Municipal Board File No. 19B5-0003

THE MUNICIPAL BOARD OF MANITOBA

In the matter of: Aggregate Quarry Appeal with Respect to NE, SE and SW ¼ 17-12-12 EPM and Resolution of Council 4/18

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

Appellants

-and-

THE RURAL MUNICIPALITY OF ROSSER and
THE SOUTH INTERLAKE PLANNING DISTRICT

Respondents

DOCUMENTS TO BRIEF OF THE RURAL MUNICIPALITY OF ROSSER

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File No. 116134-0080

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Footnote #	Document	Document Reference
1	Lilyfield Quarry Permit Application	Heapring Exhibit No. 4
2, 3	Sections from Rural Municipality of Rosser Zoning By-Law No. 15-14 and Bulk Table	Brief Tab 1
4	List of persons affected and making presentations at the hearing	Brief Tab 2
5	Resolution 4/18	Hearing Exhibit No. 2
6	SIPD Letter dated November 25, 2019	Hearing Exhibit No. 2
7	Notice of Appeal	Hearing Exhibit No. 1

8	Municipal and Appellant Consent to Conditions	Hearing Exhibit No. 14
9, 10, 12, 13	*The Planning Act*, Sections 106(1), 118.2(1), 118.3(1)	Brief Tab 3
11	*Ladco Company Limited v. The City of Winnipeg,* 2020 MBQB 101	Brief Tab 4
14	Steven H Gifis, *Law Dictionary,* (New York: Barron's Educational Series Inc, 1984)	Brief Tab 5
15	The Municipal Board of Manitoba - Procedure at Aggregate Appeal Hearings	Brief Tab 6
16	*The Municipal Board Act*, Sections 24(1) & (3)	Brief Tab 7
17	*Dupras v. Mason,* [1994] BCWLD 2844 (BCCA)	Brief Tab 8
18	*Orange Properties Ltd v Winnipeg (City) Assessor, (1996)* 107 Man R (2d) 278, MBCA	Brief Tab 9
19	*Newterm, Re.*, [1988] NJ No 379	Brief Tab 10
20	*Pelech v. Pelech,* [1987] 1 S.C.R. 801 (SCC)	Brief Tab 11
21	*Saballoy Inc. v. Techno Genia S.A.* [1993] A.W.L.D. 414 (ABQB)	Brief Tab 12
22	*Stoewner v. Hanneson*, [1992] O.J. No. 697 (On Crt of Justice Gen Div)	Brief Tab 13
23, 31	MMM Group Traffic Study (2011)	Hearing Exhibit No. 3, Appendix E
24	WSP Canada Group Limited, "Lilyfield Community Consultation Report" (January 2019)	Hearing Exhibit No. 5, Tab 1
25, 32, 37	Dillon Consulting, "Lilyfield Quarry Traffic Impact Study" (23 January 2020)	Hearing Exhibit No. 5, Tab 3

26, 38	Manitoba Infrastructure and Transportation, "General Guidelines for the Preparation of Traffic Impact Studies (April 2010)	Hearing Exhibit No. 16, Tab 1(g)
27, 33	MPI "Data for collisions, injuries and fatalities-Highway 6 between the Perimeter to the Western extension of PR 236"	Hearing Exhibit No. 16, Tab 1(f)
28, 29	*The Municipal Act*, Sections 3 and 232(1)(a)	Brief Tab 14
30	*Grenier v Piney (Rural Municipality Of)*, 2003 MBQB 74	Brief Tab 15
34	"White crosses for 'highway of death'"- Winnipeg Free Press	Submission of the Rural Municipality of Rosser, Tab 1(b)
35	Manitoba, Legislative Assembly, 39th Leg, 2nd Sess (7 December 2007)	Submission of the Rural Municipality of Rosser, Tab 1(a)
36	Manitoba, Legislative Assembly, 40th Leg, 1st Sess (May 29, 2012);	Submission of the Rural Municipality of Rosser, Tab 1(c)
39	Prud'homme c. Prud'homme, 2002 SCC 85);	Brief Tab 16

THE RURAL MUNICIPALITY OF ROSSER

ZONING BY-LAW N0. 15-14

THE RURAL MUNICIPALITY OF ROSSER

ZONING BY-LAW NO. 15-14

BEING A BY-LAW to regulate the *Use* and development of the land within a designated area of the Rural Municipality of Rosser.

WHEREAS pursuant to Section 45 of *The Planning Act,* The South Interlake Planning District, of which the Rural Municipality of Rosser is a member, has by By-Law adopted the South Interlake Planning District Development Plan By-law;

AND WHEREAS Section 68 of *The Planning Act* provides that a municipal Council must adopt a zoning by-law that is generally consistent with the Development Plan By-law;

NOW THEREFORE, the Council of the Rural Municipality of Rosser, in meeting duly assembled, enacts as follows:

1. That By-law 4-85, being the Rural Municipality of Rosser Zoning By-law is hereby repealed.

2. That Schedule "A" attached hereto and being the Rural Municipality of Rosser Zoning By-law is hereby adopted to regulate and control the use and development of land and buildings within the limits of the Rural Municipality of Rosser, excluding CentrePort lands as defined in the South Interlake Development Plan By-law 3-10.

DONE AND PASSED as a by-law of the Rural Municipality of Rosser at 0 077E PR 221, Rosser in the Province of Manitoba this 13th day of September, 2016.

Original Executed by Frances Smee
Reeve
Frances Smee

Original Executed by Beverley Wells
Chief Administrative Officer
Beverley Wells, CMMA

GIVEN First Reading this 1st day of December, 2015.
GIVEN Second Reading this 13th day of September, 2016.
GIVEN Third Reading this 13th day of September, 2016.

THE RURAL MUNICIPALITY OF ROSSER

ZONING BY-LAW No. 15-14

Table of Contents

5 Rural Agricultural Zones

5.1 Intent and Purpose

The Rural Agricultural Zones established in this by-law are intended to provide sufficient land for various types of agricultural development or other *Uses* related to or compatible with agricultural development, in accordance with the provisions of the *Development Plan*.

5.2 Zones

In order to carry out the intent and purpose of section 5.1, the following zones have been established:

.1 The "AG" Agricultural General Zone provides for a full range of agricultural and other compatible activities in accordance with Agricultural *Use* Table 5 -1.

.2 The "AL" Agricultural Limited Zone provides for agricultural *Uses* and activities on a restricted basis as per Table 5-1, in the immediate area of the community of Marquette, as well as in areas adjacent to the Rural Settlement Centres of Rosser, Grosse Isle and Meadows, in order to avoid land *Use* conflicts and to preserve lands for future expansion of the centres. Summer pasturing is allowed in this zone.

5.3 General Requirements

The requirements applying to all Rural Zones are contained within this Part. Also applying to these zones are the provisions of Part 1- "Interpretation", Part 2 - "Administration", and Part 3 - "General Provisions".

5.4 *Use* Provisions

.1 Table 5 - 1, "Rural Agricultural *Use* Table", lists all *Uses* that are "P", Permitted, and "C", Conditional in the Rural Zones. All listed *Uses* are subject to the provisions of this By-law.

.2 After the adoption of this By-law, no land shall be *Used* or occupied, and no *Structure* shall be erected, altered, used or occupied for any *Use* in the Rural Agricultural Zones other than a *Use* listed in Table 5 - 1, "Rural Agricultural *Use* Table", with the exception of *Uses* lawfully established prior to the effective date of this By-law.

Table 5 – 1
Rural Agricultural *Use* Table

LEGEND: **P – Permitted** **C - Conditional** **– - *Use* Not Permitted**	**ZONES**	
USES	**"AG"**	**"AL"**
Agricultural Activities	P	P
Abattoirs	C	–
Advertising Signs, *Structures*, and Billboards	P	P
Agricultural Exhibition Grounds	C	C
Agricultural fertilizer and chemical storage facilities excluding anhydrous ammonia	C	C
Agricultural Implement Sales and Services	P	P
Agriculture Support Industry (excluding grain elevators, feed mills and seed plants).	C	C
Aircraft Landing Strips	C	–
Anhydrous Ammonia Facilities	C	–
Animal Hospitals and Veterinary Clinics	P	P
Asphalt Plants	C	–
Bed and Breakfast Facilities (see section 3.20)	P	P
Camping and Tenting Grounds	C	C
Cemeteries	C	C
Community Recreation facilities, public parks, playgrounds	C	C
Communication Installations and Facilities	C	C
Conservation Areas	P	P
Contractor's *Yards*	C	C
Grain Elevators, Feed Mills and Seed Plants	C	-
Garbage and Sewage Disposal Areas	C	C
Golf Courses	C	C
Home Based Businesses (see section 3.19)	P	P
Kennels	C	C
Keeping of *Livestock* generating not more than 10 AUs of waste (see section 5.9)	P	P
Livestock Operations of greater than 10 AU's but not greater than 125 AU's (See section 5.9)	P	C-
Livestock Operations with greater than 125 AU's	C	C–
Moto Cross Track	C	-
Public camps	C	-
Public Utilities	P	P
Recreational Trails	C	C
Recreational *Vehicle*, *Travel Trailer* storage *Yard*	C	C
Single-Family Dwellings or *Mobile Homes* (see section 5.5)	C	C
Sand and Gravel Pits, and Quarry Operations (see section 5.12)	C	-
Secondary Small Scale Industry (see section 5.11)	C	C
Shooting Ranges	C	–
Public Stables and Riding Academies	C	C
Temporary Additional *Dwellings* or *Mobile Homes* (see section 5.13)	C	C
Wind Energy Generation System	C	-
Wood millworks, lumber *Yard*, milling or woodworking	C	C
Accessory Uses, *Buildings* and *Structures* (see section 5.6)	P	P

5.5 *Conditional Use*

Any *Use* listed as a "*Conditional Use*" in Table 5 – 1 shall comply with the provisions as set forth in Part 2 - "Administration" and Part 3 – General Provisions".

Further, when considering a *Conditional Use* application for *Single-Family Dwellings* or *Mobile Homes* as identified in Table 5-1, *Council* will consider approval where in its opinion, a proposal meets the criteria outlined in Sections 3.3.1.7-9 of the *Development Plan*.

5.6 *Accessory Uses, Buildings* And *Structures*

In the Rural Agricultural Zones, *Accessory Uses*, *Buildings* or *Structures* shall be limited to the following:

.1 staff *Dwellings*, including a *Single-Family Dwelling, Two-Family Dwelling*, dormitory, or *Mobile Home* when on the same *Site* as permitted or *Conditional Uses* where, in the opinion of the *Council*, such a *Dwelling* is essential for the maintenance, operation and care of the permitted or *Conditional Use*;

.2 *Buildings* or *Structures* for the operation and maintenance of an *agricultural activity*;

.3 storage of goods used in, or produced by, *Agricultural Activities* on the same *Site* as such activities, unless such storage is excluded by the zoning district or provincial regulations;

.4 a *Private Garage, Carport*, covered patio, tool house, shed, and other similar *Buildings* for the storage of domestic equipment and supplies;

.5 incinerators and individual sewage disposal systems, subject to the authority with jurisdiction;

.6 *Home Based Businesses*;

.7 *Signs* as permitted in this part; and

.8 clubhouses and other related recreational *Structures* on the grounds of private clubs, golf courses, and other like permitted or conditional recreational facilities.

5.7 *Aircraft Landing Strips*

All *Buildings* and *Structures*, when being located in close proximity to licensed *Aircraft Landing Strips*, whether on the same property or an adjoining property, shall be governed by the appropriate Transport Canada regulations.

5.8 *Conservation Areas*

Developments and the *Use* of land adjacent to *Conservation Areas* (1 mile radius) will be referred to Manitoba Conservation for review and comment on whether a development might adversely affect the sustainability of the area or its resident flora and fauna. Such proposals may also be referred to the appropriate Provincial department for comment where *Council* considers the development may have the potential to alter, disrupt or destroy significant natural and/or sensitive environmental areas, including the Grants Lake Wildlife Management Area.

5.9 *Livestock* and *Livestock Operations*

.1 A *Development Permit* shall be required for new or expanding *Livestock Operations*.

.2 The number of *Animal Units* for a *Livestock Operation* shall be determined in accordance with Table 5-2.

.3 *Livestock* may be kept on parcels of land of 10 acres and smaller, in agricultural zones, notwithstanding Table 5.1, based on the following criteria limiting the number of *Animal Units* to acreage sizes:

< 4 acres	0 A.U.
> 4 acres to 6 acres	2 A.U.
> 6 acres to 8 acres	3 A.U
> 8 acres to 10 acres	4 A.U.

.4 New or expanding *Livestock Operations* of greater than 10 *Animal Units* must be in conformance with the Minimum Separation Distances as outlined in Table 5-3.

.5 When reviewing permit applications for *Livestock Operations*, the *Designated Officer* and *Council* shall consider:

a) the type and size of the operation and its location in relation to neighbouring land *Uses*;
b) the source of water supply and proposed consumption levels;
c) the need for odour control provisions in accordance with the provisions of *The Act*;
d) the nature of the land base;
e) local resident concerns;
f) for *Livestock Operations* of a size of 300 A.U. or greater, the Technical Review Committee report and recommendations;
g) the potential impacts generated by the operation on the Provincial *Highway* and *Municipal* road systems;
h) Provincial guidelines and regulations governing *Livestock Operations*; and

i) whether there is a need for a development agreement to be entered into between the proponent and the *Municipality* dealing with such conditions as the timing of construction of any proposed *Buildings* or *Structures*; the control of traffic; and the construction and maintenance of roads, fencing, landscaping, shelter belts, manure storage facility covers or *Site* drainage works by or at the expense of the proponent

.6 *Council* may approve the development applications subject to conditions, as provided for in *The Act*, including, but not limited to, the following:

a) conditions that ensure conformity with the applicable provisions of the *Development Plan* and zoning by-law for a municipality;

b) measures to implement recommendations made by the Technical Review Committee (such as obtaining all necessary approvals from the appropriate authorities) are undertaken;

c) one or both of the following measures intended to reduce odours from the *Livestock Operation*;

i) requiring covers on manure storage facilities,

ii) requiring shelter belts to be established,

d) the payment of a sum of money to the *Board* or *Council* to be used for 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*.

e) other conditions such as:

i) the timing of construction of any proposed *Building* or *Structure*;

ii) As part of any Development Agreement, *Council* may require that no development takes place until all approvals and conditions have been met. *Council* may revoke its approval for violation of the Development Agreement on any condition imposed by it.

Table 5 – 2
***Animal Unit* Summary Table**

Type of Operation	**A.U Produced by One Animal**	***Livestock* Producing One A.U.**
Dairy		
Milking Cows, including assoc. *Livestock*	2.0	0.5
Beef		
Beef Cows, including assoc. *Livestock*	1.25	0.8
Backgrounder	0.50	2.00
Summer Pasture / replacement heifers	0.625	1.6
Feeder cattle	0.769	1.3
Hogs		
Sows, farrow to finish	1.25	0.8
Sows, farrow to weanling	0.25	4
Sows, farrow to nursery	0.313	3.2
Weanlings	0.033	30
Growers/Finishers	0.143	7.0
Boars (artificial insemination operations)	0.2	5
Chickens		
Broilers	0.0050	200
Roasters	0.0100	100
Layers	0.0083	120
Pullets	0.0033	300
Broiler Breeder Pullets	0.0033	300
Broiler Breeder Hens	0.01	100
Turkeys		
Broilers	0.010	100
Heavy Toms	0.020	50
Heavy Hens	0.010	100
Horses		
Mares, including assoc. *Livestock*	1.333	0.75
Sheep		
Ewes, including assoc. *Livestock*	0.20	5
Feeder Lambs	0.063	16

Table 5 - 3
Minimum Separation Distances for Siting *Livestock Operations

Size of *Livestock Operation* in *Animal Units*	Separation Distance in Metres (Feet) from a Residence		Separation Distance in Metres (Feet) from a Designated Area	
	To Earthen Manure Storage Facility or Feed Lot	To Animal Confinement Facility or Non-earthen Manure Storage Facility	To Earthen Manure Storage Facility or Feed Lot	To Animal Confinement Facility or Non-earthen Manure Storage Facility
10 - 100	200 (656)	100 (328)	800 (2,625)	530 (1,739)
101 – 200	300 (984)	150 (492)	1200 (3,937)	800 (2,625)
201 – 300	400 (1,312)	200 (656)	1600 (5,249)	1070 (3,511)
301 – 400	450 (1,476)	225 (738)	1800 (5,906)	1200 (3,937)
401 – 800	500 (1,640)	250 (820)	2000 (6,561)	1330 (4,364)
801 – 1,600	600 (1,968)	300 (984)	2400 (7,874)	1600 (5,249)
1,601 – 3,200	700 (2,297)	350 (1,148)	2800 (9,186)	1870 (6,135)
3,201 – 6,400	800 (2,625)	400 (1,312)	3200 (10,499)	2130 (6,988)
6,401 – 12,800	900 (2,953)	450 (1,476)	3600 (11,811)	2400 (7,874)
>12,800	1000 (3,281)	500 (1,640)	4000 (13,123)	2670 (8,760)

* Applies to new and expanding *Livestock Operations* and new residences only.

5.10 Mutual Separation of *Dwelling* and *Livestock Operations*

Mutual separation distance between any new *Dwelling* or *Mobile Home* and any *Livestock Building* or manure storage facility producing 10 *Animal Units* (A.U.) or greater shall be the same as the Minimum Separation Distances as described in Table 5 - 3. *Livestock* production operators that have their residences located on the same *Site* as *Livestock Operation* are excluded from this requirement. The mutual separation distance is deemed to be a *Yard* requirement consistent with the provisions contained in *The Act*.

5.11 Secondary Small Scale Industries

The following provisions shall apply to the establishment of secondary small scale industries in the Agricultural Zones:

.1 Secondary small scale industries shall mean such industries which are secondary to the agricultural *Use* and are conducted on the

farm premises principally by the residents living on the farm premises.

.2 Industrial *Uses* considered secondary to agricultural *Uses* includes agricultural support industries.

.3 When reviewing a *Conditional Use* Application for secondary small scale industrial operation, *Council* shall take into consideration the provisions of Section 3.3.5 of the *Development Plan*, as well as:

a) Whether the type of operation and location on the farm premises can be sustained without adverse impact to adjoining *Agricultural Activities* or to the natural environment;

b) Ensuring that the character and scale of the operation does not create adverse impacts upon the *Use* of adjoining land *Uses*; and

c) Whether the type and location of the industry require the *Municipality* to invest in new infrastructure to accommodate the operation.

.4 The following SITING CRITERIA shall be applied:

a) The industrial activity shall be located in the same *Yard Site* that serves the farm operation.

b) The industrial activity shall not require the creation of a new title separate from the title for the principal agricultural operation.

c) All industrial activities submitted for approval of *Council* in accordance with this By-law, shall be accompanied by supporting information describing the proposed *Use*, and a *Site* plan identifying the location of the proposed *Use*, all related *Buildings*, storage areas and *Site Access* routes.

d) Conditional Applications for secondary industrial *Uses* approved by *Council* under this By-Law, will require the preparation of *Building* plans and specifications for the purpose of a *Building Permit*, to confirm that all new or modified *Buildings*, intended to accommodate the industrial activity, comply with *Building* regulations.

5.12 *Aggregate Extraction Operations*

1. Applications for a *Development Permit* for an *Aggregate extraction operation* shall include documents and information in accordance with this By-law, as well as the R.M. of Rosser Quarry Operations By-law, and as directed by the *Designated Officer* in consultation with the R.M. of Rosser *Council*.

2. The *Owner*/operator of an *Aggregate extraction operation* shall enter into a development agreement with the *Municipality* in accordance with the applicable *Municipal* By-law.

5.13 *Secondary Suites*

This section is intended to provide standards and conditions for the development of '*Secondary Suites*' (sometimes referred to as "granny suites") as defined in this by-law.

.1 A *Secondary Suite* shall be subject to the following:

a) Not more than 1 *Secondary Suite* shall be permitted within a principal residence.

b) Not more than 1 *Secondary Suite* shall be permitted on a single *Zoning Site*.

c) The principal *Dwelling* must be an existing permanent *Structure*.

d) The principal *Dwelling* is to be occupied by the *Owner* of the property.

e) *Secondary Suite* development shall be a "*Conditional Use*". Such conditional approval must be reviewed by *Council* every second year at which time *Council* may or may not approve the *Use* for an *Extension* of two (2) years.

f) The area of a *Secondary Suite* shall not exceed 40% of the total habitable floor space of the principal *Dwelling* or 861.1 sq. ft. whichever is the lesser.

g) An exterior, private amenity space such as a deck or patio may be provided for the *Secondary Suite*.

5.14 *Wind Energy Generation System (WEGS)*

This section is intended to provide standards and conditions for the placement of *wind energy generation systems* as a *Conditional Use* in the rural areas provided that:

.1 Proponents of a *Wind Energy Generation System (WEGS)* shall

submit to the Development Officer a detailed *Site* plan showing the location of all wind generating devices, associated *Accessory Buildings* or *Structures*, electrical lines (above or below ground) on-*Site* roads and driveways providing *Access* to the public road system.

.2 *Accessory Buildings* or *Structures* forming part of any WEGS shall comply with all minimum *Required Yards* for *WEGS*.

.3 In addition to satisfying the minimum *Yard* requirements in Table 5-4, all *WEGS* shall be setback a minimum of one and one half (1.5) times the total height of the WEGS from all property lines and *Dwellings*. The sole exception to the separation requirement between a residence and a *WEGS* shall be where a landowner sites a *WEGS* for his sole *Use* on his own property adjacent to his principal residence.

.4 In addition to satisfying the minimum *Yard* requirements in TABLE 5-4, newly *Sited* residences in the vicinity of a *WEGS*, other than the residence of the *Owner* of the lands upon which a *WEGS* is located, shall be separated a minimum of one and one half (1.5) times the total height of the nearest adjacent *WEGS*.

.5 The total height of any *WEGS* shall be the distance measured from the ground to the uppermost point of *Extension* of any rotor blade.

.6 In addition to satisfying the minimum *Yard* requirements in Table 5-4, all *WEGS* shall be separated a minimum of 2,640 feet (.5 miles) from any lands designated or zoned for residential *Use*.

.7 Any WEGS *Sites* located adjacent to provincial *Highways* (PTH or PR) shall be subject to the setback requirements of the Province, including that towers should be setback sufficiently from the provincial Highway right of way so that if the *Structure* should fail, the Highway right of way shall not be impacted.

.8 Proponents of *WEGS* shall be responsible for obtaining any required federal and/or provincial government permits or approvals from agencies such as but not limited to Transport Canada, NAV Canada the federal Department of Fisheries and Oceans, Manitoba Hydro and Manitoba Conservation, prior to the issuance of a *Development Permit*.

.9 A *Development Permit* shall be obtained prior to the commencement of construction.

.10 Where a proponent locates a *WEGS* on lands not under their *Owner*ship, they will be required to enter into an easement

agreement with the *Owner* of the property in order to ensure on-going *Access* to the *WEGS*.

.11 The criteria in the *Use* and *Bulk* Tables pertaining to *WEGS* shall not apply in instances where a *WEGS* is constructed on the same *Site* as and is in direct support of either a permitted or conditionally approved agricultural activity. In such cases, the *WEGS* shall be treated as an *Accessory Structure*.

.12 Notwithstanding the treatment of *WEGS* as *Accessory Structures* to permitted or conditionally approved *Agricultural Activities* as outlined in .11 above, proponents shall be required to investigate the need for federal and/or provincial approval or licensing of the *WEGS* in these circumstances.

5.15 *Bulk* Provisions

.1 The Rural *Bulk* provisions are listed in Table 5 – 4, Rural *Bulk* Table.

.2 Explanations and Exceptions to the *Bulk* Requirements in Table 5 – 4 are as follows:

a) Minimum *Site* requirements for *Single-Family Dwellings* and *Mobile Homes* may be reduced by *Council* when it is deemed that subdivision of land for these purposes is in compliance with the *Development Plan* guidelines as outlined in Sections 3.3.1. 7-9 and related Sections of that Plan.

b) Notwithstanding the provisions of Table 5-4, the siting of *Livestock Operations* shall not be inconsistent with the minimum separation distances set out in the table in Appendix 1 of the *Provincial Planning Regulation*, Regulation 81/2011. In addition, minimum standards respecting setbacks shall not be inconsistent with the minimum setback requirements from property lines and water features prescribed in the *Livestock Manure and Mortalities Management Regulation*, Manitoba Regulation 42/98

c) *Buildings* and *Structures* shall have a *Side* or *Rear Yard* of one hundred and twenty-five (125) feet when the *Yard* is adjacent to a Government Road Allowance.

d) Setbacks for *Buildings*, *Structures* or hedges from provincial roads, major provincial *Highways* and their centers of intersection shall be in accordance with The *Highway* Protection *Act, The Highway* Transportation Act and other related Acts as varied from time to time.

Table 5 - 4
Rural Bulk Table

Permitted or *Conditional Uses*	**Zone**	**Requirements**							
		Minimum					**Maximum**		
		***Site Area* (Ac)**	***Site Width* (Ft)**	***Front Yard* (Ft)**	***Side Yard* (Ft)**	***Rear Yard* (Ft)**	***Front Yard* (Ft)**	**Height (Ft)**	***Site Coverage* (%)**
General *Agricultural Activities*	"AG" "AL"	80	600	125	25	25		-	-
Single-Family Dwelling or *Mobile Home*	"AG" "AL"	80	600	125	25	25	300		
Livestock Operations	"AG" "AL"	80	600	125	25	25		-	-
Other *Uses*	"AG" "AL"	2	200	125	25	25		-	-
Aggregate Mineral Extraction[1]	"AG"	80							
	"AL"	-	-	-	-	-	-	-	-
Wind Energy Generation System	"AG" "AL"	80	660	125	75	75		-	-
Accessory Buildings and *Structures*	"AG"	-	-	125	25	25		-	-
	"AL"	-	-	125	25	25		-	-

[1] See Rosser *Aggregate* By-law for Specific Standards.

File No. 19B5-0003
6901142 Manitoba Ltd. and Lilyfield Quarry Inc. vs. Rural Municipality of Rosser
Hearing date: Monday July 27, 2020 & Tuesday, July 28, 2020

List of Presenters:

July 27, 2020

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Colleen Munro
John Wintrup
Michelle Richard
Larissa Sveinson
Jennifer Rogers
Jeff Bell
Greg Mckee
Tim Stone
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Dana Thomson
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Valerie Gough
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Tessa Thevenot

July 28, 2020

Charles Chappell *
David Kaplen
Brynn Kaplen *
Valerie Gough *
Dan Gough
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James Thevenot *
Karen Kaplen *
Sheilagh Monchak *
Jim Ogilvie
Jeff Bell *
John Wintrup *
Orvel Currie *
Michelle Richard *
Jennifer Rogers *
Colleen Munro *

* Repeat presenter from July 27, 2020

MANITOBA

THE PLANNING ACT

C.C.S.M. c. P80

LOI SUR L'AMÉNAGEMENT DU TERRITOIRE

c. P80 de la *C.P.L.M.*

An order made under *The Emergency Measures Act* affects the application of this Act:

Order re Temporary Suspension of Local Government Provisions

Effective from 20 Mar 2020 to 21 Sep 2020

Un décret pris en vertu de la *Loi sur les mesures d'urgence* modifie l'application de cette loi :

Décret portant suspension temporaire de dispositions concernant les administrations locales

En vigueur du 20 mars 2020 au 21 sept. 2020

As of 31 Jul 2020, this is the most current version available. It is current for the period set out in the footer below.

Le texte figurant ci-dessous constitue la codification la plus récente en date du 31 juill. 2020. Son contenu était à jour pendant la période indiquée en bas de page.

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,

(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.

Date: 20200708
Docket: CI 17-01-05956
CI 17-01-05957
CI 17-01-05958
(Winnipeg Centre)
Indexed as: Ladco Company Limited v. The City of Winnipeg
Cited as: 2020 MBQB 101

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	**APPEARANCES:**
	)	
LADCO COMPANY LIMITED,	)	Keith Ferbers
applicant,	)	for the applicant, Ladco
- and -	)	Company Limited
	)	
THE CITY OF WINNIPEG,	)	Mark Newman and
respondent,	)	Dayna Steinfeld
	)	for the applicants, Ridgewood
	)	West Land Corp. and Sage
APPLICATION UNDER: *The City of Winnipeg Charter*, S.M. 2002, c. 39; *The Constitution Act 1867* and *The Court of Queen's Bench Act* S.M. 1988-89 c.4	)	Creek Development
	)	Corporation
	)	
	)	Antoine Hacault and
	)	John Stefaniuk
	)	for the applicants, Urban
IN THE MATTER OF: The City of Winnipeg Charter Act, City of Winnipeg By-law 127/2016 and Section 92(2) of the *Constitution Act 1867*	)	Development Institute
	)	(Manitoba Division) and
	)	Manitoba Home Builders'
	)	Association
	)	
AND BETWEEN:	)	Brian Meronek Q.C., Orvel
	)	Currie, Jennifer Hanson and
RIDGEWOOD WEST LAND CORP., and	)	Erin Lawlor-Forsyth
SAGE CREEK DEVELOPMENT CORPORATION,	)	for the respondent
	)	
applicants,	)	
	)	
- and -	)	
	)	
THE CITY OF WINNIPEG,	)	
respondent,	)	Judgment delivered:
	)	July 8, 2020

[117] ***Vavilov*** provides guidance on the manner in which to conduct a reasonableness review. The application of the reasonableness standard is a contextual inquiry. Authorities establish that the context of municipal decision to pass by-laws demonstrates a deferential approach on judicial review. A review of municipal by-laws must reflect the broad discretion provincial legislatures have traditionally accorded to municipalities engaged in delegated legislation. In this context, reasonableness includes the fact that courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable. (See ***Catalyst Paper Corp. v. North Cowichan (District)***, 2012 SCC 2, [2012] 1 S.C.R. 5, at paras. 18 - 21)

[118] In conducting the reasonableness assessment, the court reviews the decision-maker's reasons in light of the history and context of the proceedings. Formal written reasons supporting or explaining a decision to pass a by-law is not necessarily required. As pointed out in ***Vavilov***, at para. 94:

> **94** The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves ...

[119] In applying the reasonableness standard on a question of statutory interpretation, ***Vavilov*** is also instructive. I am to employ the modern principles of statutory interpretation in the review of City council's decision as follows:

> **117** A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention

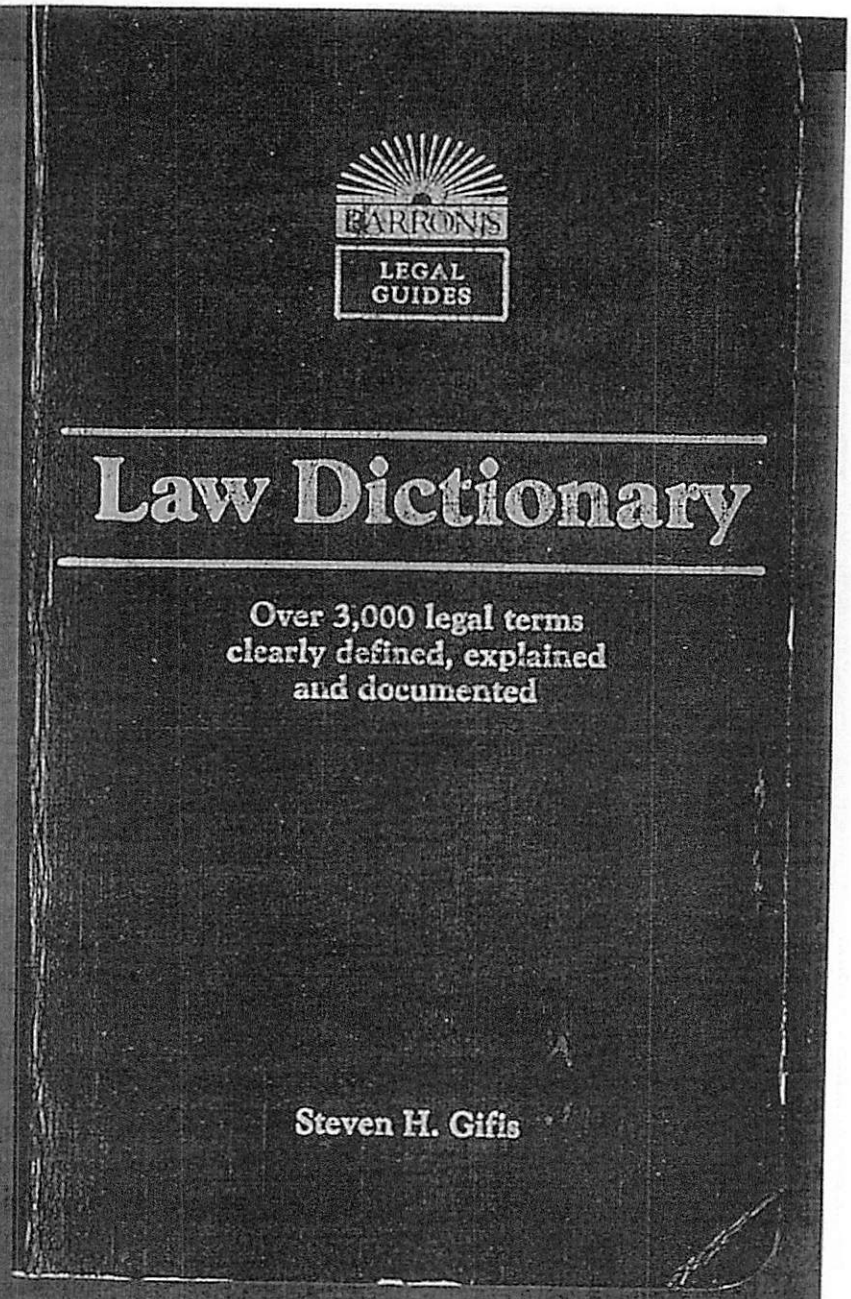
of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, R.S.C. 1985, c. I-21.

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

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

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

[120] ***The Interpretation Act*** C.C.S.M. c. I80, also governs the rules of statutory interpretation as follows:


BARRON'S
LEGAL GUIDES
Law Dictionary
Over 3,000 legal terms clearly defined, explained and documented
Steven H. Gifis

tional challenge. Whether a particular error is harmless or not is a matter of federal and not state law as to federal constitutional questions. The prosecution has the burden of proving "beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained." 386 U.S. 18, 24. Other properly received evidence may be considered in determining whether the valid proof was so overwhelming as to preclude the possibility that the constitutional violation contributed to the verdict. 395 U.S. 250. See also **error; plain error.**

HEAD NOTE summary of an issue covered in a reported case; summaries of all the points discussed and issues decided in a case, which are placed at the beginning of a case report.

HEAD OF HOUSEHOLD an unmarried **taxpayer** who maintains as his home a household which is the principal place of residence of a specifically designated person who constitutes a **dependent.** A person who qualifies as a head of household is subject to a **tax rate** that is less than the tax rate applied to a person who is not a head of household. I.R.C. §§1(b) and 2(b).

HEARING a proceeding wherein evidence is taken for the purpose of determining an issue of fact and reaching a decision on the basis of that evidence, 426 P. 2d 942, 951; describes "whatever takes place before magistrates clothed with judicial functions and sitting without jury at any stage of the proceeding subsequent to its inception." 15 N.E. 2d 1014, 1015. Thus a hearing, such as an ADMINISTRATIVE HEARING, may take place outside the judicial process, before officials who have been granted judicial authority expressly for the purpose of conducting such hearings.

FINAL HEARING "is sometimes used to describe that stage of proceedings relating to the determination of a **suit** upon its **merits**, as distinguished from those of preliminary questions." 15 N.E. 2d 1014, 1015. See **preliminary hearing; fair hearing.** See also **due process of law.**

HEARING DE NOVO see **de novo** [DE NOVO HEARING].

HEARSAY RULE a rule that declares **not admissible** as **evidence** any statement other than that by a **witness** while testifying at the **hearing** and offered into evidence to prove the truth of the matter stated. Uniform Rule of Evidence 63. The reason for the hearsay rule is that the credibility of the witness is the key ingredient in weighing the truth of his statement; so when that statement is made out of court, without benefit of cross-examination and without the witness's demeanor being subject to assessment by the trier of fact (judge or jury), there is generally no adequate basis for determining whether the out-of-court statement is true. 6 Wigmore, Evidence §1766 (chadbourne rev. 1976). The statement may be oral or written and includes non-verbal conduct intended as a substitute for words. If, for example, a witness's statement as to what he heard another person say is elicited to prove the truth of what that other person said, it is hearsay; if however, it is elicited to merely show that the words were spoken, it is not hearsay. The witness's answer will be admissible only to show that the other person spoke certain words and not to show the truth of what the other person said.

There are many exceptions to the hearsay rule of exclusion based on a combination of trustworthiness and necessity. Thus, official written statements, such as police reports, where the declarant's statements are based on firsthand knowledge and where the officer is under an official duty to make the report (and hence has no motive to falsify) are admissible under the BUSINESS RECORDS EXCEPTION. See,

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.

MANITOBA

THE MUNICIPAL BOARD ACT

C.C.S.M. c. M240

LOI SUR LA COMMISSION MUNICIPALE

c. M240 de la *C.P.L.M.*

As of 31 Jul 2020, this is the most current version available. It is current for the period set out in the footer below.

Le texte figurant ci-dessous constitue la codification la plus récente en date du 31 juill. 2020. Son contenu était à jour pendant la période indiquée en bas de page.

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.

1994 CarswellBC 532
British Columbia Court of Appeal

Dupras v. Mason

1994 CarswellBC 532, [1994] B.C.W.L.D. 2844, [1994] B.C.J. No. 2456, 120 D.L.R. (4th) 127, 32 C.P.C. (3d) 126, 51 A.C.W.S. (3d) 350, 52 B.C.A.C. 59, 86 W.A.C. 59, 99 B.C.L.R. (2d) 266

PAUL DUPRAS v. MATT MASON, JOHN EDWARD ROBINS and DENIS LIEUTARD, CHIEF GOLD COMMISSIONER FOR THE PROVINCE OF BRITISH COLUMBIA

PAUL DUPRAS v. JOHN EDWARD ROBINS, MATT MASON, ECSTALL MINING CORPORATION and DENIS LIEUTARD, CHIEF GOLD COMMISSIONER FOR THE PROVINCE OF BRITISH COLUMBIA

PAUL DUPRAS v. JOHN EDWARD ROBINS, MATT MASON, ECSTALL MINING CORPORATION and DENIS LIEUTARD, CHIEF GOLD COMMISSIONER FOR THE PROVINCE OF BRITISH COLUMBIA

Lambert, Legg, Taylor, Proudfoot and Finch JJ.A.

Heard: June 17, 1994
Judgment: November 3, 1994
Docket: Docs. Vancouver CA016932, CA016934, CA016935

Counsel: *W. Derby, Q.C.* and *N. Hughes*, for appellants Robins and Mason.
D.B. Kirkham, Q.C. and *C. Cordell*, for respondent Dupras.

Subject: Civil Practice and Procedure; Natural Resources
Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
XXIII.15 Appeal de novo
Natural resources
II Mines and minerals
II.2 Mining legislation
II.2.a Statutory powers and duties of mining authorities
II.2.a.ii Mining commissioner
Natural resources
II Mines and minerals

II.6 Practice and procedure
II.6.j Appeals
II.6.j.vi Appeal de novo

Headnote

Mines and Minerals --- Mining legislation — Statutory powers and duties of mining authorities — Mining commissioner

Mines and Minerals --- Practice and procedure — Appeals — Appeal de novo

Energy and natural resources — Mining — Claims — Mineral Tenure Act not contemplating or permitting appeal by trial de novo — Legislation contemplating a true appeal confined to determine whether chief gold commissioner having made reviewable error of fact, of law, or of procedure.

Administrative law — Appeals from administrative decisions — Mineral Tenure Act not contemplating or permitting appeal by trial de novo — Legislation contemplating a true appeal confined to determine whether chief gold commissioner having made reviewable error of fact, of law, or of procedure.

Under s. 35 of the *Mineral Tenure Act*, an "interested person" may complain to the chief gold commissioner that a claim has been located or recorded contrary to the legislation, or such person may make various other types of complaint contemplated by the section. Following any investigation ordered under s. 35(5) and review of the resulting report, together with any submissions received under s. 35(8), the chief gold commissioner may dismiss the complaint, cancel the record of the claim or any exploration credit, or he may make any other order he considers appropriate. The chief gold commissioner's decision may be appealed to the Supreme Court. Although the legislation does not delineate the nature and scope of the court's powers or obligations when hearing the appeal, nothing in the Act indicates that the appeal is to be anything other than an appeal in the usual sense of the word. The appeal is not to be taken by trial de novo. If that was the mode of appeal, the chief gold commissioner's expertise would no longer be available in the process of decision making under s. 35 and s. 34. As well, because of the fact that the appeal is not specified in the statute to be by trial de novo, it must be concluded that s. 35(10) of the *Mineral Tenure Act* does not contemplate or permit an appeal to a Supreme Court judge by trial de novo. It follows that the appeal must be a true appeal confined to whether the chief gold commissioner made a reviewable error of fact, of law, or of procedure.

Table of Authorities

Cases considered:

Abbotsford School District 34 v. Shewan (1987), 21 B.C.L.R. (2d) 93, 47 D.L.R. (4th) 106, affirming (1986), 70 B.C.L.R. 40, 26 D.L.R. (4th) 54 (C.A.) — *referred to*

Dupras v. Lieutard (January 21, 1991), Doc. Vancouver A903084, Holmes J. (B.C.S.C.) — *referred to*

McKenzie v. Mason (1992), 72 B.C.L.R. (2d) 53, 9 C.P.C. (3d) 1, 96 D.L.R. (4th) 558, 18 B.C.A.C. 286 [leave to appeal to S.C.C. refused (1993), 75 B.C.L.R. (2d) xxxii, 151 N.R. 400, 31 B.C.A.C. 320] — *followed*

Statutes considered:

Inquiry Act, R.S.B.C. 1979, c. 198

s. 15*referred to*

s. 16*referred to*

Mineral Tenure Act, S.B.C. 1988, c. 5

s. 10(1)*considered*

s. 10(2)*considered*

s. 10(3) [re-en. 1988, c. 44, s. 4]*considered*

s. 10(5) [am. 1988, c. 44, s. 4]*considered*

s. 10(6)*considered*

s. 34*considered*

s. 35(1)*considered*

s. 35(4)*considered*

s. 35(5) [am. 1989, c. 71, s. 23]*considered*

s. 35(6)*considered*

s. 35(7)*considered*

s. 35(8)*considered*

s. 35(9)*considered*

s. 35(10)*considered*

s. 35(11)*considered*

Minerals (Other Than Coal) Act, S.B.C. 1888 — *referred to*

Rules considered:

British Columbia, Rules of Court (1990)

R. 49*considered*

Regulations considered:

Mineral Tenure Act, S.B.C. 1988, c. 5 — Mineral Tenure Act Regulations, B.C. Reg. 587/77

Appeals from consent orders directing appeals from Chief Gold Commissioner under *Mineral Tenure Act* to be by way of trial de novo.

The judgment of the court was delivered by *Lambert J.A.*:

I

1 These three appeals relate to the nature of the right of appeal to the Supreme Court of British Columbia from a decision of the Chief Gold Commissioner with respect to a cancellation of a mineral claim or a refusal to cancel a mineral claim, under s. 35(9) of the *Mineral Tenure Act*.

2 The consideration of that question also requires a reference to R. 49 of the *Supreme Court Rules*, which deals with statutory appeals.

3 These three appeals were heard by a division of five judges because we were invited by counsel for the respondent to re-examine the decision of this Court in *McKenzie v. Mason* (1992), 72 B.C.L.R. (2d) 53. That case, like this case, arose from the staking of the mineral claims underlying the Eskay Creek Gold Mine in Northern British Columbia. It decided that the appeal was not to be by way of a trial de novo but was instead to be a review of the correctness of the decision of the Chief Gold Commissioner. The principal reason for that decision was that if the legislature had intended that an appeal to the Supreme Court should be in the exceptional form of a trial de novo, it would have specified the availability of that form of appeal either as the only form of appeal or as an alternative form of appeal.

II

4 For the purposes of these appeals it is sufficient to say that in November, 1988 Mr. Dupras overstaked some mineral claims that had been staked in May, 1988; that Mr. Mason and Mr. Robins overstaked the same area in December, 1988; that in July, 1989 Mr. Mason and Mr. Robins relocated the claims that they had staked in December 1988; that Ecstall Mining Corporation overstaked another part of the same area at about the same time; and that Mr. McKenzie overstaked the same area again, at the fourth level, in 1989.

5 Mr. Robins and Ecstall Mining Corporation filed separate complaints with the Gold Commissioner under s. 35 of the *Mineral Tenure Act* saying that the claims staked by Mr. Dupras had been located or recorded contrary to the Act. In each case, the Chief Gold Commissioner ordered a mineral title inspector to prepare a report and invited Mr. Dupras, Mr. Robins and Ecstall Mining Corporation to make written submissions. In each case, after considering the report and the submissions, the Chief Gold Commissioner ordered the cancellation of the claims staked by Mr. Dupras and declared that they were void ab initio. The Chief Gold Commissioner did not give any reasons for his decisions.

15 So the question arises of whether that decision-making structure exhausts the Chief Gold Commissioner's powers. The answer to that question is crucial in deciding on the nature of the appeal to the Supreme Court of British Columbia and in deciding whether the *Mineral Tenure Act* contemplates an appeal by way of trial de novo as an alternative to a true appeal.

16 The distinction between a trial de novo and a true appeal is that in a trial de novo the question before the court is the very question that was before the Chief Gold Commissioner, namely, was the claim located or recorded according to the Act and Regulations, whereas in a true appeal the question before the Court is whether the Chief Gold Commissioner made a reviewable error of fact, of law, or of procedure. A trial de novo ignores the original decision in all respects, except possibly for the purposes of cross-examination. A true appeal focuses on the original decision and examines it to determine whether it is right or wrong, flawed or unflawed.

17 Running through the consideration of s. 35 must be an understanding of the function and expertise of the Chief Gold Commissioner. He or she may be expected to have had many years of experience with respect to the mining industry in general and the locating and recording of mineral claims in particular. That expertise will imbue the carrying out of his or her functions under s. 35. It will also make his or her decision under s. 34 about good faith non-compliance a decision which is well informed by practical experience of what constitutes a good faith attempt to comply with the Act and Regulations, and about whether a failure to comply was calculated to mislead other free miners.

18 If an appeal were to be taken by trial de novo the Chief Gold Commissioner's expertise would no longer be available in the process of decision making under s. 35 and s. 34. For that reason and for the other reasons set out by Mr. Justice Toy for this Court in *McKenzie v. Mason*, including particularly the fact that the appeal is not specified in the statute to be by trial de novo, I conclude that s. 35(10) of the *Mineral Tenure Act* does not contemplate or permit an appeal to a Supreme Court Judge by trial de novo.

19 Having reached that conclusion, it follows that the appeal to the Supreme Court must be a true appeal confined to whether the Chief Gold Commissioner made a reviewable error of fact, of law, or of procedure.

20 When such a question comes before the Supreme Court, surely s. 35, coupled with R. 49, must contemplate that the Chief Gold Commissioner will not have been thwarted in his or her decision-making function by not having been able to decide disputed questions of fact, of law, or of procedure, in accordance with the best and the most appropriate standards of justice and fairness.

21 Suppose that there were a disputed question of fact about the locating of a claim. On an appeal, the Supreme Court could order, under R. 49(5)(*c*), that evidence be given orally on that question and that witnesses be subject to cross-examination. After hearing those witnesses, the

1996 CarswellMan 38
Manitoba Court of Appeal

Orange Properties Ltd. v. Winnipeg (City) Assessor

1996 CarswellMan 38, 107 Man. R. (2d) 278, 109
W.A.C. 278, 132 D.L.R. (4th) 400, 60 A.C.W.S. (3d) 894

Orange Properties Ltd., (Applicant) Appellant v. The Assessor for the City of Winnipeg and the City of Winnipeg, (Respondents) Respondents

Scott, C.J.M, Helper, Kroft, JJ.A.

Judgment: January 24, 1996
Docket: Doc. AI 93-30-01367

Counsel: *E. B. Eva*, for the appellant.
M. S. Samphir, and *K. J. Durkin*, for the respondents.
T. D. Gisser, for the Municipal Board.

Subject: Public; Tax — Miscellaneous; Municipal
Related Abridgment Classifications
Municipal law
XX Municipal tax assessment
XX.11 Remedies
XX.11.a Statutory remedies
XX.11.a.i Effect of failure to exercise
Headnote
Municipal law --- Municipal tax assessment — Remedies — Statutory remedies — Effect of failure to exercise
Municipal tax assessment — Remedies — Statutory remedies — Effect of failure to exercise.
Held:

***Scott, C.J.M.*:**

1 Does the Municipal Board have the authority on an appeal to it by the City assessor to increase the assessment beyond the original value assigned by the assessor, when the assessor had not previously appealed to the Board of Revision? That is the question on this appeal.

2 The particular facts of this case my be quickly stated.

10 The assessor, supported by the Municipal Board, now takes the position that by virtue of the wording of sec. 60(1) of the *Act* the Municipal Board is authorized to examine the matter *de novo* and, having received the appropriate notice of appeal or cross-appeal, to increase an assessment when it is requested and persuaded to do so by the assessor, regardless of the position taken by the assessor before the Board of Revision. Both sec. 17(1) of the *Act* and previous decisions of this Court make it clear that assessed value of the property means market value for the reference year: see *Shapiro et al. v. Winnipeg City Assessor and Winnipeg (City)* (1987), 49 Man.R. (2d) 305, and *Lamont et al. v. Provincial Municipal Assessor (Man.)* (1992), 76 Man.R. (2d) 291. The only limitation is the requirement that a fair and just relation exists between assessable properties in the City of Winnipeg.

11 Counsel for the assessor submits that, in the absence of clear language to the contrary, the Municipal Board is therefore mandated to determine the amount of the assessment based on the twin concepts of market value and equity without in any way being restricted by the issues or positions taken by the parties before the Board of Revision. The Municipal Board cannot be limited to merely rehearing issues as delineated during the previous proceedings as this would run counter to the *de novo* nature of the hearing before it. This is further confirmed by the broad discretion given to the Municipal Board under sec. 60(1) to raise or lower the assessed value "as the circumstances require and as the Board considers just and expedient."

12 Orange, on the other hand, argues that the plain words of sec. 56(4) of the *Act* which entitles the parties before the Municipal Board "to a full hearing on the issues that are the subject of the appeal" mean that the parties are restricted to the issues and positions taken before the Board of Revision.

13 When Lyon J.A. granted leave to appeal (reported at (1995), 100 Man.R. (2d) 208) he concluded at p. 213:

> In my opinion the Board sitting on appeal from a decision from the Board of Revision is limited by statute to considering the issues dealt with at first instance by the Board of Revision.
>
> The language of s. 56(4) clearly harkens back to the hearing before the Board of Revision. The phrase "*as if the issues were being heard for the first time*" suggests (1) a recognition that the Board of Revision did in fact adjudicate on *the issues*, but (2) that for the purposes of the hearing before the Board, it is as if it did not so adjudicate. The effect of this is that the Board is not fettered in any way by the decisions reached by the Board of Revision with respect to findings of fact, of credibility and the like; however, it must consider those same issues.
>
> This does not in any way destroy the *de novo* nature of the hearing. As the definition of *de novo* suggests, the Board is to hear the matter afresh. However, it is not to hear a fresh matter.
>
> . . . . .

Board of Revision and the benefit of the rights and procedural safeguards set forth in the statutory scheme. This is entirely consistent with and, indeed, necessitated by the fact that the assessor does not have authority to make changes unilaterally to the assessment roll when there is a dispute as to market value. In such a case, a hearing before the Board of Revision is the time and place for the positions and evidence on behalf of the taxpayer and the assessor to be fully explored and dealt with.

19 It makes no sense, and is contrary to procedural fairness, to allow the assessor to subsequently take a position that it not only failed to place before the Board of Revision, but that is totally contrary to the evidence presented and argument made by it in defending the original assessment.

20 Taking the argument advanced by the City assessor and the Municipal Board to its logical conclusion would give the City assessor the right, after having successfully requested an increase in its original assessment before the Board of Revision, to take a different position on a further appeal to the Municipal Board by requesting an even greater assessment. Such a right would permit the City assessor to use this power as a tactical device to discourage appeals by taxpayers from the Board of Revision to the Municipal Board.

21 It is only when the revision and appeal process is looked at as a comprehensive whole that it becomes clear that what the Legislature must have intended in sec. 56(4) was that the "full hearing" before the Municipal Board be confined to the issues and positions taken at the first round before the Board of Revision. It is the failure of the City assessor in this case to put the issue before the Board of Revision that disentitles the Municipal Board to grant the relief the assessor now seeks. Thus, the Municipal Board's responsibilities are confined in any other appeal to the matters properly placed before it which do not encompass a position wholly inconsistent with that taken before the Board of Revision. Fairness demands no less.

22 Reference should also be made to this Court's concurrent decision in *W.R.E. Development Ltd. v. The Assessor for the City of Winnipeg* (Suit No. AI 95-30-02220) in which we concluded that the Municipal Board cannot consider a request to change an assessment in the absence of a notice of appeal or cross-appeal.

23 The appeal is accordingly allowed with costs.

End of Document

1988 CarswellNfld 26
Newfoundland Supreme Court, Court of Appeal

Newterm Ltd., Re

1988 CarswellNfld 26, [1988] N.J. No. 379, 13 A.C.W.S. (3d) 389, 231 A.P.R. 328, 2 R.P.R. (2d) 264, 41 M.P.L.R. 69, 74 Nfld. & P.E.I.R. 328

CITY OF ST. JOHN'S v. NEWTERM LTD.

Goodridge C.J.N., Gushue and Marshall JJ.A.

Judgment: November 3, 1988
Docket: No. CA 49/88

Proceedings: Reversed (1988), 38 M.P.L.R. 17, 70 Nfld. & P.E.I.R. 216, 215 A.P.R. 216 (Nfld. T.D.)

Counsel: *Stephen J. Stafford*, for appellant.
R.P. Stack, for respondent.

Subject: Property; Public; Tax — Miscellaneous; Municipal

Related Abridgment Classifications

Civil practice and procedure
XXII Judgments and orders
XXII.15 Final or interlocutory
XXII.15.a Interlocutory judgment or order
XXII.15.a.i What constituting
XXII.15.a.i.A For purpose of appeal
Municipal law
XX Municipal tax assessment
XX.12 Practice and procedure on assessment appeals and objections
XX.12.a Appeal
XX.12.a.i De novo hearing

Headnote

Municipal law --- Municipal tax assessment — Practice and procedure on assessment appeals (objections to assessment) — Nature of appeal — De novo hearing

Assessment — Practice and procedure — Appeals — Appeal from decision of Assessment Review Court to Supreme Court of Newfoundland, Trial Division, being by way of hearing de novo — Onus of proof resting upon appellant but assessment presumed to be correct at outset — Respondent disputing assessment and onus upon it to prove valuation should be reduced.

The respondent appealed to the Assessment Review Board from an assessment against its property on the basis that the valuation was too high. Although the assessment was reduced, the respondent further appealed to the Trial Division for a further reduction. At trial the Judge ruled that as the proceedings before him were a de novo hearing, the burden of proof remained with the city. The city appealed. The respondent submitted that since the trial Judge's ruling on the onus of proof issue was made during the course of a hearing in the Trial Division, it ought not to be the subject of an appeal in itself.

Held:

The appeal was allowed.

Although the accepted practice is for the unsuccessful party at trial to appeal to the Court of Appeal from an adverse decision, the general rule was not to be applied in this case. The issue of burden of proof was one of fundamental importance to the parties and should be determined prior to the hearing de novo.

The onus of proof on the hearing de novo and on any appeal lies on the appellant. However, it was the respondent who was disputing the assessment and, therefore, at the outset of the hearing de novo the assessment is presumed to be correct until demonstrated to be erroneous. Therefore, the onus lies upon the respondent to establish that the valuation of its property should be reduced.

Table of Authorities

Statutes considered:

Judicature Act, 1986, S.N. 1986, c. 42 —

s. 2(1)

s. 5(1)(a)

s. 34

St. John's Assessment Act, S.N. 1980, c. 39 —

s. 54

s. 64

s. 77(2)

s. 87

s. 88

s. 89, as am. The Judicature Act, 1986, S.N. 1986, c. 42, Schedule B, Item 85

APPEAL from a decision of Steele J. reported (1988), 38 M.P.L.R. 17, 70 Nfld. & P.E.I.R. 216, 215 A.P.R. 216 (Nfld. T.D.).

***Gushue J.A. (Marshall J.A.* concurring):**

1 The City of St. John's has taken this appeal from an order of the Trial Division filed March 8, 1988, that, on an appeal taken to the Trial Division from a decision of the Assessment Review Court in accordance with *The St. John's Assessment Act*, S.N. 1980, c. 39 ("the Act"), the onus of proving the validity of the assessment appealed against rests with the city, even though Newterm, not the city, was the appellant.

2 Since the passing of the Act in 1980, property tax imposed by the city on occupiers and owners of property has been assessed in accordance with that statute. Pursuant to s. 54 of the Act, a notice of real property assessment was sent to Newterm Limited on December 12, 1985. On December 19, a notice of appeal of the valuation appearing in that assessment was filed by Newterm. The appeal was heard by the Assessment Review Court constituted by the Act on February 4 and February 9, 1987. The Court filed a decision reducing the valuation of Newterm's real property, and thereby its assessment, but that reduction was not acceptable to Newterm, which further appealed to the Trial Division under ss. 87 and 88 of the Act. The hearing of that appeal commenced on February 16, 1988 [38 M.P.L.R. 17, 70 Nfld. & P.E.I.R. 216, 215 A.P.R. 216].

3 Section 89, as am. *The Judicature Act, 1986*, S.N. 1986, c. 42, Schedule B, Item 85, requires that hearings into an appeal to the Trial Division shall be an inquiry de novo.

4 It provides:

> The Trial Division shall enquire into the matter de novo and examine such witnesses and take all such proceedings as are necessary for a full investigation of the matter.

5 The appeal on its merits never actually commenced because a preliminary point of law was raised for the Judge's decision as to just what was meant by a de novo hearing under that section. It is the decision of the hearings Judge in that regard which is now appealed to this Court by the city.

6 The appeal Judge found that a new hearing was intended at which witnesses could be called and evidence adduced by both sides. He further found that the Act contemplated that the Trial Division on appeal would consider the reasons and findings appearing in the decision of the Review Court. He then stated [38 M.P.L.R. 17 at 23]:

> The conduct of the hearing and the nature and scope of the appeal to the Supreme Court may be ill-defined, but the scheme and spirit of the appeal process in the Act are very evident: to permit a reconsideration of the assessment of the property; another opportunity for the aggrieved party to be heard, to call witnesses, to cross-examine opposing witnesses and make submissions on both fact and law relevant to the assessment.

1987 CarswellBC 147
Supreme Court of Canada

Pelech v. Pelech

1987 CarswellBC 147, 1987 CarswellBC 703, [1987] 1 S.C.R. 801, [1987] 4 W.W.R. 481, [1987] R.D.F. 264, [1987] B.C.W.L.D. 2645, [1987] W.D.F.L. 1487, [1987] S.C.J. No. 31, 14 B.C.L.R. (2d) 145, 17 C.P.C. (2d) 1, 38 D.L.R. (4th) 641, 4 A.C.W.S. (3d) 322, 76 N.R. 81, 7 R.F.L. (3d) 225, J.E. 87-682, EYB 1987-80055

PELECH v. PELECH

Dickson C.J.C., McIntyre, Chouinard [*], Lamer, Wilson, Le Dain and La Forest JJ.

Heard: March 24 and 25, 1986
Judgment: June 4, 1987
Docket: No. 19265

Counsel: *S. Hall*, for appellant.
R. Kasting, for respondent.

Subject: Civil Practice and Procedure; Family; Contracts
Related Abridgment Classifications
Family law
VI Domestic contracts and settlements
VI.2 Effect of contract
VI.2.b On spousal support
VI.2.b.i Under Divorce Act
VI.2.b.i.A Variation of support
Family law
XVII Practice and procedure
XVII.1 Jurisdiction
XVII.1.a Divorce
Headnote
Family Law --- Domestic contracts and settlements — Effect of contract — On spousal support — Under Divorce Act — Variation of support
Family Law --- Divorce — Jurisdiction of Court — Duties and powers of Court — On appeal
Family law — Maintenance — Variation — Change in circumstances — Parties entering into maintenance agreement after receiving independent legal advice — Agreement incorporated into court order under Divorce Act — Wife's health deteriorating requiring her to apply for social assistance while husband prospering financially — Agreement fair when negotiated and change

in wife's circumstances unrelated to former marriage — Supreme Court of Canada dismissing application to vary order under s. 11(2) of Divorce Act.

Judges and courts — Jurisdiction — Appellate jurisdiction — Maintenance orders — Ex-wife applying to vary maintenance order under s. 11(2) of Divorce Act — Identification of criteria for determining appropriateness of judicial intervention to vary valid and enforceable settlement agreement raising question of law — Court of Appeal and Supreme Court of Canada having jurisdiction to hear appeal from application to vary order.

Following their divorce in 1969, the parties entered into a maintenance agreement which provided for the payment of a lump sum to the wife in full satisfaction of all claims for maintenance. The parties had independent legal advice, and the agreement was approved by the registrar and subsequently incorporated into an order made under s. 11(1) of the Divorce Act. The husband made the payments required under the agreement and, subsequently, his net worth increased substantially. In contrast, as a result of deteriorating health the wife became unable to work, depleted the capital of the maintenance fund and had to apply for social assistance. Twelve years after the agreement the wife applied under s. 11(2) of the Divorce Act for an order to vary the award of maintenance. At the hearing, although the judge found that the original agreement was neither improvident nor unconscionable and that there was no connection between the husband's changed circumstances and the former marriage, the application to vary was granted. The husband's appeal was allowed and the wife brought a further appeal.

Held:

Appeal dismissed.

Per WILSON J. (DICKSON C.J.C., MCINTYRE, LAMER and LE DAIN JJ. concurring): With respect to the appellate court's jurisdiction under the Divorce Act, s. 17(2) of the Act does not confer a broad power on a Court of Appeal to review discretionary decisions of the courts below. The section sets out the remedial powers of the reviewing court upon hearing an appeal, not the conditions under which the appeal can be heard in the first place. The purpose of the enumeration of powers is to set out alternative dispositions open to the court in granting or dismissing an appeal in conformity with traditional principles of appellate review. Accordingly, a Court of Appeal should not interfere with a trial judge's decision unless his reasons disclose material error. In this case, however, the Court of Appeal had jurisdiction under s. 17(2), as the case raised the question of law as to what the criteria are for determining when it is fit and just for the court to vary a s. 11(2) order in the face of an antecedent and enforceable settlement agreement. That question of law also gave the Supreme Court of Canada jurisdiction under s. 18. Where the provisions of s. 41(1) of the Supreme Court Act are not in conflict with s. 18 of the Divorce Act, the court also has jurisdiction under s. 41(1).

Where a maintenance agreement has been freely entered into on the advice of independent legal counsel and the agreement is not unconscionable in the substantive law sense, it should be respected. A maintenance agreement can never totally extinguish the jurisdiction of the court to impose its own terms on the parties. However, the court should not vary an agreement by amending an order which incorporates it unless the applicant seeking maintenance or an increase

in maintenance establishes there has been a radical change of circumstances which has a causal connection with the former marriage. The courts must recognize the right of the individual to end a relationship as well as to begin one, and recent case authority emphasizes mediation, conciliation and negotiation as the appropriate means of setting the affairs of parties upon the dissolution of their marriage. The overriding policy consideration should be to encourage people to take responsibility for their own lives and decisions, and parties should be free to make new lives for themselves without ongoing contingent liability for future misfortunes which may befall the other. Unless a change in circumstances is causally connected with the marriage, the obligation to support a former spouse should be the communal responsibility of the state. In this case it was not appropriate to vary the maintenance order: the wife's circumstances were not connected to her former marriage, and the maintenance agreement was entered into freely on the advice of counsel and was perfectly fair at the time it was made.

Per LA FOREST J.: Where the parties have attempted to finally settle their financial situation and a court, in the exercise of its discretion under s. 11(1) of the Divorce Act, has confirmed the settlement as "fit and just", the element of finality inherent in divorce and in such an arrangement must be respected in the absence of the most cogent reasons. The agreement in this case was not inequitable and the change in the circumstances of the parties was not really attributable to either the marriage or the settlement.

Table of Authorities

Cases considered:

Considered by Wilson J.:

Ashby v. White (1703), 2 Ld. Raym. 938, 92 E.R. 126 — *considered*

Barrett v. Barrett (1985), 43 R.F.L. (2d) 405 (Ont. H.C.) — *considered*

Baumgartner Estate v. Ripplinger (1984), 34 Sask. R. 181 (C.A.) — *considered*

Binns v. Binns (1985), 45 R.F.L. (2d) 369, 69 N.S.R. (2d) 205, 163 A.P.R. 205 (Fam. Ct.) — *considered*

Carmichael v. Carmichael (1976), 27 R.F.L. 325, 69 D.L.R. (3d) 297 (B.C.C.A.) — *not followed*

Carnochan v. Carnochan, [1955] S.C.R. 669, [1955] 4 D.L.R. 81 [Ont.] — *referred to*

Caron v. Caron, 14 B.C.L.R. (2d) 186, [1987] 4 W.W.R. 522 (S.C.C.) — *referred to*

Collins v. Collins (1978), 2 R.F.L. (2d) 385, 5 Alta. L.R. (2d) 315, 10 A.R. 214 (T.D.) — *considered*

Connelly v. Connelly (1974), 16 R.F.L. 171, 47 D.L.R. (3d) 535, 9 N.S.R. (2d) 48 (C.A.) — *considered*

Csada v. Csada, [1985] 2 W.W.R. 265, 35 Sask. R. 301 (C.A.) — *considered*

Dal Santo v. Dal Santo (1975), 21 R.F.L. 117 (B.C.S.C.) — *considered*

Droit de la famille — 182, [1985] C.A. 92 — *referred to*

Dwelle v. Dwelle (1982), 31 R.F.L. (2d) 113, 46 A.R. 1 (C.A.) — *referred to*

Fabian v. Fabian (1983), 34 R.F.L. (2d) 313 (Ont. C.A.) — *considered*

Farquar v. Farquar (1983), 43 O.R. (2d) 423, 35 R.F.L. (2d) 287, 1 D.L.R. (4th) 244 (C.A.) — *applied*

Gandy v. Gandy (1882), 7 P.D. 168 (C.A.) — *considered*

Gazdeczka v. Gazdeczka (1982), 30 R.F.L. (2d) 428 (B.C.C.A.) — *considered*

Goldstein v. Goldstein, [1976] 4 W.W.R. 646, 23 R.F.L. 206, 67 D.L.R. (3d) 624 (Alta. C.A.) — *considered*

Guberman v. Guberman, [1977] 2 W.W.R. 1, 27 R.F.L. 15 (Man. C.A.) — *referred to*

Hallberg v. C.N.R. (1955), 16 W.W.R. 538 (Sask. C.A.) — *considered*

Harrington v. Harrington (1981), 33 O.R. (2d) 150, 22 R.F.L. (2d) 40, 123 D.L.R. (3d) 689 (C.A.) — *applied*

Hyman v. Hyman, [1929] A.C. 601 — *applied*

Jull v. Jull, [1985] 1 W.W.R. 385, 34 Alta. L.R. (2d) 252, 42 R.F.L. (2d) 113, 14 D.L.R. (4th) 309, 56 A.R. 123 (C.A.) — *considered*

Katz v. Katz (1983), 33 R.F.L. (2d) 412, 21 Man. R. (2d) 1 (C.A.) — *not followed*

Lensen v. Lensen, [1984] 6 W.W.R. 673, 28 B.L.R. 53, 14 D.L.R. (4th) 611, 35 Sask. R. 48 (C.A.) — *considered*

MacAllister v. MacAllister (1984), 39 R.F.L. (2d) 307, 54 N.B.R. (2d) 211, 140 A.P.R. 211 (C.A.) — *referred to*

Massicotte v. Boutin, [1969] S.C.R. 818 [Que.] — *considered*

Messier v. Delage, [1983] 2 S.C.R. 401, 35 R.F.L. (2d) 337, 2 D.L.R. (4th) 1, 50 N.R. 16 [Que.] — *applied*

Nash v. Nash, [1975] 2 S.C.R. 507, 16 R.F.L. 295, 47 D.L.R. (3d) 558, 2 N.R. 271 — *considered*

Newman v. Newman (1980), 19 R.F.L. (2d) 122, 114 D.L.R. (3d) 517, 4 Man. R. (2d) 50 (C.A.) — *not followed*

Piasta v. Piasta (1974), 15 R.F.L. 137 (Sask. Q.B.) — *considered*

Piller v. Piller, [1975] 4 W.W.R. 342, 17 R.F.L. 252, 54 D.L.R. (3d) 150 (B.C.C.A.) — *not followed*

Posener v. Posener (1984), 4 D.L.R. (4th) 385 (B.C.C.A.) — *considered*

Richardson v. Richardson, S.C.C., No. 19287, 4th June 1987 (not yet reported) — *referred to*

Ross v. Ross (1984), 39 R.F.L. (2d) 51, 6 D.L.R. (4th) 385, 26 Man. R. (2d) 122 (C.A.) — *not followed*

Schmeiser v. Schmeiser (1982), 32 R.F.L. (2d) 449, 21 Sask. R. 437 (C.A.) — *referred to*

Swain v. Dennison, [1967] S.C.R. 7, 58 W.W.R. 232, (sub nom. *Re Woods)* 59 D.L.R. (2d) 357 [B.C.] — *distinguished*

Webb v. Webb (1984), 46 O.R. (2d) 457, 39 R.F.L. (2d) 113, 10 D.L.R. (4th) 74, 5 O.A.C. 161 (C.A.) — *considered*

Webster v. Webster (1978), 25 N.S.R. (2d) 33, 36 A.P.R. 33 (C.A.) — *referred to*

Considered by La Forest J.:

Messier v. Delage, [1983] 2 S.C.R. 401, 35 R.F.L. (2d) 337, 2 D.L.R. (4th) 1, 50 N.R. 16 [Que.] — *considered*

Richardson v. Richardson, S.C.C., No. 19287, 4th June 1987 (not yet reported) — *distinguished*

Statutes considered:

Court of Appeal Act, R.S.S. 1978, c. C-42

s. 8

Divorce Act, R.S.C. 1970, c. D-8

s. 3 [am. 1980-81-82-83, c. 125, s. 30]

s. 11

s. 17(2)

s. 18(1)

Family Relations Act, S.B.C. 1972, c. 20

Judicature Act, R.S.O. 1970, c. 228 [now R.S.O. 1980, c. 223]

s. 30(1) [now s. 29(1)]

Married Women's Property Act, R.S.O. 1950, c. 223

s. 12(1)

Supreme Court Act, R.S.C. 1970, c. S-19

s. 41(1) [re-en. 1974-75-76, c. 18, s. 5]

s. 42

s. 44

s. 47

Testator's Family Maintenance Act, R.S.B.C. 1960, c. 378 [now the Wills Variation Act, R.S.B.C. 1979, c. 435]

s. 17 [now s. 15 [re-en. 1982, c. 7, s. 118]]

Authorities considered:

Abella, "Economic Adjustment On Marriage Breakdown: Support" (1981), 4 F.L.R. 1.

Law Reform Commission of Canada, Report on Family Law (1976), pp. 42-43.

Law Reform Commission of Canada, Working Paper 12, Maintenance on Divorce (1975), p. 30.

Payne, "Policy Objectives of Private Law Spousal Support Rights and Obligations", in Connell-Thouvez and Knoppers (eds.), Contemporary Trends in Family Law: A National Perspective (1984), pp. 86-87.

Wilson, "The Variation of Support Orders", in Abella and L'Heureux-Dubé (eds.), Family Law: Dimensions of Justice, p. 36.

Words and phrases considered:

ANY CHANGE

So far at least as spousal maintenance is concerned . . . in employing the phrase "any change" in s. 11(2) [of the *Divorce Act*, R.S.C. 1970, c. D-8], Parliament did not have in mind changes having no real causal connection with the marriage relationship or the settlement. Broad general words like these must, of course, be read in context and in light of the intention of Parliament. What Parliament has sought to do by the *Divorce Act* is to bring an end to the marriage while providing a mechanism to apportion equitably the burden of the economic disadvantages that may have resulted to a spouse by reason of the marriage. Mrs. Pelech's misfortune has resulted in her being a charge on the public purse. But that is no reason to transfer that burden to Mr. Pelech simply because he has had good fortune.

CATASTROPHIC CHANGE

The Webb standard of catastrophic change (by which is meant . . . that the change must be "dramatic" or "radical" or "gross", not that it must be the result of a catastrophe) is one attempt to reconcile the competing values represented by [*Farquar v. Farquar* (1983), 43 O.R. (2d) 423 (C.A.)] and [*Ross v. Ross* (1984), 39 R.F.L. (2d) 51 (Man. C.A.)] and still remain within the ambit of the Hyman principle and the language of the statute [the *Divorce Act*, R.S.C. 1970, c. D-8].

. . . . .

The test of radical change in [*Webb v. Webb* (1984), 46 O.R. (2d) 457 (C.A.)] is an attempt to carve a fairly narrow exception to the general policy of restraint. It fails, however . . . in one important particular. It makes the mere magnitude of the change the justification for the court's intervention and takes no account of whether or not the change is in any way related to the fact of the marriage. In order to impose responsibility for changed circumstances on a former spouse it seems to me essential that there must be some relationship between the change and the marriage . . . In the

case of a wife who has devoted herself exclusively to home and children and has acquired no working skills outside the home, this relationship is readily established. The former spouse in these circumstances should have a responsibility for a radical change in his ex-wife's circumstances generated as a consequence of her total dependency during the period of the marriage. By way of contrast, a former spouse who simply falls upon hard times through unwise investment, business adversity, or a lifestyle beyond his or her means should not be able to fall back on the former spouse, no matter how radical the change may be, simply because they once were husband and wife.

FIT AND JUST

While the shift in focus away from moral blameworthiness is salutory, it renders the calculation of what is "fit and just" under s. 11 [of the *Divorce Act*, R.S.C. 1970, c. D-8, s. 11] much more difficult and complex. The courts are required to analyze the pattern of financial interdependence generated by each particular relationship and devise a support order that minimizes as far as possible the economic consequences of the relationship's breakdown. In this sense, each case is sui generis as declared by this court in [*Messier v. Delage*, [1983] 2 S.C.R. 401]. However, the order made must meet a uniform standard of fairness and reasonableness.

HYMAN PRINCIPLE

The first observation concerns the principle that a maintenance agreement can never totally extinguish the jurisdiction of the court to impose its own terms on the parties. This principle derives from the House of Lords' decision in *Hyman v. Hyman*, [1929] A.C. 601. In that case, Lord Hailsham L.C. stated at p. 614:

However this may be, it is sufficient for the decision of the present case to hold, as I do, that the power of the Court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and that the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction.

The view that a freely negotiated and informed waiver of legal rights cannot oust the jurisdiction of the court is supported by the language of s. 11(2) [of the *Divorce Act*, R.S.C. 1970, c. D-8] and by the case law. Although the recent decision of this court in *Messier v. Delage*, [1983] 2 S.C.R. 401 . . . did not involve a maintenance agreement, the *Hyman* principle underlies the view expressed by Chouinard J., speaking for the majority of the court, that s. 11(1) orders can never be truly final.

Appeal from decision of British Columbia Court of Appeal, 61 B.C.L.R. 217, 45 R.F.L. (2d) 1, 17 D.L.R. (4th) 147, allowing appeal from order of Wong L.J.S.C., 41 R.F.L. (2d) 274, varying maintenance under s. 11(2) of Divorce Act.

***Per Wilson J. (Dickson C.J.C., McIntyre, Lamer* and *Le Dain JJ.* concurring):**

11 Wong L.J.S.C. rejected this approach to s. 11(2). He felt that the need to preserve the court's jurisdiction to supervise the maintenance of former spouses "as an incident of divorce" was fully as important as the need for finality in the marital obligations of ex-spouses. He saw "the divorced relationship" as a continuing relationship involving an ongoing power in the court to supervise maintenance presumably for as long as the parties lived. He did not think that a broader interpretation of s. 11(2) had the effect of excluding the considerations voiced by the court in *Collins*. He accepted the view expressed in the authorities that a court should not ignore or lightly upset a previous agreement when making an order that is "fit and just" under s. 11(2). Judicial intervention therefore should only occur when there is "a gross change in circumstances" or when "the conscience of the court is shocked". Wong L.J.S.C. felt that at the time Mr. and Mrs. Pelech entered into the agreement they both assumed that Mrs. Pelech was employable and would become financially self-sufficient. Mrs. Pelech's current dire need constituted a gross change in circumstances and Mr. Pelech was now, by contrast, a person of ample means. The burden of maintaining Mrs. Pelech should therefore fall upon her ex-spouse rather than on the public purse. Wong L.J.S.C. ordered Mr. Pelech to pay periodic maintenance of $2,000 per month to Mrs. Pelech.

12 Mr. Justice Lambert, for a unanimous Court of Appeal, overturned Wong L.J.S.C.'s decision to vary the original order: (1985), 61 B.C.L.R. 217, 45 R.F.L. (2d) 1, 17 D.L.R. (4th) 147. Although he agreed that the court's jurisdiction could not be extinguished by the fulfilment or satisfaction of the terms of the previous order, he had a different view of when it was appropriate to exercise that jurisdiction. Lambert J.A. referred to the extensive jurisprudence on this issue and suggested that the recurring concern in the modern authorities is that parties should be able to rely on their agreements. He quoted with approval Zuber J.A.'s reasons in the Ontario Court of Appeal in *Farquar v. Farquar* (1983), 43 O.R. (2d) 423, 35 R.F.L. (2d) 287, 1 D.L.R. (4th) 244, to the effect that, since changes in circumstance are inevitable, such changes should not be used to justify judicial intervention into otherwise valid and binding contractual arrangements. "If the parties agree to settle their affairs", said Mr. Justice Zuber, "then their affairs should be regarded as settled" (p. 253). Zuber J.A. went on to say, however, that if the agreement they enter into is vulnerable on some other basis, then the changes in circumstance will be a factor to be taken into account in determining the appropriate award of maintenance. In Lambert J.A.'s view, Mr. Justice Zuber's reference to some other basis was to the traditional common law and equitable defences to the enforcement of ordinary contracts as well as to a "narrow range of cases" where relief is appropriate despite the binding effect of the contract.

13 Unfortunately Mr. Justice Lambert did not elaborate on what he considered comprised the narrow range of cases in which a binding settlement agreement could be varied other than to say that cases "where the maintenance provisions adversely affect the custody of children come instantly to mind, as an example". Instead, he concentrated on the principle he was relying on for not intervening in this case, namely that where [pp. 8-9]:

> (a) there is an agreement for the payment of maintenance as a lump sum or as periodic payments for a set period, and
>
> (b) the agreement releases all claims for future maintenance, and
>
> (c) the agreement was valid and enforceable when it was made, and
>
> (d) the agreement was not an unreasonable or unfair one when it was made, and
>
> (e) the provisions of the agreement for payment of maintenance are incorporated in a court order without any change that has not been agreed to by the parties, and
>
> (f) the agreement and the court order are carried out, and all maintenance payments are made, and
>
> (g) there are no children whose care is directly affected by any subsequent application to vary the maintenance order,

there should be no intervention. Judicial intervention should be the exception and not the rule [p. 8]:

> The rule is that settlement agreements must be respected. Marriage partners who decide to go their own way should be able to set for themselves, if they wish, the terms on which they will part, without risk of judicial intervention. If an agreement is not final and binding, then nothing can be achieved by making the compromises required to reach agreement, and the parties will have little incentive or encouragement to settle their differences.

Lambert J.A. acknowledged that the consequence of this principle was that Mrs. Pelech and others in similar circumstances would remain a public charge. However [p. 10]:

> ... against that must be weighed, among other financial consequences, the financial advantages to the community in having binding maintenance settlements made by the parties themselves, rather than by judges and other public officers in facilities provided and maintained at public expense.

Mr. Justice Lambert concluded by allowing Mr. Pelech's appeal and dismissing Mrs. Pelech's application for a variation of the 1969 maintenance order.

IV. Jurisdictional Issues

(a) The Powers of the Reviewing Court

14 The appellant submits that the principle enunciated by Lambert J.A. in the Court of Appeal amounts to a fettering of the trial judge's discretion under s. 11(2). That discretion, the appellant argues, confers on the trial judge "an untrammelled right to vary a maintenance order in appropriate

inevitably fail at this level. However, no such hard and fast proposition emerges from *Carnochan*. The decision turned on s. 12(1) of the Married Women's Property Act, R.S.O. 1950, c. 223, which uses some of the same language as s. 11(2) of the Divorce Act, namely, that "the judge may make such order with respect to the property in dispute ... as he thinks fit ..." Cartwright J. (as he then was) for the court granted the motion to quash the leave application on the basis that the trial judge acted within his discretion and that therefore s. 44 of the Supreme Court Act, which is the same as the current provision, precluded a further appeal. However, Cartwright J. stated in the course of his reasons at p. 673 that "There may well be cases falling within s. 12 of the *Married Women's Property Act* in which an appeal lies to this Court." He gave as an example the case of a dispute as to title where the judge fails to decide the matter in accordance with the applicable principles of law. In my view, any situation in which the court below errs in formulating the principles upon which it exercises its discretion gives rise to a question of law. In addition, the discretion in s. 11(2) of the Divorce Act is a much more structured one than the discretion in s. 12(1) of the Married Women's Property Act, since it is to be exercised "having regard to the conduct of the parties since the making of the order or any change in the condition, means, or other circumstances of either of them." Indeed, part of the task before this court is to identify the legal content to be given to "change in the condition, means, or other circumstances ..."

V. Preliminary Observations

34 The central issue in this case concerns the effect of a valid and enforceable antecedent settlement agreement on the court's discretionary power under s. 11(2) to vary maintenance orders. Some preliminary observations might be helpful.

35 The first observation concerns the principle that a maintenance agreement can never totally extinguish the jurisdiction of the court to impose its own terms on the parties. This principle derives from the House of Lords' decision in *Hyman v. Hyman*, [1929] A.C. 601. In that case, Lord Hailsham L.C. stated at p. 614:

> However this may be, it is sufficient for the decision of the present case to hold, as I do, that the power of the Court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and that the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction.

36 The view that a freely negotiated and informed waiver of legal rights cannot oust the jurisdiction of the court is supported by the language of s. 11(2) and by the case law. Although the recent decision of this court in *Messier v. Delage*, [1983] 2 S.C.R. 401, 35 R.F.L. (2d) 337, 2 D.L.R. (4th) 1, 50 N.R. 16 [Que.], did not involve a maintenance agreement, the *Hyman* principle underlies the view expressed by Chouinard J., speaking for the majority of the court, that s. 11(1)

and that considerable deference should be paid to the right and responsibility of individuals to make their own decisions.

83 It seems to me that where the parties have negotiated their own agreement, freely and on the advice of independent legal counsel, as to how their financial affairs should be settled on the breakdown of their marriage, and the agreement is not unconscionable in the substantive law sense, it should be respected. People should be encouraged to take responsibility for their own lives and their own decisions. This should be the overriding policy consideration.

84 The test of radical change in *Webb* is an attempt to carve a fairly narrow exception to the general policy of restraint. It fails, however, in my opinion in one important particular. It makes the mere magnitude of the change the justification for the court's intervention and takes no account of whether or not the change is in any way related to the fact of the marriage. In order to impose responsibility for changed circumstances on a former spouse it seems to me essential that there must be some relationship between the change and the marriage. Matas J.A. hinted at this in *Ross*. In the case of a wife who has devoted herself exclusively to home and children and has acquired no working skills outside the home, this relationship is readily established. The former spouse in these circumstances should have a responsibility for a radical change in his ex-wife's circumstances generated as a consequence of her total dependency during the period of the marriage. By way of contrast, a former spouse who simply falls upon hard times through unwise investment, business adversity, or a lifestyle beyond his or her means should not be able to fall back on the former spouse, no matter how radical the change may be, simply because they once were husband and wife.

85 Absent some causal connection between the changed circumstances and the marriage, it seems to me that parties who have declared their relationship at an end should be taken at their word. They made the decision to marry and they made the decision to terminate their marriage. Their decisions should be respected. They should thereafter be free to make new lives for themselves without an ongoing contingent liability for future misfortunes which may befall the other. It is only, in my view, where the future misfortune has its genesis in the fact of the marriage that the court should be able to override the settlement of their affairs made by the parties themselves. Each marriage relationship creates its own economic pattern from which the self-sufficiency or dependency of the partners flows. The assessment of the extent of that pattern's post-marital impact is essentially a matter for the judge of first instance. The causal connection between the severe hardship being experienced by the former spouse and the marriage provides, in my view, the necessary legal criterion for determining when a case falls within the "narrow range of cases" referred to by Zuber J.A. in *Farquar*. It is this element which is missing in *Webb*. Accordingly, where an applicant seeking maintenance or an increase in the existing level of maintenance establishes that he or she has suffered a radical change in circumstances flowing from an economic pattern of dependency engendered by the marriage, the court may exercise its relieving power. Otherwise, the obligation to support the former spouse should be, as in the case of any other citizen, the communal responsibility of the state.

1993 CarswellAlta 336
Alberta Court of Queen's Bench

Saballoy Inc. v. Techno Genia S.A.

1993 CarswellAlta 336, [1993] A.W.L.D. 414, [1993] A.J. No. 276, 139 A.R. 228, 16 C.P.C. (3d) 337, 40 A.C.W.S. (3d) 46, 9 Alta. L.R. (3d) 179

SABALLOY INC. v. TECHNO GENIA S.A.

Miller J.

Judgment: April 15, 1993
Docket: Doc. Edmonton 8603-01884

Counsel: *F.H. Monaghan*, for Saballoy.
M.F. Wesolowski, for Techno Genia.

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XXII Judgments and orders
XXII.13 Consent judgments or orders
XXII.13.d Setting aside
Headnote
Practice --- Judgments and orders — Consent judgments or orders — Setting aside
Civil procedure — Settlement of action — Setting aside — Court having inherent jurisdiction to set aside settlement where one party failing to disclose material prior to settlement and other party establishing that material was relevant and significant to resolution of issues raised in action and that existence of material was or could reasonably have been within knowledge of party seeking to rely upon settlement agreement.
Civil procedure — Discovery — Discovery of documents — Affidavit of documents — Omission of documents — Parties entering into settlement agreement with respect to portion of action — Plaintiff subsequently discovering existence of documents not disclosed in defendant's affidavit of documents and obtaining court order for production of same — Court having jurisdiction to interfere with settlement upon plaintiff establishing material relevant and significant and existence ought to have been within knowledge of defendant.
Civil procedure — Settlement of action — Enforcement — Court having inherent jurisdiction to set aside settlement where one party failing to disclose material prior to settlement and other party establishing that material was relevant and significant to resolution of issues raised in action and

that existence of material was or could reasonably have been within knowledge of party seeking to rely upon settlement agreement.

The plaintiff company entered into a verbal agreement with the defendant whereby, according to the plaintiff, it would become the sole Canadian distributor for the defendant's products. The defendant maintained that it had only agreed that the plaintiff would be a sales outlet. The plaintiff sued the defendant for breach of contract, and the defendant counterclaimed for unpaid goods and negligent misrepresentation. After the defendant produced its affidavit of documents, the parties reached an agreement whereby the plaintiff would abandon its claim for future loss of profits and the defendant would reduce its claim to the balance owing for the goods shipped. As a result, part of the action was settled by consent judgment. The plaintiff subsequently became aware of certain correspondence which had not been produced in the defendant's affidavit of documents. The plaintiff obtained a court order directing that the defendant file a further affidavit of documents disclosing 35 additional documents. The defendant applied for a declaration that the partial settlement agreement was valid and binding.

Held:

Application dismissed.

Courts should be loath to interfere with negotiated settlements for a variety of reasons. However, there is inherent authority in the Court to interfere where there has been a failure to disclose material prior to the settlement if it can be established that the material was relevant and significant to the resolution of the issues raised in the action and that the existence of the material was or could reasonably have been within the knowledge of the party seeking to rely upon the settlement agreement. The order for production of the further 35 documents was prima facie proof that those documents had some relevance to the issues in the action. The discovery of the existence of the further documentation by the plaintiff suggested that it was possible for the defendant to do the same. It would be speculative to rule at this point that the new documents would not have materially changed the situation had they been revealed prior to the settlement agreement. Without knowledge of the existence of the material it was impossible to say how it would have affected the plaintiff's decision.

Table of Authorities

Cases considered:

Holt v. Jesse (1876), 3 Ch. D. 177 — *applied*

Rules considered:

Alberta Rules of Court

R. 221(1)*considered*

R. 221(2)*considered*

Application for declaration that agreement partially settling action being valid and binding upon parties.

15 Saballoy's counsel conducted further examinations of Maybon on October 15th and 16th of 1992 on several of these items.

16 Counsel for Saballoy now takes the position that because Techno and/or its officers did not make full disclosure of relevant documents and tapes in a timely fashion that it knew, or ought to have known, existed amongst Techno's files or those of its agent Marphil, Saballoy should now be allowed to escape being bound by the agreement it signed whereby it limited its damage claim and, of course, if this is permitted Techno would similarly be entitled to pursue its full claim. Techno, on the other hand, seeks to enforce the settlement agreement and limit the damages claimed in the forthcoming trial. Counsel for Techno argues that this Court has authority under R. 221 of the *Alberta Rules of Court* to rule that the settlement agreement is binding upon both parties. Rule 221 reads as follows:

> 221.(1) The court may order any question or issue arising in a proceeding whether of fact or law or partly fact and partly law to be tried before, at or after the trial and may give direction as to the manner in which the question or issue is to be stated, and may direct any pending application to be stayed until the question or issue has been determined.
>
> (2) Where it appears to the court that the decision in that question or issue tried separately substantially disposes of the proceeding or renders the trial of further issues unnecessary, it may dismiss the proceeding or make such other order or give such other judgment as it considers proper.

17 I think it is trite law that, in the absence of instructions to the contrary, counsel has authority to settle litigation on behalf of a client and that a settlement can be concluded between counsel representing opposing interests. On the face of it, that appears to be what occurred when counsel for Saballoy and Techno negotiated the agreement to limit their respective damage claims in this action, and I accept the proposition that courts should be loath to interfere with such negotiated settlements for a variety of sound reasons. It is not for the court to interfere with a negotiated settlement only on the basis that it turned out to be a bad economic decision for one side or the other.

18 When, then, can or should a court ever interfere to set aside a negotiated settlement?

19 Counsel for Techno in his written brief concedes that, under general contract principles, the presence of fraud, duress, lack of capacity or mutual mistake would enable the court to intercede but, in the absence of any of these situations, he argues that the court has no alternative but to enforce the settlement agreement. None of these grounds appear to exist in the facts of the case at bar.

20 Counsel for Saballoy does not cite any authorities exactly on point for his position that a withholding of important information is another valid ground enabling the court to interfere. He

does, however, seek to draw an analogy between this case and some early English decisions where a court has set aside a settlement agreed to between counsel where one counsel has exceeded or misunderstood the authority to settle given to him by his client.

21 One of these decisions is *Holt v. Jesse* (1876), 3 Ch. D. 177. In that case Malins V.C. quoted with approval the observations of the Master of the Rolls when he said at p. 184:

> ... I should entirely agree with the observation of the Master of the Rolls: "If the counsel says, I made a concession under a misapprehension, it has never been, and I trust it will never be, the course of the Court to bind the counsel to that mistake." I say precisely the same thing in precisely the same terms, that if consent has been given under a misapprehension, or from a misstatement, or want of materials, and if all the information which counsel ought to have when he gives a consent is not before him, it has never been the rule of this Court, and I also trust it never will be the rule of this Court, that the unfortunate client should be bound by such misapprehension.

22 Drawing upon this analogy I have concluded that there is inherent authority in this court to interfere if it can be established:

23 (a) That the material which was not disclosed until after the settlement agreement was reached was relevant and significant to the resolution of the issues raised in the action and,

24 (b) The existence of the material was or could reasonably have been within the knowledge of the party seeking to rely upon the settlement agreement.

25 It seems to me that the decision of my brother Marshall to order production of the additional 35 documents on November 5, 1991 is by itself prima facie proof that these documents had some relevance to the issues in the action. The discovery by Saballoy of the existence of further documentation and tape recordings, which it claims is also relevant, goes even further in establishing the first essential ingredient.

26 If the plaintiff was able to locate this additional material in the control of the defendants and/or its former agents, one can assume it was possible for the defendant to accomplish the same if it was motivated to do so.

27 Counsel for Techno, in his brief, makes the argument that the 35 documents ordered to be produced by Justice Marshall did not disclose any new information than that already known to the plaintiff and its counsel so that even if they had been produced prior to the settlement agreement it would not have materially changed the situation. With respect, this is mere speculation at this point in time.

1992 CarswellOnt 3695
Ontario Court of Justice (General Division)

Stoewner v. Hanneson

1992 CarswellOnt 3695, [1992] O.J. No. 697, 32 A.C.W.S. (3d) 897, 3 W.D.C.P. (2d) 297

Michael Stoewner, Plaintiff and Gary Hanneson and Richard Turpin and Herbertus Vandenbroek and Wayne Seymour, Defendants

MacDonald J.

Judgment: March 24, 1992
Docket: 2083/88

Counsel: None given

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XVI Disposition without trial
XVI.7 Settlement
XVI.7.c Enforcement of terms
Headnote
Civil practice and procedure

***E. Macdonald J.*, (Orally):**

1 This is a motion for judgment between the plaintiff, Michael Stoewner and Gary Hanneson, defendant. I was advised at the opening of this application that it is not necessary to deal with the other named defendants.

2 The motion before me was for judgment for the plaintiff in the amount of $10,000 in full settlement of the action and costs on a solicitor and client basis.

3 The matter arises from a statement of claim which was issued in the then Supreme Court of Ontario on January 4, 1988. The statement of claim sought, *inter alia*, damages as a result of an assault of the plaintiff which occurred on May 4, 1985 by the defendant Gary Hanneson. Gary Hanneson was subsequently convicted of this assault and spent some three years in jail. I have noted the contents of the medical reports filed in the material before me with respect to

10 Before dealing with other evidence which persuades me that a settlement did take place on November 30th, I want to comment on a number of matters which emerged during the hearing before me. Both lawyers arguing the matter before me and both lawyers who gave evidence appeared to be in agreement that the settlement was one which was "economically" driven. It was suggested that because the settlement was economically driven the parties were prepared to compromise on the merits of the matter. This is not unlike all settlements which in their very fundamental nature are compromises by the parties in respect of the merits of the matter.

11 In this matter I am urged by Mr. Dexter to exercise the undisputed discretion of the Court to refuse to impose a settlement where it is unfair or where it could cause major prejudice to the rights of one of the parties.

12 I am made aware that Mr. Stoewner had commenced against Mr. Hanneson at some subsequent time a fraudulent conveyance action based on an alleged fraudulent conveyance between Mr. Hanneson and his father-in-law in respect of the home in which Mr. Hanneson resided at the time of the alleged settlement. The details of this action are not before me. Nevertheless, it is relevant to this matter in that Mr. Dexter urges me to find that the plaintiff was under a misapprehension of fact relating to the financial circumstances of the defendant on Friday, November 30, 1990 and that even if I find, as I do, that a settlement occurred on November 30, 1990, I should, because of the misapprehension of fact on the part of the plaintiff in relation to the financial circumstances of the defendant, set the settlement aside.

13 Mr. Dexter has cited to me a number of authorities wherein judges have set aside settlements in certain circumstances where there was misapprehension of facts. The case of *Scherer v. Paletta*, [1966] 2 O.R. 524, a decision of the Ontario Court of Appeal was cited by both counsel in their briefs of authorities. This case is a leading authority on the issue of settlement and in addition Mr. Dexter has urged me to consider in support of his position the decisions in the *Roman Catholic Archiepiscopal Corporation of Winnipeg, et al. v. Rosteski, et al.* (1958), 13 D.L.R. (2d) 229 (Man. Q.B.); *Flynn v. Canadian General Insurance Co.* (1985), 2 C.P.C. (2d) 146; and *Charlebois v. Baril*, [1927] 3 D.L.R. 762.

14 I was also urged to consider the decision of Mr. Justice Granger in *Re Cambrian Ford Sales (1975) Ltd. v. Horner* (1988), 66 O.R. (2d) 94. As well the matter of the Court's discretion to interfere with a settlement was reviewed extensively by Mr. Justice Gray in *Lunardi v. Lunardi* (1988), 31 C.P.C. (2d) 27. The principles emerging from these cases dealing with the Court's discretion to refuse to enforce an agreement are clear. The discretion should be rarely exercised and utmost consideration must be given to the policy of the courts to promote settlement. Both Mr. Dexter and Mr. Felkai agreed before me that there was no issue in this case as to the authority of the respective solicitors. Further, they agreed that oral agreements in respect of settlements can be

binding upon the parties. The policy of the courts is to hold parties to their bargains even in cases where second thoughts arise or where unforeseen circumstances occur.

15 In this matter Mr. Zweig testified that on the Saturday following November 30, 1990, while at home he developed concerns about the settlement that was discussed. He stated in his evidence that he recalled thinking that something was not right and he was concerned about the representations made to him by Mr. Parker regarding the severe financial situation of Mr. Hanneson. He discussed it on that day with Mr. Stoewner and suggested that a property search of the home in which Hanneson resided be completed. He stated that this was done on December 4, 1990. Mr. Zweig in his testimony confirmed that he in fact received the letter of Mr. Parker dated December 4, 1990 which was Exhibit "A" of Mr. Parker's affidavit. This letter reads as follows:

> This will confirm that we have agreed to settle this matter for $10,000.00 inclusive of claim, [sic] costs and interest. I have asked my client to obtain the funds and he advises me that his father-in-law is obtaining a new mortgage in order to provide these funds. I shall be in contact with you in due course and would ask that you provide us with a release and we shall provide you with a release as well.

16 On December 5, 1990 Mr. Zweig wrote to Mr. Parker which letter was Exhibit "B" in Mr. Parker's affidavit. Both Mr. Zweig and Mr. Parker acknowledge the exchange between them of this letter. I have considered this letter and its contents convince me that settlement was achieved on November 30th. The first paragraph refers to the fact that Mr. Stoewner had been asked to provide written instructions with respect to a settlement "since he has been wavering back and forth on a number of occasions." There were no previous disclosures to Mr. Parker about the requirement of written instructions. The letter confirms that the amount of $10,000 was discussed on Friday, November 30th and goes on to state until written instructions were received Mr. Zweig was taking the position that *he did not wish to view the matter as settled.*

17 The last paragraph of the letter asks Mr. Parker to treat his offer on Friday as withdrawn. Overall, I find that this correspondence confirms that the plaintiff was having second thoughts about a settlement that was achieved on November 30th.

18 I also note that Mr. Zweig did not correspond again with Mr. Parker until December 18th, 1990, at which time he advised Mr. Parker that a title search had been conducted at 118 Queensbury Avenue (the residence in which Hanneson resided). This letter discloses that Mr. Hanneson had transferred the residence at 118 Queensbury Avenue to his father-in-law and the letter advises that because Mr. Stoewner was no longer able to believe that Hanneson was without assets, he was willing to take a chance upon a judgment. This letter was Exhibit D to the Affidavit of Mr. Parker. The letter proposed that there be an attempt to settle the matter "once and for all for the sum of $20,000".

MANITOBA

THE MUNICIPAL ACT

C.C.S.M. c. M225

LOI SUR LES MUNICIPALITÉS

c. M225 de la *C.P.L.M.*

An order made under *The Emergency Measures Act* affects the application of this Act:

Order re Temporary Suspension of Local Government Provisions

Effective from 20 Mar 2020 to 21 Sep 2020

Un décret pris en vertu de la *Loi sur les mesures d'urgence* modifie l'application de cette loi :

Décret portant suspension temporaire de dispositions concernant les administrations locales

En vigueur du 20 mars 2020 au 21 sept. 2020

As of 9 Aug 2020, this is the most current version available. It is current for the period set out in the footer below.

Le texte figurant ci-dessous constitue la codification la plus récente en date du 9 août 2020. Son contenu était à jour pendant la période indiquée en bas de page.

References to population
1(3) A reference in this Act to the population of a municipality or other area means the population of the municipality or area as shown by the most recent census taken and available under the *Statistics Act* (Canada).

Registered common-law relationship
1(4) For the purposes of this Act, while they are cohabiting, persons who have registered their common-law relationship under section 13.1 of *The Vital Statistics Act* are deemed to be cohabiting in a conjugal relationship of some permanence.

S.M. 2002, c. 24, s. 42; S.M. 2002, c. 48, s. 28; S.M. 2004, c. 2, s. 31; S.M. 2005, c. 27, s. 158; S.M. 2013, c. 54, s. 50; S.M. 2017, c. 34, s. 20; S.M. 2018, c. 6, s. 43.

Indian Reserves excluded
2 Despite any Act of the Legislature,

(a) land within an Indian Reserve is not part of the area of any municipality;

(b) persons residing within an Indian Reserve are not residents of any municipality; and

(c) any description of the boundaries of a municipality or the area within a municipality is deemed to provide that land within an Indian Reserve is excluded from the municipality.

MUNICIPAL PURPOSES

Municipal purposes
3 The purposes of a municipality are

(a) to provide good government;

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

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

Mention de la population
1(3) Toute mention dans la présente loi de la population d'une région, notamment d'une municipalité, s'entend de la population de la région telle que l'indique le plus récent recensement fait en vertu de la *Loi sur la statistique* (Canada).

Union de fait enregistrée
1(4) Pour l'application de la présente loi, les personnes qui ont fait enregistrer leur union de fait en vertu de l'article 13.1 de la *Loi sur les statistiques de l'état civil* sont, pendant la période où elles vivent ensemble, réputées vivre dans une relation maritale d'une certaine permanence.

L.M. 2002, c. 24, art. 42; L.M. 2002, c. 48, art. 28; L.M. 2004, c. 2, art. 31; L.M. 2005, c. 27, art. 158; L.M. 2017, c. 34, art. 20; L.M. 2018, c. 6, art. 43.

Réserves indiennes exclues
2 Par dérogation à toute loi de l'Assemblée législative :

a) les biens-fonds situés sur une réserve indienne ne font pas partie du territoire d'une municipalité;

b) les personnes qui résident sur une réserve indienne ne sont résidents d'aucune municipalité;

c) toute description des limites d'une municipalité ou du territoire situé à l'intérieur d'une municipalité est réputée exclure de la municipalité les biens-fonds faisant partie d'une réserve indienne.

FINS MUNICIPALES

Fins municipales
3 Les municipalités ont pour fins :

a) de gérer sainement leurs affaires;

b) de fournir les services, les installations ou les autres choses qui, selon leur conseil, sont nécessaires ou utiles à l'ensemble ou à une partie de leur territoire;

c) d'implanter et de maintenir des collectivités sûres et viables.

(b) to enhance the ability of the council to respond to present and future issues in the municipality.

Spheres of jurisdiction

232(1) A council may pass by-laws for municipal purposes respecting the following matters:

(a) the safety, health, protection and well-being of people, and the safety and protection of property;

(b) people, activities and things in, on or near a public place or a place open to the public, including parks, municipal roads, recreation centres, restaurants, facilities, retail stores, malls, and private clubs and facilities that are exempt from municipal taxation;

(c) subject to section 233, activities or things in or on private property;

(c.1) subject to section 233.1, the condition and maintenance of vacant dwellings and non-residential buildings;

(c.2) subject to section 233.2, the conversion of rental units into units under *The Condominium Act*;

(d) municipal roads, including naming the roads, posting the names on public or private property, and numbering lots and buildings along the roads;

(e) private works on, over, along or under municipal roads;

(f) property adjacent to highways or municipal roads, whether the property is publicly or privately owned;

(g) the operation of off-road vehicles on public or private property;

(h) drains and drainage on private or public property;

(i) preventing and fighting fires;

(j) the sale and use of firecrackers and other fireworks, the use of rifles, guns, and other firearms, and the use of bows and arrows and other devices;

b) que soit accrue la capacité du conseil de faire face aux questions actuelles et futures qui intéressent la municipalité.

Domaines de compétence

232(1) Le conseil peut, à des fins municipales, prendre des règlements concernant les questions suivantes :

a) la sécurité, la santé, la protection et le bien-être des personnes ainsi que la sécurité et la protection des biens;

b) les activités qui prennent place dans des lieux publics ou des lieux ouverts au public, ou près de tels lieux, y compris les parcs, les chemins municipaux, les centres de loisir, les restaurants, les installations, les magasins de détail, les centres commerciaux ainsi que les clubs et les installations privés qui sont exempts des taxes municipales;

c) sous réserve de l'article 233, les activités qui prennent place sur ou dans des propriétés privées;

c.1) sous réserve de l'article 233.1, l'état et l'entretien des logements et des bâtiments non résidentiels vacants;

c.2) sous réserve de l'article 233.2, la conversion d'unités locatives en parties privatives sous le régime de la *Loi sur les condominiums*;

d) les chemins municipaux, y compris leur désignation, l'indication de leur nom au moyen de panneaux installés sur des propriétés publiques ou privées ainsi que la numérotation des terrains et des bâtiments le long de ces chemins;

e) les travaux privés sur ou sous les chemins municipaux ou le long de ceux-ci;

f) les propriétés publiques ou privées adjacentes aux routes ou aux chemins municipaux;

g) l'utilisation des véhicules à caractère non routier sur les propriétés publiques ou privées;

h) les canaux de drainage et le drainage sur les propriétés publiques ou privées;

i) la prévention et l'extinction des incendies;

2003 MBQB 74
Manitoba Court of Queen's Bench

Grenier v. Piney (Rural Municipality)

2003 CarswellMan 124, 2003 MBQB 74, [2003] M.J. No. 112,
121 A.C.W.S. (3d) 953, 174 Man. R. (2d) 1, 36 M.P.L.R. (3d) 272

Adrien Grenier (Applicant) and The Rural Municipality of Piney (Respondent)

De Graves J.

Judgment: March 27, 2003
Docket: Winnipeg Centre CI 02-01-27877

Counsel: Kara L. Crawford for Applicant
Gregory M. Tramley for Respondent

Subject: Public; Municipal

Related Abridgment Classifications

Municipal law
X Attacks on by-laws and resolutions
X.1 Grounds
X.1.e Ultra vires
X.1.e.iii Miscellaneous
Municipal law
X Attacks on by-laws and resolutions
X.2 Practice and procedure
X.2.a On quashing by-laws or resolutions
X.2.a.viii Miscellaneous

Headnote

Municipal law --- Attacks on by-laws — Grounds — Ultra vires — General
Applicant was farmer who made two applications to respondent rural municipality to develop hog barn on his property — Municipality had passed two by-laws pursuant to Municipal Act requiring that building permit be obtained to permit construction of livestock production operation of 200 animals or more and generally regulating such operations — By-law stated that municpality had to give decision on any application for such permit within 90 days — Applicant was told that there was moratorium on permit applications — Moritorium was subsequently lifted and new resolution passed limiting applications for permit to operations involving no more than 400 animals — Application was refused on basis that applicant had refused to allow extension of time to

municipality to consider it — Applicant made new application for permit for 400 animal operation but this was denied without reasons being given — Applicant applied for declarations that by-laws in question were ultra vires municipality's legislative authority — Application dismissed — Municipal Act conferred on municipality right to legislate and administer standards for businesses and property in respect of safety, health and improvements of, and incidental to land use — Although by-laws had effect of limiting use of land, they did not zone land but regulated businesses carried out on land — Accordingly, by-laws were valid exercise of municipality's jurisdiction.

Municipal law --- Resolutions — Quashing resolution — Grounds — General

Applicant was farmer who made two applications to respondent rural municipality to develop hog barn on his property — Municipality had passed two by-laws pursuant to Municipal Act requiring that building permit be obtained to permit construction of livestock production operation of 200 animals or more and generally regulating such operations — By-law stated that municpality had to give decision on any application for such permit within 90 days — Applicant was told that there was moratorium on permit applications — Moritorium was subsequently lifted and new resolution passed limiting applications for permit to operations involving no more than 400 animals — Several councillors resigned and new municipal council had to be elected — Application was refused on basis that applicant had refused to allow extension of time to municipality to consider it — Applicant made new application for permit for 400 animal operation but this was denied without reasons being given — Applicant applied for declarations that resolutions declaring moratorium and rejecting his applications were ultra vires municipality's legislative authority — Application granted — Background to actions of municipality was political turmoil and discontent arising out of proposed livestock operations — Resolutions imposing and lifting moratorium were both invalid under Municipal Act since they should have been enacted by by-laws and not by resolution — Applicant had prima facie right to use his property as he wished, subject to law of nuisance — If right was to be denied or abridged it was incumbent on municipality to give reasons — Applications were complete and therefore rejection without reasons was indication of bad faith on part of majority of municipal council — Accordingly, resolutions were quashed and order of mandamus was issued directing municipality to reconsider applications.

Table of Authorities

Cases considered by *De Graves J.*:

Oakwood Development Ltd. v. St. François Xavier (Rural Municipality), (sub nom. *Oakwood Development Ltd. v. Rural Municipality of St. François Xavier)* [1985] 2 S.C.R. 164, (sub nom. *Oakwood Development Ltd. v. Rural Municipality of St. François Xavier)* 18 Admin. L.R. 59, (sub nom. *Oakwood Development Ltd. v. Rural Municipality of St. François Xavier)* 61 N.R. 321, (sub nom. *Oakwood Development Ltd. v. Rural Municipality of St. François Xavier)* 20 D.L.R. (4th) 641, (sub nom. *Oakwood Development Ltd. v. Rural Municipality of St. François Xavier)* 36 Man. R. (2d) 215, (sub nom. *Oakwood Development Ltd. v. St. François Xavier)* [1985] 6 W.W.R. 147, (sub nom. *Oakwood Development Ltd. v. St. François Xavier)* 37 R.P.R. 101, (sub nom. *Oakwood Development Ltd. v. St. François Xavier)* 31 M.P.L.R. 1, 1985 CarswellMan 202, 1985 CarswellMan 383 (S.C.C.) — referred to

Ottawa (City) v. Boyd Builders Ltd., [1965] S.C.R. 408, 50 D.L.R. (2d) 704, 1965 CarswellOnt 66 (S.C.C.) — considered

R. v. Sharma, 14 M.P.L.R. (2d) 35, 19 C.R. (4th) 329, 10 Admin. L.R. (2d) 196, 79 C.C.C. (3d) 142, 100 D.L.R. (4th) 167, [1993] 1 S.C.R. 650, 149 N.R. 161, 61 O.A.C. 161, 1993 CarswellOnt 79, 1993 CarswellOnt 973 (S.C.C.) — referred to

Vancouver (City) v. Simpson (1976), [1977] 1 S.C.R. 71, [1976] 3 W.W.R. 97, 7 N.R. 550, 65 D.L.R. (3d) 669, 1976 CarswellBC 147, 1976 CarswellBC 313 (S.C.C.) — referred to

Westminster v. London & Northwestern Railway, [1905] A.C. 426 (U.K. H.L.) — referred to

114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville), 2001 SCC 40, 2001 CarswellQue 1268, 2001 CarswellQue 1269, (sub nom. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town))* 200 D.L.R. (4th) 419, 19 M.P.L.R. (3d) 1, 271 N.R. 201, 40 C.E.L.R. (N.S.) 1, (sub nom. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town))* [2001] 2 S.C.R. 241 (S.C.C.) — considered

4500911 Manitoba Ltd. v. Stuartburn (Municipality), 2002 MBQB 266, 2002 CarswellMan 446, 32 M.P.L.R. (3d) 187, [2003] 1 W.W.R. 761, 168 Man. R. (2d) 294 (Man. Q.B.) — followed

Statutes considered:

Farm Practices Protection Act, S.M. 1992, c. 41

Generally — referred to

Municipal Act, S.M. 1996, c. 58

Generally — considered

s. 3 — referred to

s. 140(1) — referred to

s. 140(2) — considered

s. 208 — referred to

s. 209 — considered

s. 231 — referred to

s. 232 — considered

s. 232(1)(a) — referred to

s. 232(1)(c) — referred to

s. 232(1)(k) — referred to

s. 232(1)(n) — referred to

s. 232(2)(a) — referred to

s. 232(2)(c) — referred to

s. 232(2)(e)(iii) — referred to

s. 232(2)(e)(iv) — referred to

s. 232(2)(e)(v) — referred to

s. 233 — considered

s. 233(a) — referred to

s. 233(d) — referred to

s. 382(1) — referred to

s. 382(1)(b) — referred to

s. 382(2) — referred to

s. 382(3) — referred to

s. 384(a) — referred to

Planning Act, R.S.M. 1987, c. P80

Generally — referred to

APPLICATION for declaration that two by-laws regulating intensive livestock operations and two municipal council resolutions refusing building permits for such operation were ultra vires legislative authority of municipality.

De Graves J.:

1 The applicant Adrien Grenier ("the applicant") applies for the following declarations and consequent relief:

(a) declarations that

(i) by-law No. 15/99, "A By-Law of The Rural Municipality of Piney to Authorize the Rural Municipality to Regulate Intensive Livestock Operations" (the "Livestock By-law");

Allana Shoenbach yes

Barb Zailo yes

Luc Gendreau yes

cd

B. Grawberger

ACTING CHIEF ADMINISTRATIVE OFFICER

Luc Gendreau

REEVE

Intensive Livestock Operations in Piney

42 It is apparent that there were community tensions in respect of livestock. Even to the most disinterested observer, it was evident that there was political turmoil and discontent arising out of proposed livestock operations. This manifested itself in the purported suspensions or moratoria of by-law 15/99, the appointment of an administrator arising out of the resignation in January 2002 of two councillors and the reeve, the subsequent amending by-law 26/02 imposing further restrictions and applying the restrictions retroactively.

Is there legislative authority for enacting by-laws 15/99 and 26/02?

43 Sections 232 and 233 of the ***Municipal Act*** confer jurisdiction on Piney's council to pass the two by-laws. Its authority emanates from these sections, conferring generally on municipalities the right to legislate and administer standards for businesses and property in respect of safety, health and improvements of and incidental to land use. In ***Spraytech*** *(supra)*, the Supreme Court of Canada (L'Heureux-Dubé J.) approved the decisions of the judge of first instance and on appeal:

> [13] . . . that by-laws are presumed to be valid and legal and that there is a presumption that legislators act in good faith and in the public interest. . . .

44 I am persuaded by the decision of Suche J., in *4500911 Manitoba Ltd. v. Stuartburn (Municipality)* (Man. Q.B.), that the by-laws are a valid exercise of council's jurisdiction. That decision provides a compendious review of ss. 232 and 233 of the ***Municipal Act***, the authority and reach of these sections, the correlation and co-existence of the ***Municipal Act*** and the ***Planning Act*** and their interpretation.

45 There is no question that the by-laws have the effect of limiting the use of land, but the by-laws do not zone land. This limit and regulation of the businesses carried out on land is authorized

Cour suprême du Canada

Supreme Court of Canada

28117

André Prud'homme, Gilles Prud'homme, Jean-Paul Fortin, André Fortin et Savino Cantatore

- c. -

Fernand Prud'homme

- et -

Société Radio-Canada, La Presse Ltée, 3834310 Canada Inc., Groupe Transcontinental G.T.C. Ltée et Fédération professionnelle des journalistes du Québec (Qué.) (28117)

CORAM :
La très honorable Beverley McLachlin, c.p.
L'honorable juge L'Heureux-Dubé
L'honorable juge Gonthier
L'honorable juge Iacobucci
L'honorable juge Major
L'honorable juge Bastarache
L'honorable juge Binnie
L'honorable juge Arbour
L'honorable juge LeBel

Appel entendu :
Le 13 mars 2002

Jugement rendu :
Le 20 décembre 2002

Motifs de jugement conjoints :
L'honorable juge L'Heureux-Dubé
L'honorable juge LeBel

André Prud'homme, Gilles Prud'homme, Jean-Paul Fortin, André Fortin et Savino Cantatore

- v. -

Fernand Prud'homme

- and -

Canadian Broadcasting Corporation, La Presse Ltée, 3834310 Canada Inc., Groupe Transcontinental G.T.C. Ltée and Fédération professionnelle des journalistes du Québec (Que.) (28117)

CORAM:
The Right Honourable Beverley McLachlin, P.C.
The Honourable Madame Justice L'Heureux-Dubé
The Honourable Mr. Justice Gonthier
The Honourable Mr. Justice Iacobucci
The Honourable Mr. Justice Major
The Honourable Mr. Justice Bastarache
The Honourable Mr. Justice Binnie
The Honourable Madam Justice Arbour
The Honourable Mr. Justice LeBel

Appeal heard:
March 13, 2002

Judgment rendered:
December 20, 2002

Joint reasons for judgment by:
The Honourable Madame Justice L'Heureux-Dubé
The Honourable Mr. Justice LeBel

Souscrivent à l'avis des honorables juges L'Heureux-Dubé et LeBel :	Concurred in by:
La très honorable Beverley McLachlin, c.p.	The Right Honourable Beverley McLachlin, P.C.
L'honorable juge Gonthier	The Honourable Mr. Justice Gonthier
L'honorable juge Iacobucci	The Honourable Mr. Justice Iacobucci
L'honorable juge Major	The Honourable Mr. Justice Major
L'honorable juge Bastarache	The Honourable Mr. Justice Bastarache
L'honorable juge Binnie	The Honourable Mr. Justice Binnie
L'honorable juge Arbour	The Honourable Madam Justice Arbour
Avocats à l'audience :	Counsel at hearing:
Pour les appelants : William J. Atkinson	For the appellants: William J. Atkinson
Pour l'intimé : Jean-Jacques Rainville Réjean Rioux	For the respondent: Jean-Jacques Rainville Réjean Rioux
Pour les intervenantes : Marc-André Blanchard Sylvie Gadoury	For the interveners: Marc-André Blanchard Sylvie Gadoury

Références	Citations
C.A. Qué.: [2000] R.R.A. 607, [2000] J.Q. nº 2070 (QL).	Que. C.A.: [2000] R.R.A. 607, [2000] Q.J. No. 2070 (QL).
C.S. Qué.: *Prud'homme c. Prud'homme*, 18 février 1999 (juge Tellier).	Que. Sup. Ct.: *Prud'homme v. Prud'homme*, February 18, 1999 (Tellier J.).

RÉFÉRENCE

Avant la publication de ce jugement dans le R.C.S., il faut utiliser sa référence neutre: *Prud'homme c. Prud'homme*, 2002 CSC 85. Après sa publication dans le R.C.S., la référence neutre sera utilisée comme référence parallèle: *Prud'homme c. Prud'homme*, [2002] x R.C.S. xxx, 2002 CSC 85.

CITATION

Before publication in the S.C.R., this judgment should be cited using the neutral citation: *Prud'homme v. Prud'homme*, 2002 SCC 85. Once the judgment is published in the S.C.R., the neutral citation should be used as a parallel citation: *Prud'homme v. Prud'homme*, [2002] x S.C.R. xxx, 2002 SCC 85.

prud'homme *v.* prud'homme

André Prud'homme, Gilles Prud'homme, Jean-Paul Fortin, André Fortin and Savino Cantatore *Appellants*

v.

Fernand Prud'homme *Respondent*

and

Canadian Broadcasting Corporation, La Presse Ltée, 3834310 Canada Inc., Groupe Transcontinental G.T.C. Ltée and Fédération professionnelle des journalistes du Québec *Interveners*

Indexed as: Prud'homme *v.* Prud'homme

Neutral citation: 2002 SCC 85.

File No.: 28117.

2002: March 13; 2002: December 20.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for quebec

Civil liability -- Municipal councillor -- Defamation -- Rules of civil liability applicable to wrongful individual act of municipal councillor in Quebec -- Civil Code of Québec, S.Q. 1991, c. 64, arts. 1376, 1457.

Civil liability -- Municipal councillor -- Defamation -- Common law defences -- Whether defence of fair comment and defence of qualified privilege applicable to Quebec rules of civil liability -- Civil Code of Québec, S.Q. 1991, c. 64, art. 1457.

Civil liability -- Municipal councillor -- Defamation -- Ratepayers suing municipal councillor for defamation for remarks made at regular meeting of municipal council that allegedly interfered with their reputation -- Whether municipal councillor committed a fault -- Civil Code of Québec, S.Q. 1991, c. 64, art. 1457.

A school board purchased a lot located in a part of the city of Repentigny on which to build a school. The municipal council passed a bylaw which provided that only residents of that part of the city would have to cover the cost of a loan to pay for the infrastructure work. Some ratepayers, including the appellants, brought an action to have the bylaw quashed and the action was allowed by the Superior Court. The respondent, who was then a municipal councillor, tried unsuccessfully to persuade the other councillors to appeal the judgment. He decided to criticize publicly, for 20 minutes at a regular meeting of the council, the fact that no public debate had been held as to whether the judgment should be appealed. The appellants, offended by the statement, which was, in their opinion, full of malicious insinuations about them that made them out to be bad citizens, brought an action against the respondent in damages for interfering with their reputation, honour and dignity. The Superior Court allowed the action. The Court of Appeal set the judgment aside.

Held: The appeal should be dismissed.

Elected municipal officials are, as a rule, governed by public law. Before finding that the wrongful individual act of an elected municipal official in Quebec is subject to the rules of civil liability, a rule of public law that provides for this must be identified. When the new provisions of the *Civil Code of Québec*, and more particularly art. 1376, came into force, they no longer allowed the use of the method laid down by *Laurentide Motels*, insofar as that decision imposed an obligation on the individual to identify a public common law rule that made the private law applicable to his or her action in liability against the governmental body. Article 1376 *C.C.Q.*, which is public law, expressly provides that the rules set forth in Book Five of the *Civil Code of Québec* on obligations "apply to the State and public authorities, and to all other legal persons established in the public interest, subject to any other rules of law which may be applicable to them". The civil law principles of civil liability now apply, as a rule, to wrongful acts by such bodies. It therefore belongs to the party which intends to rely on the public law in order to avoid or limit the application of the general rules of civil liability to establish, where the need arises, that there are relevant public law principles that prevail over the civil law rules. Article 1376 *C.C.Q.* also applies to the persons who make up a public authority or a body of that authority, where their acts are connected with public duties. In this case, the respondent was acting as a member of a public authority in the performance of important political duties. The action thus gave rise to a public liability problem, within the meaning of art. 1376 *C.C.Q.*

Because Quebec civil law does not provide for a specific form of action for interference with reputation, the general rules that apply to questions of civil liability as laid down in art. 1457 *C.C.Q.* apply. In an action of that nature, the plaintiff must

establish, on a balance of probabilities, the existence of injury, of a wrongful act, and of a causal connection. To demonstrate the existence of injury, the plaintiff must convince the judge that the impugned remarks were defamatory. Words may be defamatory because of the idea they expressly convey or by the insinuations that may be inferred from them. Whether remarks are defamatory is determined by applying an objective standard. It must be asked whether an ordinary person would believe that the remarks made, when viewed as a whole, brought discredit on the reputation of another person. In defamation cases, the wrongful act may derive from two types of conduct, one malicious and the other merely negligent. Determining fault is a contextual question.

An action in defamation involves two fundamental values: freedom of expression and the right to reputation. While elected municipal officials may be quite free to discuss matters of public interest, they must act as would the reasonable person. The reasonableness of their conduct will often be demonstrated by their good faith and the prior checking they did to satisfy themselves as to the truth of their allegations.

Because the laws governing elected municipal officials in Quebec are silent as to the personal liability of those officials for their wrongful individual acts, any public law rule that deviates from the *jus commune* of civil liability will therefore necessarily derive from the public common law. The common law qualified privilege that protects a municipal councillor at council meetings is so intimately connected to the public nature of the duties of office performed by the councillor, and to the unique requirements of that office, that it must be recognized as a principle of the public common law that is applicable in Quebec law. However, the defence of qualified privilege that applies to defamation actions in common law is based on the existence of a presumption of malice, and therefore cannot be incorporated in that form into the

civil law rules, which are based on a presumption of good faith (art. 2805 *C.C.Q.*), without disturbing the coherence of its application in the area of public authority liability.

The fact that fault is determined from the context and that there is a presumption of good faith enables the Quebec rules of civil liability to provide equivalent protection for an elected municipal official and to protect the societal values and interests that the qualified privilege rule which applies to elected municipal officials in common law is designed to preserve; it is therefore not necessary simply to import that qualified privilege. In Quebec civil law, the criteria for the defence of qualified privilege are circumstances that must be considered in assessing fault. The only rules that apply to an action in defamation brought against an elected municipal official in Quebec are therefore still the rules set out in the Civil Code, applied based on the context, having regard to the requirements associated with the office of an elected municipal official and the specific constraints involved in municipal government. As well, for reasons relating to the process followed by an action for defamation in the common law, the method of legal analysis that must be applied to the defence of fair comment is also incompatible with the general scheme of the law of delictual civil liability. It is not only unjustified, but pointless, to import that defence into the civil law. The rules of civil liability already provide that a defendant may rely on all the circumstances that tend to demonstrate the non-existence of fault. Because the criteria for the defence of fair comment are precisely the circumstances to be taken into consideration in determining whether a fault has been committed, those criteria are an integral part of Quebec civil law.

The intervention by the Court of Appeal in this case, and its decision to set aside the trial judgment, were not based on a general reassessment of the evidence.

The issue in this appeal is the legal characterization and effects of the events. The issue is whether the respondent's statement, when viewed in its context and in its entirety, was defamatory in nature and constituted a fault within the meaning of the law of civil liability, having regard to the judgment of the Superior Court and the findings of fact in that judgment. The characterization of the respondent's statements for the purpose of determining whether they were wrongful may, depending on the circumstances, be a question of mixed fact and law. In the circumstances, the Court of Appeal must accord a degree of deference to the trial judge's decision, and, in order to review that decision, must find palpable and overriding error.

In this case, the respondent did not commit a fault. The Superior Court focused its analysis on isolated elements of the respondent's speech instead of examining it as a whole and in context, and this vitiated its assessment of the content and legal consequences of the speech. Even assuming that this was an error on a question of mixed fact and law, it must be regarded as a palpable and overriding error. The nature and gravity of the error justified the Court of Appeal's intervention with respect to the trial judge's decision. The respondent spoke to let the voters of the city know that he opposed the council's decision not to appeal the judgment quashing the bylaw. He was entitled to question the assessment of the facts done by the judge. He remained steadfast in his original position, and argued that it was not the responsibility of the entire population of the city to pay the cost of the infrastructure work. The respondent cannot be faulted for failing, in the time that he was allowed and in a speech punctuated by interruptions and calls to order, to present an exhaustive account of all of the facts of the case. In his attempt to persuade the other councillors and his audience, he was entitled to stress the facts that appeared to support an appeal. Overall, the respondent acted in good faith, with the aim of performing his duties as an elected municipal official. While his comments about the appellants were

sometimes harsh, they were made in the public interest. His remarks remained within the bounds of his right of comment, opinion and expression, as a municipal official, about the affairs of his municipality that were matters of public interest. If the respondent were to be found to have committed a fault in these circumstances, the right of free discussion within the municipal political precincts would be dangerously undermined, and the vitality of democracy at the local level would be weakened.

Cases Cited

Not followed: *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; **referred to:** *Steenhaut v. Vigneault*, [1986] R.R.A. 548; *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Houde v. Benoit*, [1943] B.R. 713; *Société Radio-Canada v. Radio Sept-Îles Inc.*, [1994] R.J.Q. 1811; *Hervieux-Payette v. Société Saint-Jean-Baptiste de Montréal*, [1998] R.J.Q. 131; *Société Saint-Jean-Baptiste de Montréal v. Hervieux-Payette*, [2002] R.J.Q. 1669; *Beaudoin v. La Presse Ltée*, [1998] R.J.Q. 204; *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *R. v. Zundel*, [1992] 2 S.C.R. 731; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *R. v. Guignard*, 2002 SCC 14; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Horrocks v. Lowe*, [1975] A.C. 135; *Shaw v. Morgan* (1888), 15 R. 865; *Ward v. McBride* (1911), 24 O.L.R. 555; *Edwards v. Gattmann* (1928), 40 B.C.R. 122; *Savidant v. Day* (1933), 5 M.P.R. 554, aff'd by [1933] 4 D.L.R. 456; *Peckham v. Mount Pearl (City)* (1995), 122

Nfld. & P.E.I.R. 142; *Johnson v. Jolliffe* (1981), 26 B.C.L.R. 176; *Lamy v. Pagé* (1910), 16 R. de J. 456; *Belley v. Labrecque* (1911), 20 B.R. 79; *Montreal Light, Heat & Power Co. v. Clearihue* (1911), 20 B.R. 529; *Pichette v. Giroux* (1914), 20 R. de J. 595; *Joannette v. Jasmin* (1915), 21 R.L. 78; *Anjou 80 v. Simard*, [1987] R.R.A. 805; *Revelin v. Boutin*, [1991] R.R.A. 507; *Rouillard v. Malacort*, [1993] R.R.A. 486; *129675 Canada Inc. v. Caron*, [1996] R.R.A. 1175; *Adam v. Ward*, [1917] A.C. 309; *McLoughlin v. Kutasy*, [1979] 2 S.C.R. 311; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3; *Rubis v. Grey Rocks Inn Ltd.*, [1982] 1 S.C.R. 452; *L. v. Éditions de la Cité Inc.*, [1960] C.S. 485; *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067; *Paquet v. Rousseau*, [1996] R.R.A. 1156; *Conseil de la Nation huronne v. Lainé*, [1998] R.R.A. 495; *Drouin v. La Presse Ltée*, [1999] R.R.A. 714; *Guitouni v. Société Radio-Canada*, [2001] R.R.A. 67; *Picard v. Gros-Louis*, [2000] R.R.A. 62; *Dhawan v. Kenniff*, [2001] R.R.A. 53; *Maison du Parc inc. v. Chayer*, [2001] Q.J. No. 2663 (QL); *Housen v. Nikolaisen*, 2002 SCC 33; *Repentigny (Ville) v. Domaine Ti-Bo inc.*, J.E. 96-2062; *Domaine Repentigny inc. v. Repentigny (Ville)*, [1998] T.A.Q. 453.

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APPEAL from a judgment of the Quebec Court of Appeal, [2000] R.R.A. 607, [2000] Q.J. No. 2070 (QL), setting aside a decision of the Superior Court. Appeal dismissed.

William J. Atkinson, for the appellants.

Jean-Jacques Rainville and *Réjean Rioux*, for the respondent.

Marc-André Blanchard and *Sylvie Gadoury*, for the interveners.

Solicitors for the appellants: McCarthy Tétrault, Montréal.

Solicitors for the respondent: Dunton Rainville, Montréal.

Solicitors for the interveners: Gowling Lafleur Henderson, Montréal.

V. Analysis

16 Elected municipal officials are the leading players in municipal democracy. They are chosen by the residents to look after the community's interests; they take on a variety of responsibilities, some of which are provided by law and others of which are inherent in the nature of their position. Because their office is an elected one, municipal officials are accountable primarily to their constituents if they are unable to meet the demands of their position. However, like anyone else, elected municipal officials may commit wrongful acts that cause injury to individuals in the performance of the duties of their office. Because such a wrongful act cannot be adequately remedied at the polls, an effective sanction for it can be applied only by the courts. When this happens, because of the public nature of the duties of the office of elected municipal officials, the courts are faced with the question of how to apply the ordinary rules of liability in the *jus commune* to the wrongful individual acts of those officials.

17 The parties did not examine the impact of the public nature of the duties of the respondent's office on the rules that apply to this appeal, but they analysed the respondent's actions under the rules of the civil law system of liability. The respondent, citing case law, also raised two common law defences: fair comment, and qualified privilege. The appellants argued that the criteria that the first defence requires were not met, while the second defence simply could not be made in civil law. Before addressing the central issue in this appeal, the respondent's liability, this Court must try to resolve the difficulties associated with identifying and defining the rules that apply to a defamation action against an elected municipal official in Quebec. For that purpose, the Court must revisit what it held in *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1

42 In a defamation action against an elected municipal official, freedom of expression takes on singular importance, because of the intimate connection between the role of that official and the preservation of municipal democracy. Elected municipal officials are, in a way, conduits for the voices of their constituents: they convey their grievances to municipal government and they also inform them about the state of that government (Gaudreault-Desbiens, *supra*, at p. 486). Their right to speak cannot be limited without negative impact on the vitality of municipal democracy, as Professor P. Trudel noted in an article entitled "Poursuites en diffamation et censure des débats publics. Quand la participation aux débats démocratiques nous conduit en cour" (1998), 5 *B.D.M.* 18, at p. 18:

> [TRANSLATION] Municipal democracy is based on confrontation between views and on open, and sometimes vigorous and passionate, debate. Discussion about controversial subjects can occur only in an atmosphere of liberty. If the rules governing the conduct of such debates are applied in such a way as to cause the people who participate in them to fear that they will be hauled before the courts for the slightest breach, the probability that they will choose to withdraw from public life will increase.

43 That freedom of speech is not absolute. It is limited by, *inter alia*, the requirements imposed other people's right to the protection of their reputation. As Cory J. observed in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 108, reputation is an attribute of personality that any democratic society concerned about respect for the individual must protect:

> Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.