IN THE MATTER OF AN APPEAL BEFORE THE MUNICIPAL BOARD OF MANITOBA
PURSUANT TO SECTION 118.2(1) OF THE PLANNING ACT

HUGH MUNRO CONSTRUCTION LTD.,
6901142 MANITOBA LTD. and LILYFIELD QUARRY INC.

("Appellant")

- and –

RURAL MUNICIPALITY OF ROSSER

("Respondent")

SUBMISSIONS OF THE APPELLANT
STANDARD OF REVIEW AND JURISDICTION
Hearing Date: Tuesday, August 18, 2020 at 9:30 a.m.

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SUBMISSIONS OF THE APPELLANT
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List of Documents Relied Upon

1. Consent Order / Municipal and Appellant Consent to Conditions dated July 9, 2020
2. Executed Development Agreement dated July 17, 2020 (deposited in escrow)

List of Authorities Relied Upon (excerpts unless otherwise noted)

Tab

1. *The Planning Act*, C.C.S.M. c. P80, ss. 106, 118
2. *City Centre Equities Inc. v. Regina (City)*, 2018 SKCA 43
3. *British Columbia Chicken Marketing Board v. British Columbia Marketing Board*, 2002 BCCA 473
4. *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55
5. *Technical Safety BC v. BC Frozen Foods Ltd*, 2019 BCSC 716
6. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65
7. *Habib Transport Ltd. (Re)*, 2019 ABTSB 1741
8. *The Municipal Board Act*, C.C.S.M. c. M240, ss. 15(2), 24(1)-(4)
9. Procedure at Aggregate Appeal Hearings – Municipal Board of Manitoba
10. *Friesen (Brian Neil) Dental Corp. et al. v. Director of Companies Office (Man.) et al.*, 2011 MBCA 20
11. *R. v. Anthony-Cook*, 2016 SCC 43
12. *Pillay, Re*, 2018 CarswellMan 223
13. *Altus Group v The City of Edmonton*, 2019 ABECARB 336
14. *Jaskarn Sidhu v The City of Edmonton*, 2020 ABELARB 12

Factual Background

1. Hugh Munro Construction Ltd., 6901142 Manitoba Ltd. and Lilyfield Quarry Inc. (together, the "**Appellant**") has proposed the development and operation of a limestone aggregate quarry on property in the NE, SE and SW of Section 17-12-2 EPM in the Rural Municipality of Rosser (the "**Municipality**") in the Province of Manitoba (the "**Planned Area**"). The Planned Area is zoned "A80" Agricultural Zone in the Municipality's Zoning By-law 15-14 and requires a conditional use for an aggregate extraction operation.

2. In June 2018, the Appellant submitted an application for approval of a conditional use to the Municipality as required by section 103 of *The Planning Act*, C.C.S.M. c. P80 **(Tab 1)**.

3. On September 7, 2019, the Municipality held a public hearing to receive representations from the Appellant and other interested persons in respect of the proposed conditional use. After holding the hearing, the Municipality rejected the Appellant's application without reasons. The Appellant appealed the decision of the Municipality to the Municipal Board (the "**Board**") as permitted by section 118.2(1)(a) of *The Planning Act* and closing submissions are scheduled for August 18, 2020.

4. In the interim, the Municipality and the Appellant have reached an agreement whereby the Appellant may operate a quarry in the Planned Area under a conditional use on the conditions set out in the Consent Order dated July 9, 2020, including the requirement that the Appellant and the Municipality enter into a development agreement addressing certain issues relating to the development and operation of the quarry. The parties have agreed to the terms of and executed a development agreement dated July 17, 2020.

5. The Board has requested that the parties provide answers to the following questions in their respective submissions in advance of the hearing on August 18, 2020:

1) What is the standard for review for a Municipal Board Appeal?

2) What is the jurisdiction of the Municipal Board to Accept, Modify or Reject, agreed upon condition(s)?

What is the standard for review for a Municipal Board Appeal?

6. A recent decision from the Saskatchewan Court of Appeal offers guidance on the proper approach in determining the standard of review to be applied by an appellate administrative tribunal reviewing the decision of another administrative tribunal. In *City Centre Equities Inc. v. Regina (City)*, the Court was tasked with determining the proper standard of review to be applied by the Assessment Appeals Committee of the Saskatchewan Municipal Board of Revision when reviewing a decision regarding a tax assessment made by the Board of Revision.

***City Centre Equities Inc. v. Regina (City)*, 2018 SKCA 43 (Tab 2)**

7. The Court in *City Centre* undertook a comprehensive review of the law on the standard of review of appellate administrative tribunals across Canadian jurisdictions at paragraphs 38 to 59, and concluded as follows:

> [58] Conflicting approaches have been taken in the above-noted decisions but, in general terms, there is one common element among them: the intention of the legislature as revealed by statutory interpretation ultimately determines what standard of review an appellate tribunal should apply. I agree with Jenkins C.J.P.E.I., who expressed the following in *Dyment*:
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> > [40] Counsel cited jurisprudence in this and other jurisdictions as examples of hybrid standards of review. While this case law provides a window on the world of internal standard of review, it provides only limited assistance on the standard

> of review issue in this appeal. It always depends on the language of the enabling statute; all cases cited share the view that standard of review is a matter that depends on statutory interpretation. None suggest that a new standard is called for only because *Dunsmuir* and its progeny call for deference in judicial review of administrative decision-making. Those cases come to a variety of conclusions; and most do not necessarily prescribe deference. It always depends. Some, or most, of the decisions acknowledge virtues of deference; however, the particular decision on extent of deference is often left with the appellate tribunal rather than being imposed as a judicial requirement.
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> [59] In my view, this is the proper approach to determining the standard of review that the Committee should apply in the present case. The standard of review should be determined by conducting a full exercise in statutory interpretation, which ultimately will answer what respective roles the Legislature intended the Committee and Board to fulfill…

***City Centre*, supra, paras. 58-59 (Tab 2)**

8. The Court reviewed the governing legislative scheme and concluded that the legislature intended the Assessment Appeals Committee to fulfill a role akin to a traditional appellate court, and thus it was to apply a deferential standard of review of reasonableness. The Court's decision turned on the fact that appeals to the Appeals Committee proceeded "on the record" with the Board of Revision functioning as a trial-level decision maker and receiving evidence and the Appeals Committee reviewing the Board's decision for error. In this case, the legislation was clear in that the function of the Appeals Committee was not to rehear the case or receive new evidence.

***City Centre*, supra, paras. 98-101 (Tab 2)**

9. The British Columbia Court of Appeal applied the same analysis in *British Columbia Chicken Marketing Board v. British Columbia Marketing Board* in determining the standard of review of an appellate administrative tribunal. At issue was the appropriate standard of review on

an appeal from the B.C. Chicken Marketing Board to the provincial Marketing Board under section 8 of the *Natural Products Marketing (B.C.) Act*.

***British Columbia Chicken Marketing Board v. British Columbia Marketing Board*, 2002 BCCA 473 (Tab 3)**

10. Unlike the legislative scheme in *City Centre*, the legislation in *Marketing Board* mandated that the provincial Marketing Board was to hold a full hearing into the merits to decide the appeal and to give the parties an opportunity to present evidence and be represented by counsel. The legislation also endowed the Board with discretion to receive any evidence it considered necessary without regard to rules of evidence and to make any decision it considered appropriate, including to vary, confirm or reverse the decision under appeal. In light of the legislative scheme, the British Columbia Court of Appeal upheld the Marketing Board's decision to review the appeal on a standard of correctness, finding that:

> [13] The statutory regime created by this legislation clearly indicates that an appeal to the Marketing Board is to be in the nature of a full hearing into the merits of the case. There is nothing in the legislation to suggest that the Marketing Board must give any or any significant deference to the decision of a commodity board, such as the Chicken Board. Where the Chicken Board has heard no evidence, information or argument and has offered no reasons for its decision, the Marketing Board has little alternative under its statutory adjudication regime other than to determine the facts and issues based on the evidence and argument presented to it. It has the power to conduct a full hearing into the merits.
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> ...
>
> [16] The Marketing Board did not err in applying the standard of correctness...

***Marketing Board, supra*, paras. 13, 16 (Tab 3)**

11. The *Marketing Board* decision was cited with approval by the Supreme Court of Canada in *Paul v. British Columbia (Forest Appeals Commission)*.

***Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, para. 44 (Tab 4)**

12. More recently, the British Columbia Supreme Court confirmed in *Technical Safety BC v. BC Frozen Foods Ltd.* that, where an appeal is conducted as a new hearing before an appellate administrative tribunal as opposed to an appeal "on the record", a correctness standard of review is appropriate. That case involved a contest between two statutory decision-makers – the Safety Standard Appeal Board and Technical Safety BC, a subordinate decision-maker. The Board's decision to apply a correctness standard of review was upheld by the Court in view of the legislative scheme which dictated that the appeal was to proceed as a new hearing:

> [40] In the Decision at paras. 22-25, the Board justifies its adoption of a correctness standard of review in assessing penalties by reference to provisions of the *SSA*, the judgment of Rowles J.A. in *Investment Industry Regulatory Organization of Canada v. Rahmani*, 2010 BCCA 93 (in Chambers) [IIROC], and its own jurisprudence. Addressing the legislative scheme, it notes the requirement of s. 53 that an appeal is conducted as a new hearing, its exclusive jurisdiction over all matters of fact, law or discretion arising in an appeal, and the limitations on judicial review imposed by s. 60.
>
> [41] This reasoning is not irrational or obviously flawed. The application of a correctness standard of review has been respected by the courts addressing other legislative schemes providing for an "internal" appeal to a specialized administrative tribunal…

***Technical Safety BC v. BC Frozen Foods Ltd*, 2019 BCSC 716, paras. 40-41 (Tab 5)**

13. It follows from these authorities that the standard of review the Board is to apply on an appeal under section 118.2(1)(a) of *The Planning Act* depends on the nature of the appeal and the role the legislature intended the Board to fulfill.

14. The most recent pronouncement from the Supreme Court of Canada on standard of review in the case of *Canada (Minister of Citizenship and Immigration) v. Vavilov* does not change the analysis. *Vavilov* concerned the standard of review to be applied by a court in reviewing a decision of an administrative-decision maker, not the standard of review to be applied by an appellate administrative tribunal in reviewing the decision of another administrative decision-maker, as in the case here.

***Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (Tab 6)**

***Habib Transport Ltd. (Re)*, 2019 ABTSB 1741, paras. 27-40 (Tab 7)**

15. It is clear from a review of the legislative scheme contained in Part 1 of *The Municipal Board Act*, Part 7 of *The Planning Act* and the rules of procedure published by the Board, that an appeal pursuant to section 118.2(1)(a) is to be conducted as a hearing *de novo* without deference to the decision of council.

16. The Board is established pursuant to section 2 of *The Municipal Board Act* and by virtue of section 15(2) has the discretion to conduct its proceedings "in such manner as may seem to it most convenient for the speedy and effectual dispatch of business". The Board is the master of its own procedure in that all hearings conducted by the Board are to be governed "by rules adopted by the board" (s.24(1)) and the Board "is not bound by the technical rules of legal evidence" (s.24(2)).

17. In addition, this Board is empowered to make rules of practice regulating its procedure (s.24(3)) and has all the powers of a judge of the Court of Queen's Bench in respect of the

attendance and examination of witnesses and the production of documents, among other judicial-like powers (s.24(4)).

***The Municipal Board Act*, supra, ss. 15(2), 24(1)-(4) (Tab 8)**

18. An application for approval of a conditional use is made at first instance to the council of the municipality in which the affected property is located, or the board of the planning district in which the affected property is located if the district has adopted a district-wide zoning by-law.

***The Planning Act*, supra, s. 103(3) (Tab 1)**

19. Upon receiving an application the council or planning commission is required to hold a public hearing to receive representations from any person on the application (s.105). After holding the hearing the council or planning commission must make an order rejecting the application or approving the application if the conditional use proposed in the application: (i) will be compatible with the general nature of the surrounding area, (ii) will not be detrimental to the health or general welfare of people living or working in the surrounding area, or negatively affect other properties or potential development in the surrounding area, and (iii) is generally consistent with the applicable provisions of the development plan by-law, the zoning by-law and any secondary plan by-law (s.106(1)).

20. The council or planning commission has the discretion to impose any conditions on the approval that it considers necessary to meet the above criteria and to require the affected property to enter into a development agreement (s.106(2)). In this case, the Municipality rejected the Appellant's application for conditional use without providing reasons.

21. The legislative scheme dictates that an applicant is entitled to appeal a decision rejecting a conditional use application (or a decision to impose conditions) as of right to the Board by virtue of section 118.2(1)(a). Section 118.3(1) provides that the Board "must hold a hearing to consider the appeal" and that the Board is mandated to reject the proposal or approve the proposal subject to any conditions that it considers appropriate (s.118.4(1)). In other words, the Board is tasked with determining the merits of the application, not reviewing council's decision for error. This interpretation is consistent with the fact that there is no legislative requirement for council to provide reasons in support of whatever decision it makes under section 106(2).

22. The rules of procedure pertaining to "Aggregate Appeal Hearings" published by the Board are an essential component of the legislative scheme and, upon review, invariably lead to the conclusion that an appeal under section 118.2(1)(a) is a new hearing into the merits of the conditional use application. In particular:

> 2. A hearing before the Board is separate and distinct from previous council and public hearings on the matter. It is not a town hall meeting.
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> 7. All evidence given at the hearing of an appeal will be given under oath or affirmation.
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> 10. Each party will have an opportunity to present their case and call witnesses. The other parties will have an opportunity to cross-examine the evidence that has been presented. The Board may also question a party or witness on the evidence presented.
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> 14. At the conclusion of the hearing, the Panel will consider all of the evidence and make its decision within 30 days. A copy of the written Decision and Order and supporting reasons will be sent to the Appellant, the Municipality, and the Board of the Planning District or Planning Commission (as applicable), and any other person who was given notice of the hearing.
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> 16. The Board will not accept any information or evidence after the hearing has concluded.

17. The Board has final discretion in the manner in which the hearing of an appeal is conducted. The Board may in its discretion dispense with, vary or amend these procedures.

Procedure at Aggregate Appeal Hearings – Municipal Board of Manitoba (Tab 9)

23. The legislative scheme, defined in large part by the rules of procedure adopted by the Board, clearly envisions that an appeal under section 118.2(1) will be conducted as a new hearing and not an "appeal" in the traditional sense of reviewing the subordinate decision-maker's decision for error. Were this not the case, the parties to the appeal should have no ability to adduce evidence, call witness or cross examine as of right (as they do) and similarly there should be no requirement on the Board to "consider all of the evidence" in making its decision. The right to present further evidence is a defining characteristic of a hearing *de novo*. The procedures adopted by the Board in regards to aggregate appeals impose no restrictions on a party's ability to present evidence at the appeal.

***Friesen (Brian Neil) Dental Corp. et al. v. Director of Companies Office (Man.) et al.*, 2011 MBCA 20, para. 33 (Tab 10)**

24. It is also significant that there is no reference in the legislation to the appeal being conducted "on the record" or any reference to a "record" for that matter. An appeal is commenced simply by sending a notice of appeal to the Board within 30 days after the council gives notice of its decision (s.118.2(2)).

25. The legislative intent is clear in that an appeal pursuant to section 118.2(1) is to be conducted as a hearing *de novo* and not an appeal on the record. The Board owes no deference to the decision of council and, similar to the situations in *Marketing Board*, *Habib* and *Technical*

Safety BC, the Board's role is to decide the application on its merits with reference to the statutory criteria articulated in section 106(1)(b) of *The Planning Act*.

26. The Appellant therefore submits that the applicable standard of review is one of no deference to the Municipality's decision or, stated another way, a standard of correctness.

What is the jurisdiction of the Municipal Board to Accept, Modify or Reject, agreed upon condition(s)?

27. The agreed upon Consent Order and conditions therein are a detailed and thoughtfully prepared product of negotiations between the Municipality and the Appellant, and is tantamount to a joint recommendation to this Board for the approval of the proposed conditional use on the conditions outlined therein.

28. It is not in dispute that the combined effect of sections 118.4(1) and 106(2) of *The Planning Act* is to confer upon the Board broad discretion to impose any conditions on the approval that it considers appropriate to meet the statutory requirements of section 106(1)(b). This means that the Board is free to accept, modify or reject an agreed upon condition if the Board is satisfied that the condition(s) as drafted does not further one of the objectives outlined in section 106(1)(b). That being said, for the reasons below, a joint recommendation by the Municipality and the Appellant who is undertaking the conditional use should be afforded significant weight in the Board's analysis.

29. By way of analogy, in the criminal law context it is not unusual for the Crown and defence counsel to agree to a joint submission on sentence in exchange for a guilty plea. Generally, such agreements are unexceptional and are readily approved by trial judges without

difficulty. The Supreme Court of Canada has cautioned that a joint submission on sentence "should not be rejected lightly" and that the threshold for doing so is "undeniably high" in that trial judges should not depart from a joint submission "unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest".

***R. v. Anthony-Cook*, 2016 SCC 43, paras. 29-31 (Tab 11)**

30. The benefits of a joint submission in the criminal context include minimizing legal costs, certainty and the desirability of having the litigants craft a solution they can both live with. Even outside the criminal context the reasoning in *Anthony-Cook* is sound and the "public interest test" outlined therein has been adopted and applied in the administrative law context across Canada, including in Manitoba.

***Pillay, Re*, 2018 CarswellMan 223, para. 47 (Tab 12)**

31. An appeal under section 118.2(1) is designed to be adversarial with the municipality and the applicant each presenting their own evidence in support of their desired outcomes and challenging the other's evidence through cross examination. There is no reason why parties to an appeal before the Board ought not to be encouraged to put forward a joint recommendation for the same reasons that these types of recommendations are so strongly encouraged and protected in the criminal context.

32. It is safe to assume that, very often, a joint recommendation will save the time and expense associated with a contentious appeal. Ignoring or giving inadequate consideration to a joint recommendation, which has been crafted by the parties most affected by the outcome, will have a chilling effect on settlement.

33. It should be the goal of every appellate administrative tribunal, including the Board, to promote settlement provided that the outcome is consistent with the objectives of the legislative scheme.

34. While every legislative scheme is different, it is worth noting that joint recommendations are not uncommon in municipal law cases and the following are just some examples:

a) *Altus Group v The City of Edmonton*, 2019 ABECARB 336 (**Tab 13**): The Edmonton Composite Assessment Review Board accepted a joint recommendation from the complainant taxpayer and the respondent City of Edmonton Assessment and Taxation Branch to change the assessed value of the subject property because the joint recommendation was "fair and equitable".

b) *Jaskarn Sidhu v The City of Edmonton*, 2020 ABELARB 12 (**Tab 14**): The Edmonton Local Assessment Review Board accepted a joint recommendation as to the sales of comparable properties and to reduce the assessed value of the subject property.

35. Persuasive jurisprudence dictates that joint recommendations should not be rejected lightly. The Appellant therefore submits that even though this Board has the jurisdiction to amend or reject an agreed upon condition, the Municipality and the Appellant are well placed to arrive at a joint recommendation that reflects the interests of the public. The parties have done just that, and so it is the Appellant's position that the conditions as agreed should be accepted by the Board without revision.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11th DAY OF AUGUST, 2020.

PER: 

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PART 7

CONDITIONAL USES

DIVISION 1

GENERAL CONDITIONAL USES

APPLICATIONS

Requirement for approval
103(1) No person may undertake a conditional use without first obtaining approval under this Part.

Applicants
103(2) An application for approval of a conditional use must be made by the owner of the affected property, or a person authorized in writing by the owner.

Application to board or council
103(3) The application must be made to

(a) the council of the municipality in which the affected property is located; or

(b) the board of the planning district in which the affected property is located, if the planning district has adopted a district-wide zoning by-law under section 69.

Application requirements
103(4) The application must be in the form and accompanied by any supporting material and fee required by the board or council.

PARTIE 7

USAGES CONDITIONNELS

SECTION 1

USAGES CONDITIONNELS GÉNÉRAUX

DEMANDES

Exigences relatives à l'approbation
103(1) Nul ne peut se prévaloir d'un usage conditionnel sans avoir obtenu au préalable une approbation en vertu de la présente partie.

Auteur de la demande
103(2) La demande visant l'approbation d'un usage conditionnel doit être présentée par le propriétaire de la propriété visée, ou par une personne que le propriétaire a autorisée par écrit.

Demande présentée à la commission ou au conseil
103(3) La demande doit être présentée, selon le cas :

a) au conseil de la municipalité où la propriété visée est située;

b) à la commission du district d'aménagement du territoire où la propriété visée est située, si le district d'aménagement du territoire a adopté un règlement de zonage à l'échelle du district en vertu de l'article 69.

Exigences relatives à la demande
103(4) La demande doit revêtir la forme et être accompagnée des documents à l'appui et des droits que la commission ou le conseil exige.

Authority respecting conditional uses

104 A board or council may, by by-law, authorize a planning commission to consider and make decisions on applications for conditional uses or specified types of conditional uses. Applications must be referred to the planning commission in accordance with the by-law.

Pouvoirs concernant les usages conditionnels

104 La commission ou le conseil peut, par règlement, autoriser une commission d'aménagement du territoire à examiner les demandes visant des usages conditionnels ou certains types d'usages conditionnels et à rendre des décisions à cet égard. Les demandes doivent être renvoyées à la commission d'aménagement du territoire en conformité avec le règlement.

Public hearing

105 Upon receiving an application for approval of a conditional use, the board, council, or planning commission must

(a) hold a public hearing to receive representations from any person on the application; and

(b) give notice of the hearing in accordance with section 169.

Audience publique

105 Sur réception d'une demande visant l'approbation d'un usage conditionnel, la commission, le conseil ou la commission d'aménagement du territoire doit :

a) tenir une audience publique pour recevoir les observations de quiconque désire en présenter au sujet de la demande;

b) donner avis de l'audience en conformité avec l'article 169.

Decision

106(1) After holding the hearing, the board, council or planning commission must make an order

(a) rejecting the application; or

(b) approving the application if the conditional use proposed in the application

(i) will be compatible with the general nature of the surrounding area,

(ii) will not be detrimental to the health or general welfare of people living or working in the surrounding area, or negatively affect other properties or potential development in the surrounding area, and

(iii) is generally consistent with the applicable provisions of the development plan by-law, the zoning by-law and any secondary plan by-law.

Décision

106(1) Après avoir tenu l'audience, la commission, le conseil ou la commission d'aménagement du territoire doit, par ordre :

a) soit rejeter la demande;

b) soit approuver la demande, si l'usage conditionnel proposé dans la demande répond aux conditions suivantes :

(i) il sera compatible avec la nature générale de la périphérie,

(ii) il n'aura pas d'effet préjudiciable sur la santé ou le bien-être général des personnes qui habitent ou travaillent dans la périphérie, ni sur d'autres propriétés ou mises en valeur potentielles dans la périphérie,

(iii) il est conforme, de manière générale, aux dispositions applicables du règlement portant sur le plan de mise en valeur, du règlement de zonage et de tout règlement portant sur un plan secondaire.

Conditions of approval

106(2) When approving an application for a conditional use, the board, council or planning commission may, subject to section 107 and subsections 116(2) and (3) (conditions on livestock operations),

(a) impose any conditions on the approval that it considers necessary to meet the requirements of clause (1)(b); and

(b) require the owner of the affected property to enter into a development agreement under section 150.

Revoking approval

106(3) The approval of a conditional use may be revoked if the applicant or the owner of the affected property fails to comply with the conditional use order or a condition imposed under subsection (2).

Modification of conditions

106(4) A condition imposed on the approval of a conditional use may be changed only by following the same process required to approve a new conditional use under this Part.

Conditions on small livestock operations

107(1) Only the following conditions may be imposed on the approval of a conditional use for a livestock operation involving fewer than 300 animal units, and any condition must be relevant and reasonable:

(a) measures to ensure conformity with the applicable provisions of the development plan by-law, the zoning by-law and any secondary plan by-law;

(b) one or both of the following measures intended to reduce odours from the livestock operation:

(i) requiring covers on manure storage facilities,

Conditions d'approbation

106(2) Au moment d'approuver une demande d'usage conditionnel, la commission, le conseil ou la commission d'aménagement du territoire peut, sous réserve de l'article 107 et des paragraphes 116(2) et (3), prendre les mesures suivantes :

a) imposer les conditions d'approbation qui, à son avis, sont nécessaires pour satisfaire aux exigences de l'alinéa (1)b);

b) exiger du propriétaire de la propriété visée qu'il conclue une entente de mise en valeur en vertu de l'article 150.

Révocation de l'approbation

106(3) L'approbation d'un usage conditionnel peut être révoquée si l'auteur de la demande ou le propriétaire de la propriété visée omet de se conformer à l'ordre d'usage conditionnel ou à une condition imposée en vertu du paragraphe (2).

Modification des conditions

106(4) Les conditions imposées au moment de l'approbation d'un usage conditionnel ne peuvent être modifiées que selon la procédure requise pour approuver un nouvel usage conditionnel en vertu de la présente partie.

Conditions applicables aux exploitations de bétail à petite échelle

107(1) L'approbation d'un usage conditionnel pour une exploitation de bétail concernant moins de 300 unités animales ne peut être assujettie qu'à des conditions qui appartiennent à une ou à des catégories ci-dessous et qui soient pertinentes et raisonnables :

a) des mesures pour assurer la conformité avec les dispositions applicables du règlement portant sur le plan de mise en valeur, du règlement de zonage et de tout règlement portant sur un plan secondaire;

b) l'une des deux mesures suivantes ou les deux mesures suivantes, qui aient pour but de réduire les odeurs provenant de l'exploitation de bétail :

(i) exiger que soient recouvertes les installations d'entreposage de déjections,

(ii) requiring shelter belts to be established;

(c) requiring the owner of the affected property to enter into a development agreement dealing with the affected property and any contiguous land owned or leased by the owner, on one or more of the following matters:

(i) the timing of construction of any proposed building,

(ii) the control of traffic,

(iii) the construction or maintenance — at the owner's expense or partly at the owner's expense — of roads, traffic control devices, fencing, landscaping, shelter belts or site drainage works required to service the livestock operation,

(iv) the payment of a sum of money to the planning district or municipality to be used to construct anything mentioned in subclause (iii).

(ii) exiger l'usage de brise-vent;

c) une disposition selon laquelle le propriétaire de la propriété visée doit conclure une entente de mise en valeur au sujet de la propriété visée ou de tout bien-fonds contigu qu'il possède ou qu'il loue, et selon laquelle une telle entente doit traiter de l'un ou de plusieurs des sujets suivants :

(i) les échéances relatives à la construction des bâtiments proposés,

(ii) la réglementation de la circulation,

(iii) la construction ou l'entretien des chemins, des dispositifs de signalisation, du clôturage, de l'aménagement paysager, des brise-vent ou des travaux de drainage requis pour desservir l'exploitation de bétail, aux frais du propriétaire ou en partie aux frais de celui-ci,

(iv) le paiement au district d'aménagement du territoire ou à la municipalité d'un montant devant être affecté à la construction des choses mentionnées au sous-alinéa (iii).

No conditions re manure
107(2) No conditions may be imposed respecting the storage, application, transport or use of manure from a livestock operation described in subsection (1), other than a condition permitted under clause (1)(b).

Interdiction d'imposer des conditions concernant les déjections
107(2) Aucune condition portant sur l'entreposage, l'épandage, le transport ou l'usage de déjections provenant de l'exploitation de bétail décrite au paragraphe (1) ne peut être imposée à moins d'être permise en vertu de l'alinéa (1)b).

Notice of decision
108 The board, council or planning commission must send a copy of its order to the applicant and every person who made a representation at the hearing held under section 105.

Avis de la décision
108 La commission, le conseil ou la commission d'aménagement du territoire doit envoyer une copie de son ordre à l'auteur de la demande et à toutes les personnes ayant présenté des observations lors de l'audience tenue en vertu de l'article 105.

No appeal
109(1) Except as provided in section 118.2, the order of a board or council on an application for approval of a conditional use is final and not subject to appeal.

Aucun appel
109(1) Sous réserve de l'article 118.2, l'ordre que donne une commission ou un conseil relativement à une demande visant l'approbation d'un usage conditionnel est définitif et sans appel.

(b) the applicant obtains every approval, including any permit or licence, required under an Act, regulation or by-law in respect of the proposed operation or expansion, and complies with, or agrees to comply with, any condition attached to the approval.

b) l'auteur de la demande n'a pas obtenu toutes les approbations voulues, y compris les permis ou licences, que prescrivent les lois ou des règlements, municipaux ou autres, relativement à l'exploitation ou à l'expansion proposée, et il ne s'est pas conformé ou n'a pas accepté de se conformer aux conditions d'approbation.

DIVISION 3

APPEALS CONCERNING AGGREGATE QUARRIES AND LARGE-SCALE LIVESTOCK OPERATIONS

Definitions

118.1 The following definitions apply in this Division.

"aggregate quarry" has the same meaning as in subsection 1(1) of *The Mines and Minerals Act*. (« carrière d'agrégat »)

"large-scale livestock operation" means a livestock operation that is subject to Division 2. (« exploitation de bétail à grande échelle »)

S.M. 2018, c. 14, s. 20.

Right to appeal

118.2(1) An applicant may appeal the following decisions of a board, council or planning commission to the Municipal Board:

(a) for an application for approval of a conditional use made in respect of an aggregate quarry,

(i) a decision to reject the application,

(ii) a decision to impose conditions;

(b) for an application for approval of a conditional use made in respect of a large-scale livestock operation,

SECTION 3

APPELS RELATIFS AUX CARRIÈRES D'AGRÉGAT ET AUX EXPLOITATIONS DE BÉTAIL À GRANDE ÉCHELLE

Définitions

118.1 Les définitions qui suivent s'appliquent à la présente section :

« carrière d'agrégat » S'entend au sens du paragraphe 1(1) de la *Loi sur les mines et les minéraux*. ("aggregate quarry")

« exploitation de bétail à grande échelle » Exploitation de bétail visée à la section 2. ("large-scale livestock operation")

L.M. 2018, c. 14, art. 20.

Droit d'appel

118.2(1) L'auteur d'une demande peut interjeter appel auprès de la Commission municipale des décisions indiquées ci-dessous rendues par une commission, un conseil ou une commission d'aménagement du territoire :

a) à l'égard d'une demande visant l'approbation d'un usage conditionnel à l'égard d'une carrière d'agrégat :

(i) une décision portant rejet de la demande,

(ii) une décision portant imposition de conditions;

b) à l'égard d'une demande visant l'approbation d'un usage conditionnel à l'égard d'une exploitation de bétail à grande échelle :

(i) a decision to reject the application,

(ii) a decision to impose conditions.

How to appeal

118.2(2) An appeal may be commenced by sending a notice of appeal to the Municipal Board within 30 days after the board, council or planning commission gives notice of its decision under

(a) section 108, in respect of an application concerning an aggregate quarry; or

(b) section 117, in respect of an application concerning a large-scale livestock operation.

Notice of appeal

118.2(3) A notice of appeal must include the following information:

(a) the legal description of the land that is subject to the application and the name of the municipality in which the land is located;

(b) the name and address of the appellant;

(c) if the decision being appealed relates to conditions imposed in a conditional approval, a description of the conditions being appealed.

S.M. 2018, c. 14, s. 20.

Appeal hearing

118.3(1) The Municipal Board must hold a hearing to consider the appeal.

Notice of hearing

118.3(2) At least 14 days before the hearing, the Municipal Board must send notice of the hearing to the appellant, the board, council or planning commission and any other person the Municipal Board considers appropriate.

S.M. 2018, c. 14, s. 20.

(i) une décision portant rejet de la demande,

(ii) une décision portant imposition de conditions.

Procédure d'appel

118.2(2) L'appel peut être interjeté par l'envoi d'un avis d'appel à la Commission municipale dans les 30 jours suivant la date à laquelle la commission, le conseil ou la commission d'aménagement du territoire donne avis de sa décision en vertu :

a) de l'article 108, s'il s'agit d'une demande visant une carrière d'agrégat;

b) de l'article 117, s'il s'agit d'une demande visant une exploitation de bétail à grande échelle.

Avis d'appel

118.2(3) L'avis d'appel comprend les renseignements suivants :

a) la description légale du bien-fonds visé par la demande et le nom de la municipalité où il se situe;

b) le nom et l'adresse de l'appelant;

c) si la décision portée en appel se rapporte aux conditions imposées à l'égard de l'approbation d'un usage conditionnel, une mention des conditions faisant l'objet de l'appel.

L.M. 2018, c. 14, art. 20.

Audience d'appel

118.3(1) La Commission municipale tient une audience pour examiner l'appel.

Avis d'audience

118.3(2) Au moins 14 jours avant l'audience, la Commission municipale envoie un avis d'audience à l'appelant, à la commission, au conseil ou à la commission d'aménagement du territoire et à toute autre personne à laquelle elle estime indiqué de le faire parvenir.

L.M. 2018, c. 14, art. 20.

Decision of Municipal Board

118.4(1) The Municipal Board must make an order

(a) rejecting the proposal; or

(b) approving the proposal, subject to any conditions described in the following provisions that it considers appropriate:

(i) subsection 106(2), in the case of an aggregate quarry,

(ii) section 107, in the case of a large-scale livestock operation.

Notice of decision

118.4(2) The Municipal Board must make its order within 30 days after the hearing is concluded and must send a copy of the order to the appellant, the board, council or planning commission and any other party to the appeal.

Decision not subject to appeal

118.4(3) A decision of the Municipal Board on an appeal is final and not subject to further appeal.

S.M. 2018, c. 14, s. 20.

Effect of decision

118.5 The applicable board, council or planning commission continues to have jurisdiction under the following provisions in respect of an order made under section 118.4, but may not require the owner of the affected property to enter into a development agreement under section 150 unless the Municipal Board requires a development agreement as a condition under clause 118.4(1)(b):

(a) subsections 106(3) and (4) and section 110, in the case of an aggregate quarry;

(b) subsection 116(4), in the case of a large-scale livestock operation.

S.M. 2018, c. 14, s. 20.

Décision de la Commission municipale

118.4(1) Par ordonnance, la Commission municipale :

a) soit rejette la proposition;

b) soit l'approuve, sous réserve des conditions qu'elle estime indiquées et qui sont énoncées :

(i) au paragraphe 106(2), s'il s'agit d'une carrière d'agrégat,

(ii) à l'article 107, s'il s'agit d'une exploitation de bétail à grande échelle.

Avis de la décision

118.4(2) La Commission municipale rend son ordonnance dans les 30 jours après la date à laquelle l'audience a pris fin et en envoie une copie à l'appelant, à la commission, au conseil ou à la commission d'aménagement du territoire et à toute autre partie à l'appel.

Décision définitive et sans appel

118.4(3) La décision que la Commission municipale rend à l'égard d'un appel est définitive et ne peut faire l'objet d'aucun autre appel.

L.M. 2018, c. 14, art. 20.

Effet de la décision

118.5 La commission, le conseil ou la commission d'aménagement du territoire en question peut toujours exercer les attributions que lui confèrent les dispositions indiquées ci-dessous relativement à une ordonnance rendue en application de l'article 118.4, mais ne peut exiger du propriétaire de la propriété visée qu'il conclue une entente de mise en valeur en vertu de l'article 150 à moins que la Commission municipale n'ait imposé une telle condition conformément à l'alinéa 118.4(1)b) :

a) les paragraphes 106(3) et (4) et l'article 110, s'il s'agit d'une carrière d'agrégat;

b) le paragraphe 116(4), s'il s'agit d'une exploitation de bétail à grande échelle.

L.M. 2018, c. 14, art. 20.

2018 SKCA 43
Saskatchewan Court of Appeal

City Centre Equities Inc. v. Regina (City)

2018 CarswellSask 279, 2018 SKCA 43, 294 A.C.W.S. (3d) 177, 75 M.P.L.R. (5th) 179

City Centre Equities Inc., The Canada Life Assurance Company and HDL Investments Inc. (Appellants / Applicants) And City of Regina and Saskatchewan Assessment Management Agency (Respondents / Respondents)

Herauf, Whitmore, Ryan-Froslie JJ.A.

Heard: June 8, 2017
Judgment: June 6, 2018
Docket: CACV2867

Counsel: Leonard Andrychuk, Q.C., for Appellants
Jayne Krueger, for Respondents

Subject: Civil Practice and Procedure; Property; Public; Tax — Miscellaneous; Municipal

Headnote

Municipal law --- Municipal tax assessment — Practice and procedure on assessment appeals and objections — Appeal — Appeal by way of stated case
Appellant C Inc., CL Company, and HDL Inc. appealed from decision of Assessment Appeals Committee of Saskatchewan Municipal Board of Revision — Appeal allowed, decision of Committee was quashed, and decision of Board was affirmed — Assessor testified that capitalization rate achieved applied to all office buildings, with some variances for other components such as hotels — There did not appear to be evidence contradicting his testimony on this point — He testified building was only class A office building included in sales array — Nevertheless, appellant's argument regarding new equity provision was persuasive — It explicitly required assessor to apply market valuation standard ("MVS") in order to achieve equity — In cases such as this, where assessor could not satisfy MVS because of its use of non-market value sale, equity had not been achieved.

APPEAL by appellant C Inc., CL Company, and HDL Inc. from decision of Assessment

applied this standard of review in other decisions — citing *Costco Wholesale Canada Ltd. and Saskatoon (City), Re*, No 0081/2003, [2003] S.M.B.A.A.C.D. No. 84 (Sask. M.B.A.A.C.) at paras 34-35 (QL); *SAMA v Dixon*, No 0153/2002, [2003] SMBAACD No 144; and *Regina (City) and 451082 Ontario Ltd., Re*, No 0086/2003, [2004] S.M.B.A.A.C.D. No. 99 (Sask. M.B.A.A.C.).

35 There was no palpable and overriding error, argues the Appellant, because the evidence before the Committee supported the Board's factual findings. Relying on *Saskatoon (City) v. Wal-mart Canada Corp.*, 2015 SKCA 125, 472 Sask. R. 45 (Sask. C.A.), the Appellant argues finding the Board made a mistake is not the same as finding a material error of fact and reflects a relaxed interpretation of the standard of review. Further, the Appellant submits that even on a correctness standard, as suggested by the City, the evidence favours the conclusion that the sale was not arm's-length.

2. The City's position

36 The City submits the Committee applied the correct standard of review to the Board's decision. The City contends the following:

> (a) the standard of review should be that expressed in s. 226 of *The Cities Act* and prior jurisprudence, being correctness; or alternatively,
>
> (b) the standard of review is irrelevant because the Board's failure to adequately articulate its reasons for finding SGI and SaskPen were corporate affiliates amounts to a palpable and overriding error.

The City submits the Committee properly found the Board's conclusion was not supported by the facts and modified the decision to correct that error.

3. Standard of review analysis

37 This issue only deals with the standard of review applied by the Committee to the Board's factual findings and to questions of mixed fact and law where there is no extricable question of law, not the standard of review applicable to questions of law and questions of mixed fact and law where there is an extricable question of law.

a. Approach to determining the standard of review

38 Generally, the standard of review for applications for judicial review is dictated by *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) [*Dunsmuir*]. Where a

statute provides for an appeal from a decision of a specialized administrative tribunal, the applicable standards of review remain those that apply on judicial review as set out in *Dunsmuir*, not those applicable on appeal: *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 (S.C.C.) at paras 29, 37-38, and 43, [2015] 2 S.C.R. 3 (S.C.C.) [*Saguenay*]; or *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 (S.C.C.) at paras 29-30, [2016] 2 S.C.R. 293 (S.C.C.). However, the existence of a right of appeal may affect what deference is shown (*Saguenay* at para 43).

39 While *Dunsmuir* generally governs the determination of the standard of review applied by courts to tribunal decisions, other courts have questioned its application where an appellate tribunal reviews the decision of an administrative tribunal of first instance. The distinction between these contexts was described by Jenkins C.J.P.E.I. in *Prince Edward Island (Workers Compensation Board) v. Dyment*, 2016 PECA 10, 376 Nfld. & P.E.I.R. 107 (P.E.I. C.A.) [*Dyment*]:

> [39] Dunsmuir itself dealt with the standard of review by courts on judicial review of decisions of administrative tribunals. The important distinction is that the role of a reviewing court is to supervise a statutory tribunal, while the role of an appellate tribunal is to carry out an internal appellate function in accordance with the mandate prescribed by the relevant enabling legislation.

40 The Alberta Court of Appeal also noted a similar distinction in *Newton v. Criminal Trial Lawyers' Assn.*, 2010 ABCA 399, [2011] 4 W.W.R. 232 (Alta. C.A.) [*Newton*]:

> [37] The issues upon which leave to appeal was granted in this appeal arise in a different context from the other two standard of review paradigms: when an administrative structure includes a tribunal of first instance, and an appellate tribunal, what standard of review should the appellate tribunal apply to the decision of the tribunal of first instance? Should it apply the *Housen* [2002 SCC 33] analysis, or the *Dunsmuir/Pushpanathan* [2003 ABCA 346] analysis, or a different standard of review analysis altogether? While all the parties to this appeal assumed or conceded that the *Dunsmuir/Pushpanathan* analysis applies, neither the *Housen* analysis, nor the *Dunsmuir/Pushpanathan* analysis seems entirely apt. They are both based on different constitutional and legal foundations. The relationships that they govern are not necessarily the same as the relationship between an appellate tribunal and an administrative tribunal of first instance. The role of an internal appellate tribunal operating within an administrative structure is significantly different from that of an external reviewing superior court: *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585 at para. 44; *British Columbia (Chicken Marketing Board) v. British Columbia (Marketing Board)*, 2002 BCCA 473, 216 D.L.R. (4th) 587 at para. 14.
>
> (Emphasis added)

See also *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 (S.C.C.) at para 44, [2003] 2 S.C.R. 585 (S.C.C.); and *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93 (F.C.A.) at paras 47-48, (2016), 396 D.L.R. (4th) 527 (F.C.A.).

41 Because of this distinction, there is uncertainty regarding what approach should be taken in determining the standard of review to be applied by these appellate tribunals. This uncertainty was described by Richards J.A. (as he then was) in *Pearlman v. College of Medicine of the University of Saskatchewan*, 2006 SKCA 105, 273 D.L.R. (4th) 414 (Sask. C.A.):

> [59] The functional and pragmatic analysis was developed by the Supreme Court in the context of determining the level of deference which a court of law should show to an agency exercising statutory authority. There are now some cases which have extended that approach to the situation where one administrative agency has the authority to review the decisions of another agency. See, for example: *Budhai v. Canada (Attorney General)* (2002), 2002 FCA 298, 216 D.L.R. (4th) 594 (F.C.A.); *College of Hearing Aid Practitioners (Alberta) v. Zieniewicz* (2003), 2003 ABCA 346, 24 Alta. L.R. (4th) 59 (C.A.). However, it is fair to say that the law in this area is still emerging and is far from settled.
>
> [60] As a practical matter, the approach which [an adjudicator] will apply in adjudicating a complaint will necessarily be dependent on context. His role is flexible and may assume a character which has both appellate and supervisory characteristics. See: *R. v. University of London, ex parte Vijayatunga*, *supra* at p. 213. Thus, because his jurisdiction is not restricted to the sort of supervisory role played by the courts in judicial review proceedings, it is questionable whether the functional and pragmatic approach is an appropriate tool for determining how [an adjudicator] should approach a decision he or she has been asked to investigate. See: *Mohamed v. University of Saskatchewan* (2006), 2006 SKQB 23, 276 Sask. R. 87 (Q.B.) at para. 38.
>
> (Emphasis added)

See also *Mycyk v. University of Saskatchewan*, 2009 SKCA 71, [2009] 8 W.W.R. 615 (Sask. C.A.).

42 This uncertainty still exists in the jurisprudence today. In my view, the issue presented by this uncertainty is this: What approach should be taken in determining the standard of review to be applied by an administrative appellate tribunal to the decision of an administrative tribunal of first instance? That is, should the approach be that of *Dunsmuir*, the appellate standard as stated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) [*Housen*], or something else entirely?

43 As will be demonstrated below, courts have not followed *Dunsmuir* or *Housen* in this context, and have instead taken different approaches. While the proper approach and what

factors are considered remains unsettled, there is, nevertheless, one common theme among jurisdictions: What role did the Legislature intend the appellate tribunal to play? I will summarize the varying approaches taken to resolve this question.

44 At one time, the Alberta Court of Appeal relied on the pragmatic and functional approach, as established by three main cases: *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 1222 (S.C.C.) [*Pushpanathan*]; *College of Hearing Aid Practitioners (Alberta) v. Zieniewicz*, 2003 ABCA 346, 24 Alta. L.R. (4th) 59 (Alta. C.A.); and *Plimmer v. Calgary (City) Chief of Police*, 2004 ABCA 175, 354 A.R. 62 (Alta. C.A.). Subsequently, the Alberta Court of Appeal developed its own approach to this issue.

45 In *Newton* the Alberta Court of Appeal considered the standard of review a board should apply to the decision of the presiding officer and established the following approach:

> [42] The determination of the standard of review to be applied by an appellate administrative tribunal (here the Board) to the decision of an administrative tribunal of first instance (here the presiding officer) requires a consideration of many of the same factors that are discussed in *Housen* and *Dunsmuir/Pushpanathan*, adapted to the particular context: *College of Physicians and Surgeons of Ontario v. Payne* (2002), 219 D.L.R. (4th) 350, 163 O.A.C. 25 (Div. Ct.) at para. 20.
>
> [43] The following factors should generally be examined:
>
> (a) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;
>
> (b) the nature of the question in issue;
>
> (c) the interpretation of the statute as a whole;
>
> (d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;
>
> (e) the need to limit the number, length and cost of appeals;
>
> (f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and
>
> (g) other factors that are relevant in the particular context.

46 In *Pelech v. Alberta (Law Enforcement Review Board)*, 2010 ABCA 400 (Alta. C.A.) at para 22, (2010), 328 D.L.R. (4th) 156 (Alta. C.A.), the Court clarified that not all of these factors are in play in every analysis of standard of review. See also *Spinks v. Alberta (Law*

Enforcement Review Board), 2011 ABCA 162 (Alta. C.A.) at para 33, (2011), 505 A.R. 260 (Alta. C.A.); *Thompson Brothers (Construction) Ltd. v. Alberta (Workers' Compensation Board Appeals Commission)*, 2012 ABCA 78 (Alta. C.A.) at paras 16-17, (2012), 522 A.R. 118 (Alta. C.A.); *Edmonton Police Service v. Alberta (Law Enforcement Review Board)*, 2012 ABCA 357 (Alta. C.A.) at paras 21-22, (2012), 539 A.R. 177 (Alta. C.A.); *Kikino Métis Settlement v. Métis Settlements Appeal Tribunal*, 2013 ABCA 151 (Alta. C.A.) at paras 10-11, (2013), 361 D.L.R. (4th) 461 (Alta. C.A.); and *Lum v. Alberta Dental Assn. and College*, 2015 ABQB 12, 604 A.R. 117 (Alta. Q.B.) (aff'd 2016 ABCA 154 (Alta. C.A.)).

47 In British Columbia, the Court of Appeal has distinguished between situations where a court is involved and those where an appellate tribunal is involved: see *British Columbia (Chicken Marketing Board) v. British Columbia (Marketing Board)*, 2002 BCCA 473, 216 D.L.R. (4th) 587 (B.C. C.A.).

48 In *Harding v. Law Society of British Columbia*, 2017 BCCA 171, [2017] 12 W.W.R. 106 (B.C. C.A.), the central issue was the internal standard of review to be applied by a Law Society review board reviewing a hearing panel decision. Kirkpatrick J.A. found that the Court was not entitled to dictate the standard of review to be applied by Law Society review boards:

> [25] This brings me to the second reason for rejecting Mr. Harding's argument. Mr. Harding's submission assumes that this Court can dictate the standard of review to be applied by Law Society review boards. I disagree. In my opinion, Mr. Harding's submission ignores the purely supervisory role of this Court over administrative tribunals such as the Law Society review board. The confines of the Court's role were discussed in *Newton v. Criminal Trial Lawyers Association*, 2010 ABCA 399....
>
> [26] In my opinion, it is not for this Court to decide whether reasonableness is the internal standard of review for questions of mixed law and fact in every case. Mr. Cuttler argues that *Mohan* [2013 BCCA 489] and *Kay* [2015 BCCA 303] should be read as persuasive *dicta* that the internal standard of review for questions of mixed fact and law is reasonableness. However, if the standard of review is to be changed in this way, it is properly up to the Law Society or the Legislature to do so. This Court's role is not, as I said, to dictate the internal standard of review but to ensure that whatever standard is adopted is reasonable.
>
> (Emphasis added)

See also *Vlug v. Law Society of British Columbia*, 2017 BCCA 172, [2017] 8 W.W.R. 633 (B.C. C.A.); and *The Law Society of British Columbia v. McLean*, 2017 BCCA 388 (B.C. C.A.) at paras 18-19.

49 Federal Court decisions, like those in Alberta, have evolved in their approach over the last decade. There are decisions that applied the pragmatic and functional approach pre-*Dunsmuir*

(see *Budhai v. Canada (Attorney General)*, 2002 FCA 298 (Fed. C.A.) at para 26, (2002), 216 D.L.R. (4th) 594 (Fed. C.A.)). Subsequent decisions found the appellate tribunal must apply the standard of palpable and overriding error (see *Spasoja c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2014 FC 913 (F.C.) at para 39) and others condemned the application of the reasonableness standard in this context (see *Green v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 536 (F.C.) at paras 26-27, (2015), 479 F.T.R. 231 (F.C.); or *Taqadees v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 909 (F.C.) at paras 19-21, (2015), 37 Imm. L.R. (4th) 281 (F.C.)).

50 The Federal Court of Appeal has since clarified its approach in *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, 396 D.L.R. (4th) 527 (F.C.A.) [*Huruglica*]. The issue was the standard of review the Refugee Appeal Division should apply to decisions of the Refugee Protection Division. Gauthier J.A. rejected the use of the *Newton* factors and concluded the focus is on statutory interpretation:

> [46] I do not find the decision in *Newton* particularly useful. I believe that the determination of the role of a specialized administrative appeal body is purely and essentially a question of statutory interpretation, because the legislator can design any type of multi-level administrative framework to fit any particular context. An exercise of statutory interpretation requires an analysis of the words of the *IRPA* [*Immigration and Refugee Protection Act*, SC 2001, c 27] read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the *IRPA* and its object (Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983)). The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent in respect of the relevant provisions of the *IRPA* and the role of the RAD [Refugee Appeal Division].
>
> . . .
>
> [49] When the legislator designs a multi-level administrative framework, it is for the legislator to account for considerations such as how to best use the resources of the executive and whether it is necessary to limit the number, length and cost of administrative appeals. As will be discussed, the legislative evolution and history of the *IRPA* shed light on the policy reasons that guided the creation of the RAD and the role it was intended to fulfil. These policy considerations are unique to the RPD [Refugee Protection Division] and the RAD. Thus, one should not simply assume that what was deemed to be the best policy for appellate courts also applies to specific administrative appeal bodies.
>
> . . .
>
> [51] Rather, what I am saying is that one cannot simply decide that this standard will apply on the basis of one's own assessment of factors (e) and (f) listed in *Newton* (see paragraphs 10, 15 and 16 above). One must seek instead to give effect to the legislator's intent.

(Emphasis added)

51 In Nova Scotia, the standard of review to be applied by an appellate tribunal is not determined by the pragmatic and functional approach, by *Dunsmuir*, or by *Housen*. Instead, appellate tribunals "simply ha[ve] to follow the clear test set out in the legislation" as determined by the directions contained in the statute: *Federation of Nova Scotian Heritage v. Peninsula Community Council*, 2006 NSCA 115 (N.S. C.A.) at para 45, (2006), 248 N.S.R. (2d) 319 (N.S. C.A.). See also *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corp.*, 2010 NSCA 38 (N.S. C.A.) para 23, (2010), 290 N.S.R. (2d) 361 (N.S. C.A.), in which "the Board's task was effectively spelled out in the statute" (at para 44); *Royal Environmental Inc., Re*, 2012 NSCA 62 (N.S. C.A.) at para 41, (2012), 317 N.S.R. (2d) 341 (N.S. C.A.); *Ghosn v. Halifax (Regional Municipality)*, 2016 NSCA 90, 57 M.P.L.R. (5th) 211 (N.S. C.A.); and *Nova Scotia (Minister of Agriculture) v. Millett*, 2017 NSCA 2, 407 D.L.R. (4th) 691 (N.S. C.A.).

52 In Ontario, a functional and structural approach was taken in *College of Physicians & Surgeons (Ontario) v. Payne* (2002), 163 O.A.C. 25 (Ont. Div. Ct.) [*Payne*], to determine the standard of review to be applied by a health professions appeal and review board to a registration committee's decision:

> [18] In considering the jurisdiction of tribunals, the Supreme Court of Canada has adopted a functional and structural approach by looking to the function which the legislature has asked the tribunal to perform and to the powers and processes it has furnished to it (see *R. v. 974649 Ontario Inc.* et al., [2001] S.C.J. No. 116).

See also the *Law Society of Upper Canada v. Crozier* (2005), 203 O.A.C. 176 (Ont. Div. Ct.).

53 In *Ottawa Police Services v. Diafwila*, 2016 ONCA 627, 352 O.A.C. 310 (Ont. C.A.) [*Diafwila*], one issue was the standard of review to be applied by the Commission in reviewing decisions of a hearing officer. Miller J.A. stated that the standard of review applicable to a hearing officer's decision is determined from the language of the enabling legislation:

> [58] The objection that the reasonableness standard results in "no impetus for the Commission to look to determine if the Hearing Officer was correct", rests on an assumption that a deferential standard of review creates a standing risk that a tribunal will not fulfill its statutory mandate. That decision-makers can only be made accountable through the most intense level of judicial scrutiny is a questionable proposition. But even if that assumption were borne out, the standard of review by which the Commission is made answerable is not settled by the efficacy of the arrangement, but is a matter of discerning the intention of the Legislature as expressed through legislation (*Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, 2012 SCC 12, at para 30; *Dunsmuir*, at para. 29).

> [59] As the Commission argues, the standard of review that it must apply is to be determined from the language of the enabling legislation: "In considering the jurisdiction of tribunals, the Supreme Court of Canada has adopted a functional and structural approach by looking to the function which the legislature has asked the tribunal to perform and to the powers and processes it has furnished to it" (*College of Physicians and Surgeons of Ontario v. Payne* (2002), 219 D.L.R. (4th) 350 (Ont. Div. Ct.), at para. 18).
>
> (Emphasis added)

Diafwila, and the standard of review expressed therein, was relied upon by this Court in *Robin v. Saskatchewan Police Commission*, 2016 SKCA 159, 15 Admin. L.R. (6th) 22 (Sask. C.A.).

54 In *Law Society of Upper Canada v. Nguyen*, 2017 ONSC 5431 (Ont. Div. Ct.) [*Nguyen*], the issue was the standard of review to be applied by an appeal panel to a hearing panel's decision. Sachs J., writing for herself, and Thens J. relied on *Huruglica* to find that *Dunsmuir* is inapplicable:

> [39] In *(Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, the Federal Court of Appeal makes the point at para. 47 that:
>
> > [47] The principles which guided and shaped the role of the courts on judicial reviews of decisions made by administrative decision-makers (as set out in *Dunsmuir* at paras. 27-33) have no application here. Indeed, the role and organization of various levels of administrative decision-makers do not put into play the tension between the legislative intent to confer jurisdiction on administrative decision-makers and the constitutional imperative of preserving the rule of law.
>
> [40] In *Huruglica* the Court also states that the standard of review that an administrative appellate tribunal should apply when reviewing a decision of a hearing tribunal is to be determined with reference to the relevant governing legislation and that reasonableness is the proper standard for a court to apply when reviewing an administrative appellate body's own choice of standard of review.

55 In dissent, Nordheimer J. (as he then was) rejected the distinction made in *Huruglica* and stated that *Dunsmuir* should apply:

> [76] My colleague has correctly set out the standard of review applicable to our review of the decision of the appeal panel, i.e., reasonableness. I am not certain, however, that she has correctly set out the standard of review that the appeal panel ought to have applied to the decision of the hearing panel. I see no reason why the analysis in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and other decisions of the Supreme Court of Canada that have followed and built upon it, on the proper approach to be taken to the

review of decisions of administrative tribunals, should be different when a court is considering a review of an appeal tribunal or a tribunal of first instance, and when an appeal tribunal is considering a review of a tribunal of first instance. The applicable principles, and their underlying rationales, would appear to apply equally to both. In particular, I am not persuaded by the statement that my colleague quotes from *Huruglica v. Canada (Minister of Citizenship and Immigration)* at para. 47, which appears to be entirely conclusory in nature, is a sufficient justification for this dichotomy in approach.

56 In Prince Edward Island, Jenkins C.J.P.E.I. considered in *Dyment* how the standard of review to be applied by an appeal tribunal to decisions of a board was to be determined:

> [13] Determination of the standard of review applicable to appeal tribunal review of board decisions regarding benefits, including findings of fact, involves an exercise in statutory interpretation. The objective of the exercise is to determine and give effect to the intention of the Legislature as expressed in the applicable legislation. This can be accomplished by an exercise in statutory interpretation. In my opinion, it is unnecessary to also perform an administrative law standard of review analysis.
>
> . . .
>
> [22] Although the issue was decided in *MacDonald* [264 Nfld & PEIR 112], this appeal provides opportunity for a full reconsideration. The Court has received submissions from all interested parties, and we have carried out a full exercise in statutory interpretation, in stages: textual, contextual, purposive, and consequential.
>
> . . .
>
> [49] The balance to be struck between the role of the court and the legislature is stated in *Dunsmuir* (at para. 30):
>
> > [30] ... In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.
>
> The [*Workers Compensation Act*, R.S.P.E.I. 1988, W-7.1] does not stipulate the internal standard of review, and so it is the role of the Court of Appeal to determine the applicable standard. This is subject to the limitation that it is not for the court to make a policy change without legislative direction. On my review of the *Act* I see no such direction.
>
> (Emphasis added)

From this statutory interpretation, Jenkins C.J.P.E.I. ultimately concluded the standard of review was correctness.

57 Lastly, I turn to Quebec. In *KPMG inc. c. Montréal (Ville)*, 2010 QCCA 68 (C.A. Que.) at para 31, the Court of Appeal stated that legislative intent is determinative when considering the appropriate standard of review. In *Larochelle c. Comité de déontologie policière*, 2015 QCCA 2105 (C.A. Que.) at para 34, (2015), 9 Admin. L.R. (6th) 95 (C.A. Que.) [*Larochelle*], the Quebec Court of Appeal relied on the considerations identified by Paul Daly in "Les appels administratifs au Canada" (16 March 2015) 93 Canadian Bar Review 71: (a) the respective roles of the administrative decision-makers in question as determined from statute and, where necessary, legislative history; and (b) the relative expertise of the two tribunals. In *Larochelle*, the Court noted this did not mean these considerations would apply in all circumstances, but identified that the factors identified in *Newton* were, for the most part, incorporated into those proposed by Paul Daly.

58 Conflicting approaches have been taken in the above-noted decisions but, in general terms, there is one common element among them: the intention of the legislature as revealed by statutory interpretation ultimately determines what standard of review an appellate tribunal should apply. I agree with Jenkins C.J.P.E.I., who expressed the following in *Dyment*:

> [40] Counsel cited jurisprudence in this and other jurisdictions as examples of hybrid standards of review. While this case law provides a window on the world of internal standard of review, it provides only limited assistance on the standard of review issue in this appeal. It always depends on the language of the enabling statute; all cases cited share the view that standard of review is a matter that depends on statutory interpretation. None suggest that a new standard is called for only because *Dunsmuir* and its progeny call for deference in judicial review of administrative decision-making. Those cases come to a variety of conclusions; and most do not necessarily prescribe deference. It always depends. Some, or most, of the decisions acknowledge virtues of deference; however, the particular decision on extent of deference is often left with the appellate tribunal rather than being imposed as a judicial requirement.
>
> (Emphasis added)

59 In my view, this is the proper approach to determining the standard of review that the Committee should apply in the present case. The standard of review should be determined by conducting a full exercise in statutory interpretation, which ultimately will answer what respective roles the Legislature intended the Committee and Board to fulfill. Consequently, I will now turn to the governing principles of statutory interpretation, which demonstrate the Legislature intended for the Committee to fulfill a traditional appellate role such that it gives deference to the Board on questions of fact.

b. Statutory interpretation

60 The modern principle of statutory interpretation was established in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), which adopted Elmer Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983): "Today there is only one principle or approach, namely, the words of an Act are 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" (at 87).

i. The legislative scheme

61 In *Corman Park (Rural Municipality) v. 618421 Saskatchewan Ltd.*, 2018 SKCA 29 (Sask. C.A.) [*Corman Park*], Caldwell J.A. described the framework for assessment appeals as follows:

> [56] The basic framework of the Committee's appellate role under *The Cities Act* was summarised by Hunter J.A. in *Marose Investments* [2009 SKCA 20], where she wrote:
>
> > [15] The Committee is required to interpret s. 217(6) in the context of the specific language in the whole of s. 217(6) together with the purpose of the legislation. It should be remembered that the appeal to the Committee is an appeal solely on the record [[1998] SMBAACD No 10, note 1, s. 222 (QL)]. The hierarchy of the decision-making process in the *Act* is that the assessment decision is made by the Assessor which may be appealed to the Board, where the parties have an opportunity to call evidence and present full factual and legal argument. There is an appeal to the Committee on the record and materials that were before the Board [ss. 217 and 222]. There is a very limited right of appeal to this Court from a decision of the Committee and only by leave of a judge of the Court and restricted to a question of law or jurisdiction [*The Municipal Board Act*, s. 33.1].

62 Determining the respective roles of the Assessor, the Board, and the Committee requires a consideration of *The Cities Act*, *The Municipal Board Act*, and *The Public Inquiries Act, 2013*, as these three Acts set out the procedures and powers of the Board and the Committee.

a) The Assessor

63 An assessor is a person appointed by a city (s. 163(c.1) of *The Cities Act*). Assessors must determine to which class (established by the regulations) any property belongs (s. 166(3)), calculate the assessment of property that belongs to a class of property established under s. 166(1), and determine the taxable assessment of the property by multiplying the assessment by the percentage of value applicable to the class of property to which the property belongs (s.

167). An assessor may request information from persons to exercise this role (see s. 171 for details).

64 Further, an assessor is responsible for preparing the annual assessment roll for all assessed property (s. 174), making that roll available for the public's inspection (s. 183(1)), and, unless a city council dispenses with the requirement, preparing annual assessment notices (s. 184(1)).

65 There is a presumption that assessments prepared by an assessor are correct: see *Saskatoon (City) v. Walmart Canada Corp.*, 2018 SKCA 2 (Sask. C.A.) at para 69 [*Walmart 2018*]. However, while this presumption exists, the discretion of an assessor is not unlimited. I will return to this issue below. At this point, all that need be said is that where an assessor errs, the Board may intervene to address this error.

b) The Board

66 Boards of revision are established pursuant to s. 192 of *The Cities Act*. A board of revision hears a taxpayer's appeal from the decision of an assessor, and is required to pay appropriate deference to an assessor's decision when hearing such an appeal (see *Walmart 2018*).

67 Boards of revision must consist of at least three persons who are appointed by a city council (s. 192(1)). In addition, a city council prescribes the term of office of each member, the manner in which vacancies are to be filled, and the remuneration and expenses, if any, payable to each member (s. 192(4)). The only limitations placed on board membership are those contained in s. 192 of *The Cities Act*. Apart from these stipulations, city councils are left to determine the qualifications for members of a board of revision.

68 The members of a board of revision choose a chairperson (s. 192(5)), who then appoints panels of three members and chairpersons for these panels (s. 192(6)).[1] These panels may hear and rule on appeals as if it were a board of revision (s. 192(8)) and their decisions are considered the decisions of a board of revision (s. 192(10)).

69 Parties may appeal to a board of revision in accordance with s. 197. The form of the notice of appeal is governed by s. 197(6) and the timing of filing by s. 198. The secretary of the board of revision then sets the date, time, and location where a hearing is required (s. 199).

70 Disclosure of evidence between the parties, pre-hearing, is governed by s. 200. Copies of written materials to be relied upon by the appellant must be filed with the secretary of the board of revision and served on every other party at least 20 days before the date set for the hearing (s. 200(1)). Any other party who intends to use written materials must do the same at least 10 days before the hearing (s. 200(2)). Anything relied upon in response by the appellant must be filed at least five days before the hearing (s. 200(2.1)). If a party does not comply, the board of revision

may accept and consider the material or refuse to do so (s. 200(3)). Further, at least 10 days before the date set for the hearing, an assessor must file with the secretary and serve a copy of the following (s. 200(4)):

> **Disclosure of evidence**
>
> **200**(4)(a) a complete assessment field sheet; and
>
> (b) a written explanation of how the assessment was determined, including:
>
> (i) a statement indicating whether the assessor considered any decisions of the appeal board pursuant to subsection 165(3.2) in determining the assessment; and
>
> (ii) if the assessor did consider one or more decisions of the appeal board in determining the assessment, a statement indicating whether the assessor decided to apply, to apply in part, to apply with modification or not to apply the decision of the appeal board to the assessment and the reasons for that decision.

71 As noted in *Corman Park*, "Even though the Legislature has constrained when and how a first-level assessment appeal may be commenced, boards of revision have fairly broad discretion to determine the procedure for an appeal hearing, subject to procedural fairness or the rules of natural justice" (at para 42). The proceedings before a board of revision are governed by s. 203 of *The Cities Act*:

> **Proceedings before board of revision**
>
> **203**(1) Boards of revision are not bound by the rules of evidence or any other law applicable to court proceedings and have power to determine the admissibility, relevance and weight of any evidence.
>
> (2) Boards of revision may require any person giving evidence before them to do so under oath.
>
> (3) All oaths necessary to be administered to witnesses may be administered by any member of the board of revision hearing the appeal.
>
> (4) A board of revision may make rules to govern its proceedings that are consistent with this Act and with the duty of fairness.

A board of revision may also compel the attendance at the hearing of persons "having charge of the assessment roll" or "of any books, papers or documents relating to the matter of an appeal" (s. 203.1)).

72 Before the board of revision, witnesses may also be called in accordance with s. 205. Parties to the appeal may testify and may call witnesses to testify at the hearing (s. 205(1)). Parties may request that the secretary issue a subpoena to any person to (a) appear before the board, (b) to give evidence, or (c) to "produce any documents and things that relate to the matters" at issue in the appeal (s. 205(1)). Further, any party to an appeal must "tender *all of the evidence* on which he or she relies at or before the board revision hearing" (emphasis added, s. 206).

73 A board of revision then has the following powers to make a decision on the evidence before it:

> **Decisions of board of revision**
>
> **210**(1) After hearing an appeal, a board of revision or, if the appeal is heard by a panel, the panel may, as the circumstances require and as the board or panel considers just and expedient:
>
> (a) confirm the assessment; or
>
> (b) change the assessment and direct a revision of the assessment roll accordingly:
>
> (i) subject to subsection (3), by increasing or decreasing the assessment of the subject property;
>
> (ii) by changing the liability to taxation or the classification of the subject property; or
>
> (iii) by changing both the assessed value of the subject property and its liability to taxation or its classification.

Enumerated constraints on the board of revision's powers include that non-regulated property assessments shall not be varied on appeal "using single property appraisal techniques" (s. 210(1.1)), the board of revision cannot use these powers "except as the result of an appeal" (s. 210(2)), and assessments "shall not be varied on appeal if equity has been achieved with similar properties" (s. 210(3)).

c) The Committee

74 Appeals from decisions of boards of revision go to the Assessment Appeals Committee. The Committee is a committee of the Saskatchewan Municipal Board appointed pursuant to s. 12(1)(a) of *The Municipal Board Act*. The *Board Regulations* govern who may be a member of a municipal board and, consequently, the Committee. To be eligible to be a member of The

Saskatchewan Municipal Board, a person must meet specific qualifications; notably, the qualifications require more expertise and/or experience than what is required of members of the board of revision.

75 When appealing decisions of a board of revision, *The Cities Act* provides a broad right of appeal to the Committee:[2]

> **Appeals from decisions of board of revision**
>
> **216** Subject to subsection 196(5), any party to an appeal before a board of revision has a right of appeal to the appeal board:
>
> (a) respecting a decision of a board of revision; and
>
> (b) against the omission, neglect or refusal of a board of revision to hear or decide an appeal.

The form and content of notices of appeal are governed by s. 217. Notice of the hearing is given to the parties pursuant to s. 221.

76 At the request of the Committee secretary, the secretary of a board of revision is required to transmit the record of the board of revision proceedings to the Committee. Specifically, s. 220 requires the transmission of (a) the notice of appeal to the board of revision, (b) materials filed with the board of revision before the hearing, (c) any exhibits entered at the board of revision hearing, (d) the minutes of the board of revision, including any order made under s. 209, (e) any written decision of the board of revision, and (f) the transcript, if any, of the proceedings before the board of revision.

77 There are specific provisions governing the Committee's authority and proceedings before it. There are first those contained in *The Municipal Board Act*, which apply to the Committee (s. 12(6) of *The Municipal Board Act*). Consequently, s. 20 of *The Municipal Board Act* also empowers the Committee to hear and determine questions of fact or law (s. 20(1)), to require employees of the Saskatchewan Assessment Management Agency (SAMA), appraisers, assessors and other municipal officials "to make any returns to the board with respect to any matter affecting assessment and taxation in any form that it considers advisable" (s. 20(2)) and to "enter on and inspect land and premises" (s. 20(5)). Further, the Committee is not bound by the technical rules of legal evidence during the proceedings (s. 20(7)).

78 Notably, s. 20(9) authorizes members of the Municipal Board to exercise the powers conferred on commissions by ss. 11, 15, and 25 of *The Public Inquiries Act, 2013*. Section 20(8) of the *Municipal Board Act* provides the following:

> **Determining matters of fact or law**

20(8) The board may, in its discretion, accept and act on evidence by affidavit or written statement or by the report of a member of the board, other person or technical adviser appointed by it or obtained in any other manner that it may decide, provided that for an appeal those documents are provided at the hearing to both appellant and respondent.

79 Section 11 of *The Public Inquiries Act, 2013*, authorizes a commission to require a person to give evidence and to produce documents. Section 15 authorizes a commission to apply to court to have a person held in contempt of the commission, while s. 25 relates to engaging the services of staff where the commission is conducting a "study inquiry" (s. 25(1)).

80 *The Cities Act* also governs how appeals before the Committee are to be conducted. Given their import, I repeat these provisions in full:

Appeal determined on record

222 Subject to section 223, and notwithstanding any power that the appeal board has pursuant to *The Municipal Board Act* to obtain other information, an appeal to the appeal board pursuant to this Act is to be determined on the basis of the materials transmitted pursuant to section 220.

New evidence

223(1) The appeal board shall not allow new evidence to be called on appeal unless it is satisfied that:

(a) through no fault of the person seeking to call the new evidence, the written materials and transcript mentioned in section 220 are incomplete, unclear or do not exist;

(b) the board of revision has omitted, neglected or refused to hear or decide an appeal; or

(c) the person seeking to call the new evidence has established that relevant information has come to the person's attention and that the information was not obtainable or discoverable by the person through the exercise of due diligence at the time of the board of revision hearing.

(2) If the appeal board allows new evidence to be called pursuant to subsection (1), the appeal board may make use of any powers it possesses pursuant to *The Municipal Board Act* to seek and obtain further information.

Proceedings

224(1) In conducting the hearing of an appeal, the appeal board may exercise the powers

that are vested in it pursuant to *The Municipal Board Act*.

81 In *Corman Park*, Caldwell J.A. addressed the interplay between the broad powers conferred by *The Municipal Board Act* and *The Public Inquiries Act, 2013*, and the identical provisions of *The Municipalities Act*. He found that the provisions in *The Municipalities Act* limited the Committee's ability to exercise these broad powers:

> [57] This Court has previously addressed how the Committee's appellate role affects the exercise of the Saskatchewan Municipal Board general powers under s. 20 of *The Municipal Board Act* and under *The Public Inquiries Act*, RSS 1978, c P-38. In *Saskatchewan Municipal Board v First City Trust* (1996), 148 Sask R 298 (CA), where a taxpayer submitted that the Committee had not erred by hearing a matter *de novo*, Gerwing J.A. referred to *Regina (City) v Laing Property Corp.*, [1995] 3 WWR 551 (Sask CA) at 559-560, and wrote:
>
> > Thus it seems clear that the powers under *The Public Inquiries Act* are only to be used within the context of the appellate role, in a similar fashion to the utilization of this Court's power to hear oral evidence, rarely and sparsely exercised, only in the context of its appellate role. The Board here was clearly acting under s. 16(a) [to hear and determine assessment *appeals*].
> >
> > . . .
> >
> > If the Board of Revision leaves an inadequate record, the Board may use its powers to make the issues more clear. If the record contains sufficient information, the Board should consider the appeal on that basis, without investigating further. However, parties who intentionally fail to call proper evidence before the Board of Revision should not be allowed to call evidence before the Board. Such an approach would create inefficiencies in the appeal process. Of note is Bill 70 of 1996 where the amended s. 263.1 of *The Urban Municipality Act, 1984*, S.S. 1983-84, c. U-11, sets out a similar procedure. The legislature has indicated its intention as predicted by *Laing*. Accordingly, the Board did exceed its jurisdiction.
>
> [58] As Gerwing J.A. stated, although the Legislature has made broad, general powers available to the Saskatchewan Municipal Board under *The Municipal Board Act* and *The Public Inquiries Act, 2013*, the Legislature has also in *The Municipalities Act* narrowly restricted what the *Committee* can do or affect through the exercise of those powers. It has done so by establishing a right of *appeal on the record* to the Committee against the decision of a board of revision, not a right to a hearing *de novo*. A number of provisions of *The Municipalities Act* specifically limit the broad statutory powers of the Saskatchewan Municipal Board when it acts through the Committee.

. . .

[60] As to evidence, the Committee ostensibly has the Saskatchewan Municipal Board's broad, general powers to compel evidence under *The Municipal Board Act* and *The Public Inquiries Act, 2013*, pursuant to s. 254(1) of *The Municipalities Act*. But, and notwithstanding these broad powers, *The Municipalities Act* also states that an appeal hearing before the Committee is *an appeal on the record* ....

[61] Moreover, s. 253 of *The Municipalities Act*, when read in conjunction with s. 252, clearly limits the circumstances in which the Committee may exercise the Saskatchewan Municipal Board's broad discretionary powers to allow or call for new or fresh evidence ....

. . .

[92] On the basis of the foregoing, I conclude the Committee does not have a broad or general authority to issue RFIs in the context of an appeal against a decision of a board of revision. The Saskatchewan Municipal Board's broad evidentiary powers under *The Municipal Board Act* and *The Public Inquiries Act, 2013*, are limited in such appeals by ss. 250, 252 and 253 of *The Municipalities Act*. Under the last of these provisions, new evidence is not to be adduced *despite* the powers under *The Municipal Board Act*. In practical terms then, s. 253 largely renders the broad powers under *The Municipal Board Act* (which, by reference, includes powers under *The Public Inquiries Act, 2013*) inapplicable to appeals against a decision of a board of revision. That is, absent the narrow circumstances identified in s. 253, an appeal before the Committee must be heard and determined on the basis of the record of what was before the board of revision. There is simply no authority under the relevant legislation or the general principles of appellate jurisdiction that empowers the Committee, on its own accord, to direct parties or persons to adduce new or additional evidence, whether before, during or after an appeal hearing.

(Italic emphasis in original, underline emphasis added)

82 Therefore, while the Saskatchewan Municipal Board, and consequently the Committee, ostensibly have broad powers under *The Municipal Board Act* and *The Public Inquiries Act, 2013*, these powers are curtailed by the express wording in *The Cities Act*: appeals are to be on the record and new evidence is not to be adduced (absent narrow circumstances), *in spite of* these powers. Instead, the Committee is limited to the record of the proceedings before the Board.

83 Where the Committee does find error, the Committee then has the following powers:

Decisions

226(1) After hearing an appeal, the appeal board may:

(a) confirm the decision of the board of revision; or

(b) modify the decision of the board of revision in order that:

(i) errors in and omissions from the assessment roll may be corrected; and

(ii) an accurate, fair and equitable assessment for the land or improvements may be placed of the assessment roll.

(c) set aside the assessment and remit the matter to the assessor to ensure that:

(i) errors in and omissions from the assessment roll are corrected; and

(ii) an accurate, fair and equitable assessment for the property is placed on the assessment roll.

If the Committee modifies a Board decision under (1), it may adjust, either up or down, the assessment or change the classification of the property (s. 226(2)). Like the Board, the Committee's powers are limited such that non-regulated property assessments shall not be varied on appeal using single property appraisal techniques (s. 226(3)) and assessments shall not be varied if equity has been achieved with similar properties (s. 226(3.1)).

84 In relation to these powers, the City states as follows in its factum:

37. The City submits that the Legislature has been clear in stating the standard of review it requires the Committee to adhere to, namely to review the Board's decision for error and, upon finding an error, to then modify the decision of the Board to ensure that the errors in the assessment roll are corrected and an accurate, fair and equitable assessment is placed on the property. The Committee must, as in the words in *Laing*, do what the Board ought to have done. While this statement of a standard of review is not the usual language of standard or review, namely reasonableness versus correctness, nevertheless, the direction from the Legislature is clear and provides ample direction to the Committee on how it is to conduct its appellate review. This standard has been used since *Laing* in 1994. The City submits this standard is appropriate for assessment review by the Committee because it reflects the applicable legislation and provides for oversight by an expert appellate tribunal.

85 I do not accept this view. While these corrective powers are broad and provide that errors are to be corrected, they do not speak to the standard of review to be applied by the Committee in reviewing decisions of boards of review. In *Corman Park*, Caldwell J.A. describes the relationship between reviewing the decision for error and these corrective powers:

[67] On the basis of the jurisprudence, it should be well-understood that the Committee

> must review the decision of the board of revision *for error*. If the Committee finds error, then the Committee may exercise its *corrective* powers and do what it concludes the board of revision ought to have done in the circumstances. Failing which, the Committee may remit the matter to the assessor and leave it in the assessor's hands to "ensure that: (i) errors in and omissions from the assessment roll are corrected; and (ii) an accurate, fair and equitable assessment for the property is placed on the assessment roll".
>
> (Italic emphasis in original)

While s. 226(b)(i) authorizes the Committee to correct errors, this provision does not dictate the standard of review the Committee applies when reviewing for error.

ii. Effect of the 1996 legislative amendments

86 In *Redhead*, Jackson J.A. noted that the legislative evolution of provisions may be relied upon by courts to assist in their interpretation (see also Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ont: LexisNexis, 2014) at 661). This approach was also considered by the Federal Court in *Huruglica* (at para 81-102). I will focus here on the evolution of ss. 222 and 223 of *The Cities Act*.

87 Prior to *The Cities Act*, the assessment regime was contained in *The Urban Municipalities Act, 1984*, SS 1983-84, c U-11 (repealed 1 January 2006). An important milestone in the evolution of *The Urban Municipalities Act, 1984*, was a 1996 amendment: *The Urban Municipality Amendment Act, 1996*. This amendment included ss. 46 and 47, and these provisions became s. 262.2 and 263.1 of *The Urban Municipalities Act, 1984*, respectively.[3] These provisions did not exist in any prior legislation, and provide that appeals to the Committee are to be on the record and that new evidence may only be admitted before the Committee in certain limited circumstances.

88 In *Corman Park*, Caldwell J.A. commented on the relevance of these amendments:

> [63] When speaking to *The Rural Municipality Amendment Act, 1996*, and relevant legislation [see *The Urban Municipality Amendment Act, 1996*, SS 1996, c 67, and *The Northern Municipalities Amendment Act, 1996*, SS 1996, c 54], the Honourable Carol Teichrob, Minister of Municipal Government, stated in her second-reading speech that the amendments "reinforce the role of the local board of revision as the primary appeal level for assessment appeals" (Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)*, 23rd Leg, 1st Sess (17 April 1996) at 957). And, when speaking to the identical and concurrent amendments made to *The Cities Act*, the Minister made several relevant points. She described the role of a board of revision as being to "hear evidence and determine whether an assessment was properly arrived at". The Minister remarked that the amendments would "clarify the role and authority" of the Committee. In this regard, she

said:

> More specifically, new requirements for better stating a person's grounds of appeal and providing written submissions for consideration by the board of revision are included. Measures for allowing full disclosure of information among parties, while protecting the confidentiality of information, are advanced. Written reasons are to be prepared and provided for each hearing.
>
> ... Appellants will be responsible for taking assessment appeal hearings seriously and will be required to attend hearings if they wish to preserve their right to further appeal a board of revision decision. ...
>
> These changes will also improve the ability of the Saskatchewan Municipal Board to hear appeals from decisions of the local boards of revision. A better record of the board of revision decisions will be available to the Saskatchewan Municipal Board. The Municipal Board will be somewhat more restricted in the evidence it may hear on appeals, as the thrust of these amendments is to place the primary responsibility at the local level where assessments are determined and must be defensible. Where errors have been made there will be an ability to adjust an assessment up or down [Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)*, 23rd Leg, 1st Sess (17 April 1996) at 954-955 (Mrs. Teichrob)].

[64] The amendments in question were also discussed in Committee of the Whole, where the Minister remarked:

> **Hon. Mrs. Teichrob:** — Mr. Chairman, in general the changes are meant to streamline the assessment process. And they allow more time, for instance, for an appellant. Specifically on the examination for discovery, that is at the option of the appellant. So there wouldn't be any undue costs imposed on an appellant. Because if he doesn't want ... this is at his option, or his or her option. So it would likely be used more by large commercial-type appeals. And that's one of the reasons why more time is allowed.
>
> But in summary, I think the intent is to streamline the process, along with some provisions in the municipal Act [*sic*], the SMB, the Saskatchewan *Municipal Board Act*, which will be, you know, complementary to these.
>
> But the essence of it is to try and put the onus on the board of revision at the local level. Because you would be very familiar ... the member from Saltcoats would know, that in the event of a major appeal or a precedent-setting appeal, sometimes the appellant wants to short-circuit the process at the local level and get straight to his stated case or straight to the municipal board. And that's really not the proper way.
>
> *So this legislation provides that the board of revision process at the local level will be*

> *thorough and have integrity. And that if there's going to be an appeal ... and the decisions of the board of revision will be in writing. And so that if the appeal process is to proceed then to a higher level, that the stage has been set. And similar to ... not to make it difficult. Maybe I shouldn't draw this parallel because we're trying to make it easier not tougher. But the same principles would apply then that apply in the legal system where you can't introduce evidence in the trial that hasn't been brought up at the preliminary hearing for example, if that information was known at the time.*
>
> *And the same principle will apply here, that the base will be established for any further possible appeal by having a process at the local level that has full disclosure and full integrity* [italic emphasis added, Saskatchewan Legislative Assembly, *Committee of the Whole*, 23rd Leg, 1st Sess (9 May 1996) at 1498-1499].

[65] As *Hansard* indicates, the 1996 amendments to the relevant legislation were intended to enhance and strengthen the appellate role of the Committee and the trial role of the boards of revision. The Legislature's intention in this regard has been long-recognized by this Court whenever the Committee's appellate role has been the subject of consideration in municipal property tax jurisprudence. There are many cases, but *Laing*, *Estevan Coal* [2000 SKCA 82], and *Sasco* [2012 SKCA 24] are a few of the leading decisions.

(Italic emphasis added by Caldwell J.A., underline emphasis added)

89 Thus, the purpose of the 1996 amendments was to strengthen the Committee's appellate role. These amendments place the onus on a board of revision to develop the record by hearing the evidence and finding facts, while the Committee is now constrained to the record and only able to hear new evidence in limited circumstances. The Committee's role, now, is to review the record before the Board to determine whether it erred.

iii. Prior jurisprudence

90 The respective roles played by the Board and by the Committee, and the standard of review applied by the Committee, have previously been considered.

91 This Court commented on the assessment regime and its operation in respect of the Committee in *Regina (City) v. Laing Property Corp.* (1994), 128 Sask. R. 29 (Sask. C.A.) [*Laing*]:

> [22] In some instances, however, it seems the practice of the Committee is to bypass the decision of the board of revision and go directly to the assessor's valuations. In itself, this is not that significant, as noted a moment ago, provided the Committee approaches the matter with a view, ultimately, to either upholding the decision of the board of revision or

setting it aside, if made in error, and then doing what the board in the exercise of its powers of correction and variation should have done. This is what appeal usually entails. If, rather than consider the matter on these footings, the Committee should approach it on the basis it has a free hand to do what it will in the exercise of the general powers conferred upon The Municipal Board, then the Committee runs the risk of exceeding its mandate. It would be as though such *appeal* were in the nature of a *hearing de novo* directed at the determination, anew, of the values at issue. This is not something one would expect. Indeed it would take a clear legislative indication to that effect before such approach on the part of the Committee could be seen as having been intended.

[23] It will be appreciated that these approaches differ, and not just a little. They embody different standards of review or methods of decision-making, having different effects upon the assessment regime.

. . .

[25] *The Urban Municipality Act, 1984*, confers on a party dissatisfied with a decision of a board of revision a *right of appeal*, as we have seen, and *The Municipal Board Act* imposes on that Board, acting through its Assessment Appeals Committee, *a duty to hear and determine* such appeal. *The Municipal Board Act* goes on in s. 20 to empower the Board to determine any question of fact or law as to matters within its jurisdiction; to require assessors and others to make returns to it; to engage advisers; to inspect land and premises; to accept and obtain evidence by affidavit, statement, and other means; to act as commissioners of inquiry; and so on. The *Act* also empowers the Board, in s. 41, to make binding orders in relation to matters within its jurisdiction requiring persons and local authorities to do what the Board requires of them.

[26] When it comes to appeals of the sort mentioned in subs. 16(a) of *The Municipal Board Act* — those taken pursuant to the *Urban Municipality Act, 1984*, by way of "appeal against a decision of a board of revision" — these general powers bestowed upon the Saskatchewan Municipal Board might be taken as suggesting that, on such appeals, the function of the Assessment Appeals Committee extends beyond reviewing the impugned decision of the board of revision for error with a view either to upholding the decision or, if made in error, to setting it aside and then doing what the board of revision should have done in the exercise of its powers of correction and variation.

[27] The essential nature of these cases, however, tends to pull in the other direction. They are appeals, after all — appeals against a decision of a board of revision, and the Committee is an appellate tribunal charged with the duty of hearing and determining them.

[28] The nature of assessment would also suggest a rather traditional appellate role for the Committee. Assessment of property for municipal taxation purposes entails valuing the property in the light of the relevant circumstances, the requirements of the law, and the principles, formulas, and rules of appraisal contained in the Manual. Law and fact aside, the

application of the body of appraisal principles and practice found in the Manual entails, in turn, the exercise by the assessor of skill and judgment, even a measure of discretion. What is called for in the exercise of that skill and judgment is the structured formulation of consistent opinions as to fair and equitable value for the purposes of property taxation in the municipality. This is what the Manual suggests, saying that while the systematic application of the principles, rules, and formulas found in the manual is necessary to achieve the ends of tax equalization, its use "cannot replace the personal judgment of the valuator in his work. He is the backbone of local tax administration".

[29] Having regard for all of this, we are of the view the legislation envisions in the main an appeal to the Committee to review the decision of a board of revision for error, as alleged by the appellant, and if error be found, to do what the board of revision in the exercise of its powers of correction and variation should have done, remembering that at bottom lies the personal judgment of the assessor. Unless that judgment be founded on material error of fact, of law, or of assessment principles and practice as laid down in the Manual, it should not be interfered with. And even then, if the value ascribed to an improvement by an assessor should appear for whatever reason to be more or less than its fair value, the assessed value should not be varied so long as it bears a fair and just proportion to the assessed value of other improvements in the municipality.

[30] Without necessarily suggesting the mandate of the Committee does not extend beyond this, this is its primary mandate. As a general matter, it is for the assessors to make the evaluations, not the Committee. And in the absence of error as alleged by the appellant, or in the presence of error of the kind against which relief is foreclosed by s. 256, one would think the valuation and assessment should be left to stand. Were it otherwise — were the Committee to freely and without restraint substitute its views for those of the assessor or to perform the assessment anew — the efficiency and timeliness of the assessment and taxation scheme would break down. In short, the statutes envision *appeals* against erroneous valuations and assessments, not *applications* for revaluation and reassessment.

(Italic emphasis in original, underline emphasis added)

(It is to be noted that the assessment manual referred to in paragraphs 28 and 29 of *Laing* no longer has the force of law. It is also to be noted that *Laing* preceded the legislative changes referred to above.)

92 *Laing* was then reviewed in *Estevan Coal Corp. v. Estevan (Rural Municipality No. 5)*, 2000 SKCA 82, [2000] 8 W.W.R. 474 (Sask. C.A.) [*Estevan Coal*], following the legislative changes referred to:

[16] It is appropriate to begin with an examination of the respective roles of the assessor, the Board of Revision and the Assessment Appeals Committee. These roles were carefully defined by Cameron J.A., speaking for this Court, in *Regina (City) v. Laing Property Corp.*

(1994), 128 Sask. R. 29.

. . .

[18] The Assessment Appeals Committee sits as an appellate tribunal in respect of the decision of the Board of Revision, not the decision of the assessor. Therefore, the Assessment Appeals Committee is to examine the decision of the Board of Revision for error. However, on finding error in the decision of the Board, the Assessment Appeals Committee may correct any error on the assessment roll. ... Thus, while the Assessment Appeals Committee should not undertake an initial analysis of the assessment itself, it has the authority, after it finds error in the decision of the Board of Revision, to correct errors in the assessment roll. As noted above, errors result from a "material error of fact, of law, or of assessment principles and practice as laid down in the Manual". The Assessment Appeals Committee must make an "accurate, fair and equitable entry" on the roll according to s. 322.2(b) of *The Rural Municipality Act*. Accordingly, in correcting errors on the assessment roll, the Assessment Appeals Committee is bound by the same legislation and assessment manual provisions as the assessor.

(Emphasis added)

93 This Court considered the respective roles of the Board and the Committee in *Sasco Developments Ltd. v. Moose Jaw (City)*, 2012 SKCA 24, 385 Sask. R. 287 (Sask. C.A.) [*Sasco*]:

[41] The appeals were taken pursuant to section 216 of *The Cities Act,* which allows for appeal "respecting a decision of a board of revision". The function of the Committee on such appeals is not to rehear the case, in the sense of deciding anew whether the assessor erred, but to review the decision of the Board of Revision for error as alleged in the notice of appeal: *Regina (City) v. Laing Property Corp.* (cited earlier). If error be found, which is to say material error which so affects the decision of the Board that its decision cannot stand, the Committee is empowered by section 226 of the *Act* to modify the decision of the Board by adjusting the assessment either up or down.

(Emphasis added)

94 This Court commented on the standard of review to be applied by the Committee in *Imperial Oil Ltd. v. Regina (City)*, 2016 SKCA 107, 408 D.L.R. (4th) 46 (Sask. C.A.) [*Imperial Oil*]:

[30] The Committee hears *appeals* from the decisions of boards of revision (*The Cities Act*, s. 216). On the basis of the record that was before a board of revision (*The Cities Act*, s. 222), the Committee's mandate is to review the decision of the board of revision for error (*Sasco* at para 41). In this way, the Committee does not directly review the decision of an

assessor for error (*Laing*; *Estevan Coal* at para 18).

. . .

[32] Nevertheless, the Committee properly approached its task by asking whether the Board's decision was correct ....

(Italic emphasis in original)

95 The Court in *Redhead* noted the conclusion in *Laing* regarding the Committee's appellate role and stated the following:

[87] In my view, while the powers of the Committee have been changed or clarified by amendments to *The Municipal Board Act* and *The Municipalities Act*, the purpose of the Committee remains as stated in *Laing*. As the Court indicated in *Laing*, the Committee's role is not open-ended. The Committee's role is circumscribed by the legislation that created it and the powers conferred upon it.

(Emphasis added)

96 Lastly, Caldwell J.A. considered the role of the Board in *Corman Park*:

[48] In *Sasco*, Cameron J.A. explained the role of a board of revision in these brief terms:

> [35] On such appeals the function of the Board of Revision is to review the valuation for error by the assessor — *error as specifically alleged in the notice of appeal* — and, if such error be found to exist, to give effect to it subject to the limitations imposed upon the Board's remedial powers: *Regina (City) v. Laing Property Corp.*, [1995] 3 W.W.R. 551 (Sask. C.A), 128 Sask R. 29. By error is meant material error of fact, or law, or standard appraisal principle and practice, or some combination of these. And the person who takes the appeal bears the burden of establishing, on a balance of probabilities, the error or errors the assessor is alleged to have made: *Estevan Coal Corp. v. Estevan (Rural Municipality No. 5)*, 2000 SKCA 82, 199 Sask. R. 57
>
> [emphasis added].

In terms of function, boards of revision serve as akin-to-trial-level decision-makers in circumstances where an assessment is deemed to be correct until proven otherwise. That is, they make findings of fact on the basis of the evidence adduced, interpret the law relating to the specific errors raised in the notice of appeal and then apply that law to the facts as found to reach their decision as to whether the assessor has erred in a material way.

(Italic emphasis added by Caldwell J.A., underline emphasis added)

Justice Caldwell also noted that what was said in *Laing*, regarding the Committee, "is even more applicable today, given that the Legislature has since amended the relevant legislation (two years after *Laing*) to specifically confine appeals before the Committee to appeals on the record before the board of revision (s. 252)" (*Corman Park* at para 91).

97 Thus, this Court has consistently found that the Committee fulfils a traditional appellate role. Instead of rehearing a matter, the Committee reviews the Board's decision for *error*. Error has previously been defined as "material error" (see *Laing*, *Estevan Coal*, or *Sasco*). Once such an error is found, the Committee has the remedial power to correct it.

c. Conclusion on standard of review analysis

98 It is clear from the foregoing that the Committee fulfills a traditional appellate role and, therefore, should give deference to the Board on questions of fact. What is not clear is what standard of review the Committee should apply. As seen in the jurisprudence cited above, the standard of review has been referred to as correctness (*Imperial Oil 2016*) and material error that so affects the decision of the Board that it cannot stand (*Sasco*). It has also been said that the Committee may correct *any* error in the assessment (*Laing*). However, this jurisprudence did not canvass the standard of review issue, and did not determine the standard of review with respect to questions of fact. It falls to this Court to do so now.

99 The Committee's role within the assessment regime supports a deferential standard of review on questions of fact. The Committee is an appellate tribunal charged with hearing and determining appeals. Unlike the Board, it is not a tribunal of first instance. The Board receives evidence and hears witnesses. The Committee reviews the record of the Board and only hears new evidence in narrow circumstances, not unlike the role of an appellate court. Consequently, it fulfills a traditional appellate role in that it determines appeals on the record. Its function is not to conduct trials *de novo*, but to review for *error* and if an error has been found, to correct it.

100 Both tribunals serve specialized roles that have been created by the Legislature. It is clear that the legislative intent remains that the Committee fulfil an appellate role such that it gives deference to the Board's findings of fact.

101 Ultimately, based on the Legislature's intention regarding the role of the Committee, I am of the view the most appropriate standard of review to be applied by the Committee to the Board's factual findings and to questions of mixed fact and law where there is no extricable question of law, expressed in traditional terms, is reasonableness. I say this because a standard of palpable and overriding error, the most deferential standard of review and one that applies in the appellate context, would limit the Committee's role beyond what the Legislature intended. While deference must be afforded to the Board's findings of fact, the Committee must be empowered to intervene where such findings are unreasonable or unsupported by the evidence.

Expressing the standard of review in this way is consistent with the approach taken by this Court in *Redhead*.

4. The application of the standard of review

102 At the outset, it is important to consider the nature of the questions the Committee was dealing with. The Appellant argues that *McLarty v. R.*, 2008 SCC 26 (S.C.C.) at para 45, [2008] 2 S.C.R. 79 (S.C.C.), establishes that whether parties are arm's-length when they are unrelated is a question of fact. However, that decision concerns s. 251(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp), which specifically stated, at the time, that "it is a question of fact whether persons not related to each other [were] ... at arm's length". A similar provision exists in the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 4(4). See also *Piikani Nation v. Piikani Energy Corp.*, 2013 ABCA 293 (Alta. C.A.) at para 17, (2013), 367 D.L.R. (4th) 173 (Alta. C.A.). No similar provision is contained in *The Cities Act*.

103 What must instead be considered is the nature of the Board's findings. In my view, how the Board *applied* the test for arm's-length is a question of mixed fact and law where there is no extricable question of law and the applicable standard of review to be applied to that issue is reasonableness. The factual underpinnings to which this test is applied are questions of fact for which deference is owed to the Board.

104 That being said, I turn to the Committee's decision and the standard of review it applied. While the Appellant made arguments before the Committee regarding standard of review, the Committee did not specifically address this issue. It instead framed the issue before it as whether the Board "made a mistake" by excluding the sale, and ultimately concluded it had. It then began weighing evidence, finding, for example, that Mr. Schulkowsky's testimony should have received "equal consideration at minimum" (*Committee Decision* at para 61). The *Committee Decision* concluded as follows:

> [94] The Board was convinced that SGI and SaskPen were "strategically linked through their mutual investment associations with Greystone ...". The Board further wrote it considered the "sale to be a non-arm's-length transaction between corporate affiliates". In the end, there was no evidence before the Board to substantiate that SGI and SaskPen are corporate affiliates. The corporations may be mutually invested in GREF or other Greystone investment vehicles, and they were co-owners of 1800 Hamilton Street along with HDL, but were not corporate affiliates.
>
> . . .
>
> [96] From the Committee's point of view, much of [the Appellant's] argument was based on inference from testimony and evidence, which the Board accepted. The City's defence of the use of the sale relies more on the actual evidence it had to conclude the sale was both

2002 BCCA 473
British Columbia Court of Appeal

British Columbia (Chicken Marketing Board) v. British Columbia (Marketing Board)

2002 CarswellBC 2153, 2002 BCCA 473, [2002] B.C.J. No. 1930, 116 A.C.W.S. (3d) 148, 174 B.C.A.C. 15, 216 D.L.R. (4th) 587, 286 W.A.C. 15, 44 Admin. L.R. (3d) 262

British Columbia Chicken Marketing Board, Respondent/Appellant and British Columbia Marketing Board, Appellant/Respondent and Jim Hong, Respondent/Respondent

British Columbia Chicken Marketing Board, Respondent/Appellant and British Columbia Marketing Board, Appellant/Respondent

Finch C.J.B.C., Low, Southin JJ.A.

Heard: August 16, 2002
Oral reasons: August 16, 2002
Docket: Vancouver CA029674, CA029675

Proceedings: reversing (2002), 2002 CarswellBC 2153, 2002 BCSC 610 (B.C. C.A.)

Counsel: *F.A. Falzon*, for appellant
J. Hunter, Q.C., and *S. Pike*, for respondent
C. Harvey, Q.C., for intervenors
J. Hong in person

Subject: Public; Civil Practice and Procedure

Headnote

Administrative law --- Standard of review — Correctness
BC Chicken Marketing Board used its statutory right under s. 8 of Natural Products Marketing (BC) Act to appeal two decisions of BC Marketing Board, which had reversed two chicken board decisions — Appeal was allowed because provincial board should have applied reasonableness standard when reviewing chicken board decisions — Provincial board appealed — Appeal allowed — Chambers judge erred in applying reasonableness standard — Appropriate standard of review was correctness — Chicken board was not authorized to

function as adjudicative body — Provincial board was, however, authorized to act as adjudicative body in exercise of its s. 8 jurisdiction — Provincial board frequently conducts hearings with witnesses, sworn testimony, and oral submissions, and parties may be represented by counsel — Statutory regime clearly indicated that appeal to provincial board was to be full hearing on merits of case, and nothing in legislation suggested that deference was owed to decisions of commodity boards — Provincial board was not generalist court but specialized tribunal expected to use its expertise — Provincial board was not obligated to give any deference to chicken board — Natural Products Marketing (BC) Act, R.S.B.C. 1996, c. 330, s. 8.

Administrative law --- Standard of review — Reasonableness — Reasonableness simpliciter
BC Chicken Marketing Board used its statutory right under s. 8 of Natural Products Marketing (BC) Act to appeal two decisions of BC Marketing Board, which had reversed two chicken board decisions — Appeal was allowed because provincial board should have applied reasonableness standard when reviewing chicken board decisions — Provincial board appealed — Appeal allowed — Chambers judge erred in applying reasonableness standard — Appropriate standard of review was correctness — Chicken board was not authorized to function as adjudicative body — Provincial board was, however, authorized to act as adjudicative body in exercise of its s. 8 jurisdiction — Provincial board frequently conducts hearings with witnesses, sworn testimony, and oral submissions, and parties may be represented by counsel — Statutory regime clearly indicated that appeal to provincial board was to be full hearing on merits of case, and nothing in legislation suggested that deference was owed to decisions of commodity boards — Provincial board was not generalist court but specialized tribunal expected to use its expertise — Provincial board was not obligated to give any deference to chicken board — Natural Products Marketing (BC) Act, R.S.B.C. 1996, c. 330, s. 8.

APPEAL by provincial Marketing Board from judgment reported at 44 Admin. L.R. (3d) 253, 2002 CarswellBC 888, 2002 BCSC 610 (B.C. S.C.).

***Finch C.J.B.C.* (orally):**

1 The B.C. Marketing Board appeals from a judgment of the Supreme Court of British Columbia pronounced 24 April 2002. That judgment set aside two orders of the Marketing Board described in the judge's reasons as the *Mundhenk* appeal (Action No. L0123920) and the *Hong* appeal (Action No. L013023), and restored orders made by the B.C. Chicken Marketing Board in those two cases.

2 The parties' appeals to the Marketing Board were brought under the statutory right to appeal provided by s. 8 of the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330. The

Chicken Board takes the position that the right of appeal so provided is a true appeal and that the Marketing Board was limited to a consideration of whether the decisions of the Chicken Board contained reversible error. The Marketing Board takes the position that the appeal under s. 8 is not limited to a review for error, but is rather a full hearing on the merits including all questions of fact, law and policy.

3 The learned chambers judge accepted the position advanced by the Chicken Board. He relied on the decision of this Court in *Dupras v. Mason* (1994), 99 B.C.L.R. (2d) 266 (B.C. C.A.). He held that the standard of review to be applied by the Marketing Board was the reasonableness of the Chicken Board's decisions. He held that in asking whether the Chicken Board's decisions were correct on the merits the Marketing Board had applied the wrong standard of review. He concluded his opinion in the *Mundhenk* appeal this way:

> [46] Based on the Provincial's Board error that there was no evidence before the Provincial Board that the Chicken Board had turned its mind to exercising its discretion, the Provincial Board further erred by conducting a hearing *de novo* on the very question that was before the Chicken Board. Also, they failed to accord any deference to the decision of the Chicken Board and substituted their exercise of discretion for that of the Chicken Board's.
>
> [47] The Provincial Board ought to have recognized that the Chicken Board did exercise its discretion and ought to have asked itself whether that exercise of discretion was unreasonable, that is, whether any reasons supported it and whether there was a defect in the evidentiary foundation for the decision or in the logical process from which conclusions were drawn. This the Provincial Board did not do, and this was an error of law.

4 Similarly, in the *Hong* appeal the learned chambers judge held the Marketing Board erred in applying a test of correctness to the Chicken Board's decisions. He held that the Marketing Board erred in deciding that the Chicken Board should have looked to its previous decisions. He concluded on that case in this way:

> [61] It is improper for the Provincial Board to overturn a 2001 decision of the Chicken Board by saying, in effect, that the Chicken Board, in their 2001 decision, ought to have corrected an error that is alleged to have [been] made in a 1997 decision.
>
> [62] The Provincial Board erred in law by failing to apply the appropriate standard of review or accord any deference to the Chicken Board decision. The Provincial Board ought to have asked itself whether the Chicken Board's decision not to grandfather Mr. Hong's permit was unreasonable. It is difficult to conclude that the Chicken Board's decision suffered from an evidentiary or logical defect.

5 The nature of an appeal to the Marketing Board under s. 8 depends upon on the true

interpretation of that section in the context of the legislation as a whole. The purpose of the Act is set out in s. 2(1):

> 2(1) The purpose and intent of this Act is to provide for the promotion, control and regulation of the production, transportation, packing, storage and marketing of natural products in British Columbia, including prohibition of all or part of that production, transportation, packing, storage and marketing.

And further:

> 3(1) For the purposes of this Act, the Lieutenant Governor in Council may constitute the British Columbia Marketing Board consisting of not more than 10 members appointed by the Lieutenant Governor in Council.

6 The Act by s. 3(5)(a) gives the Marketing Board a general supervisory power over all commodity boards or commissions constituted under the Act.

7 Section 8 provides the Board's appeal jurisdiction:

> 8(1) A person aggrieved by or dissatisfied with an order, decision or determination of a marketing board or commission may appeal the order, decision or determination by serving the Provincial board with written notice of the appeal within
>
> (a) 30 days after receiving notice of the order, decision or determination, or
>
> (b) if the Provincial board considers special circumstances warrant it, a further period specified by the Provincial board on request of the person who brings the appeal.
>
> (2) A notice under subsection (1) must
>
> (a) contain a statement of the matter being appealed, the name and address of the person bringing the appeal and the name and address of the marketing board or commission being appealed from, and
>
> (b) be accompanied by the prescribed fee for bringing the appeal.
>
> (3) Within 30 days of being served under subsection (1), the Provincial board must serve written notice of the time and place of the hearing of the appeal on the person bringing the appeal and on the marketing board or commission from which the appeal is made.
>
> (4) The marketing board or commission from which an appeal is made must promptly provide the Provincial board with every bylaw, order, rule and other document touching on the matter under appeal.

(5) On its own motion or, on the written request of a party to an appeal under subsection (1), the Provincial board may direct that a party to the appeal provide the Provincial board and other parties to the appeal with a copy of each document the Provincial board specifies in its direction.

(6) The Provincial board need not hold a hearing or give notice to other parties to the appeal before making a direction under subsection (5).

(7) The Provincial board must hear an appeal under this section not more than 60 days after it receives a notice of appeal under subsection (1) but the Provincial board may adjourn a hearing for the period it considers appropriate on the request of the person bringing the appeal or of the marketing board or commission from which the appeal is being made or on its own initiative.

(8) An appeal under this section or section 9 must be open to the public.

(8.1) Despite subsection (8), the Provincial board may conduct all or part of a hearing in private to the extent it considers necessary to do one or both of the following:

(a) to protect confidential business records or confidential business information respecting a party or witness from disclosure to competitors;

(b) to protect personal or medical information about a party or witness from public disclosure.

(8.2) The Provincial board may order that an order, decision or determination of a marketing board or commission that is under appeal is stayed pending the outcome of the appeal.

(8.3) On the request of a party to an appeal, the Provincial board may dismiss an appeal as frivolous, vexatious or trivial.

(9) On hearing an appeal under subsection (1), the Provincial board may do any of the following:

(a) make an order confirming, reversing or varying the order, decision or determination under appeal;

(b) refer the matter back to the marketing board or commission with or without directions;

(c) make another order it considers appropriate in the circumstances.

(10) The Provincial board must serve a copy of its order or referral made under subsection (9) on each party to the appeal proceeding as soon as practical.

(11) In making its order or referral under subsection (9), the Provincial board may, if it considers it appropriate in the circumstances, direct that a party to the appeal proceeding pay any or all actual costs, within prescribed limits, as calculated by the Provincial board

(a) of another party to the appeal, or

(b) of the Provincial board, payable to the Minister of Finance and Corporate Relations.

8 No similar powers are conferred on commodity boards such as the Chicken Board.

9 The Act further provides in s. 9 for an appeal from a decision made by the Marketing Board exercising its appellate jurisdiction under s. 8:

9(1) If a person, marketing board or commission is aggrieved or dissatisfied by an order or referral of the Provincial board under section 8(9), the person, marketing board or commission may appeal the order or referral on a question of law to the Supreme Court if the appeal is commenced within 30 days of being served with a copy of the order or referral.

(2) On hearing an appeal under subsection (1), the Supreme Court may do one or more of the following:

(a) make an order confirming, reversing or varying the order or referral of the Provincial board;

(b) refer the matter back to the Provincial board with or without directions;

(c) make another order it considers appropriate in the circumstances.

(3) An appeal from a decision of the Supreme Court under subsection (2) lies to the Court of Appeal with leave of a justice of the Court of Appeal.

10 Also relevant are the regulations promulgated under the *Natural Products Marketing (BC) Act*, and, in particular, R. 6:

6(1) These rules apply exclusively to appeals under section 8(1) of the Act.

(2) The prescribed fee under section 8(2)(b) of the Act is $100.

(3) Every notice of appeal must be sent by registered mail addressed to the General Manager, British Columbia Marketing Board, in Victoria.

(4) Repealed. [B.C. Reg. 223/94, s. 1.]

(5) Service of any notice, other than the notice required under section 8(1) of the Act, or of any relevant documents, shall be by registered mail directed to the last known address of the person.

(6) The board shall give the appellant and the marketing board or commission the opportunity to be represented by counsel to present relevant evidence and information.

(7) The board may receive evidence or information as it in its discretion considers necessary and appropriate whether or not such evidence or information would be admissible in a court of law.

(8) The board may in its discretion hear any interested persons.

11 There is no adjudicative scheme in the Act or the Rules for the Chicken Board, or other such commodity boards. The Chicken Board is not authorized to function as an adjudicative body and it does not do so. In most cases it does not hear evidence or submissions from the parties, and it does not issue reasons for its decisions.

12 The Marketing Board, on the other hand, in the exercise of its s. 8 jurisdiction, almost always conducts hearings with witnesses, sworn testimony, oral submissions, and provides the opportunity for parties to be represented by counsel. It issues reasons for its decisions in virtually every case it decides. In these two cases the Chicken Board did not hold hearings and did not give reasons for its decisions.

13 The statutory regime created by this legislation clearly indicates that an appeal to the Marketing Board is to be in the nature of a full hearing into the merits of the case. There is nothing in the legislation to suggest that the Marketing Board must give any or any significant deference to the decision of a commodity board, such as the Chicken Board. Where the Chicken Board has heard no evidence, information or argument and has offered no reasons for its decision, the Marketing Board has little alternative under its statutory adjudication regime other than to determine the facts and issues based on the evidence and argument presented to it. It has the power to conduct a full hearing into the merits.

14 In my respectful opinion, the learned chambers judge erred in applying the decision of this Court in *Dupras* to the circumstances of this case. *Dupras* was an appeal from a specialized statutory office to a court, and not an appeal to a specialized administrative appeal board. The Marketing Board is not a generalist court, but a specialized tribunal expected to use its expertise. That expertise would be lost if it were required to grant deference to a commodity board and to conduct appeals limited as to their grounds.

15 In my respectful view, the learned chambers judge erred in his interpretation of s. 8 by

reading the words "may appeal" in isolation from the other words of s. 8 and from the rest of the statute. Those words do not have a fixed meaning and must be read having regard for the legislative scheme and for the purposes of the Act. In my view, therefore, the learned chambers judge erred in interpreting the Act and consequently in the standard of review he said the Marketing Board was to apply in the exercise of its appellate powers.

16 The Marketing Board did not err in applying the standard of correctness. I would allow the appeal and restore the decisions of the Marketing Board in the *Mundhenk* and *Hong* appeals.

***Southin J.A.*:**

17 I agree.

***Low J.A.*:**

18 I agree.

***Finch C.J.B.C.*:**

19 So ordered.

Appeal allowed.

2003 SCC 55
Supreme Court of Canada

Paul v. British Columbia (Forest Appeals Commission)

2003 CarswellBC 2432, 2003 CarswellBC 2433, 2003 SCC 55, [2003] 11 W.W.R. 1, [2003] 2 S.C.R. 585, [2003] 4 C.N.L.R. 25, [2003] B.C.W.L.D. 781, [2003] S.C.J. No. 34, 111 C.R.R. (2d) 292, 18 B.C.L.R. (4th) 207, 231 D.L.R. (4th) 449, 3 C.E.L.R. (3d) 161, 5 Admin. L.R. (4th) 161, J.E. 2003-1847, REJB 2003-48213

Attorney General of British Columbia and Ministry of Forests, Appellants v. Thomas Paul, Respondent and Forest Appeals Commission, Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General for Saskatchewan, Attorney General of Alberta and First Nations Summit, Interveners

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps JJ.

Heard: June 11, 2003
Judgment: October 3, 2003
Docket: 28974

Proceedings: reversing (2001), 2001 BCCA 644, 2001 CarswellBC 2306, 206 D.L.R. (4th) 320, 40 C.E.L.R. (N.S.) 169 (B.C. C.A.); additional reasons to (2001), [2001] 7 W.W.R. 105, 2001 BCCA 411, 2001 CarswellBC 1222, 89 B.C.L.R. (3d) 210, 38 C.E.L.R. (N.S.) 149, 201 D.L.R. (4th) 251, [2001] 4 C.N.L.R. 210 (B.C. C.A.); reversing (1999), 1999 CarswellBC 2050, 179 D.L.R. (4th) 351, 31 C.E.L.R. (N.S.) 141, [2000] 1 C.N.L.R. 176 (B.C. S.C.)

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M. Hugh G. Braker, Q.C., and Robert C. Freedman for respondent
T. Murray Rankin, Q.C., and Mark G. Underhill for intervener Forest Appeals Commission
Mitchell Taylor and Peter Southey for intervener Attorney General of Canada
Michel Y. Hélie for intervener Attorney General of Ontario
Pierre-Christian Labeau (written submissions only) for intervener Attorney General of Quebec
Gabriel Bourgeois, Q.C. (written submissions only), for intervener Attorney General of New Brunswick

decision of the Chief Gold Commissioner under provincial mining legislation. Both involved R. 49 of the British Columbia *Supreme Court Rules*. The Court of Appeal in both cases held that the right of appeal did not permit a trial *de novo*.

44 I wish in no respect to comment on the validity of those decisions in their proper context or on the interpretation of R. 49. Those cases, however, dealt with an appeal from an administrative scheme to a superior court. It was on precisely that basis that the Court of Appeal in *British Columbia (Chicken Marketing Board) v. British Columbia (Marketing Board)*, 216 D.L.R. (4th) 587, 2002 BCCA 473 (B.C. C.A.), recently distinguished *Dupras*. The issue there was a statutory appeal from the Chicken Marketing Board to the Marketing Board. The former was not an adjudicative body. In contrast, the Marketing Board almost always conducted hearings with witnesses, sworn testimony and oral submissions, provided the opportunity for parties to be represented by counsel, and gave reasons for its decisions. The Court of Appeal held that the statutory appeal to the Marketing Board was a full hearing on the merits, there being no suggestion that significant deference was owed to the lower board. The chambers judge had erred in applying *Dupras*, an appeal from a specialized statutory office to a superior court, not an appeal within an administrative scheme to a specialized appeal board. The Marketing Board was not a generalist court, but a specialized tribunal expected to use its expertise. That expertise would be squandered if the Marketing Board were bound to defer to the lower board and restrict its inquiry to the grounds before the lower board (paras. 11-14). I note that in the case of an appeal from a tribunal to a superior court, as opposed to an appeal within an administrative scheme, the reviewing judge will follow the pragmatic and functional approach to determine the appropriate standard of review: *Q.*, *supra*, at para. 25. This Court's decision in *Tétreault-Gadoury*, *supra*, is another relevant example. In that case, again within an administrative scheme, only the umpire was expressly given powers to determine questions of law. This Court held that it was the umpire, who sat on appeal from the Board of Referees, who had the power to consider constitutional questions. La Forest J. noted that where the litigant has the possibility of an administrative appeal before a body with the power to consider constitutional arguments, the need for determination of the constitutional issue by the tribunal of original jurisdiction is clearly less (p. 36). That conclusion would have been impossible if, as a general proposition, an appeals tribunal could not consider issues not raised below. I see no basis for prohibiting the Commission from hearing a s. 35 argument on the basis of the nature of the appeal.

45 I conclude, therefore, that the Commission has the power to decide questions relating to aboriginal rights arising incidentally to forestry matters. No argument was made that the Legislature has expressly or by clear implication arising from the statutory scheme withdrawn from the Commission the power to determine related questions under s. 35 that will presumptively attend the power to determine questions of law. The Commission therefore has the power to hear and decide the incidental issues relating to Mr. Paul's defence of aboriginal rights.

2019 BCSC 716
British Columbia Supreme Court

Technical Safety BC v. BC Frozen Foods Ltd.

2019 CarswellBC 1252, 2019 BCSC 716, 305 A.C.W.S. (3d) 331, 62 Admin. L.R. (6th) 36

Technical Safety BC (Petitioner) and BC Frozen Foods Ltd. and the Safety Standards Appeal Board (Respondents)

Gomery J.

Heard: April 25-26, 2019
Judgment: May 8, 2019
Docket: Vancouver S186382

Counsel: J.A. Morris, L. Picotte-Li, for Petitioner
No one, for Respondent, BC Frozen Foods Ltd.
M. Underhill, for Respondent, the Safety Standards Appeal Board

Subject: Public; Employment; Occupational Health and Safety

Headnote

Labour and employment law --- Occupational health and safety legislation — Miscellaneous Safety standards legislation — Safety authority imposed $23,000 penalty on company for failure to comply with compliance order — Company appealed to Safety Standards Appeal Board, which reduced penalty to $19,000 — Authority brought petition for judicial review — Petition dismissed — Board's decision was not patently unreasonable — Board's interpretation of Safety Standards Act as authorizing board to vary penalty simply on basis that Board believed another penalty was more appropriate was not irrational or obviously flawed — Board's jurisdiction on appeal was comprehensive, and it was open to Board to conclude that deferential standard of review was not required by Act — Board's unclear and difficult internal jurisprudence on standard of review as it applied to penalty assessments was troublesome, but this did not demonstrate decision was patently unreasonable, arbitrary, or irrational — There was some evidence to support Board's reasoning that contravention had been somewhat less deliberate than authority had determined.

PETITION by safety authority for judicial review of decision of Safety Standards Appeal Board reducing penalty against company from $23,000 to $19,000.

Analysis

38 The issue is whether it was patently unreasonable for the Board to substitute its own opinion as to the appropriate penalty. In light of the arguments advanced, this can be broken down into three sub-issues:

a) Under the legislative scheme, is it patently unreasonable for the Board to vary the penalty imposed by the safety manager on the basis that it was incorrect without finding that it was unreasonable?

b) Is the Board's decision to substitute its own opinion as to the amount of the penalty patently unreasonable in light of its own jurisprudence?

c) Is the Board's decision based on a patently unreasonable view of the facts?

Under the legislative scheme, is it patently unreasonable for the Board to vary the penalty imposed by the safety manager on the basis that it was incorrect without finding that it was unreasonable?

39 It is common ground that the Board's adoption of a standard of review in the exercise of its appellate role is a question of law involving the interpretation and application of the *SSA*. The Board has interpreted the *SSA* as authorizing it to vary a penalty imposed by a safety manager simply on the basis that it believes another penalty is more appropriate. The question for the Court is whether the Board's interpretation of the legislation is "clearly irrational", "evidently not in accordance with reason", and "so flawed that no amount of curial defence can justify letting it stand"; *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20, [2003] 1 S.C.R. 247 (S.C.C.) at para. 52; *Shamji v. Workers' Compensation Appeal Tribunal*, 2018 BCCA 73 (B.C. C.A.) at paras. 35-38.

40 In the Decision at paras. 22-25, the Board justifies its adoption of a correctness standard of review in assessing penalties by reference to provisions of the *SSA*, the judgment of Rowles J.A. in *Investment Industry Regulatory Organization of Canada v. Rahmani*, 2010 BCCA 93 (B.C. C.A. [In Chambers]) [*IIROC*], and its own jurisprudence. Addressing the legislative scheme, it notes the requirement of s. 53 that an appeal is conducted as a new hearing, its exclusive jurisdiction over all matters of fact, law or discretion arising in an appeal, and the limitations on judicial review imposed by s. 60.

41 This reasoning is not irrational or obviously flawed. The application of a correctness standard of review has been respected by the courts addressing other legislative schemes providing for an "internal" appeal to a specialized administrative tribunal. *IIROC* is one such

case. Others include *British Columbia (Chicken Marketing Board) v. British Columbia (Marketing Board)*, 2002 BCCA 473 (B.C. C.A.) (which is cited in *IIROC*) and *British Columbia Society for the Prevention of Cruelty to Animals v. British Columbia (Farm Industry Review Board)*, 2013 BCSC 2331 (B.C. S.C.). The *Chicken Marketing Board* case was cited with approval in *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 (S.C.C.) at para. 44. While every legislative scheme is different and these other decisions could be distinguished, it was open to the Board to be persuaded by the reasoning in these cases and to find them helpful.

42 Judicial deference to administrative tribunals such as the Board is a principle of administrative law. Where deference to the point of a standard of patent unreasonableness is not required by s. 58 of the *ATA*, the courts still refrain from intervening unless the decision under review or under appeal is simply "unreasonable"; *Dunsmuir v. New Brunswick*, 2008 SCC 9 (S.C.C.). There is no such principle mandating deference by a supervising tribunal to the administrative decision-makers it oversees. The supervising tribunal must construe the statute and determine what it requires; *City Centre Equities Inc. v. Regina (City)*, 2018 SKCA 43 (Sask. C.A.) at paras. 38-59. Subject always to legislative requirements, it is a consequence of the principle of *judicial* deference that the courts generally refrain from directing an administrative tribunal that itself sits on appeal as to how it shall carry out its appellate functions. As Kirkpatrick J.A. put the proposition in *Harding v. Law Society of British Columbia*, 2017 BCCA 171 (B.C. C.A.) at para. 43, it is not:

> . . . the role of this Court, in the circumstances of these appeals, to dictate to the Law Society the internal standard of review to be applied by review boards. Our role is to ensure that whatever standard is adopted is reasonable.

43 TSBC relies on *The College of Physicians and Surgeons of British Columbia v. The Health Professions Review Board*, 2019 BCSC 539 (B.C. S.C.) at paras. 75-82. This case involved professional discipline of a registrant. A specialist Review Board overturned the decision of an Inquiry Committee by substituting its own opinion for that of the Committee. Basran J. held that, rather than substituting its own opinion, the Review Board should have asked whether the decision was reasonable, and the Review Board's mistake was a patently unreasonable error. The patently unreasonable error in this case was grounded in a specific provision of the governing legislation. The Review Board mistakenly held that the Inquiry Committee was bound to take the registrant's discipline history into account while the legislation expressly afforded the Inquiry Committee a discretion in this regard and the history involved conduct that was substantially different than that at hand. In my opinion, this case does not establish a principle of general application bearing on appeals to the Board under the *SSA*.

44 TSBC also relies on *Yaremy v. British Columbia (Human Rights Tribunal)*, 2013 BCSC 2386 (B.C. S.C.) at para. 65, aff'd 2015 BCCA 228 (B.C. C.A.), and *Sones v. Squamish*

2019 SCC 65, 2019 CSC 65
Supreme Court of Canada

Canada (Minister of Citizenship and Immigration) v. Vavilov

2019 CarswellNat 7883, 2019 CarswellNat 7884, 2019 SCC 65, 2019 CSC 65, [2019] S.C.J. No. 65, 312 A.C.W.S. (3d) 460, 441 D.L.R. (4th) 1, 59 Admin. L.R. (6th) 1, 69 Imm. L.R. (4th) 1, EYB 2019-335761

Minister of Citizenship and Immigration (Appellant) and 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, 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

The appellate court found the registrar's approach was inadequate and unacceptable. There was a failure to consider the context and purpose of the section. The registrar adopted the reasoning of an analyst, which had only a very short paragraph on legislative history and failed to have any consideration of other parts of s. 3(2). On the facts, s. 3(1)(a) was the governing provision. As a person born in Canada in 1994, the applicant was entitled to citizenship.

The Minister of Citizenship and Immigration appealed.

Held: The appeal was dismissed.

Per Wagner C.J.C., Moldaver, Gascon, Côté, Brown, Rowe, Martin JJ.: A new course was established for reviewing the merits of an administrative determination. Reasonableness is the presumptive standard for review. This standard can be rebutted where the legislature intends a different standard to apply, or where the rule of law requires it.

Rationales including specialized expertise may be reasons for a legislature to delegate decision-making authority, but the very fact that the legislature opted to delegate authority was the basis for a default position of reasonableness review, and expertise was no longer a relevant factor, as it had been using a contextual review approach.

Where the legislature has provided for an appeal from an administrative decision to a court, there is a departure from the reasonableness standard and the court hearing the appeal should apply appellate standards of review.

The rule of law requires a correctness standard for constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding the jurisdictional boundaries between administrative bodies. Merely being of wider public concern, or touching on an important issue, is insufficient to meet the test of a general question of law of central importance. "Matters of true jurisdiction" is not a distinct category attracting a correctness review. Other categories might arise in future cases, but new categories of correctness review should not be routinely established.

The focus of a reasonableness review must be on the decision made, including both the reasoning process and the outcome. Reasonableness is a single standard, and contextual elements of a decision do not modulate the standard. Reasons should be read in light of the record and recognize that administrative decision-makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge. A reasonable decision is justified, transparent and intelligible, and is justified in relation to relevant legal and factual constraints. Where no reasons have been provided, the determination will still be examined in the light of relevant constraints, although it is more likely that the analysis will focus on the outcome rather than the reasoning process.

In the case at bar, the standard of review was reasonableness. The registrar's determination was not reasonable in finding that the applicant's parents had been other representatives or employees in Canada of a foreign government within the meaning of s. 3(2)(a) of the Act. The

registrar failed to justify her interpretation in the light of the constraints imposed by s. 3 of the Act considered as a whole, by other legislation and international treaties that inform the purpose of s. 3, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Section 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. What matters, for the purposes of s. 3(2)(a), is not whether an individual carries out activities in the service of a foreign state while in Canada, but whether, at the relevant time, the individual has been granted diplomatic privileges and immunities. The applicant raised many of these considerations but the registrar failed to address them in her reasons and did not perform more than a cursory review of legislative history.

The officials responsible for the files were aware that s. 3(2)(a) of the Act was informed by the principle that individuals subject to the exception were not obliged to the law of Canada, and they were also aware that the interpretation they had adopted was a novel one. The registrar knew this but failed to provide a rationale for this expanded interpretation. Rules concerning citizenship require a high degree of interpretive consistency. The registrar's determination had the same effect as a revocation of citizenship.

Per Abella, Karakatsanis JJ. (concurring): The majority decision fundamentally reoriented the decades-old relationship between administrative actors and the judiciary, by dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis. The majority's framework rested on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignored the specialized expertise of administrative decision-makers. Correctness review was permitted only for questions "of central importance to the legal system and outside the specialized expertise of the adjudicator". Broadening this category from its original characterization unduly expanded the issues available for judicial substitution. The majority's reliance on the "presumption of consistent expression" in relation to the single word "appeal" was misplaced and disregarded long-accepted institutional distinctions between how courts and administrative decision-makers function. If an applicant were to challenge multiple aspects of an administrative determination, some falling within an appeal clause and others not, complexity and barriers to access to justice could arise. The judgment disregarded precedent and stare decisis and disregarded the high threshold necessary to overturn previous decisions.

A more modest approach was justified. A standard of review framework with a meaningful rule of deference, based on both the legislative choice to delegate decision-making authority to an administrative actor and on the specialized expertise that these decision-makers possess and develop in applying their mandates, was required. Outside of the correctness categories from earlier caselaw, and absent clear and explicit legislative direction on the standard of review, administrative decisions should be reviewed for reasonableness. The category of "true questions of jurisdiction" should be eliminated. The approach to reasonableness should focus on deference. Deference informs the attitude a reviewing court must adopt towards an administrative decision-maker, affects how a court frames the question it must answer, and

affects how a reviewing court evaluates challenges to an administrative decision.

In the case at bar, the standard of review was reasonableness. The registrar's reasons failed to respond to the applicant's extensive and compelling submissions about the objectives of s. 3(2)(a) of the Act. The analyst misunderstood arguments on this point. The text of s. 3(2)(c) could be seen as undermining the registrar's interpretation, as the language suggests that s. 3(2)(a) covers only those "employee[s] in Canada of a foreign government" who have diplomatic privileges and immunities.

Le requérant est né au Canada après que ses parents soient arrivés au Canada en provenance de la Russie et aient usurpé l'identité de deux Canadiens décédés. Les parents ont obtenu des passeports, ont déménagé en France puis aux États-Unis, où ils ont obtenu la citoyenneté américaine. Les parents ont été démasqués en tant qu'agents non accrédités d'un gouvernement étranger se livrant à la collecte rémunérée de renseignements. En 2010, les parents du requérant sont retournés en Russie à la suite d'un échange d'espions et le passeport du requérant ainsi que sa citoyenneté américaine ont été révoqués. Le requérant s'est installé en Russie et a obtenu une nouvelle identité. Par la suite, le requérant a tenté d'obtenir un passeport canadien après avoir modifié son certificat de naissance et utilisé la véritable identité de ses parents. Le requérant a obtenu un certificat de citoyenneté canadienne, mais la greffière a annulé le certificat au motif que les parents du requérant n'étaient pas légalement citoyens canadiens ou résidents permanents, mais étaient des représentants ou employés au service d'un gouvernement étranger pour les besoins de l'art. 3(2)a) de la Loi sur la citoyenneté. La demande du requérant en contrôle judiciaire a été rejetée au motif que quiconque déménage au Canada avec l'objectif explicite de s'établir afin de poursuivre une opération de renseignements étrangère, au Canada ou dans un autre pays, le faisait au service d'un gouvernement étranger ou en tant que représentant ou employé au service d'un tel gouvernement.

L'appel du requérant à la Cour fédérale a été rejeté.

L'appel du requérant à la Cour d'appel fédérale a été accueilli. La Cour d'appel a estimé que la décision de la greffière de révoquer la citoyenneté du requérant n'appartenait pas aux décisions acceptables ou justifiables et n'était donc pas raisonnable. Les parents du requérant n'étaient pas « au service au Canada d'un gouvernement étranger » en vertu de l'art. 3(2)a) de la Loi, ce qui signifiait que ce paragraphe ne s'appliquait pas. L'objectif de ce paragraphe était d'interdire que les enfants nés au Canada de parents au service d'un gouvernement étranger n'obtiennent la citoyenneté canadienne. L'intention de la modification à ce paragraphe était de s'assurer qu'il s'appliquât seulement aux employés qui bénéficiaient de privilèges diplomatiques et d'immunités de juridiction civile et/ou pénale. Comme telles, les personnes « au service au Canada d'un gouvernement étranger » comprenaient seulement celles qui jouissaient de privilèges et immunités diplomatiques conférés par la Convention de Vienne sur les relations diplomatiques. La Cour d'appel a conclu que les types de privilèges conférés aux diplomates et à leur famille n'étaient pas compatibles avec les obligations de la citoyenneté, ce qui expliquait pourquoi ils ne pouvaient acquérir la citoyenneté. Les personnes assujetties aux lois canadiennes

Alberta Transportation Safety Board

Citation: 2019 ABTSB 1741
Date: 2019-12-04

IN THE MATTER OF THE *Traffic Safety Act* (the "*Act*");

AND IN THE MATTER OF an appeal of the Registrar, Motor Vehicle Services (the "Registrar") to the Alberta Transportation Safety Board (the "Board") lodged by Habib Transport Ltd. (the "Appellant").

A written hearing was held in the City of Edmonton, in the Province of Alberta, on December 4, 2019.

BEFORE:

P.E. Maeda, Presiding Officer
J.G. Glavin, Member
R. Hachigian, Member

PRESENT:

A. Baker, Acting Board Secretary
A. Abbott, Independent Counsel to the Board

BACKGROUND

Notice of the hearing was provided to the Appellant and to the Registrar in advance of the hearing. The Appellant was provided with the Registrar's disclosure prior to the appeal. Both parties made written submissions to the Board.

EVIDENCE AND DOCUMENTS CONSIDERED

The Board considered the documents and evidence listed in Appendix "A", which were provided in advance of the hearing.

SUBJECT MATTER FOR THE APPEAL

1. The Appellant appeals the Administrative Penalty imposed against the Appellant for failing to have or implement a written safety program that fully met regulatory requirements.

2. On May 7, 2019, a National Safety Code audit (the "Audit") was conducted on the Appellant carrier. The results of the audit showed a score of 33% in non-compliance to transportation requirements. Drivers' hours of service records indicate a fatigue violation rate of 52.83%.

ISSUES BEFORE THE BOARD

24. In the Board's view, the issues in this appeal are:

    a. the standard of review to be applied by the Board; and

    b. whether the Board should confirm, vary, or rescind the Registrar's Decision as contemplated by section 41(2) of the *Act*.

DECISION OF THE BOARD

25. The Board finds that a correctness standard of review applies, and that it therefore does not owe deference to the Registrar's Decision.

26. The Board confirms the Registrar's Decision.

REASONS OF THE BOARD

Standard of Review

27. The Board considered the Registrar's argument that the Board should apply the reasonableness standard of review. However, upon careful examination of the argument and the case law presented by the Registrar, the Board has determined that the appropriate standard of review is correctness.

28. The Board agrees with the Registrar's submission that there are only two standards of review: correctness and reasonableness. When the standard of review is reasonableness, the reviewer will give deference to the decision-maker below and only interfere with the decision if it is unreasonable. When the standard of review is correctness, the reviewer will not give deference to the decision-maker below and, if the decision is not correct, the reviewer will substitute its own decision.

29. The Registrar argues that the standard of review is reasonableness, citing *Capilano*. However, the question in *Capilano* was what standard of review should be applied by a court when reviewing a decision from an administrative tribunal. The Board is not a court; the question for the Board is what standard of review it should apply as an administrative appeal body, to an exercise of discretion by a decision-maker of first instance (the Registrar, vis a vis the Director).

30. In the opinion of the Board, the analysis applicable to its determination of the standard of review of a decision of the Registrar was set out by Slatter J.A. in *Newton*.

31. Under *Newton*, the outcome of the standard of review analysis depends on the specific legislation and context. In the cases cited by the Registrar, *Imperial Oil* and

Lum, the legislative framework and hearing process were very different from those of the Board. Notably, in both *Lum* and *Imperial Oil* there were fully contested hearings before proceeding to an appellate tribunal. These cases are, therefore, of no assistance to the Board in determining the standard of review of a Registrar's decision.

32. In *Juneja*, the Court of Queen's Bench of Alberta made the following observations about the Board's appeal process:

> [25] The appeal process outlined in the Act gives the Board wide discretion to vary the decision made by the Registrar and to take any action that the Registrar could have. The procedure to commence an appeal is simple and involves only the filing of a notice of appeal. Section 27 of the Act gives the Board wide authority to hold oral hearings, to summon witnesses, and to take evidence under oath. The appellant has the right to appeal and a right to counsel. The appeal process appears to provide for a *de novo* hearing in which the Board reassesses the merits of the decision without being required to accord any deference to the Registrar's decision.

33. Although the standard of review for the Board was not specifically argued, in making the above statement, the Court considered the legislative scheme, the nature of the Registrar's decision, and the duty of fairness owed by the Registrar to the Appellant before concluding that a hearing before the Board is a *de novo* hearing.

34. The Board notes that a *de novo* hearing does not preclude giving deference to the decision-maker of first instance. However, as stated by Slatter J.A. in *Newton* at paragraph 44, "While the right or obligation to hold a *de novo* hearing does not necessarily dictate a correctness standard of review, it is one important signal of the intention of the Legislature."

35. The Board notes that no hearing is held before an administrative penalty is imposed by the Registrar or the Registrar's delegate. Lack of a prior formal hearing contributes to one of the key issues that the Board sees with conducting a "reasonableness" review: the lack of a formal "record" of the decision below it. The Registrar's Decision is a three page letter from the Director without any documents attached or referenced in the letter, save for the NSC Auditor Contact Information and Selecting a Transportation Safety Consultant enclosures.

36. There is no evidence of what materials were before the Director when he made the Registrar's Decision, or what materials he relied on in making the Registrar's Decision. The only reference to the materials in the Registrar's Decision is a line that states, "The carrier would have received the documentation reflecting these results from the certified third party auditor at the conclusion of the audit", which leads the Board to believe that the Director of Carrier Services relied on the Audit, or some part of the Audit, in making the Registrar's Decision.

37. In response to the appeal, the Registrar provided disclosure to the Board and to the Appellant, which consisted of 18 documents totaling over 265 pages. While the Registrar urges the Board to review the "record", no clear record is apparent.

38. Therefore, in this appeal, the Board finds that although it may confirm the Registrar's Decision, it does not owe any deference to the Registrar's Decision. The standard of review is correctness.

Note

39. After the Board decided this appeal, but before these written reasons were issued, the Supreme Court of Canada issued its decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (the "*Vavilov*"). The Board is also aware of the decision of the Court of Queen's Bench of Alberta in *Trach v. Alberta (Transportation Safety Board)*, 2020 ABQB 21 (the "*Trach*").

40. Like *Capilano*, *Vavilov* and *Trach* deal with the standard of review to be applied by a court in reviewing a decision of an administrative decision-maker, not the standard of review to be applied by one administrative decision-maker who is reviewing the decision of another administrative decision-maker. Therefore, neither of these cases changes the analysis set out above.

Merits

41. The Board considered the Appellant's argument that the deficiencies in the Appellant's paperwork are technical in nature and that the Appellant is working to correct the deficiencies as soon as possible. As part of this argument, the Board considered what the Registrar characterized as an argument by the Appellant that some of the deficiencies found by the auditor were incorrect.

42. The Board noted that the auditor considered the Appellant's claims as summarized in the Summary Audit Report, including the Appellant's claims that the times recorded were not accurate and that this was the reason why they did not match the daily logs. The auditor's comments provided in the Internal Audit Report state:

> "The owner verbalized that he was not aware that fueling, washing the truck, doing maintenance was to be considered as 'on-duty', and was quite argumentative when it was explained why the daily logs were considered to be false, when compared to the above captioned documentation. The owner also strongly disagreed with the use of the times that were recorded on the dangerous goods bills of lading, vehemently expressing that the times recorded were not accurate and that is why they did not match up with the daily logs. You will see in the carrier comments, it is mentioned. The carrier was not able to provide evidence that the times were inaccurate. When it came to fuel records not matching the daily logs, the carrier again argued trying to explain it away, why the

PART I

ORGANIZATION, PROCEDURE AND POWERS

Continuation of board

2 The Municipal Board is hereby continued.

Membership of board

3 Subject to section 4, the board shall be composed of such number of members as the Lieutenant Governor in Council may from time to time determine.

Not less than three

4 The board shall be composed of not less than three members.

Chairman designated

5(1) The Lieutenant Governor in Council shall designate one of the members to be chairman of the board.

Acting chairman

5(2) Where there is, for any cause, a vacancy in the office of chairman, the Lieutenant Governor in Council may appoint one of the other members, whether he is a permanent member or a member appointed temporarily under section 11, as acting chairman either for a specified period or without fixing the term of the appointment.

Powers of acting chairman

5(3) The acting chairman has, during the absence or incapacity of the chairman, all the power and authority of the chairman.

Duties of chairman

6(1) The chairman shall devote the whole of his time to his duties under this Act; and he has the supervision of the staff of the board.

PARTIE I

ORGANISATION, PROCÉDURE ET POUVOIRS

Prorogation de la Commission

2 Est prorogée la Commission municipale.

Composition

3 Sous réserve de l'article 4, la Commission est composée du nombres de membres que fixe le lieutenant-gouverneur en conseil.

Nombre minimum

4 La Commission est composée d'au moins trois membres.

Président

5(1) Le lieutenant-gouverneur en conseil nomme un président parmi les membres de la Commission.

Vacance

5(2) Lorsque pour quelque cause que ce soit il y a vacance au poste de président, le lieutenant-gouverneur en conseil peut nommer l'un des membres, qu'il soit permanent ou nommé à titre temporaire en vertu de l'article 11, pour remplacer le président, pour une période fixe ou indéfinie.

Pouvoirs du remplaçant

5(3) Le remplaçant a, pendant l'absence ou l'empêchement du président, tous les pouvoirs de ce dernier.

Fonctions du président

6(1) Le président consacre tout son temps aux fonctions que lui attribue la présente loi. Il supervise le personnel de la Commission.

SITTINGS OF THE BOARD

Place of office of board

15(1) The government shall provide the board with suitable quarters, furniture, and facilities for the holding of its sittings and the transaction of its business generally.

Conduct of sittings

15(2) The board shall sit at such times and places within the province as the chairman may designate; and it shall conduct its proceedings in such manner as may seem to it most convenient for the speedy and effectual dispatch of business.

Public hearings

15(3) All sittings of the board or of a member for hearing applications and taking evidence shall be open to the public.

Quorum

15(4) Save as herein otherwise provided, two members of the board constitute a quorum of the board.

Separate sittings

15(5) Separate sittings of the board may be held concurrently in different places if a quorum is present at each sitting; and the decision of a majority of the members present at a sitting is the decision of the board.

Continuation of hearing after resignation of member

15(6) Where, after the board has commenced a hearing in any matter, a member who was present when the hearing commenced dies, resigns, or becomes for any reason incapable of acting, the other members present when the hearing commenced, notwithstanding that they do not constitute a quorum of the board, may complete the hearing or any adjournment thereof and render a decision in the matter and the hearing and the decision are valid as though the other members constituted a quorum.

SÉANCES DE LA COMMISSION

Bureaux de la Commission

15(1) Le gouvernement fournit à la Commission des locaux, du mobilier et des installations propres à assurer la tenue de ses séances et l'exercice de ses activités en général.

Conduite des séances

15(2) Le président peut fixer le moment et le lieu où la Commission siège dans la province. La Commission mène ses instances de manière à assurer un traitement prompt et efficace de ses affaires.

Séances publiques

15(3) Les séances de la Commission ou d'un de ses membres pour entendre les demandes et recueillir la preuve sont ouvertes au public.

Quorum

15(4) Sauf disposition contraire de la présente loi, le quorum de la Commission est constitué par deux membres.

Séances distinctes

15(5) Des séances distinctes de la Commission peuvent avoir lieu en même temps à différents endroits, si le quorum est atteint à chacune des séances. Une décision prise à la majorité des membres présents lors d'une séance constitue une décision de la Commission.

Continuation des audiences après une démission

15(6) Lorsqu'au cours d'une séance de la Commission un membre présent décède, démissionne ou est pour une raison quelconque empêché, les autres membres présents peuvent mener à terme la séance ou la continuation de celle-ci, même si de ce fait, ils ne constituent plus le quorum. Ils peuvent rendre décision sur l'affaire en cause, et la séance et les décisions ont la même validité que s'il y avait eu quorum.

No personal liability of board and employees

23 Neither the members, nor the secretary of the board, nor any employee under the board, are or is personally liable for anything done by them or by it or by him under the authority of this or any other Act of the Legislature.

Immunité de la Commission et de ses employés

23 Les membres, le secrétaire et les employés de la Commission ne sont pas personnellement tenus des actes qu'ils accomplissent en application de la présente loi ou d'une autre loi de la Législature.

PROCEDURE

PROCÉDURE

Procedure governed by rules

24(1) All hearings and investigations conducted by the board shall be governed by rules adopted by the board.

Règles applicables à la procédure

24(1) Les audiences et les investigations de la Commission sont soumises aux règles qu'elle adopte.

Rules of evidence not binding on board

24(2) The board is not bound by the technical rules of legal evidence.

Caractère facultatif des règles du droit de la preuve

24(2) La Commission n'est pas liée par les règles formelles du droit de la preuve.

Rules of practice, their publication

24(3) The board may make rules of practice, not inconsistent with this Act, regulating its procedure and the times of its sittings; but the rules do not come into force until they are published on the board's website.

Publication des règles de pratique

24(3) La Commission peut établir des règles de pratique, compatibles avec la présente loi, concernant sa procédure et les dates de ses séances. Ces règles n'entrent en vigueur qu'après publication sur le site Web de la Commission.

Rules for resolving assessment appeals

24(3.1) The board's power under subsection (3) includes the power to make rules of practice respecting one or more members of the board assisting the parties to resolve matters at issue in an appeal under *The Municipal Assessment Act*, without holding a hearing.

Règles — règlement des appels en matière d'évaluation

24(3.1) Le pouvoir prévu au paragraphe (3) comprend celui de prendre des règles de pratique concernant l'aide qu'un ou plusieurs des membres de la Commission peuvent fournir aux parties afin de leur permettre de régler certaines questions en litige lors d'un appel visé par la *Loi sur l'évaluation municipale*, sans qu'il soit nécessaire de tenir une audience.

Board to have powers of Court of Queen's Bench in certain matters

24(4) The board, except as herein otherwise provided, as respects the attendance and examination of witnesses, the amendment of proceedings, the production and inspection of documents, the enforcement of its orders, the payment of costs, and all other matters necessary or proper for the due exercise of its powers, or otherwise for carrying any of its powers into effect, has all such powers, rights, and privileges as are vested in the Court of Queen's Bench or a judge thereof.

Witnesses

24(5) The procedure relating to the attendance of witnesses before the board is that from time to time in force in the Court of Queen's Bench; but a summons to a witness may be signed by a member or the secretary of the board.

Affidavit or evidence by report

24(6) The board may, in its discretion, accept and act upon evidence by affidavit or written affirmation or by the report of a member or of any officer or technical adviser appointed hereunder or obtained in such other manner as it may decide.

Commissions to take evidence out of Manitoba

24(7) The board may issue commissions to take evidence outside of Manitoba, and make all proper orders for the purpose and for the return and use of the evidence so obtained.

S.M. 2008, c. 34, s. 17; S.M. 2013, c. 39, Sch. A, s. 76.

Power of board to maintain order

25 The board has full power and authority to maintain order and decorum at all meetings or sittings of, or hearings, investigations, or inquiries conducted by the board; and for that purpose the chairman or other presiding member of the board may

(a) remove, eject, or exclude, or cause to be removed, ejected, or excluded from any such meeting, sitting, hearing, investigation, or inquiry,

Pouvoirs de la Commission en certaines matières

24(4) Sauf disposition contraire de la présente loi, la Commission a les pouvoirs, les droits et les privilèges conférés à la Cour du Banc de la Reine ou à un juge de celle-ci en ce qui concerne la comparution et l'interrogatoire des témoins, la modification d'actes de procédure, la production et l'inspection de documents, l'exécution de ses ordonnances, le paiement des frais ainsi que toute autre mesure nécessaire ou appropriée au bon exercice de ses pouvoirs ou à leur mise en œuvre.

Témoins

24(5) La procédure relative à la comparution des témoins devant la Commission est celle en vigueur devant la Cour du Banc de la Reine. Cependant, un membre ou le secrétaire de la Commission peut signer une assignation à témoin.

Témoignage par affidavit

24(6) La Commission peut, à sa discrétion, accepter tout mode de preuve qu'elle estime approprié et agir en conséquence. Elle peut notamment recevoir un témoignage par affidavit, par affirmation solennelle écrite ou contenue dans le rapport d'un membre, d'un cadre ou d'un conseiller technique nommé en conformité avec la présente loi.

Commissions rogatoires

24(7) La Commission peut créer des Commissions rogatoires pour prendre des dépositions à l'extérieur du Manitoba et rendre les ordonnances nécessaires relatives à cette fin de même qu'à la production et à l'utilisation des dépositions ainsi obtenues.

L.M. 2008, c. 34, art. 17; L.M. 2013, c. 39, ann. A, art. 76.

Maintien de l'ordre au cours des séances

25 La Commission a tous les pouvoirs nécessaires pour maintenir l'ordre et le décorum au cours des réunions, séances ou audiences qu'elle tient ainsi que des investigations et des enquêtes qu'elle mène. À cette fin, le président de la Commission ou le membre présidant la séance peut :

a) sortir, expulser ou exclure ou faire sortir, expulser ou exclure de toute réunion, séance, audience,

any person whom, in his absolute discretion, he deems to be intoxicated or to be, or to be about to become, disorderly or offensive or guilty of any improper conduct thereat; and

(b) require the assistance of any peace officer in maintaining peace and good order at any such meeting, sitting, hearing, investigation, or inquiry or in removing, ejecting, or excluding therefrom any person to whom clause (a) applies.

investigation ou enquête toute personne qu'il considère, à son entière discrétion, être en état d'ébriété, avoir, ou être sur le point d'avoir, une conduite désordonnée, embarrassante ou répréhensible;

b) exiger l'aide d'un agent de la paix pour maintenir la paix et l'ordre lors d'une réunion, séance, audience, investigation ou enquête ou pour faire sortir, expulser ou exclure toute personne à qui l'alinéa a) s'applique.

Protection of witnesses

26(1) No person shall be excused from testifying or from producing any book, document, or paper in any investigation or inquiry by, or upon a hearing before, the board when ordered so to do by the board, upon the ground that the testimony or evidence, book, document, or paper required of him may tend to incriminate him or subject him to penalty or forfeiture; but, except for prosecution or punishment for perjury committed by him in his testimony before the board, no person shall be prosecuted, punished, or subjected to any penalty or forfeiture for or on account of any act, transaction, matter, or thing concerning which he has, under oath, testified or produced documentary evidence.

Protection des témoins

26(1) Nul n'est exempt de témoigner ni de produire des livres ou des documents au cours d'une investigation, d'une enquête ou d'une audience devant la Commission, lorsque celle-ci le lui ordonne, pour le motif que le témoignage, la preuve, le livre ou le document exigé de lui est de nature à l'incriminer et à le rendre passible d'une peine ou d'une confiscation. Cependant, sauf en cas de poursuite ou de condamnation pour parjure commis au cours d'un témoignage devant la Commission, nul ne peut être poursuivi, condamné ou assujetti à une peine ou à une confiscation pour un acte, une opération, une affaire ou une chose au sujet de laquelle il a, sous serment, témoigné ou produit une preuve documentaire.

Members and employees not required to give evidence in civil suits

26(2) No member or employee of the board shall be required to give testimony in any civil suit to which the board is not a party, with regard to information obtained by him in the discharge of his official duties in connection with the board.

Immunité des membres et des employés dans les procès

26(2) Dans un procès civil auquel la Commission n'est pas partie, un membre ou un employé de la Commission n'est pas tenu de témoigner concernant les renseignements qu'il a obtenus dans l'accomplissement de ses fonctions officielles à la Commission.

Corporations not immune

26(3) Nothing in this section gives to any corporation immunity of any kind.

Aucune immunité pour les corporations

26(3) Le présent article n'a pas pour effet de conférer une immunité quelconque à une corporation.

Initiation of inquiries

27 The board may, of its own motion, and shall, upon the request of the Legislature or the Lieutenant Governor in Council, inquire into, hear, and determine any matter or thing within its jurisdiction.

Enquêtes

27 La Commission peut, de sa propre initiative, et doit, à la demande de la Législature ou du lieutenant-gouverneur en conseil, faire enquête, tenir des audiences et décider toutes les questions relevant de sa compétence.

Power to inspect, examine witnesses, documents, etc.
28 The board, or any person authorized by the board to make inquiry or report, may, where it appears expedient,

(a) enter upon and inspect any place, building, works or other property;

(b) require the attendance of all such persons as it or he thinks fit to summon and examine and take the testimony of the persons;

(c) require the production of all books, plans, specifications, drawings, and documents;

(d) administer oaths, affirmations, or declarations, and to summon witnesses, enforce their attendance, and compel them to give evidence and produce the books, plans, specifications, drawings, and documents, which it or he may require them to produce.

Pouvoirs de perquisitionner
28 La Commission ou toute personne qu'elle autorise à faire une enquête ou un rapport peut, lorsqu'indiqué :

a) entrer dans un endroit, un bâtiment, des ouvrages ou autres biens et en faire l'inspection;

b) requérir la présence des personnes qu'il lui paraît utile d'assigner et d'interroger, et recueillir leur témoignage;

c) exiger la production de tous livres, plans, devis, dessins et documents;

d) faire prêter serment, recevoir les affirmations ou déclarations solennelles, assigner les témoins, les contraindre à comparaître, à témoigner et à produire les livres, plans, devis, dessins et documents qu'elle peut leur enjoindre de produire.

Power to require doing of acts
29(1) In matters within its jurisdiction, the board may order and require any person, local authority, or corporation to do any act, matter, or thing that the person, local authority, or corporation is or may be required to do under this Act or any other Act of the Legislature or under any order, regulation, direction, or agreement.

Pouvoir d'exiger l'accomplissement de certains actes
29(1) Dans les domaines de sa compétence, la Commission peut ordonner et exiger qu'une personne, une autorité locale ou une corporation accomplisse un acte ou fasse une chose qu'elle est obligée ou susceptible d'être obligée d'accomplir ou de faire en application de la présente loi, d'une autre loi provinciale ou d'une ordonnance, d'un règlement, d'une directive ou d'un accord.

Method of performance
29(2) Any act, matter, or thing ordered and required to be done under subsection (1) shall be done

(a) forthwith, or within or at any time specified in the order; and

(b) in any manner prescribed by the board, so far as it is not inconsistent with this Act or any other Act of the Legislature conferring jurisdiction upon the board.

Méthode d'exécution
29(2) Un acte ou une chose ordonné et exigé en conformité avec le paragraphe (1) est accompli ou fait :

a) soit immédiatement, soit dans le délai ou à la date précisé dans l'ordonnance;

b) de la façon prescrite par la Commission dans la mesure où l'acte ou la chose est compatible avec la présente loi ou une autre loi provinciale conférant compétence à la Commission.

In case of default, board may authorize doing of act
30(1) Where default is made by any person, local authority, or corporation in the doing of any act, matter, or thing, that the board has authority, under this or any

Autorisation en cas de défaut
30(1) En cas de défaut d'une personne, d'une autorité locale ou d'une corporation d'accomplir un acte ou de faire une chose que la Commission a le pouvoir

THE MUNICIPAL BOARD OF MANITOBA

Procedure at Aggregate Appeal Hearings

1. The Municipal Board (the "Board") is an "Independent Body" appointed by Order-in-Council and hearings before the Board are open to the public.

2. A hearing before the Board is separate and distinct from previous council and public hearings on the matter. It is not a town hall meeting.

3. A party must, at least ten (10) days prior to the hearing of an appeal:

   (a) serve one (1) copy of the written materials it intends to rely upon on each of the other parties as follows:

   - one (1) copy to the Appellant;
   - one (1) copy to the Municipality;
   - one (1) copy to the Board of a Planning District or Planning Commission (as applicable),

   and

   (b) file four (4) copies of the written materials with the Board.

4. Any other person served with a notice of hearing pursuant to Section 118.3(2) of *The Planning Act* may make an oral and/or written presentation to the Board. It is recommended that four (4) copies of any written presentations be filed with the Board and that one (1) copy be provided to each of the parties at least ten (10) days prior to the hearing, failing which copies of written presentations must be provided to the Board and the parties at the hearing.

5. If you wish to have service provided in French, please notify our office fifteen (15) days prior to the hearing.

6. Although a quorum of the Board is two, the Board typically sits as a panel of three, one of whom acts as the Chair. The Chair will introduce the panel members and explain how the hearing will proceed.

7. All evidence given at the hearing of an appeal will be given under oath or affirmation.

8. The Board requires all in attendance at the hearing to behave respectfully and not to interrupt the proceedings.

9. The Board will hear presentations from the parties as follows:
   - The Appellant
   - The Municipality
   - The Planning District or Planning Commission (as applicable)

10. Each party will have an opportunity to present their case and call witnesses. The other parties will have an opportunity to cross-examine the evidence that has been presented. The Board may also question a party or witness on the evidence presented.

11. The Board will also hear presentations from the persons referred to in 4. above. Once a presentation is complete, the Board may question the presenter on his or her presentation.

12. Following the completion of all presentations, each party will have an opportunity to present closing submissions.

13. The Board, in dealing with the appeal, must look at its duty which is set out in *The Planning Act,* as follows:

    Section 118.4(1) states:

    Decision of Municipal Board
    118.4(1) The Municipal Board must make an order
    (a) rejecting the proposal; or
    (b) approving the proposal, subject to any conditions described in the following provisions that it considers appropriate:
    (i) subsection 106(2), in the case of an aggregate quarry,

    (ii) .....

14. At the conclusion of the hearing, the Panel will consider all of the evidence and make its decision within 30 days. A copy of the written Decision and Order and supporting reasons will be sent to the Appellant, the Municipality, and the Board of the Planning District or Planning Commission (as applicable), and any other person who was given notice of the hearing.

15. The Order of the Board is final and not subject to further appeal.

16. The Board will not accept any information or evidence after the hearing has concluded.

17. The Board has final discretion in the manner in which the hearing of an appeal is conducted. The Board may in its discretion dispense with, vary or amend these procedures.

2011 MBCA 20
Manitoba Court of Appeal

Brian Neil Friesen Dental Corp. v. Manitoba (Director of Companies Office)

2011 CarswellMan 50, 2011 MBCA 20, [2011] 4 W.W.R. 577, [2011] M.J. No. 50, 198 A.C.W.S. (3d) 889, 262 Man. R. (2d) 197, 27 Admin. L.R. (5th) 102, 507 W.A.C. 197

Brian Neil Friesen Dental Corporation and Zdan Roman (De Leliva) Shulakewych Dental Corporation carrying on business as a partnership under the firm name and style Images Dental Centre (Applicant / Appellant) and Director of Companies Office (Manitoba) and SV Dental Corporation carrying on business as Dental Image Therapy Centre St. Vital, also known as Dental Image and Mark Johnston in partnership with M.J. Dental Corporation, Linda Patricia Simpson Dental Corporation and G&D Dental Corporation carrying on business as Dental Image Therapy Centre Garden City (Respondents / Respondents)

Freda M. Steel, Martin H. Freedman, Richard J. Chartier JJ.A.

Heard: September 20, 2010
Judgment: February 9, 2011*
Docket: AI 10-30-07343

Proceedings: reversing *Brian Neil Friesen Dental Corp. v. Director of Companies Office (Manitoba)* (2009), 247 Man. R. (2d) 201, 2009 MBQB 330, 2009 CarswellMan 574 (Man. Q.B.)

Counsel: N.D.M. Hamilton for Appellant
S.D. Boyd for Respondent, Director of Companies Office
K.T. Williams, P.J. Karsten for all other Respondents

Subject: Corporate and Commercial; Civil Practice and Procedure; Public

Headnote

Business associations --- Creation and organization of business associations — Corporations —

upon hearing the appeal, may make such order as to him seems just.

32 In attempting to determine whether this appeal to the courts was to be on the record or by way of a hearing *de novo*, this court considered a number of factors. First, the provision itself was silent as to the possibility of a hearing *de novo*. This raised a presumption in favor of a review on the record. As stated by Sara Blake in *Administrative Law in Canada*, 4th ed. (Markham: LexisNexis Canada Inc., 2006) (at p. 165):

> .... A hearing *de novo* is permitted where the statute calls for a new hearing on appeal.....
>
> Some statutes do not state whether an appeal is on the record or by way of a new hearing. If the appeal is to a superior court, it is usually on the record.....

33 Next, as has been noted, in other Manitoba statutes where the Legislature intended a hearing *de novo*, the intention was explicitly so stated or at least there was an explicit reference to the right to present further evidence. Beside the fact that the provision in question used the word "appeal," *The Farm Lands Ownership Act* as a whole did not contain any language indicating that a fresh hearing was envisioned or that further evidence could be heard on the appeal. There was nothing that indicated the Legislature intended anything other than an appeal on the record.

34 As well, the nature of the decision appealed from should be examined in order to determine the nature of the appeal. In *Guinn*, the purpose of *The Farm Lands Ownership Act* was to establish a board to regulate and enforce limits on foreign ownership of farm land. The wording and scheme of *The Farm Lands Ownership Act* showed that the Legislature intended the board to be a specialized tribunal with acquired expertise in determining the precise issues brought before it. That expertise would be lost if the appeal was in the nature of a hearing *de novo* with no deference to the original decision.

35 The analysis and conclusion in *Guinn* is in accord with the jurisprudence in this area. For example, the decision in *McKenzie v. Mason* (1992), 9 C.P.C. (3d) 1 (B.C. C.A.) was referred to in *Guinn*. In *McKenzie*, the issue before the Court of Appeal was whether the appeal from the decision of the Chief Gold Commissioner to a judge could be heard by way of a trial *de novo*. Section 35 of the *Mineral Tenure Act*, S.B.C., 1988 c. 5, simply indicated that a complainant "may ... appeal the decision" to a judge.

36 The court in *McKenzie* indicated at paras. 30 and 44, after examining the particular provision, the whole statute and the scheme of the *Mineral Tenure Act*, that where a statute uses the words "may ... appeal," and nothing in the statute or the scheme of the *Act* appears to expand the nature and scope of the appeal hearing, such an appeal will not envisage a trial *de novo*.

2016 SCC 43, 2016 CSC 43
Supreme Court of Canada

R. v. Anthony-Cook

2016 CarswellBC 2929, 2016 CarswellBC 2930, 2016 SCC 43, 2016 CSC 43, [2016] 2 S.C.R. 204, [2016] B.C.W.L.D. 7149, [2016] B.C.W.L.D. 7159, [2016] A.C.S. No. 43, [2016] S.C.J. No. 43, 133 W.C.B. (2d) 80, 32 C.R. (7th) 1, 342 C.C.C. (3d) 1, 404 D.L.R. (4th) 238, 488 N.R. 289, J.E. 2016-1796

Matthew John Anthony-Cook (Appellant) and Her Majesty the Queen (Respondent) and Director of Public Prosecutions of Canada,Attorney General of Ontario, Criminal Lawyers' Association (Ontario), Association des avocats de la défense de Montréal andBritish Columbia Civil Liberties Association (Interveners)

Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown JJ.

Heard: March 31, 2016
Judgment: October 21, 2016
Docket: 36410

Proceedings: varying *R. v. Anthony-Cook* (2015), [2015] B.C.J. No. 63, 2015 CarswellBC 79, 2015 BCCA 22, 631 W.A.C. 96, 367 B.C.A.C. 96, Bennett J.A., Garson J.A., Neilson J.A. (B.C. C.A.); affirming *R. v. Anthony-Cook* (2014), 2014 BCSC 1503, [2014] B.C.J. No. 2055, 2014 CarswellBC 2353, W.F. Ehrcke J. (B.C. S.C.)

Counsel: Micah B. Rankin, Michael Sobkin, Jeremy G. Jensen, for Appellant
Mary T. Ainslie, Q.C., Megan A. Street, for Respondent
David W. Schermbrucker, Monica McQueen, for Intervener, Director of Public Prosecutions of Canada
Elise Nakelsky, for Intervener, Attorney General of Ontario
Joseph Di Luca, Erin Dann, for Intervener, Criminal Lawyers' Association (Ontario)
Nicholas St-Jacques, Lida Sara Nouraie, Walid Hijazi, for Intervener, Association des avocats de la défense de Montréal
Emily Lapper, Ryan D.W. Dalziel, for Intervener, British Columbia Civil Liberties Association

Subject: Criminal

point us to any appellate decisions that have adopted it, and I am aware of none.

29 The third test, commonly referred to as the "public interest" test, was developed in the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993) (the "Martin Committee Report").[2] Under this test, trial judges "should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest" (p. 327 (emphasis deleted)). This test has also been adopted by a number of provincial appellate courts (see, for example, *R. v. Dorsey* (1999), 123 O.A.C. 342 (Ont. C.A.), at para. 11; *R. v. Druken*, 2006 NLCA 67, 261 Nfld. & P.E.I.R. 271 (N.L. C.A.), at para. 29; *R. v. Nome*, 2002 BCCA 468, 172 B.C.A.C. 183 (B.C. C.A.), at paras. 13-14). The appellant supports this test, largely because it provides "a high threshold and is intended to foster confidence in an accused, who has given up his right to a trial, that the joint submission he obtained in return for a plea of guilty will be respected by the sentencing judge" (*R. v. Cerasuolo* (2001), 151 C.C.C. (3d) 445 (Ont. C.A.), at para. 8).

30 And, finally, some courts, most notably in Quebec, treat the fitness and public interest tests as essentially the same, and use the language of the two tests interchangeably (though in Quebec "reasonableness" is used in place of "fitness": see, for example, *R. c. Verdi-Douglas* (2002), 162 C.C.C. (3d) 37 (C.A. Que.), at para. 51; *R. c. Dion*, 2015 QCCA 1826 (C.A. Que.), at para. 14 (CanLII); *R. c. Dumont*, 2013 QCCA 576 (C.A. Que.), at para. 12 (CanLII); *R. c. Mailhot*, 2013 QCCA 870 (C.A. Que.) , at para. 7 (CanLII). Perhaps the best example of this is found in *Verdi-Douglas*, an oft-referred to decision of the Quebec Court of Appeal in which Fish J.A. (as he then was), said:

> In my view, a reasonable joint submission cannot be said to "bring the administration of justice into disrepute". An unreasonable joint submission, on the other hand, is surely "contrary to the public interest". Accordingly, though it is purposively framed in striking and evocative terms, I do not believe that the [public interest test] departs substantially from the test of reasonableness articulated by other courts, including our own. Their shared conceptual foundation is that the interests of justice are well served by the acceptance of a joint submission on sentence accompanied by a negotiated plea of guilty — provided, of course, that the sentence jointly proposed falls within the acceptable range and the plea is warranted by the facts admitted. [Endnote omitted; para. 51.]

31 Having considered the various options, I believe that the public interest test, as amplified in these reasons, is the proper test. It is more stringent than the other tests proposed and it best reflects the many benefits that joint submissions bring to the criminal justice system and the corresponding need for a high degree of certainty in them. Moreover, it is distinct from the "fitness" tests used by trial judges and appellate courts in conventional sentencing hearings and, in that sense, helps to keep trial judges focused on the unique considerations that apply when

assessing the acceptability of a joint submission. To the extent *Verdi-Douglas* holds otherwise, I am respectfully of the view that it is wrongly decided and should not be followed.

A. The Proper Test

32 Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. But, what does this threshold mean? Two decisions from the Newfoundland and Labrador Court of Appeal are helpful in this regard.

33 In *Druken* , at para. 29, the court held that a joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system". And, as stated by the same court in *R. v. O. (B.J.)*, 2010 NLCA 19 (N.L. C.A.) (CanLII), at para. 56, when assessing a joint submission, trial judges should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts".

34 In my view, these powerful statements capture the essence of the public interest test developed by the Martin Committee. They emphasize that a joint submission should not be rejected lightly, a conclusion with which I agree. Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. This is an undeniably high threshold — and for good reason, as I shall explain.

B. Why a Stringent Test Is Required

35 Guilty pleas in exchange for joint submissions on sentence are a "proper and necessary part of the administration of criminal justice" (Martin Committee Report, at p. 290). When plea resolutions are "properly conducted [they] benefit not only the accused, but also victims, witnesses, counsel, and the administration of justice generally" (Martin Committee Report, at p. 281 (emphasis deleted)).

36 Accused persons benefit by pleading guilty in exchange for a joint submission on sentence (see D. Layton and M. Proulx, *Ethics and Criminal Law* (2nd ed. 2015), at p. 436). The most obvious benefit is that the Crown agrees to recommend a sentence that the accused is prepared to accept. This recommendation is likely to be more lenient than the accused might expect after

a trial and/or contested sentencing hearing. Accused persons who plead guilty promptly are able to minimize the stress and legal costs associated with trials. Moreover, for those who are truly remorseful, a guilty plea offers an opportunity to begin making amends. For many accused, maximizing certainty as to the outcome is crucial — and a joint submission, though not inviolable, offers considerable comfort in this regard.

37 The Martin Committee recognized this. As it noted at p. 328, the most important factor in the "ability to conclude resolution agreements, thereby deriving the benefits that such agreements bring, is that of certainty". Generally speaking, accused persons will not give up their right to a trial on the merits, and all the procedural safeguards it entails, unless they have "some assurance that [trial judges] will in most instances honour agreements entered into by the Crown" (*Cerasuolo*, at para. 9).

38 The Crown also relies on the certainty of joint submissions. Agreements that are certain are attractive to the Crown "because there is less risk that what Crown counsel concludes is an appropriate resolution of the case in the public interest will be undercut" (Martin Committee Report, at p. 328).

39 From the Crown's perspective, the certain or near certain acceptance of joint submissions on sentence offers several potential benefits. First, the guarantee of a conviction that comes with a guilty plea makes resolution desirable (Martin Committee Report, at pp. 285-86). The Crown's case may suffer from flaws, such as an unwilling witness, a witness of dubious worth, or evidence that is potentially inadmissible — problems that can lead to an acquittal. By agreeing to a joint submission in exchange for a guilty plea, the Crown avoids this risk. Second, the accused may have information or testimony to offer the Crown that can prove invaluable to other investigations or prosecutions. But this information may not be forthcoming absent an agreement as to a joint submission. Third, the Crown may consider it best to resolve a particular case for the benefit of victims or witnesses. When an accused pleads guilty in exchange for a joint submission on sentence, victims and witnesses are spared the "the emotional cost of a trial" (*R. v. Edgar*, 2010 ONCA 529, 101 O.R. (3d) 161 (Ont. C.A.), at para. 111). Moreover, victims may obtain some comfort from a guilty plea, given that it "indicates an accused's acknowledgement of responsibility and may amount to an expression of remorse" (*Edgar*, at para. 111).

40 In addition to the many benefits that joint submissions offer to participants in the criminal justice system, they play a vital role in contributing to the administration of justice at large. The prospect of a joint submission that carries with it a high degree of certainty encourages accused persons to enter a plea of guilty. And guilty pleas save the justice system precious time, resources, and expenses, which can be channeled into other matters. This is no small benefit. To the extent that they avoid trials, joint submissions on sentence permit our justice system to function more efficiently. Indeed, I would argue that they permit it to function. Without them, our justice system would be brought to its knees, and eventually collapse under its own weight.

41 But as I have said, for joint submissions to be possible, the parties must have a high degree of confidence that they will be accepted. Too much doubt and the parties may choose instead to accept the risks of a trial or a contested sentencing hearing. The accused in particular will be reluctant to forgo a trial with its attendant safeguards, including the crucial ability to test the strength of the Crown's case, if joint submissions come to be seen as an insufficiently certain alternative.

42 Hence, the importance of trial judges exhibiting restraint, rejecting joint submissions only where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system. A lower threshold than this would cast the efficacy of resolution agreements into too great a degree of uncertainty. The public interest test ensures that these resolution agreements are afforded a high degree of certainty.

43 At the same time, this test also recognizes that certainty of outcome is not "the ultimate goal of the sentencing process. Certainty must yield where the harm caused by accepting the joint submission is beyond the value gained by promoting certainty of result" (*R. v. DeSousa*, 2012 ONCA 254, 109 O.R. (3d) 792 (Ont. C.A.), per Doherty J.A., at para. 22).

44 Finally, I note that a high threshold for departing from joint submissions is not only necessary to obtain all the benefits of joint submissions, it is appropriate. Crown and defence counsel are well placed to arrive at a joint submission that reflects the interests of both the public and the accused (Martin Committee Report, at p. 287). As a rule, they will be highly knowledgeable about the circumstances of the offender and the offence and the strengths and weaknesses of their respective positions. The Crown is charged with representing the community's interest in seeing that justice is done (*R. v. Power*, [1994] 1 S.C.R. 601 (S.C.C.), at p. 616). Defence counsel is required to act in the accused's best interests, which includes ensuring that the accused's plea is voluntary and informed (see, for example, Law Society of British Columbia, *Code of Professional Conduct for British Columbia* (online), rule 5.1-8). And both counsel are bound professionally and ethically not to mislead the court (*ibid.*, rule 2.1-2(c)). In short, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest (Martin Committee Report, at p. 287).

45 Bearing in mind these benefits and the need for certainty, I turn to the other tests proposed by the respondent Crown and some of the interveners.

C. The Fitness of Sentence and Demonstrably Unfit Tests Should Be Rejected

46 As indicated, the position of the respondent is that while trial judges should give serious consideration to joint submissions, such submissions may be rejected on a simple "fitness" test. With respect, this test is not sufficiently stringent. Under it, trial judges must ask what a fit or

appropriate sentence *would be*, instead of asking whether *the sentence proposed* would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system. In short, the "fitness" test does not direct trial judges to approach joint submissions from a position of restraint. Rather, it sends a different, and in my view, a wrong signal: that they may interfere if they have a different view of what a "fit" sentence would be. If trial judges were free to interfere on this basis, the result would be to "effectively eliminate the use of plea bargaining as part of the criminal prosecution process" (*R. v. Oxford*, 2010 NLCA 45, 299 Nfld. & P.E.I.R. 327 (N.L. C.A.), at para. 55).

47 While the "demonstrably unfit" test used by appellate courts is undoubtedly a higher threshold than the simple "fitness" test, in rare cases, this threshold may not be sufficiently robust for the joint submission context. I would not rule out the possibility that a sentence which would otherwise be considered demonstrably unfit absent a joint submission may nonetheless be acceptable in the context of one. For example, take the case of an accused involved in a very serious crime that the Crown may have difficulty proving because of deficiencies in its case. The accused agrees to plead guilty, and to assist the Crown in prosecuting his co-conspirators for this and other more serious offences. The Crown might reasonably conclude that it is in the public interest to agree, by way of a joint submission, to a very lenient sentence in order to obtain the accused's guilty plea and his assistance. In short, a very lenient, even "demonstrably unfit" sentence may, in a particular case, serve the greater good.

48 Further, both the fitness test and the appellate "demonstrably unfit" test suffer from a similar flaw: they are designed for different contexts. As such, there is an appreciable risk that the approaches which apply to conventional sentencing hearings or sentencing appeals will be conflated with the approach that must be adhered to on a joint submission. In conventional sentencing hearings, trial judges look at the circumstances of the offender and the offence, and the applicable sentencing principles. They are not asked to consider the critical systemic benefits that flow from joint submissions, namely, the ability of the justice system to function fairly and efficiently. Similarly, appellate courts are not bound to consider these systemic benefits on a conventional sentencing appeal. The public interest test avoids these pitfalls.

D. Guidance for Trial Judges

49 Finally, I would offer some brief guidance to trial judges on the approach they should follow when they are troubled by a joint submission on sentence.

50 Courts across the country are generally in agreement on the procedure judges should follow when they are inclined to depart from a joint submission (see, for example, *O. (B.J.)* , at paras. 74-82; *R. v. Sinclair* (2003), 2004 MBCA 48, 185 C.C.C. (3d) 569 (Man. C.A.), at para. 17; *C. (G.W.)*, at para. 26). The parties and interveners emphasize the importance of procedure. It ensures that joint submissions are given proper consideration, and that accused persons —

2018 CarswellMan 223
College of Physicians and Surgeons of Manitoba Inquiry Panel

Pillay, Re

2018 CarswellMan 223

IN THE MATTER OF "THE MEDICAL ACT" C.C.S.M.

IN THE MATTER OF DR. POOVENTHRAN GOPAL PILLAY, a member of the College of Physicians and Surgeons of Manitoba

Decision of the Board

Heard: February 9, 2018
Judgment: April 17, 2018
Docket: None given.

Counsel: Counsel — not provided

Subject: Public

Headnote

Health law --- Provincial matters — Regulation of health professionals — Physicians — Discipline by College of Physicians and Surgeons — Unprofessional conduct — Miscellaneous

Health law --- Provincial matters — Regulation of health professionals — Physicians — Discipline by College of Physicians and Surgeons — Penalty — Miscellaneous

Decision of the Board:

INTRODUCTION

1 On February 9, 2018, a hearing was convened before an Inquiry Panel (the "Panel") of the College of Physicians and Surgeons of Manitoba (the "College"), for the purpose of conducting an inquiry pursuant to Part X of *The Medical Act, C.C.S.M. c.M90* into charges against Dr. Pooventhran Gopal Pillay (Dr. Pillay) as set forth in an Amended Notice of Inquiry dated

43 Secondly, a revocation of Dr. Pillay's licence cannot preclude him from applying to be reinstated at some point in the future. The current Panel, in the specific context of these proceedings, is uniquely well placed to assess the Joint Recommendation and whether it is appropriate in the circumstances. The Panel has carefully considered the Joint Recommendation and has concluded that it is appropriate and fulfills the objectives of orders under subsection 59.6 of *The Medical Act*, and in particular the protection of the public.

44 Thirdly, although the College has concerns with respect to issues related to medical care and potential patient harm, the evidence available to the College is insufficient to enable either the Investigation Committee or this Panel to reach definitive conclusions relating to the overall adequacy of the care which Dr. Pillay provided to patients.

45 Fourthly, there are mitigating circumstances in this case. For example, there is a possibility (which has not been conclusively established) that there may be a mental health component to some of Dr. Pillay's behaviours. In addition, although Dr. Pillay was initially uncooperative with the College's investigative processes, he ultimately agreed to cease practicing medicine and to plead guilty to the charges in the Amended Notice of Inquiry. The College also frequently adopts a rehabilitative approach in physician misconduct cases, recognizing that the public good will often be served by allowing a properly trained and educated physician to provide medical services to the public. While in this case it is clear that a disciplinary and punitive response was required, the Joint Recommendation contains a significant disciplinary and punitive component. Nevertheless, it also provides for rehabilitation and sets forth a path by which Dr. Pillay may return to the practice of medicine. The path will be a challenging one, and if Dr. Pillay decides to return to the practice of medicine it will require him to significantly elevate his level of practice.

46 With respect to the remainder of the objectives, specific deterrence will be fulfilled by both the punitive aspects of the Joint Recommendation and by the conditions set forth in paragraphs 3 and 4 of the Joint Recommendation. General deterrence, by way of informing and educating the profession generally as to the serious consequences that will result from breaches of standards of competent and ethical practice, will be realized by publication of the outcome of these proceedings, as determined by the Investigation Committee Chair.

47 In reaching the decision to accept the Joint Recommendation of the parties, the Panel has also been mindful of the Supreme Court of Canada's 2016 decision in *R. v. Anthony-Cook*, [2016] 2 S.C.R. 204 (S.C.C.), which emphasized the high threshold for departing from Joint Recommendations from counsel. The Supreme Court approved of the "public interest test" and determined that a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest.

48 In this case the Panel recognizes that counsel for the Investigation Committee and counsel

for Dr. Pillay are well placed to arrive at a Joint Recommendation that reflects the interests of both the public, and Dr. Pillay. There is nothing in the Joint Recommendation which would bring the administration of justice into disrepute or is otherwise contrary to the public interest. A properly informed and reasonable member of the public would recognize that the Joint Recommendation of the parties fulfills the objectives of orders under section 59.6 of *The Medical Act*.

49 Accordingly, the Inquiry Panel orders that:

1. Dr. Pillay is hereby reprimanded.

2. Dr. Pillay shall be suspended until he has, at his own cost, completed both a record-keeping course and a professionalism course which focuses on the importance of the responsibilities of members of a self-governing profession, both of which must be acceptable to the Investigation Chair.

3. Further, Dr. Pillay shall be suspended until such time as he has demonstrated to the satisfaction of the Chair of the Physician Health Program of the College that he has overcome any mental health issues that caused or contributed to the matters to which he pleaded guilty in the Amended Notice of Inquiry, in the manner more particularly set forth in the Resolution and Order of this Panel, issued concurrently herewith and attached hereto.

4. Conditions are imposed upon Dr. Pillay's entitlement to practice medicine as more particularly set forth in the Resolution and Order of this Panel, issued concurrently herewith and attached hereto.

5. Dr. Pillay shall pay all costs related to the conditions on his licence, including the costs of any continuing medical education, any reports, any supervising, mentoring and any monitoring.

6. If there is any disagreement between the parties respecting any aspect of the Inquiry Panel Order, the matter may be remitted by either party to a Panel of the Inquiry Committee for further consideration, and the Inquiry Committee hereby expressly reserves jurisdiction for the purpose of resolving any such disagreement.

7. Dr. Pillay shall pay costs to the College of the investigation and inquiry in the sum of $19,307.50, such payments to be made as mutually agreed over time between Dr. Pillay and the College.

8. There will be publication, including Dr. Pillay's name, as determined by the Investigation Committee Chair. The College, at its sole discretion, may provide information regarding this disposition to such person(s) or bodies as it considers appropriate.

Edmonton Composite Assessment Review Board

Citation: Altus Group v The City of Edmonton, 2019 ABECARB 00336

Assessment Roll Number:	10032659
Municipal Address:	12311 17 Street NE
Assessment Type:	Annual New
2019 Assessment:	$7,838,500

Between:

Altus Group

Complainant

and

The City of Edmonton, Assessment and Taxation Branch

Respondent

DECISION OF
Graham Gilchrist, Presiding Officer
Christina Clark, Board Member
Mary Sheldon, Board Member

Hearing Date: June 3, 2019
Decision Date: June 28, 2019

Procedural Matters

[1] The parties did not object to the Board's composition. The Board members have no bias regarding this matter.

Preliminary Matters

[2] The Respondent asked the Board to present a joint recommendation from both the Respondent and the Complainant.

Background

[3] The subject property is a medium warehouse located at 12311 17 Street NE in Edmonton.

Issue

[4] Should the Board accept the joint recommendation and change the assessed value of the subject property from $7,835,500 to $7,595,500?

Summary of the Complainant's Position

[5] The Complainant told the Board he is in favor and in agreement with the joint recommendation.

Summary of the Respondent's Position

[6] The Respondent told the Board he is in favor and in agreement with the joint recommendation.

[7] The Respondent outlined the reasons for the joint recommendation.

[8] In this case the Respondent identified an issue that affected the assessment value of the property. The reason for the 2019 recommendation is the subject property no longer had two relocatable offices and the condition of a remaining building (#5) was lowered to average.

[9] As a result of the above recommendations and outlined in section 289 2 (a) of the *Municipal Government Act*, RSA 2000, c M-26 (MGA), the assessment must reflect the characteristics and physical condition of the property as of December 31. The resulting corrected assessment value recommended is $7,595,500.

Decision

[10] **The decision of the Board is to reduce the assessment to $7,595,500.**

Reasons for the Decision

[11] The Respondent presented testimony and evidence showing an error in the assessment of the subject property.

[12] Both the Complainant and the Respondent has agreed to the change in the assessment, and both parties agreed to the joint recommendation.

[13] The Board accepts the joint recommendation as fair and equitable

_____

Graham Gilchrist, Presiding Officer

Appearances:

Brett Flesher, Altus Group
for the Complainant

Chris Rumsey, Assessor, City of Edmonton
for the Respondent

This decision may be judicially reviewed by the Court of Queen's Bench pursuant to section 470(1) of the Municipal Government Act, RSA 2000, c. M-26.

Appendix

Legislation

The *Municipal Government Act*, RSA 2000, c M-26, states:

> s 1(1)(n) "market value" means the amount that a property, as defined in section 284(1)(r), might be expected to realize if it is sold on the open market by a willing seller to a willing buyer;
>
> s 289 (2) Each assessment must reflect
>
> (a) the characteristics and physical condition of the property on December 31 of the year prior to the year in which the tax is imposed under Part 10 in respect of the property.
>
> s 467(1) An assessment review board may, with respect to any matter referred to in section 460(5), make a change to an assessment roll or tax roll or decide that no change is required.
>
> s 467(3) An assessment review board must not alter any assessment that is fair and equitable, taking into consideration
>
> (a) the valuation and other standards set out in the regulations,
>
> (b) the procedures set out in the regulations, and
>
> (c) the assessments of similar property or businesses in the same municipality.

Exhibits

C1 Complainant Disclosure (48 pages)
R1 Respondent Disclosure (78 pages)

Edmonton Local Assessment Review Board

Citation: Jaskarn Sidhu v The City of Edmonton, 2020 ABELARB 00012

Assessment Roll Number:	4621850
Municipal Address:	5219 118 Avenue NW
Assessment Type:	Annual New
2020 Assessment:	$333,000

Between:

Jaskarn Sidhu

Complainant

and

The City of Edmonton, Assessment and Taxation Branch

Respondent

DECISION OF
Brian Carbol, Presiding Officer
Brian Frost, Board Member
Christina Clark, Board Member

Hearing Date: March 17, 2020
Decision Date: April 9, 2020

Procedural Matters

[1] The parties consented to the Board hearing this matter on the written submissions provided. The parties did not appear before the Board.

Preliminary Matters

[1] A Joint recommendation was presented to the Board by the parties which states that sales of the most comparable properties show that the assessed value should be revised to $293,000.

Background

[2] The subject property (subject) is a 1,011 square foot (sf) single family home built in 1957, situated on a 5,100 sf lot in the Highlands neighbourhood. It is in average condition and of standard quality with a 483 sf detached garage and 860 sf secondary suite area located in the basement. The subject is assessed with a Moderate Traffic Influence.

Issue

[3] Should the Board accept the joint recommendation to reduce the assessment of the subject from $333,000 to $293,000?

Summary of the Complainant's Position

[4] The Complainant disclosed listings and sales of 16 similar properties in the Highlands neighbourhood.

Summary of the Respondent's Position

[5] The Respondent disclosed a chart with seven sales of similar properties in the Highlands neighbourhood which produced a median value of $293,494.

Decision

[6] The Board accepts the joint recommendation to reduce the 2020 assessment of the subject to $293,000.

Reasons for the Decision

[7] The Joint Recommendation is supported by the sales of similar properties.

Brian Carbol, Presiding Officer

This decision may be judicially reviewed by the Court of Queen's Bench pursuant to section 470(1) of the Municipal Government Act, RSA 2000, c. M-26.

Appendix

Legislation

The *Municipal Government Act*, RSA 2000, c M-26, states:

s 1(1)(n) "market value" means the amount that a property, as defined in section 284(1)(r), might be expected to realize if it is sold on the open market by a willing seller to a willing buyer;

s 467(1) An assessment review board may, with respect to any matter referred to in section 460(5), make a change to an assessment roll or tax roll or decide that no change is required.

s 467(3) An assessment review board must not alter any assessment that is fair and equitable, taking into consideration

(a) the valuation and other standards set out in the regulations,

(b) the procedures set out in the regulations, and

(c) the assessments of similar property or businesses in the same municipality.

Exhibits

R1 Joint Recommendation (1 page)