UNIVERSITY OF BRITISH COLUMBIA
PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – APRIL 2020

LAW 372.003
Administrative Law

Alexandra Flynn

EXAMSOFT PASSWORD:
EXAMSOFT RESUME CODE:

TOTAL MARKS: 70 or 100

WRITING TIME ALLOWED: 20 MINUTES READING TIME + 3 HOURS WRITING TIME
(If you completed the optional assignment: 20 MINUTES READING TIME + 2 HOURS WRITING TIME)

PREPARATION TIME ALLOWED: 10 MINUTES

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ADMINISTRATIVE LAW FINAL EXAM

Relevant statutory provisions and administrative materials are located in the Appendix. Rely only on the fact pattern in this exam question, including the Appendix, and the materials listed in the course syllabus to answer the following questions. You may assume that I have provided you with all relevant materials. Please use a clear short-form citation when referencing sources (e.g. *Baker*).

You are a law clerk for Justice Blackstone of the BC Supreme Court.

Fact pattern for questions 1 and 2

This case involves an application brought under s. 623 of the *Local Government Act*, R.S.B.C. 2015, c. 1 [*LGA*] for judicial review of decisions made by the City of White Rock (the "City"). In August 2019, the parties appeared before Justice Blackstone in which the petitioner, Mountain Building Company (MBC), sought a declaration that it was entitled to proceed with a project to build a 10-story building in White Rock, BC at 12 Petunia Road (the "Property"). In the alternative, MBC sought orders quashing Bylaw 123 or an order of mandamus compelling the issuance of a building permit.

The City opposes the relief sought on the basis that the proposed development is inconsistent with the zoning for the Property. The City claims that it had the right to withhold the issuance of the building permit based on changes to a zoning bylaw and the official community plan ("OCP") that are in conflict MBC's proposed development. The City believes that it lawfully followed its long-established policies on building permit applications, which is a complete answer to the petition.

After the hearing of the petition, Justice Blackstone of the BC Supreme Court reserved judgment. While the matter was under reserve, the Supreme Court of Canada delivered reasons for judgment in *Canada (Minster of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 [*Vavilov*]. On December 20, 2019, the court invited the parties to provide further submissions regarding the impact, if any, of *Vavilov* on the standard of review to be applied in this petition.

Background Facts

MBC became the registered owner of the Property in September 2017.

In September 2017, City Council adopted Zoning Bylaw 123. The Bylaw 2210 created greater zoning and density for buildings – up to 12 storeys - in the White Rock Downtown Core (the "WRDC"). The Property is located in the WRDC.

In June 2018, City Council passed a resolution to issue a development permit to MBC authorizing the construction of a new 10-storey residential building to replace the existing two-storey building (the "Project").

On July 20, 2018, the City issued Development Permit 101 ("DP 101") to MBC, which included the following terms and conditions:

> 1. Land, buildings, and structures on the Lands shall only be used in accordance with the provisions of Bylaw 123; and

2. The holder of this Development Permit must obtain a Building Permit, to be approved by City Council, within two years. If not, this development permit shall lapse.

The City filed a notice in the Land Title Office that the Property is subject to DP 101.

After the issuance of DP 101, MBC asserts that it spent approximately $1 million on the Project. At the time that this issue arose, MBC had not yet applied for a Building Permit. It expected to do so by February 2019.

The City's 2018 general elections were held in October 2018, and a new City Council was elected. A heated issue during the election was increased density in the WRDC. The incumbent mayor was in favour, while Sheila Sharp, vying for mayor, stated during the all-candidates debate, "There is no way I'll allow any more than six storeys if I am elected!" and "I think MBC is ruining our city and nothing will change my mind." The inaugural meeting of the newly elected Council was held on November 5, 2018. On November 6, 2018, the new Mayor, Sheila Sharp, called a special meeting of Council, to be held on November 7, 2018. The agenda for the special meeting was posted on the City's website at 4 p.m. on November 6, and stated:

> Official Community Plan And Zoning Bylaw Discussion - The Director of Planning and Development Services to present a power point presentation regarding: The City's Official Community Plan; The City's Zoning Bylaw; and Outline of Major Development Projects.

MBC was not notified of the November 7 special meeting.

At the November 7, 2018 meeting, City staff provided an overview of council's land use planning powers; the status of major projects, the City's power to potentially modify future building permit applications; and the status of MBC's development of the Property.

On November 7, 2018, Council adopted the following resolutions: "THAT Council directs staff to prepare amendments, for Council's consideration, to: the Bylaw No. 123, as amended, that if enacted would have the legal effect of an official plan policy to limit the height of building on properties in the WRDC to a maximum range of 4 to 6 storeys (Resolution 1)." A further resolution was adopted by the City that read: "prepare a report to City Council that addresses various items relating to Resolution 1 including "discussion of a process to treat the owners of affected parcels with scrupulous fairness in procedure."

On November 8, 2018, the City sent an email to MBC at approximately 6:25 p.m. attaching a letter providing notice of the November 7th Resolutions.

That same day, the City posted an amended agenda attaching the PowerPoint presentation delivered at the November 7, 2018 meeting. The Property was one of three developments discussed under the category "Building Permit Not Applied for (Have Development Permits)".

Still on November 8, 2018, at approximately 10:30 p.m., the City sent another email to MBC. The email advised that the "7 day window" to submit a building permit application, as indicated in its policies on building permits, started at 12:01 a.m. on November 8 and would end when the City Hall closed for business at 4:30 p.m. on November 14, 2018.

On November 9, 2018, at approximately 6:30 p.m., the City sent an email to MBC setting out the requirements for a building permit application. MBC was advised in the email that the building

permit would require a geotechnical report, building code analysis, and sealed engineering drawing. MBC was unable to submit a completed foundation building permit application during the 7-day window.

On December 10, 2018, City staff prepared a report to Council that attached draft amendment bylaws to the Zoning Bylaw. That same day, a further Council resolution directed staff to send copies of the proposed amendments and supporting report to all affected landowners, and to initiate a public consultation process concerning the proposed amendments. The report and draft amendments were sent to MBC on December 13, 2018.

On December 19, 2018, the City sent a letter to landowners, including MBC, inviting them to a special meeting of council on January 21, 2019 to make oral and written submissions concerning the proposed amendments.

On January 21, 2019, MBC submitted a completed building permit application (the "Building Permit Application"), along with the required fee. On the same day, the City Council held a special meeting to "consider the proposed bylaws with respect to the Zoning Amendments for the WRTC." At this meeting, MBC made oral submissions.

On February 1, 2019, MBC made written submissions to the City.

On February 11, 2019, MBC attended a City Council meeting to make further submissions. At that meeting, City Council directed that MBC's building permit be withheld for 30 days as stated in its policies, identifying the conflict between the planned development and the zoning bylaw and OCP amendments that the City says were under consideration.

A public hearing was set for March 11, 2019. MBC requested that the public hearing be changed to a different date because some members of its development team were not available to attend on March 11, 2019. The City refused to change the date and the public meeting went ahead on March 11, 2019. Representatives of MBC attended the public meeting and made submissions to Council.

On March 13, 2019, the City Council held a special Council meeting and adopted the changes, reducing the permitted size in the WRDC to six storeys. Mayor Sharp introduced the motion that was ultimately approved by 5 out of 9 members of council. In her remarks, Mayor Sharp said, "This was my campaign promise and I will deliver." The Mayor also stated that MBC was not permitted to proceed with the development approved under DP 101 and would have to comply with the amended bylaw.

The City Council record shows that the Mayor and several members of City Council campaigned on a promise to reduce the density of the WRDC as the reasons why it sought to amend the Bylaw 123. The record also disclosed that the council believed that it had the legal power to do so.

Position of the Petitioner

MBC submitted that the interpretation of municipal enabling legislation is a true jurisdictional question, reviewable on a standard of correctness.

MBC also submits that s. 623 of the *LGA* is an example of the "dual role" contemplated for courts in para. 44 of *Vavilov*. That paragraph states:

> [. . .] Accepting that the legislature intends an appellate standard of review to be applied when it uses the word "appeal" also helps to explain why many statutes provide for both appeal and judicial review mechanisms in different contexts, thereby indicating two roles for reviewing courts: see, e.g., *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 27 and 28. This offers further support for giving effect to statutory rights of appeal.

MBC submits that s. 623 is a type of statutory appeal mechanism.

Alternatively, MBC argues that the interpretation of municipal enabling legislation is a category of decision subject to correctness review. It argues that, before *Vavilov*, the Supreme Court of Canada had authoritatively determined that the interpretation of municipal enabling legislation is reviewed on a correctness standard and that municipal councils are not entitled to deference on matters of statutory interpretation. It argues that *Vavilov* should not be interpreted as changing this well-settled jurisprudence without explicitly considering it.

MBC also relies on the fact that local governments are distinct and unique from other tribunals and decision makers in that they are elected officials, and, unlike most administrative body members, are not appointed based on skill or expertise, in arguing for a new correctness category.

In the further alternative, MBC submits that if the Council's decisions are subject to a reasonableness standard, then the decisions are unreasonable.

Position of the City

The City submits that there is no separate issue of law with respect to "illegality" or "vires," and that its actions related to the denial of a building permit, even though a development permit had been issued, were allowed under the relevant statutes.

The City also submits that s. 623 does not create an appeal for the purposes of applying *Vavilov*. The remedy under a s. 623 application is not in the nature of an appeal but is a form of judicial review particular to municipal governments: the reviewing court cannot reverse a decision or substitute a judgment in respect if the decision, all it can do is set the decision aside.

With respect to the submission that a new category of correctness review should be recognized, the City argues that MBC relies on doctrines concerning expertise and true questions of jurisdiction, were of which both expressly rejected in *Vavilov*.

Further, the Court in *Vavilov* did, in fact, consider the application of its decision to municipalities at para 137, when it wrote:

> Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision (*Baker* at para 44). For example, as McLachlin C.J. noted in *Catalyst* at para 29: "[t]he reasons for a municipal bylaw are traditionally deduced from the debate,

deliberations, and the statements of policy that give rise to the bylaw." In that case, not only were "the reasons [in the sense of rationale] for the bylaw . . . clear to everyone", they had also been laid out in a five-year plan (at para 33).

The City submits that the Supreme Court of Canada was clear that it was implementing a fundamental change in the standard of review analysis and that reasonableness is the presumptive standard subject to the specific exceptions listed. The City maintains that the presumption of reasonableness has not been displaced here.

Finally, the City submits that the decisions made by the Council were reasonable.

Agreed to by both parties

- The powers conferred on municipalities and their council under the *LGA* must be interpreted broadly.
- The City has the power to amend bylaws, including Bylaw 123.
- Bylaw 123 is consistent with the City's Official Community Plan ("OCP").

Applicable law

Please use only those statutes or rules listed or referenced in the Appendix.

Question 1 – Standard of review (40 marks)

a) What is the applicable standard of review?

b) Apply the standard of review to the City's decision.

c) Do sections 58 or 59 of the BC *Administrative Tribunals Act* apply? Why or why not?

d) Would the standard of review and its application have been different if the court were reviewing the decision in 2018 rather than 2020? Why or why not?

Question 2 – Procedural fairness (30 marks)

a) Assuming the common law duty of fairness applies, what is the strength of duty owed to MBC by the City of White Rock?

b) How strong are MBC's arguments that it was denied procedural fairness on the basis of participatory rights OR reasonable apprehension of bias (select ONE of participatory rights or reasonable apprehension of bias)?

c) If the court decides to intervene, what is the appropriate remedy in this case?

Question 3 – Critical analysis of administrative law (30 marks)

If you completed the optional assignment worth 30%, do not complete the following question

Background information

Consider the Supreme Court of Canada's decision in *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 [*Mikisew Cree*].

The majority judgment of Wagner C.J. and Karakatsanis and Gascon JJ., delivered by Karakatsanis, stated at *paras* 38 and 39:

> Applying the duty to consult doctrine during the law-making process would lead to significant judicial incursion into the workings of the legislature, even if such a duty were only enforced post-enactment. The duty to consult jurisprudence has developed a spectrum of consultation requirements that fit in the context of administrative decision-making processes. Directly transposing such *executive* requirements into the *legislative* context would be an inappropriate constraint on legislatures' ability to control their own processes.
>
> The administrative law remedies normally available for breach of a duty to consult would further invite inappropriate judicial intervention into the legislature's domain. The Crown's failure to consult can lead to a number of remedies, including quashing the decision at issue or granting injunctive relief, damages, or an order to carry out consultation prior to proceeding further with the proposed action (*Carrier Sekani*, at paras. 37 and 54). Thus, if a duty to consult applied to the law-making process, it would require the judiciary to directly interfere with the development of legislation. I recognize that the Mikisew only sought declaratory relief in this case. However, their rationale for seeking declaratory relief was that Canada was considering changing its environmental protection framework at the time of this litigation. The Mikisew acknowledged that it may be appropriate, in future litigation, for courts to consider granting ancillary relief requiring further consultation on the challenged legislation, a stay of further implementation of the challenged legislation, or judicial supervision. Such remedies could significantly fetter the will of Parliament.

Abella and Martin JJ. stated at para 71 that: "the duty to consult now forms "part of the essential legal framework" of Aboriginal law in Canada."

At para 72 they quoted McLachlin C.J. in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, stating that a "generous, purposive approach" applies to the duty to consult, including "strategic, higher level decisions" that could have an impact on Aboriginal rights or claims (*Carrier Sekani*, at para. 44). As McLachlin C.J. explained, high-level management decisions or structural changes to resource management may set the stage for future decisions that will have a direct adverse impact on lands and resources, and leave Aboriginal groups with a lost or diminished constitutional right to have their interests considered (*Carrier Sekani*, at para. 47). This is itself an adverse impact sufficient to trigger the *Haida Nation* duty to consult and accommodate.

Abella and Martin JJ further stated at para. 74: "I do not see this extension of the duty to consult into the administrative context as a *rejection* of its application in other aspects of the government's relationship with Indigenous peoples, especially since that question was expressly left open by this Court (*Carrier Sekani*, at para. 44). They concluded at para 75 that, "Although the law of

judicial review, which applies to the exercise of statutory powers or the royal prerogative, is often implicated in consultation cases, the duty to consult itself attaches to all exercises of Crown power, including legislative action."

Questions

a) Provide a summary of the two main issues involved in the *Mikisew Cree* decision.

b) Explain in plain language the reasons provided by the majority and concurring opinions provided above.

c) Based on arguments from *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, the guest lecture by Karenna Williams, and the article written by Janna Promislow, which of the judgments in (b) do you find most compelling?

END OF EXAM QUESTIONS

Appendix on following page

Appendix: Applicable law

***Local Government Act*, R.S.B.C. 2015, c. 1 [LGA]**

1. The purposes of this Act are

> (a) to provide a legal framework and foundation for the establishment and continuation of local governments to represent the interests and respond to the needs of their communities,
> (b) to provide local governments with the powers, duties and functions necessary for fulfilling their purposes, and
> (c) to provide local governments with the flexibility to respond to the different needs and changing circumstances of their communities.

623 (1) An application to the Supreme Court to set aside a municipal bylaw or another municipal instrument may be made by

> (a) an elector of the municipality, or
> (b) a person interested in the bylaw, order or resolution, as applicable.

(2) On an application under subsection (1), the Supreme Court may

> (a) set aside all or part of the municipal instrument for illegality, and
> (b) award costs for or against the municipality according to the result of the application.

Zoning bylaws

Part 14 of the *LGA* deals with planning and land use management. Under this Part, the powers and duties of local governments in relation to zoning bylaws.

The *LGA* authorizes local governments to adopt bylaws regulating the use and density of land and buildings, as well as the siting, size, and dimensions of buildings and uses: s. 479(1).

Local governments seeking to adopt a zoning bylaw must provide notice of, and hold a public hearing on, the bylaw before adopting it to allow the public to make representations to the local government respecting matters contained in the proposed bylaw: ss. 464(1), 466. However, the local government may waive the public hearing on a proposed zoning bylaw if an OCP is in effect for the area that is subject to the zoning bylaw and the bylaw is consistent with the OCP: s. 464(2).

***Administrative Tribunals Act*, SBC 2004, c 45 [*ATA*]**

58 (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> > (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and

(c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

(3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,
(b) is exercised for an improper purpose,
(c) is based entirely or predominantly on irrelevant factors, or
(d) fails to take statutory requirements into account.

59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

(2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,
(b) is exercised for an improper purpose,
(c) is based entirely or predominantly on irrelevant factors, or
(d) fails to take statutory requirements into account.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.