PRINCE EDWARD ISLAND REGULATORY & APPEALS COMMISSION

BETWEEN:

1349856 CANADA INC.

APPELLANT

AND:

CITY OF CHARLOTTETOWN

RESPONDENT

SUBMISSIONS ON JURISDICTION ON BEHALF OF THE APPELLANT, 13498956 CANADA INC.

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SUBMISSIONS ON JURISDICTION ON BEHALF OF THE APPELLANT, 13498956 CANADA INC.

1. The Commission has requested submissions on the matter of its jurisdiction over the appeal in this matter.

I. LAW

2. The Commission is authorized by s. 28(1.1) of the *Planning Act*, R.S.P.E.I. 1988, Cap. P-8 (the "*Planning Act*") (Tab 2) to hear appeals from:

> a decision of a council of a municipality
>
> (a) that is made in respect of an application by a person under a bylaw for
>
> i. a development permit,
>
> ii. an occupancy permit, in relation to a matter under this Act or the regulations,
>
> iii. a preliminary approval of a subdivision,
>
> iv. a final approval of a subdivision
>
> (b) or to adopt an amendment to a bylaw, including
>
> i. an amendment to a zoning map established in a bylaw, or
>
> ii. an amendment to the text of a bylaw.

3. In *Miltonvale Park v. IRAC & O'Halloran*, 2017 PECA 23 (Tab 3), the majority of the Court of Appeal held that the Commission acted beyond its statutory authority given by s.28 (1.1) in determining the validity of provisions contained in a development agreement.

4. The minority, however, held that the Commission's interpretation of its enabling statutes and ruling was reasonable.

II. APPELLANT'S POSITION

5. Judicial review is a discretionary remedy. The Supreme Court of Canada has held that when there is an adequate alternative remedy available but not pursued by an applicant for judicial review, courts ought to deny the application (as elaborated in *Strickland v. Canada (Attorney General)*, 2015 SCC 37) (Tab 4).

6. The Appellant has initiated both this appeal with the Commission and an application for judicial review with the Supreme Court of Prince Edward Island to ensure it receives relief from the unreasonable decision made by a senior employee of the City of Charlottetown. Under the law as stated by the Supreme Court of Canada, the Appellant has a duty to pursue any potential adequate alternative remedies in order to ensure judicial review remains available.

7. The Commission has expressed concern with its jurisdiction in this matter and the Appellant shares that concern. The Appellant has indicated that it is content to proceed with judicial review, so long as the Respondent agrees not to argue that there is an adequate

alternative remedy available. In the absence of such an agreement, the Appellant seeks a ruling from the Commission as to whether or not it has jurisdiction to deal with the appeal. If the Commission holds it does not have jurisdiction, our client will proceed with its judicial review application as there clearly will not be an adequate alternative remedy.

DATED at Charlottetown, Queens County, Prince Edward Island this 5th day of June, 2024.

ORIGINAL SIGNED BY
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(i) the quality of life of persons residing in the neighbourhood affected by the decision,

(ii) the natural environment in the community affected by the decision, or

(iii) features, structures or sites having significant cultural or recreational value in the community affected by the decision; or

(f) an organization, the majority of whose members are individuals referred to in clause (d). *2023,c.31,s.18.*

28. Appeals from decisions of Minister

(1) Subject to subsections (1.2) to (4), an aggrieved person may appeal, by filing a notice of appeal with the Commission, a decision of the Minister made in respect of an application for

(a) a development permit;

(b) a preliminary approval of a subdivision or a resort development;

(c) a final approval of a subdivision;

(d) the approval of a change of use; or

(e) any other authorization that the Minister may grant or issue under the regulations.

Appeals from decisions of council

(1.1) Subject to subsections (1.2) to (1.4), an aggrieved person may appeal, by filing a notice of appeal with the Commission, a decision of a council of a municipality

(a) that is made in respect of an application by a person under a bylaw for

(i) a development permit,

(ii) an occupancy permit, in relation to a matter under this Act or the regulations,

(iii) a preliminary approval of a subdivision, or

(iv) a final approval of a subdivision; or

(b) to adopt an amendment to a bylaw, including

(i) an amendment to a zoning map established in a bylaw, or

(ii) an amendment to the text of a bylaw.

"bylaw"

(1.2) In subsection (1.1) and subsection (1.4) "**bylaw**" means a bylaw made under this Act.

Notice of appeal and time for filing

(1.3) A notice of appeal must be filed with the Commission within 21 days after the date of the decision being appealed.

Council decision that requires Minister's approval

(1.4) For greater certainty, the 21-day period for filing a notice of appeal under this section commences on the date that the council gave final reading to the amendment to the bylaw.

Elimination of appeal when development approved under *Environmental Protection Act*

(2) Where the Lieutenant Governor in Council has by order declared that

(a) a development for which approval is required under the *Environmental Protection Act* has met all the requirements of that Act and written approval has been given;

(a.1) a development for which approval is required under the *Water Act* has met all the requirements of that Act and written approval has been given; and

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Miltonvale Park (Community) v. Prince Edward Island (Island Regulatory and Appeals Commission)

Prince Edward Island Judgments

Prince Edward Island Court of Appeal

Charlottetown, Prince Edward Island

D.H. Jenkins C.J.P.E.I., M.M. Murphy and J.K. Mitchell JJ.A.

Heard: September 26, 2017.

Judgment: December 15, 2017.

Docket: S1-CA-1353

Registry: Charlottetown

[2017] P.E.I.J. No. 49 | 2017 PECA 23 | 2017 CarswellPEI 70 | 287 A.C.W.S. (3d) 371 | 69 M.P.L.R. (5th) 1

Between Community of Miltonvale Park, Appellant, and Island Regulatory and Appeals Commission and Phillip O'Halloran, Respondents

(122 paras.)

Counsel

Jonathan M. Coady, counsel for the Appellant.

John W. Hennessey, Q.C., counsel for the Respondent, Island Regulatory and Appeals Commission.

Matthew J.W. Bradley, counsel for the Respondent, Phillip O'Halloran.

Reasons for judgment

Reasons for judgment were delivered by M.M. Murphy J.A. Separate concurring reasons were delivered by J.K. Mitchell J.A. Separate dissenting reasons were delivered by D.H. Jenkins C.J.P.E.I.

M.M. MURPHY J.A.

1 The appellant, the Community of Miltonvale Park ("Miltonvale") appeals a decision of the Island Regulatory and Appeals Commission ("Commission") dated March 16, 2017. The Commission granted a developer's request for implementation pursuant to s.28(11) of the ***Planning Act***. It ordered Miltonvale Park to issue a development permit to the land developer, Phillip O'Halloran ("Mr. O'Halloran").

Background

2 Mr. O'Halloran applied for a development permit to place fill on his property. Two applications were denied by Miltonvale in 2014. Mr. O'Halloran appealed these decisions to the Commission. In June 2015 the Commission allowed the appeal and quashed the decisions of Miltonvale to deny a development permit. The first decision in 2015 and order specified that Miltonvale "*is ordered to issue a development permit for the placement of fill to the appellants, effective for the 2015 year.*" (Order LA15-05)

3 In its Reasons, the Commission stated that Miltonvale "*may attach reasonable and relevant conditions to such permit or may require a development agreement setting out reasonable and relevant terms.*"

4 Miltonvale did not appeal from this order.

5 The parties attempted to negotiate the terms and conditions of the development agreement but were unable to reach an agreement. In August 2016 Mr. O'Halloran wrote to the Commission requesting "*enforcement*" and "*implementation*" of its earlier order. Miltonvale responded there was no basis for implementation of the order because Miltonvale did not fail to implement the order; the Commission order was for a specific time, being the 2015 year, which has since lapsed; and, the zoning and development bylaw under which the Commission Order was made has since been repealed and substituted. Miltonvale advised that the lack of agreement was not a failure attributable to it, and in fact there was no correspondence from the developer between September 2015 and April 2016. Miltonvale informed the Commission that Mr. O'Halloran had refused to submit an application in 2016 under the new planning and zoning bylaw.

6 In November 2016 the Commission invited written submissions as to what Miltonvale and Mr. O'Halloran considered "*reasonable and relevant terms*" to a permit or development agreement and advised that following receipt of submissions, it would decide if a full hearing was necessary. The parties made submissions. The Commission decided that a full hearing was not necessary. The Commission considered the written submissions and then made the following findings:

i) the order sought to be implemented is Order LA15-05 (June 16, 2015) issued by the Commission pursuant to s.28(8) of the ***Planning Act***;

ii) Mr. O'Halloran initially sought a development permit pursuant to s.4.1.1 of the Community Zoning and Subdivision Control (Development) Bylaw 2013 which permits Miltonvale to impose conditions and require any applicant to enter into a Development Agreement;

iii) Miltonvale did not issue a development permit with conditions, but instead proceeded to propose a development agreement first, and this approach was a reversal of the sequence of events as contemplated by its 2013 Bylaw. This effectively rendered Order LA15-05 of no practical force or effect and by extension, would negate the ability of Mr. O'Halloran to seek an implementation order;

iv) The repeal of Miltonvale's 2013 Bylaw did not prevent the Commission from implementing Order LA15-05 because Mr. O'Halloran had a vested right to a development permit subject to such conditions as Miltonvale decided to impose, subject to the conditions being consistent with the Bylaws of its Official Plan;

v) The reference in Order LA15-05 to the 2015 year is not material to the nature of the permit sought and, as such, does not preclude the Commission from making an order of implementation because (1) Order LA15-05 referred to the 2015 year because that was the year in which it was issued "*and the effect of the order would extend into 2016*"; (2) the request for implementation is, in effect, a continuation of the appeal process which began in 2014, and the calendar year is not material to the nature of the permit sought "*What is material is that the Appellants be entitled to place fill on property which they own*;" and (3) the Community position on the "*2015 year*" would effectively neuter Mr. O'Halloran's right of appeal under the ***Planning Act***, *R.S.P.E.I. 1988, Cap. R-8*;

The Commission could direct what would comprise reasonable and relevant conditions, not to dictate the terms of a development agreement, but to exercise its appellate authority to supervise a Council decision made pursuant to the ***Planning Act***. In view of s.6(1) of the ***Island Regulatory and Appeals Commission Act***, *R.S.P.E.I. 1988, Cap. I-8*, the Commission has the "*implied and incidental*" power to enforce its order by determining what are reasonable and relevant terms to impose on the development permit. The Commission found that five conditions that applied to an earlier permit, plus two additional terms acceptable

to Mr. O'Halloran would be reasonable and relevant, but that three other terms or conditions proposed by the Community which dealt with costs and arbitration were not.

vi) The Commission concluded that an Order would follow implementing Commission Order LA15-05 directing Miltonvale to forthwith issue to Mr. O'Halloran a development permit to be in effect for a period of one year commencing May 1, 2017, and subject to the terms it described and found to be reasonable and relevant.

7 Section 28(10) of the ***Planning Act*** requires a community to implement the order of the Commission. The authority for the Commission to implement an order where the community has not done so, as ordered, is found in s.28(11) of the ***Planning Act***:

> 28.(11) Where the council or the Minister, as the case may be, fails to implement an order made under subsection (8), the Commission, on its own initiative or the initiative of an interested person, may act in the name of the council or the Minister to implement the order.

8 Miltonvale appeals to this Court from the order for implementation pursuant to s.13(1) of the ***Island Regulatory and Appeals Commission Act*** from Order LA17-01, dated March 16, 2017:

> 13.(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.

9 In its Notice of Appeal Miltonvale set out its grounds of appeal in general terms:

(a) the Commission breached its duty of procedural fairness;

(b) the Commission made errors of law and jurisdiction by:

(i) failing to properly exercise the authority conferred by the ***Planning Act***, R.S.P.E.I. 1988, c. E-4;

(ii) failing to properly interpret the applicable bylaw and other applicable legislation;

(iii) acting beyond the authority conferred by the ***Planning Act, supra***;

(c) ***Planning Act, supra***, and related regulations;

(d) ***Island Regulatory and Appeals Commission Act, supra;*** and

(e) such further and other grounds as counsel for the Appellant may advise in a timely manner upon review of the record and the Court of Appeal may permit.

10 Miltonvale restated its grounds of appeal in its factum at para.25 in terms of these six issues:

> 25. The appeal raises a number of issues of procedural fairness, law, and jurisdiction. Miltonvale submits that:
>
> (a) the Commission breached its duty of procedural fairness by failing to provide adequate notice and/or by deciding the matter in writing;
>
> (b) the Commission erred in law by reconsidering its earlier decision and not exercising its authority in accordance with s. 28(11) of the ***Planning Act***;
>
> (c) the Commission erred in law by applying a bylaw that had been repealed and replaced and/or by failing to properly interpret the ***Interpretation Act***;
>
> (d) the Commission erred in law by imposing conditions on a permit pursuant to a repealed bylaw and/or without regard to the proper legal principles;
>
> (e) the Commission erred in law by finding that the developer had a vested right when any such right was effective only for a certain time, conditional upon a future event, and/or subject to an exercise of discretion; and
>
> (f) the Commission erred in law and/or acted beyond its jurisdiction when it determined the validity of provisions contained in the development agreement.

11 Mr. O'Halloran asserts that the grounds of appeal contained in Miltonvale's factum are drastically different than those set out in the Notice of Appeal and as a result offends Rule 61.06(2):

> **Argument Limited to Grounds Stated**
>
> 61.06(2) No grounds other than those stated in the notice of appeal or cross-appeal or supplementary notice may be relied on at the hearing, except with leave of the court hearing the appeal.

12 Mr. O'Halloran's complaint is that the Notice of Appeal does not allow him to respond to the case to be met.

13 All of these issues are within the rubric of the grounds stated in general terms in the Notice of Appeal.

Standard of review

14 The standard of review on this appeal is reasonableness except for the procedural fairness issue.

15 The Commission acting as a tribunal is exercising statutory authority. Its power to act must be found in the statute. In this instance, the Commission was acting in furtherance of its authority as the appeal tribunal for land use planning matters. The authority of the Commission is determined by interpreting and applying s.28(11) of the ***Planning Act***. The role of this Court is to review the Commission's interpretation and application of that section of the ***Act***. This review is to be performed on the standard of reasonableness (***Charlottetown (City) v. Island Regulatory and Appeals Commission***, 2013 PECA 10, para.30).

16 The standard of review applicable to the issues of procedural fairness is best described "*as simply a standard of 'fairness'*" (***Seaspan Ferries Corp. v. British Columbia Ferry Services Inc.***, 2013 BBCA 55, at para.52). This Court reviewed the common law concept of procedural fairness in ***Summerside v. Maritime Electric et al.***, 2015 PECA 1, at paras.88-92. The Court made a statement, at para.89, that, in the exercise of public powers, administrative decision makers should act fairly in coming to decisions that affect the interests of individuals. The court said that fairness requires that a party who will be affected by a decision have an opportunity to make representation. To do that, the party must first be informed of the case to be met.

17 A tribunal is at liberty to choose its own procedures as long as those procedures are consistent with statutory requirements and are fair. On review it is necessary to determine whether the procedures used by the tribunal conformed with the requirements of procedural fairness. In making that determination the court does not owe deference to the tribunal's own assessment that its procedures were fair. However, where a court concludes that the procedures met the requirements of procedural fairness, it will not interfere with the choice of procedures of the tribunal.

Issue 1: Did the Commission breach its duty of procedural fairness?

18 I share the view with Chief Justice Jenkins with respect to the issue of procedural fairness; however, I would supplement it with the following reasons: Miltonvale asserts that the Commission breached its duty of procedural fairness by:

i) failing to provide adequate notice;

ii) failing to disclose the issues or the case to be met; and

iii) by deciding the matter without a hearing.

19 Mr. O'Halloran submits as there was no new decision being appealed but instead a request for implementation of the June 16, 2015 order, the matter could only be a continuation of the earlier appeal, and the Commission did not need to provide notice; that the Commission exceeded its duty by inviting written submissions from the parties as to whether the Commission should exercise its discretion pursuant to s.28(11) of the ***Planning Act*** to implement the 2015 Order; that s.8(b) of the ***IRAC Act*** provides the Commission with the ability to decide all matters of

procedure; the wide authority and discretion granted to the Commission by the statutory scheme to establish its own process and procedures requires a significant amount of deference to be allowed to the procedures followed; neither party requested a hearing in their written submissions; and, Miltonvale did not raise any objection to the lack of an oral hearing.

20 Mr. O'Halloran also argues that since this was not an appeal of a decision by Miltonvale but instead, a request to correct the inaction of Miltonvale to have the June 16, 2015 Order implemented, Miltonvale had no legitimate expectation to be heard.

21 Finally, Mr. O'Halloran submits that Miltonvale's complaint that the Commission did not follow its regular procedure for an appellate review of a decision of a municipality is without merit. He asserts that as the Commission was not performing a review of a decision of Miltonvale, it had no legitimate expectation that the same procedures would be followed for appellate review of a decision of a municipality.

22 When it comes to procedural fairness, as stated in both ***Maritime Electric*** and ***Seaspan Ferries***, a reviewing court must be satisfied that the procedure was fair. In ***Baker v. Canada (Minister of Citizenship and Immigration)***, *[1999] 2 S.C.R. 817*, at paras.21-27, the non-exhaustive factors to be considered in a determination of whether a procedure meets the requirements of fairness are:

i) the nature of the decision being made and the process followed in making it;

ii) the nature of the statutory scheme and the terms of the statute pursuant to which the tribunal operates;

iii) the importance of the decision to the individual or individuals affected;

iv) the legitimate expectations of the person challenging the decision;

v) the choice of the procedure made by the tribunal, particularly where the statute leaves that choice to the tribunal.

23 The Commission did not receive and decide the request for implementation in a vacuum. It occurred in the aftermath of the appeal and Order LA15-05 - June 16, 2015, the consequence of which was an order to issue a development permit to Mr. O'Halloran for the 2015 year.

24 In analyzing and applying the factors in ***Baker***, the first one being the nature of the decision being made and the process employed, I am of the view that the decision that was made is not one that attracts a high level of procedural fairness. In this case the matter to be determined was whether the Commission could, pursuant to s.28(11) of the ***Planning Act***, implement in the name of Miltonvale, the June 16, 2015 Order. Where a tribunal is deciding whether to exercise its discretion of its enabling statute requires a low level of procedural fairness. The Commission invited written submissions in response to two specific questions -- what each party considers would be reasonable and relevant conditions to a permit or a development agreement, and whether the Commission could implement its Order in view of the fact that Miltonvale had repealed and enacted a new zoning and subdivision control bylaw. Miltonvale was aware of the case to be met.

25 This process employed by the Commission could not be deemed unfair. The Commission did not fail to provide adequate notice to Miltonvale. It informed the parties that implementation of the June 16, 2015 LA15-05 Order was being sought. Regarding the mode of hearing, Miltonvale did not contest the Commission decision to decide based on written submissions.

26 The second factor outlined in ***Baker*** directs one to examine the statutory scheme and the terms of the statute pursuant to the ***IRAC Act*** and the ***Planning Act***. Subsection 8(b) of the ***IRAC Act*** provides that in the exercise of its jurisdiction the Commission may decide all matters of procedure. The ***Planning Act*** provides in s.28(7) that subject to adherence to the rules of natural justice, the Commission shall determine its own procedure. The wide authority and discretion given to the Commission by the statutory scheme to establish its own process and procedures suggests a significant amount of deference be granted to the procedures followed. The statutory scheme suggests a low level of procedural fairness is owed.

27 The third factor in ***Baker*** in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual(s) affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated (para.25). Counsel for Mr. O'Halloran submits that this case is simply about "*putting dirt on dirt and of little or no importance to Miltonvale.*" With respect, I disagree. Whatever use is made of this property has a significant impact on its neighbours and also a precedential affect on Miltonvale's planning processes.

28 The general objectives of any land use planning legislation are to provide a favourable living environment for its citizens and sustainable development as well as allowing citizens to participate in the planning processes of its community. The purpose of planning legislation is to regulate the use and development of land in an orderly and controlled way (Rogers: **Canadian Law of Planning and Zoning**, 2nd Edition, Ch.1-1).

29 The right of a property owner to use the land as he or she pleases without regard for ones neighbors has long since gone. The comments of Currie J. in the 1950 case of ***Halifax v. Wonnacott***, *[1951] 2 D.L.R. 488*, at p.504 (NSTD), still apply today:

> Therefore it is proper that municipal bodies should have such power as is proper and suitable so as to give homesteaders, who too are an important element in the life of a nation, such quiet and enjoyment in their surroundings, such opportunities for relaxation and recreation as is possible. Therefore also, it is proper that the courts should assist in the enforcement of all appropriate measures which are designed for that purpose and which are applicable to the particular case before it. It may happen at times that some persons may be inconvenienced or financially affected by restrictive building laws but modern experience has shown that the disadvantages of these laws do not fall with such disproportionate weight as to make them unreasonable and unwarranted. [Emphasis added.]

> The ability of Miltonvale to regulate the issuance of development permits is integral to its planning function. It is necessary for Miltonvale to control the process which provide for the safety and health of its citizens; the esthetics of the properties within its boundaries, including noise and dust concerns; and environmental concerns. The purpose of its bylaw is to implement the policies of the Official Plan and to establish a transparent, fair and systematic means of development control for the Community (**Community of Miltonvale Park - Zoning and Subdivision Control Bylaw 16 (2016)**). To refer to this matter as a case of "*putting dirt on dirt*" minimizes the important role of the community in regulating the use and development of land in an orderly and controlled way.

30 As the decisions of Miltonvale have a direct impact on the lives of its citizens, this would elevate the requirement of fairness. The importance of a decision to the landowners and neighbours affected, therefore, "*constitutes a significant factor affecting the content of the duty of procedural fairness*" (***Baker***, para.15).

31 The fourth factor in ***Baker*** suggests the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. It appears Miltonvale's real concerns were not that it did not receive notice or that an oral hearing was not held, but rather that the Commission saw fit to venture into matters that in Miltonvale's view, engage in more than implementation and involve a rehearing or new hearing of the appeal. Miltonvale's concern was that a reconsideration was occurring. Due to these factors Miltonvale may have had a legitimate expectation that an oral hearing would be held. Nevertheless, this was the first time the Commission dealt with a s.28(11) request so there was no established procedure that would have lead Miltonvale to this conclusion.

32 The doctrine of legitimate expectations is based on the principle that the circumstances affecting procedural fairness take into account the promises or regular practices of administrative decision makers and that it will generally be unfair for them to act in contravention as to procedure without according significant procedural rights (***Baker***, para.26).

33 As this was not an appeal pursuant to s.28(8) of the ***Planning Act*** but instead a request to implement an order

pursuant to s.28(11), and as it was the first time such a request was made to the Commission for implementation of such an order, I would view the bar for procedural fairness to be low as according to its statutory empowerment the Commission could set its own procedure.

34 Regarding the final factor in ***Baker***, the duty of fairness requires that the choices of procedure made by the Commission ought to be respected. As a result, this Court is reluctant to impose additional or ancillary procedures to be utilized by the Commission.

35 After considering all of the abovenoted factors in ***Baker***, I have determined that the procedures which were followed respected the duty of fairness. I am also of the view that Miltonvale had the opportunity to present its case fully and fairly and that the process was fair, impartial and open. There has been no denial of procedural fairness.

Issue 2: Did the Commission err in exercising its statutory authority when it failed to properly interpret the *Interpretation Act*, R.S.P.E.I. 1988, Cap. I-8, and purported to apply a bylaw which had been repealed and replaced?

36 In 2016, Miltonvale repealed its 2013 bylaws and enacted new bylaws effective May 31, 2016. The earlier order issued by the Commission stated that a permit was "*effective for the 2015 year*" and it considered that the request for enforcement by Mr. O'Halloran was "*in effect, a continuation of the appeal process which began in 2014.*"

37 The Commission relied on the following provision of the ***Interpretation Act*** to support its finding that the repealed bylaw continued to apply in 2017:

> 32. Where an enactment is repealed in whole or in part, whether or not another enactment is substituted for it, the repeal does not
>
> ...
>
> (e) subject to clause 33(1)(b), affect any investigation, proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment,
>
> and subject to subsection 33(1), an investigation, proceeding or remedy as described in clause (e) may be instituted, continued or enforced and the penalty, forfeiture or punishment imposed as if the enactment had not been repealed.

38 It is clear that the operation of this provision is subject to s-ss.33(1) and 33(1)(b) of the ***Interpretation Act*** which states as follows:

> (1) Where an enactment (in this section called the (former enactment() is repealed and another enactment (in this section called the (new enactment() is substituted therefor,
>
> ...
>
> (b) every proceeding commenced under the former enactment shall be continued under and in conformity with the new enactment so far as it may be done consistently with the new enactment;
>
> (c) the procedure established by the new enactment shall be followed as far as it can be adapted thereto,
>
> ...
>
> (ii) in the enforcement of rights existing or accruing under the former enactment, and
>
> (iii) in a proceeding in relation to matters that have happened before the repeal;

39 The Commission did not consider s-ss.33(1) and 33(1)(b) in its decision. Miltonvale contends that had the Commission considered and applied these provisions, it would have recognized that the ***Interpretation Act*** did not support its finding that the repealed bylaw continued to apply in 2017. Miltonvale further asserts that the legislation

was clear that any "*continuation*" was required to be in conformity with the new bylaw and that any proceeding or enforcement process was required to follow the procedure outlined in the new bylaw.

40 In my view the bylaw applied by the Commission is not fatal; it is of no material consequence. The procedure for obtaining a development permit did not change. Under both bylaws it is necessary to make application for a development permit. Miltonvale itself acknowledges that there is no real difference between the 2013 bylaw and the 2016 bylaw. Nonetheless, when the reasonableness standard of review is employed, the Commission's course of decision-making is reasonable and its conclusion is within a range of possible, reasonable outcomes.

Issue 3: Did the Commission err in finding that Mr. O'Halloran had a vested right to a development permit subject to such conditions as Miltonvale decides to impose?

41 The principle against interference with vested rights was considered in ***Dikranian v. Quebéc (Procureur général)***, 2005 SCC 73, at para.39-40:

> A court cannot find that a vested right exists if the juridical situation is not tangible, concrete and distinctive. The mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists.
>
> ... The situation must also have materialized. ...

42 Miltonvale argues that Mr. O'Halloran cannot meet the criteria in ***Dikranian*** because the permit was limited in time (2015) and was conditional on a future event - that being a development agreement to be negotiated between the parties.

43 In my view, the Commission's determination that Mr. O'Halloran had a vested right to a development permit is reasonable for two reasons:

i) his right to a development permit was tangible and concrete: The Commission found that rights had accrued to Mr. O'Halloran that allowed him the right to a development permit which had not been provided. The Commission, an administrative tribunal, after conducting a hearing, issued an order, for which the appeal period had expired, establishing his right to a development permit with reasonable and relevant conditions; and

ii) the Commission's June 16, 2015 Order predates the coming into force of the 2016 bylaw.

The reasons given are transparent, intelligible and defensible.

44 Intertwined in the issue of vested rights is the Commission's use of the repealed bylaw and whether the Commission, in reconsidering its earlier decision erred when it directed Miltonvale to issue a development permit, subject to conditions, for a different period, namely "*a period of one year commencing May 1, 2017.*"

45 The Order LA15-05 stated it was effective for the 2015 year and the implementation Order LA17-01 was issued after the expiration of 2015. The implementation order directs Miltonvale to issue a development permit subject to conditions, for a different period, namely "*a period of one year commencing May 1, 2017.*"

46 The Commission stated its rationale for this substitution of dates:

> [50] Commission Order LA15-05 referred to the 2015 year as that was the year in which it was issued, and the effect of that Order would extend into 2016.
>
> [51] It is the view of the Commission that the request by the Appellants under consideration is, in effect, a continuation of the appeal process which began in 2014. **The calendar year is not, in the Commission's view, material to the nature of the permit sought. What is material is that the Appellants be entitled to place fill on property which they own.**
>
> [52] Again, to accept the position taken by the Respondent would effectively neuter the appeal rights of the Appellants as provided under the ***Planning Act (PEI)***. ...

[Emphasis added in original.]

47 If it was within the Commission's implementation powers to extend and/or substitute the date, then the Commission's decision should be upheld and Miltonvale's appeal dismissed. On the other hand, if the Commission is confined to the express term of the Order LA15-05, then there would be nothing to implement because the Commission's Order LA15-05 had expired or became invalid at the end of 2015.

48 In my opinion, more than one approach or view can be applied to what the Commission did regarding the operative date for the development permit. It would be reasonable to view the Order LA15-05 as final and to confine the Commission's authority to act in the name of the Council to the express terms of the Order. On that thesis, the time period of the permit is manifestly a material term of the order. The Commission as a tribunal exercising statutory authority to implement the Order and not something different than the order, would be confined to the express terms of the order, including "*the 2015 year.*" That view results in a conclusion that the Commission exceeded its mandate granted by s.28(11) by ordering a permit that operates in the year 2017. On the other hand, it would be reasonable too, to apply a remedial approach to the Commission power of implementation, and conceptualize that Miltonvale was always willing to issue a 12-month permit to the developer together with a development agreement (Appeal Book, at p.57); the Commission had ordered Miltonvale to issue a permit; for whatever reason no permit was issued in 2015; the Commission had decided that an implementation order should issue, and for the effective operation of s.28(11) within the permits and appeals scheme of the ***Planning Act***, a 12-month permit should issue. That is what the Commission did. From an administrative law perspective, deference advises that the Commission decision respecting implementation order for the 2017 year is reasonable. Its analysis is justifiable, intelligible, transparent and the result is reasonable (See ***Dunsmuir v. New Brunswick***, 2008 SCC 9 , paras. 47-50). On that basis, the Commission decision regarding dates or time withstands appellate scrutiny because its interpretation and application of s.28(11) of the ***Planning Act*** was reasonable.

Issue 4: The final issue is whether the Commission acted beyond its statutory authority when it determined the validity of provisions contained in the development agreement and by dictating the terms of the development permit.

49 The following is what the Commission determined to be reasonable and relevant terms to impose on the development permit:

> [58] Taking the foregoing statutory provisions together with the objects of the ***Planning Act (PEI)*** together, the Commission is of the view that it does have the "*...implied and incidental power ...*" to enforce its Order by determining what are reasonable and relevant terms to impose on the development permit sought by the Appellant. Not doing so would do little to resolve the impasse which, as can be seen, is over precisely what those terms should be.

> [59] The Commission have considered the submissions of counsel for the parties and find that the five conditions imposed by the Respondent in respect to the applicant previously referred to in paragraph 14 are reasonable and relevant, those being as follows:
>
> 1. The Applicant agreeing that only clean earthen fill shall be placed on the Property, such fill to conform to the standards of the Department of Environment, Labour and Justice;

2. The Applicant agreeing to control dust and dirt resulting from the placement of the fill that may affect neighbouring properties, including leveling the fill to the final grade and seeding it with see [sic] mix or mulch mix, as appropriate;
3. The Applicant agreeing that no trucks shall enter upon or leave the Property other than between the hours of 7:00 A.M. and 8:00 P.M.;
4. The permit having an expiration date of one year from the date of issue, with the Development Officer having the power to renew the permit for an additional one year term; and
5. Other conditions that may be required by either the Department of Environment, Labour & Justice or Department of Transportation & Infrastructure Renewal.

[60] These appear to the Commission to be "*... directly related to or consistent with the Bylaws of the Community or the Official Plan*", and appear intended in part "*... to ensure the health, safety and convenience of Community residents and the travelling public*" as provided in Bylaw 4.7(x).

[61] As well, the Commission finds that the following additional terms acceptable to the Appellant would be reasonable and relevant, those being as follows:

* Fill to be placed on the property as delineated Part B on map ...
* No waste demolition materials will be placed
* Seed out when work is complete in a specific area, taking into account time of year and potential for future traffic over the seeded area
* If the site becomes too dusty to safely operate Applicant [sic] will water the drive area and manage any dust issues that arise, to be done at their reasonable discretion
* Any site visit by community staff or agent shall be pre-arranged with Appellant by appointment only during regulator operating hours

[62] While recognizing that the Respondent has made some concessions regarding various matters, including costs, the Commission advises that in its view some articles of the proposed Development Agreement are not reasonable nor relevant.

[63] The first is Article #2 dealing with costs. This provision is far too broad and could extend to costs of further proceedings before this Commission or proceedings in Court to enforce the agreement, seemingly without regard to the ultimate outcome. There are no costs awarded to any party appearing before this Commission, and appeals from our decisions to the Court of Appeal do not

> attract costs except for special reasons. This article is inconsistent with those considerations, and is inconsistent with what the Commission views as an overriding policy expressed by statute that costs sanctions should rarely be imposed in planning matters, including appeals.

> [64] The second is Article #5 which establishes the Respondent as the sole arbiter of whether the Development Agreement has been complied with. The Development Bylaw sections 19.2 and 19.3 contain enforcement mechanisms which are available to the Respondent if it considers that there has been any violation of the Development Bylaw, including a Development Agreement. Those enforcement mechanisms require that the determination of any alleged violations should be in the hands of a third party, i.e. a court, and that is as it should be.

> [65] The third is Article #6 respecting a security deposit which appears to be tied to Article #2 respecting costs.

50 The Commission found that three provisions of the draft development agreement were unreasonable. The provisions it considered unreasonable pertained to the matters of costs, the security deposit required, and the arbitration clause.

51 It is the position of Mr. O'Halloran that the Commission did not exercise any statutory authority other than s.28(11) of the ***Planning Act*** and the draft development agreement presented by Miltonvale contained similar conditions. Regarding the jurisdiction of the Commission to determine the validity of the terms of a development agreement, Mr. O'Halloran agrees with Miltonvale that the Commission does not have jurisdiction. However, he argues that the Commission did not canvass the validity of the terms.

52 In my view the Commission exceeded its authority by determining the validity of the contractual provisions and by determining which conditions are reasonable and relevant to impose on the development permit, and by doing so it acted unreasonably for the following reasons:

i) The question of whether terms contained in a contract (development agreement) are valid is not one in which the Commission has authority to decide. It is not a decision that is found in the prescribed list of decisions subject to appeal by the Commission in s.28(1.1) of the ***Planning Act***. Instead, a municipality's power to contract is vested by the ***Municipalities Act***, *R.S.P.E.I. 1988, Cap. M-13*, and there is no right of appeal to the Commission from that legislation.

(ii) In ***Sobeys Inc. v. Charlottetown (City)***, *[1996] P.E.I.J. No. 11*, Nfld. & P.E.I.R. 224 (PEITD), Jenkins J. (as he then was) found that the proper process to determine whether a municipal council has exceeded its jurisdiction is by an application for judicial review.

(iii) The Commission was wrongly of the view that it had the implied and incidental power to enforce its order with conditions. In ***ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)***, *2006 SCC 4*, at para.73, the Supreme Court of Canada set out the legal test for "*jurisdiction by necessary implication*." Bastarache J. cautioned that care must be taken not to use the doctrine of jurisdiction by necessary implication to broaden the scope of a board's jurisdiction, where, in fact, the power at issue is one that was excluded from the legislation. The circumstances in which the doctrine may be applied:

(1) when the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;

(2) when the enabling Act fails to explicitly grant the power to accomplish the legislative objective;

(3) when the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;

(4) when the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and

(5) when the Legislature did not address its mind to the issue and decide against conferring the power upon the Board.

(iv) In previous decisions of the Commission and in particular Decision LA13-02 the Commission discussed this very subject. At page two of its reasons it stated:

... In the absence of an express right of appeal, there is always the potential that an appellant might argue in favour of the existence of an implied right of appeal. However, if the legislature was of the view that a broad menu of municipal decisions could be appealed to the Commission it would be logical to place the appellate provisions within the ***Municipalities Act***. This, however, has not occurred in Prince Edward Island.

There is no express right of appeal of a bylaw enforcement decision within the ***Planning Act***. The statutory right of appeal is provided for under the ***Planning Act***, not the ***Municipalities Act***, and therefore the Commission finds that the rights of appeal are limited to those set out in section 28 of the ***Planning Act***.

(v) Additionally, it is to be noted that s.8(1)(e)(iv) of the ***Planning Act*** speaks of the Minister or in the case of a municipality, the Council, being responsible to negotiate development agreements with a developer. This power is not assigned to the Commission and therefore the Commission could not venture into the area of validating terms or deciding conditions of a development agreement.

53 In my opinion the Commission does not have the implied or implicit authority to determine the validity of a contractual provision in a development agreement. It would follow that it too does not have the power to impose or dictate terms of a contract for the following reasons:

(i) In previous decisions of the Commission it has reasoned that a development agreement is a contract between the parties and where there is a dispute between the parties as to the terms of the development agreement, the appropriate forum is the Supreme Court of P.E.I. (Order LA13-05; LA04-10; Book of Authorities (Tabs 37,38)). These decisions indicate that the Commission has been reluctant to interfere in the validity of contracts to dictate or the terms contained therein.

(ii) In ***Sobeys Inc. v. Charlottetown (City)***, *[1996] 145 Nfld. & P.E.I.R. 72*, (PEITD), MacDonald C.J. recognized that municipal legislation vests councils with the authority to enter into development agreements. He also concluded that it was a reasonable term of a development agreement that a developer pay for any costs associated with a development. This decision indicates that it would be reasonable for a municipality to address the issue of costs in a development agreement.

The Commission stated in its reasons that appeals from its decision to the Court of Appeal do not attract costs except for special reasons and for this reason determined that costs should not be borne by the developer. With respect, this is not relevant as the legislation provides for the court to only award costs in exceptional circumstances. However, it would be unreasonable to order a community to bear the costs associated with the development of land. These costs are generally always borne by the developer.

(iii) This Court in ***Resort Municipality v. IRAC***, *2014 PECA 19*, at para.31, affirmed that the Commission acted beyond its statutory authority when it indicated that an amendment to the development agreement may be required. In that case the Commission was only suggesting that an amendment may be required and this court found it was acting beyond its statutory authority. In this case, the Commission went beyond suggesting. It was not only validating the terms but indicating which terms should be contained in the contract. In my view the Commission was acting beyond its statutory authority.

54 Finally, not only am I of the view that the Commission exceeded its authority in validating and dictating the terms of the development agreement, I also find that one of the conditions imposed by the Commission is contrary to both the 2013 and 2016 Bylaws.

55 Both Bylaws, in 4.22 and 4.25 respectively, provide that "*an application for a development permit shall constitute authorization for inspection of the subject ... lot during development by an officer or agent of the Community for the purpose of ensuring compliance with the provisions of this bylaw.*" Regarding this provision, the Commission dictated that any site visit by Community staff or agent shall be pre-arranged with the developer by appointment only during regular operating hours. In this regard, the condition imposed is contrary to a right which has already been conferred upon Council by the Bylaw.

56 Some of the conditions are vague (*"too dusty"*), incapable of enforcement (*"to safely operate"*), and fall solely within the subjective discretion of the developer (*"our discretion"*) and not the municipal regulatory authority. Therefore, some of the conditions are not reasonable as they could not be enforced by Miltonvale.

Conclusion

57 For the foregoing reasons I would allow the appeal in part. I would affirm the Commission's decision regarding implementation of the order -- the only exception being I would not allow the Commission to attach conditions to the development permit. However, Miltonvale may impose conditions on the permit that are directly related to the bylaws of the Community, the Official Plan, or statutes, regulations or other enactment adopted by the provincial government; or may require a development permit be entered into between the parties. I agree with the reasons of Mitchell J.A. regarding implementation and would order accordingly.

58 If the parties are unable to negotiate the terms of the development agreement, the appropriate forum for that dispute is the Supreme Court of Prince Edward Island by application for judicial review pursuant to the ***Judicial Review Act***, *R.S.P.E.I. 1988, Cap. J-3.*

59 There will be no award of costs as there are no special reasons to order costs (s.13(4) of the ***IRAC Act***).

M.M. MURPHY J.A.

J.K. MITCHELL J.A. (concurring)

60 I agree with the reasons of Murphy J.A. and those of Jenkins C.J.P.E.I. when he deals with his issues one, two, three and five. However, having read the reasons of my colleague Jenkins C.J.P.E.I. on his issues four and six, with which I disagree, I would like to make the following comments.

61 I do not agree with the Chief Justice's assertion contained at para.100 that "*...Miltonvale does not dispute the Commission's authority to act in its name to implement its 2015 order to issue a development permit, or to do so effectively by determining the conditions in accordance with Miltonvale's Development Bylaw.*" As I read Miltonvale's appeal and argument they most certainly do dispute the Commission's authority to determine the conditions in accordance with Miltonvale's Development Bylaw.

62 For example, issue #6 in Miltonvale's factum states:

> The Commission acted beyond its authority when it determined the validity of the provisions contained in the development agreement.

63 At paragraph 78, they say:

> Tthe question of whether provisions in a contract are valid is not one that has been assigned to the Commission for determination. That authority rests with the superior court like the Supreme Court of Prince

> Edward Island. It is not a decision found in the prescribed list of decisions subject to appeal by the Commission in s.28(1.1) of the ***Planning Act***."

64 Nor do I agree that the development agreement issue is a non-starter as stated at para.99 of the Chief Justice's decision. It is, from a practical perspective, a very live issue. The Miltonvale bylaws allow the municipality to do one of two things in relation to a development permit. Firstly, they may attach conditions to a development permit; or secondly, they may require a development agreement. In this case, rather than dictate the conditions of a development permit, they attempted to negotiate a development agreement. When they were unsuccessful in doing so, the Commission simply took the terms that were in dispute between the parties, selected the ones that they considered reasonable and imposed them as terms in the development permit. While technically speaking they didn't impose a development agreement on the parties, they in fact imposed the conditions of the development agreement on the parties under the guise of conditions to a development permit. A rose by any other name.

65 I agree with the Chief Justice that whether or not the Commission acted unreasonably and/or beyond its jurisdiction by determining and imposing conditions on the development permit is a matter of statutory interpretation. I agree with him, as well, that where the words are precise and unequivocal they play a dominant role in the interpretative process (see para.103 of decision of Jenkins C.J.P.E.I.).

66 It seems to me however that the focus of the interpretative exercise in this case should be on the precise and unequivocal words "*implement the order.*" The words "*act in the name of*" can only be understood by reference to the words that follow. Section 28(11) gives the Commission the power to "*act in the name of*" Miltonvale for what purpose? To implement the order. What order? The original order dated June 16, 2015 being order LA15-05.

67 The word "*implement*" is easy to understand. It means "*to put into effect.*" To understand what the word "*order*" means we must start with the initial appeal to the Commission. The Commission's authority to hear the appeal is found in s.28(1.1). That is, O'Halloran was a person dissatisfied by Miltonvale's decision to deny him a development permit. This section grants the Commission the power to deal with that issue. The Commission could either confirm Miltonvale's decision or quash the decision and order them to issue a development permit.

68 It is true that in the reasons for their decision the Commission stated that Miltonvale "*may attach reasonable and relevant conditions or may require a development agreement setting out reasonable and relevant terms.*" That merely acknowledges Miltonvale's bylaws. The bylaw is permissive, not mandatory. However, conditions to be attached to a development permit or conditions of a development agreement were not an issue at the appeal and were not the subject of the order the Commission issued.

69 Had Miltonvale complied with the order and issued a building permit with conditions or subject to a development agreement, and had O'Halloran been dissatisfied, he could not have appealed those conditions to the Commission. In Order LA13-05 the Commission wrote at para.12:

> In the present appeal the Commission **finds once again** that a development agreement is a contract between the parties. Where there is a dispute between the parties as to the terms of the development agreement the appropriate forum is the Supreme Court of Prince Edward Island. [Emphasis added.]

70 Likewise in Order LA04-10 at para.14 the Commission wrote:

> The Commission also wishes to point out that a development agreement is a legal contract between the parties. This development agreement is in accordance with the requirements of the respondent's bylaw as amended. The Commission cannot interfere with a signed contract between the parties. In the event a party wishes to challenge the validity of that contract, the Commission is not the appropriate forum for such a challenge.

71 In ***Stanley Bridge (Resort Municipality) v. Prince Edward Island (Island Regulatory & Appeals Commission)***, 2014 PECA 19, this court wrote:

> The Commission acted beyond its statutory authority when it indicated that "*an amendment of the development agreement may be required ...*".

72 As the original order resulted from a hearing which had nothing to do with conditions of a development permit, as the Commission itself would not have entertained an appeal on the conditions had the Municipality acted as it ought to have and issued the permit, and as the Court of Appeal has stated that in even suggesting an amended development agreement the Commission was acting outside its jurisdiction, it is, in my view, unreasonable to interpret s.28(11) of the ***Planning Act*** as giving the Commission authority to dictate the conditions of a development agreement as conditions of a development permit. The fact that Miltonvale failed to issue the development permit as ordered cannot vest power in the Commission to go beyond the order issued and put new and binding conditions on the development permit. This was never an issue in the appeal.

73 In my view, the meaning of s.28(11) is plain and obvious. That is, once the Commission finds that Miltonvale failed to issue the development permit as ordered, the Commission could exercise their discretion and act in the name of Miltonvale to issue the development permit. The only reasonable interpretation of s.28(11) is that the Commission has the power to put O'Halloran in the same position as he would have been on the day they issued their order under LA15-05. That is O'Halloran would have a development permit, not a development permit with the Commission imposed conditions. I agree with both my colleagues that the bylaws of 2013 should apply.

74 I would add that the Commission did not, in fact, act in the name of Miltonvale when they issued their implementation order. Instead, they ordered Miltonvale to issue a different order with conditions. This court has overlooked that error for practical reasons. The proper course when issuing an implementation order under s.28(11) is for the Commission to act in the name of the community and to issue the order. I would order the Commission act in the name of Miltonvale pursuant to s.28(11) and to issue the development permit LA15-05 ordered by them June 16, 2015 without conditions.

J.K. MITCHELL J.A.

D.H. JENKINS C.J.P.E.I. (dissenting)

75 In this appeal, the Court is called upon to consider the Commission's statutory authority to implement its own order previously made following a developer's successful appeal from a community council denial of two applications for a development permit. On June 16, 2015, the Commission made an order requiring the Council of the Community of Miltonvale Park ("Miltonvale") to issue a development permit to Philip O'Halloran ("O'Halloran") to place fill on his property. On August 12, 2016, O'Halloran informed the Commission that Miltonvale had not issued the order and requested the Commission to implement or enforce its order. On March 16, 2017, the Commission issued an order requiring implementation of its previous order. Miltonvale appealed from the Commission decision on implementation.

76 Miltonvale asserts that the Commission: (1) did not give proper notice of the issues; (2) exceeded its legal authority; and (3) made errors of law in its interpretation and application of the applicable municipal planning legislation. Upon my review of the record that was before the Commission, the applicable legal principles, and the submissions of all parties, I am satisfied that the Commission proceeded properly, acted within its legal authority, and did not make any error of law when it implemented its previous order. I would dismiss the appeal.

77 The following summary provides a context.

78 The ***Planning Act***, R.S.P.E.I. Cap. P-8 Part V Appeals creates a statutory right of appeal for a person who is dissatisfied by a decision of a municipal council. This includes an appeal by a developer from a decision to deny an application for a development permit[1]. After a notice of appeal is properly filed, the Commission is required to hear and decide the appeal and then give reasons for its decision and issue an order giving effect to its disposition[2]. The municipal council is then required to implement the Commission order. Where the council fails to implement the order, Commission may act in council's name to implement the order. These provisions state:

Implementation

(10) The council or the Minister, as the case may be, shall implement an order made by the Commission.

Action by Commission

(11) Where the council or the Minister, as the case may be, fails to implement an order made under subsection (8), **the Commission**, on its own initiative or the initiative of an interested person, **may act in the name of the council** or the Minister **to implement the order**. [Emphasis added.]

79 O'Halloran applied to Miltonvale twice in 2014 for a development permit to place fill on his vacant property located near the north end of the Lower Malpeque Road. Miltonvale had concerns over hazards posed to neighbours and the general public -- by dust, noise, drainage, quality of fill, and failure to adhere to permit conditions during previous years -- and turned down O'Halloran's applications. O'Halloran appealed from Miltonvale's decisions to the Commission. After hearing the appeal in 2015, the Commission determined that Miltonvale had not acted pursuant to its Zoning and Subdivision Control (Development) Bylaw (the "Development Bylaw") because there was a lack of objective evidence of the stated concerns. The Commission issued Order LA15-05 requiring Miltonvale to issue a development permit. The Commission's order was straightforward, and did not contain any conditions; however, the Commission's Reasons for Order permitted the Miltonvale to attach reasonable and relevant conditions to the permit or to require a development agreement setting out reasonable and relevant terms. Miltonvale did not appeal from the Commission's Order LA15-05 to issue a development permit; but Miltonvale did not issue a permit. Instead, it sought to have O'Halloran enter into a development agreement, but Miltonvale and O'Halloran did not reach any agreement on the terms for a development agreement. O'Halloran asked the Commission to enforce its Order LA15-05.

80 The Commission then set in motion a process under which it would deliberate and decide on implementation. It requested from the parties submissions on the issues to be determined, the need for an oral hearing, and the content of reasonable and relevant terms in a development permit. The parties made submissions. The Commission then decided: (1) a full hearing was not necessary; (2) the Commission had authority to order implementation; (3) Miltonvale did not comply with its order to issue a development permit; and (4) it would exercise its power to implement Order LA15-05 by requiring Miltonvale to issue a development permit to O'Halloran, subject to imposition of particularly stated conditions of operation that the Commission found to be directly related to or consistent with Miltonvale's Development Bylaws or its Official Plan.

81 Miltonvale appealed to the Court of Appeal from the Commission's implementation order[3]. Its grounds of appeal are stated in general terms in its Notice of Appeal, and with particularity in its Factum. This Court received written submissions and then held an appeal hearing and received oral submissions. I will address Miltonvale's grounds of appeal.

Grounds (1) Breach of duty of procedural fairness

(2) Reconsideration

82 Miltonvale submits that the Commission breached its duty of procedural fairness by failing to provide adequate notice and by deciding the matter without an oral hearing. It cites a number of deficiencies. The heart of Miltonvale's assertion seems to be not that it did not receive notice of the Commission intention to pursue a process under s.28(11) of the ***Planning Act*** that could result in an implementation order, but rather that during its process the Commission saw fit to venture into matters that involved more than implementation. Miltonvale asserts that in its deliberations, decision and order for implementation the Commission effectively engaged in a continuation of the 2015 appeal hearing after judgment, and also in a reconsideration which, while permitted by s.12 of the ***Planning Act***, occurred in this instance without notice, and all of this resulted in it changing the terms of Order LA15-05 to something different in the terms of its implementation order[4].

83 There can be no question that in the implementation hearing process, the Commission had a duty to give notice to the parties of the essential issues. The duty to act fairly exists at common law, and is also specifically

acknowledged in the Part V Appeal provisions of the ***Planning Act***[5]. O'Halloran was seeking implementation of a Commission order, the Commission was acting pursuant to statutory authority, and its decision whether or not to grant a remedy would affect rights of the parties, including the Miltonvale.

84 As a general statement, in the exercise of public powers administrative decision makers should act fairly in coming to decisions that affect interests[6]. Procedural fairness is a common law concept, and breach of procedural fairness is an error of law. The content of the duty of fairness in particular circumstances is reviewable without deference. This Court has previously stated in an appeal from a Commission decision that consideration of the content of the duty and whether a breach has occurred does not require an assessment of the appropriate standard of review[7]. Evaluating the duty of fairness in a particular context involves an assessment of procedures and safeguards required in that situation[8].

85 Here, the Commission certainly had a duty to give notice of the process and the issues and also to provide opportunity for the parties to participate by bringing evidence or relevant information and submissions on the issues. But on my reading of the full record the Commission satisfied the requirements and there was no unfairness. The Commission gave notice in writing to Miltonvale of O'Halloran's request for implementation. It sought particulars from both parties as to what had transpired since its order, and it invited them to provide any other information counsel considered pertinent as to whether there was a failure to issue a permit and what should be considered in a s.28(11) process. Upon receiving full information, the Commission informed the parties as to the information it deemed to be exhibits and invited their submissions on all the matters it considered relevant. These are the same matters Miltonvale now puts into contention: (1) reasonable and relevant conditions to a development permit or a development agreement; (2) the effect of Miltonvale's repeal of the 2013 Development Bylaw and enactment in 2016 of a new/replacement bylaw; and (3) whether there would be an oral hearing or only written submissions. The content of the notice given by the Commission to the parties regarding both its procedures and the issues it intended to canvass was fair.

86 The Commission provided opportunity for input from the parties on mode of hearing. When it informed the parties it intended to proceed by written submissions only, Miltonvale acquiesced and did not object.

87 Miltonvale also contends that the Commission went beyond implementation, and without giving notice engaged in a reconsideration of its 2015 order. Order LA17-01 is on its face different than Order LA15-05. The initial order to issue a development permit does not require conditions in the development permit, and is effective for the 2015 year. The implementation order requires issuance of a development permit with terms and conditions found by the Commission in its Order LA17-01 -- Reasons to be reasonable and relevant in the context of the applicable development bylaw, and the permit is to be effective for one year commencing May 1, 2017.

88 In my view, there was no reconsideration. The Commission identified why these matters were in issue, and it dealt with both matters. It acknowledged the parties' various submissions, and stated its understanding of its authority and its function within an implementation process. The Commission explained why and how it focussed on the essence of what O'Halloran was seeking from Miltonvale by way of a development permit and its understanding that its applications for development permits always envisioned conditions in furtherance of the Development Bylaw, and that Miltonvale always had the option whether to require a development agreement too.

89 Regarding the effective time period, the Development Bylaw[9] and correspondence between the parties and to the Commission advises that Miltonvale always proceeded on the expectation that the permit would be effective for an initial term of one year from date of issue. The Commission explained that it decided that Miltonvale did not comply with the Commission order to issue a permit, and therefore the Commission stepping in to do what needed to be done to fulfill its statutory mandate to "*act in the name of the council ... to implement the order.*" In stating that it viewed the implementation request as a continuation of the appeal process, I understand the Commission to have been harkening back to its 2015 decision in which it allowed O'Halloran's appeal. In that decision the Commission found that Miltonvale had not provided objective evidence necessary to show why a permit should be denied. The Commission found that the calendar year was not material to the nature of the permit sought, and stated its

determination that what was material to the permit process was for O'Halloran to be entitled to place fill on property which the O'Hallorans own.

90 I will address further under Grounds (4) and (6) whether the Commission exceeded its authority. My assessment under the procedural fairness and reconsideration grounds can be concluded by stating my view that the Commission did not engage in a reconsideration; rather it necessarily dealt with all the issues Miltonvale raised under the rubric of implementation, and did so in order to exercise fully and effectively its mandate of providing an effective statutory appeal as intended by the ***Planning Act***, Part V Appeals, in particular s-ss.28(10) and (11). Overall regarding grounds (1) and (2), the Commission did not engage in consideration of issues beyond the scope of issues that were raised by Miltonvale[10] and necessarily determined for a proper and effective implementation order.

Grounds (3) and (5) Errors of law by applying a repealed bylaw and finding a vested right

91 I view grounds (3) and (5) as being directly related. In 2016 Miltonvale repealed the 2013 Development Bylaw pursuant to which O'Halloran had applied and the Commission had ordered Miltonvale to issue a development permit. Order LA15-05, issued on June 16, 2015, states:

IT IS ORDERED THAT:

1. The appeals are allowed and the Respondent(s June 26, 2014 and October 23, 2014 decisions are hereby quashed.
2. The Respondent is ordered to issue a development permit for the placement of fill to the Appellants, effective for the 2015 year.

92 No permit was issued. In 2016, Miltonvale enacted a new development bylaw, and in so doing it repealed the 2013 Development Bylaw pursuant to which its 2015 order to issue a development permit was made. In its appeal to this Court, Miltonvale submits that the Commission made an error in finding that O'Halloran had a vested right because its order was effective only for 2015, was conditional on a future event, and was subject to the exercise of discretion. Miltonvale submits that the Commission compounded its error by then proceeding through the implementation process based on the repealed 2013 Development Bylaw.

93 The Commission found that O'Halloran's right to a development permit was vested when it issued Order LA15-05. Being aware it was dealing with a disputed question of law, the Commission gave full reasons for that decision. It identified the common law principle against interference with vested rights, which is now codified in provincial legislation[11]. It found that O'Halloran's right to a development permit was vested because it satisfied the criteria of its legal situation in the relevant circumstances being tangible, concrete, and distinctive, rather than general and abstract; and because this legal situation was sufficiently constituted at the time of the enactment of the new 2016 bylaw. The Commission found that its order required Miltonvale to issue a development permit; no conditions were attached; and no development agreement was required. Miltonvale's Development Bylaw permits (but did not require) Miltonvale to impose as reasonable and relevant terms conditions directly related to or consistent with Miltonvale bylaws or Official Plan. The Commission concluded that O'Halloran had a vested right to a development permit in accordance with the 2013 Development Bylaw:

> [48] Taking into account the jurisprudence discussed above and in consideration of the particular circumstances of this case, it is the view of the Commission that the Appellants have a vested right to a development permit subject to such conditions as the Respondent decides to impose, subject to such conditions being directly related to or consistent with Bylaws of the Community or its Official Plan.

> [49] Accordingly, the Commission is prepared to implement its Order LA15-05 by requiring the Respondent to issue a development permit to the Appellants subject to the imposition of conditions by the Respondent which are directly related to or consistent with the Bylaws of the Community or its Official Plan. The Respondent may require that such conditions, or terms, be included in a development agreement signed by the parties containing the conditions which were attached to the development permit.

94 The Commission disposed of Miltonvale's submission that its order was effective for only the 2015 year by associating the right to a permit being vested when the order was rendered with the essence of the order being to give effect to O'Halloran's right to place fill on his property, the Commission had determined in O'Halloran's appeal in 2015. Reading the Commission's decision as a whole confirms for me that the Commission viewed the calendar year as not being material to the nature of the permit sought.

95 The issues raised by these grounds of appeal involve questions of law and of mixed law and fact. The Commission had to consider and apply a common law principle and statutory provisions on vested rights to determine whether a permit it issued was vested before a municipal bylaw under its supervision was repealed. For these questions, the standard of review on a statutory appeal to this Court regarding such Commission decisions on questions of law is generally viewed to be reasonableness[12]. In the present appeal, the Commission was also called upon to venture beyond the bailiwick of its home statute and statutes closely connected with its function, which include the ***Planning Act***, ***Interpretation Act***, and Miltonvale's planning legislation, to consideration of the common law criteria for vested rights. In my view, that does not raise the spectre of a correctness review. The concept of vested rights is settled law and is codified in the ***Interpretation Act***, is only one incident of the Commission's reasoning, and the Commission demonstrated it was following the Supreme Court of Canada directions and not seeking to break any new ground. As well, all parties submitted that reasonableness is the applicable standard of review. I share their view, as it appears to me to be consistent with the underlying principle of deference that is presumed by Supreme Court of Canada directions, applied by this Court, to apply[13].

96 In my opinion, the Commission decision is reasonable. There was nothing contingent or conditional about the right to a permit; the 2015 order to issue a development permit is clear and unqualified. The order requires Miltonvale to issue a development permit. The Commission justified its decision with clear reasons that in my opinion resonate as intelligible. It found the right to a permit was vested, and then it explained why it viewed the confining language "*effective for the 2015 year*" to be immaterial in view of the essential themes of entitlement to a permit and fulfillment of the Commission's appellate and enforcement authority. Also, upon determining there was a vested right, the Commission's decision to continue to operate under Miltonvale's 2013 Development Bylaw that was in effect when the permit was issued legally followed, and accordingly was reasonable, for the reasons given by the Commission. Regarding Miltonvale's assertion that the Commission was by the implementation proceeding continuing the 2015 appeal process, in my view the Commission was not carrying on a proceeding that was commenced but not yet decided; it was carrying out a discrete function implementing a final order that it had rendered. The replacement bylaw Miltonvale enacted in 2016 could not affect or diminish O'Halloran's vested right to a development permit. Upon this analysis, the 2016 bylaw was not relevant to the merits of the implementation process, and the Commission's decision to implement its order in context of the 2013 Development Bylaw was reasonable.

Ground (4): Acting beyond statutory authority by imposing conditions

Ground (6): Acting beyond its statutory authority by determining validity of provisions in the development agreement

97 Under grounds (4) and (6), Miltonvale makes assertions that challenge the authority of the Commission to dictate the content of a development agreement and question the validity of the conditions set out in Commission Order LA17-01 -- Reasons. Miltonvale raises as issues: 1) vagueness; 2) the Commission setting forth criteria that conditions be both "*reasonable and relevant*" and "*directly related to or consistent with the Bylaws of the*

Community or the Official Plan", and 3) the Commission not viewing Miltonvale's proposed conditions as reasonable.

98 Regarding standard of review on the statutory appeal to this Court, the questions of law decided by the Commission involve interpretation of provisions of Part V Appeals of the ***Planning Act*** and Miltonvale's municipal planning legislation. All of these matters fall within the parameters of questions of law within the scheme of the Commission's home statute. The general principle that reasonableness would be the standard of review applies[14]. As well, counsel for the parties submitted the applicable standard of review is reasonableness.

Summary of opinion on grounds 4 and 6

99 In summary of my opinion, the Commission decision that it had legal authority under s.28(11) of the ***Planning Act*** to determine the conditions to be attached to the development permit was reasonable. The Commission had to interpret and apply s.28(11) of the ***Planning Act***. It's interpretation and application of s.28(11) was consistent with the language of that provision and the scheme of the ***Planning Act***, which contemplates Commission enforcement of a Commission order to issue a development permit, in the interests of enforceability, expedition and finality. The criteria employed by the Commission is the criteria stated in Miltonvale's Development Bylaws.

100 The development agreement issue is a non-starter. There was no development agreement; neither the Commission nor the Development Bylaw required or require a development agreement; the Commission did not in any way act in the name of Miltonvale to make a development agreement.

101 My reading of Miltonvale's ground of appeal and arguments reveals its submission to be that the Commission was unreasonable regarding the content of the conditions it imposed. However, Miltonvale does not dispute the Commission's authority to act in its name to implement its 2015 order to issue a development permit, or to do so effectively by determining the conditions in accordance with Miltonvale's Development Bylaw. Miltonvale's complaint is regarding the content of the conditions; in particular, that the Commission for content adopted O'Halloran's precedent conditions and did not adopt its proposal.

102 Miltonvale's final submission, that it acted reasonably, misses the point of the implementation exercise. In 2017, the Commission was acting pursuant to s.28(11) because it found that Miltonvale had not followed its 2015 order under s.28(9) to issue a development permit, as Miltonvale was required to do by s.28(10). Miltonvale's Development Bylaw contemplates conditions will accompany a permit for proper municipal planning administration. Miltonvale and O'Halloran having reached a stalemate, the Commission acted pursuant to its authority under s.28(11) to what is necessary for effective implementation of its order.

103 As to the conditions in the permit, Miltonvale's submission that the conditions are vague is not made out, especially when the review of the Commission decision at this stage is limited by deference under the reasonableness standard of review.

Discussion of Ground 4: Commission authority to attach conditions to permit

104 The question of the Commission's authority to implement its order turns first and foremost on statutory interpretation. There is well-settled judicial guidance on how to conduct this exercise[15]. Words enacted are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act, and the intention of the legislature. The interpretation of a statutory provision must be made according to a textual, contextual, and purposive analysis to find a meaning that is harmonious with the act as a whole. When the words are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretative process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretative process may vary, but in all cases the courts must seek to read the provisions of an act as a harmonious whole. The ***Interpretation Act*** complements these directions by stating that statutes are to be read as remedial and therefore, to receive such fair, large, and liberal construction and interpretation as well best assure the attainment of the objects of the act according to its true intent, meaning and spirit[16].

105 Miltonvale raises a variety of concerns. In my assessment, the Commission stated in clear terms how and why it proceeded as it did. The Commission explained why it had to evaluate which conditions proposed by Miltonvale and O'Halloran were reasonable and relevant conditions to impose on a development permit, why it needed to determine the competing submissions, and the source of its statutory authority to carry out that function. Miltonvale Development Bylaw permits its Council to impose conditions on a permit subject to such conditions being directly related to or consistent with bylaws of the Community or the Official Plan. Accordingly, when the Commission decided O'Halloran's developer appeal in 2015, it stated in its reasons (although not in the Order LA15-05) that in issuing the permit, Miltonvale's Council ("... may attach reasonable and relevant conditions to such permit or may require a development agreement setting out reasonable and relevant terms."[17] Miltonvale did not issue a permit. It remained in 2017 that such conditions are necessary for a balanced order and development permit in accordance with sound planning principles. The ***Planning Act*** underlying objectives seek to provide for efficient planning at the municipal level, and to provide effective means for resolving conflicts respecting land use[18]. The Commission was of necessity acting to determine the content of the conditions. The Commission explained its understanding of the source of its authority to do this. In my opinion, this approach was purposive; was respectful and accommodating of the competing interests; and was complete in its resolution. The Commission approach was holism, as is intended by the ***Planning Act***.

106 I will address further the argument that the Commission exceeded its authority, per se, by deciding that conditions would be attached to the development permit, deciding the content of those conditions, and imposing those conditions. To be clear, in my opinion, the Commission's interpretation and application of s.28(11) of the ***Planning Act*** in that regard was reasonable. Acting as a tribunal, the Commission's authority must be found in its enabling statutory scheme. It is a fundamental principle of administrative law that a tribunal has no inherent authority; but on the other hand has all the authority conferred upon it by the legislature. Here, the Commission provided a well-marked roadmap of its reasoning. First, it identified its supervisory function under s.28(11). Then, it cited its reliance on the more general enabling provisions which state that the Commission has all the powers conferred by any enactment and "*all other implied or incidental powers necessary to perform its functions*,"[19] which it construed as being remedial, and to include powers "*as are necessary to enable*" the Commission to do or enforce the doing of the act[20]. It stated why its involvement in setting the conditions was necessary. As the Commission explained, not so acting would leave unresolved the very impasse between Miltonvale and O'Halloran that was the impetus for O'Halloran's request for implementation. In my view, the Commission proceeded properly by determining the positions of the parties and in inviting and considering their submissions, and the Commission acted within its s.28(11) authority.

107 The aforementioned fundamental administrative law principle applies: a tribunal has no inherent authority but only authority conferred by statute. In this case, upon viewing the very specific and broad enabling provisions, and the scheme of the planning legislation as a whole, and considering the role of the Commission and rights of all who are affected, in my opinion the Commission's interpretation and application of s.28(11) is entirely consistent with its remedial purpose, is plainly functional, and is defensible in respect of both the law and the facts. In my view, the Commission's reasons fit well upon a review for intelligibility, and the result it sought to accomplish is a practical outcome that is manifestly reasonable.

108 The Commission's exercise of authority under s.28(11) is readily reconcilable with the proposition that the legislature vested administration of planning with the municipal council[21]. While Miltonvale is responsible for administration of its Official Plan and its bylaws, including the issuance of development permits, all of this is subject to review upon appeal to the Commission under Part V of the ***Planning Act***. In its administration, Miltonvale is dealing with rights. Where a person is aggrieved by a Miltonvale decision, there is a right of appeal to the Commission. Here, O'Halloran appealed, and the Commission decided that Miltonvale had not justified its denial. The Commission ordered Miltonvale to issue the permit. The Commission then found that Miltonvale failed to issue the permit, contrary to s.28(10) of the ***Planning Act***. In that scenario, s.28(11) authorizes the Commission to act. Particularly, its authority is "*to act in the name of council ... to implement the order*," which was to issue the permit.

109 O'Halloran made the Commission aware that Miltonvale had options: it could have issued a permit without

conditions; issued a permit with reasonable and relevant conditions; or issued a permit with a development agreement setting out reasonable and relevant terms. Miltonvale did not issue a permit, and O'Halloran requested the Commission to implement its order.

110 The Commission role pursuant to s.28(11) of the ***Planning Act*** is to implement its order for a municipal council to issue a development permit, where it finds that the council should have issued a permit but did not. The language of the provision is clear: the Commission "*may act in the name of the council ... to implement the order.*" This legislative provision has never been judicially considered. Research of counsel for the parties and the Commission revealed no previous interpretation. In my opinion, the Legislature has thereby authorized the Commission to do what is necessary in accordance with the objectives of the ***Planning Act*** to implement its order. Acting in the name of the council involves doing what the Commission determines the council should have done in exercising its primary authority for municipal planning. In this case, the Commission found that Miltonvale did not issue a permit with or without conditions. Section 28(11) recognizes that the Commission needs to have the means to make its order effective. In its reasons for Order LA15-05 the Commission found (at para.64) that because Miltonvale had not met the first part of the Commission's two-part test because it did not provide truly objective evidence to entitle it to deny a permit under its Development Bylaw, it was unnecessary to determine whether Miltonvale's decisions were in accordance with sound planning principles. Now at the implementation stage in 2017, Miltonvale still had not complied with the Commission order to issue a permit. It seems clear to me that the Commission could act in the name of the council to fully implement its 2015 order. That order did not require any conditions; however, it would not accord with sound planning principles envisioned by the ***Planning Act*** or Milton's Development Bylaw to issue the development permit without conditions. That would create a one-sided permit that disrespects the various expressed concerns of the community and neighbours and the competing responsibilities a municipal council needs to weigh in the balance when engaged in land use planning.

111 I agree with the metaphor advanced by O'Halloran's counsel that in acting under s.28(11), the Commission is stepping into council's shoes. The Commission heard from Miltonvale and O'Halloran regarding their difficulties and impasse in defining reasonable and relevant conditions, and considered their submissions regarding the content thereof. It is an integral part of the Commission's authority under s.28(11) to properly complete the task of issuing the permit by attaching appropriate conditions. That is an integral facet of the permit and was always envisioned by all -- Miltonvale, O'Halloran, and the Commission -- to be so.

112 I close this exercise in statutory interpretation by performing what Professor Ruth Sullivan calls a consequential analysis[22]. Near the start of her text (at p. 3), Professor Sullivan sets out three questions which an interpreter must address to determine whether a provision applies to particular facts. I have kept those questions in mind, and now return to them at the conclusion of my analysis, as somewhat of a litmus test. Those questions are:

* what is the meaning of the legislative text?

* what did the legislature intend? That is, when the text was enacted, what law did the legislature intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding facts such as these?

* what are the consequences of adopting a proposed interpretation? Are they consistent with the norms that the legislature is presumed to respect?

113 Sullivan (at p.300) advises that such a consequential analysis be performed. Reflecting on these questions has reinforced my conclusion that the Commission determination is reasonable. Upon a textual, contextual, and purposive analysis, the meaning as interpreted by the Commission appears harmonious with the ***Planning Act*** as a whole. Statutory interpretation involves the application of legislation to facts in a way that affects the well-being of individuals and communities for better or worse. It follows that the court is interested in knowing what the consequences will be and will judge whether they are acceptable. In my assessment, in this case the consequences are what they should be; and a contrary interpretation advancing a narrower and restrictive approach to the issue of conditions, would render consequences that undermine the purpose of the ***Act***.

114 There does exist judicial interpretation of the phrase "*act in the name of.*" Albeit this is in the law of

receivership. While a different legal context, this provides me with some supplementary and useful guidance. In 1950-51, ***National Trust Company Limited v. Barcelona Traction, Light & Power Company Limited et al***, *[1950] O.R. 864* (ON SC); *[1951] O.R. 530* (ONCA), Ontario courts considered the role of a court-appointed receiver and manager upon an insolvent company being placed in receivership. Particularly in question was the receiver's right to "***act in the name of***" an insolvent company to sell personal property, in that case mortgage bonds. The trial judge, Schroeder J., called upon to determine the legal position of the receiver and manager, relied on a 1913 House of Lords decision in an earlier Canadian case ***Parsons et al. v. The Sovereign Bank of Canada***, [1913] A.C. 160 at 167, 9 DLR. 476, in which Viscount Haldane had stated:

> A receiver and manager appointed, as were those in the present case, is the agent neither of the debenture-holders whose credit he cannot pledge, nor of the company which cannot control him. **He is an officer of the Court put in to discharge certain duties prescribed by the Order appointing him. ... The Company remains in existence but it has lost its title to control its assets and affairs**, with the result that some of its contracts . . . [Emphasis added.]
>
> On appeal, Robinson C.J.O conceptualized the role and authority of a receiver: The appointment of a receiver and manager has significance in four respects: (1) it does not destroy the corporate existence of the company; (2) it is not the same or equivalent as an order in bankruptcy or for winding-up, but the assets are vested in the receiver; (3) it prevents the use of the assets or income for any purpose other than the protection of the rights of the secured creditors; (4) the receiver displaces the board of directors in the control of the assets and affairs of the company. All powers of the company are vested in the receiver. Robinson C.J.O. found it extraordinary that in 1951 there should be no decided cases on the point of the meaning of "*act in the name of*." His concern was the source of the authority for the court to appoint a receiver. He found that a court of equity has inherent jurisdiction to appoint a receiver and manager for the protection of bondholders.

115 So how does this historical note relate to the present case? For me, an analogy provides some instruction. It can be seen that a receiver steps into the shoes of the insolvent company. The receiver acts in substitution for the suspended operating mind of the body corporate to carry out court-approved corporate acts. To enable that objective, the receiver has all the powers to carry out corporate acts in order to complete the transaction in question. The corporation's assets are vested in the receiver and are at the receiver's disposal for that particular purpose. The situations are analogous: in ***Barcelona Traction*** in 1950, the court-appointed receiver had the authority, indeed sole and total authority, to deal with the corporate property for a particular purpose, namely to transfer the bonds. In ***Miltonvale Park*** in 2017, the ***Planning Act*** -- enabled Commission has the authority, indeed sole and total authority, to do what it reasonably considers necessary to implement its orders for the council to issue a development permit, and the Commission has all the Miltonvale's powers at its disposal for that purpose. In particular, the Commission is authorized to "*act in the name of*" the council to give effect for that purpose by implementing its order. The Commission is authorized to determine that Miltonvale failed to follow its order, and thereupon to step into the shoes of Miltonvale's council and do what is necessary to implement its order.

116 Upon reflection, further analogy could be made to various other fields of law where a statute or court-authorized substitute is empowered to exercise the powers of a principal. In estates law, for instance, an executor acts pursuant to the terms of a will and the court-issued letters probate which come about pursuant to statutory provisions of the ***Probate Act***, and thereby "*acts in the name of*" the deceased person/testator. In financial security and property law matters -- mortgagees, receivers under debentures, sometimes the Prothonotary of the courts for deeds or partition -- an actor is authorized either by the terms of the financial instrument or pursuant to a court order for foreclosure, receivership, mortgage sale, partition, etc., to act in the place and stead of, and sometimes to "*act in the name of*" the principal debtor, mortgagor, company, or registered owner of the property.

Discussion on Ground 6: development agreement

117 It is a matter of fact that the Commission did not dictate the terms of a development agreement. Nor did it determine the validity of provisions of a development agreement. There was no development agreement at all. There was only an unsigned document that Miltonvale filed with the Commission, which comprised the vessel in which Miltonvale shipped its requested conditions to the Commission. The Commission understood and

acknowledged that Miltonvale could require a development agreement, and explained its view of how Miltonvale had proceeded out of order by requiring a development permit before issuing a development permit with conditions rather than vice versa[23]. However, the Commission neither required Miltonvale to have a development agreement; nor purported to act in the name of Miltonvale's council in that regard. Whether the Commission could make a development agreement in the stead of Miltonvale by virtue of its statutory authority to "*act in the name of the council . . . to implement the order*" was not in issue before the Commission and is not really in issue in this appeal. The Commission acknowledged Miltonvale's submission that it could not dictate the contents of a development agreement. It explained that its implementation action was respectful to the legal precedent, and its view that it was not involved in planning as such, but rather in the exercise of the Commission's appellate authority to supervise decisions of a municipal council under the ***Planning Act***[24]. In my assessment, the Commission in exercising its statutory authority to implement its order did not exceed its authority in that regard.

Comment on Commission methodology

118 I wish to comment on the Commission's chosen method of implementation under s.28(11). The Commission decided to issue an order implementing its 2015 order. Its methodology was to issue another order, requiring Miltonvale to forthwith issue to O'Halloran a development permit subject to the terms described in its Reasons as reasonable and relevant, such development permit to be for a period of one year commencing May 1, 2017. That seems to fall short of implementation. It is really an order to enforce the 2015 order, rather than a direct act of implementation. Commission counsel explained that the Commission does not have the paper work etc. that is in Miltonvale's council office. In my respectful view, it would be more consistent with the s.28(11) authority, and more practical and expeditious as a means of resolving the conflicts that gave rise to O'Halloran's request for implementation, for the Commission to fulfill the statutory mandate directly and fully in accordance with its clear language. The provision employs the verb "*implement*", not "*order*" or "*enforce*." The object of the action is "*the order*," not a new order. It would be better for the Commission to "*act in the name of the Miltonvale ... to implement the order.*" Then the Commission function would be fulfilled, efficiently, without further delay or proceedings, and the parties could deal with the Commission's issued order.

119 As well, it seems prudent, reflective of the Development Bylaw[25], and fair that the development permit would state the term of the order is the twelve-month period from the date of issue rather than stating a temporal start date.

120 The Commission methodology not being a ground of appeal and not amounting to reviewable error, it does not detract from my view that the Commission's implementation order should be upheld and Miltonvale's appeal from Order LA17-01 should be dismissed.

Conclusion

121 Accordingly, I find that the Commission acted reasonably in all respects, and I would dismiss the appeal.

122 The general statutory direction against costs should apply, so that there should be no order for costs on this appeal.

D.H. JENKINS C.J.P.E.I.

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1 Section 28(1.1)(a)(i) of the ***Planning Act***.

2 Subsection 28(8) and (9) of the ***Planning Act***.

3 Appeal to the Court of appeal is pursuant to s.13(1) of the ***Island Regulatory and Appeals Commission Act***, R.S.P.E.I. 1988, c-18, which permits an appeal from a Commission decision or order on a question of law or jurisdiction.

4 Commission implementation order is Order LA17-05.

5 Subsection 28(7) states that the Commission authority to determine its own procedures is subject to adherence with the rules of natural justice.

6 ***Dunsmuir v. New Brunswick***, 2008 SCC 9, at para.74.

7 ***Summerside (City) v. Maritime Electric Co.***, 2015 PECA 1, at para.89.

8 ***Summerside, supra***, applying ***Moreau-Bérubé v. New Brunswick (Judicial Council)***, 2002 SCC 11, at para.74.

9 Miltonvale Development Bylaw s.4.4: "*A development permit shall be valid for a twelve-month period, or such additional time as may be authorized by Council.*"

10 Commission Order LA17-01 -- Reasons, paras.19-24 set out Miltonvale's position that: 1) it did not fail to implement the order; 2) the order was effective for 2015 only; 3) the 2013 Development Bylaw was repealed; the Commission did not have the right to dictate the content of a Development Agreement; and the "*reasonable and relevant conditions*" that Miltonvale proposed to O'Halloran are reasonable and within the scope of its planning authority under its Development Bylaw.

11 Section 32 of ***Interpretation Act***, R.S.P.E.I. 1988, Cap. I-8.

12 ***Charlottetown (City) v. Prince Edward Island (Island Regulatory and Appeals Commission)***, 2013 PECA 10, at para.22.

13 ***Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association***, 2011 SCC 61, at para.44; ***Charlottetown, supra***, at paras.20-22.

14 ***Charlottetown, supra***, at para.22.

15 ***Celgene Corporation v. Canada (Attorney General)***, 2011 SCJ No. 1, at para.21, cited in ***Maritime Electric v. Summerside (City)***, 2011 PECA 13, at para.115 (Jenkins C.J. dissenting in part). See also: ***Donovan v. QCRS***, 2016 PECA 1, at paras.20-21.

16 ***Interpretation Act***, R.S.P.E.I. 1988, Cap. I-8.

17 Order LA15-05-Reasons, at para.63; cited by the Commission in Order LA17-01-Reasons, at para.36.

18 The objects of the ***Planning Act***, ss.2(a) and (e).

19 Subsection 6(1) of ***Island Regulatory and Appeals Commission Act***, R.S.P.E.I. 1988, Cap. I-11.

20 ***Interpretation Act, supra***, ss.9 and 24(2).

21 ***Charlottetown, supra***, at para.29-30.

22 **Sullivan on Construction of Statutes**, 6th Edition, by Ruth Sullivan (LexisNexis 2014), at pp.3, 532-533, and 300.

23 Commission Order LA17-01 -- Reasons, paras.39-40.

24 Commission Order LA17-01 -- Reasons, at paras.54-55.

25 Miltonvale Park 2013 Development Bylaw, s.4.4.

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⚠ *Strickland v. Canada (Attorney General)*

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

Heard: January 20, 2015;

Judgment: July 9, 2015.

File No.: 35808.

[2015] 2 S.C.R. 713 | *[2015] 2 R.C.S. 713* | *[2015] S.C.J. No. 37* | *[2015] A.C.S. no 37* | *2015 SCC 37*

Robert T. Strickland, George Connon, Roland Auer, Iwona Auer-Grzesiak, Mark Auer and Vladimir Auer by his Litigation Representative Roland Auer, Appellants; v. Attorney General of Canada, Respondent.

(85 paras.)

Counsel

Glenn Solomon, *Q.C.*, and *Laura Warner*, for the appellants.

Anne M. Turley and *Catherine A. Lawrence*, for the respondent.

The judgment of McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis, Gascon and Côté JJ. was delivered by

CROMWELL J.

I. Introduction

1 The appellants seek to make a point: that the *Federal Child Support Guidelines*, *SOR/97-175*, are unlawful. They chose to make it by bringing a judicial review application in the Federal Court. The Federal Court, however, found that this was not an appropriate means by which to raise this issue and dismissed their application. It did so by exercising the well-established discretion to decline to undertake judicial review when some other, more suitable remedy is available. The Federal Court of [page721] Appeal upheld that decision. In my view, it made no mistake in doing so.

2 The appellants' challenge to the child support *Guidelines* raises an issue of fundamental importance to, and with broad ramifications for child support on divorce, an area entrusted by Parliament mainly to the provincial superior courts. Questions about the nature and objectives of child support on divorce, which are squarely within the expertise of those courts, will be central to resolving the appellants' challenge. While the appellants point to procedural and efficiency advantages of addressing these questions by means of judicial review in the Federal Court, any advantages are, on closer examination, largely illusory. I would therefore affirm the decision of the Federal Court of Appeal.

II. Overview of the Facts, Judicial History and Issues

3 The Governor in Council has made guidelines, by regulation, respecting child support orders: *Guidelines*. The

power to do so is conferred by s. 26.1 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). That provision authorizes the Governor in Council to make such guidelines "based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation" (s. 26.1(2)).

4 The six appellants are potentially affected by the *Guidelines* in different ways. Three of them pay child support. Robert T. Strickland entered into an interim child support agreement through court-mandated mediation during a divorce action. George Connon, who is separated from his wife, voluntarily pays child support calculated in accordance with the *Guidelines*. Roland Auer pays child support to his second wife, the amount of which was initially calculated with reference to the *Guidelines* and has since [page722] been varied twice by the Alberta Court of Queen's Bench. The other three appellants are Roland Auer's first wife, Iwona Auer-Grzesiak, and two of his sons. They argue that they are affected by Mr. Auer's obligation to pay child support to his second wife.

5 The appellants maintain that the *Guidelines* are not authorized by s. 26.1(2) and are therefore unlawful (or as lawyers say, are *ultra vires*). They claim that, contrary to what that section requires, the *Guidelines* are not based on the "relative abilities to contribute" of both spouses and that they do not reasonably calculate the amounts required "to maintain the children". To advance this position, the appellants brought an application for judicial review in the Federal Court seeking a declaration to this effect.

6 The Federal Court has "exclusive original jurisdiction ... to ... grant declaratory relief, against any federal board, commission or other tribunal": *Federal Courts Act*, *R.S.C. 1985, c. F-7, s. 18*(1)(*a*). The parties argued the appeal on the assumption that, under the *Federal Courts Act*, the application for a declaration that the *Guidelines* are *ultra vires* is, by virtue of this provision, within the exclusive jurisdiction of the Federal Court. There was no argument to the contrary and I accept that assumption for the purposes of my reasons. However, the Attorney General of Canada brought a motion to dismiss the judicial review application arguing, among other things, that the Federal Court should exercise its discretion to decline to hear the application.

7 The Federal Court agreed and dismissed the appellants' judicial review application: *2013 FC 475*, *432 F.T.R. 152*. The application judge, Gleason J., held that the Federal Court is not an appropriate forum in which to address the validity of the *Guidelines*. She reasoned that the provincial superior courts [page723] have jurisdiction over a claim that the *Guidelines* are *ultra vires* if that claim is made in proceedings in which those courts are asked to apply them. Given the minor role the Federal Court plays in issues under the *Divorce Act* and the breadth of the jurisdiction and expertise of the provincial superior courts in matters related to divorce and child support, it would be inappropriate for the Federal Court to consider the judicial review application on its merits. The Federal Court of Appeal upheld this conclusion: *2014 FCA 33*, 460 N.R. 240.

8 The appellants' appeal to this Court, as I see it, raises two related questions:

1. Do the provincial superior courts have jurisdiction to address the validity of the *Guidelines*?
2. Even if they do, did the federal courts err in refusing to hear the judicial review application on its merits?

9 In my view, the provincial superior courts have jurisdiction to address the validity of the *Guidelines* where doing so is a necessary step in resolving a case otherwise properly before them and the Federal Court did not err by refusing to hear the appellants' judicial review application.

III. Analysis

A. *First Issue: Do the Provincial Superior Courts Have Jurisdiction to Address the Validity of the Guidelines?*

(1) Position of the Parties

10 The Federal Court's refusal to undertake judicial review was based on a central premise: the provincial superior courts may rule on the legality [page724] of the *Guidelines* when that question arises in a proceeding otherwise

properly before them. The appellants challenge that premise. Their position is based on two uncontroversial propositions.

11 They say, first, that s. 18 of the *Federal Courts Act* gives the Federal Court exclusive original jurisdiction to (among other things) "grant declaratory relief, against any federal board, commission or other tribunal". (The full text is in the Appendix.) This leads to their second point, which is that this exclusive jurisdiction undisputedly includes the jurisdiction to declare regulations promulgated by the Governor in Council, such as the *Guidelines*, to be *ultra vires*: *Saskatchewan Wheat Pool v. Canada (Attorney General)* (1993), 67 F.T.R. 98, at paras. 8 and 12. The appellants submit that it follows from these two points that litigants like themselves, who are seeking a public law remedy against a federal entity, may proceed *only* in the federal courts: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, at para. 19.

12 The appellants note that there are only two exceptions to this exclusive jurisdiction of the Federal Court, neither of which applies here. First, Parliament may create express exceptions, as it has done in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and the *Extradition Act*, S.C. 1999, c. 18. There is no such express exception for the appellants' judicial review proceeding. Second, Parliament cannot, through s. 18 of the *Federal Courts Act* or otherwise, deprive provincial superior courts of the ability to determine the constitutional validity and applicability of legislation: *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147. But that principle does not apply here because the appellants challenge the *Guidelines* on administrative law, not on constitutional grounds.

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13 Based on these points, the appellants submit that, contrary to the view of the federal courts, "the weight of authority, and strong policy considerations, favour concluding that the provincial superior courts do not require jurisdiction to determine administrative validity as part of being asked to apply the *Guidelines*" and that provincial superior courts must presume the *Guidelines* to be valid unless found to be invalid by a court of competent jurisdiction: A.F., at para. 83 (emphasis deleted).

14 The respondent Attorney General rejects this contention and supports the conclusion of the federal courts on this point.

15 In my respectful view, the Attorney General is correct. A provincial superior court can hear and determine a challenge to the legality of the *Guidelines* where that determination is a necessary step in disposing of support proceedings properly before it. This, in my view, is clear from a line of very recent authority from this Court. I will turn to review it and explain why it applies here after a brief account of the purposes of the Federal Court's exclusive jurisdiction.

(2) Section 18 and the Federal Court's Exclusive Jurisdiction

16 In 1970, Parliament enacted the *Federal Court Act*, S.C. 1970-71-72, c. 1. The Act was subsequently renamed the *Federal Courts Act*, S.C. 2002, c. 8, s. 14, which is the legislation in force today. For clarity, when I refer to the "Act" in these reasons, I refer to the enactment that was in force at the relevant time.

17 Before the Act, judicial review of federal administrative action was conducted by the provincial superior courts as an aspect of their inherent jurisdiction. However, with the growth of federal regulatory regimes and administrative tribunals, several disadvantages of this arrangement became apparent. [page726] These included the possibility of multiple proceedings involving a federal decision that could lead to conflicting decisions and "a perceived lack of familiarity with federal legislation by judges who encountered it only occasionally": D. J. M. Brown and J. M. Evans, with the assistance of C. E. Deacon, *Judicial Review of Administrative Action in Canada* (loose-leaf), at topic 2: 4100.

18 To respond to these concerns, Parliament consolidated judicial review of federal boards, commissions and

tribunals within the exclusive jurisdiction of the Federal Court: s. 18 of the Act. This, it was hoped, would ensure uniformity and prevent a multiplicity of proceedings: see, e.g., *TeleZone*, at paras. 49-50; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at para. 35. The then-Minister of Justice stated that this consolidation was "designed to create a single and uniform basis of superintending jurisdiction in relation to federal boards and commissions and to place them on the same footing in this regard as provincial boards and commissions": *TeleZone*, at para. 50, citing *House of Commons Debates*, vol. V, 2nd Sess., 28th Parl., March 25, 1970, at p. 5471. Thus, with the passage of the Act, Parliament "remove[d] from the superior courts of the provinces the jurisdiction over prerogative writs, declarations, and injunctions against federal boards, commissions and other tribunals and ... place[d] that jurisdiction (slightly modified) in a new federal court": *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 34; see also *Paul L'Anglais Inc.*, at p. 154.

19 The Act also gave the Federal Court *exclusive* jurisdiction over proceedings against the federal crown: s. 17. However, this scheme proved unworkable in practice by virtue of the constitutional limits of the court's jurisdiction under s. 101 of the *Constitution Act, 1867*. That meant that the Federal Court generally had no jurisdiction over Crown servants or over other co-defendants, third parties or defendants by counterclaim and that those persons and proceedings had to be addressed in parallel proceedings in [page727] the provincial superior courts. This unsatisfactory state of affairs was resolved by amendments in 1990 making the Federal Court's jurisdiction over claims against the federal Crown concurrent with that of the provincial superior courts rather than exclusive: S.C. 1990, c. 8, s. 3; and see generally, P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 1, at pp. 7-33 and 7-34. Thus, since 1990, the Federal Court's exclusive jurisdiction with respect to judicial review is a qualification of the general rule of concurrent jurisdiction between it and the provincial superior courts.

(3) The *TeleZone* Principle

20 I have already referred briefly to the practical problems which arose by virtue of the attempt to confer on the Federal Court exclusive jurisdiction over claims against the federal Crown. The conferral of exclusive jurisdiction in judicial review of federal tribunals has also given rise to some practical problems. The main one, which arose in a line of recent cases, is whether this exclusive judicial review jurisdiction means that a claim for damages based on allegedly unlawful conduct by a federal board, commission or tribunal cannot be brought in the provincial superior courts without the claimant first successfully applying for judicial review of that conduct in the Federal Court: *TeleZone*; *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626; *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, 2010 SCC 66, [2010] 3 S.C.R. 657.

21 The Attorney General of Canada adopted the position that bringing an action in the provincial superior courts without first challenging the legality of the conduct by way of judicial review in the Federal Court was an impermissible evasion of the Federal Court's exclusive judicial review jurisdiction under s. 18 and therefore constituted an impermissible [page728] collateral attack on the actions of the federal tribunal. This Court, however, unanimously rejected this contention, noting that accepting it would create a "bottleneck" that was "manifestly not the intention of Parliament": *TeleZone*, at para. 3.

22 *TeleZone* and the related cases, although they did not decide the precise point in issue here, support the principle that the provincial superior courts have the authority to consider and rule on the legality of the actions of federal tribunals when doing so is a necessary step in adjudicating claims properly before the superior courts. As in my view this principle is central to this case, a brief review of the key cases is in order.

23 In *TeleZone*, the plaintiff company sued the federal government in the Ontario Superior Court of Justice, seeking damages in tort, contract and equity stemming from a decision not to include TeleZone among the successful bidders for licences to provide personal communication services - essentially a cell phone network. It alleged that the Minister of Industry Canada had breached a term of the department's policy statement which had accompanied its call for licence applications and had failed to treat TeleZone fairly as required by the tendering process. TeleZone neither impugned the Minister's decision to issue the licences nor sought a licence for itself. It simply sought damages for the Minister's allegedly illegal conduct in denying it a licence and for failing to treat it fairly. The Crown argued that by virtue of the Federal Court's exclusive jurisdiction under s. 18 of the Act, TeleZone

could not advance these claims in the Superior Court unless it first obtained from the Federal Court an order quashing the Minister's decision.

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24 The Court rejected the Crown's position, holding that the Ontario Superior Court of Justice could determine whether the Minister's decision was lawful or not for the purposes of the damages claim. The claim as pleaded was "dominated by private law considerations": *TeleZone*, at para. 80. The Court explained that the grant of exclusive jurisdiction in s. 18 must be understood in the broader context of the Act. Section 17 of the Act (as amended in 1990) explicitly confers concurrent jurisdiction on the provincial superior courts "in all cases in which relief is claimed against the Crown". The exclusive jurisdiction provision in s. 18 must be understood as "a reservation or subtraction from the more comprehensive grant of concurrent jurisdiction in s. 17": para. 5. Thus, the provincial superior courts may exercise their concurrent jurisdiction where the attack on a law or an order is essential to the cause of action and adjudication of that allegation is a necessary step in disposing of the claim: para. 67. As Binnie J. put it on behalf of the Court, s. 18 of the Act does not "shield the Crown from private law damages involving [federal boards, commissions and tribunals] in respect of losses caused by unlawful government decision making without first passing through the Federal Court": para. 3. The provincial superior courts, in the context of matters properly before them, have the authority "to determine every legal and factual element necessary for the granting or withholding of the remedies sought", including the potential unlawfulness of government orders: para. 6. Binnie J. was careful to point out that this principle will not apply unless the validity of the underlying order is genuinely a necessary step in an otherwise valid proceeding and is not simply made to appear as such as the result of "artful pleading": para. 75.

25 The companion case of *McArthur* supports the premise relied on by the Federal Court in this appeal. In *McArthur*, the plaintiff sued the federal Crown in the Ontario Superior Court of Justice. He sought damages and constitutional remedies for what [page730] he alleged was wrongful or false imprisonment and emotional harm stemming from time he spent in solitary confinement, segregation and a special handling unit. The Court stated the issue to be whether Mr. McArthur could pursue his damages claim in the Superior Court for arbitrary detention and alleged mistreatment without first seeking judicial review in the Federal Court to quash the segregation orders that were the basis of his claim: para. 1. Mr. McArthur alleged that the segregation orders were made without just cause and lacked the reasonable grounds required under the relevant statute. As Binnie J. noted, Mr. McArthur was "putting in issue the lawfulness or validity of the segregation orders, but he [did] so as an element of a private law cause of action over which the provincial superior court ha[d] jurisdiction": para. 13.

26 The Court rejected the Crown's position that Mr. McArthur must first seek judicial review in the Federal Court to quash the segregation orders that founded his claim: paras. 2 and 11. The Superior Court had jurisdiction to entertain the claim because its authority extended to "the person and the subject matter in question and, in addition, [because it] has authority to make the order sought": para. 17, citing *Mills v. The Queen*, *[1986] 1 S.C.R. 863*, at p. 960, quoting Brooke J.A. in *R. v. Morgentaler (1984), 41 C.R. (3d) 262* (Ont. C.A.), at p. 271. Thus, in adjudicating the claim, the Court could consider "the validity of Mr. McArthur's detention in the context of a damages claim, as well as the impact, if any, of a *valid* order on Crown liability": para. 15 (emphasis in original). Binnie J. concluded that "[t]here is nothing in the *Federal Courts Act* to give the Federal Court the exclusive jurisdiction to determine the lawfulness or validity of the order of a 'federal board, commission or other tribunal' when Mr. McArthur does not seek any of the remedies listed in s. 18 of the *Federal Courts Act*": para. 17.

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27 I acknowledge that, unlike in *McArthur*, the appellants in this case *do* seek a s. 18 remedy, a declaration of invalidity. However, the question at this point in the analysis focuses on the authority of the superior courts to deal with the *Guidelines*. *McArthur* strongly supports the premise of the Federal Court's decision in the present case, that is, that the provincial superior courts have the authority to determine the "lawfulness or validity" of the *Guidelines* in the course of proceedings properly before them in which doing so is a necessary step in resolving

those proceedings. As I will discuss below, this was a key consideration for the federal courts in exercising discretion not to undertake judicial review.

28 In the last of the relevant cases in the *TeleZone* line, *Canadian Food Inspection Agency*, the Agency contested the jurisdiction of the Quebec Superior Court to entertain recourses in warranty alleging that a direction the Agency had issued was the cause of any damage meat producers had suffered from being unable to market some of their product: para. 9. The Agency's position was that the claims could not succeed without first attacking the lawfulness or validity of its decision by way of judicial review in the Federal Court: paras. 16 and 20. Once again, this Court affirmed that "[s]uccessfully challenging an administrative decision of a federal board on judicial review is not a requirement for bringing an action for damages with respect to that decision": para. 21. Since the Quebec Superior Court had jurisdiction over the parties and the subject matter of the dispute, the claims were properly before it: para. 29.

29 This decision, too, supports the premise of the Federal Court in the present case: the superior court can rule on the legality of the federal administrative action in proceedings properly before it in which deciding that issue is an essential step.

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30 Another line of cases illustrates and supports this approach. They affirm the view that a provincial superior court dealing with an application for *habeas corpus* with *certiorari* in aid can assess the legality of detention resulting from the decision of a federal board. These cases rejected the contention that *certiorari* in aid of *habeas corpus* was no longer available in the provincial superior courts by virtue of the exclusive jurisdiction provision in s. 18 of the Act.

31 In *R. v. Miller*, *[1985] 2 S.C.R. 613*, the Court noted that Parliament intended to leave with provincial superior courts "the jurisdiction by way of *habeas corpus* to review the validity of a detention imposed by federal authority": p. 624. This parliamentary intent combined with the importance of *certiorari* in aid to the effectiveness of *habeas corpus* led the Court to conclude that a provincial superior court has jurisdiction to issue *certiorari* in aid of *habeas corpus* to assess the validity of detention: p. 625. *Certiorari* in aid was considered to be distinct from the writ of *certiorari* to quash a decision of a federal authority and was therefore not within the exclusive jurisdiction of the Federal Court by virtue of s. 18. In *May v. Ferndale Institution*, *2005 SCC 82*, *[2005] 3 S.C.R. 809*, the Court reaffirmed this principle as it did once again most recently in *Mission Institution v. Khela*, *2014 SCC 24*, *[2014] 1 S.C.R. 502*. The Court held that reasonableness of the decision to detain should be regarded as one element of its lawfulness. It followed that the provincial superior court may review for reasonableness in deciding an application for *habeas corpus* even though the court would, in effect although not in form, be assessing the legality on administrative law grounds of the federal board's conduct and orders: para. 65.

(4) Conclusion on the First Issue

32 The Federal Court of Appeal held that the Federal Court judge "did not err in law when she [page733] concluded that the provincial superior courts have jurisdiction to determine the *vires* of the Guidelines in the context of proceedings for which they have jurisdiction under the *Divorce Act* and to decline to apply them if found to be *ultra-vires*": para. 7. I agree.

33 The Court's jurisprudence, which I have just reviewed, supports the principle that the provincial superior courts, in the context of proceedings properly before them, can address the legality of the conduct of federal boards, commissions and tribunals, where doing so is a necessary step in resolving the claims asserted in those proceedings. This means that in the context of family law proceedings otherwise properly before them, the provincial superior courts can decide that the *Guidelines* are *ultra vires* and decline to apply them if doing so is a necessary step in resolving the matters before them. It follows that the appellants' position to the contrary on this point must be rejected and that the premise underlying the decisions of the Federal Courts to decline jurisdiction was correct.

B. *Second Issue: Did the Federal Courts Err in Refusing to Hear the Judicial Review Application on Its Merits?*

(1) Introduction

34 The appellants submit that the Federal Court erred by refusing to entertain their judicial review application.

35 The Federal Court based its discretionary decision to deny judicial review primarily on the greater expertise of provincial superior courts in family law. The Federal Court of Appeal upheld that decision and referred to additional factors supporting it. Invalidating the *Guidelines*, the Federal Court of Appeal reasoned, would have uncertain consequences in respect of family law matters outside the *Divorce Act* to which the *Guidelines* apply by virtue of provincial legislation and practice and adjudicating these issues in the context of a divorce or corollary relief proceeding in the superior courts would ensure a more complete adversarial debate: paras. 14-16.

[page734]

36 The appellants submit that the federal courts erred because the possibility of challenging the *Guidelines* in the context of child support proceedings in the provincial superior courts is a remedy that is neither adequate nor truly "alternative" for several reasons. Before turning to those submissions in detail, however, it will be helpful to establish the legal framework within which this issue must be decided.

(2) Legal Principles

(a) *The Discretionary Nature of Judicial Review and Declaratory Relief*

37 Judicial review by way of the old prerogative writs has always been understood to be discretionary. This means that even if the applicant makes out a case for review on the merits, the reviewing court has an overriding discretion to refuse relief: see, e.g., D. J. Mullan, "The Discretionary Nature of Judicial Review", in R. J. Sharpe and K. Roach, eds., *Taking Remedies Seriously: 2009* (2010), 420, at p. 421; *Harelkin v. University of Regina*, *[1979] 2 S.C.R. 561*, at p. 575; D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (6th ed. 2014), at pp. 686-87; Brown and Evans, at topic 3: 1100. Declarations of right, whether sought in judicial review proceedings or in actions, are similarly a discretionary remedy: "... the broadest judicial discretion may be exercised in determining whether a case is one in which declaratory relief ought to be awarded" (Dickson C.J. in *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, *[1989] 2 S.C.R. 49*, at p. 90, citing S. A. de Smith, *Judicial Review of Administrative Action* (4th ed. 1980), at p. 513).

38 The discretionary nature of judicial review and declaratory relief is continued by the judicial review provisions of the Act. This is underlined both by the reference in s. 18 to the traditional prerogative writs and other administrative law remedies [page735] which have always been considered discretionary and by the use of permissive rather than mandatory language in relation to when relief may be granted. Section 18.1(3) provides that "[o]n an application for judicial review, the Federal Court may" make certain orders in the nature of those traditional remedies. This statutory language "preserves the traditionally discretionary nature of judicial review. As a result, judges of the Federal Court ... have discretion in determining whether judicial review should be undertaken": *Canadian Pacific Ltd. v. Matsqui Indian Band*, *[1995] 1 S.C.R. 3*, at para. 31; *TeleZone*, at para. 56.

39 The fact that undertaking judicial review is discretionary means that the Federal Court judge's exercise of that discretion is entitled to deference on appeal. As this Court noted in *Matsqui*, an appellate court "must defer to the judge's exercise of ... discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently": para. 39, quoting Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042, at p. 1046.

(b) *Alternative Relief*

40 One of the discretionary grounds for refusing to undertake judicial review is that there is an adequate alternative. The leading case is *Harelkin*, in which a student alleged that a university committee made a decision that violated his procedural rights. There was a right of appeal to the university's senate, but instead of pursuing it,

the student applied for judicial review. This Court held that the judge at first instance had erred in entertaining the judicial review application because he failed to exercise his discretion on relevant grounds: he did not consider whether the internal appeal process was an adequate alternative remedy that was capable of curing the denial of natural justice of which the student complained.

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41 The Court has applied similar reasoning in a number of cases to dismiss applications for judicial review. For example, in *Matsqui*, the Court upheld the decision of the Federal Court to decline to hear Canadian Pacific's application for judicial review because it could have pursued an appeal procedure established by the Matsqui Band. In *Canada (Auditor General)*, the Court refused judicial review to the Auditor General to challenge a denial of access to information because a political remedy - reporting to the House of Commons any refusals to comply with requests for information - was an adequate alternative remedy.

42 The cases identify a number of considerations relevant to deciding whether an alternative remedy or forum is adequate so as to justify a discretionary refusal to hear a judicial review application. These considerations include the convenience of the alternative remedy; the nature of the error alleged; the nature of the other forum which could deal with the issue, including its remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost: *Matsqui*, at para. 37; *C.B. Powell Limited v. Canada (Border Services Agency)*, *2010 FCA 61*, *[2011] 2 F.C.R. 332*, at para. 31; Mullan, at pp. 430-31; Brown and Evans, at topics 3: 2110 and 3: 2330; *Harelkin*, at p. 588. In order for an alternative forum or remedy to be adequate, neither the process nor the remedy need be identical to those available on judicial review. As Brown and Evans put it, "in each context the reviewing court applies the same basic test: is the alternative remedy adequate in all the circumstances to address the applicant's grievance?": topic 3: 2100 (emphasis added).

43 The categories of relevant factors are not closed, as it is for courts to identify and balance the relevant factors in the context of a particular case: *Matsqui*, at paras. 36-37, citing *Canada (Auditor General)*, at p. 96. Assessing whether there is an [page737] adequate alternative remedy, therefore, is not a matter of following a checklist focused on the similarities and differences between the potentially available remedies. The inquiry is broader than that. The court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances. In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. Ultimately, this calls for a type of balance of convenience analysis: *Khosa*, at para. 36; *TeleZone*, at para. 56. As Dickson C.J. put it on behalf of the Court: "Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the factors which are relevant ..." (*Canada (Auditor General)*, at p. 96).

44 This balancing exercise should take account of the purposes and policy considerations underpinning the legislative scheme in issue: see, e.g., *Matsqui*, at paras. 41-46; *Harelkin*, at p. 595. David Mullan captured the breadth of the inquiry well:

> While discretionary reasons for denial of relief are many, what most have in common is a concern for balancing the rights of affected individuals against the imperatives of the process under review. In particular, the courts focus on the question of whether the application for relief is appropriately respectful of the statutory framework within which that application is taken and the normal processes provided by that framework and the common law for challenging administrative action. Where the application is unnecessarily disruptive of normal processes ... the courts will generally deny relief. [Emphasis added; p. 447.]

45 The factors to be considered in exercising this discretion cannot be reduced to a checklist or a statement of general rules. All relevant factors, considered in the context of the particular case, should be taken into account.

[page738]

(3) Analysis of the Appellants' Position

46 The Federal Court exercised its discretion not to hear the judicial review application because Parliament has granted virtually exclusive jurisdiction over the *Divorce Act* to the provincial superior courts and, by virtue of their expertise in child support matters, those courts are "better placed" than the Federal Court to deal with the validity of the *Guidelines*: para. 61. The Federal Court of Appeal essentially adopted this reasoning and further supported it by noting that appellate courts would "significantly benefit from the practical expertise that provincial superior courts have with such matters and from the additional arguments provided by the spouse seeking support as well as those of the AGC if he chose to intervene": para. 16. These considerations are appropriately concerned more with the unsuitability of judicial review in the Federal Court in this case than with the narrower question of whether a remedy comparable to that sought by the appellants is available elsewhere. In my opinion, judicial review in the Federal Court is manifestly inappropriate here and that court reasonably exercised its discretion not to engage in it.

47 At its core, the appellants' claim is that they are entitled to a ruling on the legality of the *Guidelines*. They say that they are seeking a purely public law remedy which they can only obtain in the Federal Court and they do not seek, or want, any other remedy. This claim is founded on three flawed propositions that also undermine the appellants' more specific submissions.

48 First, the appellants' position that they are entitled to a ruling on the legality of the *Guidelines* through a judicial review is fundamentally at odds with the discretionary nature of judicial review and with the broad grounds on which that discretion may be exercised. As Brown and Evans put it, "the discretionary nature of [judicial review] reflects the fact that unlike private law, its orientation is not, [page739] and never has been, directed exclusively to vindicating the rights of individuals": topic 3: 1100. The appellants thus do not have a right to have the Federal Court rule on the legality of the *Guidelines*; the Federal Court has a discretion to do so, which it has decided not to exercise.

49 Second, the appellants' position that the alternative is not adequate because it does not provide identical procedures or relief cannot be accepted. The appellants' arguments focus too narrowly on how challenging the *Guidelines* in the context of family law litigation in the provincial superior courts will not provide everything that might be available to them on judicial review. Exercising the discretion to decline judicial review jurisdiction requires the court to take a broader view. The court should consider such factors as the appropriateness of judicial review in the particular context and, as Mullan put it, whether judicial review is "appropriately respectful" of the statutory framework and of the "normal processes" for which it provides.

50 In short, the analysis cannot simply look at the alleged advantages of judicial review from the appellants' perspective so that they can make their point, but also must engage with the more fundamental question of how judicial review interacts with the operation of the *Guidelines* in family law litigation in the provincial courts. When this is done, the conclusion is that the appellants' position is misconceived.

51 The *Guidelines* operate and play a central role within a complex area of law, governed by the *Divorce Act*. Parliament has entrusted, for practical purposes, this entire area of law to the provincial superior courts. Having done so, it would be curious, to say the least, if the legality of a central aspect of that regime were to be finally decided by the [page740] federal courts, which, as a result of federal legislation, have virtually no jurisdiction with respect to family law matters. The appellants' judicial review proceedings are thus deeply inconsistent with fundamental parliamentary choices about where important family law issues will be determined.

52 Third, the appellants' position that obtaining a ruling in the Federal Court would be more efficient than a proliferation of rulings in the various provincial superior courts in individual family law proceedings cannot be accepted. The appellants submit that the alternative remedy of litigation in the provincial superior courts is inefficient and would give rise to multiple proceedings, undermining judicial economy. This is simply not the case.

53 The appellants' position overlooks the fact that a ruling of the Federal Court on this issue would not be binding on any provincial superior court. Thus, regardless of what the Federal Court might decide, before the ruling could

have any practical effect, the issue would have to be re-litigated in the superior courts, or, alternatively, litigated up to this Court. Even if there were a binding ruling that the *Guidelines* were unlawful, a proliferation of litigation would be inevitable. It would be for the provincial courts to decide the impact of the illegality of the *Guidelines* on particular support orders and that could only be done in the context of a multitude of individual cases. A further complexity arises from the fact that all provinces and territories except Quebec have adopted child support guidelines that are very similar to the *Guidelines* and use the federal child support tables. Those provincial laws are not subject to the appellants' challenge and yet might well be affected by it. These practical considerations significantly undermine the appellants' position that a single judicial review proceeding would resolve the main issue more efficiently.

[page741]

54 In light of these considerations, arguments based on the efficiency of judicial review in the Federal Court do not persuade. They are disconnected from both the practical realities and the potential impact of these proceedings.

55 I turn to the appellants' remaining specific submissions. They submit that a child support proceeding is not available for some of the appellants and is not appropriate for others. Mark Auer, Vladimir Auer and Iwona Auer-Grzesiak have no alternative way of addressing the impact they allege that the *Guidelines* have on them, in part because children cannot bring a child support application and thus cannot raise the validity of the *Guidelines* in that context. George Connon is not a party to proceedings under the *Divorce Act* and would rather not initiate adversarial proceedings to access the alternative remedy: his complaint is against the Governor General in Council, not his wife.

56 These submissions refer to factors that, while often strengthening the case for engaging in judicial review, cannot reasonably be thought to be entitled to much weight in the circumstances of this case. While the appellants say that the impact of the *Guidelines* on spouses and children from other marriages can only be addressed in judicial review proceedings, this must be considered in light of the fact that the appellants' judicial review proceedings exclude direct adversarial participation by other directly affected parties: spouses and former spouses seeking child support orders or variations of them under the *Divorce Act*. As the Federal Court of Appeal pointed out, adjudicating the issue in the context of *Divorce Act* or child support proceedings would ensure full participation of these parties. This is at least as important a consideration as giving the appellants an opportunity to try to make their point that the *Guidelines* are unlawful. I agree with the Federal Court of Appeal that while having the legality of the *Guidelines* determined in a single proceeding in the Federal Court might weigh in favour of the Federal Court hearing the application, it does [page742] not outweigh the factors that favour declining jurisdiction. Moreover, as I discussed earlier, the touted advantages are largely illusory.

57 The appellants take exception to the Federal Court and the Federal Court of Appeal concluding that the interest of the payor applicants was to seek a downward variation in the amount of child support that they are paying. Counsel for the appellants emphasized during oral argument that this is not the relief sought in the judicial review application, that it is not the appellants' characterization of the case and that even if successful in their judicial review application, there would be no immediate effect on most of the child support arrangements that underlie this case. Taking this submission at face value, the appellants seek to engage the discretionary judicial review jurisdiction of the Federal Court in an area outside its core institutional expertise in order to achieve "no immediate effect" for themselves. This consideration, in my respectful view, strengthens not weakens the case for declining to engage in judicial review in this case.

58 The appellants also submit that they seek a declaration of invalidity; the "alternative" would give them something else entirely, which they do not want. Quoting *TeleZone*, at para. 19, they say that "[a]ccess to justice requires that the claimant be permitted to pursue its chosen remedy directly": A.F., at para. 145. The provincial superior courts do not, as required by *TeleZone*, have jurisdiction over the order sought. The appellants maintain that the alternative remedy in the provincial superior courts does not comply with the principle of rule of law. It would not provide instructions to the Governor in Council or permit the appellants to determine whether the *Guidelines* are properly enacted. In my respectful [page743] view, these submissions do not identify any reviewable error on the part of the Federal Court.

59 As I discussed earlier, the remedy available in an alternative forum need not be the claimant's preferred remedy or identical to that which the claimant seeks by way of judicial review. As the Court affirmed in *Matsqui*, at para. 37, and *Harelkin*, at p. 588, the remedial capacity of the alternative decision-maker is only one factor to consider in assessing adequacy. Thus, assuming (as the parties did before us) that the provincial superior courts cannot grant the remedy of a declaration of invalidity, this factor is relevant but not decisive. As for the contention that denying access to judicial review is contrary to the principle of the rule of law, I have already explained that the appellants do not have a right to require the Federal Court to engage in judicial review. Moreover, there is ample opportunity for the legality of the *Guidelines* to be challenged in family law litigation to which their operation is directly relevant.

60 The appellants further submit that the courts below misunderstood the expertise engaged by these proceedings, as they assumed that this was a family law case. According to the appellants, this case requires administrative, not family law, expertise because the question is whether the legislation authorizes the making of these *Guidelines*. I respectfully disagree.

61 The appellants request a judicial determination of, among other things, whether the *Guidelines* are based, as they are required to be by s. 26.1(2) of the *Divorce Act*, on the principle "that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation": see A.F., at paras. 12-13. Making that determination will inevitably engage family law expertise [page744] in relation to, among other things, the nature and extent of the obligation "to maintain" children and how the "relative abilities" of parents to do so should be assessed. The provincial superior courts deal day in and day out with disputes in the context of marital breakdown concerning the needs of children, as well as what custody and support arrangements are in their best interests. They regularly entertain submissions on the suitability of support orders, including setting support for special or extraordinary expenses (s. 7 of the *Guidelines*) and entertaining claims of undue hardship related to payment of support (s. 10 of the *Guidelines*). This subject-matter expertise will properly be brought to bear on the appellants' contentions. I agree with the following observations of the Federal Court of Appeal:

> ... the *vires* of the Guidelines should be determined by a court that has developed the particular expertise to properly assess the arguments in their factual context. This is particularly important when one considers the nature of the arguments set out in paragraphs 14 and 15 of the application and the general allegation at paragraph 16 that the Guidelines are unreasonable and manifestly unjust, which involves looking at the impact of the Guidelines and the child support calculation formula on spouses and children in practice. Practical experience is relevant also when one considers that the Guidelines provide significant discretion to the provincial superior courts to depart from the statutory formula. According to the Appellants, such courts in fact rarely exercise that discretion. It would be difficult for the Federal Court to assess the validity of that contention. [para. 13]

(4) Summary

62 I conclude that the Federal Court did not make any reviewable error in exercising the discretion not to entertain this judicial review application for declaratory relief.

[page745]

63 Since writing my reasons, I have had the advantage of reviewing the concurring reasons of my colleagues Abella and Wagner JJ. As they point out, this case was argued on the basis that there was no dispute that the Federal Court has exclusive original jurisdiction to grant judicial review remedies directed against regulations promulgated by the Governor in Council. This assumption by the parties is hardly surprising given this Court's recent decision in *McArthur*, at paras. 2 and 17, aff'g *2008 ONCA 892*, *94 O.R. (3d) 19*, at para. 94, in which we at least implicitly if not explicitly affirmed that s. 18 of the Act gives the Federal Court exclusive original jurisdiction to issue a prerogative remedy or grant declaratory relief against any federal board, commission or other tribunal on administrative law grounds. My colleagues point to a number of "concerns" about this assumption and raise various possible arguments that might be made to the contrary. As none of these points was argued, I of course will keep

an open mind about them. But I do not want my silence on these issues to be understood as indicating that, at least as presently advised, I share the concerns raised by my colleagues.

64 At this point, it seems to me that the language of the Act conferring "exclusive original jurisdiction" can be taken as a clear and explicit expression of parliamentary intent. Similarly, as presently advised I see no reason to doubt that the Governor in Council, when exercising "jurisdiction or powers conferred by or under an Act of Parliament" is a "federal board, commission or other tribunal" within the meaning of s. 2 the Act. Further, the Court in *Paul L'Anglais Inc.* distinguished between Federal Court jurisdiction to rule on constitutionality and jurisdiction to engage in judicial review on administrative law grounds. No one questions that s. 18 does not withdraw the authority of the provincial superior courts to grant the traditional administrative law remedies against federal boards, commissions and tribunals on division of powers grounds: see, e.g., *Paul L'Anglais Inc.* at pp. 152-63. But with respect to judicial review on administrative law grounds, the Court expressly confirmed that the Federal Court has [page746] exclusive original jurisdiction as described in s. 18 of the Act:

> In adopting s. 18 of the *Federal Court Act*, ... Parliament in effect divested the superior courts of the superintending and reforming power over federal agencies and conferred it on the Trial Division of the Federal Court ... .
>
> It is well established that the effect of s. 18 [of the *Federal Court Act*] was to transfer all superintending and reforming power over federal agencies from the superior courts to the Federal Court ... .
>
> ...
>
> ... Parliament has a perfect right to enact that the superintending and reforming power over federal agencies, acting in the administration of the laws of Canada ... will be exercised exclusively by the Federal Court, a court created for the better administration of those laws. However, it cannot confer such an exclusive power on the Federal Court when what is involved is no longer the administration of a law of Canada, but the interpretation and application of the Constitution. [pp. 153-54 and 162]

All of these matters are, of course, for another day.

IV. Disposition

65 I would dismiss the appeal with costs.

The following are the reasons delivered by

ABELLA and WAGNER JJ.

66 The provincial superior courts administer the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), and the *Federal Child Support Guidelines*, SOR/97-175. As the majority states, Parliament has entrusted this entire area of law to the provincial superior courts.

67 The parties proceeded before us on the assumption that the Federal Court has exclusive jurisdiction to declare invalid all federal regulations [page747] promulgated by the Governor in Council. In view of the fact that this issue was not argued, and given its importance, in our respectful view this case should not be seen as categorically endorsing this assumption. Pending argument in another case where the issue is squarely raised, our concerns arise from a number of sources.

68 First, any derogation from the jurisdiction of the provincial superior courts "requires clear and explicit statutory wording to this effect": *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 46; *Canada (Attorney General) v. TeleZone Inc.*, [2010] 3 S.C.R. 585, at para. 42. A superior court "has jurisdiction to entertain virtually any claim unless that jurisdiction is specifically, unequivocally and constitutionally removed by Parliament": *Sorbara v. Canada (Attorney General)* (2009), 98 O.R. (3d) 673 (C.A.), at para. 7, leave to appeal refused, [2009] 3 S.C.R. x. It would be possible to argue, in our view, that s. 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, does not clearly and unequivocally strip the provincial superior courts of their jurisdiction to declare federal regulations made by the Governor in Council to be invalid on administrative grounds.

69 In fact, this Court has never held that the Federal Court enjoys the exclusive authority to declare all regulations made by the Governor in Council invalid. Only two appellate courts have endorsed that proposition: *Saskatchewan Wheat Pool v. Canada (Attorney-General)* (1993), 107 D.L.R. (4th) 63 (Sask. C.A.), at pp. 66-69; *Messageries publi-maison ltée v. Société canadienne des postes*, [1996] R.J.Q. 547 (C.A.).

70 A contrary view was expressed by several others: *Waddell v. Governor in Council* (1981), 30 B.C.L.R. 127 (S.C.), appeal dismissed as academic (1982), 142 D.L.R. (3d) 177 (B.C.C.A.); *Re Williams and Attorney-General for Canada* (1983), 45 O.R. (2d) 291 (H.C.J.); and *British Columbia Milk Marketing Board v. Aquilini*, [1997] B.C.J. No. 843 (S.C.) (QL), rev'd in part on other grounds (1998), [page748] 165 D.L.R. (4th) 626 (B.C.C.A.), notice of discontinuance filed, [1999] 2 S.C.R. v.

71 Moreover, over three decades ago, this Court decided that provincial superior courts have jurisdiction to declare the federal laws they apply *ultra vires* on division of powers grounds so that they are not left with "the invidious task of execution of federal and provincial laws ... while being unable to discriminate between valid and invalid federal statutes so as to refuse to 'execute' the invalid statutes": *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 328.

72 Provincial superior courts also have jurisdiction to declare the federal laws they apply to be contrary to the *Canadian Charter of Rights and Freedoms*: *Wakeford v. Canada* (2002), 58 O.R. (3d) 65 (C.A.), at para. 40, leave to appeal refused, [2002] 4 S.C.R. vii; *Lavers v. British Columbia (Minister of Finance)* (1989), 64 D.L.R. (4th) 193 (B.C.C.A.); *International Fund for Animal Welfare, Inc. v. Canada (Attorney General)* (1998), 157 D.L.R. (4th) 561 (Ont. Ct. (Gen. Div.)).

73 Federal regulations are federal law. Consequently, an argument can be made that the jurisdiction of the provincial superior courts to declare invalid the federal laws they apply necessarily includes the authority to declare invalid the federal *regulations* they apply: see e.g. *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] 1 S.C.R. 401; *Dyck v. Highton* (2003), 239 Sask. R. 38 (Q.B.); *Ward v. Canada (Attorney General)* (1997), 155 Nfld. & P.E.I.R. 313 (Nfld. S.C. (T.D.)), rev'd on other grounds (1999), 183 Nfld. & P.E.I.R. 295 (Nfld. C.A.), rev'd [2002] 1 S.C.R. 569; *Souliere v. Leclair* (1998), 52 C.R.R. (2d) 156 (Ont. Ct. (Gen. Div.)); *Premi v. Khodeir* (2009), 198 C.R.R. (2d) 8 (Ont. S.C.J.); *Grenon v. Canada (Attorney General)* (2007), 76 Alta. L.R. (4th) 346 (Q.B.).

74 We are not suggesting that Parliament lacks the authority under s. 101 of the *Constitution Act, [page749] 1867* to grant the Federal Court jurisdiction to declare federal regulations *ultra vires*. Our concern is simply whether the *Federal Courts Act* has given it the *exclusive* jurisdiction to do so.

75 The Federal Court was created to remove from the provincial superior courts the jurisdiction to supervise federal administrative tribunals, not to strip them of their jurisdiction to determine the *vires* of the federal regulations they apply: Ian Bushnell, *The Federal Court of Canada: A History, 1875-1992* (1997), at pp. 157-58; see also Richard W. Pound, *Chief Justice W.R. Jackett: By the Law of the Land* (1999), at p. 220; John Turner, Minister of Justice and Attorney General of Canada, *House of Commons Debates*, vol. V, 2nd Sess., 28th Parl., March 25, 1970, at pp. 5469-71.

76 The view that s. 18 of the *Federal Courts Act* was designed to consolidate judicial review jurisdiction of federal boards in a national court - and *not* to interfere with the subject-matter jurisdiction of the provincial superior courts - was later confirmed by Doug Lewis, Minister of Justice and Attorney General of Canada, when introducing certain amendments to the *Federal Court Act* in 1989: *House of Commons Debates*, vol. IV, 2nd Sess., 34th Parl., November 1, 1989, at pp. 5413-14.

77 There is no evidence that Parliament intended to limit the subject matter jurisdiction of the provincial superior courts by preventing them from determining the *vires* of the regulations they apply. At the very least, this argues for caution and full argument before this Court declares - or is seen to declare - that s. 18 of the *Federal Courts Act*

means that the Federal Court has exclusive jurisdiction over *all* federal regulations, even if they are not part of legislative schemes over which the Federal Court has jurisdiction or expertise, such as the *Criminal Code*, R.S.C. 1985, c. C-46, or, as in this case, the *Divorce Act*.

[page750]

78 Nor should the companion decisions in *Canada (Attorney General) v. McArthur*, [2010] 3 S.C.R. 626, and *TeleZone* necessarily contradict this view. With respect, the question of whether the provincial superior courts have jurisdiction to declare federal regulations invalid was not in issue in either case, and neither judgment purported to decide the question of whether the Governor in Council is a "federal board, commission or other tribunal" for the purposes of the *Federal Courts Act*. In fact, the Governor in Council was not implicated in either case. As such, we respectfully disagree with the majority's assertion that *McArthur* "implicitly if not explicitly affirmed that s. 18 of the Act gives the Federal Court exclusive original jurisdiction to issue a prerogative remedy or grant declaratory relief" against the Governor in Council: para. 63.

79 In *McArthur*, a prison inmate sought damages in the Ontario Superior Court of Justice against federal prison authorities for "arbitrary detention and alleged mistreatment": para. 1. The legal issue was whether the inmate had to "first seek judicial review in the Federal Court to quash the segregation orders that [were] the basis of his claim" before he could proceed with his monetary claims in the superior court: para. 1. In *TeleZone*, a company sought damages in the Ontario Superior Court of Justice for breach of contract, negligence, and unjust enrichment resulting from a decision of the Minister of Industry Canada. The legal issue in that case was whether the company had to obtain "an order quashing the Minister's decision" from the Federal Court before it could proceed with its damages claim in the superior court: para. 2.

80 In both cases, this Court concluded that s. 18 of the *Federal Courts Act* does not require a party to seek judicial review in the Federal Court before initiating an action for damages against the Crown in a provincial superior court. The Court's decisions focused entirely on the jurisdiction of the provincial superior courts to issue monetary relief. As [page751] the majority itself acknowledges, the question of the provincial superior courts' jurisdiction to issue declaratory relief in connection with federal regulations was not in issue. As a result, it is difficult to see how it can be said that these cases "support the principle" that the provincial superior courts have only a limited authority, or that they stand for the proposition that the provincial superior courts can only consider the administrative validity of federal regulations where it is "genuinely a necessary step in an otherwise valid proceeding and is not simply made to appear as such as the result of 'artful pleading'": para. 24.

81 The majority also suggests that this Court's decision in *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147, "expressly confirmed" that s. 18 grants the Federal Court exclusive original jurisdiction "to engage in judicial review on administrative law grounds", while the provincial superior courts retain only the "jurisdiction to rule on constitutionality": para. 64. In our respectful view, the *Paul L'Anglais* decision supports a contrary interpretation.

82 *Paul L'Anglais* was about a decision by the Canada Labour Relations Board, which had found that two media companies were "federal undertakings and that their employees perform work which falls under the jurisdiction established by the *Canada Labour Code*". The companies brought a motion in the Quebec Superior Court arguing that their activities fell within "the exclusive authority of the provincial legislatures". The issue before the Court was whether s. 18 ousted the jurisdiction of the superior court to "review the decision made in the case at bar by the Board". The Court held that s. 18 does not have "the effect of superseding the superintending and reforming power of the Superior Court and its jurisdiction in evocation over the decision rendered in the case at bar by the Canada Labour Relations Board": pp. 151-52, 158 and 163. Not only did the Court make no reference to any distinction between "constitutionality" and "administrative [page752] law grounds", it made no reference to administrative law grounds at all. It is with respect inaccurate to state, as the majority does, that the Court made a distinction between "jurisdiction to rule on constitutionality", and jurisdiction "to engage in judicial review on administrative law grounds" for the purposes of s. 18.

83 What the Court did say in *Paul L'Anglais* was that it was expressly endorsing and applying its earlier decision in *Law Society* (p. 158). In that case, the Director of Investigation and Research had interpreted the *Combines Investigation Act*, R.S.C. 1970, c. C-23, as giving him jurisdiction to initiate an investigation into the regulations and policies about advertising by members of the Law Society of British Columbia. The Law Society responded by initiating an action in the British Columbia Supreme Court seeking a declaration that the Act did not apply to the Law Society or its members, or, to the extent that it did apply, a declaration that the Act was *ultra vires* Parliament. The legal issue was whether s. 18 ousted the jurisdiction of the superior court to issue declarations in connection with federal laws. The Court concluded that s. 18 did not have this effect: pp. 320, 322-23 and 329.

84 In reaching this conclusion, the *Law Society* decision too did not distinguish between "constitutionality" and "administrative law grounds" to determine the effect of s. 18 on the jurisdiction of the provincial superior courts. Rather, the Court expressly held that the provincial superior courts cannot be stripped of the jurisdiction to declare invalid the federal laws they apply:

> It is difficult to see how an argument can be advanced that a statute adopted by Parliament for the establishment of a court for the better administration of the laws of Canada can at the same time include a provision that the provincial superior courts may no longer declare a statute enacted by Parliament to be beyond the constitutional [page753] authority of Parliament. Sections 17 and 18 of the *Federal Court Act* must, in the view of the appellants, be so construed. In my view Parliament lacks the constitutional authority to so provide. To do so would strip the basic constitutional concepts of judicature of this country, namely the superior courts of the provinces, of a judicial power fundamental to a federal system as described in the *Constitution Act*. At the same time it would leave the provincially-organized superior courts with the invidious task of execution of federal and provincial laws, to paraphrase the *Valin* case, *supra*, while being unable to discriminate between valid and invalid federal statutes so as to refuse to "execute" the invalid statutes. For this second and more fundamental reason I conclude that the British Columbia courts have the requisite jurisdiction to entertain the claims for declarations herein made. [Emphasis added; p. 328.]

There was no suggestion, either in *Law Society* or *Paul L'Anglais*, that the legal proposition - provincial superior courts should not be in the "invidious" position of having to apply invalid federal laws - extended only to declarations of constitutional invalidity.

85 Accordingly, although we agree with the result reached by the majority, we are concerned that the reasons not be seen as representing a definitive view from this Court that the provincial superior courts cannot declare federal regulations invalid on administrative grounds.

* * * * *

APPENDIX

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

> **26.1** (1) The Governor in Council may establish guidelines respecting the making of orders for child support, including, but without limiting the generality of the foregoing, guidelines
>
> (*a*) respecting the way in which the amount of an order for child support is to be determined;
>
> [page754]
>
> (*b*) respecting the circumstances in which discretion may be exercised in the making of an order for child support;
>
> (*c*) authorizing a court to require that the amount payable under an order for child support be paid in periodic payments, in a lump sum or in a lump sum and periodic payments;
>
> (*d*) authorizing a court to require that the amount payable under an order for child support be paid or secured, or paid and secured, in the manner specified in the order;

(*e*) respecting the circumstances that give rise to the making of a variation order in respect of a child support order;

(*f*) respecting the determination of income for the purposes of the application of the guidelines;

(*g*) authorizing a court to impute income for the purposes of the application of the guidelines; and

(*h*) respecting the production of income information and providing for sanctions when that information is not provided.

(2) The guidelines shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation.

(3) In subsection (1), "order for child support" means

(*a*) an order or interim order made under section 15.1;

(*b*) a variation order in respect of a child support order; or

(*c*) an order or an interim order made under section 19.

Federal Child Support Guidelines, SOR/97-175

7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and [page755] the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

(*a*) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;

(*b*) that portion of the medical and dental insurance premiums attributable to the child;

(*c*) health-related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

(*d*) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;

(*e*) expenses for post-secondary education; and

(*f*) extraordinary expenses for extracurricular activities.

(1.1) For the purposes of paragraphs (1)(*d*) and (*f*), the term "extraordinary expenses" means

(*a*) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or

(*b*) where paragraph (*a*) is not applicable, expenses that the court considers are extraordinary taking into account

(i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,

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(ii) the nature and number of the educational programs and extracurricular activities,

(iii) any special needs and talents of the child or children,

(iv) the overall cost of the programs and activities, and

(v) any other similar factor that the court considers relevant.

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

(3) Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

(4) In determining the amount of an expense referred to in subsection (1), the court shall not take into account any universal child care benefit or any eligibility to claim that benefit.

10. (1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

(2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:

(*a*) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;

(*b*) the spouse has unusually high expenses in relation to exercising access to a child;

(*c*) the spouse has a legal duty under a judgment, order or written separation agreement to support any person;

[page757]

(*d*) the spouse has a legal duty to support a child, other than a child of the marriage, who is

(i) under the age of majority, or

(ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessaries of life; and

(*e*) the spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability.

(3) Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the spouse who claims undue hardship would, after determining the amount of child support under any of sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other spouse.

(4) In comparing standards of living for the purpose of subsection (3), the court may use the comparison of household standards of living test set out in Schedule II.

(5) Where the court awards a different amount of child support under subsection (1), it may specify, in the child support order, a reasonable time for the satisfaction of any obligation arising from circumstances that cause undue hardship and the amount payable at the end of that time.

(6) Where the court makes a child support order in a different amount under this section, it must record its reasons for doing so.

Federal Courts Act, R.S.C. 1985, c. F-7

17. (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.

(2) Without restricting the generality of subsection (1), the Federal Court has concurrent original jurisdiction, except as otherwise provided, in all cases in which

(*a*) the land, goods or money of any person is in the possession of the Crown;

(*b*) the claim arises out of a contract entered into by or on behalf of the Crown;

[page758]

(*c*) there is a claim against the Crown for injurious affection; or

(*d*) the claim is for damages under the *Crown Liability and Proceedings Act*.

(3) The Federal Court has exclusive original jurisdiction to hear and determine the following matters:

(*a*) the amount to be paid if the Crown and any person have agreed in writing that the Crown or that person shall pay an amount to be determined by the Federal Court, the Federal Court - Trial Division or the Exchequer Court of Canada; and

(*b*) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Federal Court - Trial Division or the Exchequer Court of Canada.

(4) The Federal Court has concurrent original jurisdiction to hear and determine proceedings to determine disputes in which the Crown is or may be under an obligation and in respect of which there are or may be conflicting claims.

(5) The Federal Court has concurrent original jurisdiction

(*a*) in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief; and

(*b*) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.

(6) If an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Federal Court has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on that court.

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

[page759]

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

Appeal dismissed with costs.

Solicitors:

Solicitors for the appellants: Jensen Shawa Solomon Duguid Hawkes, Calgary.

Solicitor for the respondent: Attorney General of Canada, Ottawa.

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