Court of Queen's Bench of Alberta

Citation: Terrigno v Calgary (City), 2021 ABQB 41

Date:
Docket: 2001 01854
Registry: Calgary

Between:

Mike Terrigno

Applicant

- and -

The City of Calgary

Respondent

Reasons for Judgment
of the
Honourable Mr. Justice P.R. Jeffrey

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[1] This application considers whether certain powers were validly sub-delegated by the City of Calgary to its City Solicitor. The Applicant says Calgary's City Council sub-delegated the powers at issue by resolution, therefore the sub-delegation is invalid. The Respondent says the powers were sub-delegated by bylaw and are therefore valid.

Background

[2] The specific powers at issue (collectively, the "**Impugned Powers**") speak of the City Solicitor's sole discretion to decide:

> (i) whether Members of Council, or other persons appointed by them, may be indemnified by the City for any liability, losses or expenses arising out of performing their public duties in good faith (the "**Indemnity Power**"); and
>
> (ii) whether the City will pay any reasonable external legal fees such indemnified Council Member or other person might incur (the "**Reimbursement Power**").

[3] Most of the City's submissions appear to operate on the belief that only the Reimbursement Power is challenged by the Applicant. I address this in more detail below under the heading "Scope of the Review". For purposes of these background comments, I refer to both the Impugned Powers.

[4] The Applicant says City Council sub-delegated the Impugned Powers to the City Solicitor as part of some amendments it made to City of Calgary Council Policy CC010 (the "**Amendments**"). He says the Impugned Powers portion of the amendments are invalid because they were approved by Council resolution, not by bylaw. He says that under the Alberta *Municipal Government Act*, RSA 2000, c M-26, (the "***MGA***") they could only be sub-delegated by bylaw.

[5] As an aside, I was told the difference between a City Council approval by resolution and a City Council approval by bylaw is significant, since the process to create a bylaw is more robust and accords opportunity for public participation and comment before approval. The Impugned Powers amendments, for example, might attract such public participation since they may affect: the private pecuniary interests of Members of Council, the price a citizen may have to pay after serving in a public office or appointed civic role in facing law suits naming them in their personal capacity, and the possible deterrent effect the absence of such indemnity may have upon citizens' willingness to serve in such public roles in the future.

[6] The specific wording of the part of the Amendments that the Applicant challenges, that City Council approved by resolution, say:

> In situations in which the City Solicitor has determined that Council members or Counsel citizen appointees to Council established Boards, Commissions, Authorities and Committees should receive the benefit of these policies, if external legal fees and disbursements are incurred, the City Solicitor has the authority to pay external legal fees and disbursements which, in the sole discretion of the City Solicitor, are reasonable;

(in this decision I refer to those "Counsel citizen appointees to Council established Boards, Commissions, Authorities and Committees" as "**Citizen Appointees**").

[7] The City agrees with the Applicant that Council may only sub-delegate the Impugned Powers to the City Solicitor by way of bylaw, not by resolution. However, the City says that the Impugned Powers were not sub-delegated by the Amendments. The City says they were sub-delegated to the City Solicitor by Council years before the Amendments, by bylaw 48M2000 (the "**Designation Bylaw**"). The City says the resolution containing the Amendments merely "shapes and helps define" the earlier sub-delegation in the Designation Bylaw.

[8] The City says the Council approved a valid resolution, because the Designation Bylaw sub-delegated the Impugned Powers to the City Solicitor many years prior to the Amendments. It is not at all evident from the Certified Record of Proceedings that that was the City Council's belief

or understanding when approving the resolution,[1] but such a prior sub-delegation to the City Solicitor by bylaw is the way the City says the Impugned Powers portion of the Amendments should survive this review. The City's position on this review necessarily entails that the City Council interpreted the Designation Bylaw as sub-delegating the Impugned Powers to the City Solicitor long before the Amendments resolution.

[9] The City says the Impugned Powers are within the scope of the Designation Bylaw that sub-delegated powers to the City Solicitor; the Applicant says they are not within the scope of the Designation Bylaw. That is the core of this dispute. It is the City Council's interpretation of the Designation Bylaw, implicit in its resolution approving the Amendments, that is being reviewed, under the appropriate standard of review.

[10] The Designation Bylaw states:

> **WHEREAS** Section 210 of the *Municipal Government Act* allows Council to create positions of designated officer and specify the powers, duties and functions of that officer;
>
> **AND WHEREAS** the City Solicitor and General Counsel has a professional responsibility to act in the best interests of the municipality, which is governed by its Council;
>
> **AND WHEREAS** the City Solicitor and General Counsel reports in a professional capacity to Council and Council wishes to establish the position of City Solicitor and General Counsel as a designated officer;
>
> **NOW THEREFORE THE COUNCIL OF THE CITY OF CALGARY ENACTS AS FOLLOWS:**
>
> 1. Council hereby establishes the position of City Solicitor and General Counsel as a designated officer.
>
> 2. The City Solicitor and General Counsel shall have the following powers, duties and functions:
>
> A. to initiate, prosecute, maintain or defend any action, claim or other proceeding at law or in equity deemed in the best interest of The City of Calgary;
>
> B. to settle any action, claim or other proceeding provided the amount does not exceed $250,000.00;

[1] Interestingly, the Designation Bylaw was not included in the Certified Record of Proceedings, therefore it must not have been placed before the City Council in the course of Council Members' discussion on the resolution. Further, the Designation Bylaw did not arise during the City Solicitor's explanatory comments to the Council Members. The City Clerk certifying to the completeness of that Certified Record said there was not "anything else in our possession relevant to the" resolution, therefore at the time of the assembly of the Record for this Court's review, the City Clerk did not consider the Designation Bylaw to be relevant to the Amendments resolution.

C. to retain outside counsel when the City Solicitor and General Counsel deems it to be in the best interests of The City of Calgary;

D. to report to Council with respect to any legal matter where in the City Solicitor and General Counsel's independent judgement a Council decision is necessary.

3. The City Solicitor and General Counsel shall, subject to Subsection 2(D), report to the City Manager.

3.1 The City Clerk and the Chief Security Officer shall be subject to the supervisor of and accountable to the City Solicitor and General Counsel.

4. The City Solicitor and General Counsel may further delegate any of the authority given by this Bylaw.

5. This Bylaw comes into force on the day it is passed.

[11] Mr. Terrigno does not argue in this application that the Designation Bylaw is invalid. He says the Impugned Powers are outside its scope and, therefore, their inclusion in the Amendments resolution is not valid, since in result the Amendments would have the effect of sub-delegating those Powers by resolution not bylaw. In this application Mr. Terrigno does not challenge the merit of the policy of the City indemnifying or the City reimbursing legal costs. He challenges the legality of the way the City proceeded to realize that policy.

[12] The Applicant commenced this action by way of judicial review on February 3, 2020, in respect of the Amendments approved March 14, 2016. The Designation Bylaw was approved December 11, 2000, and amended at various times since, most recently May 30, 2017. No issue was raised that the Applicant is out of time either for the declaration he requests in his prayer for relief, or to proceed by judicial review (see R 3.15, *Alberta Rules of Court*, AR 124/2010 as amended; s 537, *MGA*). Accordingly, I have not considered or ruled on whether the Applicant is out of time to bring this application.

Issues

[13] I address the Application under the following outline:

1. Standing
2. Standard of review
3. Meaning of the standard
4. Scope of the review
5. Conducting the review
6. Implications of the review

Analysis

1. Standing

[14] I conclude that Mr. Terrigno has standing to bring this application, for the following reasons.

[15] The test for public interest standing was summarized in *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, at para 37. It states:

> In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious issue to be tried; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts [*case citations omitted*].

[16] The three factors in the test are not to be treated as a check list, but as "interrelated considerations to be weighed cumulatively, not individually, and in light of their purpose" (*Downtown Eastside Workers*, at para 36). They are to be applied "purposively and flexibly" (at para 37).

[17] The Supreme Court of Canada summarized the test for the purposes of a constitutional case (*Downtown Eastside Workers*, at para 1). The Alberta Court of Appeal applied this test in a non-constitutional case (*Zoocheck Canada Inc v Alberta (Minister of Agriculture and Forestry)*, 2019 ABCA 208). Therefore, it has broader application than just to constitutional cases.

[18] In applying that test, I am persuaded that Mr. Terrigno has raised a genuine issue warranting the Court's attention. Given that the issue affects the validity of a decision made by persons elected to public office affecting their own interests, given that it reviews whether their approach to the use of public funds to their personal advantage was lawful, and given that the ultimate outcome of the issue may affect the willingness of other citizens to serve in public office, it is a serious and an important issue.

[19] If I deny Mr. Terrigno standing, there is a very real risk the serious issue he raises would not come before the Court in the future.

[20] I note that Mr. Terrigno resides in and owns property within the geographic boundaries of the City of Calgary. As a result, he is an elector of City Council and is obliged to pay property taxes to the City. He is as directly affected as any other resident elector and ratepayer.

[21] Further, Mr. Terrigno has a genuine interest in the outcome of this challenge. He is plaintiff in an outstanding civil suit against a Member of Council. While he may not like the defendant Council Member perhaps avoiding paying any of her legal costs, or her being relieved of the pressure that having to pay legal costs may bring to her conduct of their litigation, if he succeeds in his lawsuit he likely prefers that any City indemnity for a damage award in his favour be valid.

[22] Finally, judicial review is a reasonable and effective way to bring the matter before the Court. The conduct of a municipality is subject to judicial review (*Baker v Rural Municipality of Sherwood No 159*, 2015 SKQB 301).

[23] The *MGA* permits a challenge to the validity of a bylaw or resolution by application for declaration (s 536). But that is not prescriptive, just permissive. Commencing the challenge by judicial review is not prohibited nor is it inappropriate. Judicial review on an existing record is also an efficient way to bring the underlying public interest concerns before the Court; the core issue is a matter of statutory interpretation which requires no process for adducing and testing evidence.

[24] These three factors all militate in favour of the Court granting Mr. Terrigno standing.

[25] Regrettably, the City first revealed it was challenging Mr. Terrigno's standing in its response brief. The City chose to remain silent about this position throughout the parties' communications between commencement of the Application and the filing of its response brief. It chose to spring the challenge on the self-representing Applicant only *after* his opportunity to address the matter up front had passed and the oral hearing was imminent.

[26] The City said orally to the Court that it was not bringing any motion on the issue. This was semantic only. The City raised the matter in its brief. The City did not support Mr. Terrigno having standing and suggested his standing was "questionable at best". The City argued Mr. Terrigno had an ulterior motive not a "genuine interest". The City spoke of what the Court "must consider". Clearly the City was urging the Court to deny Mr. Terrigno standing. Clearly Mr. Terrigno had to scramble to address the surprise issue when appearing in person. Clearly the Court was being called upon to rule on the issue.

[27] I also note that the City did not similarly raise, 'merely for the Court to be aware', any issue as to its own standing. The City's lawyer did not seek leave to address the scope of its decision under review (the Designation Bylaw) before doing so. The City's lawyer did not raise the question of whether I should exercise my discretion to grant the City standing to defend its interpretation of its own bylaw and, if so, whether the scope of its standing to do so should be subject to any limits (see *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 at paras 41–59). Even though in this case the Court was highly likely to grant permission, it should not have been presumed.

2. Standard of Review

[28] The standard of review in this case is reasonableness, for the following reasons.

[29] The standard of review in a judicial review is determined by ascertaining the legislature's intended degree of deference to be accorded by courts reviewing discretionary decisions of the tribunal it created. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, said that reasonableness is presumed in all cases to be the legislative intent, unless the rule of law requires a correctness standard (at para 53) or the legislature indicates that a different standard should apply (at para 33).

[30] Neither of those exceptions applies here:

a) Mr. Terrigno's ground of challenge does not engage the rule of law. It does not raise a constitutional question, a general question of law of central importance to the legal system as a whole, or a question regarding the jurisdictional boundaries between two or more administrative bodies, or in any other way engage the rule of law.

b) Mr. Terrigno's ground of challenge also does not trigger anything in the *MGA* indicating that a standard different than reasonableness should apply. A legislature may indicate that a standard other than reasonableness should apply in either of two ways: first, it may "explicitly prescribe through statute what standard courts should apply" or, second, it may provide "for a statutory appeal mechanism from an administrative decision maker to a court" (both quotes from *Vavilov*, at para 33). The *MGA* does not explicitly prescribe the intended standard of review of a bylaw, nor does it dictate any appeal to a court for a challenge to the scope of a bylaw.

Therefore, I am to presume the Alberta Legislative Assembly (the "**Legislature**") intended that I apply the reasonableness standard when reviewing the City of Calgary's interpretation of its Designation Bylaw.

[31] Further, the ground of Mr. Terrigno's challenge is an issue of statutory interpretation – City Council's interpreting its Designation Bylaw as having already sub-delegating the Impugned Powers to the City Solicitor. *Vavilov* said that even when the administrative decision maker is interpreting legislation that defines the scope of its own jurisdiction in a manner that exceeds what the legislature intended, which under *Dunsmuir* was referred to as a possible "true question of jurisdiction" attracting a correctness standard, review on the reasonableness standard "properly applied" is appropriate (*Vavilov*, at para 109). That is, now all questions of statutory interpretation by the administrative decision maker are reviewed on the reasonableness standard unless the exceptions in paragraphs 29 and 30 above apply.

[32] Some Alberta courts have interpreted section 539 of the *MGA* as expressly prescribing the standard to be applied by a court reviewing a municipal council bylaw or resolution (*Nor-Chris Holdings Inc v Sturgeon (County)*, 2013 ABQB 184; *Gendre v Fort Macleod (Town)*, 2015 ABQB 623; *Kozak v Lacombe (County)*, 2017 ABCA 351; *Brodylo Farms Ltd v Calgary (City)*, 2019 ABQB 123; *Ponoka Right to Farm Society v Ponoka (County)*, 2020 ABQB 273; *Kissel v Rocky View (County)*, 2020 ABQB 406). Section 539 states:

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

[33] With respect, I disagree with those cases' conclusion that this section of the *MGA* expresses the Legislature's intended degree of deference to be accorded by courts in a judicial review of a resolution or bylaw.

[34] In *Kozak*, the Alberta Court of Appeal said the effect of section 539 is to require reviewing courts to apply the correctness standard. Its comments on the point were brief, as follows from paragraph 19:

> There is some disagreement among appellate courts about the standard of review applicable to subordinate enactments. ... We need not enter that debate in this appeal because s 538 [*sic*] of the *MGA* expressly excludes reasonableness as a

> ground for reviewing municipal bylaws: "No bylaw may be challenged on the ground that it is unreasonable." Accordingly, the standard of review must be correctness.

[35] In addition to that decision of the Court of Appeal, some Queen's Bench decisions also concluded that section 539 constituted the express intention of the Legislature. However, they interpreted the section as dictating not a correctness standard but the "patently unreasonable" standard, or a degree of deference akin to patent unreasonableness, such as "reasonableness with great deference" (*Nor-Chris Holdings Inc* at para 72; *Gendre* at paras 24, 58; *Brodylo Farms* at paras 42–48; *Ponoka* at paras 6–13; *Kissel* at paras 43–44).

[36] In my view section 539 does not express the Legislature's intended standard of review in a judicial review of a resolution or bylaw. I reach this conclusion for the following reasons.

[37] First, with respect, those decisions conflate a ground of review with a standard of review. Section 539 addresses the former not the latter. In *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 51, the Supreme Court of Canada acknowledged the difference between the two (emphasis in original):

> [...] a legislature has the power to specify a standard of review, as held in [*R v Owen*, 2003 SCC 33], if it manifests a clear intention to do so. However, where the legislative language permits, the courts (a) will *not* interpret grounds of review as standards of review...

Accordingly, I agree with the approaches to section 539 in the following cases, in that they do not regard it as addressing the Legislature's expectation as to standard of review: *Northland Material Handling Inc v Parkland (County)*, 2012 ABQB 407 at paras 35–43; *Bulger v Rocky View (County)*, 2013 ABQB 603 at para 47; *Bergman v Innisfree (Village)*, 2018 ABQB 326 at para 24; and *Bergman v Innisfree (Village)*, 2020 ABQB 661 at paras 108–114.

[38] Second, the very next section of the *MGA* identifies additional "grounds" that cannot be relied upon in challenging a bylaw or resolution, reinforcing the inference that the reference to "unreasonableness" in section 539 is not to a standard of review but to a basis for a challenge. Section 540 states (underlining added):

> No bylaw, resolution or proceeding of a council and no resolution or proceeding of a council committee may be challenged on the ground that
>
> (a) a person sitting or voting as a councillor
>
> (i) is not qualified to be on council,
>
> (ii) was not qualified when the person was elected, or
>
> (iii) after the election, ceased to be qualified, or became disqualified,
>
> (b) the election of one or more councillors is invalid,
>
> (c) a councillor has resigned because of disqualification,
>
> (d) a person has been declared disqualified from being a councillor,
>
> (e) a councillor did not take the oath of office,

> (f) a person sitting or voting as a member of a council committee
>
> (i) is not qualified to be on the committee,
>
> (ii) was not qualified when the person was appointed, or
>
> (iii) after being appointed, ceased to be qualified, or became disqualified,
>
> or
>
> (g) there was a defect in the appointment of a councillor or other person to a council committee.

[39] Further reinforcing the inference that the reference to "unreasonableness" in section 539 is not to a standard of review but to a basis for a challenge, in section 548(1) of the *MGA* the Legislature made explicit the standard of review on an appeal from a decision of a council under section 547 (*Gateway Charters Ltd. (Sky Shuttle) v Edmonton (City)*, 2012 ABCA 93 at para 9). Section 548(1) of the *MGA* says:

> 548(1) A person affected by the decision of a council under section 547 may appeal to the Court of Queen's Bench if
>
> (a) the procedure required to be followed by this Act is not followed, or
>
> (b) the decision is patently unreasonable.

[40] These other sections of the *MGA* all compel the conclusions that the Legislature knows how to make explicit its expectation on the standard of any court review and that the use of the word "unreasonable" in reference to a ground of review in section 539 is not about a standard of review.

[41] Third, I find it difficult to conceive that this "on the ground that it is unreasonable" wording, and the wording like it in the series of predecessor enactments to the *MGA* going back over 75 years, represents the intention of the Legislature as to the standard of review, when that "ground that it is unreasonable" type of wording entered the predecessor legislation decades before Canadian administrative law first started recognizing such categories of judicial deference, like correctness, reasonableness simpliciter and patent unreasonableness.

[42] The predecessor wording was carried over into the *MGA*, SA 1968, c 68, s 111, from the *City Act*, SA 1951, c 9, s 269. The predecessor wording remained constant in both statutes (underlining added):

> A by-law or resolution passed by a council in the exercise of any of the powers conferred and in accordance with this Act, and in good faith, is not open to question, nor shall it be quashed, set aside or declared invalid, either wholly or partly, <u>on account of the unreasonableness</u> or supposed unreasonableness of its provisions or any of them.

Prior to that 1951 statute, which consolidated into a single statute the charters of seven Alberta cities, virtually identical wording was contained in the charter statutes of both Calgary and

Edmonton (*An Act to amend The Acts and Ordinances constituting the Charter of the City of Calgary*, SA 1945, c 73, s 13, and *An Act to amend the Acts constituting The Edmonton Charter and to validate certain by-laws authorizing the borrowing of money*, SA 1936, c 106, s 12).

[43] Almost half a century later the now familiar categories of deference on judicial review developed in Canadian administrative, through cases such as *Canadian Union of Public Employees, local 963 v New Brunswick Liquor Corp*, [1979] 2 SCR 227; *Union des Employés de Service, Local 298 v Bibeault* [1988] 2 SCR 1048; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, *Dunsmuir v New Brunswick*, 2008 SCC 9 and now *Vavilov*.

[44] Fourth, this predecessor "on account of" wording, now phrased as "on the ground of", reflected the then state of municipal law, that municipal decisions were not to be challenged in court for displaying unreasonable policy choices, though other grounds of unreasonableness challenge remained permissible. The case frequently referred to as reflecting, if not leading, this change is *Kruse v Johnson*, [1898] 2 QB 91, where at pp 99-100 Lord Russell of Killowen, CJ wrote (underlining added):

> [...] I think courts of justice ought to be slow to condemn as invalid any by-laws ... on the ground of supposed unreasonableness. ... I do not mean to say that there may not be cases in which it would be the duty of the court to condemn by-laws made as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent, or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges.

[45] Fifth, more recently, as the current era of categories of judicial deference to administrative tribunals was taking shape, the law still recognized these types of permissible and impermissible challenges to bylaws based on *grounds* of unreasonableness. For example, the Supreme Court of Canada in *R v Bell*, [1979] 2 SCR 212, found that the distinction expressed in *Kruse*, between different grounds of unreasonableness, still exists. At p 223 the Court held:

> In view of the many possible inequitable applications of the definition of "family" which I have mentioned above, I am of the opinion that the by-law in its device of adopting "family" as being the only permitted occupants of a self-contained dwelling unit comes exactly within Lord Russell's words as to be found to be "such oppressive or gratuitous interference with the rights of those subject to them as

> could find no justification in the minds of reasonable men" and, therefore, as Lord Russell said, the legislature never intended to give authority to make such rules and the device of zoning by reference to the relationship of occupants rather than the use of the building is one which is *ultra vires* of the municipality under the provisions of *The Planning Act*.

[46] In *Bell* a by-law was challenged as *ultra vires* the municipality. In force at the time of the challenge was a section of *The Municipal Act*, RSO 1970, c 284, which read identically to the Alberta *MGA* then in force and as quoted above. It was at section 241(2), stating:

> A by-law passed by a council in the exercise of any of the powers conferred by and in accordance with this Act, and in good faith, shall not be open to question, or be quashed, set aside, or declared invalid, either wholly or partly, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them.

My point is simply that the term "unreasonableness" in section 539 of the *MGA* is not now, as it was not then through the middle decades of the last century, a reference to a standard of review as contemplated by *Vavilov*. I am not saying that section 539 is not *relevant* to the determination of the Legislature's intended standard of court review of a resolution or bylaw, but that it is not expressly dictating that standard. It is doing something quite different by that section.

[47] In any event, the Alberta Court of Appeal's conclusion at paragraph 19 in *Kozak*, that section 539 dictates a standard of review of correctness, is no longer binding on me. I am "to determine what standard is appropriate" by looking first to the general "holistic" framework in *Vavilov* (*Vavilov*, at para 143). Prior judicial precedents offer only "helpful guidance" on "subsidiary questions" about the appropriate standard of review (*Vavilov*, at para 143).

[48] In any event further, if I am incorrect in my interpretation of section 539, and it *is* the Legislature's attempt to signal the degree of deference to be accorded on judicial review of a municipal resolution or bylaw, it falls short of the requisite degree of explicitness described in *Vavilov*. By section 539 the *MGA* does not "explicitly prescribe" the standard of review (*Vavilov*, at paras 17, 33); it only says what is the standard is not. It lacks the "clear legislative direction" as to the standard other than reasonableness that it intends (*Vavilov*, at para 32). This is unlike other provisions in the *MGA* where the Legislature saw fit to use clear and explicit language to signal its intended standard of review. See for example, subsection 548(1) quoted at paragraph 39 above.

[49] Finally on reasonableness being the appropriate standard of review here, since the dispute between the parties is whether the City Council's interpretation of its own enactment (the Designation Bylaw) survives judicial review, it merits mention that a reasonableness standard of review is capable of protecting against an administrative decision maker interpreting statutory enactments in a manner that extends its "own authority beyond what the legislature intended" (*Vavilov*, at para 109). If that type of (potentially self-serving) statutory interpretation issue need not attract the more exacting correctness standard, then the potentially self-serving statutory interpretation here of the Designation Bylaw similarly need not attract the correctness standard.

3. Meaning of the standard

[50] What does "reasonableness" as a standard of review mean in these circumstances?

[51] A reasonableness review is characterized by both respect for the administrative decision maker and judicial restraint.

[52] From *Vavilov*, reasonableness assesses whether the decision is reasoned; it relates to the justification for the outcome. In this way, reasonableness considers both the reasoning process and the outcome. Justification, intelligibility and transparency to those affected by the decision are the hallmarks of reasonableness. The legal and factual context of a decision, and the history of the matter, constrain what will be reasonable in a given case (*Vavilov*, at paras 73–100).

[53] *Vavilov* identifies as unreasonable an administrative decision containing a fundamental flaw. It identifies two types. The first is a failure of rationality internal to the reasoning process. The second is an untenable decision in light of the factual and legal constraints (*Vavilov*, at para 101).

[54] Often the "most salient" legal constraint will be the governing statutory scheme (*Vavilov*, at para 108). As the Court says there:

> ...while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28... Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paras. 38-40.

[55] Reasonableness determinations are highly contextual. As the Federal Court of Appeal summarized at paragraph 30 of *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34, leave to appeal to SCC refused [2020] SCCA No. 183:

> [...] The Supreme Court emphasized in *Vavilov* that reasonableness is a single standard that must account for context. In its words, "the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case" (*Vavilov*, para. 89). Thus, reasonableness "takes its colour from the context" and "must be assessed in the context of the particular type of decision-making involved and all relevant factors" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, para. 59; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, para. 18 [*Catalyst*]; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770, para. 22). In other words, the circumstances, considerations and factors in particular cases influence how courts go about assessing the acceptability and defensibility of administrative decisions (*Catalyst*, para. 18; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, para. 54; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364, para. 44).

[56] Four of the contextual factors in this case are the subject of prior case law, which informs the approach to the reasonableness review in this case. First, the decision under review turned on the administrative decision makers' interpretation of a statutory enactment (the Designation Bylaw under the *MGA*). Second, the statutory enactment being interpreted is municipal legislation. Third, the decision maker is an elected governing body. Fourth, and largely as a consequence of the third, there are no formal reasons from the decision maker for the decision being challenged.

[57] Regarding the first of those four contextual factors, in reviewing a decision makers' statutory interpretation for reasonableness (see *Vavilov*, at paras 115–24) the reviewing court must not start with its own interpretation, but rather must examine the decision "as a whole, including the reasons provided by the decision maker and the outcome that was reached" (at para 116). The Court in *Vavilov* went on, in paras 118, 120–21, saying (underlining added):

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

[58] Therefore, the City Council was to interpret the Designation Bylaw with due regard to its "text, context and purpose" and I am to assume that it did (*Vavilov*, at para 118). The assumption is not dispositive, but the deferential starting point. I am then to assess the merits of City Council's interpretation for consistency with the text, context and purpose of the Designation Bylaw (*Vavilov*, at paras 120–21). The burden of persuasion is on the Applicant, who is challenging the decision maker's interpretation of the enactment.

[59] Regarding the second, the interpretation of municipal legislation calls for a broad and purposive approach (*Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231 at 244–45, *Nanaimo (City) v Rascal Trucking Ltd*, 2000 SCC 13 at para 18; *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19 at para 6; *Prairie Communities Development Corp v Okotoks (Town)*, 2011 ABCA 315 at para 23).

[60] And, of course, at section 10, Alberta's *Interpretation Act*, RSA 2000, c I-8, provides that every provincial enactment must be given a fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

[61] In *Nanaimo* the Court elaborated on the proper approach to the interpretation of municipal legislation, at paras 17–20:

> The first step is to consider the approach the courts should take when construing municipal legislation. As noted by Iacobucci J. in *R v Sharma*, 1993 CanLII 165 (SCC), [1993] 1 SCR 650, at p. 668:
>
> > . . . as statutory bodies, municipalities "may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation".
>
> The process of delineating municipal jurisdiction is an exercise in statutory construction. There is ample authority, on the interpretation of statutes generally and of municipal statutes specifically, to support a broad and purposive approach.
>
> While *R v Greenbaum*, [1993] 1 SCR 674, favoured restricting a municipality's jurisdiction to those powers expressly conferred upon it by the legislature, the Court noted that a purposive interpretation should be used in determining what the scope of those powers are. See Iacobucci J (at pp. 687-88):
>
> > As Davies J wrote in his reasons in *City of Hamilton v Hamilton Distillery Co* (1907), 38 SCR 239, at p 249, with respect to construing provincial legislation enabling municipal by-laws:
> >
> > > In interpreting this legislation I would not desire to apply the technical or strict canons of construction sometimes applied to legislation authorizing taxation. I think the sections are, considering the subject matter and the intention obviously in view, entitled to a broad and reasonable if not, as Lord Chief Justice Russell said in *Kruse* v. *Johnson*, [1898] 2 QB 91, at p. 99, a "benevolent construction", and if the language used fell short of expressly conferring the powers claimed, but did confer them by a fair and reasonable implication I would not hesitate to adopt the construction sanctioned by the implication.

> Accordingly, a court should look to the purpose and wording of the provincial enabling legislation when deciding whether or not a municipality has been empowered to pass a certain by-law . . . [A] somewhat stricter rule of construction than that suggested above by Davies J is in order where the municipality is attempting to use a power which restricts common law or civil rights.
>
> This conclusion follows recent authorities dictating that statutes be construed purposively in their entire context and in light of the scheme of the Act as a whole with a view to ascertaining the legislature's true intent. See *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27, at paras. 21-23, *M & D Farm Ltd v Manitoba Agricultural Credit Corp*, 1999 CanLII 648 (SCC), [1999] 2 SCR 961, at para. 25, and the BC *Interpretation Act*, s 8.

[62] This established body of law applicable to the interpretation of an enactment of a municipality has not been ousted by *Vavilov*. *Vavilov* has supplanted the binding effect of prior contrary court decisions applicable to determining the standard of review, but not the binding effect of other prior court decisions (at paras 143–44). This is comparable to the conclusion of the Supreme Court of Canada in *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2, where it was argued that the decision in *Dunsmuir* had "changed the law and that the traditional deferential approach to the review of municipal bylaws no longer holds" (at para 22). The Court disagreed, saying (*Catalyst*, at para 23):

> This argument misreads *Dunsmuir*. ... Here the context is the adoption of municipal bylaws. The cases dealing with review of such bylaws relied on by the trial judge and discussed above continue to be relevant and applicable. To put it succinctly, they point the way to what is reasonable in the particular context of bylaws passed by democratically elected municipal councils.

[63] Regarding the third, that the decision under challenge is the decision of a municipal council, the Supreme Court of Canada summarized the resulting approach in *Catalyst*, at paras 19–20, in the context of a challenge to the validity of a taxing bylaw (underlining added):

> The case law suggests that review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. Rather, they involve an array of social, economic, political and other non-legal considerations. "Municipal governments are democratic institutions", *per* LeBel J. for the majority in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919, at para. 33. In this context, reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.
>
> The decided cases support the view of the trial judge that, historically, courts have refused to overturn municipal bylaws unless they were found to be "aberrant", "overwhelming", or if "no reasonable body" could have adopted them (para. 80, *per* Voith J.). See *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.); *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.);

> *Lehndorff United Properties (Canada) Ltd. v. Edmonton (City)* (1993), 146 A.R. 37 (Q.B.), aff'd (1994), 157 A.R. 169 (C.A.).

[64] As I indicated near the outset of this decision (see para 11 above), here the challenge to the City Solicitor's indemnity deciding power is not to *whether* Council Members and Citizen Appointees can or should be indemnified by the City. It is not even about *whether* the City Solicitor should be making decisions about people qualifying for that indemnity and, perhaps further, having their legal expenses reimbursed. The challenge is to *how* City Council proceeded to accomplish that objective. It is not a challenge to the merits of the objective, but to the legality of how Council proceeded to realize that objective.

[65] Regarding the fourth, that the decision under challenge is a decision without formal reasons, the Court in *Vavilov* stated, at para 137:

> Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst*; *Green*; *Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision: *Baker*, at para. 44. For example, as McLachlin C.J. noted in *Catalyst*, "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw": para. 29. In that case, not only were "the reasons [in the sense of rationale] for the bylaw . . . clear to everyone", they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.

4. Scope of the review

[66] Early in these reasons for my decision (at para 3 above) I alluded to the fact that the City's response to this application appeared to construe the Applicant's challenge to be only to the Reimbursement Power. Most all of the City Brief addresses only the Reimbursement Power Amendment. At the end of an early paragraph of its Brief (Brief of the Defendant at para 11), the City says:

> The only question is whether the scope of that authority – specifically in section 2 [of 48M2000] – includes decisions relating to the payment of external legal fees as contemplated in Council Policy CC010.

The "Conclusion" paragraph of that Brief (Brief of the Defendant at para 63) similarly refers only to that issue, saying:

> This Application provides the following question for the Court to consider: whether Bylaw 48M2000 contains the necessary sub-delegation of authority relating to the payment of external legal fees contemplated in Policy CC010....

[67] Such a take on the scope of this application is somewhat defensible. First, the operative paragraph of the challenged Amendments to CC010 Policy (provided in full above at paragraph 6), that contains the two powers I defined above as the Impugned Powers, speaks in the past tense about the exercise of the Indemnity Power. It says (underlining added): "In situations in which the City Solicitor has determined that [...] should receive the benefit of these policies...". This suggests the actual determination of *whether* someone will be indemnified (which is the Indemnity Power) is not the subject of the Amendments, but rather refers to a prior decision that is a prerequisite to the City Solicitor being able to exercise the Reimbursement Power, which arguably is the only thing appearing to be done by that amendment. In other words, a challenge to the entire amended CC010 is a challenge only to what the Amendments actually do, not to everything they refer to, and they do not expressly authorize the City Solicitor to exercise the Indemnity Power. This challenge then, it might be inferred, is only to the sub-delegation of the Reimbursement Power.

[68] Second, the content of the Council Members' debate of the Amendments at their meeting does not appear to consider any proposed sub-delegation of the Indemnity Power. The Council Members did not debate that. They debated two issues in respect of the Amendments, neither of which was whether they should sub-delegate to the City Solicitor the Indemnity Power. The two issues they addressed were the Reimbursement Power and, the issue that actually dominated their comments, whether the Mayor (who excused himself from this portion of the meeting) would be *required* to solicit donations to repay the City for its earlier reimbursement of his legal expenses, incurred in his defense of an apparently controversial defamation action.

[69] Third, and relatedly, at the Council meeting the City Solicitor spoke and explained her view of the effect of the Amendments being considered. The two effects she described did not include the Indemnity Power. Her comments implied a belief that, as the City Solicitor, she *already had* the Indemnity Power and that the Amendments would just bring the City's approach to Council Members and Citizen Appointees in line with the City's process for indemnifying its employees.

[70] Fourth, the wording of the Applicant's Originating Application could be taken as challenging only the Reimbursement Power. While the Originating Application seeks a declaration that the City's Indemnification Policy CC010 is invalid "in whole or in part" (at para 15), and challenges all of that Policy "in so far as it does not comply with" the *MGA* (at para 5), the paragraphs particularizing the basis for the claim speak only of the Amendments authorizing the City Solicitor, in its sole discretion, to pay external legal expenses (see paras 9, 14) – the Reimbursement Power. It does not refer to the Indemnity Power in the paragraphs describing the particulars of the claim.

[71] However, the Applicant's Brief makes clear that the validity of both Impugned Powers is being challenged (see paragraphs 10, 72, 78–91, 102). Yet the City offered little in response, to explain how the City Solicitor had been sub-delegated the Indemnity Power, perhaps by the Designation Bylaw.

[72] This broader scope of this review, encompassing both Impugned Powers, makes sense in the circumstances, also. The two Powers are inextricably linked by both the wording of the Amendments and effect of the Amendments deleting the prior process for exercising the Indemnity power set out in the pre-Amendments Policy CC010: that City Council would decide. The Amendments delete that "Procedure" and refer to the City Solicitor having decided.

[73] Plus, the City has made the validity of the Indemnity Power the foundation for the validity of the Reimbursement Power. It resists the Applicant's challenge to the Reimbursement Power on the grounds that the same person will exercise that power for someone for whom it has already decided will benefit from the City's indemnity, that is, a person for whom the Indemnity Power has been exercised validly. That decision, the City says, will have been made pursuant to the Designation Bylaw, by the City Solicitor. In this way, according to the City's argument, the Indemnity Power being validly exercised is a precondition to the Reimbursement Power.

[74] Therefore, the scope of this review properly and clearly encompasses the validity of both Impugned Powers.

5. Conducting the Review

[75] Having reviewed the Amendments resolution in the manner described above, to ascertain whether the Applicant has shown it to be unreasonable, I conclude that (i) the Reimbursement Power is *intra vires* the Designation Bylaw, but only if the Indemnity Power upon which it relies is valid; and (ii) the Indemnity Power upon which it relies is not valid in so far as it is *ultra vires* the Designation Bylaw. I will first address my second conclusion, that the Indemnity Power is *ultra vires* the Designation Bylaw.

[76] The Designation Bylaw does not meet the requirements of the *MGA* for it to validly sub-delegate the Indemnity Power to the City Solicitor.

[77] The City is a delegate of public powers. It received them from the Legislature, largely by the *MGA*, including the Impugned Powers that are at issue. The Impugned Powers involve the exercise of broad unfettered discretion on matters of significance. Therefore, the City may only sub-delegate them in accordance with express statutory authority to sub-delegate them (*Baker*, at paras 87–90).

[78] Express statutory authority to sub-delegate such powers to the City Solicitor, as a designated officer, exists. The *MGA* says, at subsection 210(1):

> A council may by bylaw establish one or more positions to carry out the powers, duties and functions of a designated officer under this or any other enactment or bylaw.

[79] However, any such sub-delegation must expressly identify the powers, the duties, and the functions being sub-delegated. Sub-section (3) of section 210 says:

> The bylaw must include which of the powers, duties and functions referred to in subsection (1) are to be exercised by each position.

[80] Therefore, for the Designation Bylaw to validly sub-delegate the Indemnity Power to the City Solicitor, it had to specify so. It does not. The Designation Bylaw does not expressly state or in any other way "specify" that the Indemnity Power is being sub-delegated to the City Solicitor.

[81] The preamble to the Designation Bylaw expressly acknowledged this obligation to specify all powers being sub-delegated, saying:

> WHEREAS Section 210 of the [*MGA*] allows Council to create positions of designated officer and specify the powers, duties and functions of that officer;

And the operative section of the Designation Bylaw, section 2, uses the same phrase:

> The City Solicitor and General Counsel shall have the following powers, duties and functions:

The reasonable inference is that the City Council passing the Designation Bylaw understood the legislative requirement that to be a valid sub-delegation, the "powers, duties and functions" being sub-delegated had to be specified. The only reasonable inference from the Designation Bylaw not mentioning the Indemnity Power is that City Council did not intend to, and did not in fact, sub-delegate it to the City Solicitor.

[82] The Alberta Court of Appeal said in *Kozak*, at paragraph 16:

> [...] In general, when faced with a question of *vires*, the reviewing court must determine whether the subordinate enactments were authorized by the enabling legislation: *Katz Group Canada Inc. v Ontario (Health and Long Term Care)*, 2013 SCC 64 at paras 24-28....

Here the subordinate enactment, the Designation Bylaw, is not authorized by the enabling legislation, the *MGA*, in so far as thinking it sub-delegated the Indemnity Power to the City Solicitor.

[83] Further, if the Designation Bylaw already sub-delegated the Indemnity Power to the City Solicitor, then all the decisions *prior* to the Amendments by the City Council exercising the Indemnity Power – on whether the City would indemnify Council Members or Citizen Appointees – would appear to have been invalid. The *MGA* at s 201(2) states:

> A council must not exercise a power or function or perform a duty that is by this or another enactment or bylaw specifically assigned to the chief administrative officer or a designated officer.

[84] The City says its bylaws need not "identify every specific grant of authority that is delegated to them." It says that this enables modern municipalities "to address the diverse issues they face." It says this is consistent with the intention of the Legislature in the *MGA*:

> ... to empower municipalities to manage and decide a wide variety of local issues without being unduly restricted in how such powers are granted and delegated. It also allows municipalities to pass a broad range of bylaws as part of their internal

governance, which necessarily requires the appropriate indemnities to Council members and Committee volunteers.

[85] Still elsewhere the City argued (Transcript of Application Hearing, pm, p 26, ll 24 – 30):

> They suggest, the applicant, that because it's not mentioned, therefore there's no authority to subdelegate. We submit it is covered within the broad scope and authority of the bylaw, and that what the applicant seems to be suggesting is that we needed, you know, a 26-page bylaw, trying to list every possible thing that the solicitor -- city solicitor might be asked to do in the course of her proceedings or her duties. With respect, we submit that's not a reasonable interpretation and we will get to that in a moment.

[86] I agree that the City need not expressly identify every specific application of the powers it sub-delegates, in order to enable the delegee to address the diverse issues that may arise in future. But the *MGA* does not require, mention of every possible *application of* a sub-delegated power, duty and function. It just requires the powers, duties and functions be expressly specified. Deciding *whether* the City will indemnify a Council Member or a Citizen Appointee is not a possible application of the powers listed in the Designation Bylaw; it is a wholly different power.

[87] In *Vavilov* the Court said, at para 68 (underling added):

> Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker — perhaps limiting it to one. Conversely, where the legislature has afforded a decision maker broad powers in general terms — and has provided no right of appeal to a court — the legislature's intention that the decision maker have greater leeway in interpreting its enabling statute should be given effect. Without seeking to import the U.S. jurisprudence on this issue wholesale, we find that the following comments of the Supreme Court of the United States in *Arlington*, at p. 307, are apt:
>
> > The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decision-making that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where [the legislature] has established a clear line, the agency cannot go beyond it; and where [the legislature] has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to puzzle over whether the interpretive question presented is "jurisdictional" . . ..

[88] Here the Legislature established clear requirements if City Council wished to sub-delegate the Indemnity Power to a designated officer such as the City Solicitor. The City Council's interpretation of the Designation Bylaw, that it sub-delegated to the City Solicitor the Indemnity Power, was not reasonable because it was not made express or in any other way was it specified. Further adding to the unreasonableness of its interpretation, the interpretation was entirely inconsistent with City Council's apparent practice; it continued to exercise that discretion themselves after enacting the Designation Bylaw until the time of the Amendments resolution.

[89] Now I turn to my first conclusion, the Reimbursement Power is *intra vires* the Designation Bylaw, but only if the Indemnity Power upon which it relies is valid. The City says that a broad and purposive interpretation of the Designation Bylaw reasonably implies, entails, or otherwise includes within its scope, both the Impugned Powers. I disagree with respect to the Indemnity Power but agree conditionally with respect to the Reimbursement Power.

[90] The text and purposes of the *MGA* connote the delegation of broad powers to municipalities like the City of Calgary, but also connote the controlled and careful limitation around any further sub-delegating of those powers by such municipalities.

[91] The context of the Amendments includes the impetus for the Amendments. These were described by the Member of Council (Pootmans) introducing the Motion following an in-camera "legal briefing", who said:

> This Notice of Motion arises as a consequence of negotiations with the Integrity Commissioner and the Ethics Advisor as to liabilities that appropriately were considered as part of the negotiations with City Council and in particular the City Solicitor and the Mayor's office. Subsequently, we've realized that other dimensions should be included and, in particular, if external fees have been paid as a consequence of litigation or suits against Members of Council, that in fact there should be reimbursement for those fees.

[92] The minutes of the meeting state that the motion was urgent, though without speculating it is not apparent why.

[93] During the debate on the Motion, the City Solicitor explained that a recent policy review revealed an inequity in approach to reimbursing legal expenses between indemnified employees and indemnified Council Members and Citizen Appointees. The proposal was designed, the City Solicitor said, to bring the process for legal expenses reimbursement of indemnified Council Members and Citizen Appointees in line with the process for legal expenses reimbursement of indemnified City employees.

[94] Concurrently, regarding the context of the Amendments, the Mayor had recently settled a defamation suit against himself and the reimbursement of his legal expenses was both controversial and top of mind. The relevance of that is only that the Council's debate was largely directed at that part of the Amendments (that are not challenged in this application), not the Impugned Powers.

[95] A few comments were directed toward the Impugned Powers, but not so significantly that they might inform what were City Council's reasons for its statutory interpretations and decisions. If anything, they only suggest the Council Members did not all have the same understanding of

the status quo. Member of Council Keating spoke in opposition to the City Solicitor acquiring responsibilities for decisions of such magnitude, appearing to believe the City Solicitor had neither of those powers. Following his comments, no one present, including the City Solicitor, endeavoured to correct Member Keating. When Member of Council Chabot spoke, he revealed the opposite understanding, that the City Solicitor already decided whether or not a Member of Council or Citizen Appointee would receive the benefit of the indemnity policy, but that it was City Council who would decide whether that person's legal fees would be reimbursed. The City Solicitor in her comments indicated a similar understanding.

[96] I accept the comments of Counsel for the City in accurately describing the process existing before the Amendments, though of course this does not inform what might be inferred from the Record of Proceedings as to what was City Council's understanding. Counsel for the City said (Transcript of Application Hearing, pm, p 31, ll 33 – 40 and p 32 ll 24 – 26):

> The change to the policy, I think, is twofold. One, it outlines who makes the decision. Is it the City solicitor or does Council retain that? The second decision -- and it informs, I think, the majority of the debate, -- … has to do with fundraising.
>
> […]
>
> Before the policy was amended, the policy provided that the City solicitor would provide a report or I think the law department would provide a report to Council and that Council would make that decision.

The Amendments to Policy CC010 bear this out. The pre-Amendments "Procedure" stated that a Member of Council being sued as a result of carrying out duties as a Council Member in good faith had "the right to bring the matter before Council to seek payment of legal costs". It then described the process for doing so, culminating in a motion before Council in a meeting open to the public.

[97] Despite this acknowledgement by its counsel, however, the City took the position that the Amendments did not change *who* had the power to make such decisions, just the *process* for such decisions.

[98] I disagree that a broad and purposive interpretation of the Designation Bylaw reasonably implies, entails, or otherwise includes within its scope, the Indemnity Power. A broad and purposive interpretation is not license to read into an enactment whatever might be needed at the time or whatever one might wish. The interpretation must still be anchored in the purposes of the enactment. The Indemnity Power is not anchored in the purposes of the Designation Bylaw. As the Supreme Court of Canada put it in *114957 Canada Ltée (Spraytech, Société D'Arrosage) v Hudson (Town)*, 2001 SCC 40 at para 49: "Interpretation may not supplement the absence of power."

[99] The concept of indemnity is completely different than the things described in the Designation Bylaw. Indemnity means to protect another from loss or to compensate them for a loss. Nothing of that sort is mentioned in the powers sub-delegated to the City Solicitor in the Designation Bylaw. The Designation Bylaw empowers the City Solicitor using the words to "initiate, prosecute, maintain or defend", "to settle", and "to report". These are of an entirely different class of actions than "to indemnify". They are about the conduct *of* litigation whereas indemnity relates to liability *for* litigation. These are about the manner in which someone

participates in a legal process, deciding or directing strategy *during*, whereas to indemnify is about redressing the substantive consequences *of* such a process.

[100] The words "to retain" do reasonably entail the payment of the legal expenses; it is not speaking just of deciding whom to retain but is phrased generally enough to reasonably imply 'to engage by payment'. This though is still about the legal process, not a backstop for the legal liability about which legal process has commenced. It is akin to where an insurer has a duty to defend and pays for that defence, but may still reserve the right to deny coverage to the insured (that is, to deny any obligation to indemnify the insured).

[101] Sub-section 25(2) of the *Interpretation Act* speaks of implied powers, saying:

> If in an enactment power is given to a person to do or enforce the doing of any act or thing, all other powers that are necessary to enable the person to do or enforce the doing of the act or thing are deemed to be given also.

The Indemnity Power is not a power necessary to enable the City Solicitor to do any of the things that are expressly sub-delegated in the Designation Bylaw (initiate, prosecute, maintain, defend, settle, retain, report).

[102] The City says the Designation Bylaw was drafted in a broad and inclusive manner, extending in scope to all claims or proceedings that may involve the best interests of the City. The City says it was "drafted to be comprehensive and includes the defence of actions commenced against City Council members, City employees, as well as citizen appointees to municipal boards, commissions, authorities and committees."

[103] The phrase "in the best interest of The City of Calgary" (2 B, Designation Bylaw) and "in the best interests of The City of Calgary" (2 C, Designation Bylaw) both refer to a criterion for the City Solicitor's exercise of the litigation process strategy power, they do not sub-delegate more powers. The phrase in each instance sets parameters of limitation around *how* the litigation process strategy power must be exercised. That phrase does not broaden the City Solicitor's litigation process strategy power to enable the City Solicitor thereafter to do *anything* that is in the City's best interests or even anything associated with law suits, or the legal liability of anyone, just because it is perceived to be in the City's bests interests to do so. It only qualifies how the City Solicitor may exercise the litigation process strategy discretion.

[104] The list of sub-A through D in section 2 of the Designation Bylaw is prefaced with: "The City Solicitor and General Counsel shall have the following powers, duties and functions:". Absent is the word "includes", which would signal that A through D do not comprise an exhaustive list of the "powers, duties and functions" sub-delegated. Nor are there any words suggesting there are other powers 'of the same kind' that were sub-delegated, by operation of the *ejusdem generis* principle, such as terminating words like "or any other such action". Even if there were such terminating words, for my reasons above that 'indemnity' is not of the same type as 'initiate, defend, settle, etcetera', those words would not avail a reasonable interpretation that 'indemnity' is within that class, or even 'deciding who would be indemnified' is within that class. See, for example, *Nanaimo*, at paras 16, 21–22. There the Court held, at paragraphs 21–22:

> It is my opinion that the legislature, by including the phrase "or other matter or thing", did not intend to expand the scope of s. 936 to allow municipalities to declare almost anything to be a nuisance. I accept the respondent's submission that to construe that phrase as creating a third class of potential nuisance would effectively negate the purpose of including rather specific preceding language.
>
> The phrase "or other matter or thing" extends the two classes of nuisances outlined before it, that is constructed or erected things, and watercourses. This interpretation follows from both a purposive interpretation and the application of the *ejusdem generis* limited class rule. …

[105] I agree that a broad and purposive interpretation of the Designation Bylaw reasonably implies, entails or otherwise includes within its scope, the Reimbursement Power. This conclusion is premised upon the assumption that, as the wording of the Amendment implies, that there has been a prior determination that the affected Council Members or Citizen Appointee shall be indemnified by the City and that that prior determination was made validly. In such case I do not find it to be an unreasonable for the City Council to interpret their Designation Bylaw as having already delegated to the City Solicitor the power to authorize payment of external legal expenses. A reimbursement of all amounts causally connected to a covered loss is often the result of fulfilling an obligation to indemnify for such losses. Legal costs are causally connected.

[106] Where the City has already validly determined that a Council Member or Citizen Appointee shall be indemnified, it is not unreasonable to interpret that to mean, and encompass, for the costs of the associated legal process also.

[107] Where the City has already sub-delegated to the City Solicitor the power to settle "any action, claim or other proceeding" up to $250,000 (para 2 B of the Designation Bylaw), it is not unreasonable to interpret 'any … claim' as including claims for reimbursement of legal expenses by an indemnified Council Member or Citizen Appointee.

[108] Where the City has already sub-delegated to the City Solicitor the power to retain outside counsel (2 C of the Designation Bylaw) for an indemnified Council Member of Citizen Appointee, it is not unreasonable to interpret that as including authorizing reimbursement of resulting charges that reasonably comply with the terms of that retainer.

[109] It was unreasonable for the City Council, in passing the Amendments resolution, to conclude that the Indemnity Power was previously sub-delegated to the City Solicitor by implication of or within the scope of the Designation Bylaw. If, however, the Indemnity Power was previously sub-delegated to the City Solicitor by some other enactment, then it was not unreasonable for the City Council, in passing the Amendments resolution, to conclude that the Reimbursement Power was sub-delegated to the City Solicitor in the Designation Bylaw. Therefore, under that scenario, City Council passing by resolution the Reimbursement Power Amendment was not unreasonable.

6. Implications of the Review

[110] The City's position on this judicial review, that Council interpreted the Designation Bylaw as sub-delegating both Impugned Powers to the City Solicitor, is an interpretation that is simply

not tenable. It is not a reasonable interpretation of that Bylaw, in the context of the *MGA*, that it sub-delegated the Indemnity Power.

[111] Only if the Designation Bylaw does so, or some other bylaw delegates the Indemnity Power to the City Solicitor, is the City's position that the Designation Bylaw sub-delegates to the City Solicitor the Reimbursement Power reasonable.

[112] I have held that the Designation Bylaw does not do so. I find the City Council's interpretation of the Designation Bylaw to be untenable in light of the legal constraints in the *MGA* and in any event more generally. I therefore find its decision to be "an untenable decision in light of the factual and legal constraints", to use the words of *Vavilov* at paragraph 101. It was not a reasonable interpretation by the City Council, in passing the Amendments resolution, to conclude that the Indemnity Power had been previously specified in the sub-delegation to the City Solicitor by the Designation Bylaw.

[113] However, I also expressed the apprehension that the City may not have properly understood the scope of this review (see paras 66 to 74 above). It remains theoretically possible that had the City understood the full scope of the requested review, it may have relied upon other bylaws or other enactments to answer the challenge to the validity of the Indemnity Power – to offer some other basis to show the Indemnity Power had been sub-delegated to the City Solicitor prior to the Amendments to CC010.

[114] While I doubt there to be such other valid source for the Indemnity Power vesting in the City Solicitor, it does remain theoretically possible one exists. Further, the potential effects of this ruling are far-reaching. Therefore, fairness warrants that I defer the effective date of my granting of this judicial review for 30 days from the date of release of this decision. Unless within that time the City produces, by filing with the Court and serving on the Applicant, proof of sub-delegation of the Indemnity Power to the City Solicitor by bylaw or other enactment that came into effect prior to March 14, 2016, this decision shall take effect on the 31st day following the date of release of this decision.

[115] Mr. Terrigno asks that I declare the entire Amendments resolution invalid. He says the validity of the reimbursement payment mechanism "is a critical and integral element" to its entirety. He says "[t]he rest of the resolution cannot stand on its own or work without it."

[116] He has not satisfied me that is so. In my view, situations are conceivable in which the remaining parts of the resolution can viably stand on their own without the impugned portion (quoted at paragraph 6 above).

[117] In any event, such broad relief exceeds the scope of the application, is not necessary to dispose of the application, and was not the focus of submissions by the parties, therefore I am not prepared to accede to this request. As the Applicant acknowledges (Brief of the Applicant at para 102), it is not the Court's role to "figure[e] out how the procedure section should be replaced".

Conclusion

[118] Upon review I grant the application, declaring the portion the Amendments resolution repeated at paragraph 6 above to be *ultra vires* and therefore invalid.

[119] This decision shall take effect on the 31st day following the date of this decision, unless prior to that date the City files with the Court and serves on the Applicant proof of valid sub-delegation of the Indemnity Power to the City Solicitor by bylaw or other enactment that took effect prior to March 14, 2016.

Heard on the 4th day of December, 2020.
Dated at the City of Calgary, Alberta this 15th day of January, 2021.

P.R. Jeffrey
J.C.Q.B.A.

Appearances:

Mike Terrigno, Self Representing Applicant, and
John M. Keyes, Professor of Law, University of Ottawa
for the Applicant

Henry Chan, City of Calgary Law Department
for the Respondent