

**ISLAND REGULATORY AND APPEALS COMMISSION**

BETWEEN:

**GREENFIELD CAPITAL INC.**

Appellant

and

**RESORT MUNICIPALITY OF STANLEY BRIDGE, HOPE RIVER, BAYVIEW, CAVENDISH  
AND NORTH RUSTICO**

Respondent

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**REPLY SUBMISSIONS OF THE RESPONDENT  
ON THE QUESTION OF JURISDICTION**

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**No annotations by legal counsel**

1. Greenfield suggests that legal counsel for the Resort Municipality has “notated” the record.<sup>1</sup> This is not the case. Legal counsel for the Resort Municipality has not marked the record, other than to redact for privilege.

**No evidence of bad faith or improper motive**

2. Greenfield raises concerns about bad-faith decision-making. Greenfield suggests, for example, that the Resort Municipality may seek to characterize a denial as a mere deferral

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<sup>1</sup> Appellant’s submissions on jurisdiction at para 2.

for the very purpose of avoiding appellate scrutiny.<sup>2</sup> Greenfield also cites cases that express or address concerns about deferring for improper motives.<sup>3</sup>

3. These concerns find no support in the record produced for this appeal. Disagreement does not mean bad faith.

#### **No breach of bylaw timeline**

4. Greenfield cites the *Clive Pickles* case to argue that a decision to defer is appealable.<sup>4</sup> But *Clive Pickles* concerned the breach of a prescribed timeline.<sup>5</sup> No such breach is alleged here.

#### **No determination on applicable legal framework**

5. Greenfield implies that the Resort Municipality has already determined the legal framework that it will apply to assess Greenfield's applications.<sup>6</sup> But this is not apparent from the record.
6. Greenfield's applications remain before council. Council must apply the correct legal framework – in accordance with its own assessment of the law – when it considers the applications. If council applies an incorrect legal framework, a person aggrieved by this decision could appeal to the Commission. But a person cannot appeal based on their apprehension that council will err in the future.

#### **Must refer to subsection 11(1)**

7. Greenfield argues that the Commission must interpret "decision", as it appears in subsection 28(1.1) of the *Planning Act*, with reference to subsection 11(2) of the

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<sup>2</sup> Appellant's submissions on jurisdiction at para 22.

<sup>3</sup> *Seawood Estates Inc. v. Resort Municipality*, LA10-05 at para 20 [Tab 1 of the appellant's submissions on jurisdiction]; *Evergreen Environmental Inc v. Oshawa (City)*, 2020 CarswellOnt 19349 at para 25 [Tab 4 of the appellant's submissions on jurisdiction].

<sup>4</sup> Appellant's submissions on jurisdiction at para 15.

<sup>5</sup> Tab 3 of the appellant's submissions on jurisdiction: "It is the Commission's view that the bylaw does not permit the Council to withhold a decision beyond the required time frame prescribed by the bylaw in effect at the time of the application."

<sup>6</sup> Appellant's submissions on jurisdiction at para 22.

*Interpretation Act*.<sup>7</sup> This is correct but incomplete: subsection (2) does not exist in isolation. The Commission must also refer to subsection 11(1) of the *Interpretation Act*, which states that the words of a statute shall 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 Legislative Assembly”.<sup>8</sup> In plainer terms, this means that the Commission must interpret “decision” with reference to all indicators of legislative meaning – the text, context, purpose, and relevant legal norms.<sup>9</sup> Properly considered, these indicators confirm that “decision” – as it appears in subsection 28(1.1) of the *Planning Act* – means *final* decision.

8. **Text and context.** Subsection 28(1.1) begins by announcing that the right to appeal is “[s]ubject to subsections (1.2) to (1.4)”. Subsection (1.4) specifies, “[f]or greater certainty”, that the period for filing a notice of appeal commences “on the date that the council gave final reading to the amendment to the bylaw” (emphasis added). This signifies a legislative intent to create a right to appeal from final decisions. A recent Commission decision confirms this reading.<sup>10</sup>
9. **Purpose.** In enacting the *Planning Act*, the Legislature intended to confer primary planning authority on council.<sup>11</sup> But this intention would be frustrated if an appellant could appeal from an *interim* decision of council. An appellant could – as Greenfield has done here – ask the Commission to intervene in the planning process *before* it is complete. If this were permitted, the Commission would displace council as the primary planning authority. That is not what the Legislature intended. “Decision” must therefore mean *final* decision.

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<sup>7</sup> Appellant’s submissions on jurisdiction at paras 10 and 11.

<sup>8</sup> [Interpretation Act](#), RSPEI 1988, c I-8.1, s 11(1). [Tab 2 of the appellant’s submissions on jurisdiction]

<sup>9</sup> [Field v. Aviva Insurance Company](#), 2024 PESC 8 (CanLII) at paras 18 and 19. [Tab 2 of these reply submissions]

<sup>10</sup> [Goops Wooldridge, Laurena Wooldridge, Robin Boutillier and Brian Chandler](#), 2022 PEIRAC 1 (CanLII) at para 14. [Tab 3 of these reply submissions]

<sup>11</sup> [Charlottetown \(City\) v. Island Reg. & Appeals Com.](#), 2013 PECA 10 (CanLII) at para 29. [Tab 4 of these reply submissions]

10. **Relevant legal norms.** Appeal-creating provisions are consistently interpreted as permitting appeals only from final decisions.<sup>12</sup> There is no indication that the Legislature intended to break from this norm when it enacted subsection 28(1.1) of the *Planning Act*.

**ALL OF WHICH** is respectfully submitted this 20<sup>th</sup> day of August, 2024.



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<sup>12</sup> Respondent's submissions on jurisdiction at para 19.

SUPREME COURT OF PRINCE EDWARD ISLAND

Citation: *Field v. Aviva Insurance Company*, 2024 PESC 8

Date: 20240221

Docket: S1-GS-29689

Registry: Charlottetown

Between:

Maynard Dean Field

Plaintiff

And:

Aviva Insurance Company of Canada

Defendant

Before: The Honourable Justice Jonathan M. Coady

Appearances:

Cynthia A. Taylor, lawyer for the Plaintiff

Donald V. Keenan, lawyer for the Defendant

Place and date of hearing

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Charlottetown, Prince Edward

Island

September

27, 2023

Place and date of written decision - Charlottetown, Prince Edward  
Island  
February 21,  
2024

***CIVIL PROCEDURE – special case – statutory interpretation – insurance – workers compensation***

This special case raises the legal question whether a worker, who is injured in an accident involving a motor vehicle and brings a civil action to recover damages arising from that accident, is entitled to claim section B benefits from their insurer under the standard automobile insurance policy in Prince Edward Island. The worker claimed entitlement to section B benefits. The insurer disagreed and relied on an exclusion in the ***Insurance Act***, R.S.P.E.I. 1988, c. I-4. According to the insurer, the worker was entitled to receive benefits under the ***Workers Compensation Act***, R.S.P.E.I. 1988, c. W-7.1, and therefore not entitled to section B benefits.

The words of a statute must be read in their entire context, in their grammatical and ordinary sense, and harmoniously with the scheme of the statute, the object of the statute, and the intention of the legislator. Statutes which deal with the same subject

are also presumed to be drafted with one another in mind so that the subject is treated in a coherent and consistent way. The Legislature is taken to know its own statute book and to draft new provisions with regard to the structures, conventions, and patterns of expression embodied in existing legislation.

By way of a deeming provision in the ***Workers Compensation Act***, the Legislature declared that a worker who brings an action as a result of an accident involving the use of a motor vehicle is not, for the purposes of the ***Insurance Act*** and any contract of insurance in place at the time of the accident, entitled to the benefits provided by the ***Workers Compensation Act***. The effect of that deeming provision is to make the exclusion stated in Schedule B of the ***Insurance Act***, and restated in section B of the policy, inapplicable. In this case, the worker, who had exercised his right to bring an action after being injured in an accident involving a motor vehicle, was entitled to claim section B benefits from the insurer.

***STATUTES REFERRED TO: Insurance Act***, R.S.P.E.I. 1988, c. I-4; ***Workers Compensation Act***, R.S.P.E.I. 1988, c. W-7.1; ***Highway Traffic Act***, R.S.P.E.I. 1988, c. H-5; ***Interpretation Act***, R.S.P.E.I. 1988, c. I-8.1; ***An Act to Amend the Insurance Act***, S.P.E.I. 1983, c. 22; ***Workers Compensation Act***, S.P.E.I. 1994, c. 67; ***An Act to Amend the Insurance Act***, S.P.E.I. 2014, c. 36; ***Workmen's Compensation Act***, R.S.O. 1970, c. 505; ***The Insurance Act***, R.S.O. 1970, c. 224; ***Workers' Compensation Act***, S.N.S. 1994-95, c. 10; ***Insurance Act***, R.S.N.S. 1989, c. 231.

***RULES REFERRED TO: Rules of Civil Procedure***, Rule 22.

***CASES CONSIDERED: Rizzo & Rizzo Shoes Ltd. (Re)***, [1998] 1 S.C.R. 27; ***La Presse Inc. v. Quebec***, 2023 SCC 22; ***R. v. Alex***, 2017 SCC 37; ***McLean v. British Columbia (Securities Commission)***, 2013 SCC 67; ***ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)***, 2006 SCC 4; ***Montreal (City) v. 2952-1366 Québec Inc.***, 2005 SCC 62; ***Bell ExpressVu Limited Partnership v. Rex***, 2002 SCC 42; ***Pointe-Claire (City) v. Quebec (Labour Court)***, [1997] 1 S.C.R. 1015; ***Euro-Excellence Inc. v.***

*Kraft Canada Inc.*, 2007 SCC 37; *Madill v. Chu*, [1977] 2 S.C.R. 400; *MacDermid v. Economical Mutual Insurance Co.*, 2000 CanLII 5425 (NS SC); *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56; *MacNeill v. Co-operators Insurance*, 2001 PESCTD 67; *MacNeill v. Co-operators Insurance*, 2003 PESCAD 9; *Reference re Impact Assessment Act*, 2023 SCC 23; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57; *Krayzel Corp. v. Equitable Trust Co.*, 2016 SCC 18; *Stevens v. Oyster Bed*, 2023 PECA 7.

**TEXTS REFERRED TO:** Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis, 2022); Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 2000).

**Coady, J.:**

## **I. Introduction**

[1] This special case under Rule 22 raises the legal question whether a worker who is injured in a motor vehicle accident and starts a civil action to recover damages arising from that accident is entitled to receive section B benefits from their insurer under the standard automobile insurance policy in Prince Edward Island. The worker claims he is entitled to section B benefits. The insurer disagrees and says that an exclusion in the *Insurance Act*, R.S.P.E.I. 1988, c. I-4 – and restated in the policy – applies. According to the insurer, the worker is entitled to receive benefits under the *Workers Compensation Act*, R.S.P.E.I. 1988, c. W-7.1, and therefore not entitled to section B benefits.

### **A. Facts**

[2] On June 18, 2021, the worker, Maynard Dean Field, was injured when he was struck by a motor vehicle that had left a stop sign and pulled out in front of him. At

the time, the worker was operating a motorcycle as part of his employment and the insurer, Aviva Insurance Company of Canada, had issued a standard automobile insurance policy to the employer. The worker was an insured person under the policy.

[3] The worker claimed section B benefits under the policy. Section B benefits are commonly known as no-fault benefits and, in general terms, include medical, rehabilitation, death, and loss of income benefits. The insurer denied that the worker was entitled to those benefits and advised the worker that he was entitled to, and should collect, workers compensation benefits.

[4] On May 18, 2022, the worker started a civil action against the operator of the motor vehicle to recover damages arising from the accident.

[5] On May 19, 2022, the worker started this proceeding against the insurer and claimed entitlement to section B benefits under the policy.

[6] The lawyers for the worker and the insurer worked collaboratively to agree on the material facts. They also agreed that the legal issue to be determined is whether the worker is entitled to claim section B benefits. That is the question presently before the court.

## **B. Statutory matrix**

### *Insurance Act*

[7] Every insurer must use the standard automobile insurance policy approved by the Superintendent of Insurance in Prince Edward Island (***Insurance Act***, s. 216(1)). Every policy is required to provide the prescribed medical, rehabilitation, death, loss of income, and other benefits; however, those benefits are “subject to the limits, terms and conditions” set out in the statutory schedule (***Insurance Act***, s. 247.1(1)). These mandatory benefits are stated in Schedule B of the ***Insurance Act*** and restated in section B of the policy.

[8] Section B benefits are subject to several exclusions. The exclusion at issue in this case states that “the Insurer shall not be liable under this section for bodily injury to or death of any person ... who is entitled to receive the benefits of any worker’s compensation law or plan” (***Insurance Act***, Schedule B, s. 3(3)(a)(ii)). No other exclusion is relied upon by the insurer.

[9] For convenience, the main provisions of the ***Insurance Act*** are reproduced in **Appendix “A”**.

#### *Workers Compensation Act*

[10] The ***Workers Compensation Act*** applies to workers and employers in any industry in Prince Edward Island except those workers, employers, or industries excluded by order or regulation (***Workers Compensation Act***, s. 2(1)). When a worker is injured by an accident arising out of, and in the course of, employment, the Workers Compensation Board (“Board”) is obligated to pay compensation to the worker in accordance with Part I of the legislation (***Workers Compensation Act***, s. 6(1)). This compensation generally includes wage loss benefits (ss. 6(2) and 40(1)), medical aid (s. 18(1)), and rehabilitation expenses (ss. 18(11) and 18(12)).<sup>1</sup> This statutory entitlement to compensation is also in lieu of all other rights which the worker has, or may have, against the employer or another worker of the same employer arising out of the accident (***Workers Compensation Act***, s. 13(1)).

[11] When an accident happens in circumstances which entitle a worker to bring a civil action against a person other than the employer or another worker of the same employer, the worker may elect to claim compensation under the legislation or bring the action (***Workers Compensation Act***, s. 11(1)).<sup>2</sup> If the worker elects to bring an

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<sup>1</sup> The statute also includes compensation in the event of the death of a worker. See ***Workers Compensation Act***, s. 37.

<sup>2</sup> The worker also generally does not have any right of action against any other employer in an industry covered by the legislation or against any worker of such an employer when the worker was, at the time of the accident, in the course of their employment (***Workers Compensation Act***, s. 12(1)).

action and the resulting settlement or recovery is less than the amount of compensation which would have been awarded under the legislation, the Board may authorize an additional payment to the worker (*Workers Compensation Act*, ss. 11(2), 11(2.1), and 11(2.2)). If the worker elects to claim compensation under the legislation, the Board is subrogated to the position of the worker and may bring an action in the name of the worker or in its own name (*Workers Compensation Act*, ss. 11(3), 11(3.1), and 11(3.2)).

[12] Where an accident happens to a worker as a result of the use of a motor vehicle<sup>3</sup> by the worker or any other person, the *Workers Compensation Act* states that “the worker, for the purposes of the *Insurance Act* or for the purposes of any contract of insurance in place on the date of the accident, shall be deemed not to be entitled to the benefits provided by this Part” (*Workers Compensation Act*, s. 11(5)). The interpretation of this statutory deeming provision is at issue in this case. In particular, the parties disagree about its relationship with the exclusion stated in s. 3(3)(a)(ii) of Schedule B of the *Insurance Act* – and restated in the policy – that the insurer is not liable for bodily injury to, or the death of, any person “who is entitled to receive the benefits of any worker’s compensation law or plan” (*Insurance Act*, Schedule B, s. 3(3)(a)(ii)).

[13] For convenience, the main provisions of the *Workers Compensation Act* are reproduced in **Appendix “B”**.

## II. Issue

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However, this statutory limitation on the right of action by a worker does not apply if the accident happens to the worker as a result of the use of a motor vehicle by the worker or any other person (*Workers Compensation Act*, s. 12(3)).

<sup>3</sup> To avoid any confusion, the phrase “motor vehicle” in this decision refers to a motor vehicle, as defined by the *Highway Traffic Act*, R.S.P.E.I. 1988, c. H-5, that is required to be registered under that statute. See *Workers Compensation Act*, ss. 11(5) and 12(3).

[14] The issue is whether the worker, who was injured in an accident as a result of the use of a motor vehicle by another person and elected to bring a civil action against that person, is entitled to claim section B benefits under the standard automobile insurance policy in Prince Edward Island.

### III. Submissions

[15] The worker submits that, according to the *Insurance Act* and the terms of the policy, an insured person who is injured is entitled to section B benefits unless that person is entitled to receive workers compensation benefits. According to the worker, a person is not entitled to receive workers compensation benefits when: (i) the person is a worker; (ii) an accident happens to the worker as a result of the use of a motor vehicle; and (iii) the worker elects to bring a civil action against some person other than the employer or another worker of that employer. In that instance, the worker is deemed by statute not to be entitled to workers compensation benefits (*Workers Compensation Act*, s. 11(5)). While described as “unique” to Prince Edward Island, this statutory deeming provision is said to be clear to the worker. A worker in these circumstances is deemed not to be entitled to workers compensation benefits and is therefore entitled to section B benefits.

[16] The insurer counters that the *Workers Compensation Act* is not the appropriate place to set out a limitation on the provisions contained in the *Insurance Act*. Also, according to the insurer, the statutory deeming provision in the *Workers Compensation Act* applies only to claims made against a tortfeasor. The exclusion at issue – stated in Schedule B of the *Insurance Act* and restated in section B of the policy – does not concern a claim against a tortfeasor. It is said to be a contractual matter between the insurer and an insured person. In other words, the deeming provision applies only to provisions in the *Insurance Act* or the policy which relate to a claim against a tortfeasor, such as the benefits provided by section A of the policy. The worker in this case was therefore entitled to workers compensation benefits at the time of the accident and the exclusion from section B benefits applies (*Insurance Act*, Schedule B, s. 3(3)(a)(ii)).

[17] In the alternative, the insurer argues that the statutory deeming provision in the *Workers Compensation Act* should not be given “retroactive application” absent express language. In other words, the provision, if applicable, should not extend to the period before the worker elects to bring a civil action.

#### IV. Analysis

##### A. Law

[18] The words of a statute are to be read in their entire context, in their grammatical and ordinary sense, and harmoniously with the scheme of the statute, the object of the statute, and the intention of the legislator (Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at p. 87, cited in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21 and *La Presse Inc. v. Quebec*, 2023 SCC 22 at para. 22). See also *Interpretation Act*, R.S.P.E.I. 1988, c. I-8.1, s. 11(1). A statute must also be construed as being remedial and given the fair, large, and liberal interpretation that best ensures the attainment of its object (*Interpretation Act*, s. 11(2)).

[19] The plain meaning of the text in a statute is not determinative. The text must be considered together with other indicators of legislative meaning — context, purpose, and relevant legal norms (*R. v. Alex*, 2017 SCC 37 at para. 31; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 43; and *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4 at para. 48). Examining the text alone is not sufficient because words, when considered alone, “may in fact prove to be ambiguous once placed in their context” (*Montreal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 at para. 10). The text chosen by the legislator, however, remains the starting point for interpretation.

[20] Care must also be taken when resorting to external interpretive aids. Immediate use of such devices is an error in approach. There must first be a real or genuine ambiguity. A statutory provision is only ambiguous when its words can reasonably be interpreted in more than one way after considering the context in

which they appear, the purpose of the provision, and relevant legal norms (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at paras. 29-30). In other words, an external interpretive aid is properly used only when a true ambiguity is revealed. That occurs when there are different readings of the same provision which cannot be decisively resolved through the modern approach of contextual and purposive statutory interpretation (*La Presse* at para. 24). Ambiguity does not arise from the mere fact that parties or lawyers have different positions on the interpretation of a statutory provision (*Bell ExpressVu* at para. 30).

[21] Statutes which deal with the same subject are also presumed to be drafted with one another in mind so as to provide that subject with coherent and consistent treatment (Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis, 2022) at p. 407; and Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 2000) at pp. 342-345). This presumption of coherency between statutes dealing with the same subject means that interpretations favouring statutory harmony prevail over discordant ones (*Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015 at para. 61; and *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37 at para. 83). However, like all rules of statutory interpretation, this presumption may be rebutted by the expression of legislative intent to the contrary (Sullivan at pp. 425-426). But absent such contrary intention, “[s]tatutes on a given subject are deemed to avoid contradiction, and to prescribe similar solutions for similar problems” (Côté at p. 347).

## B. Text

[22] The opening words in s. 11(5) of the *Workers Compensation Act* refer to ss. 11 and 12(3) of the legislation. Those references reveal that this deeming provision applies for the purpose of the rights of action a worker has against some person other than the employer or another worker acting in the course of their employment for the same employer (s. 11(1)) and against another employer in an industry covered by the legislation or against any worker of such an employer (s. 12(3)). The

provision must therefore be construed in the context of these recognized rights of action.

[23] Section 11(5) of the **Workers Compensation Act** is also limited by its text to a subcategory of accidents. It applies only to accidents which happen to a worker as a result of the use of a motor vehicle by the worker or another person. Not all accidents, as that term is broadly defined in s. 1(1)(a) of the **Workers Compensation Act**, are captured by the text of s. 11(5) of the legislation. The deeming provision must therefore be interpreted in the context of accidents resulting from the use of a motor vehicle.

[24] Further, the words used in s. 11(5) of the **Workers Compensation Act** define its reach or scope. The deeming provision is expressly stated to be for the purposes of the **Insurance Act** or for the purposes of any contract of insurance in place on the date of the accident. No section, subsection, or schedule of the **Insurance Act** is identified. The reference is to the statute as a whole. It is equally clear that the deeming provision applies to “any” contract of insurance. Again, no specific type or part of the contract is specified.

[25] Finally, the text of s. 11(5) of the **Workers Compensation Act** states that the worker must be deemed not to be entitled to the benefits as provided by “this Part.” This explicit reference to Part I of the legislation must be construed as a reference to the whole part (**Interpretation Act**, s. 36(2)). Part I of the **Workers Compensation Act** includes, for example, benefits for wage loss (ss. 6(2) and 40(1)), medical aid (s. 18(1)), and rehabilitation (ss. 18(11) and 18(12)).

[26] When s. 11 of the **Workers Compensation Act** is read in its entirety, the words chosen by the Legislature recognize the right of action which a worker has against persons other than the employer or another worker of the same employer when an accident happens in the course of their employment. In those circumstances, the worker may elect to claim compensation under the **Workers Compensation Act** or bring the action. However, when the accident giving rise to

the right of action happens as a result of the use of a motor vehicle by the worker or any other person, the worker is also deemed, for the purpose of the **Insurance Act** and any contract of insurance in place on the date of the accident, not to be entitled to the benefits provided by Part I of the **Workers Compensation Act**. That declaration is made, according to the opening words in s. 11(5) of the **Workers Compensation Act**, for the purpose of not only the right of action recognized in s. 11 of the statute but also the right of action found in s. 12(3) of the legislation.

### C. Context

[27] Section 11(5) of the **Workers Compensation Act** was introduced into the legislation by the **Workers Compensation Act**, S.P.E.I. 1994, c. 67, s. 11(5). Proclaimed in force on January 1, 1995, this new provision was part of a wholesale revision of the legislation. The former **Workers Compensation Act**, R.S.P.E.I. 1988, c. W-7, was repealed.

[28] For its part, the former **Workers Compensation Act** did not include any provision like s. 11(5) of the current **Workers Compensation Act**. While the former legislation did include similar provisions related to the election by a worker to claim statutory compensation or bring an action (s. 11(1)), the payment of additional compensation if the settlement or recovery obtained by the worker was less than the amount of compensation which would have been awarded (s. 11(3)), and the subrogation right of the Board (s. 11(4)), there was no specific treatment for accidents resulting from the use of motor vehicles. There was also no deeming provision related to the **Insurance Act** or contracts of insurance.

[29] Before s. 11(5) of the **Workers Compensation Act** was introduced into the legislation, the state of the law from our highest court was also known. In **Madill v. Chu**, [1977] 2 S.C.R. 400, the Supreme Court of Canada considered ss. 8(1) and 8(2) of the **Workmen's Compensation Act**, R.S.O. 1970, c. 505, and concluded that a worker could not claim section B benefits under the standard automobile insurance policy in Ontario where the worker did not apply for workers compensation benefits

despite being entitled to do so. In other words, the exclusion stated in Schedule E of *The Insurance Act*, R.S.O. 1970, c. 224, and restated in section B of the policy, which spoke of being “entitled to receive the benefits of any workmen’s compensation law or plan,” applied.

[30] The insurer relies mainly on the decisions in *Madill* and *MacDermid v. Economical Mutual Insurance Co.*, 2000 CanLII 5425 (NS SC), to support its position that the worker is entitled to receive workers compensation benefits in this case and therefore the insurer is not liable to pay the benefits stated in Schedule B of the *Insurance Act* and restated in section B of the policy.

[31] In *MacDermid*, the Supreme Court of Nova Scotia considered ss. 30(1) and 30(6) of the *Workers’ Compensation Act*, S.N.S. 1994-95, c. 10, in light of the decision in *Madill* and again concluded that a worker could not claim section B benefits under the standard automobile insurance policy in Nova Scotia where the worker elected to sue instead of continuing to receive workers compensation benefits. The exclusion in Schedule B to Part VI of the *Insurance Act*, R.S.N.S. 1989, c. 231, provided that the insurer was not liable when a person was “entitled to receive the benefits of any worker's compensation law or plan.” Applying *Madill*, the worker was found to be entitled to receive workers compensation benefits, notwithstanding the election to bring an action, and the exclusion in the *Insurance Act* was held to apply.

[32] On the surface, the decisions in *Madill* and *MacDermid* are compelling. The provisions in the workers compensation legislation in Ontario and Nova Scotia are substantially similar to ss. 11(1) and 11(2) of the local *Workers Compensation Act*. This is also true of the exclusions found in the insurance legislation and standard automobile insurance policies in Ontario and Nova Scotia at the time. They used words which were basically the same, if not identical, to the exclusion found in s. 3(3)(a)(ii) of Schedule B of the *Insurance Act* and restated in section B of the standard automobile insurance policy for Prince Edward Island. Missing from the interpretations in *Madill* and *MacDermid*, however, is the presence of a statutory

deeming provision like s. 11(5) of the local **Workers Compensation Act**. The legal effect of such a provision was not considered by the courts in **Madill** and **MacDermid**.

[33] The context of the **Insurance Act** also cannot be ignored. The Legislature is taken to know its own statute book (**R. v. Ulybel Enterprises Ltd.**, 2001 SCC 56 at para. 30). It is also presumed “to draft each new provision with regard to the structures, conventions and habits of expression as well as the substantive law embodied in existing legislation” (Sullivan at p. 413).

[34] When drafting the exclusion in Schedule B of the **Insurance Act**, the Legislature used the words “entitled” and “benefits” in the context of any “worker’s compensation law or plan” (**Insurance Act**, Schedule B, s. 3(3)(a)(ii)). The Legislature used the same words when drafting the deeming provision in s. 11(5) of the **Workers Compensation Act** and stated specifically that it was using those words for the purposes of the **Insurance Act** and any contract of insurance. The words chosen by the Legislature are obviously found in different statutes, but they are expressed in the context of the same subject – entitlement to workers compensation benefits. In this context, it is presumed that statutes dealing with the same subject are drafted with one another in mind so that the subject receives coherent and consistent treatment (Sullivan at p. 407; and Côté at pp. 342-343).

[35] The exclusion presently found in s. 3(3)(a)(ii) of Schedule B of the **Insurance Act** is also longstanding. It was introduced into the legislation by **An Act to Amend the Insurance Act**, S.P.E.I. 1983, c. 22, ss. 2(1) and 7(b), and proclaimed in force on September 1, 1983.<sup>4</sup> The exclusion added by the Legislature used basically the same

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<sup>4</sup> Subsection 7(b) of **An Act to Amend the Insurance Act**, S.P.E.I. 1983, c. 22, added the statutory schedule to the legislation, including the exclusion found at s. 3(3)(a)(ii) of Schedule B.

words as those considered and interpreted by the Supreme Court of Canada in *Madill*.<sup>5</sup>

[36] While the insurer questions the placement of the deeming provision in s. 11(5) of the *Workers Compensation Act* rather than the *Insurance Act*, there is no question that the Legislature has the competence to do so. For example, in *MacDermid* itself, the court noted that a legislative amendment to entitle a worker to section B benefits could be drafted into the workers compensation or insurance legislation: “[I]f it was the intent to make a person’s election away from workers’ compensation benefits an automatic right to claim under Section B benefits ... it could easily have drafted that into the amendment or an amendment to the *Insurance Act*” (*MacDermid* at p. 12). Similarly, the court observed that “[a]ny inequities resulting from a decision by a person to elect to pursue a private action against a third party and therefore lose no-fault benefits can be addressed by appropriate legislation” (*MacDermid* at p. 13). In Prince Edward Island, the Legislature decided to speak on this subject and expressed its will in s. 11(5) of the *Workers Compensation Act* effective January 1, 1995.<sup>6</sup>

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<sup>5</sup> The current provision conferring section B benefits (*Insurance Act*, s. 247.1(1)) was added by *An Act to Amend the Insurance Act*, S.P.E.I. 2014, c. 36, s. 5, and proclaimed in force on October 1, 2014. That provision is also grounded in language which is substantially the same as the original text. The original provisions conferring the benefits in Schedule B were added by ss. 1(1) and 2(1) of *An Act to Amend the Insurance Act*, S.P.E.I. 1983, c. 22, and proclaimed in force on September 1, 1983.

<sup>6</sup> The placement of the statutory deeming provision in s. 11(5) of the *Workers Compensation Act* is not illogical. Subsection 247.1(1) of the *Insurance Act* directs that the benefits are subject to the limits, terms, and conditions set out in Schedule B. Subclause 3(3)(a)(ii) of Schedule B then directs that the insurer is not liable for bodily injury to, or the death of, any person who is entitled to receive the benefits of any “worker’s compensation law.” Subsection 11(5) of the *Workers Compensation Act* finally directs that, when an accident happens to a worker as a result of the use of a motor vehicle, the worker is, for the purposes of the *Insurance Act* or any contract of insurance, deemed not to be entitled to the benefits provided by Part I of the *Workers Compensation Act*.

[37] When considered in its entire context, s. 11(5) of the *Workers Compensation Act* was added to the legislation to speak specifically about a particular subcategory of accidents – those happening as a result of the use of a motor vehicle – and to declare that, for the purpose of the *Insurance Act* and any contract of insurance, a worker is not entitled to the benefits provided by Part I of the *Workers Compensation Act*. These legislative choices were made in the context of the law already being settled by the Supreme Court of Canada in *Madill*. They were also expressed in the context of an existing and longstanding exclusion in Schedule B of the *Insurance Act* that applied to any person entitled to receive the benefits of “any worker’s compensation law” (*Insurance Act*, Schedule B, s. 3(3)(a)(ii)). That exclusion had a known interpretation from our apex court when the Legislature added the statutory deeming provision to the *Workers Compensation Act*. When examined in that contextual light, s. 11(5) of the *Workers Compensation Act* must be taken as a legislative effort to specifically address the entitlement of a worker to insurance benefits when the worker has exercised their right of action as a result of an accident involving the use of a motor vehicle.

#### D. Purpose

[38] The purpose of s. 11(5) of the *Workers Compensation Act* is demonstrated by its use of the verb “deemed.” That verb is used by legislators for the purpose of declaring something to be so. Such a declaration may also be for all or some purposes. In this case, the deeming provision is for the purposes of the *Insurance Act* and any contract of insurance in place at the time of the accident. It declares that, when an accident happens to a worker as a result of the use of a motor vehicle by the worker or another person, the worker is not entitled to the benefits provided by Part I of the *Workers Compensation Act*.

[39] Subsection 11(5) of the *Workers Compensation Act* has also previously been considered by the court. In *MacNeill v. Co-operators Insurance*, 2001 PESCTD 67, MacDonald C.J. described the intent of the provision as follows:

The intent of the amendment is to override those portions of insurance policies which purport to deduct the amount received by Workers' Compensation benefits from the amount to which an injured worker is entitled under the various insurance policies which provide benefits to the claimant. The provision sets up a legal fiction that the worker has not received any benefits under the **Workers' Compensation Act** and consequently there is nothing to deduct from available benefits under any insurance policy.

See **MacNeill** at para. 6. The questions raised in **MacNeill** were decided, however, on different grounds. Subsection 11(5) of the **Workers Compensation Act** was not in force at the time of the accident in **MacNeill**, and it was not intended to have retroactive effect. The provision was therefore not applicable to the merits of the case (**MacNeill v. Co-operators Insurance**, 2003 PESCAD 9 at para. 46).

[40] However, this intention, as described by the court in **MacNeill**, is also supported by the explanatory notes accompanying the **Workers Compensation Act**, S.P.E.I. 1994, c. 67.<sup>7</sup> The notes state that ss. 11(5) and 11(6) "clarify the entitlement of injured worker to insurance proceeds where an accident involves a motor vehicle." In short, the purpose of the deeming provision was stated to be to clarify the entitlement of a worker to insurance benefits when an accident happens as a result of the use of a motor vehicle.

[41] Recognizing that a worker injured in an accident involving the use of a motor vehicle has rights of action in ss. 11 and 12(3) of the **Workers Compensation Act**, the purpose of s. 11(5) of the legislation is to declare that, for the purpose of the **Insurance Act** and any policy of insurance, the worker is not entitled to the benefits provided by Part I of the **Workers Compensation Act**. The consequence of that declaration is to make the exclusion stated in Schedule B of the **Insurance Act** and restated in the policy – that the insurer is not liable for bodily injury to, or the death of, any person entitled to receive the benefits of "any worker's compensation law" –

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<sup>7</sup> In Prince Edward Island, explanatory notes accompany bills placed before the Legislature and are commonly relied upon when interpreting local legislation. See e.g. **Stevens v. Oyster Bed**, 2023 PECA 7 at paras. 12-13 and 27.

inapplicable. In practical terms, the deeming provision results in a worker, who has exercised their right of action, being entitled to claim the benefits of any insurance policy in place at the time of the accident.

### E. Summary

[42] The Legislature has spoken and, absent any challenge going to validity, the court must respect its will. By s. 11(5) of the *Workers Compensation Act*, the Legislature has deemed that, for the purposes of the *Insurance Act* and any contract of insurance, a worker who brings an action because the worker has been injured in an accident as a result of the use of a motor vehicle is not entitled to the benefits provided by Part I of the *Workers Compensation Act*. The effect of that deeming provision is to make the exclusion stated in s. 3(3)(a)(ii) of Schedule B of the *Insurance Act* – and restated in section B of the policy – inapplicable. And, in this case, that means the worker, having exercised his right of action under s. 11 of the *Workers Compensation Act*, is entitled to claim section B benefits from the insurer.

[43] No genuine ambiguity arises for the court when s. 11(5) of the *Workers Compensation Act* is interpreted in a purposive and contextual way. The deeming provision, when considered in light of its words, surrounding context and stated purpose, reveals that the Legislature intended to declare that a worker bringing an action following an accident involving the use of a motor vehicle is not entitled to the benefits provided by Part I of the *Workers Compensation Act*. That declaration was made specifically for the purposes of the *Insurance Act* and any contracts of insurance in place on the date of the accident.

[44] According to the parties, this interpretation yields a unique outcome in Prince Edward Island. However, that outcome also reflects a unique legislative choice made by legislators in Prince Edward Island. The court must respect the drafting choices made by the Legislature (*Reference re Impact Assessment Act*, 2023 SCC 23 at para. 193). It is not open to the court to amend or rewrite the statute as it sees fit

(*Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 at para. 90; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57 at para. 53; and *Krayzel Corp. v. Equitable Trust Co.*, 2016 SCC 18 at para. 32). This is also not the first time that the Legislature has made a choice unique to Prince Edward Island. See e.g. *Stevens v. Oyster Bed*, 2023 PECA 7 at paras. 14-15 and 24. That choice was also respected at first instance and on appeal (*Stevens* at para. 36).

[45] The insurer did advance the position that s. 11(5) of the *Workers Compensation Act* applied only to claims made by a worker against a tortfeasor. The exclusion restated in section B of the policy is said to be a contractual matter between the insurer and an insured person. Thus, the insurer argues that s. 11(5) of the *Workers Compensation Act* ought to be read as applying only to any portion of the *Insurance Act* or an insurance policy that relates to a claim by a worker against a tortfeasor, such as under section A of the policy.

[46] The court does not share this construction of the deeming provision. When the text of s. 11(5) of the *Workers Compensation Act* is examined, the words chosen by the Legislature are not limited to any part, section, or schedule of the *Insurance Act* or any policy of insurance. Rather, the references are general in nature and extend to the whole of the legislation and any contract of insurance. If the Legislature intended the deeming provision to be restricted to any part, section, or schedule of the statute or policy, it could have done so. This legislative choice must be respected.

[47] The insurer also expressed concern for double recovery. According to the insurer, s. 11(5) of the *Workers Compensation Act* is not limited or restricted to workers who elect not to receive workers compensation benefits. In other words, a worker who did not bring an action could, by relying on s. 11(5) of the *Workers Compensation Act*, collect both workers compensation benefits and benefits under section B of the policy.

[48] Again, the court does not share this concern. Subsection 11(5) of the **Workers Compensation Act** must be read in its entire context. The opening words in s. 11(5) specifically state that the deeming provision is for the purposes of ss. 11 and 12(3) of the legislation. Those provisions recognize the right of a worker to bring a civil action in certain circumstances. The declaration made in s. 11(5) of the **Workers Compensation Act** therefore has to be construed in light of these recognized rights of action. The deeming provision is not stated to be for the purpose of the **Workers Compensation Act** generally.

[49] These specific statutory references in the opening words of s. 11(5) of the **Workers Compensation Act** confirm that the deeming provision applies for the purpose of the rights of action a worker has against some person other than the employer or another worker of the same employer (s. 11(1)) and against another employer in an industry covered by the legislation or against any worker of such an employer (s. 12(3)). So, while the declaration is made generally for the purposes of the **Insurance Act** and any contracts of insurance, it is also confined by the Legislature to a worker exercising their rights of action under s. 11(1) or s. 12(3) of the **Workers Compensation Act**. The opening words in s. 11(5) of the legislation are not “for the purpose of this Act” generally. This is contrasted with the general references used elsewhere by the Legislature. See e.g. **Workers Compensation Act**, ss. 41(3) and 84(1.1).

[50] In short, a worker electing to claim workers compensation benefits cannot rely on s. 11(5) of the **Workers Compensation Act** in isolation to also claim section B benefits for an accident resulting from the use of a motor vehicle. In order to rely on the deeming provision in s. 11(5) of the legislation, the worker must be exercising a right of action under ss. 11(1) or 12(3) of the **Workers Compensation Act**.

[51] Finally, the insurer advanced an alternative position that s. 11(5) of the **Workers Compensation Act** should not be given “retroactive application” and instead interpreted as being effective only when an election is made by a worker to bring a civil action. In other words, the insurer argues that section B benefits ought

to be payable as of the date the worker elects to bring the action and not from any other date before the election is made. However, the court does not view this issue as one of retroactive application. The law is not being changed or applied differently from what the law actually was at an earlier point in time (Sullivan at p. 737). Rather, the question appears to be an operational one – when is a worker entitled to benefits – and answered by reading the text of s. 11 of the **Workers Compensation Act** in its entire context.

[52] The right of action of a worker, their entitlement to bring an action, and their entitlement to compensation under the **Workers Compensation Act** all arise from the happening of an “accident” (**Workers Compensation Act**, ss. 11(1), 12(1), and 6(1)). Similarly, the entitlement of a worker to section B benefits arises when the worker “sustains bodily injury or death by an accident arising out of the use or operation of an automobile” (**Insurance Act**, Schedule B). The operative date for benefits – whether from Part I of the **Workers Compensation Act** or from Schedule B of the **Insurance Act** – is the date that the accident happened. Nothing in s. 11(5) of the **Workers Compensation Act** displaces that operative date. In fact, the words used by the Legislature reinforce that the relevant time is the date of the accident. Any administrative concerns related to the timing of potential claims to the insurer does not change the words chosen by the Legislature.<sup>8</sup>

[53] This is not to say that the practical consequences of this interpretation are irrelevant or lost on the court. In reality, the opposite is true. Answering this special case has the legal effect of determining that a worker is entitled to claim section B benefits under the standard automobile insurance policy in Prince Edward Island when the worker brings a civil action because they have been injured in an accident as a result of the use of a motor vehicle. By declaring that the worker who takes

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<sup>8</sup> An insurer has the benefit of knowing that, by virtue of ss. 11(1) and 11(1.2.) of the **Workers Compensation Act**, the election must generally be made within six months of the accident. A worker is also deemed by statute to have elected to bring an action under certain circumstances, including the failure to make an election to the Board (**Workers Compensation Act**, s. 11(1.1)).

such action is not entitled to the benefits provided by Part I of the **Workers Compensation Act**, the Legislature has made the exclusion expressed in s. 3(3)(a)(ii) of Schedule B of the **Insurance Act**, and restated in section B of the policy, inapplicable. However, that result does not appear to the court to be an absurd one in light of the language used by the Legislature. The deeming provision in s. 11(5) of the **Workers Compensation Act** has been restricted by legislators to a subcategory of accidents – those involving the use of a motor vehicle – and limited to a subgroup of workers – those electing to bring an action and not claim benefits under the **Workers Compensation Act**.<sup>9</sup>

## V. Costs

[54] Costs ordinarily follow the result. The worker was ultimately successful. Rules 1.04(2) and 57.01(1) guide the discretion of the court when awarding costs. The parties are strongly encouraged to resolve the issue of costs in light of the outcome. If the parties cannot reach an agreement about the costs of this proceeding before March 4, 2024, the worker shall serve and file a submission in writing not exceeding five pages (excluding authorities) on or before March 11, 2024. The insurer shall serve and file a submission in writing not exceeding five pages (excluding authorities) on or before March 18, 2024. Any submissions made by the parties ought to focus on the factors outlined in the Rules and any other matter relevant to costs. Consistent with the direction in Rule 57.01(7) to devise and adopt the simplest, least expensive and most expeditious process for fixing costs, costs will be fixed by the court after receiving the written submissions and without the attendance of the parties.

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<sup>9</sup> Actions are also limited to claims against persons “other than the employer or another worker acting in the course of employment for the same employer.” See **Workers Compensation Act**, ss. 11(1) and 12(3). Actions are further limited to accidents involving a “motor vehicle” which satisfies the definition in the **Highway Traffic Act**, R.S.P.E.I. 1988, c. H-5, and is required to be registered under that statute. See **Workers Compensation Act**, ss. 11(5) and 12(3).

[55] If the parties are able to resolve the matter of costs, then they may communicate that agreement to the court in the form of a consent order.

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J.

February 21, 2024

**APPENDIX "A"**

*Insurance Act*, R.S.P.E.I. 1988, c. I-4.

**247.1 Accident benefits on or after October 1, 2014**

- (1) Every contract of insurance evidenced by a motor vehicle liability policy issued or renewed on or after October 1, 2014, shall provide
  - (a) the medical, rehabilitation, loss of income, death and funeral expense benefits; and
  - (b) the other benefits,

set out in Schedule B subject to the limits, terms and conditions set out in Schedule B.

...

**SCHEDULE B**

*MANDATORY MEDICAL AND REHABILITATION BENEFITS, AND ACCIDENT BENEFITS  
IN MOTOR VEHICLE LIABILITY POLICIES*

**ACCIDENT BENEFITS SECTION**

The insurer agrees to pay to or with respect to each insured person as defined in this Section who sustains bodily injury or death by an accident arising out of the use or operation of an automobile:

**SUBSECTION 1 - MEDICAL, REHABILITATION AND FUNERAL EXPENSES**

1. All reasonable expenses incurred within four years from the date of the accident as a result of such injury for necessary medical, surgical, dental, chiropractic, hospital, professional nursing and ambulance service and for any other service within the meaning of basic health services or insured services under the *Health Services Payment Act* R.S.P.E.I. 1988, Cap. H-2 or the *Hospital and Diagnostic Services Insurance Act* R.S.P.E.I. 1988, Cap. H-8 and for such other services and supplies which are, in the opinion of the physician of the insured person's choice and that of the insurer's medical advisor, essential for the treatment, occupational retraining or rehabilitation of said person, to the limit of \$50,000 per person.
2. Funeral expenses incurred up to the amount of \$2,500 in respect of the death of any one person.

The insurer shall not be liable under this subsection for those portions of such expenses payable or recoverable under any medical, surgical, dental, or hospitalization plan or law or, except for similar insurance provided under another automobile insurance contract, under any other insurance contract or certificate issued to or for the benefit of, any insured person.

...

### **SUBSECTION 3 – SPECIAL PROVISION, DEFINITIONS, AND EXCLUSIONS OF THIS SECTION**

#### **(3) Exclusions**

- (a) Except as provided in subsection 2A, the insurer shall not be liable under this Section for bodily injury to or death of any person

...

- (ii) who is entitled to receive the benefits of any worker's compensation law or plan, or

## APPENDIX "B"

*Workers Compensation Act*, R.S.P.E.I. 1988, c. W-7.1.

### 11. Right of action against person other than employer

- (1) Where an accident happens to a worker in the course of employment in such circumstances as entitle the worker or the worker's dependants to an action against some person other than the employer or another worker acting in the course of employment for the same employer, the worker or dependants, if entitled to compensation under this Part, may elect to claim the compensation or to bring the action.

...

#### Exception, accidents arising from use of motor vehicle

- (5) For the purposes of this section and subsection 12(3), where an accident referred to in subsection (1) happens to the worker as a result of the use by the worker or any other person of a motor vehicle, as defined in the *Highway Traffic Act* R.S.P.E.I. 1988, Cap. H-5, that is required to be registered under that Act, the worker, for the purposes of the *Insurance Act* R.S.P.E.I. 1988, Cap. I-4 or for the purposes of any contract of insurance in place on the date of the accident, shall be deemed not to be entitled to the benefits as provided by this Part.

### 12. No action against employer etc.

- (1) In any case under subsection 11(1), neither the worker nor the worker's dependants nor the employer of such worker has any right of action in respect of the accident against any other employer in an industry within the scope of this Part or a worker of that employer where the

worker of the employer was at the time of the accident in the course of his or her employment with the employer.

...

**Exception, motor vehicle accident**

- (3) Subsection (1) does not apply if the accident referred to in subsection 11(1) happens to the worker as a result of the use, by the worker or any other person, of a motor vehicle as defined in the *Highway Traffic Act*, that is required to be registered under that Act.

**SUPREME COURT OF PRINCE EDWARD ISLAND**

Date: 20240226

Docket: S1-GS-29689

Registry: Charlottetown

Between:

Maynard Dean Field

Plaintiff

And:

Aviva Insurance Company of Canada

Defendant

Before: The Honourable Justice Jonathan M. Coady  
Erratum to decision dated February 21, 2024

Appearances:

Cynthia A. Taylor, lawyer for the Plaintiff

Donald V. Keenan, lawyer for the Defendant

Place and date of hearing

-

Charlottetown, Prince Edward

Island

September

27, 2023

Place and date of written decision	-	Charlottetown, Prince Edward Island  February 21, 2024
Place and date of erratum	-	Charlottetown, Prince Edward Island  February 26, 2024

**Coady, J.:**

[56] In paragraph [34] of the original reasons for judgment published on February 21, 2024, the word "contact" in the second sentence is a typographical error and is replaced with the word "contract".

February 26, 2024

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J.





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**Date Issued:** January 27, 2022  
**Docket:** LA21022; LA21023  
**Type:** Planning Act Appeal

**INDEXED AS:** Goops Wooldridge, Laurena Wooldridge, Robin Boutillier and Brian Chandler  
2022 PEIRAC 1 (CanLII)

v.

The City of Charlottetown

**Order No: LA22-01**

**BETWEEN:**

Goops Wooldridge, Laurena Wooldridge, Robin Boutillier and Brian Chandler

**Appellants**

**AND:**

The City of Charlottetown

**Respondent**

**AND:**

Gordon Perry

**Owner**

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**ORDER**

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Panel Members:

J. Scott MacKenzie, Chair  
M. Douglas Clow, Vice-Chair  
Erin T. Mitchell, Commissioner

# CONTENTS

1.	<b>INTRODUCTION</b> .....	<b>3</b>
2.	<b>BACKGROUND</b> .....	<b>3</b>
3.	<b>ISSUES</b> .....	<b>4</b>
4.	<b>DISPOSITION</b> .....	<b>4</b>
5.	<b>SUBMISSIONS FROM THE PARTIES</b> .....	<b>5</b>
	City.....	5
	Owner.....	5
	Appellants.....	5
6.	<b>ANALYSIS</b> .....	<b>5</b>
	Legislation.....	5
	Case law.....	6
	Application to this record.....	6
7.	<b>CONCLUSION</b> .....	<b>8</b>
8.	<b>ORDERS</b> .....	<b>8</b>

## 1. INTRODUCTION

1. This proceeding requires the Commission to consider whether it has the jurisdiction to hear two appeals from a decision by a municipal council to give first reading to a bylaw amendment. A secondary question raised in this case is whether the Commission has the statutory authority to extend the time for filing an appeal under s. 28(1.3) of the *Planning Act*.<sup>1</sup>

## 2. BACKGROUND

2. On July 16, 2021, Gorden Perry (the “Owner”) made an application to the City of Charlottetown (“City”) to allow an automotive service centre to be operated at 247 Royalty Road in Charlottetown, Prince Edward Island.<sup>2</sup> The application required an amendment to the Zoning & Development Bylaw (“Bylaw”) in order to grant a site-specific exemption from certain existing requirements in the Bylaw.
3. On August 24, 2021, the City held a public meeting and the application was considered.
4. On September 13, 2021, the City gave first reading to the amendment and “approved” the proposed amendment to the Bylaw. Notice of this decision was posted on the City website. The notice stated that the application was “approved to proceed to second reading.” The deadline for filing an appeal was stated by the City to be October 4, 2021.<sup>3</sup>
5. On October 1, 2021, two notices of appeal were filed with the Commission by Brian Chandler, Robin Boutilier, Goops Wooldridge, and Laurena Woolridge (the “Appellants”). The appeals challenged the decision by the City to “approve” the application for a site-specific amendment under the Bylaw.
6. The appeals were consolidated by the Commission because they related to the same decision by the City, being the approval of the proposed amendment to the Bylaw on September 13, 2021.
7. On October 12, 2021, the City gave second reading to the amendment and “adopted” the amendment to the Bylaw. Notice of the decision was posted on the City website. The notice stated that the application “passed second reading [and was] awaiting Ministerial approval.” The deadline for filing an appeal was stated by the City to be November 2, 2021.
8. No appeal from the adoption of the amendment to the Bylaw by the City on October 12, 2021 was filed with the Commission.

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<sup>1</sup> R.S.P.E.I. 1988, c. P-8.

<sup>2</sup> Record at 6-19.

<sup>3</sup> Record at 163.

9. On October 27, 2021, the City notified the Minister of the adoption of the amendment to the Bylaw.<sup>4</sup>
10. On November 12, 2021, the Commission received the record from the City.
11. On November 18, 2021, the Commission alerted the parties to the question of whether the Commission had jurisdiction to hear the appeals and invited written submissions on that question.

### 3. ISSUES

12. The written submissions filed by the parties raise one main question for the Commission. That question is whether the Commission has the jurisdiction to hear an appeal from the first reading of a bylaw amendment. In other words, the Commission must determine whether giving first reading to a bylaw amendment is a municipal decision that is appealable to the Commission under s. 28(1.1) of the Planning Act. A secondary question also arises from the submissions and that is whether the Commission has the authority to extend the 21-day time period for filing appeals which is prescribed by s. 28(1.3) of the Planning Act.
13. The questions raised are legal ones. There is no material dispute between the parties as to the timeline of events or the facts relevant to the question of jurisdiction. No issues of credibility are present. Having received written submissions from the parties on the subject of jurisdiction, the Commission will determine these matters in writing.

### 4. DISPOSITION

14. The appeals are dismissed. For the reasons that follow, the Commission, as a statutory tribunal without inherent authority, does not have the jurisdiction to hear an appeal from the first reading of a bylaw amendment. Approval of a bylaw amendment at first reading is not one of the appealable decisions listed by the Legislature in s. 28(1.1) of the Planning Act. The appealable decision occurred when council for the City adopted the amendment to the Bylaw on October 12, 2021. No appeal was filed in the 21 days which followed that decision as required by s. 28(1.3) of the Planning Act. The Commission does not have statutory authority to extend the time limit prescribed by the Legislature. The Commission also cannot assume jurisdiction by the consent or acquiescence of the parties. The authority to hear and decide an appeal has to be granted by the Legislature in the Planning Act.

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<sup>4</sup> Record at 193-194.

## 5. SUBMISSIONS FROM THE PARTIES

### City

15. In its submissions on jurisdiction, the City does not object to the Commission hearing the appeals. However, the City does note that the Commission has traditionally decided that appeals filed outside the statutory appeal period will not be entertained. According to the City, it did “approve” the amendment to the Bylaw on September 13, 2021 and that amendment was not further amended at second reading. In support of this point, the City relies on s. 43.6 of its Procedural Bylaw which, in turn, relies on s. 125(3) of the *Municipal Government Act*.<sup>5</sup>

### Owner

16. In his submissions on jurisdiction, the Owner does not agree that the Commission has jurisdiction to hear these appeals. The Owner relies on s. 28(1.4) of the Planning Act, which directs that, when a person is dissatisfied with a decision to “adopt” an amendment to a bylaw, the statutory appeal period begins on the date when council gave final reading to the amendment. According to the Owner, that second and final reading was given by the City on October 12, 2021. The Owner, therefore, states that no appeal was filed within the statutory time period.

### Appellants

17. In their submissions on jurisdiction, the Appellants state that they made an error and mistakenly believed that the approval at first reading on September 13, 2021 was the final reading of the bylaw amendment. The Appellants acknowledge that they filed the appeal prematurely and would have filed an appeal after the final reading of the amendment to the Bylaw if they had better knowledge of the statutory appeal process. The Appellants do not have legal training and ask that the appeal not be dismissed by the Commission.

## 6. ANALYSIS

### Legislation

18. Subsection 28(1.1) of the Planning Act states that any person who is dissatisfied with a decision by a municipal council “to adopt an amendment to a bylaw” may appeal to the Commission by filing a notice of appeal. This right of appeal is subject to subsections (1.2) to (1.4). Subsection 28(1.2) states that a bylaw is one made under the Planning Act. Subsection 28(1.4) states that that, where a person is dissatisfied with a decision to adopt an amendment to a bylaw, the appeal period for filing a notice of appeal “commences on the date that the council gave final reading to the amendment to the bylaw.”
19. It is the adoption of the bylaw amendment that may be appealed to the Commission. This is confirmed by the text of ss. 28(1.1) and 28(1.4) of the *Planning*

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<sup>5</sup> R.S.P.E.I. 1988, c. M-12.1.

*Act* which speak of the decision to “adopt” an amendment. The provisions do not speak of the decision to “approve” an amendment. The surrounding context of the *Planning Act* also confirms this interpretation in s. 19, which distinguishes between a bylaw “approved” by council and a bylaw being “adopted” by council after the bylaw has been read a second time.<sup>6</sup> The practice of the City, as recorded by the record, further confirms that there is a distinction between the approval of a bylaw amendment and its adoption after second reading.<sup>7</sup> According to the record, the amendment to the Bylaw was “approved” on September 13, 2021 but not “adopted” until October 12, 2021.<sup>8</sup>

20. On the subject of the time limit for filing an appeal, s. 28(1.3) of the *Planning Act* states that a notice of appeal “must be filed with the Commission within 21 days after the date of the decision being appealed.” Subsection 28(1.4) goes on to further clarify that, when a person is dissatisfied by a decision to adopt an amendment to a bylaw, the 21-day period “commences on the date that the council gave final reading to the amendment to the bylaw.” The record confirms that, in this case, final reading of the amendment to the Bylaw was given by council for the City on October 12, 2021.<sup>9</sup>
21. The purpose of ss. 28(1.1) through (1.4) of the *Planning Act* is to make certain municipal decisions subject to appeal to the Commission. Not all municipal decisions are liable to appeal. In the case of bylaw amendments, the Legislature has determined that only the decision to adopt an amendment may be appealed to the Commission within 21 days.

## Case law

22. The Commission has often repeated that it is a creature of statute.<sup>10</sup> It only has the authority granted by the Legislature. The Legislature has prescribed the list of municipal decisions that can be appealed to the Commission in s. 28(1.1) of the *Planning Act*. Other municipal decisions cannot be appealed to the Commission.

## Application to this record

23. In this case, the Appellants filed notices of appeal challenging the decision made by the City on September 13, 2021. That decision was to approve a proposed amendment to the Bylaw at first reading. It was not a decision “to adopt an amendment to a bylaw” within the meaning of s. 28(1.1)(b) of the *Planning Act*. The decision to adopt the amendment of the Bylaw did not occur until October 12, 2021. The decision that the Appellants seek to challenge is therefore not one listed

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<sup>6</sup> This legal distinction between “approval” of a bylaw and “adoption” of a bylaw after second reading is also reflected in s. 124 of the *Municipal Government Act*, R.S.P.E.I. 1988, c. M-12.1.

<sup>7</sup> Record at 188.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> See e.g. Order LA09-11, *629857 N.B. Inc. et al. v. City of Charlottetown* (November 10, 2009), at para. 14; and Order LA15-02, *G. Willikers Ltd. v. Resort Municipality* (February 12, 2015).

by the Legislature in s. 28(1.1) of the *Planning Act* and is not subject to appeal to the Commission. The Commission has no jurisdiction to hear an appeal from the first reading of a proposed amendment to a bylaw.

24. The Commission acknowledges that the Appellants are without legal training. The Commission also notes that the City has not registered any serious objection to the appeal being heard. However, it is well-settled that neither waiver nor consent can bestow jurisdiction upon an administrative tribunal like the Commission where none exists in statute.<sup>11</sup>
25. The City places some reliance upon s. 43.6 of its Procedural Bylaw and s. 125(3) of the *Municipal Government Act* to suggest that the amendment to the Bylaw was “approved” on September 13, 2021 and not subsequently amended by council at second reading. There are at least two problems with this submission. First, it does not take account for the language chosen by the Legislature in the *Planning Act* which limits appeals to the adoption – not the approval – of bylaw amendments. The City’s own submission recognizes that the decision made on September 13, 2021 was only an approval.<sup>12</sup> Second, when s. 43.6 of its Procedural Bylaw and s. 125(3) of the *Municipal Government Act* are read in their proper context, they address a different situation where council wishes to amend a proposed bylaw after its first reading. These provisions allow for changes to be made if the amendment is read word by word by council. In short, these provisions do not extend the statutory jurisdiction of the Commission.
26. Having found the Commission has no jurisdiction to hear the appeals from the approval of the proposed bylaw amendment at first reading, a secondary question arises as to whether the Commission is able to extend the time for filing an appeal from the decision to adopt the bylaw amendment on October 12, 2021. In these types of cases, courts will often examine the surrounding circumstances for a demonstrated intention to appeal and the absence of prejudice to the parties. The City, for its part, does not object to the Commission hearing an appeal in this case. The Owner does not agree. And the Appellants ask that their appeals not be dismissed.
27. While the Commission certainly understands the circumstances of the Appellants as self-represented persons, it lacks the statutory authority to waive or extend the time period fixed by the Legislature in s. 28(1.3) of the *Planning Act*. The *Planning Act* grants no power to the Commission to extend the time for filing appeals. The case law also confirms that an intermediate appellate tribunal like the Commission

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<sup>11</sup> *Essex County Council v. Essex Incorporated Congregational Church Union*, [1963] A.C. 808 at 820-21 (H.L.). See also *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 29, where a majority of the Supreme Court of Canada confirmed: “A decision maker may not exercise authority not specifically assigned to him or her.” See further Sara Blake, *Administrative Law in Canada*, 5<sup>th</sup> ed. (LexisNexis: Markham, Ont., 2011) at 123.

<sup>12</sup> Written submissions from the City related to jurisdiction (November 22, 2021).

cannot waive or extend the time limit for filing an appeal without express statutory authority to do so.<sup>13</sup>

28. Before concluding this matter, the Commission wishes to bring one error to the attention of the City in an effort to avoid similar cases in the future and to encourage consistent communication with residents about their right to appeal certain municipal decisions under s. 28(1.1) of the Planning Act. Following its decision on September 13, 2021, the City posted a notice on its website which correctly noted that the proposed amendment had been “approved to proceed to second reading.” However, that notice by the City incorrectly noted that the deadline for filing an appeal was October 4, 2021. In fact, the appeal period did not yet begin. The appeal period commenced only after the amendment was adopted after second reading on October 12, 2021. This commencement date is stated expressly in s. 28(1.4) of the Planning Act. By carefully reviewing notices before they are posted on its website, the City may have avoided this result for its residents.

## 7. CONCLUSION

29. For the reasons above, the Commission dismisses the appeals. The Commission thanks the parties for their helpful submissions in writing. The Commission also encourages the City to exercise greater care when publishing notice of its municipal decisions on the City website. Not all decisions made by a municipal council are subject to appeal to the Commission, and appeal dates ought to be listed only for those decisions that are actually subject to appeal in s. 28(1.1) of the Planning Act.

## 8. ORDERS

30. For the reasons set out above the Commission hereby dismisses the appeals.

**DATED** at Charlottetown, Prince Edward Island, Wednesday, January 27, 2022.

**BY THE COMMISSION:**

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J. Scott MacKenzie, Q.C., Chair

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M. Douglas Clow, Vice-Chair

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Erin T. Mitchell, Commissioner

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<sup>13</sup> See *Pagee v. Director (Winnipeg Central)*, 2000 MBCA 12 at para. 10. See also *Re Van Feggelen*, 2004 NSUARB 10 at para. 8. See further Sara Blake, *Administrative Law in Canada*, 5<sup>th</sup> ed. (LexisNexis: Markham, Ont., 2011) at 123.

**PROVINCE OF PRINCE EDWARD ISLAND  
PRINCE EDWARD ISLAND COURT OF APPEAL**

Citation: Charlottetown (City) v. Island Reg. & Appeals Com. 2013 PECA 10

Date: 20130801

Docket: S1-CA-1248

Registry: Charlottetown

**BETWEEN:**

**CITY OF CHARLOTTETOWN**

**APPELLANT**

**AND:**

**ISLAND REGULATORY AND APPEALS COMMISSION  
AND ATLANTIS HEALTH SPA LTD.**

**RESPONDENTS**

Before: Chief Justice David H. Jenkins  
Justice John A. McQuaid  
Justice Michele M. Murphy

Appearances:

David W. Hooley, Q.C., and Bria M. Brown, counsel for the Appellant

Kevin J. Kiley, counsel for the Respondent, Island Regulatory and Appeals  
Commission

Jonathan M. Coady, counsel for the Respondent Atlantis Health Spa Ltd.

Place and Date of Hearing

Charlottetown, Prince Edward Island  
February 25 and 26, 2013

Place and Date of Judgment

Charlottetown, Prince Edward Island  
August 1, 2013

***Written Reasons by:***

Chief Justice David H. Jenkins

***Concurred in by:***

Justice Michele M. Murphy

***Concurring in the result:***

Justice John A. McQuaid

***ADMINISTRATIVE LAW - Statutory appeal - Municipal planning - Appeal from decision and order of the Island Regulatory and Appeals Commission acting as the appeal tribunal under the Planning Act - Standard of review - Appeal dismissed.***

***Per Jenkins C.J.P.E.I. (Murphy J.A. concurring):*** The City appealed from an order of the Commission. The Commission had quashed Council's decision to reject a developer's application to amend the City's Comprehensive Development Area Zoning and Development Bylaw Appendix "G" Permitted Uses to allow a mixed use development on the developer's property adjacent to Founder's Hall, decided the matter anew, and ordered the City to approve the development proposal and associated bylaw amendment.

The Court of Appeal found that The Commission properly performed its function as the appeal tribunal on a planning appeal. Both of its decisions: 1) quashing Council's decision because of procedural error of not deciding the application based on the Zoning and Development Bylaw; and 2) substituting its decision to approve the Developer's application as recommended by the City's Planning board and being consistent with sound planning principles, were reasonable. There being no reviewable error, the Court dismissed the City's appeal.

***ADMINISTRATIVE LAW - Statutory appeal - Municipal planning - Appeal from decision and order of the Island Regulatory and Appeals Commission acting as the appeal tribunal under the Planning Act - Standard of review - Appeal dismissed.***

***Per McQuaid J.A. (concurring in the result):*** The Commission should not have first considered the appeal on the record from the City; however, having decided the issues on a hearing *de novo*, the Commission did not err in exercising its jurisdiction. Applying the standard of review analysis to this case, the standard upon which the Court should review the decision of the Commission is reasonableness. Reviewed on this standard, the Court cannot intervene in the decision the Commission made to allow the appeal of the respondent and thus the City's appeal from that decision is dismissed.

Authorities Cited:

BY JENKINS C.J.P.E.I.:

***CASES CONSIDERED: Island Regulatory and Appeals Commission (Re)*** , [1997] 2 P.E.I.J. 70; ***Dunsmuir v. New Brunswick***, 2008 SCC 9; ***Doiron v. Island Regulatory and Appeals Commission***, 2011 PECA 9; ***Prince Edward Island (Provincial Tax Commission) v. Maritime Dredging Ltd.***, [1997] P.E.I.J. No. 112 (PE SCAD); ***Summerside (City) v. Maritime Electric Co. Ltd.***, 2011 PECA 13;

**London (City of) v. Ayerswood Development Corp.**, 2002 CanLII 3225 (On CA); **Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals**, 2011 SCC 59; **Smith v. Alliance Pipeline Limited**, 2011 SCC 7; **Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association**, 2011 SCC 61 ("**Alberta Teachers**"); **Saskatchewan (H.R.C.) v. Whatcott**, 2013 SCC 11; **MacMaster v. Workers Compensation Board (P.E.I.)**, 2012 PECA 19; **Wiswell v. Winnipeg (Greater)**, [1965] SCR 512, at paras.32-36, applied in **Welbridge Holdings Ltd. v. Winnipeg (Greater)**, [1971] SCR 957, at pp.968-969; **St. Peters Estates Ltd. v. Prince Edward Island (Land Use Commission)**, [1990] P.E.I.J. No. 121 (PESCTD); **Catalyst Paper Corp. v. North Cowichan (District)**, 2012 SCC 2; **Shell Canada Products Ltd. v. Vancouver (City)**, [1994] 1 S.C.R. 231; **Atkins v. Calgary (City)**, [1994] A.J. No. 950 (Alta. C.A.); **Nanaimo (City) v. Rascal Trucking Ltd.**, 2000 SCC 13; **Lehmann v. Thorhild (County No. 7)**, 2011 ABCA 344; **Oliviera v. Ontario (Director, Disability Support Program)**, 2008 ONCA 123; **Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.**, [1975] 1 S.C.R. 382; **Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)**, 2011 SCC 62.

**STATUTES CONSIDERED:** **Planning Act**, R.S.P.E.I. 1988 P-8, s. 28, s.28(1.1); **Island Regulatory and Appeals Commission Act**, R.S.P.E.I. 1988, c-18, l-11, s.13(1)

**TEXT CONSIDERED:** David G. Boghoslan, LL.M., and J. Murray Davison, Q.C.: **The Law of Municipal Liability in Canada** (LexisNexis, 1999), pp.1.15-1.17).

**ISLAND REGULATORY AND APPEALS COMMISSION DECISION REFERRED TO:** **Dr. and Mrs. Vincent Adams - Order LA97-02; Tiny Tots Day Care Inc. - Order LA97-14; Gary Paynter - Order LA97-16.**

Authorities Cited:

BY McQUAID J.A.:

**CASES CONSIDERED:** **Island Regulatory and Appeals Commission (Re)** (1997), 149 D.L.R. (4th) 411; [1997] P.E.I.J. No. 70 (PEISCAD); **Prince Edward Island (Provincial Tax Commissioner) v. Maritime Dredging** (1997), 157 Nfld. & P.E.I.R. 80; [1997] P.E.I.J. No. 112 (PEISCAD); **Island Telecom Inc. v. Prince Edward Island (Regulatory and Appeal Commission)**, 2001 PESCAD 27; (2001), 207 Nfld. & P.E.I.R. 161; [2001] P.E.I.J. No. 110; **Chapman Brothers Construction Ltd. v. Prince Edward Island (Regulatory and Appeals Commission)**, 2005 PESCAD 4; [2005] P.E.I.J. No. 8; (2005), 244 Nfld. & P.E.I.R. 93; **Summerside (City) v. Maritime Electric Co. Ltd.**, 2011 PECA 13; (2011), 309 Nfld. & P.E.I.R. 76; (2011), 338 D.L.R. (4th) 476; [2011] P.E.I.J. No. 24; **Doiron v.**

**Prince Edward Island (Island Regulatory and Appeals Commission)**, 2011 PECA 9; (2011) 308 Nfld. & P.E.I.R. 84; [2011] P.E.I.J. No. 16; **Dunsmuir v. New Brunswick**, 2008 SCC 9; **Smith v. Alliance Pipeline Ltd.**, 2011 SCC 7; [2011] 1 S.C.R. 160; **Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association**, 2011 SCC 61; [2011] 3 S.C.R. 654; **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999], 2 S.C.R. 817; **Dr. Q v. College of Physicians and Surgeons of British Columbia**, [2003] 1 S.C.R. 226.

**STATUTES CONSIDERED:** **Planning Act**, R.S.P.E.I. 1988 Cap. P-8, s.28, 28(1.1), (7), (8) (9), s.37; **Island Regulatory and Appeal Commission Act**, R.S.P.E.I. 1988 Cap. I-11, s, 2, s.3, s.3(11), s.5, s.6, 13(1); **National Energy Board Act**, R.S.C. 1985, c. N-7, s.99(1); **Electric Power Act**, R.S.P.E.I. 1988 Cap. E-4.

**ARTICLES CONSIDERED:** Diana Ginn: **New Words for Old Problems: Dunsmuir**, (2011) 37 **Advocates Quarterly** 317

Reasons for judgment:

**JENKINS C.J.P.E.I.:**

[1] The City appeals from an Order made by the Commission on a planning appeal.

### **1. Proceedings leading up to this appeal**

*Application for development/City Council decision*

[2] In August 2011, Atlantis applied to the City to allow a mixed use development of commercial, office and residential units on its vacant lot on the Charlottetown waterfront. The property is located between Atlantis' condominium development at 4 Prince Street and Founders Hall. The application proceeded through the Planning Board and Public Meeting stages. In November 2011, Council rejected the application. The City informed Atlantis that Council felt that the project did not conform to the existing Waterfront Plan.

*Developer appeal to Commission/Commission decision*

[3] Being dissatisfied by this decision of City Council, Atlantis appealed the decision to the Commission. The Commission is the appeal tribunal in this province for municipal planning appeals. Atlantis' grounds of appeal were that in making its decision Council failed to apply sound planning principles, failed to consider relevant factors, and considered irrelevant factors.

[4] The Commission held a hearing. It considered the City planning legislation, including the Official Plan and the zoning bylaw applicable to the Comprehensive Development Area (“CDA”) zone in which the subject property is situate; the record of proceedings that was before City Council on the Developer’s application, including the Developer’s application and supporting submissions from its architect, the Recommendations and Reports of the City’s Director of Planning and of the City’s Planning Board, first to proceed to the Public Meeting, and second to approve the proposed change to the Waterfront Plan to allow the development, by amending Appendix “G” of the Zoning and Development Bylaw for the Waterfront CDA Zone as well as the Waterfront Concept Plan, and the Developer entering into a Development Agreement; and the record of the public meeting and the meeting of City Council; and the Commission heard oral evidence from the Developer, his architect, a City Planning Officer, an external planning consultant presented by the City, and two members of the public.

[5] In deciding the appeal, the Commission made two essential findings and determinations. First, it found that the Council made a legal error by failing to decide the application on its merits according to the process set out in the present law, and acted unfairly toward the Developer by basing its decision on irrelevant considerations. As a result of those errors, it declared Council’s decision invalid. Second, the Commission then proceeded to review the evidence on the appeal and determine the Developer’s application for approval, thus deciding the matter anew as if it was the original decision-maker. Upon weighing the evidence, the Commission found that the proposed development for the subject property, as put forward by Planning Board to Council, is consistent with sound planning principles. The Commission determined that the appeal should be allowed.

*City Appeal from Commission Order*

[6] While the Legislature constituted the Commission as the appeal tribunal for planning appeals, it also provided a limited right of appeal to the Court of Appeal from a decision or order of the Commission. This right of appeal does not duplicate the planning appeal from a decision of City Council to the Commission. It is an appeal from the Commission’s decision or order, only on a question of law or jurisdiction.

[7] The City appealed from the Order of the Commission. The City’s grounds of appeal assert the Commission made errors of law and exceeded its jurisdiction: 1) it usurped the legislated and contractual powers of City Council to administer the City’s planning legislation by conducting the appeal as a hearing *de novo* without due consideration for the circumstances of the case, by improperly substituting its discretion for that of the elected Council, and by failing to have due regard for the contractual relationship between the City and the Developer under the Development Agreement made regarding permissible use of the condominium property at 4 Prince

Street; 2) by finding the City made procedural errors or omissions in its consideration of the application; 3) by failing to consider and give adequate weight to relevant factors, including the prior course of dealing between the Developer, the City, and CADC; Council's deliberations over expressions of public concern about waterfront development; and expert evidence that Council's decision to deny the Developer's application for a piecemeal development pending a comprehensive review of the waterfront development is consistent with good planning principles; and 4) by misinterpreting the presentation by the Chair of the City's Planning Board to Council as requiring Council to approve, as opposed to process, the application.

## 2. Court of Appeal standard of review regarding Commission decision

[8] The first question on an appellate review of a decision of the Commission acting as a planning appeal tribunal is the applicable standard of review to be applied by the Court of Appeal on reviewing decisions made by the Commission in the course of its conduct of the planning appeal. This question needs to be determined at the outset because it governs the review that the Court of Appeal will perform.

[9] The right of appeal from a decision or order of the Commission to the Court of Appeal is created by statute. The ***Island Regulatory and Appeals Commission Act***, R.S.P.E.I. 1988, c-18, l-11, which constitutes the Commission and sets out the parameters of its functions and jurisdiction, states at s.13(1) that an appeal lies from a decision or order of the Commission to the Court of Appeal on a question of law or jurisdiction. This appeal is direct from the Commission to the Court of Appeal.

[10] The question in the present case regarding the applicable standard of review is whether the past practice of applying the standard of correctness to questions of law should be continued or alternatively whether the post-***Dunsmuir*** and post-***Alberta Teachers' Association*** jurisprudence applies to this appeal process so that the standard of review applicable to questions of law that involve the Commission interpreting its own statute or statutes closely connected with its function with which it will have particular familiarity should be reasonableness. In my opinion, the latter scenario applies, and the applicable standard of review for the questions of law that the Commission decided in this case is reasonableness.

[11] While this analysis may be perceived as having broad application regarding appeals to the Court of Appeal from the Commission, it is my intention that this analysis applies only to an appeal from the Commission acting as the appeal tribunal for the province under s.28 of the ***Planning Act***. The Legislature established IRAC as an amalgamation of many tribunals and conferred upon it various mandates involving appellate, regulatory and administrative functions relating to various legislation. Within its function as an appeal tribunal, it serves as the appellate body from decisions by tribunals under various legislation. Other legislation obviously serves other purposes, and consequently might be expected to have specific

provisions that are different from the provisions of the **Planning Act** differing mandates and provisions regarding appeals. The applicable standard of review for appeals from the Commission acting as an appellate tribunal under other statutes can be addressed when appropriate cases arise.

[12] **Dunsmuir v. New Brunswick**, 2008 SCC 9 (“**Dunsmuir**”) (at paras.62-64) provides direction for carrying out a standard of review analysis. Where a court ascertains that the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question, it is unnecessary to proceed to a contextual analysis.

[13] The Court of Appeal employed this practice recently in an appeal from the Commission on a planning appeal in **Doiron v. Island Regulatory and Appeals Commission**, 2011 PECA 9, at para.9. Without engaging in a standard of review analysis and for reasons of practicality, the Court viewed it as previously determined that questions of law or jurisdiction arising from decisions of the Commission shall be reviewed on the standard of correctness.

[14] The **Doiron** decision referred to precedents, including **Prince Edward Island (Provincial Tax Commission) v. Maritime Dredging Ltd.**, [1997] P.E.I.J. No. 112 (PE SCAD), an appeal under the sales tax legislation. The **Maritime Dredging** case provided a full standard of review analysis applied generally to appeals under s.13(1) of the **Island Regulatory and Appeals Commission Act**. It addressed the four contextual factors in the previously named pragmatic and functional analysis which are substantially carried forward by **Dunsmuir** as the renamed standard of review analysis. It is useful to refer to that analysis at this time. The following excerpt which addresses three of the factors is instructive for its description of IRAC as a tribunal and for an understanding of the approach taken to determining the applicable standard of review on questions of law. McQuaid J.A. stated:

[13] The Island Regulatory and Appeals Commission is established pursuant to the **Island Regulatory and Appeals Commission Act, supra**. It receives its power and jurisdiction from this Act and numerous other pieces of legislation which confer jurisdiction on the Commission. It is a regulatory agency regulating utilities and petroleum products. The Commission decides matters relating to land use, and it is an appellate tribunal vested with jurisdiction to hear appeals from the decisions of certain persons. See: Sections 5 and 6 of the **Island Regulatory and Appeals Commission Act, supra**, and the **Petroleum Products Act**, R.S.P.E.I. 1988 Cap. P-5.1

[14] The membership of the Commission is made up of two full-time Commissioners, the chair who is the chief executive officer of the Commission, the vice-chair who is to assume primary responsibility for land issues, one other commissioner and not more than five

part-time commissioners who are to be knowledgeable in one or more of the areas of accounting, agriculture, municipal planning, engineering, business, environmental matters, finance, economics, law, utilities, taxation and consumer protection. See: s-s.3(1) of the **Act**.

- [15] Generally speaking, a review of the **Island Regulatory and Appeals Commission Act, supra**, and the various other statutes vesting the Commission with jurisdiction, discloses the Commission is an administrative tribunal vested both with the responsibilities of a regulator and an appeal tribunal. Whether the Legislature intended to vest it with relative expertise in all these areas may only be discerned from these statutes. For example, pursuant to the **Petroleum Products Act**, R.S.P.E.I. 1988 Cap. P-5.1, the Commission is vested with broad powers to regulate the sale and distribution of petroleum products in Prince Edward Island prompting this Court to hold the Commission possesses relative expertise in this area and based on the principle of the specialization of duties deference should be shown to decisions of the Commission on issues within the parameters of that expertise. See: **Irving Oil Limited v. Elmsdale Corner Grocery Limited, supra**. A similar conclusion might also be reached with respect to the Commission's role in regulating a utility as it is defined in s.1(e) of the **Island Regulatory and Appeals Commission Act, supra**. Thus, where the Commission acts in a regulatory capacity, vested with broad powers to determine what is in the public interest and to make some policy in relation to the subject matter being regulated, such as utilities and petroleum products, the Commission's duties are specialized, and in relative terms, it would possess expertise greater than the reviewing court. Acting within the scope of that expertise, the Commission's decisions on matters of law and jurisdiction are entitled, even where there is a statutory right of appeal and no privative clause, to a high degree of deference because of the principle of specialization of duties. Its decisions would be reviewable on the standard of reasonableness.
- [16] On the other hand, from reading the **Island Regulatory and Appeals Commissions Act, supra**, and the other statutes which establish the Commission as an appellate tribunal, it is clear the Commission has not been vested with any responsibility to regulate in the particular subject area of the appeal nor does the Commission appear to have a policy-making role in these areas. The Commission's role and function is that of an intermediate appellate tribunal with no particular expertise or specialization on matters of law and jurisdiction that might be under consideration on appeal. Therefore, where there is a statutory right of appeal from these decisions of the Commission on questions of law and jurisdiction, the decisions of the Commissions are reviewable on the less deferential standard of correctness.
- [17] The nature of the problem before the Commission was an appeal from a decision of the Provincial Tax Commissioner which raised

questions of law alone. While one of the not more than five part-time Commission members is to be knowledgeable in tax, this fact in itself is not sufficient indicia of an intent on the part of the Legislature to vest the Commission with expertise in the legal issues which might arise in sales tax, or indeed other tax matters. In addressing the issues before it on the appeal from the Provincial Tax Commissioner, the Commission was obligated to interpret certain provisions of the **Revenue Tax Act, supra**, as well as to interpret and apply a body of common law on the issue of what constituted territorial waters. Exercising these functions in an appellate role, it is my view the Commission does not possess any greater expertise than that of a reviewing court. Consequently, the scope of review is broad and is at the least deferential end of the spectrum referred to by Iacobucci J. in **Pezim**. The standard of review to be employed in considering the questions of law raised by the appeal of the Provincial Tax Commissioner to this Court is correctness.

[15] With the benefit of such precedents, more recent Court of Appeal decisions tended to focus on the matter of relevant expertise of the Commission to decide questions of law when determining the applicable standard of review. In the majority decision in **Summerside (City) v. Maritime Electric Co. Ltd.**, 2011 PECA 13, McQuaid J.A. stated at para. 16:

(i) Standard of review

[16] As the issues under review raise questions of law where the Commission would not be considered to have any specialized expertise, the standard of review to be employed by this court is that of correctness. Furthermore, the court has held in previous cases that this standard is to be applied to a review of the Commission's decisions on questions of law which are beyond the scope of the Commission's expertise in regulatory matters. See: **Island Telecom Inc. v. Prince Edward Island (Regulatory and Appeals Commission)**, [1999] P.E.I.J. No. 63 at para. 3 (C.A.). **Island Telecom Inc. v. Prince Edward Island (Regulatory and Appeals Commission)**, [2001] P.E.I.J. No. 110 at para. 13 and 15 (C.A.). See also **Summerside (Town) v. Maritime Electric Co.**, [1993] P.E.I.J. No. 104 at paras. 14, 19, and 24 (C.A.).

[16] As a comparison of pre-**Dunsmuir** practice, it is interesting to note that the Ontario Court of Appeal gave a wider berth to deference to be afforded to the planning appeal tribunal for Ontario. It recognized that a distinction should be made, so that questions of law within the specialized expertise of the Ontario Municipal Board should be accorded deference. In 2002, in **London (City of) v. Ayerswood Development Corp.**, 2002 CanLII 3225 (On CA), the Court stated:

[7] In our view, the Divisional Court erred in its conclusion as to the appropriate standard of review. The matter came before the

Divisional Court by way of an appeal under s. 96(1) of the **OMBA**, which provides for an appeal from the Board to the Divisional Court, with leave, on a question of law. The proper standard of review was one of either correctness or reasonableness, depending on the nature of the particular question of law. Questions of law that engage the specialized expertise of the Board, such as the interpretation of its own statute, attract a standard of reasonableness. Questions of law that are of general application for which the Board has no special expertise are reviewed on a standard of correctness. See for example: **Moreau-Bérubé v. New Brunswick (Judicial Council)**, 2002 SCC 11 (CanLII), 2002 SCC 11, 209 D.L.R. (4th) 1 at para. 61. ...

While the Ontario Municipal Board is constituted by particular Ontario legislation and there is some suggestion that it is more specialized than IRAC, OMBA and IRAC have a common denominator. They are both standing tribunals that perform similar functions as provincial planning appeal tribunals.

[17] In 2008, **Dunsmuir** (at para.49-56) made it clear that questions of law decided by a tribunal can no longer be treated all the same. The majority judgment states that deference will usually result where a tribunal is interpreting its own statute or statutes closely connected with its function, with which it will have particular familiarity. It considered that certain factors – a privative clause; a discrete and specialized administrative regime in which the decision maker has special expertise; and a question of law that does not rise to the level of being of central importance to the legal system and outside the specialized area of expertise – may be compatible with a reasonableness standard. If these factors, considered together, point to a standard of reasonableness, the decision-maker’s decision must be approached with deference in the sense of giving due consideration to the determinations of decision makers. The majority decision adopted the explanation of D.J. Mullan that such a policy of deference “*recognizes the reality that, in many instances, those working day-to-day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field a sensitivity to the imperatives or nuances of the legislative regime.*”

[18] Post-**Dunsmuir** jurisprudence indicated there was continuing uncertainty about the standard of review when the issue is the tribunal’s interpretation of its home statute or a statute with which it has a working familiarity. This uncertainty was addressed and substantially ameliorated by a number of decisions, including notably **Smith v. Alliance Pipeline Limited**, 2011 SCC 7; **Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals**, 2011 SCC 59; **Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association**, 2011 SCC 61 (“**Alberta Teachers**”); and recently **Saskatchewan (H.R.C.) v. Whatcott**, 2013 SCC 11. The majority judgment of Rothstein J. in **Alberta Teachers’** (at para.30-51), clarifies the direction in **Dunsmuir** and then sharpens that direction by developing a rebuttable presumption

that reasonableness will be the applicable standard of review. Where the question before the tribunal involves interpretation of a provision of its home statute, and does not fall within one of the mentioned exceptions but engages considerations and gives rise to consequences that fall squarely within the tribunal's expertise, it should be presumed to be a statutory interpretation that is subject to deference on judicial review. Conversely, for the correctness standard to apply, the question has to be one that is both of central importance to the legal system and outside the tribunal's specialized area of expertise.

[19] In *MacMaster v. Workers Compensation Board (P.E.I.)*, 2012 PECA 19, this Court decided that the applicable standard of review on a question of law involving an interpretation of its home statute in an appeal from a Workers Compensation Appeal Tribunal decision should be determined pursuant to the directions in *Alberta Teachers'* and other Supreme Court *Dunsmuir* and post-*Dunsmuir* jurisprudence. This decision was a departure from the previously employed application of the correctness standard of review or appeals from WCAT decisions to the Court of Appeal. The Court stated (at para.41): "*Following the directions in Alberta Teachers', where, as here, the question of law is regarding interpretation of its home statute, and none of the mentioned exceptions apply, deference should presumptively be accorded and the reasonableness standard of review applied.*"

[20] *Alberta Teachers'* (at para.44) also provided guidance regarding the appropriate way to carry out a standard of review analysis. Following up on the guidance in *Dunsmuir* as to how the standard of review might be determined summarily without requiring a full standard of review analysis, one method is to identify the nature of the question at issue, which would presumptively determine the standard of review. Where the standard of review can be determined summarily, it is not necessary to retreat to the application of a full standard of review analysis.

[21] The nature of the questions of law in the appeal from the Commission to the Court of Appeal involve consideration of: whether City Council followed the municipal planning law that it enacted pursuant to its authority conferred by the Legislature under the *Planning Act*; whether Council made procedural errors by denying the Developer the level of procedural fairness that was required in the circumstances; and whether the Commission properly performed its appellate role when it substituted its decision for Council's decision on the ultimate question of whether the proposed development and accompanying bylaw amendment were in accordance with sound planning principles.

[22] In my view, questions of law of these kinds are all central to the Commission's delegated mandate as the planning appeal tribunal. They engage the specialized expertise of the Commission, as that concept is characterized by *Dunsmuir* and by D.J. Mullan. They involve interpretation of the Commission's

home statutes as the planning appeal tribunal, i.e. the **Planning Act**, and statutes closely connected with its function, i.e. delegated municipal legislation authorized pursuant to the **Planning Act**. In order to obtain a full appreciation of the Commission's role and function, the **Island Regulatory and Appeals Commission Act** and the **Planning Act** should be viewed together as a legislative scheme. This exercise demonstrates for me that in deciding such questions of law, the Commission acting as an appeal tribunal is indeed interpreting its home statute and statutes closely connected with its function, with which it will have particular familiarity, and that none of these questions are questions that rise to the level of being central importance to the legal system and outside the specialized area of expertise of the Commission acting as an appeal tribunal. It is thereby revealed that the presumption is engaged and that reasonableness is the applicable standard of review regarding such questions.

[23] There is no privative clause. However, the Commission is constituted as an independent and impartial tribunal. It is a standing tribunal to which the Legislature has assigned province-wide jurisdiction for planning appeals. Its mandate is defined, and its enabling legislation contemplates it will have expertise. In my interpretation, the Legislature intended the tribunal to be viewed as having specialization and familiarity in planning matters.

[24] The City's appeal also asserts that the Commission exceeded its jurisdiction by rendering a decision that usurped the legislated and/or contractual powers of the elected officials of City Council to administer the City's bylaws. Following the Supreme Court's direction in **Dunsmuir** and **Alberta Teachers'**, I would treat that assertion as a question of law rather than a question of jurisdiction.

[25] **Dunsmuir** (at para.59) advises that administrative bodies must be correct in their determinations of true questions of jurisdiction or *vires*. However, **Dunsmuir** uses the term "*vires*" to distance the discussion from the extended definition of jurisdiction. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. True jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. This goes to the fundamental principle of delegation of statutory authority. A tribunal must interpret its grant of authority correctly or its action will be found to be beyond its authority.

[26] In **Alberta Teachers'** (at paras.38-42), Rothstein J. grappled with the question of what constitutes a true question of jurisdiction and how reviewing courts should deal with the issue. He observed that the "true questions of jurisdictions" category has caused confusion to counsel and judges alike and has unnecessarily increased costs to clients before getting to the actual substance of the case. He proposed what he viewed as a natural extension of the approach to simplification set out in **Dunsmuir**: true questions of jurisdiction are narrow and will be exceptional.

When considering a decision of an administrative tribunal, in interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. As long as the true question of jurisdiction category remains, a party seeking to invoke it must be required to demonstrate why the court should not review the tribunal's interpretation of its home statute on the deferential standard of reasonableness. Rothstein J. adopted the reasoning of Justice Evans of the Federal Court of Appeal to the effect that a very strong presumption of deferential review when a statutory authority is interpreting its home, or constitutive statute, or any other frequently encountered statute, or even common or civil law principle. He suggested the practical approach is to direct the courts and counsel that at this time, true questions of jurisdiction will be exceptional and should the occasion arise to address in a future case whether such a category is indeed helpful or necessary.

[27] This proposal and suggestion being made within the majority decision in *Alberta Teachers'*, it comprises the directions to be followed in the present case.

### 3. Decision on appeal

#### *Summary decision*

[28] In my opinion, the Commission properly performed its function as the appeal tribunal on a planning appeal, and both of its decisions: 1) to quash Council's decision based on procedural error; and 2) to substitute its decision to approve the Developer's application, were reasonable. There being no reviewable error, I would dismiss the City's appeal.

#### *Delegated authority and appellate review*

[29] The Legislature created the City, and vested its administration in Council. The Legislature conferred the primary authority over planning upon Council. Under the *Planning Act*, R.S.P.E.I. 1988 P-8, upon adopting an Official Plan, Council is thereupon responsible for administration of the City's Official Plan. Specific *Planning Act* provisions authorize mechanisms for administration of the planning process. These include the appointment of the Planning Board, the assistance and advice of staff and consultants on preparation and administration of the Official Plan regarding zoning and development, the composition of Planning Board, and the office of Chair of the Planning Board, Planning Board powers and duties including recommending by-laws and alteration of bylaws to Council in respect of the Official Plan, and the conduct of public meetings in pursuit of the objective of providing an opportunity for public participation in the planning process. The *Act* authorizes Council to make and amend bylaws implementing the Official Plan for the City, with the provisos that bylaws are subject to approval by the Minister of Finance and Municipal Affairs and an opportunity for public input through a public meeting.

[30] While the Legislature made Council responsible for administration of its Official Plan, it created a right of appeal from Council's decision. Section 28(1.1) of the **Planning Act** provides (with some exceptions) that any person who is dissatisfied by a decision of Council may appeal to the Commission.

***Review of Council decision for compliance with bylaws  
and procedural error***

[31] In my opinion, it is integral to the Commission's legislative mandate as the appeal tribunal for **Planning Act** appeals to review the decision of Council for compliance with City bylaws and procedural error. The right of appeal from City Council acting as a decision-making tribunal affecting rights is statutory. The Legislature fully vested the Commission with the function of appeal tribunal, and directed aggrieved persons to appeal to the Commission rather than to the superior courts for redress. The **Planning Act** does not limit the scope of an appeal. The fundamental principle of administrative law is that any tribunal exercising delegated statutory power must exercise its legal authority only in accordance with the provisions of its enabling and operating legislation. Otherwise, its decisions are unlawful and subject to being set aside on appeal. A person who is dissatisfied with a decision of Council appeals to the Commission with the objective of having the Commission overturn the decision subject to appeal. In order to fulfill its mandate as the appeal tribunal, the authority to review the decision appealed from for compliance with the bylaws and procedural error is necessary.

[32] I would endorse the Commission's two-step approach that it employs as a guideline when determining appeals under the **Planning act**. Once the Commission confirms that a planning appeal is within its jurisdiction to decide, its initial review of the decision appealed from is for procedural error. Because such applications are essentially for rezoning or bylaw amendment, in which Council's decisions affect rights, such an error may render the decision under review subject to being declared invalid.

[33] It is also my view that upon carrying out its review of the evidence, the Commission could reasonably find, as it did, that Council made an error of law and acted unfairly toward the Developer by not deciding the application in accordance with the requirements of the City's planning legislation, and instead making its decision based on consideration of extraneous matters.

[34] The CDA Bylaw stipulates mandatory requirements for Council in considering a Development Concept Plan. They include: the quality of architectural design of all proposed buildings; their compatibility with the architectural character of adjacent development; and the extent to which the Development Concept Plan reflects the development principles as are otherwise set out in the CDA Bylaw. The Planning Board Report to Council, which recommended approval of the proposed change to

the Waterfront Plan to allow the development, canvassed all of these criteria, sensitively and in considerable detail. The minutes of the Council meeting in which the decisions to reject the application were made contain very little reference either to any of the criteria listed in the Bylaw approval procedure or to any substantive content of the Planning Board Report to Council. On the other hand, the minutes of the Council meeting report the questions and answers that did transpire.

[35] It is another fundamental principle of administrative law that a council is required to decide an application based on the planning law that is currently in place. Laurel Palmer-Thompson, who is a City planning officer, also confirmed that this is an accepted principle of planning. Council is required to decide an application in accordance with the substantive criteria listed in the CDA Bylaw. Everyone affected by Council's decision is entitled to know the rules that Council will employ in deciding an application, and that upon making its decision Council has duly considered the Developer's application by deliberating on the criteria listed in the bylaw.

[36] In this case, the Commission's reasons demonstrate that it understood that Planning Board's role is advisory – its recommendation being "*something that should be considered seriously but not tying the hands of Council*" – and that Council as the decision maker could reach a different conclusion. The Commission stated its expectation that where Council makes such a decision against Planning Board's recommendation, that Council would explain its thought process and analysis. In the absence of a record of Council having considered the statutory criteria, and in the presence of a record that Council did consider other matters, the Commission formed the view that Council did not decide the Developer's application based on its respective merits or lack thereof, as its Chair of the Planning Board advised it to do, but instead appeared to have been concerned about other matters, including Planning Board's recommendation having been circulated in the media, whether compromise was possible, and the need for a new waterfront plan. Ultimately, the Commission found that Council sidestepped the merits of the application in pursuit of its desire for a new waterfront plan. This crucial inference made by the Commission appears reasonable to me. Without commenting on the level of information that Council should provide to make its decision amenable to effective review, in this case the presence of a fully explained Planning Board Recommendation for approval, the absence of Council reference to the statutory criteria, and the verbatim report of the Council discussion being focused on other considerations, there is a sufficient basis upon which the Commission sitting as the appeal tribunal to have made its conclusion.

[37] It is significant to appreciate that my review of the Commission's decision to quash Council's decision involves the issue of proper process. The expressed desire to pursue a grand vision for the City's waterfront is no doubt laudable. There was considerable evidence before the Commission about the present concept plan being relatively dated, and the need for revisiting the Waterfront Plan due to the inherently

incremental nature of development in a CDA, and the wide-ranging array of recently approved developments in the waterfront area: the new convention centre, the new concert site, the adjacent condominium developments east and south of the subject property, the new marina, and change of use of Founders Hall. Indeed, counsel for the City informed the Commission in the City's opening statement on the appeal that the City does not contend that its Director of Planning or the Planning Board were off base with their Recommendations for approval in terms of planning principles. Counsel informed the Commission that the nub of its case is that spot or piecemeal development on the subject property is premature because the City is about to embark on a grand vision for the waterfront, taking a holistic look at the waterfront lands that remain undeveloped. Along with Council's discussion and decision, and the evidence on the planning appeal, this description of the nub of the City's case makes it abundantly clear to me that the Commission well and fully understood that Council did not comply with its bylaws and the source of this error. Council did not follow the process required by the bylaw. It chose to not follow the advice and caution of the Planning Board Chair that it was required by law to process the Developer's application in accordance with the applicable bylaw *before* making any further decisions about a new and revised Waterfront Master Plan.

### ***Hearing and deciding the application anew***

[38] In my opinion, it was also within the Commission's mandate to decide the application on its merits. Following a **Reference** in 1997, the Court of Appeal held that the Legislature contemplated and intended that appeals under the **Planning Act** would take the form of a hearing *de novo*, after which the Commission, if it so decided, could substitute its decision for the one appealed (**Island Regulatory and Appeals Commission (Re)** , [1997] 2 P.E.I.J. 70).

[39] Following the **Reference** case, the Commission formalized a two-part test that summarized its previous analysis of its role. The Commission employs this test as a guideline in determining planning appeals. As it applies to the circumstances of this case, after carrying out step one and quashing the Council decision for failing to follow proper process and procedure, the Commission could and should move forward to step two. Here, the Commission considers whether the City's decision with respect to the proposed rezoning and bylaw amendment has merit based on sound planning principles within the field of land use and urban planning and as enumerated in the Official Plan.

[40] I agree with both the Commission's usual approach where it finds no procedural error, and its approach in this case where it finds procedural error and quashes the decision of a municipal council. As would be expected, the Commission usually employs deference toward planning decisions by Council that are properly made. That approach is consistent with the statutory scheme of the **Planning Act**. The Legislature vested City Council with responsibility for administration of its Official

Plan and created a right of appeal to the Commission. The Commission noted that its discretion should be exercised carefully, which it interprets, consistently with the directions in the **Reference** case, as meaning that the Commission ought not to interfere with a decision merely because it disagrees with the end result. However, where, as here, Council fails to decide an application for development on its merits in accordance with the applicable municipal law, which is enabled by the **Planning Act**, and decides the application based on irrelevant considerations, then there is no basis for deference. That is because there is then no decision upon which to defer. In the Commission's words, deference to a decision-maker is earned when the decision maker follows the process set out by the law and is fair to all the parties. Where, as here, process was not so followed, the Commission was unable to show deference to Council's decision.

[41] Upon reviewing the record before the Commission, including the City's Official Plan, CDA Bylaw, and related documentation regarding the Waterfront Concept Plan, all the oral evidence, and the Commission's decision and reasons, I am satisfied that the Commission's conclusion that the Developer's proposal development for the subject property, as put forward by Planning Board, is consistent with sound planning principles, is a reasonable decision. The Commission weighed the evidence. It could weigh the evidence as it did, and prefer the Reports and Recommendations of the City's Director of Planning and of the Planning Board, and the opinions of the City's Development Officer over the opinion of the planning consultant witness, who also gave expert evidence at the request of the City. The Commission had before it a full and complete evidentiary basis upon which to determine that the proposed development, and required amendment to Appendix G Permitted Uses of the CDA Bylaw, complies with all of the stated statutory criteria and is consistent with sound planning principles.

#### ***Conclusion on decision***

[42] I believe that the forgoing reasons address the City's grounds of appeal, either expressly or by implication. I would dismiss the appeal.

#### **4. Further comments**

[43] I wish to include further comments regarding some issues and grounds that were raised during the appeal from the Commission to the Court of Appeal. These comments form part of my reasons. They are added at the end because I view them as ancillary and explanatory regarding the foregoing decision.

##### ***4.(a) Hearing de novo: Did the Commission usurp Council powers?***

[44] I have previously explained the source of the Commission's mandate to

review a Council decision for error of law in procedure and process, the rationale for deference to planning decisions made by Council since it is delegated the responsibility for municipal planning, and the source and proper operation of the Commission's mandate to make the ultimate planning decision anew in the circumstances of this case where the decision of Council is declared invalid. In view of the City's ground of appeal that asserts that the Commission improperly substituted its discretion for that of the elected Council, I add this additional explanation.

[45] In my view, the Commission did not usurp the legislated and contractual powers of City Council to administer the City's planning legislation.

[46] Council decisions are subject to appeal under the **Planning Act**. Any suggestion that Council's decisions are insulated from review because Council is elected and the Commission is not has to be considered in context and appropriately moderated. The constraints on Council's discretion depend on the role being performed by Council. The legal constraints will be different depending on the nature of the function being performed. Council's decisions must always be based on relevant criteria and a decision based upon extraneous considerations is susceptible to being invalidated. Beyond that, when Council is exercising political decision making authority, making policies, enacting legislation, and carrying out operations, it may be that Council is not expected to adhere to standards of fairness or that such standards may be circumscribed. On the other hand, when Council is deciding whether to approve an application for development, it is acting as a tribunal performing a quasi-judicial function. When it is called upon to exercise its discretion in such a matter that affects the rights of persons to have the matter decided in accordance with particular rules, such as the CDA Bylaw, the Official Plan, and the **Planning Act**, then Council must exercise its discretion in accordance with the enactment containing those rules (*Wiswell v. Winnipeg (Greater)*, [1965] SCR 512, at paras.32-36, applied in *Welbridge Holdings Ltd. v. Winnipeg (Greater)*, [1971] SCR 957, at pp.968-969; *St. Peters Estates Ltd. v. Prince Edward Island (Land Use Commission)*, [1990] P.E.I.J. No. 121 (PESCTD), at pp.34-35; David G. Boghoslan, LL.M., and J. Murray Davison, Q.C.: **The Law of Municipal Liability in Canada** (LexisNexis, 1999), pp.1.15-1.17. See also: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, at para.10-12, which in the course of considering the validity of legislative power by a municipality, described the source and limits of delegated authority, and advised that all kinds of municipal decisions may be reviewed for compliance with the governing legislative scheme and applicable procedural fairness.)

[47] In *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, Sopinka J. (writing for a 5/4 majority) described the various roles of a municipal council and the associated constraints on exercise of discretion this way:

- [92] The powers of a municipality are classified for some purposes. The classifications include legislative functions, quasi-judicial functions and business functions. The nature of the function may affect the duties and liabilities of the municipality. Accordingly, it may be liable in contract or tort in respect of its business function but civil liability in respect of its legislative or quasi-judicial function is problematic. In its quasi-judicial function, Council may have a duty of fairness which does not apply in respect of the exercise of its legislative powers. See **Welbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg**, [1971] S.C.R. 957, and **Wiswell v. Metropolitan Corporation of Greater Winnipeg**, [1965] S.C.R. 512. As creatures of statute, however, municipalities must stay within the powers conferred on them by the provincial legislature. In **R. v. Greenbaum**, [1993] 1 S.C.R. 674, Iacobucci J., speaking for the Court, stated, at p. 687:

Municipalities are entirely the creatures of provincial statutes. Accordingly, they can exercise only those powers which are explicitly conferred upon them by a provincial statute.

- [93] It follows that the exercise of a municipality's statutory powers, whatever the classification, is reviewable to the extent of determining whether the actions are intra vires. Normally this is done by a motion to quash or a declaration of invalidity with respect to the act of Council which is impugned. ...

[48] The following passage from the judgment of Kerans J.A. in **Atkins v. Calgary (City)**, [1994] A.J. No. 950 (Alta. C.A.), in yet another municipal bylaw case, is instructive:

- [11] The power of a municipal government under the **Planning Act**, R.S.A. 1980, c. P-9 to enact land use by-laws, and to designate permitted uses for specific parcels, can and often does raise a narrow planning issue between competing citizens, the persons who propose a re-designation of their land and the neighbours who oppose. Alberta has a long legal history that also views decisions of that sort, even though by amendment to the by-law, as more judicial than legislative. The legal rules about what is relevant to planning apply, and resort to its planning power to accomplish a purpose not relevant to the rules about what is a valid planning factor is illegal. See **Campeau Corporation v. Council of City of Calgary** (No. 1) (1978), 12 A.R. 31, 7 Alta. L.R. (2d) 294 (S.C.A.D.) and **Re Tegen Developments Ltd. et al. and the City of Edmonton et al.** (1977), 81 O.L.R. (3d) 543 and **Re Dallinga and City of Calgary [supra]** and **Hartel Holdings Co. v. Calgary**, [1984] 1 S.C.R. 337. On the other hand, where the nature of question before Council raises a matter of public policy, a prior commitment by a councillor to a certain position does not disqualify him. See **Campeau Corp. v. Calgary (No. 2)** (1980), 112 D.L.R. (3d) 737,

[49] In the present case, the decision before Council had legislative and judicial aspects. The resolution was for an amendment to the CDA Bylaw to add to the existing Permitted Uses as described in Appendix G. In the concept of a CDA, any development can be sought but is always subject to the broad discretion of Council. The CDA Bylaw states that Uses permitted in a CDA Zone are those uses that are approved by Council in accordance with the bylaw, and “*may include any Uses or Mix of uses allowing in any zone of this Bylaw and Innovative mixed use developments...*”. Development within particular areas of a CDA Zone, such as the Waterfront, which contemplates innovative applications for various kinds of development, render the planning considerations somewhat different than those applicable to an application for rezoning to permit a non-conforming use in a specific purpose zone. That is why Bylaw 28 contains special provisions, including particular criteria to be considered in the decision-making when deciding upon an application for development. This is reflected in the Report of the Director of Planning dated September 7, 2011: “*This is in the CDA zone and would require an amendment to the concept plan given the concept plan does not show a building on this location.*” Carrying out its function of considering an additional development, the same in kind as existing uses of properties in the Waterfront but not yet a listed Permitted Use for the subject property, the function of Council is mainly judicial in nature. The application engages competing rights and interests.

#### **4.(b) *Revisiting the Reference case***

[50] The City requested the Court to consider whether the **Reference** case should be revisited in light of intervening events during the years since it was decided in 1997. The thrust of the City’s submission is that clarification is necessary regarding the guidelines the Commission follows when reviewing decisions of municipal councils. The City referred to three sources of change: 1) legislative amendments to the Planning Act; 2) the Supreme Court of Canada jurisprudence regarding the role of municipal councils; and 3) many previous decisions of the Commission itself. Counsel for both the Commission and the Developer, while willing to participate in the exercise, advised the Court that such developments in the legislation and jurisprudence have not introduced any call for revision of the directions in the **Reference** case. I agree.

[51] By the way of preliminary observation, I note that the scope of any “revisiting” is circumscribed by the circumstances in which this request occurs. The present case is a statutory appeal. It is neither another **Reference** initiated by the Commission, nor an appeal from the 1997 decision of this Court on the **Reference**. In that scenario, the exercise is limited to considering whether the Commission properly performed its mandate in the present case. The starting point is that the **Reference** case is a correct statement of the law: appeals under the **Planning Act**

take the form of a hearing *de novo*, after which the Commission if it so decides can substitute its decision for the one on appeal; however, the Commission does not have unfettered discretion or unbridled power to deal with and decide appeals any way it likes; but is bound to hear, consider, and decide the issues of the case in accordance with the requirement and objects of the **Planning Act**.

[52] My second reservation to venturing on a revisiting exercise is that in the circumstances it may not have much utility. The City's submissions regarding the Commission exercising its *de novo* authority are based on the premise that Council did not make a legal or procedural error that would render its decision invalid. That foundation now being removed, such a revisiting of the **Reference** case is mostly unnecessary.

[53] In any event, I will state my opinion that none of the mentioned legal developments suggest a need for clarification or change of the Commission's mandate or function.

#### *Legislative amendments*

[54] The amendments to the **Planning Act** do not purport to change, expand, or restrict the power of the Commission acting as the appeal tribunal on a municipal planning appeal, or to change the way in which an appeal is to occur. The amendments address notification to affected parties.

#### *Supreme Court of Canada jurisprudence*

[55] The City's submission is that these decisions suggest some revision of the applicable standard of review of a municipal council's decisions. I do not see that message or direction in those decisions.

[56] The City referred to **Shell Canada Products Ltd. v. Vancouver (City)**, [1994] 1 S.C.R. 231. First of all, that is not a decision issued subsequent to the **Reference** case; and the Court of Appeal would have been aware of it. This appeal hearing cannot be used as a collateral challenge to the decision in the **Reference** case. In any event, great care has to be taken in how statements of law in these cases are applied. **Shell Canada** dealt with the validity of a policy decision – whether Vancouver could decide not to do business with a company with South Africa connections. It did not deal with a planning and zoning decision involving a municipal council's quasi-judicial function.

[57] **Nanaimo (City) v. Rascal Trucking Ltd.**, 2000 SCC 13, is not directly applicable either. My reading of the case advises that the passages which the City now urges upon the Court were employed by the Supreme Court in support of a different proposition and the case itself does not provide much guidance for the

present case. Care always has to be taken to consider judicial statements in context so that they not be overextended or misapplied.

[58] In **Nanaimo**, the Supreme Court considered two issues. The first issue was whether the municipal legislation empowered Nanaimo to pass resolutions declaring a pile of soil a nuisance and ordering its removal. This question involved consideration of the approach a court should take when construing municipal bylaws. The Supreme Court considered this to be an exercise in statutory interpretation, and held that a broad and purposive approach should be employed. On that basis, Major J. for the Court found that the legislation did empower the municipality to issue the resolutions. That decision in turn raised a second question, which was the standard of review applicable to the Nanaimo's decision. Major J. referred back to the **Shell** decision, which he classified (at para.27) as a review of a municipal policy making decision. He then distinguished **Nanaimo** from **Shell**, because the issue in **Nanaimo** was the standard of review of a municipality's adjudicative function as opposed to its policy making function. He stated (at para.28) that the decision was clearly adjudicative as it involved an adversarial hearing, the application of substantive rules to individual cases, and a significant impact on the rights of the parties. Major J. then applied the pragmatic and functional approach to determining the issue of the appropriate level of deference. His reasoning was that the applicable municipal legislation required the municipal council to apply principles of statutory interpretation in order to answer the legal question of the scope of its authority. Major J. found that municipal councils do not have any particular advantage in deciding such a jurisdictional question in the adjudicative context. Accordingly, the applicable standard of review was held to be correctness. This is the point in the **Nanaimo** reasons where the discussion now relied upon by the City occurred. Major J. referred to and relied upon the plenary and political nature of municipal government in developing his view that municipal counselors, being politicians without particular planning or administrative law expertise, their decisions regarding the scope of their authority are reviewable with close scrutiny. Hence, he chose the standard of correctness. This part of the **Nanaimo** decision does not support the submission that greater deference should be accorded on that account for that kind of decision.

[59] The mentioned statements by Sopinka J. in **Shell** and Major J. in **Nanaimo** explain why on the one hand courts and appeal tribunals like the Commission closely scrutinize council decisions pertaining to the proper exercise of legal authority, and on the other hand practise a deference of respect regarding discretionary decisions validly made within a council's powers. Major J. (at para.27) adopted Sopinka J.'s statement that the exercise of a municipality's statutory powers is reviewable to the extent of determining whether the actions are *intra vires*, and then (at para.33) he concluded his standard of review analysis regarding adjudicative decisions this way:

[33] The fact that councillors are accountable at the ballot box, is a consideration in determining the standard of review for *intra vires*

decisions but does not give municipal councillors any particular advantage in deciding jurisdictional questions in the adjudicative context. As a result, the courts may review those jurisdictional decisions on a standard of correctness.

[60] Major J. found Nanaimo was correct in construing the legislation as permitting the resolutions to deal with the nuisance. He went on from there to find that the manner by which Nanaimo arrived at its *intra vires* decision was reviewable on the then most deferential standard of patent unreasonableness.

#### *The Commission's own jurisprudence*

[61] The Commission responded to the Court of Appeal directions in the **Reference** case by formalizing its two-stage approach to decision making. As far as I can see, this test or statement of approach first appeared in the Commission's decision in **Dr. and Mrs. Vincent Adams - Order LA97-02**, which preceded the **Reference**; was applied in **Tiny Tots Day Care Inc. - Order LA97-14**, and in **Gary Paynter - Order LA97-16**, which were released shortly after the **Reference**, and the Commission has employed the test ever since. In my view, the Commission's test is an effective response to and application of the **Reference**. It takes a balanced approach in reflecting the legislation governing municipal planning. Acknowledging that it has the authority to substitute a decision of Council with its own decision, the Commission accords appropriate respect to Council as the decision-making body to which the Legislature by virtue of the **Planning Act** has assigned the responsibility for municipal planning. This respect is manifested in the concept of deference. The Commission thereby tempers or moderates its role as the appeal tribunal, even though it is hearing the matter anew, and perhaps considering additional evidence beyond that which was before Council when it made its decision.

[62] Within its consideration of how an application for development fits with sound planning principles, the Commission considers the initial application and how Council dealt with it. It appears to me that the Commission grappled with reconciling two directions in the **Reference**: first, "*The findings of the person or body appealed from are irrelevant;*" and second, the direction to decide the matter "*...in accordance with the requirements and objects of the **Planning Act**.*" The Commission treats the latter statement as the prevailing direction. In my view, that approach accords with the general principle of statutory interpretation and planning law. Statutory interpretation involves a consideration of the ordinary meaning of the words used and the statutory context in which they are found: Words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, *the object of the Act, and the intention of Parliament.*" (**Celgence Corp. v. Canada (Attorney General)**, [2011] S.C.J. No. 1, citing **65302 British Columbia Ltd. v. Canada**, [1999] 3 S.C.R. 804, at para.50.) Within planning law jurisprudence, courts afford deference to municipal councils because

they are the statutory body imbued with delegated authority to make such discretionary decisions.

[63] The **Reference** directions and the foregoing discussion address stage two of the Commission's test or approach. As the appeal tribunal, the Commission first carries out its stage one exercise of reviewing the Council decision to determine whether the decision is in compliance with the municipal laws that were enacted pursuant to the **Planning Act**, and whether Council conducted its proceedings properly and fairly. As previously discussed, the required content of procedural fairness depends on the circumstances.

[64] The appropriate balance between deference and independent decision making at the appeal stage was set out in **Doiron, supra**. In that case, there was no challenge for failing to comply with the law or procedural fairness, and the developer's appeal to the Commission focused on the planning decision. In the appeal from the Commission to the Court of Appeal, in response to the developer's assertion that the Commission had accorded too much deference to Council and had merely rubber stamped its decision, Murphy J.A. for the Court stated:

[20] It is within the province of the Commission to agree with the decision of Council, or as Mitchell J.A. stated in the **Reference** case, "if it so decided, could substitute its decision for the one appealed" [emphasis mine]. The Commission gave some weight to the decision of City Council but it did not rubber stamp it. The Commission made its own decision on the merits of the application and therefore, properly conducted the appeal.

[65] The distinction from **Doiron** in the present case is that in the present case the developer appealed from the City's decision based on Council's failure to comply with its own bylaw and procedural unfairness, and on that basis the Commission quashed Council's decision. Upon that Council decision being rendered invalid, there was no decision by the City upon which to defer. The Commission then had to hear and decide the matter anew, in accordance with the direction in the **Reference** case.

[66] The planning law regime in this province is formulated by the Legislature. Should the City wish to see the authority of the Commission as the appeal tribunal revised or restricted, then its efforts to seek redress should be addressed to the Minister responsible for the **Planning Act**, and ultimately the Legislature.

#### **4.(c) Failing to consider relevant factors**

[67] The City submits that the Commission failed to consider or give adequate weight to relevant factors. Consideration of this ground of appeal has caused me to fully scrutinize the evidence, the criteria for Council's decision making, **and** the Commission's reasons. In the end, I see no basis for this ground of appeal.

[68] In my view, the Commission provided reasons that flow logically and are readily amenable to appellate review. Those reasons contain considerable explanation as to how the Commission carried out its analysis. The Commission set out its authority, role, and the process it followed; the municipal planning law regime that governs waterfront development that was to be followed by the Developer, Planning Board and Council; the particulars of the Developer's application for development and bylaw amendment that was under consideration; the City approval process that occurred, from start to finish; the Commission's finding that Council did not comply with the applicable bylaw, and the basis for that finding; its decision to proceed onward to decide the application; the planning evidence that was before the Commission; and how in the Commission's view the evidence fits with the City's municipal planning regime for development in the waterfront area. In particular, the Commission related the application to the aspirations of Section 3.5 of the Official Plan and to the criteria for consideration set out in s. 28.5 and of the CDA Zoning and Development Bylaw. Finally, the Commission found that the evidence, including the recommendations of the City's planning development and Planning Board, supported a determination that the proposed development appropriately reflects the stated criteria, and is consistent with sound planning principles.

[69] The appeal from the Commission to this Court being confined to questions of law and jurisdiction, I will address the first concern – whether the Commission failed to properly consider relevant factors – but not the second – whether it gave adequate weight to relevant factors. The issue of weight is not a question of law. It is not the role of this Court on an appeal from the Commission decision as the planning appeal tribunal to second guess the weight accorded to the various evidence. (*Lehmann v. Thorhild (County No. 7)*, 2011 ABCA 344; *Oliviera v. Ontario (Director, Disability Support Program)*, 2008 ONCA 123, at para.33.)

[70] In my view, there is no demonstration that the Commission failed to consider relevant evidence. All of the factors now mentioned by the City – which can be summarized as the prior development agreements, prior applications by the Developer, and what the Developer knew about the use of infill property when Mr. Madden acquired the whole 4 Prince Street property – were in the record that was before the Commission, and the Commission's reasons suggest to me it was alive to all of those matters. The reasons are sufficient. While the Commission is expected to give reasons, a decision maker "*is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion.*" (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p.391, cited in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para.16.)

[71] In any event, these submissions are not sustainable. None of the mentioned

factors precludes a new development. This City's submission does not account for the fundamental nature of ongoing development in a CDA. New proposals for development that seek to become part of the future fabric of the area are entertained in accordance with the zoning and development bylaw. The evidence before the Commission proceeded on the premise that the waterfront plan is a concept plan that envisions change and is not static, and that the CDA is a zoning and development bylaw. Development has been ongoing and incremental for over three decades; concept plans have been updated and changed. For instance, it is now known that some developments proposed in the CADC, CHAI, City Development Agreement of 2006 will not occur. The 2008 Development Agreement between the City and the Developer does not preclude another application for development to change the use of the subject property from parking lot to mixed use development as proposed from being approved by the City.

[72] It appears to me that the Commission understood the function of the Development Agreement made between the Developer and the City regarding the permitted use of the Developer's approved condominium property at 4 Prince Street. The Development Agreement is an implementation mechanism made pursuant to under the CDA Bylaw. As submitted, it does not permit further uses on the subject property; but neither does it preclude the Developer from applying to Council for a further permitted use or Council from considering and approving another application for development that would involve another amendment in the form of addition to Appendix G. The Development Agreement is subordinate to the Bylaw in the planning hierarchy.

[73] According to the Chronology filed by the City, the City was aware in 2010 when it approved the subdivision parcel PID841536 into two parcels Lots 10-1 and 10-2 that the northern portion would be "*developed or sold, as the case may be.*"

[74] The Commission's reasons demonstrate that it was understood the conceptual nature of the waterfront development plan, that waterfront development is a continuum, the role of development agreements, the previous development agreements relating to the subject property, the history of previous applications and why they were rejected, the concept of "infill," "piecemeal," and new development, the aspirations for the Waterfront Plan, including the potential for revision following the 2011 500 Lot Study and numerous developments of contiguous and neighbourhood properties over the past couple of years, the role of Planning Board under the **Planning Act** and the City's Official Plan, and Council's wide discretion in a CDA and more particularly on the Waterfront to decide whether or not to improve a use or mix of uses.

[75] My second comment is that the City basically set the record before the Commission. The City determined what history of applications and dealings would constitute the record. The City advised what documents and events would be

relevant. Counsel informed the Commission at the outset of the appeal hearing that the City had minimized the very large volume of documents at City Hall regarding previous applications. It substituted a Chronology of events prepared by the City's development officer for many of the documents, and then the development officer presented before the Commission and examined in the hearing on the Chronology.

[76] Upon viewing everything, I do not see that the Commission failed to consider relevant factors.

**4.(d) Commission interpretation of opening remarks by Chair of Planning Board to Council**

[77] This ground of appeal does not appear to me to involve a question of law. In any event, I do not see any basis for the contention that the Commission misinterpreted the language used or its meaning. The Chair of Planning Board was clear with his advice and directions that Council needed to "deal with" and to "process" the application, and that the application was a separate matter to be processed "before" Council would make any further decisions regarding the Waterfront Master Plan. The Commission's reasons for decision suggest to me that the Commission understood that, and also understood the difference between those actions and the verb "approve."

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Chief Justice David H. Jenkins

I AGREE: \_\_\_\_\_  
Justice Michele M. Murphy

**McQUAID J.A. (concurring in the result):**

**INTRODUCTION**

[78] I agree with the Chief Justice the appeal should be dismissed; however, I reach that conclusion for different reasons. I will commence my reasons with an overview as to how I reach this result and then provide a more detailed explanation.

[79] In this case the City's appeal from the decision of the Island Regulatory and Appeals Commission (the "Commission") is by way of *de novo* hearing. As a result, the Legislature has vested the Commission with the jurisdiction to consider the application of Atlantis afresh without regard to the record before City Council and the decision made by City Council. Accordingly, in this particular case the Commission's role was to consider the evidence adduced before it in the hearing *de novo* and consider whether in its discretion the application met the criteria for a development in the applicable Comprehensive Development Area Zone ("CDA Zone").

[80] Because the decision made by the Commission in this case primarily involved an exercise of discretion, the decision should be reviewed by this Court on the standard of reasonableness. Again, I reach this conclusion on the standard of review for different reasons than the Chief Justice. In the result, the Commission's decision meets the standard of reasonableness, and this Court is unable to intervene to set the decision aside.

**BACKGROUND AND FACTS**

[81] Atlantis is the owner of a parcel of land located on the waterfront in the City of Charlottetown (the "City").

[82] The land is situated within what is referred to in the City of Charlottetown By-Laws as a CDA Zone. A concept plan for the development of the land had been approved. The application by Atlantis to the City which gave rise to this appeal was to amend the initial concept plan. Atlantis sought permission to change the use of the land from residential to commercial/office/residential.

[83] Regardless of the use being proposed by an owner of land within a CDA Zone, development within the Zone requires approval of the City. Each application is considered on the basis of the criteria listed in the by-law establishing the CDA Zone.

[84] The following provisions of the by-law are helpful in understanding the scope of the City's discretion when considering whether to approve a proposed development within the CDA Zone.

**28.1 PERMITTED USES**

Uses permitted in a CDA Zone Shall be those approved by Council and May include any Uses or Mix of Uses allowing in any zone of this Bylaw and Innovative mixed-Use Developments and Council Shall give due consideration to other sections of this bylaw, but Council May approve any Use or Development in a CDA Zone which it deems to be in the public interest notwithstanding all other sections of this bylaw but only after following the procedures sections of this Section 28.

.....

**28.3 DEVELOPMENT APPLICATIONS IN THE CDA ZONE**

- .1 No Development consisting of new Buildings or the demolition or relocation of Buildings Shall take place in a Comprehensive Development Area until a Development Concept Plan has been proposed and adopted by Council.
- .2 The Council, before approving a Development Concept Plan, Shall consider the following:
  - (a) the Maintenance of Design Standards of the proposed Buildings and their acceptability with respect to land Uses and the character and scale of Existing and proposed Development in the vicinity;
  - (b) the preservation of Existing site features of unique quality and the preservation of the natural beauty of the area;
  - (c) the type of Ownership;
  - (d) the proposed population density of the area, the floor space ratio, the adequacy of Open Space areas, Building form, Parking, pedestrian walkways, Streets, water supply, sanitary and storm sewers; and
  - (e) any other factors recommended by Planning Board.
- .3 Applicants for Development approval in the CDA Zone May put forward Development Concept Plans, and such Development Concept Plans, if approved by Council, Shall serve as the elements of a Development Concept Plan for the portion of the zone in which they were situated.

- .4 Development Concept Plans for sites in the CDA Zone Shall be prepared having regard to the site Development principles as set out in Section 4.60 of this By-law.

.....

#### 28.5 APPROVAL PROCEDURE

- .1 In considering a Development Concept Plan put forward by an applicant, Council Shall deliberate the quality of architectural Design of all proposed Buildings, their compatibility with the architectural character of adjacent Development, and the extent to which the Development Concept Plan reflects the site Development principles as set out in Section 4 of this By-law.
- .2 Subsequent to approval of the Development Concept Plan, the working site plan and Buildings Shall be approved on the recommendation of Planning Board for each Phase within the Comprehensive Development Area provided it is, in the opinion of Council, consistent with the overall Development Concept Plan and any schedule attached thereto.
- .3 Before Council approves or amends a Development Concept Plan in a Comprehensive Development Area, a public hearing Shall be called in the same manner, *mutatis mutandis*, as if an amendment to this By-law were being considered.
- .4 Changes to a Development Concept Plan that do not change the approved intent of the Use or Lot such as minor additions to a Building, Lot Subdivision or consolidation will not be considered an amendment to the Development Concept Plan and May be approved by the Development Officer.

[85] Based on evidence given before the Commission by City employees and the expert witness testifying on behalf of the City, CDA zones are established to give municipalities broader discretion in permitting the land within the zones to be put to more diversified uses. As long as the provisions of the by-law establishing the CDA Zone are followed, the City has the discretion to approve the use even though it may be a use which is unique to the area and a use that is not necessarily in common with other uses within the zone.

[86] Atlantis' application proceeded through the normal channels of approval required by the City by-laws. The Planning Department gave the proposal its approval. The application was approved by the City's Planning Board. After holding the required public consultation, Planning Board approved the proposal provided for

in the application.

[87] The application came to City Council for approval. By a vote of 7 to 2 Council denied the application.

## THE APPEAL

[88] Pursuant to s.28 of the **Planning Act**, R.S.P.E.I. 1988 Cap. P-8, Atlantis appealed to the Commission. The appeal was heard over a four-day period and on June 19, 2012, the Commission issued an order allowing the appeal, quashing the decision of City Council and ordering the City to amend Appendix G to the CDA Zone to allow commercial, office and residential units on the land in question.

[89] The City appealed to this Court pursuant to s.13(1) of the **Island Regulatory and Appeals Commission Act**, R.S.P.E.I. 1988, Cap. I-11 (referred to as the "**IRAC Act**").

## GROUNDINGS OF APPEAL

1. Section 13(1) of the **Island Regulatory and Appeals Commission Act**, R.S.P.E.I. 1988, Cap.1.11.
2. The Commission erred in law and/or exceeded its jurisdiction by rendering a decision that usurped the legislated and/or the contractual powers of the elected officials of Charlottetown City Council to administer the City's bylaws pursuant to the **Charlottetown Area Municipalities Act**, R.S.P.E.I. 1988, which decision of the Commission was outside the scope of the Commissions' legislative authority and exceeded the scope of the Commission's jurisdiction pursuant to this Honourable court's decision in the case of **Re: Island Regulatory and Appeals Commission**, [1997] P.E.I.J. No. 70 including by:
  - a. Proceeding by way of a hearing *de novo* with little or no consideration as to whether or not this was an appropriate case in which to do so;
  - b. Improperly substituting its discretion for that of the elected Council with little or no regard for the deference due to Council, the greater public interest and/or the respective roles of City planning staff, City Planning Board, the elected representatives on Council and the Commission;
  - c. Issuing an order without any or due consideration as to the resultant interference of its order with the pre-existing contractual relationship voluntarily entered into between the City and the Respondent, Atlantis provided for under the June 15, 2006 and June 30, 2009 Development

Agreements governing the permissible use of 4 Prince Street (PID # 841536).

3. The Commission further erred in law or exceeded its jurisdiction by finding a procedural error or omission on the part of the Council when upon a proper review of the evidence in fact no such error or omission occurred. Therefore, based upon the Commission's own reasoning, the Commission ought to have deferred to Council's decision on the merits, particularly where Council's decision was strongly supported by expert evidence of, Mr. Phil Wood, and of the City's planning staff member, Laurel Palmer-Thompson, to the effect that Council's decision not to approve a proposed piecemeal intensification of the use of 4 Prince Street (PID# 851536) pending a comprehensive review of waterfront development was at least equally consistent with good planning principles as Atlantis' proposed infill project.
4. The Commission failed to consider certain relevant factors, and considered certain irrelevant factors, in coming to its decision. More particularly, the Commission failed to consider, or attach adequate weight to:
  - a. The entire record, context, and extensive prior course of dealings between the City; the former owner of 4 Prince Street (PID# 841536), the Charlottetown Area Development Corporation ("CADC"); and, with the Respondent, Atlantis as evidence of due consideration and "deliberation" by Council on Atlantis' final proposal which was the subject of the most recent appeal to the Commission, including without limitation:
    - i. the Development Agreement entered into between the City and CADC on or about June 15, 2006 with contractually defined the approved development concept for the entirety of 4 Prince Street (PID# 841536);
    - ii. the Agreement of Purchase and Sale between Paul Madden (or a corporation to be named) and CADC dated November 27, 2006;
    - iii. the second Development Agreement between the City, CADC and Atlantis as executed by and agreed to by Atlantis on or about June 30, 2009;
    - iv. the conveyance of 4 Prince Street (PID# 841536) by CADC to Atlantis on or about November 24 2009;
    - v. that after execution of the Agreement of Purchase and Sale and the two (2) Development Agreements

referenced above, the Respondent Atlantis closed its purchase of 4 Prince Street (PID# 851536), knowing what prescribed permissible uses were allowable pursuant to the City's Bylaw and the two (2) binding Development Agreements, one of which Atlantis itself had executed and agreed upon, only to subsequently bring forward 4 or 5 new proposals that would necessitate a rezoning; and

- vi. the series of 4 or 5 varying new proposals made to the City by Atlantis commencing in or about October, 2008 through September, 2011 proposing to amend Appendix "G" of the City's Zoning Bylaw to allow for greater density at 4 Prince Street (PID# 851536) and all of the City's and Council's deliberations and public input on such proposals;
- b. The verbatim minutes of City Council for November 14, 2011 which included Council's deliberation as to:
    - i. General public concern for waterfront development which, contrary to the Commission's findings, was not an irrelevant or extraneous planning consideration but rather upon the evidence before the Commission a compelling and relevant consideration; and
    - ii. The context of Atlantis extensive earlier course of dealings with the City regarding the subject property which also ought to have been considered by the Commission as a relevant consideration forming an integral part of Council's deliberations on the immediate rezoning request before it.
  - c. The extensive expert evidence of the City's expert planning witness, Mr. Phil Wood, and of the City's planning staff member, Laurel Palmer-Thompson, to the effect that Council's decision not to approve a proposed piecemeal intensification of the use of 4 Prince Street (PID# 851536) pending a comprehensive review of waterfront development was entirely consistent with good planning principles.
5. The Commission further erred in law or exceeded its jurisdiction by:
- a. wholly misinterpreting the opening comments of Councillor Lantz at Council's meeting on November 14, 2011 as, in effect, to be saying that Council must "approve" Atlantis' application, when in fact all Councillor Lantz stated was that Council must "process" the application – which it did by refusing the requested amendment.

- b. In effect finding that Council was obliged to approve Atlantis' proposed intensification of the use of 4 Prince Street (PID#851536) as if the rezoning proposal was for an "as of right" use rather than a discretionary use which would have entailed a significant intensification of the use prescribed legislatively by the City's Bylaw; and, prescribed contractually by the June 15, 2006 Development Agreement between the City and CADC; and, by the June 30, 2009 Development Agreement between the City, CADC and Atlantis.

6. Such further or other grounds as may appear.

**(i) The City's Position**

[90] Summarizing the City's grounds of appeal it is apparent the City takes the position the Commission erred in law when they allowed the appeal. The City also takes the position the Court should review a previous decision made as the result of a Reference to the Court by the Commission. This decision addresses the procedure to be followed by the Commission when there is an appeal to the Commission from a decision of a municipality pursuant to s.28 of the **Planning Act**.

**(ii) Atlantis' Position**

[91] Atlantis takes the position the Commission did not make an error of law and the City's grounds of appeal are essentially based on alleged errors of fact made by the Commission. Atlantis points out these errors are beyond the scope of this Court's power to review a decision of the Commission pursuant to s.13(1) of the **IRAC Act**.

**(iii) The Issues**

[92] The grounds of appeal and the position of the parties raise the following issues:

- (1) In considering an appeal from a decision of a municipality pursuant to s.28 of the **Planning Act**, is the Commission conducting a hearing *de novo* or a review on the record before the municipality?
- (2) What standard of review should be employed by this court when reviewing a decision of the Commission which comes to the Court by way of an appeal under s.28 of the **Planning Act**?
- (3) Employing the appropriate standard of review the

Court must decide if the Commission panel erred in law or jurisdiction when they allowed Atlantis' appeal from the decision of the City?

## ISSUE # 1

[93] In *Island Regulatory and Appeals Commission (Re)* (1997), 149 D.L.R. (4th) 411; [1997] P.E.I.J. No. 70 (PEISCAD), the "**Reference Case**," this Court held the Commission had appellate jurisdiction pursuant to ss.28 and 37 of the **Planning Act** to review a decision made by a municipality pursuant to the **Planning Act**. At paras. 1 to 8, Mitchell J.A. reviewed the relevant provisions of the **Planning Act** and the **IRAC Act**.

[94] Mitchell J.A. considered the provisions of the **Planning Act** as well as the provisions of the **IRAC Act**, and concluded the Legislature intended that appeals from a decision of a municipality to the Commission under the **Planning Act** "must" take the form of a hearing *de novo*. The Commission, after conducting the hearing, could substitute its decision for that of the municipality, and the Commission "must" decide the issue as if it were the original decision maker. The discretion to substitute its decision for that of the municipality, after conducting a hearing *de novo*, is not "unfettered" or unbridled. ... "It would be bound to hear, consider, and decide the issues of the case in accordance with the requirements and objects of the **Planning Act**."

[95] At paras. 9 and 10 Mitchell J.A. concluded his review by stating:

[9] When one considers the provisions of s. 28 and s. 37 in conjunction with the provisions of the **Island Regulatory and Appeals Commission Act** setting forth the composition, functions and powers of IRAC and takes into account that often the appeal will be the first opportunity for all of the interested parties to fully participate, it becomes apparent that the Legislature contemplated and intended that appeals under the **Planning Act** would take the form of a hearing *de novo* after which IRAC, if it so decided, could substitute its decision for the one appealed. The findings of the person or body appealed from are irrelevant. IRAC must hear and decide the matter anew as if it were the original decision-maker.

[10] The fact that an appellant must state the grounds of appeal and relief sought in writing in order to invoke the appeal procedure does not restrict the jurisdiction of IRAC in hearing or deciding the case. In situations where an appeal is by way of trial *de novo* grounds of appeal do not serve the same function as they do for instance in appeals to this court. [See: Salhany, **Canadian Criminal Procedure**, Canada Law Book Ltd, 1968 at pp. 203-4.] Their purpose in hearing *de novo* appeals is simply to alert the appeal

tribunal and parties to the nature of the appellant's complaint with the decision, and the form of redress being sought. However, IRAC does not have unfettered discretion or unbridled power to deal with and decide appeals as it likes. It would be bound to hear, consider, and decide the issues of the case in accordance with the requirements and objects of the **Planning Act**. It is required by s-ss. 28(7) and 37(3) of that legislation to conduct appeals in accordance with the rules of natural justice and therefore must act judicially. It must give reasons for its decision (s-ss. 28(8) and 37(3) of the **Planning Act**) and if it exceeds its authority or errs in law it is subject to review by this court by way of an appeal under s. 13 of the **Island Regulatory and Appeals Commission Act**. All of the forgoing being so, I am unable to conclude that either s. 28 or 37 of the **Planning Act** are inconsistent with the rule of law.

[96] Part V, ss. 28(1.1) of the **Planning Act** provides for the right of appeal from a decision of the municipality to the Commission respecting a building, development or occupancy permit. Sections 28(7), (8) and (9) of the **Planning Act** vest the Commission with the power to determine its own procedure on an appeal, subject to the rules of natural justice as well as the power to hear and decide the appeal, to issue an order and to give reasons.

[97] Furthermore pursuant to s.3(11) of the **IRAC Act**, the Commission has the power to not only compel the attendance of witnesses but as well, to compel the production of documentary and other evidence necessary to decide the appeal. Ancillary to these powers, the Commission has the power to find people in contempt for failing to respond to an order directing them to attend or provide the documentation.

[98] When hearing an appeal from the planning decision of a municipality, it is clear the review is not restricted to the "record" which was before the municipality when it made the decision. To the contrary, the Commission has been delegated by the Legislature with authority to hear the case afresh and decide the matter in accordance with the **Planning Act** and any delegated legislation such as the by-laws of the municipality.

[99] While the legislation vests the Commission with the power to review decisions of municipalities *de novo*, it is apparent the Commission is not exercising their powers in this manner. The Commission applies a two-part test when deciding appeals under the **Planning Act**. I refer to para.11 of the Commission's reasons where the Commission panel sets out the test it applies. The test is stated as follows:

1. Whether the municipal authority followed the proper process and procedure as required in its bylaw, in the **Planning Act** and in the law in general, including the principles of natural justice and fairness, in making a decision on what is essentially a rezoning and

bylaw amendment application; and

2. Whether the City's decision with respect to the proposed rezoning and bylaw amendment has merit based on sound planning principles within the field of land use and urban planning and as enumerated in the Official Plan.

[100] In the application of the test in this case, the Commission first considered the "record" before City Council. At para.24 the Commission stated:

- [24] In the view of the Commission, the record suggests that despite the valiant efforts of the Chair of Planning Board to direct discussion of the matter at hand, Council did not decide Atlantis' application based on its respective merits or lack thereof. Rather, the minutes reveal that Council appeared concerned that the recommendation of Planning Board had been circulated to the media, inquired whether compromise was possible and discussed the need for a new waterfront plan.

[101] At para.28 the Commission stated:

- [28] The Commission finds that there is nothing in the City's Record or evidence to establish, on the civil standard of the balance of probabilities, that Council met the requirements of section 28.5.1 of the Bylaw. The verbatim minutes of the November 14, 2011 meeting of Council fail to establish that Council deliberated what is required under section 28.5.1 of the Bylaw. While other portions of section 28 use the term "consider," section 28.5.1, by using the term "deliberate," requires a process more rigorous than to "consider" a matter.

[102] The Commission concluded its application of the test by stating at paras.33 and 34:

- [33] The Commission finds that Council's decision-making process erred in law as they failed to decide the fate of Atlantis' application on its merits according to the process set out in the present law. Further, the City's decision making process was unfair to Atlantis as it proceeded to decide its application on an irrelevant matter. Deference to a decision maker is earned when the decision maker follows the process set out by the law and is fair to all parties. The City followed its decision making process in *Doiron* and thus earned deference from the Commission. In the present case, however, the City's decision making process did not follow the process required by the Bylaw and thus the Commission is unable to show deference to the City's decision in the present appeal.
- [34] The Commission will therefore review the evidence before it to determine whether or not Atlantis' application will succeed, thus deciding the matter anew as if it were the original decision maker.

[103] Only after determining on the basis of the record before City Council there was a procedural error did the Commission proceed to decide the case as a hearing *de novo* and on the basis of the evidence adduced before the Commission.

[104] In the application of the first part of this two-part test, the Commission is treating the appeal as if it is a review or appeal on the record. It is implicit in this procedure the Commission would not have embarked on a fresh consideration of the application of Atlantis and held a hearing *de novo* if, in the application of the two-part test, the Commission had found the City did not make a procedural error.

[105] In short the Commission decides first whether the City followed the proper processes as required by the bylaws. If it did, the Commission takes the position it will not interfere. If the Commission finds the municipality's decision does not comply with the bylaws, the Commission only then takes the position it will hear the matter afresh. That is not the manner in which *de novo* appeal powers are to be exercised.

[106] One of the concerns expressed by Mitchell J.A. in the **Reference** case was that the procedure provided for by the **Planning Act** complies with the rule of law. The fundamental underpinning of our legal system is that there should be certainty and consistency. In the context of appeals from the planning decisions of municipalities, the parties are entitled to know the nature of the appeal process when they appear before the Commission. Is the appeal conducted as a review on the record before the municipality or must the parties create a fresh record and leave it in the hands of the Commission to exercise its discretion in accordance with the applicable law? The process cannot be both or a hybrid of both. It was precisely for this reason Mitchell J.A. succinctly canvassed the applicable legislative regime and opined in the **Reference** that the legislation contemplated a hearing before the commission on appeals under the **Planning Act** by way of a hearing *de novo* and not by way of an appeal on the record which was before the municipality when it made the decision.

[107] The Commission appears concerned about according deference to the decision of the municipality. While this concern may be well placed, the Commission has, nevertheless, been vested with the power to hear appeals *de novo*. To initially determine whether the municipality has "earned" deference is an error. There is no deference to be "earned" when the appeal process requires a hearing *de novo*. The Commission's mandate is to hear evidence and exercise its discretion within the parameters of the applicable law. That is what Mitchell J.A. meant when he said the scope of the Commission's *de novo* power of review is not unfettered. It is limited by the **Planning Act**, the applicable bylaws and any additional relevant legislation.

[108] The comments I make in the next few paragraphs are put forward to address what I consider to be a legitimate concern of the City and no doubt other

municipalities in the Province regarding the power of the Commission to review decisions made pursuant to their bylaws and the **Planning Act**.

[109] The City has requested the Court to reconsider the opinion given in the **Reference** case which confirms that the Commission has the power to review these decisions *de novo*. I have explained above why the Court reached the conclusion it did in the **Reference**. The reasons of Mitchell J. A. are clear. The Commission has *de novo* powers of appeal. The Commission must consider an appeal from a municipality without regard to the decision of the municipality or the record before the municipality as long as those powers of appeal are exercised in accordance with the applicable law. There have been no material changes to the **Planning Act** since the **Reference** case which would give this Court any reason to revisit the opinion of Mitchell J.A. or to modify it in the manner employed by the Commission and endorsed by the Chief Justice in his reasons.

[110] The City's concerns about the Commission's powers of review are rooted in the principle that such broad powers vested in an unelected body like the Commission divests the citizens of the City of their right to have planning decisions made by their elected representatives. To be absolutely clear, the City is not advocating that its planning decisions not be reviewed in any manner by an independent tribunal like the Commission. The City is simply stating the review should be restricted to the record before the municipality and not by way of a hearing *de novo*.

[111] There may be some validity to this argument; however, that is for the Legislature to decide. If the City and other municipalities across the Province feel strongly about this issues, they should seek a change in the legislation to provide for the review of planning decisions by an independent tribunal on the record before the municipality and not by way of hearing *de novo*. With today's technology and the myriad of procedures which must followed by municipalities to accord landowners and others procedural fairness, municipalities could be legislated to keep adequate records of their planning decisions which would be subject to review by the independent tribunal.

[112] Returning to the case at bar the Commission, after finding City Council made a procedural error, proceeded to decide the issues on the basis of the evidence adduced in the hearing *de novo*. Therefore, if the Commission erred in first adjudicating the appeal on the record, the error was rendered immaterial by the fact the Commission proceeded to hold the hearing *de novo*.

## **ISSUE # 2**

[113] The second issue which arises on this appeal is that of the standard of review to be applied to this Court's review of the Commission's decision.

[114] The Court has considered the standard of review in previous decisions. A brief review of these decisions is beneficial while at the same time keeping in mind some decisions were made prior to the most recent Supreme Court of Canada jurisprudence.

[115] In **Prince Edward Island (Provincial Tax Commissioner) v. Maritime Dredging** (1997), 157 Nfld. & P.E.I.R. 80; [1997] P.E.I.J. No. 112 (PEISCAD), at para.15, this Court considered the standard of review in the context of the binding jurisprudence at the time. The Court concluded that when the Commission is acting in a regulatory capacity, setting policy based on what is in the public interest, its duties are specialized and in relative terms, the Commission would possess expertise greater than a reviewing court. Acting within the scope of that expertise, the Commission's decisions should be accorded a high degree of deference, and they should be reviewed on a standard of reasonableness.

[116] On the other hand, when the Commission is acting as an appellate tribunal with no power to regulate and no policy-making role, the decisions of the Commission should be afforded less deference and reviewed on a standard of correctness. See: **Maritime Dredging, supra** at paras.16 and 17.

[117] In **Island Telecom Inc. v. Prince Edward Island (Regulatory and Appeal Commission)**, 2001 PESCAD 27; (2001), 207 Nfld. & P.E.I.R. 161; [2001] P.E.I.J. No. 110, at para.13, the appeal was from a decision of the Provincial Tax Commissioner and involved the interpretation of a taxing statute. The Court noted that the Commission does not regulate in this area and in effect serves as a court of first instance. The Court applied **Maritime Dredging** and applied the standard of correctness.

[118] In **Chapman Brothers Construction Ltd. v. Prince Edward Island (Regulatory and Appeals Commission)**, 2005 PESCAD 4; [2005] P.E.I.J. No. 8; (2005), 244 Nfld. & P.E.I.R. 93, the Court concluded on an appeal from the Provincial Tax Commissioner the Commission's decision should be reviewed on a standard of reasonableness. The foregoing decisions setting the standard of review at correctness were distinguished because of the importance of the factual findings of the Commission to the legal question in issue.

[119] More recently this Court considered the standard of review applicable when reviewing a decision made by the Commission exercising its regulatory power under the **Electric Power Act**. See: **Summerside (City) v. Maritime Electric Co. Ltd.**, 2011 PECA 13; (2011), 309 Nfld. & P.E.I.R. 76; (2011), 338 D.L.R. (4th) 476; [2011] P.E.I.J. No. 24. The majority of the Court found that the standard of review on issues of law which were not within the regulatory expertise of the Commission was correctness. Issues arising in the context of the interpretation of the **Electric Power**

**Act** were within the regulatory expertise of the Commission and found to be reviewable on a standard of reasonableness in accordance with the decision in **Maritime Dredging**.

[120] In **Doiron v. Prince Edward Island (Island Regulatory and Appeals Commission)**, 2011 PECA 9; (2011) 308 Nfld. & P.E.I.R. 84; [2011] P.E.I.J. No. 16, this Court held that the standard of review on an appeal from the decisions of the Commission made under the **Planning Act** was correctness. The issue in that case was jurisdictional and it was for this reason only that the Court chose correctness as the standard of review. When the issue is a tribunal's jurisdiction the tribunal must always get it right. The appellant argued on an appeal from a decision of the City of Charlottetown, the Commission lost jurisdiction because it did not conduct a hearing *de novo* as directed the **Reference** case. The Court held the Commission conducted a hearing *de novo* and did not lose jurisdiction.

[121] In **Dunsmuir v. New Brunswick**, 2008 SCC 9, the Court dispensed with the most deferential standard of review (patent unreasonableness) and left only the least deferential - correctness and what had been a middle of the road deferential standard - reasonableness. The Court also concluded it was no longer necessary to embark upon the pragmatic and functional analysis each time to determine the standard of review. The method for selecting the standard of review was revisited. Referring to previous case law, the court set down some guidelines that evolved from the previous case law and indicated that, by applying these guidelines, the standard of review might be ascertained in certain cases.

[122] These guidelines are found at paras.52 to 61 in the reasons of LeBel and Bastarache JJ. I will summarize them:

- (1) A privative clause is indicative but not determinative of deference and review on the standard of reasonableness;
- (2) If the question is one of fact, discretion or policy deference will automatically apply;
- (3) "*Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: ...*".
- (4) If the tribunal has developed an expertise in a concept of common or civil law deference will be accorded to that tribunal.

- (5) If the tribunal is part of "*A discrete and special administrative regime...*" and it is interpreting its own statute or a statute with which it is familiar deference should be accorded and reasonableness will be the standard of review. The area of labour relations being an example.
- (6) The tribunal will not be accorded deference and it must be correct when determining true questions of jurisdiction.
- (7) When the issue is a question of general law the court can substitute its view for that of the tribunal.
- (8) If the standard of review for a certain question or issue has not been previously determined a court or is not readily apparent on the basis of the above guidelines the reviewing court must undertake an analysis and determine the standard of review on the consideration of the following factors: whether the decision of the tribunal is protected by a privative clause; the purpose of the tribunal as determined by the legislation; the nature of the question of law and the expertise of the tribunal.

[123] Two recent decisions of the Supreme Court of Canada have addressed and applied the guidelines referred to in *Dunsmuir*.

[124] In *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7; [2011] 1 S.C.R. 160, the Court was considering an appeal from a decision which reviewed a decision made by an Arbitration Committee established pursuant to the provisions of the *National Energy Board Act*, R.S.C. 1985, c. N-7. In short, the issue before the Committee was whether a landowner on an expropriation proceeding could claim as part of the compensation certain legal costs and expenses. At para.22 of his reasons, Fish J. stated that the "overarching issue" was what exactly was included in the term "costs" as provided for in s.99(1) of the *National Energy Board Act*.

[125] Fish J. determined the standard of review was reasonableness. He relied on the fact the Committee was interpreting a provision of the statute which created it (the "home statute"), the fact that the Committee was vested with a significant degree of discretion and the fact that the Committee in deciding the issue was involved in addressing an issue where the facts were difficult to separate from the entire issue.

[126] In ***Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association***, 2011 SCC 61; [2011] 3 S.C.R. 654, the Court was considering an appeal from a decision which had reviewed the decision of an adjudicator delegated by the Information and Privacy Commissioner to determine if the Teachers Association had disclosed certain private information in contravention of the ***Alberta's Personal Information Protection Act***.

[127] The adjudicator had not complied with certain time lines for delivering a decision and the issue was whether, implicitly, there had been an extension of the applicable time line. If not, the adjudication process would terminate and the adjudicator was left without jurisdiction. The resolution of the issue involved the interpretation of the above legislation which established the office of the Privacy Commissioner and thus the statutory delegate whose decision was under review.

[128] Rothstein J. found that the more deferential standard of reasonableness was applicable in this case. At para.39 of his reasons, he concluded that when a tribunal is interpreting "its home statute," the standard of review is presumed to be reasonableness. I think it is significant to remember that in this particular case the adjudicator was interpreting a specific provision of the applicable legislation regarding time lines and the possible extension of those time lines by the actions of the adjudicator.

[129] Another important decision respecting the standard of review and one which precedes most of the above jurisprudence is the decision in ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999], 2 S.C.R. 817. This decision decided there is no longer a difference in establishing the standard of review between decisions of tribunals which were discretionary in nature and decisions which involved the interpretation of the law. The discretionary decision of a tribunal is subjected to the judicial review analysis (at the time called the pragmatic and functional analysis), and the appropriate standard of review is determined. Furthermore, as the result of this decision I think it is fair to say that decisions involving a tribunal's exercise of discretion are to be reviewed on the more deferential standard of reasonableness.

[130] Before turning to the determination of the appropriate standard of review in the case at bar, I wish to point out that I do not consider the guidelines set down in ***Dunsmuir*** as establishing categories or pigeon holes which automatically determine the appropriate standard of review. They are instead guidelines or signposts to assist parties as they proceed through the costly and complicated maze of administrative tribunal procedure and review. The categories approach was rejected as an approach to determining the standard of review by McLachlin C.J.C. in ***Dr. Q v. College of Physicians and Surgeons of British Columbia***, [2003] 1 S.C.R. 226. The guidelines in ***Dunsmuir*** are not written in mandatory language and generally reflect that in the situations mentioned, the legislature probably intended

the court would show deference. See: Diana Ginn: ***New Words for Old Problems: Dunsmuir***, (2011) 37 ***Advocates Quarterly*** 317 at pp. 328-330.

[131] This leaves the question of the appropriate standard of review to be applied to decisions of the Commission generally and, specifically, in reviewing the decision of the Commission under review on this appeal.

[132] The Commission is established pursuant to the provisions of the ***IRAC Act***. Members are appointed by the Lieutenant Governor in Council. There are three full-time commissioners including a Chair and vice-chair. The ***Act*** provides for not more than 5 part-time Commissioners who are to be knowledgeable in accounting, agriculture, municipal planning, engineering, business, environmental matters, finance, economics, law, utilities, taxation and consumer protection. See: ***IRAC Act***, ss.2 and 3.

[133] It is noteworthy that while the legislation requires members of the Commission to have knowledge in certain areas, the Chair, Vice-chair and the other full-time member are not required to have and particular knowledge. Furthermore, the legislation does not contain a requirement that when a certain issue is before the Commission one or more members of the panel must possess the knowledge and expertise similar to the issue before the panel. For example there is no requirement in the legislation that when the appeal is from the planning decision of a municipality all or any member of the panel must have knowledge or expertise in “municipal planning”.

[134] Section 5 of the ***IRAC Act*** provides for the functions of the Commission. In summary the Commission has the power, subject to the provisions of the ***Electric Power Act***, R.S.P.E.I. 1988 Cap. E-4, to regulate certain utilities except sewerage and water utilities owned, operated or controlled by the City of Charlottetown and the City of Summerside. The Commission has the power to decide certain matters relating to land use, including the power to decide on the applications for the acquisition of land by non-residents and corporations. Finally, the Commission may hear and decide appeals from decisions under certain other legislation.

[135] Section 5 of the ***IRAC Act*** provides as follows:

5. The functions of the Commission are
  - (a) subject to the provisions of the Electric Power Act to regulate utilities except sewerage and water utilities owned, operated, managed or controlled by the City of Charlottetown, City of Summerside or the Towns of Charlottetown South or Charlottetown West;
  - (b) to hear and decide matters relating to land use, to decide

upon the disposition of applications respecting the acquisition of land by non-residents and corporations where so required by any Act;

- (c) to hear and decide appeals from decisions of
  - (i) the Director under the Rental of Residential Property Act R.S.P.E.I. 1988, Cap. R-13.1,
  - (ii) the Minister of Finance, Energy and Municipal Affairs under the Real Property Assessment Act R.S.P.E.I. 1988, Cap. R-4 or the Real Property Tax Act R.S.P.E.I. 1988, Cap. R-5,
  - (iii) the Provincial Tax Commissioner under the Revenue Tax Act R.S.P.E.I. 1988, Cap. R-14,
  - (iv) the Minister of Finance, Energy and Municipal Affairs under the Emergency 911 Act R.S.P.E.I. 1988, Cap.E-5.1; and
- (d) to perform such other functions as may be conferred on the Commission under any enactment.

[136] Pursuant to s. 6 of the **IRAC Act**, the Commission also has the jurisdiction and powers which are vested in it by any other enactment as well as all other incidental powers necessary to carry out its functions.

[137] The Commission is a unique tribunal and unlike any in the recent decisions of the Supreme Court of Canada which have been delivered following the decision in **Dunsmuir**. It is a tribunal which has both a regulatory and appellate function.

[138] Compared to some tribunals in this jurisdiction, the Legislature has not conferred on the Commission specialized jurisdiction such as that conferred on the Labour Relations Board and the Workers Compensation Appeal Tribunal. As a result any comparison to these tribunals in setting a standard of review in the case at bar is irrelevant.

[139] It is more difficult to conclude just what might be considered Commission's "home statute" and the level of expertise the Legislature intended to accord to its jurisdiction because its powers of appeal come from, not only the **IRAC Act** itself, but other statutes. For example, the power to hear appeals from the decisions of municipalities respecting decisions they make under their planning bylaws comes from the **Planning Act** by way of s.6 of the **IRAC Act**. While it can be said the Commission has "some familiarity" with statutes other than the IRAC Act pursuant to which it is constituted, this is not, considering other factors, an indication of legislative intent to accord it a high degree of deference on issues of law and jurisdiction

decided under these statutes including particularly the **Planning Act**. In other words the categories approach and the reasoning in cases like **Alberta Teachers** do not satisfactorily resolve the issue of the standard of review.

[140] Accordingly, the most appropriate way to establish the standard of review on an appeal to this Court from a decision of the Commission is on a case-by-case basis. This is consistent with the process followed in the past in such decisions as **Maritime Dredging, Island Telecom, Summerside** and **Doiron**. Furthermore, this procedure is not inconsistent with the direction in **Dunsmuir** and not contrary to the decisions in **Alliance Pipeline** and **Alberta Teachers** where, in both cases, the "home statute" of the tribunal was clearly identifiable, and the question of law in those cases was clearly in relation to the interpretation of that "home statute."

[141] On an appeal from a decision of a municipal council proceeding as it legislated to do by way of hearing *de novo*, the Commission steps into the place of the municipality and essentially determines if the application which was before the municipal council meets the criteria set down in the planning bylaw of the municipality. The case at bar which places the Commission in that exact position is, therefore, distinguishable from **Alliance Pipeline** and **Alberta Teachers** where the tribunals were called upon to interpret specific provisions of the legislation to determine what was included in determining compensation on an expropriation and to determine whether the time line provided in the applicable statute was mandatory.

[142] I will move now to the application of the judicial review analysis to the case at bar.

[143] The right of appeal to this court is narrow. The appeal must be brought on a question of law or jurisdiction. Pursuant to s.13(1) of the **IRAC Act**, questions of fact and mixed fact and law are beyond the scope of this court's power of review. The power to review questions of law and jurisdiction is not restricted by a privative clause. These factors are an indication the Legislature intended the measure of deference to be accorded decisions on these issue would be low.

[144] In conducting the hearing *de novo* , the Commission's purpose is to hear the evidence, weigh the evidence, and make findings of fact. Exercising its discretion the Commission decides the issues in accordance with the applicable law whether it is the **Planning Act** or the bylaw.

[145] The question of law before the Commission in this appeal is the proper application of the facts to the provisions of the bylaw. I appreciate the argument of counsel for Atlantis that the issues raised by the appeal to this court are essentially questions of fact which this Court has no power to review. Nevertheless, I do think the appeal raises questions of law related to the proper interpretation of the City

bylaw and the resolution of these legal questions will set the parameters for the Commission's exercise of discretion.

[146] Considering the nature of the issues before the Commission on this appeal, it is reasonable to conclude the Commission has a fair measure of expertise relative to that of a court. The Commission has authority to conduct hearings and receive evidence under various statutes including the **Planning Act**. The Commission is positioned like a court to make findings of fact and apply them to the necessary criteria set down in the bylaw.

[147] Specifically, the Commission in deciding the matter by hearing *de novo* is deciding whether the concept plan put forward by way of the application complies with s.28 of the City's bylaws for a Comprehensive Development Area. The Commission conducts a fresh hearing, and the panel is essentially in the same position as the City. The Commission panel has to exercise its discretion based on the evidence presented, make findings of fact, and determine whether the application complied with the bylaw and could be approved as an amendment to the CDA Zone.

[148] Considering all the factors in the standard of review analysis, particularly the purpose of the Commission in relation to the issue under appeal as well as the nature of the issues it was called upon to decide, the standard to be employed in reviewing its decision is that of reasonableness.

### ISSUE # 3

[149] Did the Commission properly exercise the reasonableness standard of review?

[150] The decision of the Commission to allow the appeal of Atlantis from the decision of the City was reasonable.

[151] In **Dunsmuir** at paras.47 to 49 LeBel and Bastarache JJ. gave direction as to the meaning of reasonableness in this context. Reasonableness is founded on the principle that with respect to some questions determined by administrative tribunals, there could be more than one specific result. The application of the standard of reasonableness engages the court in a consideration of whether there is justification, transparency and intelligibility within the tribunal's decision-making process and whether the decision falls within a range of acceptable outcomes which can be defended, considering the facts and the applicable law.

[152] Reasonableness does not mean a court acquiesces in the decision of the tribunal nor does it mean the court can address the concept of reasonableness and then proceed to replace the tribunal's decision with its own. There is a distinction between judicial acquiescence and judicial restraint. A decision reviewed on the

standard of reasonableness reflects the latter.

[153] The concept of reasonableness implies that a court on reviewing the decision of the tribunal will give due consideration to the conclusion reached by the tribunal. With the creation of tribunals like the Commission, the legislators have reserved for them the jurisdiction to decide certain issues recognizing the tribunal develops a certain degree of expertise and for the public an inexpensive and efficient way to resolve certain issues. Legislators also recognized and intended the decisions of the tribunals should be accorded a certain degree of deference when reviewed by a court.

[154] In deciding the appeal by Atlantis from the decision of City Council, the Commission was required to apply the provisions of Section 28 - Comprehensive Development Area - of the City's bylaws. Pursuant to s.28.1, notwithstanding any other provisions of the City's bylaws, there is created a "CDA Zone" within which any use may be approved as long as the use is deemed to be in the public interest. The one qualification is the City must follow the procedures for the approval of a concept plan within the zone and as these procedures are articulated in ss. 28.3 and 28.5, both of which are previously set out in these reasons.

[155] Hearing and determining the issue of Atlantis' application for a variation of the initial concept approved within the particular CDA Zone, the Commission was obliged to apply the bylaw in the foregoing manner. The Commission heard a substantial body of evidence from representatives of the City and Atlantis. The reasons for decision delivered by the Commission panel, reviews and weighs the evidence. At para.62 of the reasons, the panel addressed the criteria set down in s.28 of the bylaw and came to the conclusion the application accorded with these criteria. The panel also concluded the proposed variation in the concept plan for the use of the land in issue in this particular CDA Zone was in accord with sound planning principles. There was evidence upon which the panel could reach this conclusion and in doing so they properly interpreted the provisions of the bylaw establishing the applicable CDA Zone.

[156] The procedure followed by the Commission can be justified. It is both transparent and intelligible. It clearly explains to the parties the basis on which the panel reached their conclusion. Based on the evidence adduced before the panel and the factual findings made, the result reached by the Commission panel is within an acceptable range of possible outcomes considering the criteria to be met when proposing a concept plan within this particular CDA Zone.

[157] In the result, I would dismiss the appeal and confirm the order of the Commission.

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