SUPREME COURT OF NOVA SCOTIA
Citation: *Beals v. Nova Scotia (Attorney General)*, 2020 NSSC 60

Date: 2020 02 14
Docket: Hfx No. 479549
Registry: Halifax

Between:

Lionel Beals

Applicant

v.

The Attorney General of Nova Scotia Representing Her Majesty the Queen in Right of the Province of Nova Scotia and The Minister of Lands and Forestry

Respondent

Decision

Judge:	The Honourable Justice John Bodurtha
Heard:	January 22, 2019, in Halifax, Nova Scotia
Written Decision:	February 14, 2020
Counsel:	Theresa Graham, for the Applicant
	Sheldon Choo, for the Respondent

By the Court:

[1] This is an application for judicial review of a decision by the Ministry of Lands and Forestry denying Mr. Beals's application under the *Land Titles Clarification Act*, R.S.N.S., c. 250, for a certificate of claim in relation to 22 Simmonds Road in North Preston.

[2] The parties agree that the applicable standard of review is reasonableness.

The Supreme Court of Canada's decision in *Vavilov*

[3] Prior to releasing this decision, the Supreme Court of Canada released its administrative law decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. The *Vavilov* decision was released together with *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, on December 19, 2019. Before delving further into the background of this application, it is necessary to review the *Vavilov* decision.

[4] In *Vavilov*, the majority adopted a revised framework for determining the standard of review where a court reviews the merits of an administrative decision. The analysis begins with a presumption that reasonableness is the applicable standard in all cases. The presumption can be rebutted in only two situations: (1) where the legislature has indicated that it intends a different standard or set of standards to apply; and (2) where the rule of law requires that the standard of correctness be applied. The majority also clarified the application of reasonableness review. That clarification is relevant for our purposes.

[5] The seven-person majority began its discussion of reasonableness by emphasizing that reasons "are the primary mechanism by which administrative decision makers show that their decisions are reasonable – both to the affected parties and to the reviewing courts": para. 81. They continued:

> [83]… [T]he focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a de novo analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that

yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

…

[85] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

[86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": ibid. In short, it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

[87] This Court's jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the outcome of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with both outcome and process. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

[Emphasis added]

[6] The majority reiterated that, notwithstanding the variety of decision makers and decisions that may be subjected to judicial review, reasonableness is a single standard that is shaped by context: see *Vavilov*, at paras. 88-89. The reasonableness of a decision will always depend on the constraints imposed by the legal and factual context:

> [90] The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The fact that the contextual constraints operating on an administrative decision maker may vary from one decision to another does not pose a problem for the reasonableness standard, because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.

[7] The formal reasons for a decision should be read in light of the record and with due sensitivity to the administrative setting in which they were given:

> [91] A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.
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> [92] Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge — nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. <u>These differences are not necessarily a sign of an unreasonable decision — indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.</u>
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> …
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> [94] <u>The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines</u>

> that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.
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> [Emphasis added]

[8] The principle that the exercise of public power must be justified, intelligible and transparent to the individuals subject to it must be kept in mind by reviewing courts: see *Vavilov*, at para. 95.

[9] The majority cautioned that the reviewing court must not fill in gaps in reasoning or otherwise fashion its own reasons to justify the administrative decision:

> [96] Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.
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> [Emphasis added]

[10] The majority explained that a reasonable decision is: (1) based on an internally coherent reasoning, and (2) justified in light of the legal and factual constraints that bear on the decision: see *Vavilov*, at paras. 99 and 101.

[11] With respect to the need for internally coherent reasoning, the majority wrote:

> [102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan*, at para. 55; *Southam*, at para. 56. Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment": R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 C.J.A.L.P. 123, at p. 139; see also *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750, 27 Imm. L.R. (4th) 151, at paras. 57-59.
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> …
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> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
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> [Emphasis added]

[12] As to the need for the decision to be justified in light of the legal and factual constraints, the majority stated:

> [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.
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> [106] It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and

> facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.
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> [107] A reviewing court may find that a decision is unreasonable when examined against these contextual considerations. These elements necessarily interact with one another: for example, a reasonable penalty for professional misconduct in a given case must be justified both with respect to the types of penalties prescribed by the relevant legislation and with respect to the nature of the underlying misconduct.
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> [Emphasis added]

[13] The majority reviewed each of the elements listed above. I will address only those applicable to the case before me. The first is the governing statutory scheme:

> [108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 7; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at paras. 32-33; *Nor-Man Regional Health Authority*, at para. 6. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paras. 38-40. The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see *Delta Air Lines*, at para. 18.
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> …

> [110] Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority. If a legislature wishes to precisely circumscribe an administrative decision maker's power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly constraining the decision maker's ability to interpret the provision. Conversely, where the legislature chooses to use broad, open-ended or highly qualitative language — for example, "in the public interest" — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language. Other language will fall in the middle of this spectrum. All of this is to say that certain questions relating to the scope of a decision maker's authority may support more than one interpretation, while other questions may support only one, depending upon the text by which the statutory grant of authority is made. What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.
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> [Emphasis added]

[14] The next constraint is other statutory or common law:

> [111] It is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide: see *Dunsmuir*, at paras. 47 and 74. For example, an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers: see *Katz Group Canada Inc. v. Ontario (Health and Long Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at paras. 45-48. Neither can a body instructed by legislation to determine what tax rate is applicable in accordance with an existing tax system ignore that system and base its determination on a "fictitious" system it has arbitrarily created: *Montréal (City)*, at para. 40. Where a relationship is governed by private law, it would be unreasonable for a decision maker to ignore that law in adjudicating parties' rights within that relationship: *Dunsmuir*, at para. 74. Similarly, where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding of that standard: see, e.g., the discussion of "reasonable grounds to suspect" in *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006, at paras. 93-98.
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> [112] Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding

> precedent in which the same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context: M. Biddulph, "Rethinking the Ramification of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 Alta. L.R. 119, at p. 146. There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent. …
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> [113] That being said, administrative decision makers will not necessarily be required to apply equitable and common law principles in the same manner as courts in order for their decisions to be reasonable. For example, it may be reasonable for a decision maker to adapt a common law or equitable doctrine to its administrative context: see *Nor-Man Regional Health Authority*, at paras. 5-6, 44-45, 52, 54 and 60. Conversely, a decision maker that rigidly applies a common law doctrine without adapting it to the relevant administrative context may be acting unreasonably: see *Delta Air Lines*, at paras. 16-17 and 30. In short, whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.
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> [Emphasis added]

[15] Decision makers are also constrained by the principles of statutory interpretation:

> [115] Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Although the general approach to reasonableness review described above applies in such cases, we recognize that it is necessary to provide additional guidance to reviewing courts on this point. This is because reviewing courts are accustomed to resolving questions of statutory interpretation in a context in which the issue is before them at first instance or on appeal, and where they are expected to perform their own independent analysis and come to their own conclusions.
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> [116] Reasonableness review functions differently. Where reasonableness is the applicable standard on a question of statutory interpretation, the reviewing court does not undertake a de novo analysis of the question or "ask itself what the correct decision would have been": *Ryan*, at para. 50. Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached.
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> [117] A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must 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": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, R.S.C. 1985, c. I-21.
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> [118] This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.
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> [Emphasis added]

[16] A further consideration that may constrain a decision maker is the impact of the decision on the affected individual:

> [133] It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.
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> [134] Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable. For example, this Court has held that the Immigration Appeal Division should, when exercising its equitable jurisdiction to stay a removal order under the *Immigration and Refugee Protection Act*, consider the potential foreign hardship a deported person would face: *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84.

> [135] Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.
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> [Emphasis added]

[17] The majority concluded its comments on reasonableness by providing some guidance on how courts should treat existing administrative law jurisprudence:

> [143] Given that this appeal and its companion cases involve a recalibration of the governing approach to the choice of standard of review analysis and a clarification of the proper application of the reasonableness standard, it will be necessary to briefly address how the existing administrative law jurisprudence should be treated going forward. These reasons set out a holistic revision of the framework for determining the applicable standard of review. A court seeking to determine what standard is appropriate in a case before it should look to these reasons first in order to determine how this general framework applies to that case. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance. Indeed, much of the Court's jurisprudence, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between two or more administrative bodies, will continue to apply essentially without modification. On other issues, certain cases —including those on the effect of statutory appeal mechanisms, "true" questions of jurisdiction or the former contextual analysis — will necessarily have less precedential force. As for cases that dictated how to conduct reasonableness review, they will often continue to provide insight, but should be used carefully to ensure that their application is aligned in principle with these reasons.
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> [Emphasis added]

Further submissions as a result of *Vavilov*?

[18] The recent release of the decisions in *Vavilov* and *Bell Canada* raised the following question – should the parties have been given an opportunity to make submissions on their relevance for Mr. Beals's application? In my view, the answer is no. On December 20, 2019, one day after it released *Vavilov* and *Bell Canada*, the Supreme Court of Canada released its decision in *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67. In that decision, the majority, *per* Rowe J., applied the reasonableness standard as clarified in *Vavilov*. Before beginning the analysis, Rowe J. noted:

> [24] This appeal was heard shortly after the *Vavilov* and *Bell/NFL* appeals (*Bell Canada v. Canada (Attorney General)*, 2019 SCC 66), in which the Court reconsidered and clarified the framework for determining the applicable standard of review as well as the application of reasonableness review ("*Vavilov* framework"). The Federal Court and Federal Court of Appeal decisions in this appeal were taken (and the submissions before this Court were made) under the "*Dunsmuir* framework" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190). I apply the *Vavilov* framework in coming to my conclusion that the decision of the Appeals Officer was reasonable. No unfairness arises from this as the applicable standard of review and the result would have been the same under the *Dunsmuir* framework.
>
> [25] Relying on the *Dunsmuir* framework, the parties agreed before this Court that the standard of review is reasonableness. Canada Post submitted that reasonableness "presumptively applies to an administrative decision‑maker's interpretation of [their enabling] statute" (A.F., at para. 47, citing *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230, at para. 27, and *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 8). The standard of reasonableness was undisputed in the courts below, and I agree that under the *Dunsmuir* framework, the standard of review would be reasonableness.
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> [Emphasis added]

[19] The same is true here. The parties to the application agreed that the standard of review is reasonableness, and, in my view, they would have put forward the same arguments under *Vavilov* as they did under *Dunsmuir* and the cases that followed it. In addition, the court's decision would be the same under either framework. For these reasons, no unfairness arises from applying *Vavilov* to the application.

The *LTCA* – Historical background

[20] The *Community Land Titles Clarification Act*, the predecessor to the *LTCA*, was assented to on March 18, 1964. On second reading of the proposed legislation, the Honourable W. S. Kennedy Jones stated:

> The purpose of this legislation is to provide a simpler and less expensive machinery for the clarification of titles within areas or communities.
>
> The second section of the Act is the definition section, and therein the minister is defined as being the Minister of Lands and Forests, and I perhaps should point out that my particular interest in the preparation and presentation of the present legislation is as the chairman of the Interdepartmental Committee on Human Rights.

> The third section of the bill provides that the Governor-in-Council may define an area for consideration under the Act, if there is a lack of development which can be traced to confusion or obscurity in titles.
>
> It further provides that the designation must be approved by the municipal authorities.
>
> The fourth section of the Act sets forward the procedure to be followed by the minister, and under certain circumstances by a commissioner appointed under the Act.
>
> The final section of the Act makes provision for any party who feels he has suffered because of the operation of the Act to make application to the Governor-in-Council for adjustment.
>
> This act will be of particular use in communities such as New Roads within the county of Halifax, and it has, of course, general application in many areas throughout the province.
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> [Nova Scotia House of Assembly, Hansard, 48th Gen. Ass. (4 March 1964) at 887-888 (Hon. W. S. Kennedy Jones)]

These brief comments are the only contemporaneous information available as to the purpose of the legislation.

[21] The current *Land Titles Clarification Act* contains many of the same provisions as the *Community Land Titles Clarification Act*. It is clear from Hansard that the Act was intended to provide a simpler and less expensive means for clarifying title in areas where "there is a lack of development which can be traced to confusion or obscurity in titles". What is unclear from the debates, however, is how these areas came to exist. The only hint is in the comment by the Honourable W.S. Kennedy Jones that his interest in the legislation was as chairman of the Interdepartmental Committee on Human Rights (the predecessor to the Nova Scotia Human Rights Commission). The applicant attempted to fill in this information gap by including excerpts from various secondary sources in his brief. These sources include: (1) a Masters of Arts thesis submitted to Dalhousie University in 2006 by Erica Colter entitled *A State of Affairs Most Uncommon: Black Nova Scotians and the Stanfield Government's Interdepartmental Committee on Human Rights*, 1959-1967; (2) an article by Lindsay Van Dyk entitled *Shaping a Community, Black Refugees in Nova Scotia*, available on the Canadian Museum of Immigration at Pier 21 website; (3) a report prepared for the United Nations Human Rights Council by the Working Group of Experts on People of African Descent setting out its findings following a visit to Canada in October 2016; and, (4) a report prepared by then Schulich School of Law student Angela Simmonds entitled *This Land is Our Land: African Nova Scotian Voices from the Preston*

Area Speak up (August 19, 2014). These sources discuss the experiences of black migrants who settled in Nova Scotia in the 18th and 19th centuries, and the continued impact of those experiences on subsequent generations of African Nova Scotians. Some also address how the *LTCA* has been implemented since its enactment. The respondent takes the position that these materials should not be considered by the court because they were not before the decision maker, nor were they the subject of a successful motion to admit fresh evidence. At the same time, however, counsel for the respondent conceded during argument that "it would be important for the Minister to be aware and understand the circumstances with respect to individuals living in these land clarification areas, certainly".

[22] It is helpful to examine the contested sources more closely. In her Masters thesis, Ms. Colter explains that black settlers arrived in Nova Scotia in three main groups -- the Loyalists (1783-1785), the Maroons (1796), and the refugees of the War of 1812 (1813-1815). These settlers arrived in Nova Scotia under the pretence of offers of generous land grants from the British government. Unlike their white counterparts who typically received at least 100 acres of fertile land, black families were given ten-acre lots of poor-quality land. That land was segregated from the lands given to white families. In addition, while white settlers were given deeds to their land, black settlers were given "tickets of location" and "licenses of occupation". Without legal title to their land, black settlers could not sell or mortgage their property, or legally pass it down to their descendants upon their death. Although a limited number of land titles were eventually issued in Preston, and some settlers were able to purchase land, most black families never attained clear title to their land. Lack of clear title and the segregated nature of their land triggered a cycle of poverty for African Nova Scotian families that persisted for generations:

> If blacks had attained legal ownership of their land, this would have afforded them a substantially helpful financial asset. Without this asset, blacks held little collateral and therefore had great difficulty making financial advancements; while many whites turned their land grants into successful agricultural holdings and pursued other business interests, blacks struggled to survive. Such financial hardships supported a cycle of poverty that soon included a failing or non-existent education system. Blacks seeking an education through secular schools were challenged by the Nova Scotia School Act of 1811 which virtually denied access of education to poor communities. The Act stated that the government would only fund a school after the community built a schoolhouse, hired a teacher, and raised a requisite amount of money. If these conditions were not first in place, the government would not provide the community with funds for the building costs or provide further, ongoing support for the school. Most black communities were

> too poor to initiate such arrangements and therefore the members of the community could not access an education through this manner. An educated black community might have broken or eased this cycle of poverty, but unfortunately, most black regions could not end the cycle under these circumstances. Until 1954, issues of legal school segregation and discrimination persisted in Nova Scotia; certain black regions went years without schools as qualified teachers were not available or were not willing to accept the small salaries offered.
>
> [Colter, Erica. *A State of Affairs Most Uncommon: Black Nova Scotians and the Stanfield Government's Interdepartmental Committee on Human Rights*, 1959-1967 (Master of Arts, Dalhousie University, 2006), at pp. 19-20]

[23] The isolated nature of rural black communities was accompanied by a lack of community development. Ms. Colter writes at p. 23:

> Life for black Nova Scotians by the 1960s, therefore, was still difficult, and blacks continued to face challenges similar to those faced by the early Loyalists, Maroons, and Refugees. The mid twentieth century marked a turning point in black history, however, as black problems began to gain wider attention. Urban communities, such as Africville, had long been recognized as a dire problem, but black communities in Nova Scotia's rural areas began to share Africville's notoriety.
>
> Life was worse for rural blacks as their isolation had led them to be forgotten by urban dwellers and government officials. Blacks in both urban and rural areas tended to live closely together, but the urban-living blacks frequently lived in areas also inhabited by whites. Black communities in rural areas were usually segregated and remote, and this isolation often was accompanied by an absence of typical community developments such as water, sewage, sanitation, garbage removal, road improvements, and other related services regularly provided in white or mixed communities. When blacks first arrived in the eighteenth century, the public's initial response of benevolence and financial assistance was short-lived. This attention waned, and black communities remained forgotten until the improved communication systems and better roads of the 1950s and 1960s, both initiatives of Stanfield's government, uncovered the state of these remote communities and public interest and concern returned. Stanfield recognized that, contrary to the long-held belief that black poverty was a black problem, "their problems have been exposed, and even more important, are recognized as problems of the whole community." (citing Gwendolyn Shand, *Adult Education Among the Negroes of Nova Scotia* (Halifax: Institute of Public Affairs, Dalhousie University, 1961) at p. 3.)

[24] In 1962, Premier Robert Stanfield created the Interdepartmental Committee on Human Rights (ICHR). It was charged with giving immediate attention to housing, education and employment issues faced by African Nova Scotians. Ms.

Colter reviewed the minutes of ICHR meetings as part of her research. In relation to land titles, she notes at p. 98:

> In the 1960s, blacks were encountering discrimination and confusion over land titles. Many blacks were without documentation proving ownership of their land, even though the land had stayed within a family for generations. Clear titles would have helped blacks who were in the midst of relocation and improvement projects; as well, proof of land ownership would have increased a black family's livelihood. Without a clear title, a family would be unable to sell or lease the land, or even to use the property as collateral to secure credit.
>
> Stanfield's government recognized this concern, and one of the ICHR's noteworthy accomplishments was its creation of the *Community Land Titles Act* on 18 March 1964. This Act was intended to facilitate the process by which Nova Scotians could apply to clear their land titles. …

[25] The article by Lindsay Van Dyk that is published on the Canadian Museum of Immigration at Pier 21 website contains similar historical information as the Colter thesis. The author describes the migration of people of African descent to Nova Scotia, starting in the late 1700s. In relation to land grants, she writes:

> Upon their arrival in Nova Scotia, the Black Refugees experienced many hardships. The government withheld land grants, an influx of white immigration increased competition for the few jobs available, and the rocky, infertile land proved difficult to cultivate. Under these conditions, extreme poverty became a reality for many Black Refugees. …
>
> The Black Refugees settled in the rural areas around Halifax, with the largest communities established at Preston, Hammonds Plains and Beechville. Initially, the settlers were "well pleased and satisfied" at the prospect of having land to call their own. However, the government did not give the Black Refugees outright grants to the land, but rather tickets of location or licenses of occupation. This denied the Black Refugees the opportunity to own land or sell it for a profit. The lots provided by the government were limited to ten acres and located on rocky, infertile soil. In these conditions, crops planted by the Black Refugees repeatedly failed. A series of devastating natural events made efforts to cultivate the land even more difficult. In 1815, entire fields were destroyed by hordes of mice that swept across Nova Scotia's countryside. The following year became known as the "Year without a Summer," as the ground stayed frozen until June and ten inches of snow fell that same month. Even when the Black Refugees did achieve some success in producing crops, the long, cold winter seasons generally depleted their resources. Many Black Refugees were forced to rely on government assistance and private charity despite their best efforts to become independent.
>
> The white population of Nova Scotia resented the dependence of the Black Refugees and did not accept them as equal members of society. Provincial

> authorities protested that the Refugees were "unfitted by nature to this climate, or to an association with the rest of His Majesty's Colonists." The general poverty of the Black Refugees was regarded as proof that the black population was more suited to slavery than freedom. …
>
> [Emphasis added]

[26] The Report of the Working Group of Experts on People of African Descent on its mission to Canada contains the following references to land titles in Nova Scotia:

> 60. The Working Group is concerned about the lack of implementation of the Land Titles Clarification Act in Nova Scotia, which should assist people of African descent in obtaining titles to the lands on which they live. The Act was passed in Nova Scotia in 1963 to create a process to assist with the clarification of land title and land ownership issues for residents living in 13 specific communities in Nova Scotia. For historic and systemic reasons, there was a lack of land ownership documentation for the residents of those areas and communities, many of whom are African Nova Scotian. The Act was intended to provide a simpler and inexpensive mechanism to obtain clarification of land titles. Under the Act, a certificate of title is issued to applicants who can show that they used and occupied the land claimed for at least 20 years. The process provides for notice to be given to the community and issues such as competing ownership claims and unsettled boundaries to be resolved before a certificate can be issued.
>
> 61. Civil society informed the Working Group that the system in place under the Act was not working as hoped. The process is reportedly unjust and discriminatory, and many have had their claims rejected. Residents must bear the burden for submitting all the documentation, as well as the application, lawyer and surveyor fees necessary to have the land title clarified. In May 2015, the Department of Natural Resources, which is responsible for processing the applications, acknowledged that the process was unclear and stated they were attempting to pilot a project to assist residents in the community to obtain the title to their property. It was recognized that there were financial and logistical hurdles for some residents wishing to obtain a certificate of title, as residents were responsible for all the costs of the process, include [*sic*] surveying and legal fees. However, an interdepartmental committee was currently considering various options for removing or reducing those barriers and providing support to African Nova Scotians to help them clarify titles to their properties. The Working Group emphasized that the Act must be implemented in collaboration with, and for the benefit of, the affected population group. All resources should be made available, fees should be waived and remedies should be provided for any discriminatory policies relating to the process of granting a certificate of title.

[27] The final source is *This Land is Our Land: African Nova Scotian Voices from the Preston Area Speak up*, a report prepared by then Schulich School of Law

student Angela Simmonds. Ms. Simmonds explains at p. 3 that the report contains the results from a series of interviews she conducted during the months of June, July and August 2014, with "African Nova Scotian community members who are well-informed of African Nova Scotian historical land ownership". Interviews focused on three topics:

1. What are the historical challenges and barriers faced by African Nova Scotian people when dealing with land ownership;
2. In what ways has the *Land Titles Clarification Act* been used in the process to acquire title to land from government; and
3. In what ways can we move forward to address future land ownership, acquisition and community education around the process of land ownership.

[28] The report contains some of the same historical information on the migration of black families to Nova Scotia discussed in the other sources, obtained by the author from the Nova Scotia Archives website. Unlike the other sources, however, the report contains firsthand accounts from African Nova Scotians of their negative experiences dealing with government and the *LTCA*. The only portion of the report relied on by the applicant in his brief relates to the reason that some community members do not believe in writing wills:

> During this process of interviewing members in the community I inquired about the lack of wills for some community members. Community members explained that elders in the community affiliate death with wills. To many in the community, wills represent death and with such strong religious beliefs and faith it is not something that is discussed in the home.
>
> Culturally it is known that the land would go to the youngest child of the family or the child who was residing in the home when the parents pass away. Without a will this becomes difficult and can result in conflict.

[29] How is the Court to address this additional evidence that was not before the decision maker?

[30] As noted by the Supreme Court of Canada in *Vavilov*, the court's task when reviewing an administrative decision on the reasonableness standard is to determine whether the decision is based on internally coherent reasoning and is justified in relation to the legal and factual considerations that constrain the decision maker. Those considerations include the governing statutory scheme, other relevant statutory or common law, and the principles of statutory

interpretation. With respect to the governing statutory scheme, even where a decision maker is given considerable discretion in making a particular decision, that decision must ultimately comply with the rationale and purview of the statutory scheme under which it is adopted. As to other relevant statutory or common law, s. 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c. 235 reads:

> 9(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> …

[31] Finally, the modern principle of statutory interpretation requires the decision maker to consider the words of an Act in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature. As the majority stated in *Vavilov*, "[t]hose who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose": para. 118.

[32] Accordingly, the legislature and applicants like Mr. Beals are entitled to presume that the person making a decision about an application under the *LTCA* knows the occasion and necessity for the enactment, the circumstances existing at the time it was passed, the mischief to be remedied, and the object to be attained, without that information necessarily appearing in the record. On judicial review, the court must also consider those factors, and others, that constrain the decision maker, in order to determine whether the decision is reasonable.

[33] In many cases, information on the historical context of legislation will be available in the form of standard legislative history materials (commission reports, legislative background papers, committee reports, regulatory impact analysis statements, etc.). In this case, however, those materials do not exist. The question, then, is whether the court can take judicial notice of, or otherwise rely on, certain facts contained in the materials submitted by the applicant.

[34] In *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont: LexisNexis Canada, 2014), Ruth Sullivan discusses the use by courts of

professional studies and scholarly publications to establish background facts. Although these comments are not made in the judicial review context, they are still useful for my analysis:

> **§23.98 Introduction**. When it comes to technical matters outside the scope of judicial expertise, the courts require the assistance of expert testimony. With respect to matters of law or of general information, however, the courts may inform themselves by consulting scholarly or professional publications. In interpretation cases the courts consult a wide variety of such publications including textbooks, monographs, studies, reports and articles. Scholarly materials sometimes form part of the legislative history of an enactment and may be admissible as evidence of the understanding on which the enactment was passed. More often, however, these materials are admitted as evidence of external context or as persuasive opinion on the interpretive issues facing the court. …
>
> …
>
> **§23.100 Reliance on scholarly material as evidence of external context.** Courts often rely on scholarly or professional publications to help establish the background of legislation, that is, the historical, social, political, economic or institutional context in which the legislation was enacted and operates. … In *Bank of Montreal v. Hall*, the Supreme Court of Canada looked at a textbook on banking and a number of scholarly articles to determine the purpose of ss. 178 and 179 of the *Bank Act*. La Forest J. wrote:
>
> > I turn next to a consideration of the historical circumstances behind the creation of this security interest. For if the above remarks suffice to give a basic understanding of the operation of the s. 178 security interest, it is only in light of the historical record that one can appreciate the rationale for the creation of this particular security interest ….
>
> Having established the relevance of this record, La Forest J. turned to academic authorities to supply the necessary information.
> (pp. 700-701)

[35] In relying on journal articles and a textbook, Justice La Forest did not refer to the doctrine of judicial notice. This suggests that taking judicial notice of the facts contained in those sources may not always be necessary. Sullivan sets out the law in relation to judicial notice at pp. 652-654:

> **§22.17 Proving external context.** Although the importance of external context in interpretation is recognized, getting the facts before the courts in a fair and reliable way is a concern. Historically, the courts have often relied on judicial notice, both formal and informal, for this purpose. When facts are judicially noticed, they are taken as established without having to be proved in the usual way. This does not mean that judges are prohibited from seeking assistance.

Counsel may offer argument and refer the court to [a] wide range of authoritative sources, and judges may engage in private research.

§22.18 The law of judicial notice was reviewed by the Supreme Court of Canada in *R. v. Spence*. Speaking for the Court, Binnie J. drew attention to the distinction between adjudicative facts (the facts at issue in a trial, facts that are dispositive of the case) and legislative or social facts (background facts, facts from which relevant inferences can be drawn). To take judicial notice of adjudicative facts, notice must be formal and the threshold test is high:

> Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.

These are the so-called Morgan criteria, adopted by the Court in *R. v. Find*. They are strict to ensure that neither party is treated unfairly. At the other end of the spectrum are the numerous widely shared assumptions relied on in drawing inferences and forming judgments, including judgments of meaning, clarity, plausibility, reasonableness and the like. Judicial notice of facts in this category is informal and automatic, often unconscious. No one would think to challenge facts in this category; whether true or false, they are accepted as a matter of course.

§22.19 Finally, there are facts that fall between these extremes, generally referred to as "social" or "legislative" facts. As stated by the Alberta Court of Appeal in *R. v. King*, "… [m]erely giving written material the title 'social fact evidence' or 'legislative fact evidence' does not automatically give it an imprimatur of validity." The Court in Spence proposed the following criteria for admitting this category of evidence:

> [The] court ought to ask itself whether such "fact" would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute *for the particular purpose for which it is to be used.*
>
> [T]he closer the fact approaches the dispositive issue, the more the court ought to insist on compliance with the stricter Morgan criteria.
>
> [Emphasis in original]

Binnie J. ends his analysis of judicial review [sic] with the following warning:

> …[I]n *R. v. Malmo-Levine*, … a majority of our Court expressed a preference for social science evidence to be presented through an expert witness who could be cross-examined as to the value and weight to be given to such studies and reports…. The suggestion that even legislative

> fact and social "facts" should be established by expert testimony rather than reliance on judicial notice was also made in cases as different from one another as *Find, Moysa, Danson*, …*Symes v. Canada*, … *Waldick v. Malcolm*, … *Stoffman v. Vancouver General Hospital*, … *R. v. Penno*, … and *MacKay v. Manitoba*,… Litigants who disregard the suggestion proceed at some risk.
>
> **§22.20** In statutory interpretation disputes, the facts that constitute social or historical context occupy the middle ground between adjudicative facts at the one end and widely shared assumptions at the other. Under the *Spence* test, such facts should not be judicially noticed unless reasonable and well-informed people would accept them. In practice, much of the external context in statutory interpretation is found in standard legislative history materials (commission reports, legislative background papers, committee reports, regulatory impact analysis statements, and the like). For the purpose of establishing the facts in the mind of the legislature when it enacted the relevant legislation, this material is probably as authoritative as it is possible to be.
>
> **§22.21** Courts also rely on professional studies and scholarly publications to establish background facts, especially social science facts. When such sources are used and the facts to be established are important, the Court's advice to rely on expert testimony should probably be heeded. In *Symes v. R.*, for example, to assist in interpreting the *Income Tax Act*, the Federal Court received the sworn testimony of an expert in sociology who gave evidence of social developments involving women in the workplace. In *Canada (Attorney General) v. Mossop*, similar evidence was received on the meaning of the expression "family status" in the *Canadian Human Rights Act*.
>
> [Emphasis added]

[36] Returning to the secondary sources relied on by Mr. Beals, the Van Dyk article and the Colter thesis both appear to have been extensively researched, with each citing numerous primary and secondary sources, including a variety of materials from the Nova Scotia Archives, newspapers, theses, textbooks and journal articles. In my view, if judicial notice is necessary, it would not be inconsistent with the court's role on judicial review to take notice of the following facts from these sources that ought to have been known to the decision maker:

- Many individuals of African descent who migrated to Nova Scotia during the late 18th and early 19th centuries experienced racism and discrimination upon arrival and after.

- While the government of Nova Scotia often provided white settlers with 100 acres or more of fertile land, it gave black families ten-acre lots of

rocky, infertile soil. The land given to black families was segregated from that given to white families.

- The government of Nova Scotia gave white settlers deeds to their land but did not give black settlers title to their land. Instead, black settlers were given tickets of location or licenses of occupation.

- Although a limited number of land titles were eventually issued in Preston, and some settlers were able to purchase land, most black settlers never attained clear title to their land.

- Without legal title to their land, black settlers could not sell or mortgage their property, or legally pass it down to their descendants upon their death.

- Lack of clear title and the segregated nature of their land triggered a cycle of poverty for black families that persisted for generations.

- Black communities in rural areas were isolated and remote, lacking typical community developments such as water, sewage, sanitation, garbage removal, road improvements, and other related services regularly provided in white or mixed communities.

- In 1962, Premier Robert Stanfield created the Interdepartmental Committee on Human Rights (ICHR).

- The ICHR recognized the problems that lack of clear title posed for African Nova Scotians in rural communities and created the *Community Land Titles Act*.

[37] In my view, each of these facts would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute. Indeed, the respondent acknowledges at p. 4 of its brief that African Nova Scotians have faced discrimination in relation to land rights:

> In September 2017, the government announced an initiative to alleviate administrative, legislative, and financial barriers to clarification of land ownership and to address disparities and systemic discrimination that African Nova Scotians have faced in the enjoyment of their social, economic and cultural rights related to their land.

[38] With respect to the remaining two sources – the UN report and the report prepared by Ms. Simmonds, both sources raise relevance and hearsay concerns and I do not rely on them. Both documents contain the personal accounts of

anonymous African Nova Scotians in North Preston (and other communities) of their experiences with government and the *LTCA* process.

[39] In summary, when reviewing a decision on the reasonableness standard, the court must consider whether the decision is justified in relation to the legal and factual considerations that constrain the decision maker, including the governing statutory scheme, other relevant statutory or common law, and the principles of statutory interpretation. Both the *Interpretation Act* and the modern principle of statutory interpretation oblige the decision maker to consider the object and purpose of the Act. The decision maker is presumed to know the historical context of the legislation and the mischief it was intended to remedy. In this unusual situation where standard legislative history materials are unavailable or lacking in content, and the decision maker has not sought to file an affidavit setting out the relevant historical background, it would be unjust for the court to refuse to take notice of historical facts contained in extensively researched secondary sources that would not be contested by reasonable people who informed themselves on the topic.

The *LTCA* – relevant statutory provisions

[40] The *Land Registration Act*, S.N.S. 2001, c. 6, was enacted in 2001 and contained the following consequential amendment to the *Land Titles Clarification Act*:

> 2A This Act does not apply to a parcel registered pursuant to the Land Registration Act. 2001, c. 6, s. 114.

[41] Section 3(1) of the *LTCA* states:

> 3(1) Where the residents of an area of a municipality are in necessitous circumstances as a result of lack of property development in the area and where there appears to be confusion as to the ownership of land, the Governor in Council may designate the area as a land titles clarification area.
>
> …

[42] There are currently 13 designated land titles clarification areas. They are:

1. Cherry Brook, Halifax County;
2. Drumhead, Guysborough County;
3. East Preston, Halifax County;
4. Lincolnville, Guysborough County;

5. Little Dover, Guysborough County;
6. Little Lorraine, Cape Breton County;
7. Neils Harbour – New Haven, Victoria County;
8. New Road Settlement (North Preston), Halifax County;
9. Oldham, Halifax County;
10. Sampsons Cove – Little Anse, Richmond County;
11. Seals Harbour, Guysborough County;
12. Sunnyville, Guysborough County; and
13. Terence Bay and Lower Prospect, Halifax County.

[43] Under s. 4(1) of the *LTCA*, "[a] person who resides in the Province and claims to own land in a land titles clarification area may apply to the Minister for a certificate of claim in respect of a lot of land in the area which he claims to own". The balance of s. 4 sets out the application requirements:

> 4(2) An application for a certificate of claim shall contain
>
> (a) a description of the land sufficient to identify and distinguish it from all other lands;
>
> (b) a concise statement of the facts on which the applicant bases his claim to ownership of the lot of land; and
>
> (c) the names of the persons other than the applicant who have occupied the lot of land or who have at any time claimed ownership of the lot or any interest in it.
>
> (3) An application for a certificate of claim shall be accompanied by:
>
> (a) an abstract of the title to the lot of land showing all the records in the registry of deeds that affect or may affect title to the lot or any interest in it;
>
> (b) a statutory declaration attesting to the history of the occupation of the lot of land so far as the same is known; and
>
> (c) a statement showing the names of any person who holds any lien, judgment, mortgage or encumbrance or any other charge on the lot of land and the details thereof.
>
> (4) The Minister may require the applicant to furnish any information that the Minister desires and may require the applicant to verify by affidavit or otherwise any information or material furnished or included in or accompanying the application.

[44] Section 5 deals with the issuance of a certificate of claim:

> 5 (1) When it appears from the application that the applicant is entitled to the lot of land, the Minister may issue a certificate of claim to the applicant.
>
> (2) When the Minister cannot determine from the application that the applicant is entitled to the lot of land, he may appoint a barrister of the Supreme Court as a commissioner to examine the applicant's claim.
>
> (3) A commissioner appointed by the Minister pursuant to subsection (2) shall have all the powers of a commissioner appointed under the Public Inquiries Act.
>
> (4) When a commissioner examines the claim, he shall either recommend issuance of a certificate of claim or report his reasons for not making this recommendation.
>
> (5) When a commissioner recommends issuance of a certificate of claim, the Minister may issue a certificate of claim without further inquiry.
>
> (6) No certificate of claim shall be issued in respect of any lot of land unless any lien, judgment, mortgage, encumbrance or charge other than a lien for municipal taxes has been discharged or satisfied or unless the holder thereof consents in writing.
>
> (7) When the Minister issues a certificate of claim, he shall file the same in the registry of deeds for the registration district in which the land is situate in the same manner as a deed of conveyance and shall forthwith cause notice thereof to be published in a newspaper having a circulation in the municipality in which the land is situate.
>
> (8) When a certificate of claim is issued and filed in the registry of deeds and there are rates and taxes owing in respect of the lot of land described in the certificate, the applicant may apply to the council of the municipality for relief from the rates and taxes owed and the council may give a discharge of all or a portion of such rates or taxes either absolutely or on the condition that a certificate of title is subsequently granted.
>
> [Emphasis added]

[45] Section 6 provides for notice to a lienholder that he or she must take steps to realize on the lien within three months or it will be deemed to have been discharged:

> 6 (1) Where a lien affecting land for which an application for a certificate of claim has been made is registered in the registry of deeds and has been in effect for a period of two years or longer and no payment on account or written acknowledgement has been made within one year, the applicant for the certificate or some person on his behalf or the Minister or a person requested by him to do so

> may give written notice to the person having the lien, requesting him to take steps within three months after service of the notice to realize on the lien.
>
> (2) A notice under subsection (1) may be served by:
>
> > (a) being delivered personally to the lienholder or, if the lienholder is a corporation, to its recognized agent; or
> >
> > (b) registered post addressed to the lienholder's last known place of address, and a copy of the notice shall be filed in the registry of deeds.
>
> (3) If the holder of the lien does not within three months after service of the notice upon him take steps for the enforcement of his lien, the lien shall be deemed to be discharged in relation to the land for which the certificate of claim is sought.
>
> (4) Upon the filing in the registry of deeds of an affidavit or statutory declaration that the notice referred to in this Section has been given in accordance with this Section and that the holder of the lien has not within three months after service of the notice on him taken steps to enforce his lien, the lien shall cease to bind the land.
>
> (5) In this Section, "lien" includes any judgment, mortgage, encumbrance or charge on land other than a lien for municipal taxes.
>
> …
>
> [Emphasis added]

[46] Once a certificate of claim is issued, any person who claims to have an interest in the land or the holder of a lien, judgment, mortgage, encumbrance or any other charge over the property has 60 days to file a written notice of objection with the Minister:

> 7 (1) Any person who claims to have an interest in the lot of land described in a certificate of claim or who is the holder of a lien, judgment, mortgage, encumbrance or any other charge may within sixty days of the date of registration of the certificate file a written notice thereof with the Minister.
>
> (2) Where a notice is not filed pursuant to subsection (1) within the time set out therein, the Minister may grant a certificate of title to the applicant.
>
> (3) Where a notice is filed pursuant to subsection (1), the Minister shall deliver a copy of the notice to the applicant either by personal service or by prepaid registered mail.

[47] Once a notice is filed, the person who claims an interest in the land must file a proceeding in the Supreme Court for a declaration that the interest claimed or the lien, judgment, mortgage, encumbrance or other charge is valid or a certificate of title will be granted:

> 7 (3A) A person who files a notice pursuant to subsection (1) may, within sixty days after filing the notice, commence a proceeding in the Trial Division of the Supreme Court for a declaration that the interest claimed in the notice or that the lien, judgment, mortgage, encumbrance or other charge referred to in the notice is valid.
>
> (3B) Where a proceeding is not commenced pursuant to subsection (3A), the Minister shall grant a certificate of title to the applicant.
>
> (3C) In a proceeding commenced pursuant to subsection (3A):
>
> > (a) the parties shall be each person who filed the notice pursuant to subsection (1) as plaintiff, the applicant for the certificate of claim as defendant and such other persons as the Court orders be joined as parties;
> >
> > (b) the Court may
> >
> > > (i) declare the interests of the parties,
> > >
> > > (ii) dismiss the proceeding,
> > >
> > > (iii) make such order as the Court deems just.
>
> (3D) After any proceeding commenced pursuant to subsection (3A) is finally disposed of, the Minister shall
>
> > (a) grant a certificate of title;
> >
> > (b) revoke the certificate of claim; or
> >
> > (c) grant a certificate of title subject to an interest in accordance with the decision of the Court.
>
> (3E) Where the Minister revokes a certificate of claim pursuant to subsection 3D [(3D)], the Minister shall file the revocation in the registry of deeds for the registration district in which the land is situate.
>
> (4) When a certificate of revocation has been filed but the objection mentioned in any notice given pursuant to subsection (1) has been removed and sixty days have elapsed from the date the objection was removed, the Minister may grant a certificate of title to the applicant.
>
> (5) <u>When a certificate of title has been filed in the registry of deeds, title to the lot of land described in the certificate shall vest in the applicant named in the certificate in fee simple and such title shall be absolute and indefeasible but subject to any liens, judgments, mortgages, encumbrances or other charges or reservations, exceptions or other qualifications mentioned in the certificate.</u>
>
> [Emphasis added]

[48] Finally, s. 8 provides a mechanism for a person who has been adversely affected by the registration of a certificate of title to apply to the Minister for compensation:

> 8 (1) A person who claims to have been adversely affected by the effect of subsection 7(5) may apply to the Minister for compensation.
>
> (2) The Minister shall make or cause to be made such independent investigation as is required in the opinion of the Minister to determine whether or not the applicant has been adversely affected.
>
> (3) Where the independent investigation determines that the applicant has been adversely affected, the Minister may, with the approval of the Governor in Council and subject to subsection (4), pay to the applicant such compensation as the Minister considers fair in the circumstances.
>
> (4) The compensation must not exceed the value of the land at the time the certificate of title was filed.

[49] There are no regulations under the *LTCA*. The Department of Lands and Forestry (formerly the Department of Natural Resources) has, however, published a document entitled "Procedures for Making a Claim under the Land Titles Clarification Act for Ownership of Land in a Designated Area". That document says the following about the application process:

> 2. The application must include:
>
> > a. A description of the claimed property (for example civic address, Parcel Identification Number (PID) from the land registry, Assessment Account Number (AAN) from your tax bill, location in relation to neighbouring properties); and
> >
> > b. A sketch accurately showing the location and the size of the parcel (acres or hectares). Including the names of your neighbours is helpful to locate the property.
>
> 3. Department of Natural Resources staff review the application to make sure that the location is inside one of the designated land titles clarification areas. The department also checks to see:
>
> > a. If the land has been registered under the Land Registration Act;
> >
> > b. If all or a portion of the property is part of an existing claim area.
>
> If either of these situations apply, the department will let the claimant know that the claim cannot proceed.
>
> 4. If the application can proceed, the claimant will be asked to submit the following:
>
> > a. Information to support the claim of ownership (use and occupation of the land to the exclusion of all others for at least 20 years):
> >
> > > i. Information from the claimant: The claimant should provide an explanation of how they have used the land, over what period of

> years, and what steps they have taken to let people in the community know that the land is theirs.
>
> ii. Information from an impartial community member: The claimant should provide the name of at least one person in the community (neighbour or other community member, but not relatives) who can explain how the claimant has used and occupied the land, how long they have lived there or used the land, and what the people in the community know about the claimant's land. …

The statements from the claimant and their neighbours must be must prepared as sworn statements (statutory declaration) – given under oath. The help of a lawyer is advised for preparing the statutory declarations.

> b. An abstract of title – this is a description of all the records in the land registry that affect (or may affect) the title to the land. The help of a title searcher or lawyer will be needed to complete this.
>
> c. Information on judgements and encumbrances - A statement providing information regarding any liens or mortgages or judgements or other encumbrances on the land must be provided. The help of a title searcher or lawyer will be needed to complete this.

5. It is possible that a survey plan or a drawing prepared by a Nova Scotia Land Surveyor may be needed to prove where the land is located and to provide a legal description of the land. Land Services staff will tell the claimant if a plan of survey and metes and bounds description is needed to clearly identify the location of the land

Review and Processing of Application

1. Land Services staff and a Department of Justice lawyer will review the documents and determine whether the information proves the claim.

2. If it does, a Certificate of Claim is forwarded to the Minister of Natural resources for approval and signature. The document is then registered at the Land Registration Office in the county where the land is located.

3. The department publishes a notice of the registration in a local newspaper, to advise anyone who claims to have an interest in the land that they have 60 days to make a claim.

4. The department also sends the notice of registration to all adjoining/neighbouring land owners and parties who may have an interest in the land.

5. If no one claims an interest in the land within the 60 days, the department prepares a Certificate of Title, which is signed by the Minister of Natural Resources.

> 6. If someone does submit a notice to the Minister of an interest in the land, the person has another 60 days to start a proceeding in the Supreme Court. The Court then determines the extent of everyone's interests in the land.

Background to the Beals' application under the *LTCA*

[50] In 1995, Thomas and Ruby Beals obtained a certificate of title pursuant to the *LTCA* for Lot 171 in North Preston, Nova Scotia. The certificate of title provided:

> THIS CERTIFIES pursuant to the provisions of the Land Titles Clarification Act that the said **Thomas Beals** and **Ruby Beals**, husband and wife, **as joint tenants and not tenants in common** of North Preston are entitled to the lot of land within the Land Titles Clarification Area at New Road Settlement in the Municipality of the County of Halifax, described as follows:
>
> ALL that certain lot, piece or parcel of land situate, lying and being within the boundaries of the New Road Settlement Land Titles Clarification Area and designated as Lot 171 as shown outlined in red on the plan attached to and forming part of this Certificate of Title …
>
> [Emphasis in original]

[51] In 2003, Mr. and Mrs. Beals subdivided Lot 171 (the "parent parcel") into two infant parcels: Lot 171A and Lot 171B. They retained ownership of Lot 171A and conveyed Lot 171B to Michael and Amanda Beals. Thomas Beals died intestate in or around 2004, and Ruby Beals died intestate in or around 2009. After Mrs. Beals's death, her son, Lionel Beals (the applicant) and her daughter, Rosina Beals, resided on Lot 171A. On July 14, 2016, pursuant to the process set out by the Department of Natural Resources in the "Procedures for Making a Claim under the Land Titles Clarification Act for Ownership of Land in a Designated Area", the applicant and Rosina Beals submitted an "Application for Land Titles Clarification" through their counsel Theresa Graham. Instead of the sketch required to be submitted with the application, Lionel and Rosina Beals included a plan of survey of Lot 171A and Lot 171B. On July 22, 2016, Sue Campbell, Land Administration Officer, wrote to applicant's counsel and stated:

> This letter will acknowledge receipt of an application submitted on behalf of your clients. I have completed a preliminary review and can confirm that a Certificate of Title was issued to Thomas Beals and Ruby Beals on September 26, 1995. This document was recorded at the Registry of Deeds in Halifax in Book 5805 at Page 857.

> It appears, based on the plan submitted with your client's application, that the lands identified in the above certificate have since been sub-divided into Parcels 171A and 171B.
>
> Because a Certificate of Title has been issued an application under the *Land Titles Clarification Act* is not applicable. The LTCA is a method to determine title, and title has been determined for this parcel through the issuance of the Certificate of Title. As such this application is denied and your file is considered closed.

[52] On August 29, 2016, then Deputy Minister of Natural Resources Frank Dunn asked Leslie Hickman, Executive Director of Land Services, via email, to review the file and consider what options were available to the applicant. On the same date, Ms. Hickman wrote to Ms. Graham indicating that the Department of Natural Resources agreed to continue working on her clients' application and would waive the deadline for judicial review. Also on August 29, Ms. Hickman wrote to Mr. Dunn by email and recounted a telephone conversation she had had with Ms. Graham:

> [Ms. Graham] thanked me for calling and we discussed the applications in more detail. Although this was not explained in the application (she did not think that was required at that stage and we discussed the need for improved communication between our receipt of LTCA applications and response letters) her clients are the children of the people we previously issued a certificate to and they are only applying for the infant PID created by subdivision of the parent's lot. The parents died without wills. <u>They cannot afford probate costs and she though [*sic*] that we could issue another certificate for the same parcel, but to the kids this time. [I am not sure that is legally possible or even appropriate to use the LTCA to help people following probate requirements, but we can look into it.</u> Also part of the larger questions we can explore when we meet on the LTCA project.]
>
> I explained that we will need to involve our lawyer who is away until next week.
>
> …
>
> [Emphasis added]

[53] Ms. Graham followed up with Ms. Hickman writing on October 11, 2016, to "provide some context to my clients' Land Titles Clarification application". She wrote:

> Rosina and Lionel Beals are siblings. They reside at 22 Simmonds Road, North Preston, Nova Scotia (PID 41105339), Lot 171A (the "Property"). Their mother, Ruby Mae Beals ("Mrs. Beals"), died intestate approximately seven years ago. Their father, Thomas Beals ("Mr. Beals"), died intestate approximately twelve years ago.

> During their lifetimes, Mrs. And Mr. Beals occupied the Property and neighbouring Lot 171B, which, at the time, comprised Lot 171 (the "Parent Parcel"). In 1994, they obtained a Certificate of Title pursuant to the Land Titles Clarification Act as joint tenant owners of the Parent Parcel. The Certificate of Claim was registered on October 1, 1994 as Document Number 41793 at Book 5634, Page 1125. A copy of the Certificate of Claim is attached to this letter. The Certificate of Title was registered on November 1, 1995 as Document Number 45456 at Book 5805, Page 857. A copy of the Certificate of Title is also attached to this letter. The Certificate references a Plan at Drawer 288, and a copy of the Plan (showing Lot 171) and Registration particulars are attached to this letter.
>
> In 2003, Mrs. and Mr. Beals subdivided the Parent Parcel into two infant parcels: Lot 171A (the Property) and Lot 171B. Attached to this letter is a copy of the approved Plan of Subdivision, which is stamped as approved November 21, 2003 and which was recorded on December 1, 2003 as Plan Number 36108 at Drawer 396. Lot 171B was subsequently conveyed to another owner. Title to the Property remains in the name of Mrs. Beals, and the Property has not been registered pursuant to the *Land Registration Act*, 2001 R.S.N.S. c. 6.
>
> On July 14, 2016, Rosina and Lionel Beals made the initial application to your department for a Certificate of Title with respect to the Property. On July 22, 2016, I received a letter from Sue Campbell indicating that the application was denied because the "LTCA is a method to determine title, and title has been determined for this parcel through the issuance of the Certificate of Title".
>
> My clients do not intend to question the validity [*sic*] the previously granted Certificate of Title for the Parent Parcel. In fact, they intend to rely on that Certificate with respect to the chain of title to the Property. They have six other siblings who have an interest in the Property, but the siblings are prepared to renounce their interest in favour of my clients.
>
> I understand that your department will be re-considering my clients' application and I look forward to hearing from you in due course.
>
> [Emphasis added]

[54] Ms. Graham informed Ms. Hickman by email on September 14, 2017, that Rosina Beals had passed away. On June 6, 2018, Ms. Graham further informed Ms. Hickman that Lionel Beals intended to proceed with the application on his own.

The Decision

[55] On July 17, 2018, Ms. Hickman wrote to Ms. Graham. She summarized the facts and noted that a certificate of title had been issued to Thomas and Ruby Beals in 1995 for lands identified as Lot 171 on Simmonds Road, North Preston, Halifax County. She further noted that in 2003, Lot 171 was subdivided to create Lots

171A (PID 41105339) and 171B (PID 41105347). Lot 171B is owned by Michael and Amanda Beals and was conveyed to them in December 2003 by Thomas and Ruby Beals. Lot 171A (PID 41105339) was retained by Thomas and Ruby Beals. Neither PID had been migrated. Thomas Beals died in 2004. Title to Lot 171A went to Ruby Beals as joint tenant. Ruby Beals died intestate in 2009. The applicant, Lionel Beals, is a child of Thomas and Ruby Beals who currently resides at 22 Simmonds Road.

[56] After setting out the above history, Ms. Hickman wrote:

> Based on the information we have received to date, it does not look like issuing a certificate of title under the *Land Titles Clarification Act* is the appropriate solution to help Mr. Beals clear title for the parcel in question since one was already issued to his parents for the land in 1995.
>
> Section 7(5) of the *Land Titles Clarification Act* states:
>
> > *When a certificate of title has been filed in the registry of deeds, title to the lot of land described in the certificate shall vest in the applicant named in the certificate in fee simple and such title shall be absolute and indefeasible but subject to any liens, judgments, mortgages, encumbrances or other charges or reservations, exceptions or other qualifications mentioned in the certificate. R.S., c. 250, s. 7; 1992, c. 22, s. 1.*
>
> Title vested in Thomas Beals and Ruby Mae Beals when the certificate was issued and recorded in 1995. Upon their death, the fee simple title would have formed part of their estate. As you are aware, one of the areas being addressed by the Initiative was reducing barriers arising when an estate is probated. It appears that your client may have options under the *Probate Act* that would assist him in obtaining clear title to the land in his name. Once the estate aspect is addressed, it seems like migration would be the next step. If, however, there is other information we are missing that would support issuing a new Certificate of Title for the parcel, that can also be explored.
>
> I am not sure if you are aware, but as part of the Initiative, the Province has hired two navigators: Curtis Whiley (902-424-5381) and Lauren Grant Cookey (902-428-2038). By way of copy, I include contact information for Wayn Hamilton in case you need help connecting with one of the Navigators to ensure that we can work with you and your client so that we have all relevant information and that the most appropriate option can be used for Mr. Beals' application.
>
> We look forward to working with you to ensure that your client's claim can be addressed.
>
> [Emphasis added]

Was the decision reasonable?

[57] As per *Vavilov*, the court must take a "reasons first" approach to its analysis. A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Vavilov*, para. 85.

[58] When reviewing the reasoning in the July 27, 2018, decision, it is important to remember the majority's comments in *Vavilov*:

> [91] A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.
>
> …
>
> [94] The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. …
>
> [95] That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.
>
> [Emphasis added]

[59] In the decision, Ms. Hickman, on behalf of the Minister, set out the history of the property. She noted that a certificate of title for Lot 171 was issued to Thomas Beals and Ruby Beals as joint tenants in September 1995. She acknowledged that Mr. and Mrs. Beals subdivided Lot 171 in 2003, creating Lots 171A and 171B, with Mr. and Mrs. Beals retaining ownership of Lot 171A. Ms. Hickman noted that in Ms. Graham's letter of October 11, 2016, she stated that Thomas Beals died intestate approximately 12 years earlier (2004) and Ruby Beals died intestate approximately seven years earlier (2009). Ms. Hickman then stated:

> Based on the information we have received to date, it does not look like issuing a certificate of title under the *Land Titles Clarification Act* is the appropriate solution to help Mr. Beals clear title for the parcel in question since one was already issued to his parents for the land in 1995.

[60] If, as counsel for the applicant argued, the Minister rejected her client's application solely on the basis that a previous certificate of title had been issued, the decision would have ended there. Instead, after citing s. 7(5) of the *LTCA*, Ms. Hickman wrote:

> Title vested in Thomas Beals and Ruby Mae Beals when the certificate was issued and recorded in 1995. Upon their death, the fee simple title would have formed part of their estate. …

[61] In other words, title to Lot 171A was certain. It belonged to Ruby Beals's estate. As such, the *LTCA* did not apply.

[62] The applicant's position also ignores the history of dealings between the parties. On July 14, 2016, Ms. Graham, on behalf of Lionel and Rosina Beals, filed the Application for Land Title Clarification and a plan of survey showing Lots 171A and 171B, "a subdivision of lands of Thomas Beals and Ruby Beals". The application form provided no information as to the relationship between Ms. Graham's clients and Thomas Beals and Ruby Beals. It did not indicate that either Thomas Beals or Ruby Beals was deceased. Based on the information before her, Sue Campbell, Land Administration Officer, rejected the application on July 22, 2016. In her decision, she noted that a certificate of title was issued to Thomas Beals and Ruby Beals on September 26, 1995, and that, based on the plan submitted with the application, the lands identified in the certificate of title had been subdivided into parcels 171A and 171B. She then stated:

> Because a Certificate of Title has been issued an application under the *Land Titles Clarification Act* is not applicable. The *LTCA* is a method to determine title, and title has been determined for this parcel through the issuance of the Certificate of Title. …
>
> [Emphasis added]

[63] When the Department agreed to reconsider her clients' application, Ms. Graham provided further information, including that her clients filed an application under the *LTCA* because they could not afford probate costs.

[64] In my view, when the July 27, 2018, decision is read on its own, and in the context of the dealings between the parties, the reasoning is coherent and logical.

The Minister of Lands and Forestry rejected the applicant's application because the *LTCA* is a method for determining title and it therefore does not apply where there is no uncertainty in title. When Ruby Beals died in 2009, title to Lot 171A formed part of her estate. Where an individual who holds title to a property dies intestate, their assets are distributed in accordance with the *Intestate Succession Act* and the *Probate Act*. For that reason, the Minister referred Ms. Graham to the *Probate Act* and advised that government assistance might be available to help with the cost of probating the estate. The reasons reveal a rational chain of analysis that allows the court and the applicant to understand the decision.

[65] To be reasonable, however, the decision must also be justified in relation to the factual and legal considerations that constrain the decision maker. Those may include the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies: *Vavilov*, at para. 106. As the majority stated in *Vavilov*, "[t]hese elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached": para. 106.

[66] I will deal with the governing statutory scheme, other relevant statutory or common law, and the principles of statutory interpretation together. As discussed previously, these elements required the Minister of Lands and Forestry to make a decision that complies with the rationale and purview of the *LTCA*, and that was reasonable in light of the occasion and necessity for the enactment, the circumstances existing at the time it was passed, the mischief to be remedied and the objective to be attained. At the time the *LTCA* was enacted, many African Nova Scotians living in what would later be declared "land title clarification areas" did not have title to their land, despite the land having been in their families for generations. This situation was the result of the discriminatory treatment experienced by their ancestors at the hands of the government. Without legal title, African Nova Scotians could not sell or lease their land, use it as collateral to secure credit, or legally pass it down on their death. The lack of clear title and the isolated nature of their communities triggered a cycle of poverty for black families that persisted for generations. The *LTCA* was enacted as a means of addressing

this historical injustice by providing a simpler and less expensive means for individuals living in affected areas to clarify title to their land.

[67] Under the *LTCA*, as long as the requisite period of exclusive use and occupation is established, title can be obtained to lands over which no individual has ever held title, or to lands over which title has been held by an individual at some time in history but which has not been legally conveyed to the current inhabitants. Where an applicant provides the information required under the *LTCA* and it appears that he or she is entitled to the lot of land, the Minister has discretion to issue a certificate of claim. Once a certificate of claim is issued, the Minister is required to register it and cause notice of its issuance to be published in a newspaper. From the date that the certificate of claim is registered, anyone who claims to have an interest in the lot of land or who is the holder of a lien, judgment, mortgage, encumbrance or any other charge has 60 days in which to file a written notice with the Minister. The parties referred to this as the "reverse onus provision". That person then has 60 additional days to bring a proceeding in the Supreme Court. If no proceeding is commenced, the Minister shall grant a certificate of title. If, however, a person who claims to have an interest in the lot of land or who holds a lien, judgment, mortgage, encumbrance or other charge commences a proceeding and obtains a declaration that their interest claimed or encumbrance held is valid, it is open to the Minister to revoke the certificate of claim or to grant a certificate of title subject to that interest or encumbrance. The *LTCA* also allows for the discharge of liens (defined to include judgments, mortgages, encumbrances or other charges on the land) where they have been in effect for a period of two years or longer and no payment on account or written acknowledgment has been made within one year if the lienholder does not take steps to enforce the lien within three months of being notified. This ensures that clouds on title can be removed where they are not being enforced.

[68] A decision by the Minister of Lands and Forestry to reject an application for a certificate of claim where a certificate of title has previously been issued and there is no uncertainty as to who holds title is justified in light of the governing statutory scheme and the purpose and object of the *LTCA*. The *LTCA* was enacted to respond to a situation where African Nova Scotians who had lived on their properties for decades (or more) did not have title to their land. A certificate of claim is issued under the *LTCA* only where the information put before the Minister appears to prove the requisite lengthy period of exclusive use and occupation. It is for that reason that the reverse onus under s. 7 is justified. In effect, once the applicant has provided sufficient evidence to warrant the issuance of a certificate

of claim, there is a rebuttable presumption that the applicant is entitled to clear title[1]. The burden to rebut that presumption falls on anyone who claims to have an interest in the land or who claims to hold an encumbrance over it. That person must file a proceeding within the timelines set out under the *LTCA* to prove that their interest or encumbrance is valid. Contrast this with the applicant's present situation where a certificate of title has already been issued under the *LTCA* to a person living in a land titles clarification area, and that person has later died intestate. Title is held by the estate. Unless 20 years has elapsed since the intestate's death, there can be no suggestion of any uncertainty in title. If, as in this case, the intestate leaves multiple children but no surviving spouse, the intestate's children each have an equal interest in the assets of the estate under the *Intestate Succession Act* and the *Probate Act*. Since the applicant's claim is not based on at least 20 years of exclusive use and occupation of the land, there is no justification for the reverse onus available under the *LTCA*. In fact, as the respondent pointed out in his brief, the reverse onus could create unfairness by forcing other heirs to file proceedings in the Supreme Court to protect their interest.

[69] In addition, the issuance of a certificate of title under the *LTCA* is not a trigger for migration under the *LRA*. If a certificate of title is issued in cases like the applicant's, it opens the door for the *LTCA* to be used to avoid probate in perpetuity. Once Mr. Beals passes away, any one of his children could simply apply for another certificate of title, and so on. There is no evidence before the court, or in the *LTCA* itself, to suggest that this was the legislature's intention.

[70] The Ministry of Land and Forestry's decision must also be reasonable considering the impact of the decision on Mr. Beals. In this case, Mr. Beals has other options to obtain title to the property under the *Probate Act*, and, as noted in the decision, there may be government funds available to assist him with the costs of probating his mother's estate. The decision is therefore reasonable.

[71] Ultimately, this application fails on the basis that there is no uncertainty with respect to the title of the property. Title is clear, it rests in the estate of Mrs. Beals.

---

[1]Subject possibly to s. 5(6), which provides that no certificate of claim shall be issued in respect of any lot of land unless any lien, judgment, mortgage, encumbrance or charge other than a lien for municipal taxes has been discharged or satisfied or unless the holder thereof consents in writing. It is not clear whether consent means that the certificate of claim, and the eventual certificate of title, would be issued subject to that person's encumbrance. If so, the presumption would be that there are no other persons with an interest in, or an encumbrance over, the land beyond those identified by the applicant in the application materials.

The jurisdiction argument

[72] Finally, I will deal with the argument by the applicant that Ms. Hickman, on behalf of the Minister of Lands and Forestry, had no jurisdiction under the *LTCA* to reject Mr. Beals's claim at what the applicant describes as the "preliminary application stage". According to the applicant, upon receiving his application form and confirming that the land was in a land titles clarification area and had not been migrated, the Minister had no option under the *LTCA* other than to invite the applicant to file the documentation set out in s. 4. In my view, this cannot be the case.

[73] Contrary to the applicant's position, the absence of an express grant of authority to take a particular action does not necessarily mean that a statutory decision maker lacks that authority. This is true whether the decision maker's powers are narrowly or broadly drawn. In *Olumide v. Nova Scotia Human Rights Commission*, 2019 NSSC 223, Jamieson J. considered whether Human Rights Officers under the *Human Rights Act*, R.S.N.S. 1989, c. 214, have jurisdiction to screen potential complaints and refuse to invoke the complaint process where there is no possibility of a finding of discrimination under the Act. Although Justice Jamieson acknowledged that there was no express grant of such authority in the Act, she concluded that the power exists nonetheless:

> [155] Although the *Human Rights Act* does not expressly empower Commission employees to receive inquiries from members of the public as to whether they have a complaint under the *Act*, and to refuse to invoke the complaint process where it is obvious there is no possibility of discrimination under the *Act*, this power must exist by necessary implication. In *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada Inc., 2014) at p. 386, Ruth Sullivan describes the doctrine of jurisdiction by necessary implication:
>
> > Legislative silence with respect to a matter does not necessarily amount to a gap in the legislative scheme. Sometimes a matter that has not been dealt with expressly can be dealt with by necessary implication. This possibility is illustrated in the caselaw establishing the so-called "doctrine of jurisdiction by necessary implication", relied on to determine the scope of the powers conferred by legislatures on subordinate authorities.
> >
> > …
>
> [157] In *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, [2006] S.C.J. No. 4, Bastarache J. wrote:
>
> > 51 The mandate of this Court is to determine and apply the intention of the legislature … without crossing the line between judicial interpretation and legislative drafting … That being said, this rule allows for the

> application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature … Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:
>
> > When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.
>
> *Re Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641 (Ont. H.C.J.), at pp. 658-59, aff'd (1983), 42 O.R. (2d) 731 (C.A.) (see also *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff'd. [1985] 1 S.C.R. 174).
>
> [Emphasis by Jamieson J.]

[158] Justice Bastarache identified the following circumstances in which the doctrine applies:

> 73 The City seems to assume that the doctrine of jurisdiction by necessary implication applies to "broadly drawn powers" as it does for "narrowly drawn powers"; this cannot be. The Ontario Energy Board in its decision in *Re Consumers' Gas Co.* (1987), E.B.R.O. 410-II/411-II/412-II, at para. 4.73, enumerated the circumstances when the doctrine of jurisdiction by necessary implication may be applied:
>
> > 1. when the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the Board fulfilling its mandate;
> >
> > 2. when the enabling act fails to explicitly grant the power to accomplish the legislative objective;
> >
> > 3. when the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
> >
> > 4. when the jurisdiction sought is not one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
> >
> > 5. when the legislature did not address its mind to the issue and decide against conferring the power to the Board. (See also Brown, at p. 2-16.3.)

> 74 In light of the above, it is clear that the doctrine of jurisdiction by necessary implication will be of less help in the case of broadly drawn powers than for narrowly drawn ones. Broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework. This is explained by Professor Sullivan, at p. 228:
>
> > In practice, however, purposive analysis makes the powers conferred on administrative bodies almost infinitely elastic. Narrowly drawn powers can be understood to include "by necessary implication" all that is needed to enable the official or agency to achieve the purpose for which the power was granted. Conversely, broadly drawn powers are understood to include only what is rationally related to the purpose of the power. In this way the scope of the power expands or contracts as needed, in keeping with the purpose.
> >
> > [Emphasis by Bastarache, J.]
>
> [159] If Commission employees were required to process every single inquiry they receive as a complaint, regardless of whether the material facts alleged could ever amount to discrimination under the *Act*, the Commission's operations would grind to a halt. The screening authority to turn people away, when it is obvious that what they allege does not fall within the parameters of the *Act*, is practically necessary for the accomplishment of the Commission's statutory mandate. It is an entirely reasonable interpretation of the parameters of its authority under the *Act* for the NSHRC to implement a screening mechanism prior to an inquiry moving to the complaint process. I find it to be a reasonable interpretation of the legislation and legislative intent to give Human Rights Officers authority to screen out those matters that clearly do not fall under the *Act*. This, in my view, aligns with the stated purpose under s. 2(f) of administrative effectiveness. My conclusion would not be any different if the correctness standard of review applied.

[74] In this case, s. 2A of the *LTCA* provides that the Act does not apply to a parcel registered pursuant to the *Land Registration Act*, and s. 4(1) states that a person who "claims to own land in a land titles clarification area" may apply to the Minister for a certificate of claim. There are therefore at least two conditions that must be met before a claim will fall under the *LTCA* – the land must not have been migrated, and it must be in a land titles clarification area. The *LTCA* is silent as to how or when those conditions are to be established, leaving it to the Minister's discretion.

[75] Although the *LTCA* prescribes certain information that an application for a certificate of claim shall contain, s. 4(4) gives the Minister discretion to determine

what additional information, if any, is necessary to prove that the applicant is entitled to the land:

> 4(4) The Minister may require the applicant to furnish any information that the Minister desires and may require the applicant to verify by affidavit or otherwise any information or material furnished or included in or accompanying the application.

[76] Pursuant to s. 5(1), the Minister may issue a certificate "[w]here it appears from the application that the applicant is entitled to the lot of land". The *LTCA* does not set out any specific "test" that an applicant must meet to establish that he or she is entitled to the lot of land. The requirements for establishing ownership are left to the Minister to determine and, even where those requirements are met, the Minister still maintains discretion over whether to issue a certificate of claim.

[77] The process the Minister has chosen for determining whether the preliminary requirements are met is contained in the "Procedures for Making a Claim under the Land Titles Clarification Act for Ownership of Land in a Designated Area" document. Essentially, the Minister has adopted a two-step application process. At the first step, the claimant must provide sufficient information to prove that his claim comes within the *LTCA*:

> 2. The application must include:
>
> > a. A description of the claimed property (for example civic address, Parcel Identification Number (PID) from the land registry, Assessment Account Number (AAN) from your tax bill, location in relation to neighbouring properties); and
> >
> > b. A sketch accurately showing the location and the size of the parcel (acres or hectares). Including the names of your neighbours is helpful to locate the property.
>
> 3. Department of Natural Resources staff review the application to make sure that the location is inside one of the designated land titles clarification areas. The department also checks to see:
>
> > a. If the land has been registered under the Land Registration Act;
> >
> > b. If all or a portion of the property is part of an existing claim area.
>
> If either of these situations apply, the department will let the claimant know that the claim cannot proceed.

[78] Accordingly, the claimant must submit an application form, a description of the claimed property, and a sketch accurately showing the location and size of the

parcel. Department staff then review the application materials to make sure that the location is inside one of the designated land titles clarification areas, and also checks to see if the land has been registered under the *Land Registration Act*, or "is part of an existing claim area". If either of these situations applies, the department will let the claimant know that the claim cannot proceed.

[79] The document also contains further detail as to the information required to support the claim of ownership once the Department is satisfied that the application can proceed. The document states, in part:

> 4. If the application can proceed, the claimant will be asked to submit the following:
>
> > a. Information to support the claim of ownership (use and occupation of the land to the exclusion of all others for at least 20 years):
> >
> > …

[80] In this case, the information provided by the applicant at the first stage of the application demonstrated that he had no valid claim under the *LTCA* because there was no confusion as title. On the facts before the decision maker, Ruby Beals held title to the land until her death in 2009. From that point forward, title has been held by her estate. Insufficient time has passed since Ruby Beals's death for Lionel Beals (or anyone else) to accrue the 20 years of exclusive use and occupation necessary to establish entitlement to the land under the *LTCA*. The question, then, is whether the Minister's authority includes the power to reject a claim at the preliminary stage where the information provided demonstrates that the claim falls outside the *LTCA*, or whether the Minister must allow the applicant to submit the information required under s. 4 before rejecting the claim. In my view, the Minister's broad powers under the *LTCA* must be taken to include the authority to reject an application at the preliminary stage where it is clear from the information supplied by the applicant that he has no legitimate claim of ownership. The purpose of the *LTCA* is to provide a simpler and less expensive means for clarifying title in areas where there is a lack of development which can be traced to confusion or obscurity in titles. The authority to reject claims where there is no confusion as to title is rationally related to the purpose for which the Minister takes his powers under the *LTCA*. In fact, it could be argued that such authority is necessary for the Minister to achieve the purpose of the *LTCA*. Without it, the Minister would be forced to allocate resources to reviewing applications that are doomed to fail rather than focusing on applications with valid claims. Applicants

would also be forced to incur the unnecessary expense of acquiring and submitting further materials for an application that has no chance of success.

[81] The application is dismissed with costs in the amount of $750 payable to the respondent.

Bodurtha, J.