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LAW LETTER

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In this issue

Standard of Review Under Vavilov: A "Holistic Revision" and a "Delicate Balance", or "An Encomium for Correctness" and a "Eulogy for Deference"?

The recent decision by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*") marks yet another shift in the direction taken by Canada's highest court with respect to the law governing the standard of review to be applied by courts undertaking judicial review of administrative decisions, including those of local governments.

Standard of review is a key legal aspect of judicial review as it sets out the principles that are to be used by reviewing courts, including the extent to which those courts are to defer to the decision maker whose decision is being challenged. One notable aspect of the law concerning standard of review in recent years is that it has been in a continual state of flux as courts try to develop an approach that is sound in theory and effective in practice. For example, in the late 1980s, the approach accepted by the Supreme Court of Canada to standard of review changed from a "formalistic analysis" of the jurisdiction of a decision maker to a "pragmatic and functional" approach in which the applicable standard could range from correctness (in which no deference is to be shown by a court to a decision maker), to patent unreasonableness (where significant deference is to be shown to a decision maker), to reasonableness *simpliciter* (which is between correctness and patent unreasonableness).

However, it was often difficult to determine which standard of review under this approach should apply to the review of a given decision. As the conceptual basis for the patently unreasonable standard became increasingly

difficult to explain, the Supreme Court of Canada issued its 2008 decision in *Dunsmuir v. New Brunswick*, in which it abandoned the use of patent unreasonableness in standard of review, leaving instead only reasonableness and correctness.

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The approach from *Dunsmuir* also became subject to much criticism, including that it lacked simplicity and predictability, and that debate over which standard of review was applicable to the review of a decision often overshadowed the consideration given by a court to the underlying dispute.

Accordingly, the Supreme Court of Canada concluded that the time was ripe to again clarify the law on standard of review. It did so in three judgments issued in December 2019, with the main statement of the governing principles being given in *Vavilov* (the other two cases concerned whether the CRTC was correct to allow American commercials to be shown during a Super Bowl broadcast, and whether routes used by letter carriers were workspace under the control of Canada Post for the purpose of workplace inspections).

The underlying facts in *Vavilov* were unusual, if not unique, and concerned whether it was lawful for the government to cancel the Canadian citizenship of Canadian born children of Russian spies after the parents had been arrested in the United States and returned to Russia.

The majority of the court held that reasonableness shall now be presumed to be the standard of review in judicial review proceedings. Further, the reasonableness standard is to apply to not only the merits of the decision but also to aspects of decisions that previously might have led to the application of the correctness test, including questions of law and the interpretation of statutes.

The main rationale given by the majority of the court for adopting the reasonableness standard is that legislatures that grant enabling powers to decision makers intend those decision makers to fulfill their respective mandates, including with respect to interpreting applicable laws.

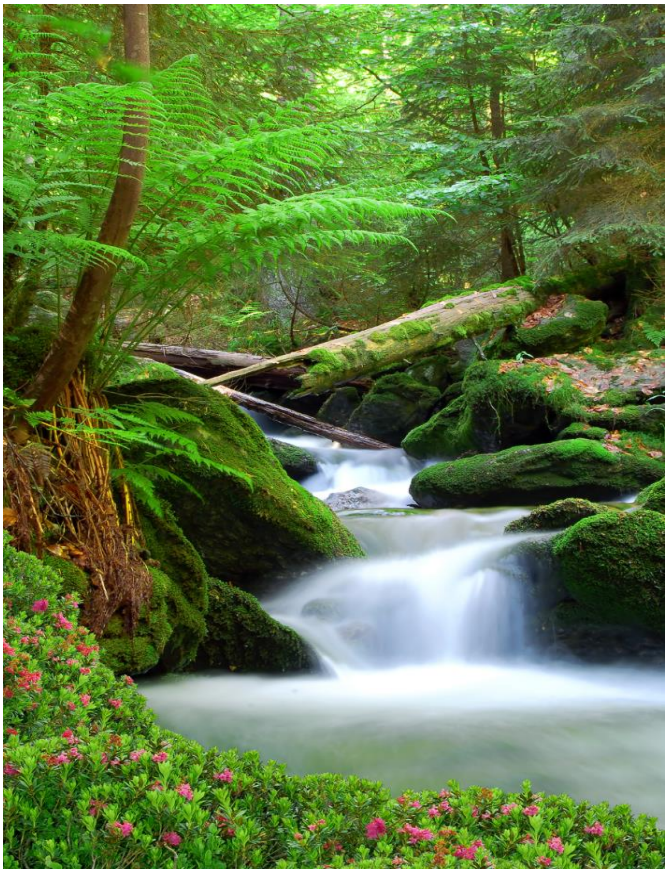
However, the majority of the court also identified two instances in which the presumption of reasonableness can be overcome. The first is if there is a statutory appeal clause in the statute that governs the making of the decision. The second is "where the rule of law requires that the standard of correctness be applied". Examples of the latter cited by the majority include constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies.

The majority of the court then stated that in determining whether a decision is reasonable, "a reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable". Drawing upon earlier decisions of the court, the majority held that this requires consideration by a reviewing court of whether "the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision".

The burden in any case to show that a decision is unreasonable will be on the party making that assertion by showing that there are "sufficiently serious shortcomings" in the decision. The majority identified two types of fundamental flaws upon which such shortcomings can be found. The first is a lack of internally coherent reasoning. While the majority said that a court is not to conduct a "line-by-line treasure hunt for error", a court should still be able to "trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic", and that an irrational chain of analysis or the lack of a rational chain of analysis will make a decision unreasonable.

The second type of fundamental flaw identified is if the decision is not justified "in relation to the constellation of law and facts that are relevant to the decision". This "constellation" includes the governing statutory scheme, other applicable law (including the common law), principles of statutory interpretation, the evidence that was before the decision maker, the submissions of the parties before the decision maker, past practices and decisions of the decision maker, the impact of the decision on the affected individual, and the lack of formal reasons for the decision where such reasons are required by statute or procedural fairness.

In what may be one of the more significant practical outcomes of the decision of the judgment, the majority stated that where a decision cannot be upheld on the reasonableness standard, "it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the



benefit of the court's reasons. That is, the majority stated that rather than quashing a decision found to be unreasonable, the matter should instead be sent back to the decision maker to be reconsidered in light of the reviewing court's comments.

There was a spirited dissent in *Vavilov* by a minority of the court which, while agreeing with the majority on the outcome of the case and that it should be presumed that the proper approach to judicial review is a test based on reasonableness, also criticized the majority for abandoning the deference that had previously been provided to decision makers, especially those who have specialized expertise.

In that connection, one aspect of *Vavilov* that bears noting is the relatively strong commentary directed by the majority and minority of the court to each other's reasons. This includes the majority's statement that the minority's characterization of the majority's decision as "an encomium for correctness" and a "eulogy for deference" is a "gross exaggeration", and the statement by the majority that the minority's statement that the majority adopted a "formalistic, court-centric view of administrative law" is counter to the "delicate balance" that the majority says is accounted for in the new framework.

While this language suggests a marked lack of agreement by the majority and the minority in this matter, it also identifies a potential issue that may have to be addressed in judicial review, which is that the approach accepted by the majority may invite greater intervention by the courts in the judicial review process in the sense that reviewing courts are being invited to examine the entire process and context concerning the decision under review. Whether this will result in more administrative decisions being overturned remains to be seen, but it could make cases involving judicial review lengthier, more complex, and more costly to litigate.

The decision in *Vavilov* has implications for local governments.

- The court has provided a comprehensive and arguably expansive explanation of what makes a decision reasonable which gives greater certainty to decision makers about what needs to be addressed when making a decision. However, it may also increase the number of things that need to be considered by decision makers that might not have been part of the decision-making process until now, such as past practices and decisions of the decision maker, and the impact of the decision on the affected individual. In turn, this may increase the potential for a decision to be found to be unreasonable because it failed to meet the broad set of factors that the court says can be relevant.

- The continued emphasis of the court that decision makers provide reasons for decisions may not always be in accord with the practices of local governments. In that regard, the majority observed that requiring reasons may be difficult for bodies such as municipalities, whose decision-making processes for matters such as passing bylaws does not easily lend itself to producing a single set of reasons. While the majority stated that in such instances "a reviewing court must look to the record as a whole to understand the decision", and referred to its decision in *Catalyst Paper Corp. v. North Cowichan,* 2012 SCC 2 for the proposition that the reasons for a municipal bylaw "are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw", this approach may create problems in instances where such a record does not exist, or it is minimal. At a bare minimum, local governments should consider whether a sufficient record will be created to help explain the basis for a decision, and that the record show that the decision has internally coherent reasoning and addresses the "constellation" of issues that may be relevant to the decision.

Ultimately, the evolution to date on the law governing standard of review in judicial review proceedings suggests that the decision in *Vavilov* will not be the final statement on the matter, and that whether it arises from the criticisms made by the minority of the court, or some other basis, it would not be surprising to see a further restatement of that law by the court in the not so distant future.

~ James Yardley

Case Update: Carbon Pricing Reference at Supreme Court of Canada

This spring, the Supreme Court of Canada will hear two appeals regarding the federal *Greenhouse Gas and Pollution Pricing Act*. The Supreme Court's decision will determine whether the federal government has the constitutional authority under its "Peace Order and Good Government Power" to impose minimum national pricing standards for greenhouse gas emissions. The case includes two appeals, one from the Ontario Court of Appeal and one from the Saskatchewan Court of Appeal, and it has already made headlines across the country as people in every province have followed its progress. Climate change, and governments' willingness to mitigate and adapt to it, is the most pressing issue of our time, and this case will determine the extent to which the federal government can require minimum emissions pricing in all provinces.

It all started in Saskatchewan. On April 25, 2018, the Saskatchewan Provincial Government referred the following question to the Saskatchewan Court of Appeal:

> The *Greenhouse Gas Pollution Pricing Act* was introduced into Parliament on March 28, 2018 as Part 5 of Bill C-74. If enacted, will this Act be unconstitutional in whole or in part?

In the Majority's final decision, Chief Justice Richards and Justice Jackson and Justice Schwann held that the *Greenhouse Gas and Pollution Pricing Act* is valid and constitutionally enacted by the federal government. With regards to the impacts of climate change in Canada, Chief Justice Richards stated:

> [17] Climate change impacts affecting Canada and Canadians include thawing permafrost, increases in extreme weather and extreme weather events such as forest fires, degradation of soil and water resources, increased frequency and severity of heat waves, and expansion of the ranges of vector-borne diseases. Predictions show that Canada's temperature, particularly in the Arctic, will warm at a faster rate than that of the world as a whole.

On the validity and constitutionality of the legislation, Chief Justice Richards wrote:

> [11] Parliament does have authority over … the establishment of minimum national standards of price stringency for GHG emissions. This jurisdiction has the singleness, distinctiveness and indivisibility required by the law. It also

> has a limited impact on the balance of federalism and leaves provinces broad scope to legislate in the GHG area. The *Act* is constitutionally valid because its essential character falls within the scope of this POGG authority.

Saskatchewan appealed this decision, as a right, to the Supreme Court of Canada.

Then came the Ontario reference. On July 31, 2018, the Ontario Provincial Government referred its own reference question to the Ontario Court of Appeal:

> Is the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018, c. 12, unconstitutional in whole or in part?

The Majority reasons, written by Chief Justice Stathy and concurred with by Justice Hoy, also held that "the *Act* is constitutionally valid under the national concern branch of the POGG power contained in s. 91 of the *Constitution Act, 1867*" (para 139). The Court reiterated that the environment is an area of shared constitutional responsibility and that the *Greenhouse Gas and Pollution Pricing Act* "is Parliament's response to the reality and importance of climate change while securing the basic balance between the two levels of government envisioned by the Constitution" (para 138).

Ontario then also appealed the decision to the Supreme Court of Canada.

In both cases, the result was the same: the *Greenhouse Gas Pollution Pricing Act* was held to be constitutional by a majority in both courts, with each Court's Chief Justice upholding the federal legislation.

But what really is the issue before the Supreme Court? Is it whether climate change is real? Is it a debate on the best measures to tackle climate change, or the most equitable way to pay for adaptation? Ultimately, the question at issue is, predictably, a relatively dry legal question: does the federal government have the power under the *Constitution Act, 1867* to impose minimum pricing standards on greenhouse gas emissions across all provinces? Or is the federal government imposing on provincial powers and treading on provincial toes?

Under the *Constitution Act, 1867* nearly all "matters" to legislate were divided between the provincial and federal governments. The framers were attempting to take a Westminster, centralized model of government and yet also recognize the diversity, size, and scope of the new country. Provincial powers are listed under section 92 and include a host of matters including:

> Local Works and Undertakings
> Property and Civil Rights in the Province
> Municipal Institutions in the Province

Likewise, section 91 lists a host of federal powers, including:

> Sea Coast and Inland Fisheries
> Navigation and Shipping
> The Criminal Law

In order to ensure that all matters, subjects, and issues were given to one head of government or another, the *Constitution Act 1867* includes two important catch all provisions. Under section 92(16), the Provinces are granted a catch-all for "generally all Matters of a merely local or private Nature in the Province". The federal government, under section 91, was then granted the residual power to "make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by tis Act assigned Exclusively to the Legislatures of the Provinces".

However, determining when a matter, which is not expressly listed under either section 91 or 92 is either a "Matters of a merely local or private

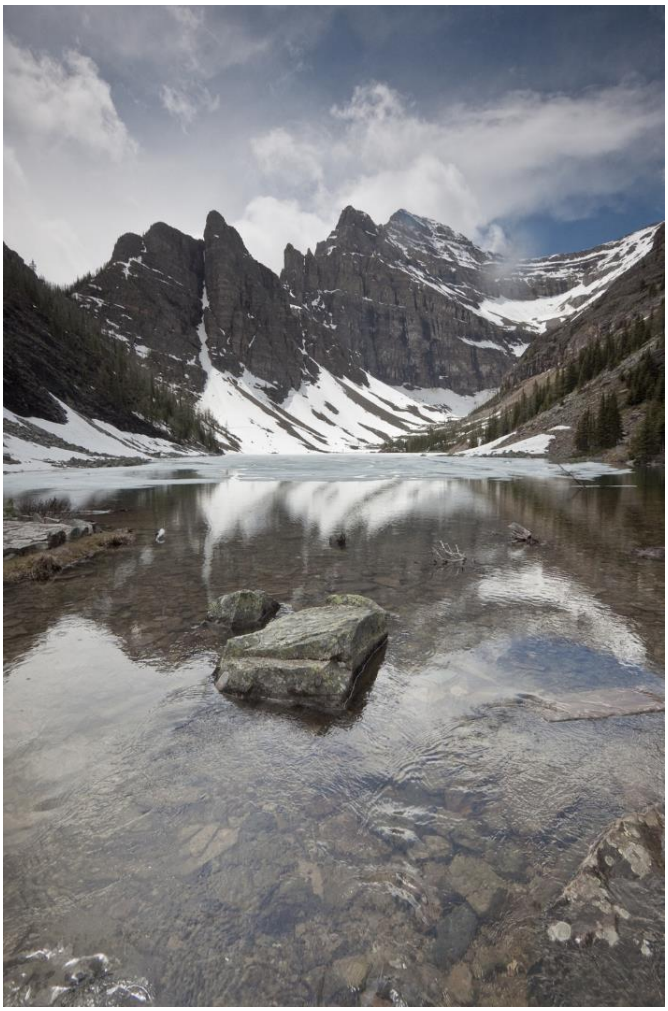
Nature in the Province" or whether it is a "Laws for the Peace, Order, and good Government of Canada" which falls outside of a matter assigned to the Provinces is a complex and much discussed issue before the Courts.

The first step in any constitutional analysis is to determine the "pith and substance" or "true character" of the law at issue.

> This step of the analysis requires an examination of the purpose and effects of the law to identify its "main thrust"…. The purpose of a law is determined by examining both intrinsic evidence, such as the preamble of the law, and extrinsic evidence, such as the circumstances in which the law was enacted…. The effects of the law include both its legal effects and the practical consequences of the law's application. (para 70 of the Ontario Decision)

Once the pith and substance of the law at issue has been identified, it must then be determined whether that matter falls under any of the existing powers set out in sections 91 and 92 of the *Constitution Act, 1867*. Canada is arguing that the pith and substance or true matter of the *Greenhouse Gas and Pollution Pricing Act* is properly framed as an issue of "national concern" and is housed under the Peace Order and Good Government (or POGG) powers of the federal government.

The current test for determining whether a matter is an issue of national concern and as such falls under the federal government's POGG, was articulated in the Crown Zellerbach case. The Ontario Court of Appeal summarized the principles from Crown Zellerbach as follows: [T]he court considers first whether the matter has a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern. In this regard, the court considers the effect on extra-provincial interests of a provincial failure to regulate the "matter". Second, the court considers whether the scale of impact of the federal legislation is reconcilable with the constitutional distribution of legislative power. (para 102)



So, what is the "pith and substance" of the *Greenhouse Gas and Pollution Pricing Act*? As it turns out, no one can seem to agree. The Saskatchewan Court of Appeal stated it is: ""the establishment of minimum national standards of price stringency for GHG emissions" (para 125). The Minority in the Saskatchewan Court of Appeal found the pith and substance to be either taxation or regulating greenhouse gas emissions (generally). The Ontario Court of Appeal stated it is: "establishing minimum national standards to reduce greenhouse gas emissions." (para 77). In

concurring reasons at the Ontario Court of Appeal, Justice Hoy found the pith and substance is: "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions" (para 166 and 175). And the minority found that the pith and substance was simply regulating greenhouse gas emissions. In addition to the Courts' deliberations, all parties have also had various formulations of what the pith and substance truly is and no one can quite seem to pin it down.

Next up, the Supreme Court of Canada will have a shot at defining the pith and substance. And this articulation matters because based on the articulation of the pith and substance is the determination of whether the matter properly falls within the scope of federal power. If the *Greenhouse Gas and Pollution Pricing Act* is held to be constitutional, the federal scheme will continue to apply in those provinces which do not have a substantially equivalent system. In British Columbia, the carbon tax which has been in place for years has already been held to be equivalent, so we will not see any on the ground changes here.

Finally, to add one more layer of complexity to this case, the Alberta government also referred a question regarding the constitutionality of the *Greenhouse Gas and Pollution Pricing Act* to the Alberta Court of Appeal. The Alberta Court found the federal carbon pricing legislation unconstitutional. That decision will be considered by the Supreme Court of Canada with the Ontario and Saskatchewan appeals.

~ Olivia French

The Restrictions against Business Subsidies and Incentives in Trade Agreements

Municipalities in Alberta have the capacity, rights, powers and privileges of a natural person of full capacity. In theory, that means that a municipality should be able to make any deal a natural person can, including business subsidies and incentives. But, this broad power is subject to limitations against preferential treatment or business subsidies under applicable trade agreements, including the *New West Partnership Trade Agreement* ("*NWPTA*") and the *Canadian Free Trade Agreement* ("*CFTA*").

The *NWPTA* prohibits parties from providing direct or indirect business subsidies that (a) provide an advantage to an enterprise that results in material injury to a competing enterprise of another party; (b) entice or assist the relocation of an enterprise from another party; or (c) otherwise distort investment decisions. If the complaint process under the *NWPTA* is initiated, then there is a possibility of a monetary award being imposed to a maximum amount of $5,000,000. The *NWPTA* defines a "business subsidy" as a financial contribution by a party, namely: (a) cash grants, loans, debt guarantees or an equity injection, made on preferential terms; (b) a reduction in taxation and other forms of revenue generation, including royalties and mark-ups, or government levies otherwise payable, but does not include a reduction resulting from a provision of general application of a tax law, royalties, or other forms of a party's revenue generation; or (c) any form of income or price support that results directly or indirectly in a draw on the public purse that confers a benefit on a specific non-government entity.

Similarly, the *CFTA* prohibits incentives that discriminate against enterprises on the basis that the head office of the enterprise is located in another Canadian jurisdiction, the enterprise is owned or controlled by an investor of another Canadian jurisdiction, or the incentive would directly result in an enterprise located in another Canadian jurisdiction relocating the territory of another Party; or the incentive would undercut competitors in other Canadian jurisdictions.

The *CFTA* defines an incentive means: (a) a contribution with a financial value, including cash grants, loans, debt guarantees, or equity injections, made on preferential terms, which confers a benefit on the recipient of that contribution; (b) a reduction in taxes or government levies otherwise payable aimed at a specific enterprise, whether organized as one enterprise or as a group of enterprises, but does not include such a reduction when it results from the general application of a tax law of a Party; or (c) any form of income or price support that results directly or indirectly in a draw on the public purse;

Where business subsidies or incentives are identified, municipal governments should determine if they fall within permitted exceptions to the general rules under the trade agreements. Both the *NWPTA* and the *CFTA* include a list of exceptions that permit business subsidies or incentives in certain circumstances.

Exceptions in the *NWPTA* are listed in part V of the agreement and general exceptions include measures adopted or maintained for aboriginal peoples and water and services and investments pertaining to water. Permitted exceptions for business subsidies in the *NWPTA* include: (i) measures adopted or maintained to provide compensation for losses resulting from calamities such as diseases or disasters, (ii) assistance for recreation, and (iii) assistance for non-profit organizations. This exception may be particularly useful during the current COVID 19 pandemic.

The CFTA permits incentives in Article 320(3) in situations where a municipal government can demonstrate that the incentive was provided to offset the possibility for relocation of the existing operation outside Canada and the relocation was imminent, well known, and under active consideration.

As well, the *CFTA* includes a general exception against incentives in Article 320 whereby parties are not prevented from carrying out general investment promotion activities; however, Article 321 qualifies this exception whereby parties are to refrain from providing incentives

for an extended period of time or for economically non-viable operations.
Given these restrictions, municipal governments should be careful to ensure they are compliant with the restrictions of the *NWPTA* or *CFTA*.

~ Lindsay Parcells and Olga Rivkin

Addressing Environmental Contamination Issues in the Disposition or Development of Property

Municipal governments frequently acquire or dispose of property as part of their natural person powers and municipal functions.

Acquiring or disposing of property with potential or actual environmental contamination issues may cause the municipal government to incur potential liability. Municipal government may also incur potential liability when acting as a land developer or in granting approvals for land use amendments, development permits or subdivisions Liability may arise if the lands in question are contaminated and municipal action or inaction is found to be inadequate in addressing contamination issues. It is important for municipal governments to be aware of its legal obligations and potential liability for these issues.

Environmental contamination of land in Alberta is governed by two key acts, the *Environmental Protection and Enhancement Act* (the "*EPEA*") and the *Water Act*. The legislation regulates substance releases, remediation and reclamation of contaminated land. The *EPEA* prohibits the release of specified substances that cause, or may cause, a significant adverse effect and any such release must be reported and remediated.

Under the statutory regime established by this legislation, a "*person responsible*" is held responsible for cleaning up contamination on a property. A *person responsible* can include a person responsible for release of any "substance" as defined in the legislation including the owner and previous owner of a substance, any person with charge, management or control of a substance, and any person who acts as a principal or agent for any of those persons. A person or entity becomes a "*person responsible*" upon acquiring real property and is bound by all of the statutory requirements for clean-up of contaminated sites, subject to the obligations of the current and previous owners who were responsible for the contamination. This general rule also applies to municipal governments, unless the municipality acquired the real property as a result of property tax arrears or by dedication or gift and the contamination existed at the time of acquisition.

The statutory objective of the *EPEA* is to require polluters to pay the cost of the clean-up of contamination and liability may be apportioned among *persons responsible* by the Director in an environmental protection order under s. 129 of the *EPEA*. Under the legislation, the province can issue an order to a *person responsible* to investigate or clean up property and can also issue an "administrative penalty" or ticket to a *person responsible*. The province can also designate a property as a contaminated site, which then provides a broad scope of liability under *EPEA* for each *person responsible*.

Notwithstanding the "polluter pays" principles of the legislation, if the polluter is judgement proof, deceased, or the no longer exists, other current and past owners of a property may be held liable for remediating contamination. The determination of obligations by *persons responsible*, including past and present owners of the property is fraught with uncertainty and municipal governments should not acquire or dispose of real property until such time as the status of any site contamination is confirmed and clean-up costs and responsibility for those costs is clearly established. If site contamination is a possibility, the municipal government or another party with responsibility for the property should undertake a site investigation. A site investigation is the primary method used for gathering detailed information about potentially contaminated sites. The site investigation can be conducted without government involvement, but it should be carried out by experienced consultants who are qualified to act under the *EPEA*.

A site investigation consists of a preliminary investigation and if warranted, a more detailed investigation. A preliminary investigation involves searching existing records for information about a site, interviewing people who are or have been involved with the site and determining the general location and degree of any contamination. If the preliminary investigation suggests possible contamination, a

more detailed investigation should be undertaken with the involvement of professionals who are able to determine the location, extent and impact of contamination. Information from this phase is usually sufficient to develop a remediation plan, or a human health and environmental risk assessment.

After a site is investigated, the findings are analysed and compared with the environmental quality standards set out in the regulations. The standards prescribe acceptable concentrations of contamination in soil, surface water, groundwater, vapour and sediments and acceptable risk levels from exposure to contamination at the site. These standards are used to determine if the site is contaminated, when the site has been adequately cleaned up, when soil relocation is required and identify potential safety hazards. The standards established by the province consist of *Tier 1 Guidelines* and *Tier 2 Guidelines* for remediation, *Exposure Control Guidelines* and *Environmental Site Assessment Standards*.

To address potential liability, municipal governments involved in the remediation of a contaminated site or contemplating the development, purchase or sale of contaminated property, should ensure that remediation efforts are undertaken in order to obtain a remediation certificate ("Certificate") under s. 117 of the *EPEA*. Under s. 118 of the *EPEA*, when a Certificate is issued, no environmental protection order requiring the doing of further work in respect of the same release of the same substance may be issued under the *EPEA* after the date prescribed. In limited cases, an exposure control program managed through a risk management plan may form part of a transaction involving the contaminated site.

In addition to obtaining a Certificate, a municipal government should also protect itself from liability by including release and indemnity provisions in the contract of purchase and sale or development agreement whereby the other party releases and indemnifies the municipal government for any issues related to site contamination. A municipal government should utilize all statutory and contractual tools at its disposal to minimize the risk of liability for site contamination.

~ Lindsay Parcells

Tools for Regulating Land and Buildings in Flood Hazard Areas

Many Alberta municipalities are located near water bodies as a result the historic benefit these locations provided to communication and transport. These locations have contributed to periodic flooding. While Alberta municipalities have always faced risks of flooding, more extreme weather and population growth have

increased risks to public safety and property loss.

In response, the province amended the *Municipal Government Act* ("*MGA*") in 2013 to provide Lieutenant Governor in Council with powers to create regulations for controlling, development and authorized uses in floodways and ministerial exemptions for municipal authorities from some or all of the general provisions of the regulations where special circumstances or significant existing development exists.

Subsection 693.1(1) of the *MGA* provides that the Lieutenant Governor in Council may make regulations as follows:

a) controlling, regulating or prohibiting any use or development of land that is located in a floodway within a municipal authority, including, without limitation, regulations specifying the types of developments that are authorized in a floodway;
b) exempting a municipal authority or class of municipal authorities from the application of all or part of this section or the regulations made under this subsection, or both;
c) modifying or suspending the application or operation of any provision of this Act for the purposes of giving effect to this section; and
d) defining, or respecting the meaning of, "floodway" for the purposes of this section and the regulations made under this subsection.

Subsection 693.1(b) and 693.1(c) compel municipalities to implement and bring their own statutory plans and land use bylaws into conformance with any regulation adopted pursuant to subsection 693.1(1).

Consultations on the proposed regulations were completed in 2014. The discussion paper produced by the Floodway Development Regulation Task Force (FDRTF) noted that once the proposed Floodway Development Regulation is in force:

- Municipalities will need to ensure that their statutory plans and land use bylaws are consistent with provisions of the Floodway Development Regulation, where applicable Municipalities may not approve an application for subdivision in a floodway if the application is inconsistent with the provisions of the Regulation; and
- Municipalities may not issue a development permit for any use or development of vacant land in a floodway if the proposed development is inconsistent with the provisions of the regulation.

Floodway typically include the river channels and overbank areas. The FDRTF's discussion paper identifies four areas for consideration in drafting the regulation:

- New development in floodways (prohibitions and authorized uses);
- Existing development in floodways (prohibitions and authorized uses and development);
- Exemption provisions; and
- Other related discussions.

Consensus was reached in a number of areas including:

- No new development should be constructed in the floodway;
- Elevating a building (above a determined flood level) as a form of mitigation above flood waters in a flood way is not considered appropriate;
- There is to be no redevelopment or additions to existing buildings in the floodway that will result in expanding the building footprint and/or changing the building use;

- There should be no infill development in the floodway; and,
- Any exemptions for floodway areas need to be based on an agreed set of criteria and need to demonstrate appropriate mitigation measures that are sufficient enough to reduce/minimize risk to life and property.

To date, the regulation has not been finalized. A provincially implemented scheme will ensure that a consistent, minimum level of land use control will apply in the floodway(s) across the province. Until such time as the proposed Floodway Development Regulation has been enacted municipalities continue to have obligations with respect to development that may be subject to flooding and tools to incorporate sound planning measures within their land use bylaw and statutory plans.

The provincial *Alberta Land Stewardship Act* ("ALSA") also provides guidance on appropriate subdivision and development in areas that are subject to flooding. According to section 630.2 of the MGA, every actor with authority over planning decisions must "carry out its functions and exercise its jurisdiction in accordance with any applicable ALSA regional plan. The currently approved regional plans support the development of municipal flood mitigation plans and the expansion of flood hazard mapping.

A joint federal-provincial program created flood hazard maps for a number of Alberta communities. This mapping process identified appropriate land uses for areas affected by flooding, which municipalities were encouraged to incorporate into their municipal development plans and land use bylaws. In 1999, the federal-provincial program expired before all mapping was completed; however, Alberta Environment and Parks continues to produce flood hazard studies and mapping under the current Flood Hazard Identification Program. This information can be a valuable resource for communities in identifying areas that may warrant additional regulation.

At the community level, broadly applicable flood mitigation policies can be incorporated into the municipal development plan ("MDP"). The MDP may address environmental matters and contain

statements regarding any development constraints. Where flooding is likely to occur in a municipality, the MDP typically incudes a section describing the nature of the flooding, the area affected, and policies regarding development in the area. For municipalities without current flood hazard mapping, these policies can incorporate requirements for additional information to be supplied with an application for subdivision or development within a standard distance of a watercourse.

Area structure plans and area redevelopment plans similarly allow for broader policies dealing with flood mitigation at the community level. These statutory plans allow for strategies such as sequencing of development and the identification of storm water management plans and public utility lots that will be required to ensure that the land is suitable for its intended uses.

In deciding on an application for subdivision, the *Subdivision and Development Regulation* requires the subdivision authority to consider any potential for flooding. As a final tool, a land use bylaw may establish specific provisions regarding the development of buildings in areas subject to flooding.

Cumulatively, municipalities have a number of tools available to regulate land and buildings in flood hazard areas. These tools range from lobbying the Province to adopt meaningful regulations to incorporation of their own regulations in statutory plans and land use bylaws.

~ Alison Espetveidt and Rahul Ranade

Council Meetings and Procedures during the COVID-19 pandemic

Local Government Responsibilities for Public Meetings

Section 198 of the *Municipal Government Act* ("***MGA***") provides that:

> "Everyone has a right to be present at council meetings and council committee meetings conducted in public unless the person chairing the meeting expels a person for improper conduct."

To assist municipalities in complying with legislative meeting requirements, the province has enacted *Meeting Procedures (COVID-19 Suppression) Regulation* (the "Regulation") to allow municipal meetings to be held in a manner that supports social distancing recommendations from the Chief Medical Officer of Health ("CMOH"). The Regulation provides municipalities with flexibility to conduct meetings and public hearings by electronic means, to address quorum challenges due to councillors in quarantine, and to provide information to the public. In addition, the province has extended timelines and deadlines legislated in the *MGA* by Ministerial Orders MSD:019/20 and MSD:022/20.

Under s. 3(1) of the Regulation, a requirement to hold a meeting in public under the *MGA* is deemed be complied with by holding the meeting by electronic means, including a teleconference or a live, publicly streamed broadcast, if: (a) members of the public are able to hear the meeting as it occurs; (b) any members of the public who would be entitled to make submissions at the meeting if the meeting were being held in person are able, before and during the meeting, to make submissions by email or any other method that council considers appropriate; and (c) the chief administrative officer or a designated officer attends the meeting by electronic means.

Under s. 3(2) of the Regulation, when a meeting is intended to be held by electronic means, notice of the meeting must be given to the public and the notice must state the electronic means by which the meeting is to be held and give the information necessary for the public to access the meeting.

The Regulation also includes provisions for restricting or suspending electronic access in order to close all or part of the meeting under s. 197 of the *MGA*.

Public Health Order Issued by the Provincial Health Officer

The CMOH has also issued an order restricting mass gathering throughout the province to protect Albertans' health and limit the spread of COVID-19 (CMOH Order 07/2020). The order prohibits all persons from attending a place with mass gatherings of more than 15 attendees. The Province of Alberta has indicated that a gathering is "any event or assembling that brings people together in person, in a single room or single space at the same time." For the purposes of the order, a council meeting or public hearing is a gathering. For gatherings of 15 people or less, people must maintain a distance of 2 metres from one another and gatherings may only occur in a space that allows for mandated physical distancing of at least 2 metres between attendees).

It would also be prudent for municipalities to implement mitigation strategies during the COVID-19 pandemic with the goal of limiting the risk of exposure to the virus for their employees who continue to provide essential services. The order requires a "place of business" to that offers services to the public or at a location that is accessible to the public to (a) prevent the risk of transmission of infection to co-workers and members of the public by a worker or member of the public; (b) provide for rapid response if a worker or member of the public develops symptoms of illness while at the place of business; and (c) maintain high levels of workplace and worker hygiene. Municipalities may be able to adopt some or all of the following strategies:

- If possible, encourage working from home;
- Set up workplaces to allow for social distancing;

- Increase access to handwashing stations or alcohol-based sanitizer in municipal offices and at meetings;
- Workplaces and property should be thoroughly and frequently cleaned and sanitized; and

- Encourage personal protective practices for all persons who may attend municipal buildings.

Options going forward

As local governments respond to these directives and consider electronic meetings, they should keep in mind the following principles to ensure all meetings are conducted in accordance with good meeting practice:

Planning: The key to success is planning and the plan should include the following elements:

1. *Procedure Bylaw*: meetings should be conducted in accordance with the *Procedure Bylaw* and changes may need to be made the bylaw to accommodate electronic meetings.

2. In camera and public portions of meetings: The in-camera portions of the meeting should be planned for the start or end of meeting and the public portion of the meeting should be scheduled in the middle to ensure there is continuity in the public portion of the electronic meeting.

3. Records retention: The electronic meetings policy should detail how long recordings of meetings should be retained. Keep in mind that recordings do not constitute an official record.

4. In camera portions of meetings: In the agenda package released to the public, be careful to not include in camera portions of the meeting.

5. Security: Your IT department or consultants are the best resource to pick the right platform to ensure proper security for your electronic meetings. Consider the most effective tools and then use the tools provided by your organization. Make sure to test equipment before meeting and close other applications that may adversely affect your security. Managing bandwidth will support a good connection and limit notifications during online meetings.

6. Technical glitches: Before the meeting starts, do some testing as if it were a real meeting. Try adding and removing people and mute and unmute people. Provide access in advance to become familiar with the program. Maintain a "glitch sheet" so that people know how to overcome challenges when "live". Have a start time and a go live time (allows time for everyone to get online before meeting starts).

7. Attendance: Ensure that the Clerk or CAO regularly monitors attendance and have the chair confirm attendance for each item in the agenda that requires a vote to ensure that that everyone is present who needs to be present.

8. Have a dedicated e-mail/phone to call if there are technical challenges.

9. Have a Plan B: Part of preparation is having a plan B in case there are technical issues. For example, move to teleconference if internet issues exist.

Implementation: After planning comes implementation of your electronic meeting strategy. Implementation should include the following:

1. Clarity of Purpose: Have clarity of purpose in all municipal meetings and in accordance with a clearly defined agenda that is consistent with the council procedure bylaw.

2. Have the right people at the meeting and ensure they are properly trained: Give consideration to having the right people there, including IT people to help ensure the meeting runs smoothly. Steps should also be taken to ensure the Chair and others participating in the meeting understand the process and rules that will apply during the meeting.

3. Involving the public: Your electronic meeting system (whether teleconference or video conference, or both at the same time) should have the ability to mute people, exercise control over video sharing. For discussion and Q&A, most platforms allow you to control the ability of people to speak. You should inform the public in advance what chat features or email features, if any, can be used during the meeting. Make sure that members of the public have been given information on the process and how they will be able to participate. An FAQ or tip sheet is also useful to help meeting attendees understand the process and their participation in the meeting. Keep control and make sure the public understands what those controls will be.

4. Meeting process: Endeavour to keep your electronic meeting process and format as close as possible to your in-person process so that it is familiar to participants. Remember to inform participants that the meeting will be recorded so that people know that their face/voice will be recorded.

5. Role of the Chair: The Chairperson should be provided with a script to ensure there are no omissions and that the meeting runs smoothly. For debate, the Chair can ask for comments and the debate rules in procedure bylaw should be followed. The Chair should also do a roll call to make sure that all members have been able to participate. When the Chair calls for a vote, they can ask for a show of hands or can poll asking for a verbal response. Zoom gives opportunity to raise hand.

6. Presentations: Presentations should be provided ahead of time so that everyone can see them. Open your platform to the delegation so that they can present to Council.

7. Recording: Official minutes are still the official record. Recording and making the recording available supports transparency.

8. Timing: Account for time to assess for progress of the agenda. Allow for glitches, budget for extra time to work through various elements of the agenda. Be transparent about need to accommodate technology.

9. Establish and encourage rapport with participants: Make space in your electronic meetings to allow courtesies to be extended in the virtual environment. Practice patience compassion and kindness with participants.

10. Continuous improvement: Be willing to learn and adapt and improve for next time.

~ Alison Espetveidt and Lindsay Parcells

The Structure of Contracts

Although the structural elements of an agreement are less important than its substance, understanding formal elements can help a reader understand an agreement's substance. We receive questions about different structural components of agreements, and in response have prepared this very brief guide to distinguishing three structural elements that may appear to be similar.

Perhaps the most important takeaway is that structure alone does not create an enforceable contract. This can be deceiving because a document can *look* like an agreement and include all the structural elements identified below, and yet not be legally binding. Conversely, even a verbal agreement can be a legally binding contract despite having none of these structural elements set out in writing. The structure of an agreement matters because it impacts whether the agreement's substance is clearly communicated or not, but—in the words of a wise colleague—the key is to "never let the tail wag the dog".

With that background, here are some common structural elements of an agreement:

Recitals

Identification: recitals can often be spotted near the beginning of an agreement after the names of the parties. This section generally begins with the word 'background' or 'whereas', and then the recitals follow in a list of lettered sentences (e.g., "A. The…").

Purpose: recitals provide background information. They do not establish legal obligations or rights. Enforceable terms should not be in the recitals.

If someone found a physical copy of an agreement lying on the street and knew absolutely nothing about it, the recitals should give them basic background information such as who the parties are (e.g. "x is a local government…") and why they decided to enter into a contract (e.g. "x wishes to purchase…").

During litigation about an agreement, courts may use recitals to help them interpret contracts. In this way, recitals may impact the legal obligations or rights of the parties.

Body

Identification: the body of an agreement is usually introduced by a line stating, "the parties agree as follows". The space between this introductory line and the signatures of the parties is the body of the agreement.

Purpose: the body of the agreement is the core of the agreement. It establishes rights and obligations of the parties, as well as other substantive provisions that the parties have agreed to.

Attachments

Identification: attachments are found after the signatures of the parties. Each attachment will generally have a title (e.g., "Schedule A") which makes it easy to identify. The body of the agreement must refer to an attachment in order to incorporate it into the agreement.

Purpose: whether to include material in an attachment instead of the main body of the agreement is a strategic decision. Unlike recitals, attachments may contain enforceable provisions. In addition, attachments may be used to provide a reference copy of a stand-alone document that is relevant to the agreement (such as a plan, a *Land Title Act* form, or a different agreement).

Conclusion

In addition to these three structural elements, agreements have other standard structural elements such as the title, names of parties, and signature line. Different types of agreements may require unique structural features. The overriding concern is always whether the structure serves the substance of the agreement.

~ Kate Gotziaman

Prayers at Council Meetings and the Duty of Neutrality

We have recently had multiple requests for advice regarding the practice of starting a meeting with a prayer.

Some municipalities have been receiving emails from an organization stating that:

a) in 2015, the Supreme Court of Canada ruled that it was unconstitutional to begin a municipal council session with a sectarian prayer as it violated the state's duty of religious neutrality,

b) the organization had reviewed minutes of a Council meeting at which a religious representative provided an invocation or prayer, and

c) the organization asked for confirmation that the Council would ensure future meetings complied with the Supreme Court of Canada's ruling.

The email refers to *Mouvement laïque québécois v. Saguenay (City)* 2015 SCC 16.

In that case the Supreme Court of Canada heard an appeal regarding the municipal council of the City of Saguenay's practice of starting each public meeting with the mayor making the sign of the cross while saying "in the name of the Father, the Son and the Holy Spirit" before and after reciting a prayer. Other councillors and City officials would cross themselves at the beginning and end of the prayer as well. In one of the council chambers there was a Sacred Heart statue. In another, there was a crucifix hanging on the wall.

A resident felt uncomfortable with the practice and asked the mayor to stop. The mayor refused, and so the resident invoked Quebec's human rights complaint process, asking that the recitation of the prayer cease and that all

religious symbols be removed from council chambers.

Quebec's human rights tribunal found that the prayer was religious, and by reciting it, the City was showing a preference for one religion to the detriment of others. This was a breach of the state's duty of neutrality, as well as a discriminatory interference with the complainant's freedom of conscience and religion. The tribunal granted the relief sought and awarded $30,000 in damages to the complainant.

The Quebec Court of Appeal disagreed: in its view the prayer expressed universal values that could not be identified with any particular religion, the religious symbols were devoid of religious connotation and were works of art.

The Supreme Court of Canada overturned the Court of Appeal and upheld the Tribunal's decision. It ruled that reciting a prayer at council meetings was above all else a use by the council of public powers to manifest and profess one religion to the exclusion of all others. Reciting the prayer turned the meetings into a preferential space for people with theistic beliefs, who could participate in municipal democracy in an environment favourable to the expression of their beliefs. Although non-believers could also participate, the price for doing so was isolation, exclusion and stigmatization.

The Supreme Court articulated the following key principles with respect to what is colloquially known as the separation of church and state:

a) A state authority cannot make use of its powers to promote or impose a religious belief,

b) The state has a duty of religious neutrality: it must neither favour nor hinder any particular belief, or non-belief,

c) A neutral public space free is one that is free from coercion, pressure and judgment on the part of public authorities in matters of spirituality,

d) The state is required to encourage everyone to participate freely in public life, regardless of their beliefs: the state may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others, and

e) Religious expression under the guise of cultural or historical reality or heritage breaches the duty of neutrality.

A breach of the duty of neutrality is established by proving that the state is professing, adopting or favouring one belief to the exclusion of all others in a manner that resulted in interference with the complainant's freedom of conscience and religion.

Given the Supreme Court's ruling and the principles articulated above, and in particular, that religious expression cannot be justified under the guise of cultural or historical reality or heritage, local governments should consider whether they are engaging in practices that, although customary, might breach their duty of neutrality.

We suggest a review of existing policies and practices not just with respect to prayers at the start of meetings, but also with respect to holiday decorations and use of funds to support events associated with only one religious group, to ensure that local governments are complying with their duty of neutrality. The full decision is available at: https://www.canlii.org/en/ca/scc/doc/2015/2015scc16/2015scc16.html?resultIndex=1

~ Sara Dubinsky