

Federal Court



Cour fédérale

Date: 20150616

Docket: T-2567-14

Citation: 2015 FC 752

Ottawa, Ontario, June 16, 2015

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

**THE UNION OF MUNICIPALITIES OF NEW
BRUNSWICK**

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review brought under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The Union of Municipalities of New Brunswick [UMNB] challenges a decision rendered by Philippe Nault, the Director of the Public Service Bodies and Governments Division, Excise and GST/HST Rulings Directorate at the Canada Revenue Agency [CRA]. In his decision, Mr Nault revoked the applicant's municipal determination pursuant to section 123 of the *Excise Tax Act*, RSC 1985, c E-15 [the Act].

I. **Background**

[2] There are 105 municipalities in New Brunswick. The UMNB is an organization which represents 59 of them. It advocates for and promotes the interests of its member municipalities and facilitates the exchange of information between them.

[3] In August 2000, the UMNB wrote a letter to the CRA requesting a municipal determination for the purposes of the GST rebate program set out in the Act. In July 2001, the UMNB received a response from a CRA Director named P Bertrand. This letter communicated a decision that the UMNB was determined to be a municipality pursuant to paragraph (b) of the definition of “municipality” in subsection 123(1) of the Act. The determination had a four year retroactive effect beginning on July 1, 1997.

[4] In a sworn affidavit, Chantal Desrosiers, the Manager of the Health Care Sectors Unit at the CRA, explains that at the time the applicant was determined to be a municipality, there was no significant difference in the public service body rebates between registered charities and qualifying non-profit organizations (50% of the GST or federal part of the HST; 50% of the provincial part of the HST) and municipalities (57.14% of the GST or federal part of the HST; 57.14% of the provincial part of the HST). In February 2004, the rebate for the GST or federal part of the HST for municipalities was raised to 100%. This increase in the federal rebate generated an increase in the number and complexity of requests for municipal determinations. As a result, the CRA adopted a more thorough review and oversight process.

[5] On November 9, 2006, Susan Eastman, a Senior Rulings Officer, provided Ms Desrosiers with a memorandum recommending that the UMNB's municipal determination be revoked. Ms Desrosiers has sworn that she did not rely on the information in this memorandum to make any decision.

[6] The CRA reactivated its review of the UMNB's municipal determination in 2013. By letter dated October 11, 2013, Mr Nault advised the UMNB that a review of its file suggested that it did not fall within the scope of the administrative policy and eligibility criteria for a municipal determination. Mr Nault invited reply submissions.

[7] Arthur Slipp, the President of the UMNB, responded to Mr Nault by letter dated November 14, 2013, with enclosures.

[8] Ms Eastman reviewed the applicant's file again. In January 2014, she wrote an analysis. Ms Desrosiers reviewed the analysis and the remainder of the file. She concluded that the applicant did not qualify for determination as a municipality. She made a recommendation to Mr Nault in September 2014 that the determination be revoked.

[9] Mr Nault reviewed the file and reached the same conclusion. By letter dated November 19, 2014, he communicated the CRA's decision to revoke the applicant's municipal determination. He advised that the revocation would take effect on January 1, 2015. Upon receiving this decision, the UMNB applied for judicial review.

II. Decision under Review

[10] To provide context, I will summarize the preliminary correspondence between the CRA and the applicant and then move on to the decision under review.

A. *Letter from Mr Nault (October 11, 2013)*

[11] Mr Nault explains that the CRA's review of the applicant's file indicates that the UMNB does not fall within the administrative policy and eligibility criteria for determination as a "municipality" pursuant to subsection 123(1) of the Act. Paragraph (b) of that definition provides that the Minister may determine a local authority to be a municipality for the purposes of Part IX of the Act. Municipal determination is an exercise of statutory discretion performed on a case-by-case basis.

[12] To qualify, the applicant must be a body, board, commission, corporation or other organization established by one or more municipalities or by a province at the request of one or more municipalities. Furthermore, the applicant must be either owned or controlled by that municipality or municipalities.

[13] An organization will be considered to be owned by one or more municipalities if those municipalities own at least 90 per cent of the shares or capital of the organization, or if those municipalities hold title to the assets of the organization or control their disposition – so that in the event of a wind-up or liquidation, the assets are vested in those municipalities.

[14] An organization will be considered to be controlled by one or more municipalities if those municipalities appoint a majority of the members of the governing body of the organization and the organization is required to submit its operating budget (and where applicable its capital budget) to those municipalities for review and approval.

[15] Mr Nault observes that the administrative policy behind municipal determinations requires that an applicant must be providing services to the residents or property owners of a community, and that those services be of a type that a municipality would otherwise provide. In other words, the organization must exercise powers of local self-government, provide municipal services or perform a municipal function within a local geographic area.

[16] Mr Nault explains that the CRA's records show that the UMNB was created by two associations: the Association of Villages of New Brunswick [AVNB] and the Association of Towns of New Brunswick [ATNB]. They were dissolved and control of the UMNB was transferred to the member municipalities who subsequently joined the organization. The two former associations were not municipalities. Even though municipalities are members of the UMNB, municipalities did not create the organization. No municipal by-laws or resolutions were provided to show that any municipalities authorized the incorporation of the UMNB.

[17] Moreover, the UMNB is not owned or controlled by one or more municipalities. It does not have shares and there is no indication that any municipality holds title to its assets or controls their disposition. There is no evidence that the UMNB is required to submit its operating and/or capital budget to the council of any municipality for approval, or that members of its governing

body are appointed by the council of any municipality. Instead, the budget of the UMNB is approved by its members at its Annual General Meeting. The same members elect the Board of Directors at the Annual General Meeting. The fact that the members are municipalities is not a relevant factor for assessing ownership or control.

[18] Finally, Mr Nault expresses the view that the UMNB does not fall within the scope of the tax policy underlying municipal determinations. Its objects and the scope of its activities are not those of a local authority performing municipal functions or providing municipal services to residents within its area of jurisdiction. Rather, the organization derives authority from its own by-laws and has the purpose of advocating for its members and promoting the exchange of information between them. Advocacy activities on behalf of municipalities are not municipal functions or municipal services.

[19] Mr Nault concludes that the UMNB does not qualify for determination as a municipality for the purposes of the Act. He invites the UMNB to provide submissions to the contrary. Otherwise, the revocation will become effective on January 1, 2014.

B. *Letter from the UMNB (November 14, 2013)*

[20] Mr Slipp writes a lengthy reply to Mr Nault. He maintains that the UMNB meets the criteria for a municipal determination.

[21] The UMNB was created by municipalities, particularly by directors and officers elected or appointed by the member municipalities. It is 100% controlled by its member municipalities,

since the only directors and officers who are able to vote must be elected or appointed by member municipalities. The member municipalities control the disposition of the UMNB's assets, since no decision regarding the assets can be made without a vote. Finally, the UMNB submits its operating budget for review and approval every year prior to the Annual General Meeting. The budget and financial statements are debated and approved at that meeting.

[22] The UMNB's activities fall within the scope of the administrative policy. Its constitution enshrines the objective of uniting municipalities into a body of common effort devoted to the achievement of that which is to the benefit of all. The organization serves the interests of all the taxpayers of New Brunswick by creating a union which removes obstacles and provides a united front for the realization of municipal goals. The organization deals with policing, governance, population growth, economic development and other issues of interest to the member municipalities. Were it not for the UMNB, each municipality would have to deal with these issues on an individual basis. The UMNB provides an economical alternative which saves money to municipal taxpayers.

[23] The UMNB was created by the municipalities of New Brunswick, as stated in a letter provided by the province. This letter recognizes that the organization is a "government funded body" because it is funded by the membership fees paid by each member municipality. The province of New Brunswick invites the UMNB to participate directly in meetings that pertain to and affect municipal governance. The UMNB assists municipalities in obtaining program funds by interacting with other levels of government.

[24] Mr Slipp concludes by expressing the opinion that it would be economically detrimental to the municipalities and taxpayers of New Brunswick if his organization were required to absorb additional GST/HST costs.

[25] Mr Slipp's letter contains five annexes as enclosures. Annex A includes the UMNB's constitution. Appendix B includes a list of the Board of Directors for 2012-2013. Appendix C includes the minutes of the Annual General Meeting held on September 29, 2012. Appendix D includes a letter from the Province of New Brunswick, dated January 18, 2001, expressing the view that the UMNB is a "government funded body". Appendix E includes letters from the mayors of Nackawic and St Stephen, stating that their municipalities receive and review the UMNB's operating budget each year prior to the vote at the Annual General Meeting.

C. *Decision by Mr Nault (November 19, 2014)*

[26] Mr Nault explains the eligibility criteria and administrative policy in largely the same terms as in his previous letter.

[27] Turning to the establishment factor, Mr Nault indicates that the UMNB's constitution does not address the manner in which the organization was created. It does not identify a particular municipality as being the party responsible for creating the UMNB. The letter from the Province of New Brunswick, which recognizes the UMNB as a "government funded body" for a specific purpose, does not demonstrate that the UMNB was in fact created by any municipality.

[28] The CRA's records show that the UMNB was created by the AVNB and ATNB in late 1994. These organizations were separate legal entities from their members, which were municipalities. That the members of the predecessor organizations were municipalities does not mean that the UMNB was created by a municipality.

[29] Acts or decisions of municipalities are authorized through by-laws or resolutions passed at council meetings. It is therefore expected that the council of a municipality would approve a para-municipal organization's budgets and elect the members of its Board of Directors through the adoption of by-laws or resolutions. The financial statements of para-municipal organizations are commonly included in a municipality's consolidated financial statements.

[30] In the CRA's view, the voting rights of members are not an appropriate indicator of control or ownership. For example, voting rights at the UMNB are linked to the payment of membership fees. According to the UMNB's constitution, a member which fails to pay its fees loses the right to vote. A municipality may lose its membership and must apply to the Board of Directors for reinstatement only after it has paid its membership fee for the year.

[31] The CRA would expect to see a municipality's ownership of shares or assets, or control relating to the appointment of a governing body and the approval of budgets, to be demonstrated through by-laws or resolutions adopted at a council meeting of the municipality.

[32] However, Mr Nault states that the CRA does not apply the eligibility criteria to the exclusion of all other relevant considerations. A municipal determination may be granted where

an organization may be considered to be operating like a department providing municipal services or performing municipal functions.

[33] Mr Nault concludes that the nature and scope of the UMNB's activities do not fall within the tax policy rationale for municipal determinations. The UMNB's objects and activities are not those of a local authority performing municipal functions or providing municipal services to residents and property owners within a local geographic area. Rather, the UMNB is a membership organization created for the purpose of providing advisory and administrative services to municipalities.

[34] Mr Nault reaffirms that the UMNB's municipal determination will be revoked. Because of the delay in replying, the effective date is changed to January 1, 2015.

III. Issues

[35] This application raises two issues.

1. Did the Minister observe the duty of procedural fairness?
2. Did the Minister err in determining that the applicant is not a municipality for the purposes of Part IX of the Act?

IV. Standard of Review

[36] Allegations of procedural unfairness warrant review on the standard of correctness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 129; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79.

[37] When reviewing the Minister's exercise of his statutory discretion, the Court applies the standard of reasonableness: *Wellesley Central Residences Inc v Canada (National Revenue)*, 2011 FC 760 at para 14. The provisions of the Act which the Minister is called to interpret fall within his specialized area of expertise in taxation. He must apply the law to the facts of a particular case. These factors call for deference.

V. Relevant Legislation

A. *Excise Tax Act, RSC 1985, c E-15*

[38] Part IX of the Act concerns the Goods and Services Tax. Subsection 123(1) provides definitions, including a definition of "municipality". According to paragraph (b) of that definition, the Minister may determine any "local authority" to be a municipality for the purposes of Part IX.

123(1)	123(1)
"municipality"	« municipalité »
« municipalité »	"municipality"
"municipality" means	« municipalité »
(a) an incorporated city, town, village, metropolitan authority, township,	a) Administration métropolitaine, ville, village, canton, district,

<p>district, county or rural municipality or other incorporated municipal body however designated, and</p>	<p>comté ou municipalité rurale constitués en personne morale ou autre organisme municipal ainsi constitué quelle qu'en soit la désignation;</p>
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<p>(b) such other local authority as the Minister may determine to be a municipality for the purposes of this Part...</p>	<p>b) telle autre administration locale à laquelle le ministre confère le statut de municipalité pour l'application de la présente partie...</p>
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[39] Schedule V pertains to exempt supplies in relation to subsection 123(1). Part VI of this Schedule applies to public sector bodies. Section 1 contains the following relevant definitions.

<p>1. In this Part,</p> <p>“municipal body” means a municipality or a provincially established designated body;</p> <p>“para-municipal organization” of a municipal body means an organization (other than a government) that is owned or controlled by the municipal body and that</p> <p>(a) where the municipal body is a municipality,</p> <p>(i) is designated under section 259 of the Act, or under section 22 or 23, to be a municipality for the purposes of that section, or</p>	<p>1. Les définitions qui suivent s'appliquent à la présente partie.</p> <p>« organisme municipal » Municipalité ou organisme municipal de régime provincial.</p> <p>« organisation paramunicipale » Organisation, sauf un gouvernement, qui appartient à un organisme municipal, ou qui est sous sa surveillance, et qui :</p> <p>a) dans le cas où l'organisme municipal est une municipalité:</p> <p>(i) soit est désignée comme municipalité, en vertu de l'article 259 de la loi ou des articles 22 ou 23, pour l'application de ces articles,</p>
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(ii) is established by the municipal body and determined, under paragraph

(ii) soit est établie par l'organisme municipal et possède, en conformité avec l'alinéa b) de la définition de «municipalité» au paragraphe 123(1) de la loi, le statut de municipalité pour l'application de la partie IX de la loi;

(b) of the definition "municipality" in subsection 123(1) of the Act, to be a municipality for the purposes of Part IX of the Act, or

b) dans le cas où l'organisme municipal est un organisme désigné de régime provincial, possède, en conformité avec l'alinéa b) de la définition de « municipalité » au paragraphe 123(1) de la loi, le statut de municipalité pour l'application de la partie IX de la loi.

(b) where the municipal body is a provincially established designated body, is determined under that paragraph to be a municipality for the purposes of that Part,

and for the purposes of this definition, an organization is owned or controlled by a municipal body if

Pour l'application de la présente définition, une organisation appartient à un organisme municipal ou est sous sa surveillance si, selon le cas :

(c) all or substantially all of the shares of the organization are owned by the municipal body or all or substantially all of the assets held by the organization are owned by the municipal body or are assets the disposition of which is controlled by the municipal body so that, in the event of a winding-up or liquidation of the

c) la totalité, ou presque, de ses actions sont la propriété de l'organisme municipal ou la totalité, ou presque, des éléments d'actif qu'elle détient sont la propriété de l'organisme municipal ou sont des éléments dont l'aliénation est surveillée par ce dernier de sorte que, dans l'éventualité d'une liquidation de l'organisation, les éléments soient dévolus à l'organisme

organization, those assets are vested in the municipal body, or

(d) the organization is required to submit to the municipal body the periodic operating and, where applicable, capital budget of the organization for approval and a majority of the members of the governing body of the organization are appointed by the municipal body;

“provincially established designated body” means a body that is established by Her Majesty in right of a province and designated, under section 259 of the Act, to be a municipality for the purposes of that section...

municipal;

d) elle est tenue de présenter périodiquement à l'organisme municipal, pour approbation, son budget d'exploitation et, le cas échéant, son budget des immobilisations, et la majorité des membres de son conseil d'administration sont nommés par l'organisme municipal.

« organisme désigné de régime provincial » Organisme établi par Sa Majesté du chef d'une province et désigné comme municipalité, en vertu de l'article 259 de la loi, pour l'application de cet article...

B. *Municipalities Act, RSNB 1973, c M-22*

[40] The parties cited several provisions of the *Municipalities Act* in their arguments.

3(3) The inhabitants of a municipality created under this Act are a body corporate under the name prescribed for it under this Act.

4(2) A municipality may, in its corporate name,

(a) sue and be sued,

3(3) Les habitants d'une municipalité créée en application de la présente loi deviennent une corporation sous le nom qui lui est attribué en application de la présente loi.

4(2) Une municipalité peut, sous sa désignation sociale,

a) ester en justice,

(b) become a party to any contract or agreement within its powers,

b) être partie à un contrat ou à un accord dans les limites de ses attributions,

(b.1) subject to the regulations, charge interest, at the rate determined by resolution of the council, on any debt owing to it,

b.1) sous réserve des règlements, faire payer des intérêts au taux fixé par résolution du conseil sur toute somme qui lui est due,

(c) receive by donation and otherwise acquire, hold, dispose of and convey any property, real or personal, for any purpose within its powers, and

c) recevoir par donation et, de toute autre manière, acquérir, posséder, aliéner et transférer tout bien, réel ou personnel pour quelque objet que ce soit dans les limites de ses attributions, et

(d) take security in any form for a debt owing to it.

d) prendre tout genre de sûreté en garantie d'une créance.

4(3) A municipality may provide for, create, alter and abolish committees, departments, bureaus, divisions, boards, commissions, officials and agencies of the municipality and delegate administrative powers and duties to them.

4(3) Une municipalité peut prévoir, créer, modifier ou supprimer des comités, services, bureaux, subdivisions, fonctionnaires et organismes municipaux et leur déléguer des pouvoirs et fonctions d'ordre administratif.

7(1) A municipality may provide any of the services contained in the First Schedule.

7(1) Une municipalité peut fournir tout service figurant à l'Annexe I.

7(3) Where a municipality carries out any of the powers or provides any of the services under this Act it

7(3) Lorsqu'elle assume l'un des pouvoirs que lui confère la présente loi ou fournit l'un des services prévus par la présente loi, une municipalité

(a) shall administer,

a) a) doit veiller à

l'application de ces pouvoirs et services, doit veiller à l'application

(b) shall pay the costs of and

b) doit en acquitter le coût, et

(c) subject to the Motor Vehicle Act may make by-laws with respect to, such powers and services

c) peut, sous réserve des dispositions de la Loi sur les véhicules à moteur, prendre des arrêtés y relatifs

7(4) Without restricting the generality of any powers given under this Act, a municipality in providing any service may...

7(4) Sans restreindre la portée générale des pouvoirs conférés par la présente loi, une municipalité peut, pour fournir un service...

(b) enter into an agreement with one or more municipalities or rural communities or with any person, including the Crown, whereby the cost and use of the service may be shared by the parties to the agreement;

b) conclure avec une ou plusieurs municipalités ou communautés rurales ou avec toute personne, y compris la Couronne, une convention de répartition des frais et de l'utilisation du service entre les parties à la convention;

(c) enter into an agreement with one or more municipalities or rural communities or with any person, including the Crown, to provide for the joint acquisition, ownership, development, extension, management or operation of services that may be provided by municipalities under this Act...

c) conclure avec une ou plusieurs municipalités ou communautés rurales ou avec toute personne, y compris la Couronne, une convention mettant en commun l'acquisition, la propriété, l'aménagement, l'extension, la gestion et l'exploitation des services que peuvent fournir les municipalités en application de la présente loi...

10.2(2) All decisions of a council shall be	10.2(2) Toutes les décisions d'un conseil doivent être
(a) made in a regular or special meeting of the council, and	a) prises au cours de ses réunions ordinaires ou extraordinaires, et
(b) adopted by a by-law or resolution of the council.	b) adoptées par un arrêté ou une résolution du conseil
10.2(2.1) No act or decision of a council is valid unless it is authorized or adopted by a by-law or resolution at a council meeting.	10.2(2.1) Aucune action ou décision d'un conseil n'est valide à moins d'être autorisée ou adoptée par un arrêté ou une résolution à une réunion du conseil

VI. Analysis

A. *Did the Minister observe the duty of procedural fairness?*

[41] The applicant argues that the respondent should have disclosed the two documents prepared by Ms Eastman and provided an opportunity to speak directly to the Director. It also questions Ms Desrosiers's statement that she did not rely on Ms Eastman's 2006 analysis. It implies that it was unfair for Ms Eastman to prepare the 2014 analysis because she had a closed mind. The applicant suggests that Ms Desrosiers impermissibly made the decision instead of Mr Nault. It also argues that the decision-maker fettered his or her discretion by applying administrative policies instead of the law. At the hearing, the applicant further alleged that the respondent should have disclosed the changes made to the applicable internal policies in 2004. In its view, it smacks of unfairness to revoke a determination that was granted under the previous policies without such notice.

[42] In my view, the applicant's various allegations are wholly without merit.

[43] The duty of fairness required that the applicant be provided with a meaningful opportunity to participate in the decision-making process. This calls for notice of the case to be met and a full and fair opportunity to make representations relevant to the case: *Hersi v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 2136 (TD) at para 20.

[44] The respondent discharged these procedural duties. Mr Nault's letter dated October 11, 2013 fully disclosed the case to be met. The applicant seized the opportunity to make submissions. In the decision under review, Mr Nault explains why he rejected the applicant's arguments. His reasons suggest that he paid careful attention to the submissions he received.

[45] The respondent was under no obligation to disclose Ms Eastman's documents to the applicant. Decision-makers must give notice of the case to be met, not notice of every internal memorandum. Mr Nault's first letter expressed the concerns raised by Ms Eastman in her two documents. This was enough. Moreover, the respondent was under no obligation to invite the applicant's representatives to a personal meeting with the Director. The opportunity to make written submissions satisfied the requirements of the duty of fairness in these circumstances.

[46] While best practice might have recommended disclosing the policy changes which occurred after the rebate was increased in 2004, I am not satisfied that the respondent was under any legal obligation to do so. The Minister is entitled to change his policies and procedures in response to validly enacted amendments to the rebate scheme. Reversing an existing determination was no more unfair than refusing an initial application for a determination in these circumstances – especially since the reversal did not have any retroactive effects.

[47] In his written submissions, counsel for the applicant suggests bias on the part of Ms Eastman and Ms Desrosiers and that Ms Desrosiers usurped Mr Nault's decision-making role. These allegations find no support in the record. They are founded on a strained interpretation of the affidavit Ms Desrosiers swore in this proceeding. Counsel for the applicant had the opportunity to cross-examine Ms Desrosiers in order to obtain further details. He declined to do so. There was no basis for impugning the integrity of the decision-making process, in the absence of any persuasive evidence. Allegations of bias are not to be bandied about lightly. As Justice de Grandpré insisted in *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at 394, "the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the require information..." Bald allegations do not suffice.

[48] There is no hint in the record that anyone except for Mr Nault made the final decision. A decision-maker is entitled to consult documents prepared by other civil servants and even receive their recommendations, provided that he renders the decision personally: *Yang v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 158 at paras 32-34. It is apparent that Mr Nault personally exercised the statutory discretion delegated to him by the Minister upon reviewing the evidence before him.

[49] Nor did the Minister fetter his discretion by applying the criteria set out in the relevant CRA policy and guidelines. As my colleague Justice de Montigny explained in *Waycobah First Nation v Canada (Attorney General)*, 2010 FC 1188 at para 43, aff'd 2011 FCA 191, "a decision-maker's discretion is fettered where a factor that may properly be taken into account in

exercising discretion is elevated to the status of a general rule that results in the pursuit of consistency at the expense of the merits of individual cases”. However, this does not mean that policy factors should never be considered. The jurisprudence is consistent that policies and guidelines are useful because they promote consistent decision-making. A reviewable error only occurs where the decision-maker believes that a particular policy requires him to exercise his discretion in a particular manner, regardless of the facts of the case.

[50] On this matter, I am mindful of Justice Evans’s comprehensive analysis in *Canada (Minister of Citizenship and Immigration) v Thamothearem*, 2007 FCA 198, especially at paras 55-56 and 59-62. I also refer to Justice Stratas’s more recent comments in *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 59-60:

Policy statements play a useful and important role in administration: *Thamothearem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385. For example, by encouraging the application of consistent principle in decisions, policy statements allow those subject to administrative decision-making to understand how discretions are likely to be exercised. With that understanding, they can better plan their affairs.

However, as explained in paragraphs 20-25 above, decision-makers who have a broad discretion under a law cannot fetter the exercise of their discretion by relying exclusively on an administrative policy: *Thamothearem, supra* at paragraph 59; *Maple Lodge Farms, supra* at page 6; *Dunsmuir, supra* (as explained in paragraph 24 above). An administrative policy is not law. It cannot cut down the discretion that the law gives to a decision-maker. It cannot amend the legislator’s law. A policy can aid or guide the exercise of discretion under a law, but it cannot dictate in a binding way how that discretion is to be exercised.

[51] Upon consideration of these authorities, it cannot be said that the decision-maker committed a reviewable error. He allowed the administrative policies and eligibility criteria to

guide the exercise of his discretion but there is no indication that he was insensitive to the particular facts of the case. To the contrary, his reasons carefully discuss the applicant's circumstances with respect to every relevant criterion. No criterion is arbitrarily elevated to the detriment of any other. The reasons conclude that granting a municipal determination would not advance the Minister's tax policy objectives in view of the applicant's specific activities. Clearly, the decision-maker did not allow any particular factor to predetermine his decision.

B. *Did the Minister err in determining that the applicant is not a municipality for the purposes of Part IX of the Act?*

[52] The applicant takes exception to every conclusion reached by Mr Nault. It argues that it was established by a municipal body pursuant to subsections 4(3) and 7(4) of the *Municipalities Act*, which do not require that a municipal council enact a by-law or resolution to create an agency and delegate municipal powers to it. It argues that it meets the ownership criterion because title to its assets would vest in its member municipalities in the event of a wind-up or liquidation, either through a constructive trust or the doctrine of restitution. It further argues that it meets the control criterion because its member municipalities appoint agents to vote on the composition of its Board of Directors and its annual operating budgets. Finally, the applicant argues that it provides municipal services and performs municipal functions which mirror those listed in the First Schedule to the *Municipalities Act*.

[53] To begin, I agree with the respondent that the legislative criteria for a "para-municipal organization", as defined in Part VI to Schedule V of the Act, have not been incorporated into the definition of a municipality in subsection 123(1). The applicant has relied heavily on these

criteria but, strictly speaking, they do not govern the discretion which the Minister may exercise pursuant to subsection 123(1). In practice, though, it is clear that the Minister takes these criteria into account. They are mentioned in the relevant guidelines and in the decision under review. However, they are not determinative. A municipal determination may be granted where the criteria are not entirely met, if the Minister is of the view that a determination would advance his tax policy objectives.

[54] In the present case, the decision-maker reasonably concluded that the UMNB should not obtain a municipal determination in light of the totality of the eligibility criteria and the Minister's tax policy objectives.

[55] The decision-maker's conclusion that the UMNB was not created or established by any municipality was reasonably open to him. The applicant insists that municipalities in New Brunswick may informally agree to create organizations and delegate their powers to them, without passing any by-laws or resolutions to that effect, by virtue of subsections 4(3) and 7(4) of the *Municipalities Act*. However, a plain reading of that statute reveals that subsections 10.2(2) and 10.2(2.1) impose restrictions on all the decisions taken by municipalities. They read as follows.

10.2(2) All decisions of a council shall be

(a) made in a regular or special meeting of the council, and

(b) adopted by a by-law or resolution of the council.

10.2(2) Toutes les décisions d'un conseil doivent être

a) prises au cours de ses réunions ordinaires ou extraordinaires, et

b) adoptées par un arrêté ou une résolution du conseil.

<p>10.2(2.1) No act or decision of a council is valid unless it is authorized or adopted by a by-law or resolution at a council meeting.</p>	<p>10.2(2.1) Aucune action ou décision d'un conseil n'est valide à moins d'être autorisée ou adoptée par un arrêté ou une résolution à une réunion du conseil.</p>
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[56] The language of these provisions is comprehensive. It refers to “all decisions” and “no act or decision”. There is nothing in subsections 4(3) or 7(4) to suggest that they exempt certain decisions from the general requirements expressed in the former provisions. Counsel for the applicant did not cite a single case to support his preferred interpretation of the *Municipalities Act*. As a result, I will give effect to the ordinary meaning of the legislation and assume that the decision-maker did the same.

[57] There is no evidence in the record that any municipal council ever passed a by-law or resolution to establish the UMNB or either of its predecessors (the ATNB and AVNB). If such evidence exists, it was incumbent on the applicant to present it to the decision-maker. Given the state of the record before him, the decision-maker made a reasonable finding.

[58] It was equally reasonable for the decision-maker to find that municipalities do not control the applicant. There is nothing illogical about his conclusion that voting rights are not an indicator of control, since the UMNB may suspend municipalities from voting if they do not pay their fees. Furthermore, there was no evidence in the record that municipalities approve the UMNB's annual operating budget through by-laws or resolutions, as required by subsections 10.2(2) and (2.1) of the *Municipalities Act*. The letters from two mayors which the applicant sent to the respondent do not provide such evidence. They merely state that municipal councils look

over the UMNB's proposed budget in advance of each Annual General Meeting, where their representatives hold a vote. Once again, it was reasonable for Mr Nault to conclude that voting rights at the UMNB's Annual General Meetings are not a reliable proxy for control.

[59] With respect to the ownership criterion, the applicant concedes that its member municipalities do not possess title to its assets. However, it contends that title would vest in these municipalities in the event of a wind-up or dissolution through the operation of a constructive trust or the doctrine of restitution. The Court cannot lend any weight to these arguments because they were never proffered to the decision-maker. On judicial review, the role of the Court is to determine whether the decision-maker rendered a reasonable decision on the facts and legal arguments that were before him. It is not to receive new evidence and arguments in order to make an independent decision on the merits: *Gitksan Treaty Society v Hospital Employees' Union*, [1999] FCJ No 1192 (FCA) at paras 13-15; *Zolotareva v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1274 at para 36.

[60] Indeed, the arguments made by the applicant on this point are quite complex. The decision-maker cannot be faulted for not predicting and addressing them on his own initiative. If the UMNB wishes for the decision-maker to consider them, it is free to submit a new application for a municipal determination which makes these arguments explicitly.

[61] Finally, it was open to the decision-maker to conclude that the UMNB does not conduct activities which warrant a municipal determination. It would appear from the guideline that the Minister's policy objective in expanding the scope of the definition is to minimize the tax

consequences of a municipality's decision to delegate municipal services or functions to another entity. For instance, Municipality X may order municipal employees to drain sewers and Municipality Y may delegate this task to a separate agency. The idea is that neither municipality should suffer adverse tax consequences solely as a result of its choice in this matter, since they are both providing municipal services to the residents and property owners falling within their jurisdiction.

[62] The decision-maker reasonably characterized the UMNB's main functions as conducting advocacy on behalf of its member municipalities and facilitating the flow of information between them. His conclusion that these functions do not justify a municipal determination was reasonably open to him. It is true that the First Schedule to the *Municipalities Act* does not purport to provide a comprehensive list of municipal services – but it is noteworthy that it does not contain any service which approximates those performed by the UMNB. While the UMNB provides a forum where municipalities may discuss their provision of these services and make requests related to these services to the provincial or federal governments, it does not actually perform these services on behalf of the municipalities. There is no evidence in the record of any fire departments, police stations or tourist offices administered by the UMNB. Given this factual matrix, the decision-maker could form the opinion that granting a municipal determination to the UMNB would not advance the Minister's tax policy objectives.

[63] I do not wish to be understood as minimizing the significance and utility of the services provided by the UMNB. Quite clearly, they are of great benefit to the residents of New Brunswick. It is possible that the Minister could have made a positive decision on the facts

before him. However, “[t]he essence of discretion is that it can be exercised differently in different cases”: *Waycobah First Nation*, above, at para 43. It is not up to the Court to compel the Minister to exercise that discretion in one way. Indeed, on reasonableness review, the Court is not “developing, asserting and enforcing its own view of the matter”: *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 28.

[64] In sum, the decision under review is transparent, justified and intelligible. This is enough on judicial review: *Dunsmuir*, above, at para 47. Once again, the Court does not shoulder the task of setting up a tax policy or pronouncing upon the wisdom of the Minister’s policy. Its task is simply to ensure that the Minister gives effect to his chosen policy in a manner which can be defended with respect to the facts and the law. In this case, that threshold was met. The Court has no reason to intervene.

[65] This application is dismissed. The Minister requested his costs and he shall have them on the normal scale.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed with costs to the respondent.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2567-14

STYLE OF CAUSE: THE UNION OF MUNICIPALITIES OF NEW
BRUNSWICK v THE MINISTER OF NATIONAL
REVENUE

PLACE OF HEARING: FREDERICTON, NEW BRUNSWICK

DATE OF HEARING: JUNE 9, 2015

JUDGMENT AND REASONS: MOSLEY J.

DATED: JUNE 16, 2015

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