "mechanical" provisions where the judiciary would simply apply the law. The judiciary always has a mediating role in the actualization of law, although the extent of this role may vary.

Ce rôle d'arbitre doit être exercé conformément à la loi, mais il atteint souvent un tel degré de complexité que le texte de loi correspondant sera couché dans des termes relativement généraux. À mon avis, la généralité de ces termes peut entraîner un rôle plus grand pour le pouvoir judiciaire, mais contrairement à certains auteurs (voir F. Neumann, *The Rule of Law* (1986), aux pp. 238 et 239), je ne vois pas de différence de nature entre les dispositions générales en vertu desquelles le pouvoir judiciaire exercerait en partie le rôle du pouvoir législatif et les dispositions «mécaniques» à l'égard desquelles le pouvoir judiciaire appliquerait simplement la loi. Le pouvoir judiciaire joue toujours un rôle de médiateur dans l'actualisation du droit, encore que l'étendue de ce rôle puisse varier.

Indeed, as the ECHR has recognized in *Sunday Times*, *supra*, and particularly in the *Barthold* case, judgment of 25 March 1985, Series A No. 90, at p. 22, and in the case of *Müller and others*, judgment of 24 May 1988, Series A No. 133, at p. 20, laws that are framed in general terms may be better suited to the achievement of their objectives, inasmuch as in fields governed by public policy circumstances may vary widely in time and from one

En effet, comme la CEDH l'a reconnu dans l'affaire *Sunday Times*, précitée, et en particulier dans l'affaire *Barthold*, arrêt du 25 mars 1985, série A nº 90, aux pp. 21 et 22, et dans l'affaire *Müller et autres*, arrêt du 24 mai 1988, série A nº 133, à la p. 20, les lois qui sont conçues en termes généraux sont peut-être mieux faites pour la réalisation de leurs objectifs, en ce sens que, dans les domaines où l'intérêt public est en cause, les circonstances

case to the other. A very detailed enactment would not provide the required flexibility, and it might furthermore obscure its purposes behind a veil of detailed provisions. The modern State intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactments remains nonetheless intelligible. One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights. A measure of generality also sometimes allows for greater respect for fundamental rights, since circumstances that would not justify the invalidation of a more precise enactment may be accommodated through the application of a more general one.

What becomes more problematic is not so much general terms conferring broad discretion, but terms failing to give direction as to how to exercise this discretion, so that this exercise may be controlled. Once more, an unpermissibly vague law will not provide a sufficient basis for legal debate; it will not give a sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements. In giving unfettered discretion, it will deprive the judiciary of means of controlling the exercise of this discretion. The need to provide guidelines for the exercise of discretion was at the centre of the ECHR reasons in *Malone*, *supra*, at pp. 32-33, and the *Leander* case, judgment of 26 March 1987, Series A No. 116, at p. 23.

Finally, I also wish to point out that the standard I have outlined applies to all enactments, irrespective of whether they are civil, criminal, administrative or other. The citizen is entitled to have the State abide by constitutional standards of precision whenever it enacts legal dispositions. In the criminal field, it may be thought that the terms of the

peuvent varier considérablement dans le temps et d'une affaire à l'autre. Un texte de loi très détaillé n'aurait pas la souplesse nécessaire et pourrait en outre masquer ses objectifs derrière un voile de dispositions détaillées. L'État moderne intervient de nos jours dans des domaines où une certaine généralité des textes de loi est inévitable. Mais quant au fond, ces textes restent néanmoins intelligibles. Il faut hésiter à recourir à la théorie de l'imprécision pour empêcher ou gêner l'action de l'État qui tend à la réalisation d'objectifs sociaux légitimes, en exigeant que la loi atteigne un degré de précision qui ne convient pas à son objet. Il y a lieu d'assurer un délicat dosage des intérêts de la société et des droits de la personne. Une certaine généralité peut parfois favoriser davantage le respect des droits fondamentaux car un texte précis pourrait ne pas être invalidé dans certaines circonstances, alors qu'un texte plus général pourrait adéquatement régir ces mêmes circonstances.

Ce qui fait plus problème, ce ne sont pas tant des termes généraux conférant un large pouvoir discrétionnaire, que des termes qui ne donnent pas, quant au mode d'exercice de ce pouvoir, d'indications permettant de le contrôler. Encore une fois, une loi d'une imprécision inacceptable ne fournit pas un fondement suffisant pour un débat judiciaire; elle ne donne pas suffisamment d'indication quant à la manière dont les décisions doivent être prises, tels les facteurs dont il faut tenir compte ou les éléments déterminants. En donnant un pouvoir discrétionnaire qui laisse toute latitude, elle prive le pouvoir judiciaire de moyens de contrôler l'exercice du pouvoir discrétionnaire. La nécessité d'énoncer des lignes directrices concernant l'exercice du pouvoir discrétionnaire a été au centre des motifs de la CEDH dans l'affaire *Malone*, précitée, aux pp. 32 et 33, et dans l'affaire *Leander*, arrêt du 26 mars 1987, série A nº 116, à la p. 23.

Pour terminer, je tiens à souligner en outre que la norme que j'ai exposée s'applique à tous les textes de loi, de droit civil, de droit pénal, de droit administratif ou autre. Les citoyens ont droit à ce que l'État se conforme aux normes constitutionnelles régissant la précision chaque fois qu'il établit des textes de loi. En droit pénal, on peut penser

legal debate should be outlined with special care by the State. In my opinion, however, once the minimal general standard has been met, any further arguments as to the precision of the enactments should be considered at the "minimal impairment" stage of s. 1 analysis.

The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law in the modern State, and it reflects the prevailing argumentative, adversarial framework for the administration of justice.

B. *The Validity of Section 32(1)(c) of the Act*

The offence created by s. 32(1)(*c*) comprises two material elements:

1. An agreement entered into by the accused ("Every one who conspires, combines, agrees or arranges with another person"); and

2. An undue prevention or lessening of competition flowing from this agreement ("to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property").

There is furthermore a mental element to this offence, which I will discuss in Part VI of these reasons.

The first element has given rise to some debate throughout the history of competition legislation in Canada, but it is not the prime concern of this appeal. The bulk of the argument before us has been on the second element of s. 32(1)(*c*), more precisely on the word "unduly". Only the interveners Association québécoise des pharmaciens propriétaires et al. (hereinafter "AQPP") presented submissions on other points, and I will deal with them briefly before concentrating on the word

que l'État doit énoncer avec un soin particulier les termes du débat judiciaire. À mon avis, cependant, si on a respecté la norme générale minimale, on devrait examiner tous les autres arguments relatifs à la précision des textes de loi à l'étape de l'étude de l'«atteinte minimale» de l'analyse fondée sur l'article premier.

La théorie de l'imprécision peut donc se résumer par la proposition suivante: une loi sera jugée d'une imprécision inconstitutionnelle si elle manque de précision au point de ne pas constituer un guide suffisant pour un débat judiciaire. Cet énoncé de la théorie est le plus conforme aux préceptes de la primauté du droit dans l'État moderne et il reflète l'économie actuelle du système de l'administration de la justice, qui réside dans le débat contradictoire.

B. *La validité de l'al. 32(1)c) de la Loi*

L'infraction créée par l'al. 32(1)*c*) comprend deux éléments matériels:

1. Un accord conclu par l'accusé («toute personne qui complote, se coalise, se concerte ou s'entend avec une autre»);

2. Le fait d'empêcher ou de diminuer la concurrence, résultant de cet accord («pour empêcher ou diminuer, indûment, la concurrence dans la production, la fabrication, l'achat, le troc, la vente, l'entreposage, la location, le transport ou la fourniture d'un produit, ou dans le prix d'assurances sur les personnes ou les biens»).

Cette infraction comporte aussi un élément moral, que j'analyserai dans la partie VI des présents motifs.

Le premier élément a donné lieu à un débat depuis le début de la législation sur la concurrence au Canada, mais là n'est pas l'objet principal du présent pourvoi. L'argumentation qui nous a été présentée a porté surtout sur le second élément de l'al. 32(1)*c*), plus précisément sur le mot «indûment». Seuls les intervenants l'Association québécoise des pharmaciens propriétaires et autres (ci-après l'«AQPP») ont présenté des arguments sur d'autres points, et je vais les étudier brièvement

Brown v. Alberta Dental Association, 2002 ABCA 24

Date: 20020206
Docket: 99-18532

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE McFADYEN
THE HONOURABLE MADAM JUSTICE RUSSELL
THE HONOURABLE MR. JUSTICE SULATYCKY

BETWEEN:

DR. DUNCAN Y. BROWN

Respondent/Cross Appellant
(Applicant)

- and -

THE ALBERTA DENTAL ASSOCIATION and
THE ALBERTA DENTAL ASSOCIATION BOARD

Appellants/Respondents to Cross Appeal
(Respondents)

Appeal from the Judgment of
THE HONOURABLE MR. JUSTICE HART
Dated the 21st day of September, 1999
Filed the 29th day of October, 1999

REASONS FOR JUDGMENT

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE RUSSELL
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE McFADYEN
AND CONCURRED IN BY THE HONOURABLE MR. JUSTICE SULATYCKY

(d) Section 43(1):

[26] Section 43(1) of the Act reads as follows:

> 43(1) Any conduct of a licensed member, registered practitioner or professional corporation that, in the opinion of the Discipline Committee,
> (a) is detrimental to the best interests of the public,
> (b) contravenes this Act or the regulations,
> (c) harms or tends to harm the standing of the profession of dentistry generally, or
> (d) displays a lack of knowledge of or lack of skill or judgment in the practice of dentistry,
>
> constitutes either unskilled practice of dentistry or professional misconduct, whichever the Discipline Committee finds.

[27] The use of the words “knowledge”, “skill” and “judgment” in conjunction with the phrase “practice of dentistry”, in sub-section (d), suggests a definition that is limited to patient treatment. It is unlikely that these words, in this context, are intended to refer to the manner in which a dentist carries on his business. The same is true of the phrase “unskilled practice of dentistry”, found in the final portion of s. 43(1). However, as the issue is whether “practice of dentistry” includes both business and treatment aspects of dental work, its use in a narrower context in this section does not preclude it from being used more inclusively elsewhere.

[28] This section also reflects the scope of the matters that fall within the purview of the Act. Both sub-sections (a) and (c) are broad enough to capture the manner in which a dentist conducts his business; business practices may be detrimental to the public, and may harm the standing of the profession generally. The business of dentistry is not outside the general purview of the Act.

(e) Part 6 - Professional Corporations:

[29] Part 6 of the Act prohibits corporations from registering as members of the Association, with the exception of professional corporations as long as certain criteria, including unlimited shareholder liability, are met. Part 6 addresses business aspects of a dentist’s work and reflects an intention for such matters to be regulated by the Act.

(f) Purpose of the Act:

[30] The paramount objective of any professional act is the protection of the public, which is achieved through the establishment of a self-regulating profession charged with that responsibility. It is possible for the public to be adversely impacted by the business practices adopted by a dentist. Furthermore, in order to meet the objective of public protection, it is essential to maintain the honour and dignity of the profession. To meet these objectives, the legislative scheme must allow for controls on a dentist's business. For example, the Association might feel compelled to regulate aggressive collection or marketing practices that could jeopardize the standing of the profession. If "practice of dentistry" were given a narrow interpretation, the capacity for this control would be significantly reduced.

(g) Conclusions regarding the meaning of "practice of dentistry":

[31] I conclude that this phrase, as used in s. 90(1), captures both patient treatment and the business context in which that treatment is carried out. Despite the narrow definition suggested by s. 43(1), on balance, a broader reading of the phrase is warranted for s. 90(1).

[32] It follows from this conclusion, that subsections 90(1)(d), (e), and (l) permit regulation of the business aspects of the "practice of dentistry". I do not suggest that this power is unlimited in scope. Regulations aimed at controlling aspects of a dentist's business which in no way affect or undermine the purposes of the Act, may not be permitted. However, given the need for the Board to control the dental profession to protect the public, the intent of these subsections includes the capacity to regulate third party interventions with practitioners. Hence, the control portion of s. 13 is clearly within the scope of the Board's regulation making authority, and is *intra vires* the Act.

Is the control portion of s. 13 unenforceably vague?

[33] The respondent argues that subordinate legislation may be declared invalid and quashed on the basis of vagueness or uncertainty. He submits that s. 13 is invalid as it is not possible to determine its intended scope.

[34] Authorities cited by the respondent relate to quashing municipal by-laws. While it is clear that such by-laws may be quashed for vagueness, there is debate in the case law and among text writers as to whether this principle, and an associated principle regarding reasonableness, apply to other forms of subordinate legislation. Many decisions and texts suggest they do not: *R. v. Wonderland Gifts Ltd.* (1996), 135 D.L.R. (4th) 632 at 645 (N.F.C.A.) (considering the vagueness of a regulation); E.A. Driedger, "Subordinate Legislation" (1960) 37 Can. Bar Rev. 1 at 16 (considering the requirement of reasonableness); David J. Mullan, *Administrative Law* (Toronto: Irwin, 2001) at 143 (considering vagueness and reasonableness); *Remis v. Fontaine*, [1951] 2 D.L.R. 461 at 464 (Man. C.A.) (considering the reasonableness of a regulation). But for the contrary view see: R. Dussault & L. Borgeat, *Administrative Law: A Treatise*, 2nd ed, trans. M. Rankin (Toronto: Carswell, 1985) at 422 (considering the principle of vagueness); *Sparks v. Edward Ash Ltd.*, [1943] 1 K.B. 223 at 228 (C.A.) (considering the unreasonableness of a

regulation); *Canadian Pacific Ltd. v. Canada (Canadian Transport Commission)* (1988), 86 N.R. 360 (F.C.A.), leave to appeal to S.C.C. refused [1988] 1 S.C.R. vi (considering the vagueness of an order of the Canadian Transport Commission).

[35] If these principles extend beyond municipal by-laws, the issue remains as to whether regulations made by the governing bodies of self-regulating professions are included in their scope. Regulations made by the Board may be entitled to less deference than those made by the Lieutenant Governor in Council, as the Board is not directly responsible to elected officials: R. Dussault & L. Borgeat, *supra*, at 432. However, as the approval of the Lieutenant Governor in Council is required before regulations made by the Board come into force, pursuant to s. 90(6) of the Act, they may be sheltered from dispute: R. Dussault & L. Borgeat, *supra*, at 433.

[36] These issues were not raised and have not been addressed by the parties. However, since I conclude below that the control portion of s. 13 is not impermissibly vague, it is not necessary for us to resolve these questions.

[37] The respondent cites *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 639-40, as providing the test for vagueness:

> A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary.

While that decision considers vagueness in the context of the *Charter*, it has previously been applied when determining if a municipal by-law is unenforceably vague: *R. v. Richards* (1994), 88 B.C.L.R. (2d) 334, at 338-39 (C.A.).

[38] In *Percy v. Hall*, [1996] 4 All E.R. 523 at 537, the House of Lords approved the following passage from *Fawcett Properties Ltd. v. Buckingham C.C.* [1960] 3 All E.R. 503 at 517 (H.L.) as setting out the proper test for uncertainty of a by-law:

> I can well understand that a bye-law will be held void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning. But, if the uncertainty stems only from the fact that the words of the bye-law are ambiguous, it is well settled that it must, if possible, be given such a meaning as to make it reasonable and valid, rather that unreasonable and invalid.... I am of opinion that a planning condition is only void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results. It is the daily task of the courts to resolve ambiguities of language and to choose between them; and to construe words so as to avoid absurdities or to put up with them.

[39] Under either approach, I would not conclude that the control portion of s. 13 -- prohibiting practising under the control, either express or implied, of a non-dentist -- is excessively vague. It is intelligible and gives sufficient indications to fuel a legal debate. It can easily be given a sensible, ascertainable meaning. Without deciding whether the principle of invalidity due to vagueness applies to a regulation such as s. 13, I conclude that the control portion of s. 13 is not vague.

Is the control portion of s. 13 an unauthorized self-delegation of regulation making authority?

[40] The respondent argues that s. 13 prescribes overly broad restrictions, which on any realistic assessment must be subject to many exceptions. He submits that s. 13 purports to convert a regulatory power into an administrative power to exercise discretion, without any governing criteria.

[41] The concept of unauthorized self-delegation of a legislative power was discussed in *Brant Dairy Co. v. Ontario (Milk Commission)*, [1973] S.C.R. 131, at 146-147:

> A statutory body which is empowered to do something by regulation does not act within its authority by simply repeating the power in a regulation in the words in which it was conferred. That evades exercise of the power and, indeed, turns a legislative power into an administrative one. It amounts to a redelegation by the Board to itself in a form different from that originally authorized; and that this is illegal is evident from the judgment of this Court in *Attorney General of Canada* v. *Brent*.

[42] In s. 90(1)(l) of the Act, the Board is given a power to make regulations "respecting ... the practice of dentistry". In the control portion of s. 13, the Board has exercised this power by instituting a prohibition against practising under the control of a non-dentist. It has also provided for exceptions to be made to this prohibition. As dentistry is a self-regulating profession, the ability of the Board to use its disciplinary powers to control those who control the practice of dentistry is fundamental to achieving the purposes of the Act. It is reasonable to conclude that an exemption from the control portion of s. 13 will be given in exceptional circumstances only. The Board has not granted itself a broad and arbitrary discretion; rather, it has created a specific prohibition with a discretionary power to grant exemptions in appropriate circumstances.

[43] The respondent cites *Air Canada v. City of Dorval*, [1985] 1 S.C.R. 861 and *Pelletier v. Law Society of New Brunswick* (1989), 59 D.L.R. (4th) 401 (N.B.C.A.) in support of his position. However, the regulations at issue in both of those decisions can be readily distinguished from the control portion of s. 13, given the specificity of the prohibition and the relatively narrow discretion retained by the Board.

[44] As discussed above, these reasons are limited to the control portion of s. 13. While the respondent's arguments may have some applicability to the other portions of s. 13 - an issue which we need not decide - the control portion is not an unauthorized self-delegation of regulation making power.

Canadian Pacific Limited *Appellant*

v.

Her Majesty The Queen in Right of Ontario *Respondent*

and

The Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General for Saskatchewan and Canadian Environmental Law Association *Interveners*

INDEXED AS: ONTARIO *v.* CANADIAN PACIFIC LTD.

File No.: 23721.

1995: January 24; 1995: July 20.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Fundamental justice — Vagueness — Use of reasonable hypotheticals — Overbreadth — Environmental protection law drafted in very broad terms — Whether or not law capable of interpretation so as to allow for legal debate — Environmental Protection Act, R.S.O. 1980, c. 141, ss. 1(1)(c), (k), 13(1)(a) — Canadian Charter of Rights and Freedoms, s. 7.

During controlled burns along the appellant's railway right-of-way, dense smoke escaped onto adjacent properties. This led to complaints about injuries to health and property, and the appellant was charged under s. 13(1)(*a*) of Ontario's *Environmental Protection Act* (EPA). This provision constitutes a broad and general prohibition of the pollution "of the natural environment for any use that can be made of it". CP's acquittal in the Provincial Offences Court of Ontario was overturned on appeal to the Ontario Court of Justice, Provincial Division and a further appeal to the Court of Appeal was dismissed. The constitutional issues that were raised in that court were appealed here. The first, that the Ontario EPA was not constitutionally applicable to CP, a federal undertaking, was dismissed here as *Canadian*

Canadien Pacifique Limitée *Appelante*

c.

Sa Majesté la Reine du chef de l'Ontario *Intimée*

et

Le procureur général du Québec, Le procureur général du Manitoba, Le procureur général de la Saskatchewan et L'Association canadienne du droit de l'environnement *Intervenants*

RÉPERTORIÉ: ONTARIO *c.* CANADIEN PACIFIQUE LTÉE

N° du greffe: 23721.

1995: 24 janvier; 1995: 20 juillet.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Justice fondamentale — Imprécision — Utilisation d'hypothèses raisonnables — Portée excessive — Loi sur la protection de l'environnement rédigée en termes très généraux — La loi peut-elle être interprétée de manière à donner lieu à un débat judiciaire? — Loi sur la protection de l'environnement, L.R.O. 1980, ch. 141, art. 1(1)c), k), 13(1)a) — Charte canadienne des droits et libertés, art. 7.

Le brûlage contrôlé effectué par l'appelante sur son emprise ferroviaire a rejeté une fumée épaisse sur les propriétés adjacentes. Des citoyens ont porté plainte en invoquant qu'ils avaient subi des conséquences préjudiciables pour leur santé et leurs biens, et des accusations ont été portées contre l'appelante en vertu de l'al. 13(1)*a*) de la *Loi sur la protection de l'environnement* de l'Ontario (LPE). Cette disposition constitue une interdiction générale de pollution «de l'environnement naturel relativement à tout usage qui peut en être fait». L'acquittement de CP par la Cour des infractions provinciales de l'Ontario a été infirmé lors de l'appel interjeté devant la Division provinciale de la Cour de justice de l'Ontario, et un autre appel interjeté devant la Cour d'appel a été rejeté. Les questions constitutionnelles qui

none of these cases, however, has the s. 7 vagueness claim succeeded.

CP's vagueness and overbreadth claims in relation to s. 13(1)(*a*) of the Ontario EPA could, in my view, be raised against any of the provincial and federal pollution prohibitions which I have mentioned above. Thus, a finding in CP's favour in the instant case would place these prohibitions, and potentially many others, in constitutional jeopardy. Such a finding would obviously impede the ability of the legislature to provide for environmental protection, and would constitute a significant social policy setback. However, for the reasons developed below, I find that CP's constitutional challenge must fail. The terms of s. 13(1)(*a*) EPA are not vague, but in fact apply quite clearly to pollution activity which is appropriately the subject of legislative prohibition. Moreover, while s. 13(1)(*a*) applies broadly, the objective of environmental protection is ambitious in scope. The legislature is justified in choosing equally ambitious means for achieving this objective.

In the discussion below, I will consider in detail the vagueness aspect of CP's constitutional challenge. I will then turn briefly to the overbreadth claim.

(2) *The Applicable Legal Principles for a Section 7 Vagueness Claim*

In *Nova Scotia Pharmaceutical Society*, *supra*, I enunciated the appropriate interpretive approach to a s. 7 vagueness claim. As I observed there, the principles of fundamental justice in s. 7 require that laws provide the basis for coherent judicial interpretation, and sufficiently delineate an "area of risk". Thus, "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate" (p. 643). This requirement of legal precision is founded on two rationales: the need to provide fair notice to citi-

(C. Ont. (Div. prov.)). Les allégations d'imprécision fondées sur l'art. 7 n'ont toutefois été retenues dans aucune de ces affaires.

Les allégations d'imprécision et de portée excessive avancées par CP à l'égard de l'al. 13(1)*a*) LPE pourraient, à mon avis, être soulevées à l'égard de n'importe quelle des interdictions de polluer provinciales et fédérales susmentionnées. Par conséquent, toute décision en faveur de CP en l'espèce mettrait en péril la constitutionnalité de ces interdictions et peut-être de nombreuses autres. Une telle décision nuirait manifestement au pouvoir du législateur d'assurer la protection de l'environnement et constituerait un important recul en matière de politique sociale. Toutefois, pour les motifs qui suivent, je conclus que l'attaque constitutionnelle présentée par CP doit être rejetée. Les termes de l'al. 13(1)*a*) LPE ne sont pas imprécis; au contraire, ils s'appliquent en fait très clairement à l'activité polluante qui est à juste titre visée par l'interdiction législative. En outre, autant l'al. 13(1)*a*) LPE s'applique de manière générale, autant l'objectif de la protection environnementale a une portée ambitieuse. Le législateur est fondé à choisir des moyens tout aussi ambitieux pour atteindre cet objectif.

Dans l'analyse qui suit, j'examinerai en détail le volet imprécision de la contestation constitutionnelle de CP. J'aborderai ensuite brièvement le volet portée excessive.

(2) *Les principes juridiques applicables à une prétention d'imprécision fondée sur l'art. 7*

Dans l'arrêt *Nova Scotia Pharmaceutical Society*, précité, j'ai énoncé la démarche interprétative qu'il convient d'adopter à l'égard d'une prétention d'imprécision fondée sur l'art. 7. Comme je l'ai dit alors, selon les principes de justice fondamentale de l'art. 7, les lois doivent fournir le fondement d'une interprétation judiciaire cohérente et délimiter suffisamment une «sphère de risque». Par conséquent, «une loi sera jugée d'une imprécision inconstitutionnelle si elle manque de précision au point de ne pas constituer un guide suffisant pour un débat judiciaire» (p. 643). Cette exigence de précision de la loi est fondée sur deux

zens of prohibited conduct, and the need to proscribe enforcement discretion.

47 In undertaking vagueness analysis, a court must first develop the full interpretive context surrounding an impugned provision. This is because the issue facing a court is whether the provision provides a sufficient basis for distinguishing between permissible and impermissible conduct, or for ascertaining an "area of risk". This does not necessitate an exercise in strict judicial line-drawing because, as noted above, the question to be resolved is whether the law provides sufficient guidance for legal debate as to the scope of prohibited conduct. In determining whether legal debate is possible, a court must first engage in the interpretive process which is inherent to the "mediating role" of the judiciary (*Nova Scotia Pharmaceutical Society*, *supra*, at p. 641). Vagueness must not be considered *in abstracto*, but instead must be assessed within a larger interpretive context developed through an analysis of considerations such as the purpose, subject matter and nature of the impugned provision, societal values, related legislative provisions, and prior judicial interpretations of the provision. Only after exhausting its interpretive role will a court then be in a position to determine whether an impugned provision affords sufficient guidance for legal debate.

48 The mediating role of the judiciary is of particular importance in those situations where practical difficulties prevent legislators from framing legislation in precise terms. On this point, I find helpful the comments of Andrew S. Butler, "A Presumption of Statutory Conformity with the *Charter*" (1993), 19 *Queen's L.J.* 209, at pp. 225-27:

Let us consider the practical difficulties facing legislators in giving statutory expression to their intentions. One difficulty faced in the drafting of statutes is meeting the demand that laws operate prospectively. Legislatures

principes: la nécessité de donner aux citoyens un avertissement raisonnable au sujet d'une conduite interdite et la nécessité d'interdire que la loi soit appliquée de façon discrétionnaire.

Lorsqu'un tribunal est appelé à analyser une prétention d'imprécision, il doit d'abord circonscrire tout le contexte interprétatif entourant la disposition attaquée. Il doit procéder ainsi parce qu'il lui faut déterminer si la disposition fournit un fondement suffisant pour établir une distinction entre une conduite permise et une conduite prohibée, ou pour délimiter une «sphère de risque». Il n'est pas nécessaire de procéder à une délimitation judiciaire stricte puisque, comme je l'ai déjà mentionné, il s'agit de déterminer si la loi fournit un guide suffisant pour un débat judiciaire en ce qui a trait à l'étendue de la conduite prohibée. Pour pouvoir dire s'il y a possibilité d'un débat judiciaire, le tribunal doit d'abord entreprendre le processus d'interprétation qui est inhérent au «rôle de médiateur» du pouvoir judiciaire (*Nova Scotia Pharmaceutical Society*, précité, à la p. 641). La question de l'imprécision ne doit pas être examinée dans l'abstrait, mais plutôt être appréciée dans un contexte interprétatif plus large élaboré dans le cadre d'une analyse de certains aspects tels que l'objectif, le contenu et la nature de la disposition attaquée, les valeurs sociales en jeu, les dispositions législatives connexes et les interprétations judiciaires antérieures de la disposition. C'est uniquement après s'être acquitté intégralement de son rôle d'interprétation qu'un tribunal est en mesure de déterminer si la disposition attaquée fournit un guide suffisant pour un débat judiciaire.

Le rôle de médiateur du pouvoir judiciaire revêt une importance particulière dans les cas où des difficultés pratiques empêchent le législateur de formuler des lois en termes précis. Sur ce point, je trouve utiles les commentaires d'Andrew S. Butler, «A Presumption of Statutory Conformity with the *Charter*» (1993), 19 *Queen's L.J.* 209, aux pp. 225 à 227:

[TRADUCTION] Examinons les difficultés pratiques auxquelles doivent faire face les législateurs lorsqu'ils expriment leurs intentions dans une loi. L'une des difficultés de la rédaction législative a trait à la nécessité

cannot as a rule set down *ex post facto* provisions, which identify types of fact situations intended to be caught by a particular enactment, distinguished from others. Accordingly, legislators face a dilemma: they must pay particular attention to and identify the core commonalities of the fact situations they *do* wish to legislate against (which become embodied within statutes), while at the same time not neglecting to anticipate and provide for variations on those fact situations, which may occur in the future .... The usual solution to this dilemma is to fall back on general language, which is adequate to cover the particular situations envisaged, and which holds out the possibility of catching unforeseen variations. This strategy can often lead to broadly expressed statutory language, with the danger that it may apply to too much activity — the problem of overbreadth — or that it will not be expressed in concrete enough terms — the problem of vagueness. In such instances, however, the expectation of legislators will invariably be that the courts will flesh-out the generality of the provisions through interpretation based upon experience. [Emphasis added; italics in original text.]

d'assurer une application prospective des lois. En règle générale, les législateurs ne peuvent établir des dispositions après le fait qui identifient des sortes de situations factuelles qu'ils entendent viser par une disposition particulière, en les distinguant des autres. Les législateurs sont donc pris dans un dilemme: il leur faut d'une part déterminer et identifier avec soin les constantes fondamentales des situations factuelles qu'ils *souhaitent* interdire par voie législative (en les énonçant dans les lois), et d'autre part ne pas négliger de prévoir les variations de ces situations factuelles qui risquent de se produire à l'avenir [. . .] La solution habituellement retenue pour sortir de ce dilemme consiste à recourir à une formulation générale, qui est adéquate pour couvrir les situations particulières prévues, et qui devrait permettre d'englober les variations non prévues. Cette stratégie donne souvent lieu à un libellé législatif exprimé en termes généraux, qui risque d'être applicable à un cercle d'activités trop grand — le problème de la portée excessive — ou qui n'est pas exprimé en des termes suffisamment concrets — le problème de l'imprécision. En pareil cas, cependant, les législateurs s'attendent invariablement à ce que les tribunaux étoffent les dispositions générales par une interprétation fondée sur l'expérience. [Je souligne; en italique dans l'original.]

The use of broad and general terms in legislation may well be justified, and s. 7 does not prevent the legislature from placing primary reliance on the mediating role of the judiciary to determine whether those terms apply in particular fact situations. I would stress, however, that the standard of legal precision required by s. 7 will vary depending on the nature and subject matter of a particular legislative provision. As I stated in *Nova Scotia Pharmaceutical Society*, *supra*, at p. 627:

49

Le recours à des dispositions législatives générales peut fort bien se justifier, et l'art. 7 n'empêche pas le législateur de se fonder principalement sur le rôle de médiateur du pouvoir judiciaire pour déterminer si ces dispositions sont applicables à des situations factuelles particulières. Je voudrais toutefois souligner que la norme de précision législative exigée par l'art. 7 varie selon la nature et le contenu de chaque disposition législative particulière. Comme je l'ai dit dans *Nova Scotia Pharmaceutical Society*, précité, à la p. 627:

Factors to be considered in determining whether a law is too vague include (a) the need for flexibility and the interpretive role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist ....

Les facteurs dont il faut tenir compte pour déterminer si une loi est trop imprécise comprennent: a) la nécessité de la souplesse et le rôle des tribunaux en matière d'interprétation; b) l'impossibilité de la précision absolue, une norme d'intelligibilité étant préférable; c) la possibilité qu'une disposition donnée soit susceptible de nombreuses interprétations qui peuvent même coexister. . .

In particular, a deferential approach should be taken in relation to legislative enactments with legitimate social policy objectives, in order to avoid impeding the state's ability to pursue and promote those objectives (at p. 642). The s. 7 doc-

Il faudrait en particulier faire preuve de retenue à l'égard des dispositions législatives qui cherchent à atteindre des objectifs de politique sociale légitimes, afin de ne pas nuire à la capacité de l'État de viser et de promouvoir ces objectifs (à la p. 642).

Canadian Foundation for Children, Youth and the Law *Appellant*

v.

Attorney General in Right of Canada *Respondent*

and

Focus on the Family (Canada) Association, Canada Family Action Coalition, Home School Legal Defence Association of Canada and REAL Women of Canada, together forming the Coalition for Family Autonomy, Canadian Teachers' Federation, Ontario Association of Children's Aid Societies, Commission des droits de la personne et des droits de la jeunesse, on its own behalf and on behalf of Conseil canadien des organismes provinciaux de défense des droits des enfants et des jeunes, and Child Welfare League of Canada *Interveners*

Canadian Foundation for Children, Youth and the Law *Appelante*

c.

Procureur général du Canada *Intimé*

et

Focus on the Family (Canada) Association, Canada Family Action Coalition, Home School Legal Defence Association of Canada et VRAIES femmes du Canada, formant la Coalition for Family Autonomy, Fédération canadienne des enseignantes et des enseignants, Association ontarienne des sociétés de l'aide à l'enfance, Commission des droits de la personne et des droits de la jeunesse, en son propre nom et en celui du Conseil canadien des organismes provinciaux de défense des droits des enfants et des jeunes, et Ligue pour le bien-être de l'enfance du Canada *Intervenants*

INDEXED AS: CANADIAN FOUNDATION FOR CHILDREN, YOUTH AND THE LAW *v.* CANADA (ATTORNEY GENERAL)

Neutral citation: 2004 SCC 4.

File No.: 29113.

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Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

RÉPERTORIÉ : CANADIAN FOUNDATION FOR CHILDREN, YOUTH AND THE LAW *c.* CANADA (PROCUREUR GÉNÉRAL)

Référence neutre : 2004 CSC 4.

Nº du greffe : 29113.

2003 : 6 juin; 2004 : 30 janvier.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Fundamental justice — Vagueness — Corporal punishment — Section 43 of Criminal Code justifying use of reasonable force by parents and teachers by way of correction of child or pupil — Whether provision unconstitutionally vague or overbroad — Canadian Charter of Rights and Freedoms, s. 7 — Criminal Code, R.S.C. 1985, c. C-46, s. 43.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Charte des droits — Justice fondamentale — Imprécision — Châtiment corporel — Article 43 du Code criminel prévoyant que tout père, mère ou instituteur est fondé à employer une force raisonnable pour corriger un enfant ou un élève — Cette disposition est-elle inconstitutionnellement imprécise ou a-t-elle une portée excessive? — Charte canadienne des droits et libertés, art. 7 — Code criminel, L.R.C. 1985, ch. C-46, art. 43.

14 Applying the legal requirements for precision in a criminal statute to s. 43, I conclude that s. 43, properly construed, is not unduly vague.

(a) *The Standard for "Vagueness"*

15 A law is unconstitutionally vague if it "does not provide an adequate basis for legal debate" and "analysis"; "does not sufficiently delineate any area of risk"; or "is not intelligible". The law must offer a "grasp to the judiciary": *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 639-40. Certainty is not required. As Gonthier J. pointed out in *Nova Scotia Pharmaceutical*, *supra*, at pp. 638-39,

> conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances. [Emphasis added.]

16 A law must set an intelligible standard both for the citizens it governs and the officials who must enforce it. The two are interconnected. A vague law prevents the citizen from realizing when he or she is entering an area of risk for criminal sanction. It similarly makes it difficult for law enforcement officers and judges to determine whether a crime has been committed. This invokes the further concern of putting too much discretion in the hands of law enforcement officials, and violates the precept that individuals should be governed by the rule of law, not the rule of persons. The doctrine of vagueness is directed generally at the evil of leaving "basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application": *Grayned v. City of Rockford*, 408 U.S. 104 (1972), at p. 109.

17 *Ad hoc* discretionary decision making must be distinguished from appropriate judicial interpretation.

Après lui avoir appliqué les conditions de précision auxquelles doit satisfaire une loi en matière criminelle, je conclus que l'art. 43, interprété correctement, n'est pas trop imprécis.

a) *La norme en matière d'« imprécision »*

Une règle de droit est inconstitutionnellement imprécise si elle « ne constitue pas un fondement adéquat pour un débat judiciaire » et « une analyse », si elle « ne délimite pas suffisamment une sphère de risque » ou si elle « n'est pas intelligible ». La règle de droit doit donner « prise au pouvoir judiciaire » : *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606, p. 639-640. La certitude n'est pas requise. Comme l'a souligné le juge Gonthier dans l'arrêt *Nova Scotia Pharmaceutical*, précité, p. 638-639,

> la conduite est guidée par l'approximation. Le processus d'approximation aboutit parfois à un ensemble assez restreint d'options, parfois à un ensemble plus large. Les dispositions législatives délimitent donc une sphère de risque et ne peuvent pas espérer faire plus, sauf si elles visent des cas individuels. [Je souligne.]

Une règle de droit doit établir une norme intelligible tant pour les citoyens qui y sont assujettis que pour les responsables de son application. Les deux sont interreliés. Une règle de droit imprécise empêche le citoyen de se rendre compte qu'il s'aventure sur un terrain où il s'expose à des sanctions pénales. De même, elle complique la tâche des responsables de son application et des juges lorsqu'ils sont appelés à déterminer si un crime a été commis. Elle suscite également la crainte que les responsables de son application disposent d'un pouvoir discrétionnaire trop grand, en plus de violer le principe voulant que les citoyens soient régis par la primauté du droit et non par l'arbitraire individuel. La règle de la nullité pour cause d'imprécision vise généralement à éviter de laisser [TRADUCTION] « aux policiers, aux juges et aux jurys le soin de régler, de façon ponctuelle et subjective, des questions de politique générale fondamentales, ce qui risque d'entraîner une application arbitraire et discriminatoire de la loi » : *Grayned c. City of Rockford*, 408 U.S. 104 (1972), p. 109.

L'exercice ponctuel d'un pouvoir décisionnel discrétionnaire diffère de l'interprétation judiciaire

Judicial decisions may properly add precision to a statute. Legislators can never foresee all the situations that may arise, and if they did, could not practically set them all out. It is thus in the nature of our legal system that areas of uncertainty exist and that judges clarify and augment the law on a case-by-case basis.

It follows that s. 43 of the *Criminal Code* will satisfy the constitutional requirement for precision if it delineates a risk zone for criminal sanction. This achieves the essential task of providing general guidance for citizens and law enforcement officers.

(b) *Does Section 43 Delineate a Risk Zone for Criminal Sanction?*

The purpose of s. 43 is to delineate a sphere of non-criminal conduct within the larger realm of common assault. It must, as we have seen, do this in a way that permits people to know when they are entering a zone of risk of criminal sanction and that avoids *ad hoc* discretionary decision making by law enforcement officials. People must be able to assess when conduct approaches the boundaries of the sphere that s. 43 provides.

To ascertain whether s. 43 meets these requirements, we must consider its words and court decisions interpreting those words. The words of the statute must be considered in context, in their grammatical and ordinary sense, and with a view to the legislative scheme's purpose and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26. Since s. 43 withdraws the protection of the criminal law in certain circumstances, it should be strictly construed: see *Ogg-Moss v. The Queen*, [1984] 2 S.C.R. 173, at p. 183.

Section 43 delineates who may access its sphere with considerable precision. The terms "schoolteacher" and "parent" are clear. The phrase "person

appropriée. Les décisions judiciaires peuvent comme il se doit préciser une loi. Le législateur ne peut jamais prévoir toutes les situations qui peuvent se présenter et, s'il le pouvait, il lui serait pratiquement impossible de toutes les énumérer. Dans notre régime juridique, il est donc naturel qu'il existe des zones d'incertitude et que les juges clarifient et étoffent de façon ponctuelle le droit.

18 L'article 43 du *Code criminel* satisfera donc à l'exigence constitutionnelle de précision s'il délimite une sphère à l'intérieur de laquelle il existe un risque de sanctions pénales. Il accomplira ainsi la tâche essentielle qui consiste à donner des indications générales aux citoyens et aux responsables de l'application de la loi.

b) *L'article 43 délimite-t-il une sphère de risque de sanctions pénales?*

19 L'article 43 a pour objet de délimiter une zone de conduite non criminelle à l'intérieur du domaine général des voies de fait simples. Comme nous l'avons vu, il doit le faire de façon à indiquer aux gens jusqu'où ils peuvent aller sans s'exposer à des sanctions pénales et à empêcher les responsables de l'application de la loi d'exercer de manière ponctuelle un pouvoir décisionnel discrétionnaire. Les gens doivent pouvoir évaluer si leur conduite risque de déborder la zone délimitée par l'art. 43.

20 Pour déterminer si l'art. 43 remplit ces conditions, nous devons examiner les termes qu'il utilise et la jurisprudence qui les interprète. Les termes d'une loi doivent être examinés dans leur contexte, en suivant leur sens ordinaire et grammatical et en tenant compte de l'objet et de l'esprit de la loi ainsi que de l'ntention du législateur : *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26. Étant donné qu'il retire la protection du droit criminel dans certaines circonstances, l'art. 43 doit être interprété de manière restrictive : voir l'arrêt *Ogg-Moss c. La Reine*, [1984] 2 R.C.S. 173, p. 183.

21 L'article 43 détermine avec beaucoup de précision qui peut entrer dans la zone qu'il délimite. Les termes « instituteur » et « père ou mère » sont clairs.

standing in the place of a parent" has been held by the courts to indicate an individual who has assumed "*all* the obligations of parenthood": *Ogg-Moss*, *supra*, at p. 190 (emphasis in original). These terms present no difficulty.

22 Section 43 identifies less precisely what conduct falls within its sphere. It defines this conduct in two ways. The first is by the requirement that the force be "by way of correction". The second is by the requirement that the force be "reasonable under the circumstances". The question is whether, taken together and construed in accordance with governing principles, these phrases provide sufficient precision to delineate the zone of risk and avoid discretionary law enforcement.

23 I turn first to the requirement that the force be "by way of correction". These words, considered in conjunction with the cases, yield two limitations on the content of the protected sphere of conduct.

24 First, the person applying the force must have intended it to be for educative or corrective purposes: *Ogg-Moss*, *supra*, at p. 193. Accordingly, s. 43 cannot exculpate outbursts of violence against a child motivated by anger or animated by frustration. It admits into its sphere of immunity only sober, reasoned uses of force that address the actual behaviour of the child and are designed to restrain, control or express some symbolic disapproval of his or her behaviour. The purpose of the force must always be the education or discipline of the child: *Ogg-Moss*, *supra*, at p. 193.

25 Second, the child must be capable of benefiting from the correction. This requires the capacity to learn and the possibility of successful correction. Force against children under two cannot be corrective, since on the evidence they are incapable of understanding why they are hit (trial decision (2000), 49 O.R. (3d) 662, at para. 17). A child may also be incapable of learning from the application of force because of disability or some other contextual

Les tribunaux ont statué que l'expression « toute personne qui remplace le père ou la mère » désigne quiconque prend en charge « *toutes* les obligations qui [. . .] incombent [au père et à la mère] » : *Ogg-Moss*, précité, p. 190 (en italique dans l'original). Ces mots ne posent aucune difficulté.

L'article 43 indique avec moins de précision quelle conduite se situe dans la zone qu'il délimite. Il définit cette conduite de deux manières, premièrement, par la condition que la force soit employée « pour corriger », et deuxièmement, par la condition que la force employée soit « raisonnable dans les circonstances ». La question est de savoir si ces expressions, considérées ensemble et interprétées conformément aux principes applicables, sont suffisamment précises pour délimiter la sphère de risque et éviter l'application discrétionnaire de la loi.

Examinons d'abord la condition que la force soit employée « pour corriger ». Ces mots, examinés conjointement avec la jurisprudence, établissent deux limites au contenu de la zone de conduite protégée.

Premièrement, la personne qui emploie la force doit le faire pour éduquer ou corriger : *Ogg-Moss*, précité, p. 193. Par conséquent, l'art. 43 ne peut pas excuser les accès de violence à l'égard d'un enfant qui sont dûs à la colère ou à la frustration. Il n'admet dans sa zone d'immunité que l'emploi réfléchi d'une force modérée répondant au comportement réel de l'enfant et visant à contrôler ce comportement ou à y mettre fin ou encore à exprimer une certaine désapprobation symbolique à cet égard. L'emploi de la force doit toujours avoir pour objet d'éduquer ou de discipliner l'enfant : *Ogg-Moss*, précité, p. 193.

Deuxièmement, la correction doit pouvoir avoir un effet bénéfique sur l'enfant, ce qui nécessite, d'une part, une capacité de tirer une leçon et, d'autre part, une possibilité de résultat positif. La force employée contre un enfant de moins de deux ans ne peut pas servir à le corriger puisque, selon la preuve, un tel enfant est incapable de comprendre la raison pour laquelle on le frappe (décision de première instance (2000), 49 O.R. (3d) 662, par. 17).

United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City of), 2002 ABCA 131

Date: 20020529
Docket: 17693

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE O'LEARY
THE HONOURABLE MADAM JUSTICE PICARD
THE HONOURABLE MR. JUSTICE WITTMANN

BETWEEN:

THE UNITED TAXI DRIVERS' FELLOWSHIP OF SOUTHERN ALBERTA, RASHPAL SINGH GOSAL, HARINGER SINGH DHESI, CHARAN KAMAL SINGH GILL, AERO CAB LTD., GOLDEN CABS INC., SUPERIOR CABS LTD. SUPREME CABS LTD. AND AIR LINKER CAB LTD.

Appellants

- and -

THE CITY OF CALGARY

Respondent

- and -

CHECKER CABS LTD., YELLOW CAB LIMITED, MAYFAIR TAXI LTD., ALBERTA SOUTH CO-OP TAXI LINE LTD., AND CALGARY TAXI DRIVERS ASSOCIATION

Interveners

Appeal from the Order of The Honourable Mr. Justice J. D. Rooke
Dated March 5, 1998

REASONS FOR JUDGMENT RESERVED

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jurisdiction. As well, the Supreme Court of Canada in ***Shell Canada Products Ltd.* v. *Vancouver (City)***, mandated a benevolent construction of a municipality's powers and rejected the narrow, pro-interventionist approach which rectified clear excesses of authority under the guise of vague doctrinal terms such as "irrelevant considerations", "improper purpose", "reasonableness", or "bad faith". Nevertheless, courts usually interfere when jurisdiction has been exceeded as the Supreme Court of Canada did in ***Shell Canada Products Ltd.* v. *Vancouver (City)***.

[165] The learned chambers judge did not find the City to be lacking the jurisdiction to enact the Bylaws and therefore did not exercise his discretion on the basis of delay. As a result, he did not weigh the relevant considerations. On appeal, I have found the impugned provisions are void for lack of jurisdiction when the City exceeded its statutory powers. In such a case, declaratory relief need not be denied because of delay. In any event, I would grant the relief despite the delay.

[166] The relevant considerations to be weighed in exercising discretion to grant relief were described by the Supreme Court of Canada in ***Friends of the Oldman River Society* v. *Canada (Minister of Transport)***, [1992] 1 S.C.R. 3 at 77-80, where the court considered the date of the filing of the action, the hearing date, the activities of the applicants to deal with the matter outside the court process, the notice to the respondents and any prejudice which the delay may cause the respondents if relief were to be granted. In that case, the action was commenced after the limitation period expired, but also the court also considered the activities by the applicants to have a public hearing and bring the matter to the attention of various federal and provincial administrative bodies. By the date of the hearing before the Supreme Court of Canada, the disputed dam project was substantially complete but the work had continued despite the legal actions and without any consideration to acceding to an environmental impact study until all legal avenues were exhausted. Despite the over two years delay and the substantial work on the dam project, the court found the provincial government did not suffer prejudice. The majority held the motions judge did not weigh these considerations adequately, or at all, and therefore, the Federal Court of Appeal was justified in interfering with the exercise of the motion judge's discretion to deny a remedy.

[167] In this case, the delay in bringing this motion has been longer, but the City was aware of the appellants' objections prior to the enactment of the Bylaw and therefore, had notice. The appellants have not waived their right to raise their objections to the defects in the Bylaw. The United Taxi Drivers Fellowship of Southern Alberta, through its officers and solicitors, deposed that since 1987, numerous written submissions and requests for information were made, through its officers and solicitors, to the Taxi Commission and City Council. [e.g. Gosal Affidavit AB 40-1]. The initial Originating Notice was also filed prior to the passing of the enactment of the Bylaw. As a result, the City cannot claim the present action was a surprise, nor can the City claim prejudice as a result of the lapse of time in hearing this matter. Between the filing of the Originating Notice and amendments and the hearing below, the parties filed numerous affidavits and conducted extensive cross-examinations on the affidavits. While the learned chambers judge found much of the material was not relevant, the parties and the appellants, specifically, have not been inactive throughout the period prior to the hearing of this matter. As a result, there is sufficient support to exercise the court's discretion in favour of granting the appellants the relief they seek.

[168] The learned chambers judge chose not to rely on the delay but held that delay was an additional reason to for his decision to deny any relief in relation to the administrative operation of the lottery system save prospective relief only. None of the parties object to his directions on the lottery.

[169] In this appeal, I find that portions of the Bylaw were *ultra vires* the City's legislative authority. The delay in hearing this matter does not confer validity on those impugned portions.

CONCLUSION

[170] The Bylaw does not violate either ss. 7 or 15 of the *Charter* but as a scheme to regulate the taxi industry some provisions exceed the powers of the City as authorized under the *MGA*. My conclusions on the grounds of appeal are as follows:

Did the learned chambers judge err when:

1. He failed to find the Bylaw violated the common law rule that municipalities cannot enact discriminatory bylaws;
No.

2. He failed to find the Bylaw violated s. 15 of the *Charter* by discriminating on the basis of analogous grounds;
No.

3. He failed to find the Bylaw violated s. 2 of the *Charter* by denying the appellants' freedom of association;
No. The s. 2 argument was not allowed to be argued on appeal.

4. He failed to find the Bylaw violated s. 7 of the *Charter* by denying the appellants the liberty or alternatively, security of the person, to pursue their chosen profession;
No.

5. He failed to find that the Bylaw was inconsistent with the *MGA*, specifically, ss. 3 and 13, and therefore, of no effect to the extent of the inconsistency.
No.

6. He failed to find the City acted outside its jurisdiction by enacting a bylaw which included provisions not authorized by the *MGA*.
Yes.

[171] As a result, s. 7(1), portions of s. 9.1 and all of s. 9.2 of the Bylaw, which provide for the freezing and limiting the number of TPLs and for transfers from estates, are declared *ultra vires* and should be set aside.

[172] Merely severing the impugned portions of the Bylaw is not a satisfactory solution. As this Court held in ***Re the Queen and Debaji Foods Ltd.*** (1981), 124 D.L.R. (3d) 254 at 257:

> When part of a by-law is invalid severance of the bad part tends to be a rewriting of the by-law. To refuse to sever leaves no part of the by-law in place and necessitates rewriting by the municipal council. It is, of course, preferable that that body rather than the Court undertake the task.

[173] Similar to the relief in ***Zivkovic* v. *Kitchner***, where the court suspended the effect of its order to allow compliance with its rulings, I find it appropriate to suspend the declaration of invalidity until October 1, 2002 to provide the City with time to reconsider and determine its course with respect to the impugned portions of the Bylaw.

APPEAL HEARD on June 11, 2001

REASONS FILED at Calgary, Alberta,
this 29th day of May, 2002

_____
WITTMANN J.A.

I concur:_____
PICARD J.A.

City of Calgary *Appellant*

v.

United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal, Haringer Singh Dhesi, Aero Cab Ltd. and Air Linker Cab Ltd. *Respondents*

and

Attorney General of Alberta *Intervener*

Ville de Calgary *Appelante*

c.

United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal, Haringer Singh Dhesi, Aero Cab Ltd. et Air Linker Cab Ltd. *Intimés*

et

Procureur général de l'Alberta *Intervenant*

INDEXED AS: UNITED TAXI DRIVERS' FELLOWSHIP OF SOUTHERN ALBERTA *v.* CALGARY (CITY)

Neutral citation: 2004 SCC 19.

File No.: 29321.

2003: December 8; 2004: March 25.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ.

RÉPERTORIÉ : UNITED TAXI DRIVERS' FELLOWSHIP OF SOUTHERN ALBERTA *c.* CALGARY (VILLE)

Référence neutre : 2004 CSC 19.

N^{o} du greffe : 29321.

2003 : 8 décembre; 2004 : 25 mars.

Présents : La juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Municipal law — Bylaws — Jurisdiction to pass bylaws — Municipal bylaw regulating taxi industry by stipulating licence requirements and freezing number of licences — Proper approach to interpretation of statutes empowering municipalities — Whether bylaw ultra vires municipality under its governing legislation — Municipal Government Act, S.A. 1994, c. M-26.1, ss. 7, 8, 9.

Administrative law — Judicial review — Standard of review applicable to decision of municipality delineating its jurisdiction.

The City of Calgary regulates its taxi industry by virtue of the *Taxi Business Bylaw* which requires that all taxis have a taxi plate licence. In 1993, the bylaw froze the number of taxi plate licences issued. The following year, the provincial government enacted a new *Municipal Government Act*. The respondents challenged the validity of the freeze on the issuance of taxi plate licences on the basis that the freeze is *ultra vires* the City under its governing legislation, the *Municipal Government Act*. The trial judge held that the City had authority under the new

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit municipal — Règlements — Compétence en matière d'adoption de règlement — Règlement municipal régissant le secteur des taxis en prévoyant des exigences en matière de permis et le gel du nombre de permis — Démarche à adopter pour l'interprétation des lois habilitant les municipalités — Le règlement outrepasse-t-il la compétence conférée à la municipalité par la loi habilitante? — Municipal Government Act, S.A. 1994, ch. M-26.1, art. 7, 8, 9.

Droit administratif — Contrôle judiciaire — Norme de contrôle applicable à la décision de la municipalité de définir sa compétence.

La Ville de Calgary réglemente son secteur des taxis en l'assujettissant au *Taxi Business Bylaw*, qui exige que tous les taxis aient une plaque de taxi. En 1993, le règlement gèle le nombre de plaques de taxi pouvant être délivrées. L'année suivante, le gouvernement de la province a édicté une nouvelle *Municipal Government Act*. Les intimés contestent la validité du gel de la délivrance de plaques de taxi au motif qu'il outrepasse la compétence conférée à la municipalité par la loi habilitante, la *Municipal Government Act*. Selon le juge de première

Act to limit the number of taxi plate licences. A majority of the Court of Appeal reversed that decision.

Held: The appeal should be allowed.

The City of Calgary was authorized under the *Municipal Government Act* to enact the bylaw and to limit the number of taxi plate licences. Municipalities must always be correct in delineating their jurisdiction. Such questions will always be subject to a standard of review of correctness.

The evolution of the municipality has produced a shift in the proper approach to interpreting statutes that empower municipalities. A broad and purposive approach to the interpretation of municipal legislation reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes and is consistent with the Court's approach to statutory interpretation generally. The *Municipal Government Act* reflects the modern method of drafting municipal legislation which must be construed using this broad and purposive approach.

Under the *Municipal Government Act* the City still has the power to limit the issuance of taxi plate licences. There is no indication in the Act that the legislature intended to remove the municipality's power to limit the number of taxi plate licences. To the contrary, s. 9(b) indicates that the legislature sought to enhance the City's powers under the Act. Further, the respondents' narrow interpretation cannot be reconciled with the language of the Act. Section 7 which empowers municipalities to pass bylaws respecting business must be read with s. 8 of the Act illustrating some of the broad powers exercisable by a municipality. The power to limit the number of licences could fall under either s. 8(a), the power to regulate, or s. 8(c), the power to provide for a system of licences. Thus, the City has the power under the Act to pass bylaws limiting the number of taxi plate licences.

Cases Cited

Referred to: *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *Merritt v. City of Toronto* (1895), 22 O.A.R. 205.

Statutes and Regulations Cited

Alberta Bill of Rights, R.S.A. 2000, c. A-14, s. 1.
Canadian Charter of Rights and Freedoms, ss. 6, 7, 15.

instance, la nouvelle loi accorde à la Ville le pouvoir de limiter le nombre de plaques de taxi. La Cour d'appel, à la majorité, infirme cette décision.

Arrêt : Le pourvoi est accueilli.

La *Municipal Government Act* accorde à la Ville de Calgary le pouvoir d'édicter le règlement et de limiter le nombre de plaques de taxi. Les décisions des municipalités doivent toujours être correctes quand il s'agit de délimiter leur compétence. L'examen de telles questions devra toujours se faire selon la norme de la décision correcte.

L'évolution de la municipalité a entraîné un virage dans la démarche à adopter pour interpréter les lois habilitant les municipalités. Une interprétation téléologique large des lois sur les municipalités reflète la véritable nature des municipalités modernes, qui ont besoin de plus de souplesse pour réaliser les objets de leur loi habilitante et est compatible avec l'approche générale adoptée par la Cour en matière d'interprétation législative. La *Municipal Government Act* reflète la méthode moderne de rédaction des lois sur les municipalités, auxquelles il faut donner une interprétation téléologique large.

En vertu de la *Municipal Government Act*, la Ville a encore le pouvoir de limiter le nombre de plaques de taxi. Rien dans la loi n'indique que le législateur avait l'intention de supprimer le pouvoir des municipalités de limiter le nombre de plaques de taxi. Au contraire, l'al. 9b) indique que le législateur cherchait à accroître les pouvoirs de la Ville en vertu de la loi. De plus, l'interprétation restrictive proposée par les intimés ne peut se concilier avec le libellé de la loi. L'article 7, qui habilite les municipalités à prendre des règlements sur les activités commerciales, doit être interprété conjointement avec l'art. 8 de la loi, qui donne quelques exemples du pouvoir général dont est dotée une municipalité. Le pouvoir de limiter le nombre de permis pourrait découler soit du pouvoir de réglementer, prévu à l'al. 8a), soit du pouvoir d'établir un régime de permis, prévu à l'al. 8c). Ainsi, la Ville est habilitée par la loi à édicter des règlements limitant le nombre de plaques de taxi.

Jurisprudence

Arrêts mentionnés : *Nanaimo (Ville) c. Rascal Trucking Ltd.*, [2000] 1 R.C.S. 342, 2000 CSC 13; *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42; *Merritt c. City of Toronto* (1895), 22 O.A.R. 205.

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City of Calgary, Bylaw No. 91/77, *Taxi Business Bylaw* (April 18, 1977), ss. 7(1), 9.1(a), (b) [am. 23M93], 9.2(a), (b), 9.3(a).
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Municipal Act, 2001, S.O. 2001, c. 25.
Municipal Government Act, R.S.A. 1980, c. M-26, ss. 234(1) [am. 1991, c. 23, s. 3(13)], (2)(a) [*idem*], (b) [*idem*], 8.
Municipal Government Act, S.A. 1994, c. M-26.1 [now R.S.A. 2000, c. M-26], ss. 3, 7, 8, 9, 70-75, 715.
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Leila J. Gosselin, *Brand R. Inlow*, *Q.C.*, and *R. Shawn Swinn*, for the appellant.

Dale Gibson and *Sandra Anderson*, for the respondents United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal and Haringer Singh Dhesi.

No one appeared for the respondent Aero Cab Ltd.

Gabor I. Zinner, for the respondent Air Linker Cab Ltd.

Cities Act, S.S. 2002, ch. C-11.1.
Gaming and Liquor Act, R.S.A. 2000, ch. G-1, art. 37(1)d).
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Leila J. Gosselin, *Brand R. Inlow*, *c.r.*, et *R. Shawn Swinn*, pour l'appelante.

Dale Gibson et *Sandra Anderson*, pour les intimés United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal et Haringer Singh Dhesi.

Personne n'a comparu pour l'intimée Aero Cab Ltd.

Gabor I. Zinner, pour l'intimée Air Linker Cab Ltd.

Lorne Merryweather, for the intervener.

The judgment of the Court was delivered by

Bastarache J. —

I. Overview

1 The City of Calgary (the "City") regulates its taxi industry by virtue of Bylaw No. 91/77, the *Taxi Business Bylaw* (the "bylaw"), which sets out several licensing requirements. Among them is a requirement that all taxi vehicles have a taxi plate licence. In 1986, the City's Taxi Commission adopted a restricted entry system for the taxi business to increase efficiency and stability, and accordingly froze the number of taxi plate licences. The freeze was continued in 1993 under s. 9.1 of the bylaw. Other sections of the bylaw permitted the transfer of licences and the creation of a lottery system to distribute revoked or relinquished licences. The following year, the provincial government enacted a new *Municipal Government Act*, S.A. 1994, c. M-26.1 (now R.S.A. 2000, c. M-26). Section 715 of the new Act deemed the existing bylaw to have the same effect as if it had been passed under the new Act.

2 The respondents, the United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal, Haringer Singh Dhesi, Aero Cab Ltd. and Air Linker Cab Ltd., challenged the validity of the freeze and the lottery process. The respondents sought a declaration that the City's actions were: *ultra vires* the City's governing legislation, the *Municipal Government Act*; a violation of the common law rule prohibiting municipalities from enacting discriminatory legislation; and an unconstitutional violation of their mobility rights, their right to liberty and their right to be free from discrimination as guaranteed by ss. 6, 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The only issue before this Court is whether the City's freeze on the issuance of taxi plate licences

Lorne Merryweather, pour l'intervenant.

Version française du jugement de la Cour rendu par

Le juge Bastarache —

I. Survol

La Ville de Calgary (la « Ville ») réglemente son secteur des taxis en l'assujettissant au règlement nº 91/77, le *Taxi Business Bylaw* (le « règlement »), qui prévoit plusieurs exigences en matière de permis, notamment l'obligation pour tous les véhicules servant au transport par taxi d'avoir une plaque de taxi. En 1986, la commission des taxis de la Ville a instauré un régime d'entrée restreinte dans le secteur des taxis afin d'en améliorer l'efficacité et la stabilité et a, donc, gelé le nombre de plaques de taxi. Le gel s'est poursuivi en 1993 en vertu de l'art. 9.1 du règlement. D'autres dispositions du règlement autorisent le transfert de permis de taxi et la création d'un système de loterie permettant la distribution de ceux qui ont été révoqués ou délaissés. L'année suivante, le gouvernement de la province a édicté une nouvelle *Municipal Government Act*, S.A. 1994, ch. M-26.1 (maintenant R.S.A. 2000, ch. M-26). Selon l'art. 715 de la nouvelle loi, le règlement existant est réputé avoir le même effet que s'il avait été pris en vertu de la nouvelle loi.

Les intimés, la United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal, Haringer Singh Dhesi, Aero Cab Ltd. et Air Linker Cab Ltd., ont contesté la validité du gel et du système de loterie. Ils ont sollicité un jugement déclarant que les mesures prises par la Ville outrepassent la compétence que lui confère sa loi habilitante, la *Municipal Government Act*, violent la règle de common law interdisant aux municipalités de prendre des règlements discriminatoires et portent atteinte à leur liberté de circulation et d'établissement, à leur droit à la liberté et à leur droit d'être protégés contre la discrimination, contrairement aux art. 6, 7 et 15 de la *Charte canadienne des droits et libertés*. La seule question dont est saisie la Cour consiste à savoir si le gel

was *ultra vires* the City under the *Municipal Government Act*.

The trial judge concluded that the City had the authority under the *Municipal Government Act* to limit the number of taxi plate licences: (1998), 60 Alta. L.R. (3d) 165, 1998 ABQB 184. The majority of the Court of Appeal disagreed: [2002] 8 W.W.R. 51, 2002 ABCA 131. Wittmann J.A., writing for the majority, concluded that while the old *Municipal Government Act* expressly granted the City the power to limit the number of taxi plate licences, the new Act did not. O'Leary J.A., in dissent, held that the new *Municipal Government Act* expressly and impliedly authorized the limit on the issuance of taxi plate licences.

II. Relevant Statutory Provisions

City of Calgary, Bylaw No. 91/77 (*Taxi Business Bylaw*)

7. (1) The Commission may limit the number of taxi licenses, which may be issued in any one-license period.

. . .

9.1 (a) The prohibition on the issuance of any new taxi licenses for the operation of a regular class taxi instituted by the Taxi Commission as of February 6, 1986, and continued by the Taxi Commission up to the date of the passage of this Bylaw, is hereby continued and the Taxi Commission shall issue no new licenses for the operation of a regular class taxi but only renew to licensees, in accordance with the Taxi Business Bylaw, such regular class taxi licenses as were issued to such licensees for the previous license year.

(b) Notwithstanding subsection (a) the Taxi Commission may issue licenses in accordance with the lottery provisions described in Section 9(28) . . . .

9.2 (a) "immediate family member" means the spouse, siblings or children of the taxi licensee.

de la délivrance de plaques de taxi imposé par la Ville outrepasse la compétence que lui confère la *Municipal Government Act*.

3 Selon le juge de première instance, la *Municipal Government Act* habilite la Ville à limiter le nombre de plaques de taxi : (1998), 60 Alta. L.R. (3d) 165, 1998 ABQB 184. La Cour d'appel, à la majorité, exprime son désaccord : [2002] 8 W.W.R. 51, 2002 ABCA 131. Le juge Wittmann, au nom de la majorité, conclut que l'ancienne *Municipal Government Act*, contrairement à la nouvelle loi, accorde expressément à la Ville le pouvoir de limiter le nombre de plaques de taxi. Le juge O'Leary, dissident, conclut que la nouvelle *Municipal Government Act* autorise expressément et implicitement le contingentement des plaques de taxis.

II. Dispositions législatives pertinentes

4 Règlement nº 91/77 de la Ville de Calgary (*Taxi Business Bylaw*)

[TRADUCTION]

7. (1) La Commission peut limiter le nombre de permis d'exploitation de taxis qui peuvent être délivrés dans une période de permis donnée.

. . .

9.1 a) L'interdiction de délivrer de nouveaux permis d'exploitation de taxis de catégorie ordinaire imposée par la commission des taxis le 6 février 1986 et réitérée jusqu'à la date de prise du présent règlement demeure en vigueur; la commission des taxis ne délivre pas de nouveaux permis d'exploitation de taxis de catégorie ordinaire et ne renouvelle au titulaire, conformément au règlement Taxi Business, que celui délivré pour l'année de permis précédente.

b) Malgré l'alinéa a), la commission des taxis peut délivrer des permis en application des dispositions sur la loterie énoncées au paragraphe 9(28) . . .

9.2 a) « membre de la famille immédiate » Conjoint, frère ou sœur ou enfant du titulaire du permis de taxi.

(b) Notwithstanding section 9(15) a taxi license held by a deceased taxi licensee shall be capable of being transferred to the estate of the deceased licensee, or to an immediate family member of the deceased, if the transfer occurs without remuneration from the estate of the deceased to the transferee.

. . .

9.3 (a) The licensee of a taxi license shall not transfer or otherwise dispose of a taxi license unless:

(1) the licensee does so in accordance with this Bylaw and the regulations; and

(2) the licensee pays the license transfer fee as set out in this Bylaw.

Municipal Government Act, R.S.A. 1980, c. M-26

234(1) A council may pass by-laws licensing, regulating and controlling the taxi and limousine business.

(2) Without restricting the generality of the foregoing a council may pass by-laws to

(a) establish and specify the rates or fares that may be charged for hire of taxis and limousines;

(b) limit the number of taxi and limousine licences that may be issued in the municipality having regard to its population or the area to be served in it or by any other means the council considers to be just and equitable;

. . .

(8) A council, by by-law, may establish a commission to be known as the taxi commission

(a) which shall be composed of the number of resident electors the council selects including, if it seems desirable, any members of council or officials of the municipality who are considered appropriate, and

(b) which may exercise any power or make any decisions which the council may make pursuant to this section as the by-law provides.

b) Malgré le paragraphe 9(15), le permis de taxi du titulaire décédé peut être transféré à sa succession, ou à un membre de sa famille immédiate, si le transfert lui est effectué par la succession à titre gratuit.

. . .

9.3 a) Le titulaire du permis de taxi ne peut l'aliéner, notamment par transfert, sauf si les conditions suivantes sont réunies :

(1) il le fait conformément au présent règlement et à la réglementation;

(2) il acquitte les droits de transfert prévus dans le présent règlement.

Municipal Government Act, R.S.A. 1980, ch. M-26

[TRADUCTION]

234(1) Le conseil peut, par règlement, assortir de conditions les permis d'exploitation des services de taxi et de limousine ainsi que régir et contrôler l'exploitation de ces services.

(2) Il peut, par règlement, notamment :

a) fixer les tarifs ou les prix des courses de taxi ou de limousine;

b) limiter le nombre de permis de taxi et de limousine qui peuvent être délivrés dans la municipalité compte tenu de sa population ou de la région à desservir, ou selon tout autre critère qu'il estime juste et équitable;

. . .

(8) Il peut, par règlement, établir une commission, la commission des taxis, qui :

a) est formée du nombre d'électeurs résidents de son choix, y compris, si cela semble souhaitable, tout membre du conseil ou fonctionnaire de la municipalité dont la présence est jugée appropriée;

b) peut exercer tout pouvoir ou prendre toute décision qu'il est habilité à exercer ou prendre en vertu du présent article de la façon prévue au règlement.

Municipal Government Act, S.A. 1994, c. M-26.1

3 The purposes of a municipality are

(a) to provide good government,

(b) to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality, and

(c) to develop and maintain safe and viable communities.

. . .

7 A council may pass bylaws for municipal purposes respecting the following matters:

(a) the safety, health and welfare of people and the protection of people and property;

. . .

(d) transport and transportation systems;

(e) businesses, business activities and persons engaged in business; . . .

8 Without restricting section 7, a council may in a bylaw passed under this Division

(a) regulate or prohibit;

(b) deal with any development, activity, industry, business or thing in different ways, divide each of them into classes and deal with each class in different ways;

(c) provide for a system of licences, permits or approvals, including . . . :

. . .

(iii) prohibiting any development, activity, industry, business or thing until a licence, permit or approval has been granted;

(iv) providing that terms and conditions may be imposed on any licence, permit or approval,

Municipal Government Act, S.A. 1994, ch. M-26.1

[TRADUCTION]

3 La municipalité a pour objets :

a) d'assurer un bon gouvernement;

b) de fournir les services, les installations ou autres choses qui, selon le conseil, sont nécessaires ou utiles à l'ensemble ou à une partie de la collectivité,

c) de créer et de maintenir des collectivités sûres et viables.

. . .

7 Le conseil peut, par règlement, régir au niveau municipal les domaines suivants :

a) la sécurité, la santé et le bien-être des personnes et la protection des personnes et des biens;

. . .

d) le transport et les systèmes de transport;

e) les entreprises, les activités commerciales et les personnes qui exercent des activités commerciales; . . .

8 Sans que soit limitée la portée générale de l'article 7, il peut, par règlement pris en vertu de la présente section :

a) réglementer une activité ou l'interdire;

b) prendre des mesures à l'égard de tout développement ou de toute activité, industrie, entreprise ou chose de différentes façons, les classer par catégorie et prendre des mesures différentes pour chaque catégorie;

c) établir un régime de licences, de permis ou d'agréments, notamment [. . .];

. . .

(iii) interdire tout développement ou toute activité, industrie, entreprise ou chose jusqu'à l'obtention d'une licence, d'un permis ou d'un agrément;

(iv) prévoir que les licences, permis ou agréments peuvent être assortis de conditions,

the nature of the terms and conditions and who may impose them;

(v) setting out the conditions that must be met before a licence, permit or approval is granted or renewed, the nature of the conditions and who may impose them;

(vi) providing for the duration of licences, permits and approvals and their suspension or cancellation for failure to comply with a term or condition of the bylaw or for any other reason specified in the bylaw;

. . .

9 The power to pass bylaws under this Division is stated in general terms to

(a) give broad authority to councils and to respect their right to govern municipalities in whatever way the councils consider appropriate, within the jurisdiction given to them under this or any other enactment, and

(b) enhance the ability of councils to respond to present and future issues in their municipalities.

. . .

715 A bylaw passed by a council under the former *Municipal Government Act* . . . continues with the same effect as if it had been passed under this Act.

énoncer ces conditions et préciser qui peut les imposer;

(v) définir les conditions d'octroi ou de renouvellement de licences, permis ou agréments et préciser qui peut les imposer;

(vi) prévoir la durée de validité des licences, permis ou agréments et leur suspension ou annulation pour défaut de se conformer à une condition du règlement ou pour tout autre motif prévu par le règlement;

. . .

9 Le pouvoir de prendre des règlements en vertu de la présente section est formulé en termes généraux dans les buts suivants :

a) conférer un pouvoir général aux conseils et respecter leur droit de gouverner les municipalités de la façon qu'ils jugent appropriée, dans les limites de la compétence qui leur est conférée par la présente loi ou tout autre texte;

b) renforcer la capacité des conseils de régler les questions qui se posent et se poseront dans leur municipalité.

. . .

715 Tout règlement pris par le conseil en vertu de l'ancienne *Municipal Government Act* . . . continue à s'appliquer comme s'il avait été pris en vertu de la présente loi.

III. Analysis

A. *The Standard of Review*

5 The only question in this case is whether the freeze on the issuance of taxi plate licences was *ultra vires* the City under the *Municipal Government Act*. Municipalities do not possess any greater institutional competence or expertise than the courts in delineating their jurisdiction. Such a question will always be reviewed on a standard of correctness: *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 29. There is no need to engage in the pragmatic and functional approach in a review for *vires*; such an inquiry is

III. Analyse

A. *La norme de contrôle*

En l'espèce, il faut seulement se demander si, en vertu de la *Municipal Government Act*, la Ville a commis un excès de pouvoir en gelant la délivrance des plaques de taxi. Les municipalités ne possèdent pas une expertise ou compétence institutionnelle plus grande que les tribunaux pour délimiter leur compétence. L'examen d'une telle question devra toujours se faire selon la norme de la décision correcte : *Nanaimo (Ville) c. Rascal Trucking Ltd.*, [2000] 1 R.C.S. 342, 2000 CSC 13, par. 29. Il n'est pas nécessaire de procéder à une analyse

only required where a municipality's adjudicative or policy-making function is being exercised.

B. *The Proper Approach to the Interpretation of Municipal Powers*

The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. This notable shift in the nature of municipalities was acknowledged by McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at pp. 244-45. The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced: *Nanaimo*, *supra*, at para. 18. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters: *The Municipal Act*, S.M. 1996, c. 58, C.C.S.M. c. M225; *Municipal Government Act*, S.N.S. 1998, c. 18; *Municipal Act*, R.S.Y. 2002, c. 154; *Municipal Act, 2001*, S.O. 2001, c. 25; *The Cities Act*, S.S. 2002, c. C-11.1. This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes: *Shell Canada*, at pp. 238 and 245.

Alberta's *Municipal Government Act* follows the modern method of drafting municipal legislation. The legislature's intention to enhance the powers of its municipalities by drafting the bylaw passing provisions of the Act in broad and general terms is expressly stated in s. 9. Accordingly, to determine whether a municipality is authorized to exercise a certain power, such as limiting the issuance of taxi plate licences, the provisions of the Act must be construed in a broad and purposive manner.

pragmatique et fonctionnelle pour déterminer s'il y a eu excès de pouvoir; une telle démarche ne s'impose que dans le cas où une municipalité exerce une fonction juridictionnelle ou une fonction de prise de décisions de principe.

B. *L'interprétation correcte des pouvoirs municipaux*

6 L'évolution de la municipalité moderne a entraîné un virage dans la démarche à adopter pour interpréter les lois habilitant les municipalités. Dans *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231, p. 244-245, la juge McLachlin (plus tard Juge en chef) reconnaît ce virage notable dans la nature des municipalités. La dichotomie entre interprétation « bienveillante » et interprétation « stricte » fait place à une interprétation téléologique large des pouvoirs municipaux : *Nanaimo*, précité, par. 18. Cette méthode d'interprétation s'est développée en même temps que la méthode moderne de rédaction des lois sur les municipalités. Plusieurs provinces, au lieu de conférer aux municipalités des pouvoirs précis dans des domaines particuliers, préfèrent leur accorder un pouvoir général dans des domaines définis en termes généraux : *Loi sur les municipalités*, L.M. 1996, ch. 58, C.P.L.M. ch. M225; *Municipal Government Act*, S.N.S. 1998, ch. 18; *Loi sur les municipalités*, L.R.Y. 2002, ch. 154; *Loi de 2001 sur les municipalités*, L.O. 2001, ch. 25; *Cities Act*, S.S. 2002, ch. C-11.1. Ce virage en matière de rédaction législative reflète la véritable nature des municipalités modernes, qui ont besoin de plus de souplesse pour réaliser les objets de leur loi habilitante : *Shell Canada*, p. 238 et 245.

7 La *Municipal Government Act* de l'Alberta suit la méthode moderne de rédaction des lois sur les municipalités. L'intention du législateur d'accroître les pouvoirs des municipalités en formulant en termes larges et généraux les dispositions de la loi relatives à la prise de règlements est expressément énoncée à l'art. 9. De ce fait, pour déterminer si une municipalité est habilitée à exercer un pouvoir donné, comme celui de limiter le nombre de plaques de taxi, il faut donner une interprétation téléologique large aux dispositions de la loi.

8 A broad and purposive approach to the interpretation of municipal legislation is also consistent with this Court's approach to statutory interpretation generally. The contextual approach requires "the words of an Act . . . to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26. This approach is also consistent with s. 10 of Alberta's *Interpretation Act*, R.S.A. 2000, c. I-8, which provides that every provincial enactment must be given a fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

Une interprétation téléologique large des lois sur les municipalités est également compatible avec l'approche générale adoptée par la Cour en matière d'interprétation législative. Selon l'analyse contextuelle, il faut interpréter [TRADUCTION] « les termes d'une loi dans leur contexte global selon le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur » : E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26. Cette approche concorde également avec l'art. 10 de l'*Interpretation Act* de l'Alberta, R.S.A. 2000, ch. I-8, qui prévoit que tout texte de la province s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

C. *The City's Power to Limit the Number of Licences*

C. *Le pouvoir de la Ville de limiter le nombre de permis*

9 The respondents argue that the City does not have the power to limit the number of taxi plate licences under the Act. They submit that the authority to regulate has never implied numerical limits and that ss. 7 and 8 of the current *Municipal Government Act*, unlike s. 234 of the previous *Municipal Government Act*, neither expressly nor impliedly grant a municipality the power to limit the number of taxi plate licences. The respondents argue that while the Act expands the "matters" over which municipalities may enact bylaws under s. 7, the Act limits the "powers" exercisable by municipalities to those expressly specified. As the power to limit the number of taxi plate licences is not expressly specified in s. 8, the respondents allege it has been abolished.

Les intimés soutiennent que la Ville n'a pas le pouvoir de limiter le nombre de plaques de taxi en vertu de la loi. Ils font valoir que le pouvoir de réglementer n'a jamais impliqué le pouvoir d'imposer des limites quantitatives et que les art. 7 et 8 de la *Municipal Government Act* actuelle, contrairement à l'art. 234 de l'ancienne *Municipal Government Act*, n'accordent ni expressément ni implicitement aux municipalités le droit de limiter le nombre de plaques de taxi. Selon eux, alors qu'elle élargit les « domaines » dans lesquels les municipalités peuvent prendre des règlements en vertu de l'art. 7, la loi limite les « pouvoirs » pouvant être exercés par les municipalités à ceux qu'elle prévoit expressément. Comme le pouvoir de limiter le nombre de plaques de taxi n'est pas expressément prévu par l'art. 8, les intimés affirment qu'il a été supprimé.

10 In my respectful opinion, the respondents' argument must fail.

À mon avis, l'argument des intimés doit être rejeté.

11 It is well established that the legislature is presumed not to alter the law by implication: *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 395. Rather, where it intends to depart from prevailing law, the legislature will do so expressly. Here, there is no indication in the Act that the legislature intended to remove the municipality's

Il est bien établi que le législateur est présumé ne pas modifier implicitement le droit : *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 395. Lorsqu'il a l'intention de s'écarter du droit existant, le législateur le fait expressément. En l'espèce, rien dans la loi n'indique que le législateur avait l'intention de supprimer le pouvoir des

power to limit the number of taxi plate licences. To the contrary, s. 9(b) indicates that the legislature did not intend to curtail the powers exercised by municipalities but rather sought to enhance those powers under the new Act subject to the limitations in ss. 70 to 75, which do not preclude limiting the number of taxi licences. It is inconceivable, in my view, that the legislature would have intended to indirectly limit the ability of municipalities to regulate the taxi industry according to a practice dating 15 years and to adopt the restrictive approach defined in *Merritt v. City of Toronto* (1895), 22 O.A.R. 205, at pp. 207-8, simply by changing its method of drafting legislation. The new method was in fact specifically designed to avoid the need for listing specific matters and powers. Accordingly, a provision explicitly limiting the number of licences such as s. 13(1)(a) of the *Wildlife Act*, R.S.A. 2000, c. W-10, and s. 37(1)(d) of the *Gaming and Liquor Act*, R.S.A. 2000, c. G-1, is unnecessary.

The respondents' narrow interpretation cannot be reconciled with the language of the Act. According to the respondents, the broad authority conferred on municipalities only applies to s. 7 which deals exclusively with matters and not to s. 8 which deals exclusively with powers. I disagree. First, s. 9 clearly states that the power to pass bylaws is stated in general terms to "give broad authority" in respect of matters attributed to them. Second, to accept this matter/power distinction renders the opening words of s. 8, "[w]ithout restricting section 7", useless. Rather, ss. 7 and 8 must be read together, as one is without restriction to the other. Section 8 is supplementary to s. 7 and speaks of the "broad authority" mentioned in s. 9. On this reading of ss. 7, 8 and 9 the respondents' interpretation must be rejected because their narrow and literal approach to s. 8 effectively restricts s. 7, which grants the power to regulate businesses.

municipalités de limiter le nombre de plaques de taxi. Au contraire, l'al. 9b) indique que le législateur n'avait pas l'intention de diminuer les pouvoirs des municipalités, mais cherchait plutôt à les accroître en vertu de la nouvelle loi, sous réserve des art. 70 à 75, qui n'empêchent pas la limitation du nombre de permis de taxi. Il est inconcevable, selon moi, que le législateur ait eu l'intention de limiter indirectement la capacité des municipalités de réglementer le secteur des taxis selon une méthode vieille de 15 ans et d'adopter l'approche restrictive énoncée dans *Merritt c. City of Toronto* (1895), 22 O.A.R. 205, p. 207-208, simplement en modifiant sa méthode de rédaction législative. En fait, la nouvelle méthode visait spécialement à éviter d'avoir à énumérer des domaines de compétence et des pouvoirs précis. Il est donc inutile d'avoir une disposition qui limite expressément le nombre de permis, comme l'al. 13(1)a) de la *Wildlife Act*, R.S.A. 2000, ch. W-10, et l'al. 37(1)d) de la *Gaming and Liquor Act*, R.S.A. 2000, ch. G-1.

12 L'interprétation restrictive proposée par les intimés ne peut se concilier avec le libellé de la loi. Selon les intimés, le pouvoir général conféré aux municipalités ne s'applique qu'à l'art. 7, qui porte exclusivement sur les domaines de compétence, et non à l'art. 8, qui porte exclusivement sur les pouvoirs. Je ne suis pas de cet avis. Premièrement, l'art. 9 dit clairement que le pouvoir de prendre des règlements est formulé en termes généraux afin de [TRADUCTION] « conférer un pouvoir général » aux municipalités dans les domaines qui leur sont attribués. Deuxièmement, admettre cette distinction entre domaines de compétence et pouvoirs enlève toute utilité à l'expression [TRADUCTION] « [s]ans que soit limitée la portée générale de l'article 7 » dans le passage introductif de l'art. 8. Les articles 7 et 8 doivent plutôt être lus ensemble, l'un ne devant pas limiter la portée de l'autre. L'article 8, qui complète l'art. 7, traite du « pouvoir général » mentionnée à l'art. 9. Selon cette interprétation des art. 7, 8 et 9, la position des intimés doit être rejetée parce que leur interprétation restrictive et littérale de l'art. 8 limite effectivement la portée de l'art. 7, qui confère le pouvoir de réglementer les activités commerciales.

13 Applying a broad and purposive interpretation, ss. 7 and 8 grant the City the power to pass bylaws limiting the number of taxi plate licences. As discussed, s. 8 supplements s. 7 by illustrating some of the broad powers exercisable by a municipality. Here the power to limit the number of licences could fall under either s. 8(a), the power to regulate, or s. 8(c), the power to provide for a system of licences. To "regulate", as defined in the *Oxford English Dictionary* (2nd ed. 1989), vol. XIII, is "subject to . . . restrictions". Thus, as O'Leary J.A. in dissent aptly stated, the "jurisdiction to regulate the taxi business necessarily implies the authority to limit the number of TPLs [taxi plate licences] issued": para. 202. This accords with the legislative history.

14 The power to limit the issuance of licences also falls under the power to provide for a system of licences under s. 8(c). Sections 8(c)(i) through (vi) represent some of the types of bylaws that provide for a system of licences. The use of the word "including" indicates that the list is non-exhaustive; therefore, any type of bylaw that is consistent with the list is authorized. There is clearly no room for the application of the *expressio unius est exclusio alterius* principle advocated by the respondents. Common to each of the provisions is the power to impose limitations on licences such as setting out the conditions that must be satisfied before a licence is granted or renewed. The bylaw limiting the number of taxi plate licences is consistent with the examples provided as it also imposes a specific limit on a licensed activity.

15 The respondents have also argued that the bylaw is inconsistent with the right to enjoyment of property protected by the *Alberta Bill of Rights*, R.S.A. 2000, c. A-14, s. 1, and with s. 3 of the *Municipal Government Act* which provides that the purposes of municipalities are good governance and the development and maintenance of safe and viable communities. Both arguments relate to the effects of the bylaw which the respondents allege have transformed taxi licences into an expensive commodity benefiting a small group of brokers.

L'application d'une interprétation téléologique large permet de conclure que les art. 7 et 8 habilitent la Ville à prendre des règlements limitant le nombre de plaques de taxi. Comme nous l'avons vu, l'art. 8 complète l'art. 7 en donnant quelques exemples du pouvoir général dont est dotée une municipalité. En l'espèce, le pouvoir de limiter le nombre de permis pourrait découler soit du pouvoir de réglementer, prévu à l'al. 8a), soit du pouvoir d'établir un régime de permis, prévu à l'al. 8c). Le terme « réglementer », selon *Le Nouveau Petit Robert* (2003), p. 2218, signifie « [a]ssujettir à un règlement ». Et comme le dit si bien le juge O'Leary dans sa dissidence, le [TRADUCTION] « pouvoir de réglementer le secteur des taxis comporte nécessairement le pouvoir de limiter le nombre de plaques de taxi délivrées » : par. 202. Cela concorde avec l'historique législatif.

Le pouvoir de limiter le nombre de permis découle également du pouvoir d'établir un régime de permis en vertu de l'al. 8c). Les sous-alinéas 8c)(i) à (vi) représentent quelques types de règlements établissant un régime de permis. L'emploi du terme « notamment » indique que la liste n'est pas exhaustive; par conséquent, tout type de règlement compatible avec la liste est autorisé. Il n'est clairement pas possible d'appliquer le principe défendu par les intimés selon lequel la mention de l'un implique l'exclusion de l'autre. Le pouvoir d'assortir de restrictions la délivrance de permis en prévoyant, par exemple, les conditions d'octroi ou de renouvellement, est commun à chacune des dispositions. Le règlement limitant le nombre de plaques de taxi est compatible avec les exemples fournis en ce qu'il impose aussi une limite précise à une activité autorisée.

Les intimés ont également fait valoir que le règlement porte atteinte à leur droit à la jouissance de leurs biens garanti par l'art. 1 de l'*Alberta Bill of Rights*, R.S.A. 2000, ch. A-14, et qu'il allait à l'encontre de l'art. 3 de la *Municipal Government Act*, qui précise que les municipalités ont pour objets d'assurer un bon gouvernement et de créer et de maintenir des collectivités sûres et viables. Ces deux arguments ont trait aux effets du règlement, lequel aurait, selon les intimés, transformé le permis de taxi en un produit coûteux qui profite à un petit groupe de courtiers.

As noted earlier in these reasons, there is no challenge before this Court to the legislation based on the *Charter* and no record to support the allegation now being made that the *Alberta Bill of Rights* has been breached. This Court in *Bell ExpressVu*, *supra*, at para. 62, held that absent any challenge on constitutional grounds, courts are bound to interpret and apply statutes in accordance with the sovereign intent of the legislature. In this case, I find no ambiguity in the legislation that would bring me to consider whether the Act is reflective of *Charter* values and no reason to question the authority of the Council for the City of Calgary to decide the best interests of its citizens in the regulation of the taxi industry. Here, as in *Bell ExpressVu*, some citizens are affected by the restrictions imposed, but this has no bearing on the jurisdiction of the municipal government to regulate.

Accordingly, the City of Calgary was authorized under the Act to enact Bylaw 91/77.

IV. Conclusion

The appeal is allowed with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: City of Calgary Law Department, Calgary.

Solicitors for the respondents United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal and Haringer Singh Dhesi: Dale Gibson & Associates, Edmonton.

Solicitors for the respondent Air Linker Cab Ltd.: Zinner & Sara, Calgary.

Solicitor for the intervener: Attorney General of Alberta, Edmonton.

16 Comme je l'ai mentionné au début de mes motifs, la loi ne fait l'objet d'aucune contestation, devant la Cour, fondée sur la *Charte*, et aucun document n'a été soumis à l'appui de l'allégation de violation de l'*Alberta Bill of Rights* qui est maintenant soulevée. Dans *Bell ExpressVu*, précité, par. 62, la Cour a statué qu'en l'absence de contestation fondée sur des motifs d'ordre constitutionnel, les tribunaux ne peuvent qu'interpréter et appliquer les textes législatifs selon l'intention souveraine du législateur. En l'espèce, je ne vois aucune ambiguïté dans la loi qui m'oblige à me demander si elle respecte les valeurs véhiculées par la *Charte*, et aucune raison de mettre en doute la compétence du conseil de la Ville de Calgary pour décider du meilleur intérêt de ses citoyens en matière de réglementation du secteur des taxis. En l'espèce, comme dans *Bell ExpressVu*, certains citoyens sont touchés par les limites imposées, mais cela n'a aucune incidence sur la compétence du gouvernement municipal en matière de réglementation.

17 En conséquence, la Ville de Calgary était habilitée par la loi à édicter le règlement 91/77.

IV. Conclusion

18 Le pourvoi est accueilli avec dépens dans toutes les cours.

Pourvoi accueilli avec dépens.

Procureur de l'appelante : Contentieux de la Ville of Calgary, Calgary.

Procureurs des intimés United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal et Haringer Singh Dhesi : Dale Gibson & Associates, Edmonton.

Procureurs de l'intimée Air Linker Cab Ltd. : Zinner & Sara, Calgary.

Procureur de l'intervenant : Procureur général de l'Alberta, Edmonton.

In the Court of Appeal of Alberta

Citation: R. v. Debaji Foods Ltd., 1981 ABCA 109

Date: 19810428
Docket: 14301
Registry: Edmonton

Between:

Her Majesty the Queen

Respondent

- and -

Debaji Foods Ltd.

Appellant

The Court:

The Honourable Mr. Justice Haddad
The Honourable Mr. Justice Harradence
The Honourable Mr. Justice Stevenson

Reasons for Judgment of The Honourable Mr. Justice Stevenson
Concurred in by The Honourable Mr. Justice Haddad
Concurred in by The Honourable Mr. Justice Harradence

COUNSEL:

D.W. Lutz, Esq., for the appellant

John W. McIsaac, Esq., for the respondent.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE STEVENSON

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[1] This is a case stated by the Court of Queen's Bench pursuant to s.406 of *The Municipal Government Act,* R.S.A. 1970, c.246, as amended. It raises questions as to the

validity of a business closing by-law enacted by the City of Wetaskiwin under ss. 231 and 232 of the Act.

[2] The appellant was convicted on a charge that it remained open in violation of s.7 of the by-law. The by-law is No. 776-79 and is the appendix to this judgment. The conviction was upheld on an appeal to the Court of Queen's Bench and the judge sitting on appeal was required by the appellant to state a case. The stated case asks if the judge erred in holding (1) that the by-law was not void for uncertainty, (2) that it was not void for discrimination, and (3) that the conviction was proper.

[3] An agreed statement of facts was filed. The appellant concedes that it opened its grocery store on a holiday and that its operations do not come within any of the apparent exceptions to the closing by-law. Its sole argument is that the by-law is bad.

[4] Sections 231 and 232 of *The Municipal Government Act* provide:

> "231. The council may by by-law provide for all matters or things relating to the days and hours wherein shops or one or more classes of shops shall be permitted to remain open or shall be required to close, and for such purposes may
>
> (a) exempt shops or one or more classes of shops, designated as to size or type, from any of the provisions of such by-law;
>
> (b) designate by type the merchandise that may be sold or exposed for sale during the hours that any shops or one or more classes of shops are permitted to remain open;
>
> (c) impose conditions which must be met by any shops or one or more classes of shops that are permitted to remain open, including a condition that a specified minimum number of employees shall be on the shop premises at such times as are specified.
>
> 232. The council, by by-law, may require that during the whole or any part of a holiday as defined in *The Interpretation Act* or of a day proclaimed as a civic holiday, all shops, businesses and industries or any specified class or classes thereof be closed and remain closed."

[5] Section 2 31 clearly authorizes discrimination and in argument before us the appellant sought only to impeach the by-law for uncertainty. The question of discrimination was not argued and it follows that the judges below did not err in holding that the by-law was not invalidated by reason of discrimination.

[6] The by-law sets closing hours by s.2. It then lists classes of operations in s.3 to which the by-law applies. The reach of s.2 is further extended by s.5 to cover virtually any

retail sales. Section 7 then says all classes of business and shops are required to close on holidays. Section 4 founds the focus of the attack on the by-law. It is an exempting provision and reads:

> "4. The following classes of business and shops are exempt from the provisions of this By-Law under the authority of Section 231 of the Municipal Government Act:
>
> (i) Garages and Service Stations
>
> (ii) Corner Stores limited to Fourteen Hundred (1400) square feet of floor area in commercial use
>
> (iii) Convenience Stores
>
> (iv) Stores located in a Neighborhood Commercial Zone as designated in the Zoning By-Law of the City of Wetaskiwin."

[7] It may be noted that ss.231 and 232 both form a legislative foundation for the by-law. It is s.2 31 that authorizes exemptions and s.4 of the by-law is specifically related to that section. It is the position of the City of Wetaskiwin that the exemption authorized by s.231 extends to holiday closing under s.232, a view shared by the appellant. No attempt was made to uphold the by-law as requiring universal holiday closing of all businesses and shops.

[8] The appeal, then, was advanced on the basis that s.4 is, in part, invalid for uncertainty. Counsel for the respondent took the position that any uncertainty found in s.4 could be cured by simply severing the offensive provisions.

[9] Counsel for the respondent stressed that the Court should give a benevolent interpretation to the by-law and that every effort should be made to sustain it consistent with ordinary rules of construction. Difficulty in interpretation is not to be confused with vagueness and uncertainty to the point of invalidity. The respondent cited 24 Halsbury (3d) 517; 2 Rogers Law of Canadian Municipal Corporations, 2nd edition, p.1024; *Re Bent* [1940] 2 W.W.R. 702; *Neilson Engineering Ltd. v. Toronto* (1967) 66 D.L.R. (2d) at page 223; *Re Shops Regulation By-Law of Corporation of the City of North Vancouver* [1972] 2 W.W.R. 628. We accept these general principles.

[10] Both counsel agreed that s.s.(i) gave rise to no uncertainty. Both counsel agreed that s.s.(iv) could not be given any content as there is no such designation as "a Neighborhood Commercial Zone" in the Zoning By-Law. Both counsel also agreed that if

that subsection were an attempt to exempt by location, as distinct from size or type, it would probably fall.

[11] I turn now to 4 (ii). There is a definition of "Corner Store" in s.1 (ii) of the by-law and it reads:

> "(ii) 'Corner Store' means a shop used for the sale of goods in accordance with the City of Wetaskiwin Zoning By-Law."

An examination of the Zoning By-Law undertaken by counsel for the respondent produced two references, one being its listing as a conditional use in an R-2 zone, the other a parenthetical reference under restrictions (imposing certain conditions for developments), where one set of restrictions is labeled "Neighborhood Shopping Centres (Including Corner Stores)". There is no definition or description. I have no hesitation in saying that s.s.(ii) is impossible to apply sensibly and is bad for uncertainty.

[12] Both counsel argued the validity of 4 (iii). The by-law defines Convenience Store as:

> "(iii) 'Convenience Store' means a shop emphasizing the sale of tobacco, confectionary, newspapers, magazines and paper books and may have an area not exceeding two hundred (200) square feet which may be used for the sale of consumer produce of all types."

That definition is not too happily worded. It appears to necessitate an emphasis on all of the subjects of sale, being conjunctive, and leaves an interpreter to struggle with the expression "emphasizing". It probably means "having an area not exceeding two hundred square feet" and "produce" probably means products or merchandise. In view of the conclusion to which I have come I need not determine the validity of this subsection. It is sufficient to note that in any revision of the by-law more precision might be sought.

[13] As neither (ii) nor (iv) restrict the kind of merchandise that may be sold it is these exemptions that would permit the sale of groceries outside the restricted business hours or on holidays.

[14] I mention, to reject, an argument put forward by the appellant. Counsel argues that if council defines classes under the opening words of s.231 it is obliged to use the same classes in its exemption provisions. He argues there is no power to create different classes or sub-classes. I do not agree. It is clear to me that in phrasing exemptions council may use a different description in designating as to size or type or type of merchandise and is free to "reclassify" in so doing.

[15] At least two exemptions are incapable of application. Can those provisions be severed leaving the by-law to mandate closing of all but Garages and Service Stations and Convenience Stores? Is this a proper case for severance?

[16] When part of a by-law is invalid severance of the bad part tends to be a rewriting of the by-law. To refuse to sever leaves no part of the by-law in place and necessitates rewriting by the municipal council. It is, of course, preferable that that body rather than the Court undertake the task. In order to sever there must be a perfect and complete by-law capable of being enforced: Rogers, *op. cit.* at 1032. At 1033 of Rogers it is said:

> "The intention of the council should therefore be looked at …. the parts upheld must form, independently of the invalid portion, a complete law in some reasonable aspect so that it may fairly be concluded that the council would have enacted it without the invalid part."

Applying the latter test I am unable to conclude that council would have enacted the remainder. The result would be to close all shops except those engaged in the sale of tobacco, confectionary, newspapers, magazines and paper books. It is clear that it was intended to exempt some stores which could, *inter alia,* sell groceries. That, of course, is a common exception to closing by-laws. As is said in *Varga* (1979) 8 M.P.L.R. 51 at 61:

> "The issue of severability is one that turns on the presumed intention of the council that enacted the by-law. The Courts cannot legislate: they must search for the intention of the council. Thus, if the excision of a part of a by-law leaves something that does not appear that a council would enact, it is easy to infer a contrary intention and quash the whole by-law."

If the severance were permitted the effect would be to leave the citizens without any stores that could sell groceries after hours or on holidays. I do not think council would have enacted such a by-law. This conclusion is like that of Aylesworth, J.A. in *Re Musty 's Service Station Ltd. v. Ottawa* [1959] O.R. 342 at 350 where severance would have left no Sunday opening of gasoline stations. The exemptions appear to be an integral and indispensable part of the by-law and therefore this invalidity does not, in my view, create a case for severance.

[17] The stated case is answered accordingly. The by-law is not void as discriminatory. It is, in part, void for uncertainty and falls in total. The appellant could not properly be convicted. The conviction is set aside and the fine paid is to be returned. Costs were not sought and are not awarded.

Dated at EDMONTON, Alberta
this 28th day of April, 1981.

APPENDIX

BY-LAW 776-79

A BY-LAW OF THE CITY OF WETASKIWIN IN THE PROVINCE OF ALBERTA GOVERNING THE DAYS AND HOURS WHEN SHOPS OF ALL CLASSES SHALL BE PERMITTED TO REMAIN OPEN AND WHEN SUCH SHOPS SHALL BE REQUIRED TO REMAIN CLOSED.

WHEREAS under the provisions of the Municipal Government Act, R.S.A. 1970, Section 231, 2 32, and 233 Council may provide for all matters or things relating to the days and hours wherein shops or one or more classes of shops shall be permitted to remain open or shall be required to close.

AND WHEREAS the Wetaskiwin Chamber of Commerce and Agriculture has requested Council of the City of Wetaskiwin to pass a By-Law to govern the days when such shops of all classes shall be permitted to remain open or shall be required to remain closed.

AND WHEREAS the council of the City of Wetaskiwin deems it expedient to update its Store Hours By-Law because of recent amendments and a further request for amendment by the Wetaskiwin Chamber of Commerce.

NOW THEREFORE the Municipal Council of the City of Wetaskiwin hereby enacts a By-Law to regulate store hours in the City.

1. Interpretation

In this By-Law:

(i) "Shop" means any building or portion of a building, booth, stall or place where goods are exposed or offered for sale by retail and includes barber shops, ladies hairdressing, manicuring and beauty parlours;

(ii) "Corner Store" means a shop used for the sale of goods in accordance with the City of Wetaskiwin Zoning By-Law;

(iii) "Convenience Store" means a shop emphasizing the sale of tobacco, confectionary, newspapers, magazines and paper books and may have an area not exceeding two

hundred (200) square feet which may be used for the sale of consumer produce of all types.

2. All classes of businesses and shops hereinafter enumerated, located within the jurisdictional boundaries of the City of Wetaskiwin shall be closed and remain closed for the servicing of customers as follows:

(i) On Monday, Tuesday, Wednesday, and Saturday of each week throughout the year at 6:00 o'clock P.M.

(ii) On Thursday and Friday throughout the year at 9:00 o'clock P.M.

(iii) Exceptions to the foregoing closing hours shall be as follows:

(a) Businesses and shops may remain open until 9:00 o'clock P.M. on the last three (3) business days prior to Christmas except on Christmas Eve or Saturday.

(b) When a holiday falls on Thursday or Friday during the year, businesses and shops may remain open the Wednesday immediately prior thereto until 9:00 o'clock P.M.

3. The following classes of businesses and shops and combinations of business operations are subject to the provisions of this By-Law as set forth in the following categories:

Supermarkets, Grocery Stores, Department Stores, Meat Markets, Bakeries, Hardware Stores, Appliance and T.V. Stores, Furniture Stores, Jewellery Stores, Stationery, Book and Novelty Stores, Travel Agencies, Real Estate and Insurance Agencies, Sewing Machine and Fabric Stores, Sporting Goods Stores, Paint and Floor Covering Stores, Hairdressers and Beauty Parlours, Barbershops, Mail Order Houses, Florists, Office Equipment Supplies and Maintenance Stores, Clothing and Footwear Stores, Upholstery Shops, New and Second Hand Merchandise Stores, Dry Cleaners, Music Stores and Seed Houses, Plumbing, Sheet Metal and Heating Supplies, Lumberyards, Building Supplies Dealers, Tire Shops and Service Area, Farm Implement Dealers, Welding and Welding Supply Outlets, Drug Stores, Photographers, Auto Supplies, Printers & Publishers.

4. The following classes of business and shops are exempt from the provisions of this By-Law under the authority of Section 231 of the Municipal Government Act:

(i) Garages and Service Stations

(ii) Corner Stores limited to Fourteen Hundred (1400) square feet of floor area in commercial use

(iii) Convenience Stores

(iv) Stores located in a Neighborhood Commercial Zone as designated in the Zoning By-Law of the City of Wetaskiwin

5. The Provisions of Section 2 herein shall apply to any business or shop not specifically named in this By-Law which sells or exposes for sale, merchandise to the general public.

6. Machine Shops, Implement Shops, Farm Service Depots and Garage Parts Departments may make sales in the case of an emergency repair, such sale shall be limited to the parts required in the emergency or the repair of parts.

7. All classes of businesses and shops shall be required to close during any day defined as a holiday in the Interpretation Act or of a day declared as a civic holiday.

8. The provisions of this By-Law shall be subject to the exemptions set forth in Section 2 36 of the Municipal Government Act.

9. On request by the Chamber of Commerce for special shopping hours not covered by this By-Law, Council may by resolution set the hours for such occasion.

10. Any person violating any of the provisions of this By-Law shall be liable on summary conviction to a fine not exceeding $100.00 exclusive of costs and in default of payment to imprisonment for a period not exceeding sixty (60) days.

11. No person shall be deemed guilty of an offence against this By-Law who serves after the closing hour any customer who was in the shop at such hour.

12. Upon coming into force of this By-Law all previous closing By-Laws shall be and are hereby repealed.