Court of Queen's Bench of Alberta

Citation: Canadian Natural Resources Limited v Fishing Lake Métis Settlement, 2022 ABQB 53

Date: 20220118
Docket: 1903 17590
Registry: Edmonton

Between:

Canadian Natural Resources Limited, Husky Oil Operations Ltd., Crescent Point Energy Corp., Altagas Ltd., Altagas Holdings Inc. and Altagas Processing Partnership

Applicants

- and -

Fishing Lake Métis Settlement and The Métis Settlements General Council

Respondents

Reasons for Judgment
of the
Honourable Madam Justice M. Hayes-Richards

I. Introduction

[1] The Métis Settlements General Council ("MSGC") acts as the collective government for the eight Métis Settlements (the "Settlements" or "Métis Settlements") in Alberta. Fishing Lake Métis Settlement ("Fishing Lake") is one of those eight Settlements. It is a small Métis community approximately 52 kilometres south of Cold Lake with a population of approximately 500 residents.

[2] The *Metis Settlement Act*, RSA 2000, c M-14 (*MSA*) promotes self-governance of the Settlements by delegating policy and bylaw making powers. Section 222 of the *MSA* empowers the MSGC to pass policies respecting the assessment and taxation of property on Settlements, and s. 166 allows Settlements to enact bylaws in accordance with those policies.

[3] In 1996, the MSGC passed the *Business Property Contributions Policy*, GC-P9602 (May 15, 1997) A Gaz I, 897 ("*BPCP*") which set out their tax and assessment policy. In 2018, the *BPCP* was revoked and replaced with two new policies – the MSGC Property Taxation Policy ("Taxation Policy") and the MSGC Property Assessment Policy ("Assessment Policy") (collectively "the Policies"). In May 2019, Fishing Lake passed their Annual Property Tax Bylaw #005/2019 ("Tax Bylaw"), in accordance with the Policies.

[4] This judicial review is brought by four companies (the "Applicants") who own and operate natural resource businesses in Fishing Lake. They challenge the Policies as being *ultra vires* the statutory authority of the *MSA* because they discriminate against the Applicants, and wish to amended their Amended Originating Application to further claim the MSGC acted in a manner which was procedurally unfair to them in passing the Policies without notice and without providing them the opportunity to be heard. The Applicants originally argued in their written submissions that the Policies were unreasonable, but conceded in oral argument that if this Court finds the Policies are *intra vires*, the issue of reasonableness is properly considered only with respect to the Tax Bylaw. The Applicants also challenge the Tax Bylaw as being both substantively unreasonable and invalid due to procedural unfairness.

[5] For the reasons that follow, I find: 1) the Policies are *intra vires* the statutory authority of the *MSA* because the *MSA* impliedly allows discrimination, 2) the MSGC owed no duty of procedural fairness to the Applicants in passing the Policies, and 3) the Tax Bylaw is void for failing to follow the mandatory procedural requirements of the *MSA* respecting notice and an opportunity to be heard. Had I not found the Tax Bylaw void, I would have found it substantively reasonable on the basis of the information before the Court.

II. Facts

[6] A judicial review with similar issues was brought before Devlin J in ***Canadian Natural Resources Limited* v *Elizabeth Métis Settlement***, 2020 ABQB 210 [***Elizabeth***]. Much like the issues before me, in ***Elizabeth***, Devlin J had to determine whether a tax bylaw, passed pursuant to the Policies, should be quashed on the basis that it was invalidly enacted and substantively unreasonable. The issue of the *vires* of the Policies was not considered by Devlin J in ***Elizabeth***.

[7] In determining the tax bylaw issues in ***Elizabeth***, Devlin J considered both the legislative history of the impugned tax bylaw in that case, as well as the overall context of the Métis people in Alberta and their emergent form of self-government. Given that the impugned tax bylaw in ***Elizabeth*** and the Tax Bylaw before me were both made pursuant to the Policies, I borrow and adopt Devlin J's review of this history and context as set out at paras 5-29 of ***Elizabeth***:

> ### a. Alberta's Métis Settlements
>
> [5] The Métis people are the descendants of 18th-century unions between European explorers, fur traders and pioneers, and Indian women: see *Daniels* v *Canada (Indian Affairs and Northern Development)*, 2016 SCC 22 at paras 17*ff*.

They first gained formal recognition as one of Canada's three aboriginal groups in section 35 of the Constitution Act, 1982, 1982, c 11 (UK), which recognized existing aboriginal and treaty rights of "Indian, Inuit and Métis peoples of Canada".

[6] Unlike First Nations, however, the Métis people lacked any territory to call their own. Beginning with a Joint Government-Métis Committee report in 1984, a movement began towards securing lands to support Métis communities in Alberta attaining self-governance: Alberta, *Report of the MacEwan Joint Métis-Government Committee to Review the Métis Betterment Act and Regulations: Foundations for the Future of Alberta's Métis Settlements* (Edmonton: Municipal Affairs, 1984).

[7] A period of negotiations between the Métis and the Government of Alberta followed, focusing on providing settlement lands for Métis communities and extending self-government powers to them: see ***Alberta (Aboriginal Affairs and Northern Development)* v *Cunningham***, 2011 SCC 37 [***Cunningham***] at paras 5-19. This consultation ultimately led to the *Alberta-Métis Settlements Accord* dated July 1, 1989. This framework agreement and related legislation created eight Métis settlement corporations (the "Settlements" or "Métis Settlements") and granted fee simple title to those lands to the Métis Settlements General Council ("MSGC").

[8] This process also led to the incorporation of the Métis people in the *Constitution of Alberta Amendment Act*, 1990, RSA 2000, c C-24, which expressly recognized that the Métis people were to gain self-governance, and protected their land base with the specific stated aim of preserving and enhancing Métis culture and identity.

[9] Ultimately, the *Métis Settlements Act*, RSA 2000, c M-14 (the "*MSA*") was brought into force to provide a structure of delegated authority by which these communities could govern themselves individually, and collectively through the MSGC. All legal authority for the Métis Settlements flows through the *MSA*, Recital 0.1 of which states that:

> This Act is enacted
>
> (a) recognizing the desire expressed in the *Constitution of Alberta Amendment Act, 1990* that the Metis [*sic*] should continue to have a land base to provide for the preservation and enhancement of Métis culture and identity and to enable the Metis [*sic*] to attain self-governance under the laws of Alberta...

[10] The top level of Métis governance established by the *MSA* is the MSGC. This umbrella body creates policies from which each of the Settlements derive sub-delegated authority to run their own communities. The individual Métis Settlements, in practice, operate at a quasi-municipal level. While their existence has a deeper social, cultural and historical underpinning than ordinary municipal corporations, they perform many of the same functions of a local municipal

government and provide the panoply of local services and infrastructure common to municipalities across the province.

[11] Similar to municipalities, the sole source of tax revenue for the Settlements is through property taxation. Due to the structure of land holding on the Settlements, however, Elizabeth appears to have only four taxpayers – Canadian Natural Resources Limited ("CNRL"), Husky Oil Operations Limited, Crescent Point Energy Corp., and Altagas Limited and its related companies, who are the Applicants in this case.

b. Structure of Métis Landownership

[12] The lands comprising the eight Métis Settlements were granted under patent to the MSGC, and their interest can only be devolved in narrow circumstances provided by the *Métis Settlements Land Protection Act*, RSA 2000, c M-16. Settlement members are permitted to own and occupy homes on the Settlements, on terms defined by the MSGC and the Settlements themselves. As discussed below, however, these lands are exempt from taxation.

c. Self-Governance and Financial Sustainability

[13] The roots of this case lie in the challenges of attaining viable self-government and fiscal stability for a small and newly-autonomous series of communities. In July 2013, the Government of Alberta and the MSGC signed Long-Term Governance and Funding Arrangements (the "LTGFA")...

[14] The recitals of the LTGFA state that both Alberta and the MSGC are committed to achieving certain goals over the 10-year period of 2013-2023, including:

- strengthened settlement governance and enhanced accountability;
- long-term sustainability of settlement communities; and
- a fiscal relationship with the Government of Alberta comparable to that of other local governments.

[15] The LTGFA contain detailed schedules covering essential services, infrastructure, housing, governance, capacity building in local government, education, training, consultation between settlements, government and industry, and financial sustainability. The LTGFA came into being together with a Co-Management Agreement, designed to allow the MSGC and Métis Settlements to negotiate royalties and working interests with oil and gas operators wishing to secure mineral leases on Settlement lands.

[16] It is clear from all of these documents that both Alberta and the MSGC envisioned a situation whereby the Settlements would receive substantial ongoing financial support from the government, but would also receive funding from the MSGC, along with contributions from individual households and property owners. This, together with a clear intention that industrial development in the natural resources sector continue to the benefit of the Settlements, appears to have formed the financial vision on which the Settlements were to operate.

d. Settlement Taxation Powers

[17] Métis Settlements first gained independent taxation powers in 1997. Prior to that, any taxation was subject to direct ministerial approval. Section 166(1) of the *MSA* allows Settlement councils to make bylaws taxing interests in land if the MSGC has enacted a General Policy permitting them to do so. MSGC policy defines the parameters of Settlement taxation powers and the process for property assessment. Each Settlement in turn is left to pass its own property tax bylaw.

(i) Taxation structure beginning in 1997

[18] Effective in 1997, the MSGC enacted a tax policy called the *Business Property Contributions Policy*, GC-P9602 ("*BPCP*"). Section 1.02 of the *BPCP* defined its purpose as follows:

> The purpose of this Policy is to establish a fair, orderly, and equitable system by which those who use land in a Settlement area for business purposes can be required to contribute a fair share, based on valuation or agreement, to the cost of maintaining a viable Metis [sic] community in the Settlement area.

[19] The *BPCP* permitted Settlements to make annual business property contribution bylaws, through which the Settlements levied property tax based on the deemed value of land holdings. The *BPCP* limited any Settlement's tax rate to 130% of the maximum mill rate for similar classes of property in adjacent local government areas: BPCP, s 2.03(3)(b).

...

(ii) A new property taxation structure comes into force for 2019

[21] In 2019, the basis and structure of property taxation within the Métis Settlements changed fundamentally. On November 14, 2018, the MSGC revoked the *BPCP* and replaced it with a new instrument called the *Métis Settlements General Council Property Taxation Policy 2018*, GC-P1806 (the "*Tax Policy*"). This policy was intended to work in conjunction with the *Métis Settlements General Council Property Assessment Policy 2018*, GC-P1807 (the "*Assessment Policy*"), which was enacted on March 6, 2019.

[22] Neither of these documents contained any cap on Settlement property tax rates. Notably, gone is any mention of "fair, orderly, and equitable" contributions being required by businesses operating on Settlement lands. The relevant section of the new preamble of the *Assessment Policy* reads instead:

> B. The General Council deems it to be in the best interests of the settlements of Alberta to make such a policy to authorize settlements to assess and tax business property located within settlement areas for the purposes of raising revenue for the cost of settlement expenditures and community services;

[23] The *Tax Policy* specified a new formula by which the tax rate was to be calculated. It is based on dividing its total budget by the value of its assessed

taxable base. Each Settlement was to determine its tax rate by dividing its budget by the total value of its tax base. The relevant terms of the *Tax Policy* are as follows:

PART VI – LEVY OF TAX

Tax Levy

8(1) No settlement Council may pass a property tax bylaw in respect of the year unless the operating and capital budget for that year's been passed by the settlement Council.

(2) A property tax bylaw that sets the rate of tax to be applied to each assessment class must be passed by a settlement Council on or before May 15 each taxation year. [Emphasis added]

(3) A tax rate is calculated by dividing the amount of revenue required pursuant to the budget by the total assessed value of all property in which the tax is to be imposed.

...

[24] Four facets of the *Tax Policy* bear on the issues in this Application. They are:

- the total exemption of any Metis-held property from taxation;
- the elimination of any rate cap;
- the calculation of the tax rate by dividing the community's financial needs by its assessed taxable base; and
- the establishment of a May 15 deadline for the enactment of each Settlement's annual property tax bylaw

[25] Under section 7(1) of the *Tax Policy*, any property held or occupied by a Settlement member is exempt from taxation. This exemption extends to property held or occupied by member-owned corporations as well. The result of this structure is that the Settlements appear to have a very small taxable base, comprised almost exclusively of non-Métis businesses or residents. In the case of Elizabeth, the four oil and gas companies who brought this Application appear to make up the entire taxable property base of the community.

e. The New Tax Regime Comes into Force

[26] The *Tax Policy* was passed by the MSCG on November 14, 2018, and came into force on February 14, 2019 by operation of section 224(1) of the *MSA*. The MSGC's new Assessment Policy was passed on March 6, 2019 and came into force on March 16, 2019 through direct Ministerial Approval pursuant to section 224(1)(a) of the *MSA*: *MSA*-03/2019. Both instruments were published in the *Alberta Gazette*, Part I on April 30, 2019 at pages 359 and 380, respectively.

[27] In this case, the role of the Minister and the exact date the MSGC Polices came into force take on significance. Both are governed by section 224 of the *MSA*, which provides that:

> **Ministerial veto**
>
> **224(1)** General Council Policies made under section 222 or an amendment or repeal of those Policies must be sent to the Minister and come into effect 90 days after they are received by the Minister, or any other period to which the General Council and the Minister agree, unless
>
> (a) the Minister by order approves the Policy in writing at an earlier date, in which case the Policy comes into effect when it is approved, or on any later date specified in the Policy, or
>
> (b) the Minister vetoes the Policy or any portion of it by notice in writing to the President of the General Council.
>
> (2) A General Council Policy or any portion of it that is vetoed by the Minister has no effect.
>
> [Emphasis added]

[28] Under section 224(1), the Minister may do three things when an MSGC Policy is sent to him or her: (i) nothing, in which case the Policy comes into force automatically after 90 days; (ii) actively approve a Policy, which brings it into force immediately, unless her or she specifies another date; or (iii) veto all or part of a Policy, which prevents those sections coming into force at all.

[29] In this case, the Minister vetoed certain provisions of the *Tax Policy* on February 7, 2019, and noted that the balance would come into force automatically by operation of the *MSA*. He specifically approved the *Assessment Policy* on March 15, 2019, bringing it into force that day pursuant to section 224(1)(a).

[8] As was the case in ***Elizabeth***, Fishing Lake appears to have only four taxpayers – the Applicants in this case. Prior to the 2019 tax year, the *BCPC* capped the tax rate at 130% of the maximum mill rate for similar properties in adjacent local government areas using similar assessment methods. For Fishing Lake, the Municipal District of Bonnyville is the adjacent municipality. In 2018, the Fishing Lake mill rate was 37.569 and Bonnyville's was 15.11797. The maximum mill rate, using the Bonnyville mill rate for 2018 would have been 19.65336. According to the Affidavit of Darrin Hrycak, filed by the Applicant Canadian Natural Resources Limited ("CN"), CN filed a complaint to Fishing Lake of its assessment and associated taxes in 2018 on the basis that the rate exceeded 130% of that imposed by Bonnyville. That complaint is apparently still outstanding.

[9] At a public meeting on May 29, 2019, Fishing Lake passed the Tax Bylaw pursuant to the Policies with a tax rate of 8.88%. It appears that the first time the Applicants became aware of the new Policies and the Fishing Lake Tax Bylaw was when they received assessment and tax notices on or about May 31, 2019. Under the new Policies and Tax Bylaw, CN's tax notice for the 2019 year is $1, 967, 486.25. Based on the previous *BCPC*, at a cap rate of 130%, the tax owing would have been $435, 545.34. CN paid the $435, 545.34 amount and then filed this judicial review. It points out that in 2020, Fishing Lake raised their tax rate again, and it is now in excess of 10%.

[10] The Applicants say that as far as they are aware, Fishing Lake did not give notice of the May 29, 2019, public meeting and therefore they were not able to make any submissions regarding the Tax Bylaw, notwithstanding the fact that they are directly affected by it.

III. The Application for Judicial Review

[11] On July 16, 2019, the Applicants filed their application for judicial review. On July 29, 2020, the Applicants filed an Amended Originating Application and on July 30, 2020, a Consent Procedural Order was filed. On September 30, 2020, the MSGC provided its Record. In October 2020, the Applicants provided an unsworn copy of the Affidavit of Darrin Hrycak to the MSGC and Fishing Lake, which Affidavit was then sworn December 16, 2020 and filed December 18th ("Affidavit of Darrin Hrycak" or the "Affidavit").

[12] In their brief filed on February 12, 2021, the Applicants allege that the MSGC owed them a duty of procedural fairness in enacting the Policies. MSGC objects that this is a new issue not plead in the original or Amended Originating Application, and accordingly should not be considered by this Court. In response, the Applicants seek to amend their Amended Originating Application to include this issue. They filed a preliminary application to amend that was heard at the beginning of oral submissions on the judicial review. The MSGC opposes the application to amend, and also seeks to have the Affidavit struck as against MSGC because it repeats evidence already in the MSGC Record and includes evidence about lack of notice, something the Applicants did not plead in their Amended Originating Affidavit.

[13] I will deal with the preliminary applications first, and then move on to the substantive issues on the judicial review.

a. Preliminary Issue: Whether the Applicants should be allowed to amend their Amended Originating Application to plead MSGC owed a duty of procedural fairness in enacting the Policies

[14] The Applicants seek to amend their Amended Originating Application to state that MSGC acted in a manner that was procedurally unfair to them in passing the Policies without notice to the Applicants and without an opportunity to be heard. MSGC provided its Record of Proceedings on September 30, 2020, and in response, the Applicants provided the proposed Affidavit of Darrin Hyrcak in October 2020. The Affidavit included the following statement:

> Canadian Natural did not receive any notice of the proposed Taxation Policy or Assessment Policy prior to their passing, nor am I aware of any consultation by the Metis settlements or the MSGC with industrial taxpayers, such as Canadian Natural in advance of the passing of the Taxation Policy and the Assessment Policy.

[15] The Applicants made submissions about procedural fairness in relation to MSGC's actions in their brief filed February 12, 2021. MSGC responded to those submissions in its brief but also raised an issue with the sufficiency of the pleadings on this issue.

[16] This judicial review application was originally scheduled to be heard on March 11-12, 2021, but was adjourned when Feth J recused himself at the request of the Applicants. I was told that the issue of the sufficiency of the pleadings was discussed by Feth J and a suggestion made that the parties attempt to resolve the issue before the next scheduled date for the judicial review.

[17] The Applicants provided MSGC with their proposed amendments on March 30, 2021 and invited MSGC to provide a supplemental record of proceedings. MSGC advised that they would not consent to the requested amendment because it was hopeless.

[18] The parties agree that leave is not required to amend pleadings prior to the close of pleadings pursuant to Rule 3.62 of the *Alberta Rules of Court*, Alta Reg 124/2010 (*Rules of Court*) and that there is no rule expressly closing pleadings in judicial review applications commenced by originating application. However, they do not agree on whether pleadings were closed in this case before the Applicants filed their application to amend.

[19] The Applicants rely on cases which they say hold that pleadings close when the hearing has been held: ***Jane Doe* v *Alberta (Deputy Minister of Executive Council)***, 2016 ABQB 135 at para 29; ***Simonelli* v *Rocky View (Municipal District No. 44)***, 2004 ABQB 45 at para 54. MSGC points out that those cases actually rely on the decision in ***Friends of the Athabasca Environmental Association* v *Public Health Advisory & Appeal Board***, 1994 CanLII 8931 (ABQB) [***Athabasca***], in which Veit J held that the pleadings in a judicial review before her were closed by the date of the originally scheduled hearing. MSGC further points to Lee J's decision in ***JFM* v *VP***, 2003 ABQB 982 [***JFM***], which interpreted Veit J's decision in ***Athabasca*** as holding that "once the matter was set down for hearing, pleadings were closed, and that therefore leave under R. 130 was required before the applicants could amend their pleadings": at para 12.

[20] MSGC submits that this Court should follow ***Athabasca*** and ***JFM*** and find that leave is required to amend as the pleadings here were closed at least by the date of the originally scheduled hearing on March 10, 2021. Having reviewed the above noted decisions, I agree with MSGC's position and find that leave is required for the Applicants to further amend their Amended Originating Application.

[21] The parties agree that there are four circumstances in which amendments will not be permitted: ***Terrigno* v *Butzner***, 2021 ABCA 18 at para 11. MSGC submits that the second of these circumstances apply here, that the proposed amendments are hopeless, and therefore, leave to amend should not be allowed.

[22] The Applicants submit the amendments are not hopeless as they are not such that had they been included in the original pleading they would have been struck.

[23] MSGC submits that the cause of action advanced by the Applicants in their amendments, namely a breach of procedural fairness related to the enactment of the Policies, is not arguable and has no potential to provide the Applicants with relief pursuant to relevant and binding legal principles.

[24] I find it is best to allow the amendment and deal with the issue of whether MSGC owed a duty of procedural fairness to the Applicants in passing the Policies as part of the judicial review application. Although MSGC appears to have a strong argument against the claim, I cannot say the claim is hopeless. For that reason, I grant leave to the Applicants to amend their pleadings as set out in their Preliminary Application to Amend.

[25] I do, however, find that given the history of this proceeding, and the very late request to amend, MSGC shall be awarded costs of this preliminary application in any event of the cause. I agree with MSGC that the costs of dealing with these late amendments could have been avoided entirely had the Applicants complied with the deadlines set out in the Procedural Order, which

deadlines were set with their consent and in the context of the Applicants' past conduct in the related ***Elizabeth*** proceedings, involving late-arising grounds not pled.

b. Preliminary Issue: Whether the Affidavit of Darrin Hrycak should be struck as against MSGC

[26] On December 8, 2020, Kraus J ordered that the Affidavit of Darrin Hyrcak could be filed in these proceedings, but the issue of its admissibility or weight were to be determined by the justice hearing the judicial review.

[27] MSGC objects to the admissibility of the Affidavit as it relates to the allegations regarding the Policies and asks that the Affidavit be struck. It says the Affidavit should not be considered unless the Applicants demonstrate that it should be and their brief is silent on this issue.

[28] Rule 3.22 sets out what evidence may be considered by the Court on a judicial review and includes "any other evidence permitted by the Court." The general rule is that judicial reviews are conducted based only on the record of proceedings filed by the decision maker and additional affidavit evidence is exceptional: ***Alberta Liquor Store Association* v *Alberta (Gaming and Liquor Commission)***, 2006 ABQB 904 at para 42 [***Alberta Liquor***]; ***Alberta College of Pharmacists* v *Sobeys West Inc.***, 2017 ABCA 306 at para 67. Affidavit evidence may only be allowed in a judicial review in limited circumstances, including where it shows bias, or a reasonable apprehension of bias, or a breach of the rules of natural justice, and the facts in support of the allegations do not appear on the record: ***Alberta Liquor*** at para 41.

[29] The paragraphs in the Affidavit relating to the allegations against MSGC either restate evidence already on the MSGC Record, or go to the issue of procedural fairness.

[30] MSGC says the paragraphs that restate evidence already in the MSGC Record should be struck because they do not fall into any of the recognized exceptions to the general rule and are already before the Court in the MSGC Record. The impugned paragraphs provide background facts and context to understand the grounds of the application and other portions of the Affidavit, including the historical taxation of the Applicants' property. I see no reason why these paragraphs should be struck. While they may be duplicative of material provided in the MSGC Record, they are necessary to help assist in understanding the Affidavit and establishing the background facts which underlie the grounds for the judicial review: see ***Lethbridge and District Pro-Life Association* v *Lethbridge (City)***, 2020 ABQB 654 at paras 17-19.

[31] As for the evidence that goes to the issue of procedural fairness, MSGC's written submission setting out its complaint about these paragraphs was made before the Applicants brought their application to amend their Amended Originating Application to plead the issue of a duty of procedural fairness. Given that I have allowed that application, there is no reason to strike the paragraphs of the Affidavit relating to the issue of procedural fairness, specifically whether notice was given to the Applicants of the proposed Policies before they were passed.

[32] MSGC also raises the issue that it did not include any evidence on the issue of procedural fairness in the MSGC Record because the Applicants did not originally, or in their Amended Originating Application, raise the issue of a duty of procedural fairness. I note, however, that MSGC was given the opportunity to provide a further record, with evidence on the issue of procedural fairness, as part of the Applicants' preliminary application to amend the Amended Originating Application. They chose not to do so, presumably because their entire argument on

the issue of procedural fairness is that there was no such duty owed pursuant to the common law or the *MSA*. For reasons that will become apparent, the lack of evidence from MSGC on the notice issue is inconsequential to the outcome of this application.

[33] MSGC's application to strike the Affidavit as it relates to the Policies is dismissed.

IV. Issues

[34] The Applicants written submissions set out the issues as follows:

Issue 1: The 2019 Policies and Tax Bylaw are discriminatory and *ultra vires*

Issue 2: Procedural Deficiencies and Procedural Unfairness

Issue 3: The MSGC Policies and the Settlement Bylaw are void for unreasonableness

[35] The Applicants written submissions deal with the MSGC Policies and Fishing Lake Tax Bylaw together under each issue, which in some circumstances conflates the issues and legal arguments that apply to one but not the other. I will deal with the issues as against each respondent separately, and as determined and agreed to at the oral hearing, in the order as set out below.

[36] The issues as they relate to MSGC are as follows:

Issue 1: Are the Policies void for being *ultra vires* on the basis of discrimination?

Issue 2: In enacting the Policies, was a duty of procedural fairness owed by MSGC to the Applicants?

[37] The issues as they relate to Fishing Lake are as follows:

Issue 3: Is the Tax Bylaw void for failing to comply with the procedural requirements of the *MSA*?

Issue 4: Is the Tax Bylaw void for unreasonableness?

[38] In oral argument, counsel for the Applicants agreed with the MSGC and Fishing Lake's submission that the issue of discrimination and *vires* arose only in respect of the Policies and not the Tax Bylaw. If the Policies are *intra vires* despite discrimination, then the Tax Bylaw made pursuant to the Policies is also *intra vires* despite discrimination. If the Policies are *ultra vires* due to unauthorized discrimination, then the Tax Bylaw is invalid as being enacted pursuant to an unauthorized policy.

V. Law and Analysis

[39] I will deal first with the issues relating to the MSGC Policies and then the issues relating to the Fishing Lake Tax Bylaw.

Issue 1: Are the Policies void for being *ultra vires* on the basis of discrimination?

a. The Parties' Positions

i. The Applicants

[40] The Applicants challenge the Policies on the basis of discrimination, alleging the Policies are *ultra vires* the policy-making power of MSGC. Specifically, they seek a declaration that ss. 5(4), 7(1)(a) and (b), and 8(9) of the Tax Policy and s. 5(1) of the Assessment Policy are invalid.

[41] The Applicants primary complaints are that the Taxation Policy exempts Settlement members and Settlement member owned corporations from paying tax (s. 7(1)(a)-(b)) and that the Taxation Policy permits Settlements to impose differential tax rates on individual taxpayers (s. 8(9)). The Assessment Policy likewise only permits for assessment of those properties which are taxable under the Taxation Policy, resulting in no assessments being issued for Settlement member-owned businesses. As the tax rate under the Taxation Policy is derived by dividing the amount of revenue required by the total assessed value of the taxable property, the removal from assessment of Settlement-member owned property has the effect of decreasing the overall amount of the assessable property, thus increasing the mill rate payable by the remaining taxable properties.

[42] The Applicants argue that this is an overtly discriminatory regime which disadvantages non-Settlement member owned businesses. It leaves only non-voting, non-Settlement members carrying the entire tax burden, a form of discrimination which they say is not authorized in the *MSA*.

[43] The Applicants submit that according to general tax and administrative law principles, this type of discrimination must be expressly authorized by the governing legislation in order to be *intra vires* the power of the statutory body. They argue that the *MSA* gives no express authorization to discriminate beyond tax exemptions for land held by the MSGC: *MSA*, s. 166-169. Although they recognize that the *MSA* serves an ameliorative purpose, they submit that fact does not oust the requirements of the common law, nor does it provide enough foundation for the Court to draw a necessary inference that discrimination is authorized.

ii. MSGC

[44] The MSGC submits that the exemptions in s. 7(1)(a)-(b) of the Taxation Policy are permitted by the *MSA* and accordingly are not *ultra vires* the MSGC to enact. Further, the MSGC says the remaining sections of the Taxation Policy and Assessment Policy do not discriminate in and of themselves, and are not *ultra vires*.

[45] The MSGC submits that the *MSA* implicitly permits the discrimination between non-Settlement member businesses and Settlement member-owned property found in s. 7(1)(a)-(b). It relies on a developing body of caselaw which distinguishes Indigenous self-government from general municipal law and tax policy in recognition of the importance of ameliorative legislation such as the *Indian Act*, RSC 1985, c I-5, and the *MSA*. The MSGC asks this Court to find that the history, context and purpose of the *MSA* necessarily implies an exception to the common law rule against the enactment of discriminatory bylaws, and as such, the provisions found in the Policies are *intra vires* the MSGC's authority.

b. Standard of Review

[46] In ***Canada (Minister of Citizenship and Immigration)*** **v** ***Vavilov***, 2019 SCC 65 [***Vavilov***], the Supreme Court of Canada established reasonableness as the presumptive standard of review. The Supreme Court also set out two types of situations where the presumption of reasonableness review can be rebutted. The first is where the legislature has indicated that it intends a different standard to apply. For example, where it explicitly prescribes the applicable standard of review or where it provides a statutory appeal mechanism signalling the legislature's intent that appellate standards apply. The second is where the rule of law requires that the standard of correctness be applied, including constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding the jurisdictional boundaries between two or more administrative bodies: ***Vavilov*** at paras 17, 53.

[47] In this case, what is at issue is the MSGC's authority to pass discriminatory taxation and assessment policies. The question of *vires* of a particular piece of subordinate legislation does not fall into any of the exceptions to the presumptive standard of reasonableness and therefore the reasonableness standard applies. There are a number of post-***Vavilov*** cases which support this conclusion: ***TransAlta Generation Partnership*** **v** ***Regina***, 2021 ABQB 37 at para 46 [***TransAlta***]; ***Auer*** **v** ***Auer***, 2021 ABQB 370 at para 11; ***Innovative Medicines Canada*** **v** ***Canada (Attorney General)***, 2020 FC 725 at para 65.

c. Analysis

[48] The issue I must determine is whether the Policies represent a reasonable exercise of the authority delegated to the MSGC under the *MSA*. In order to answer this question, the principles of modern statutory interpretation require me to read the words of the relevant sections in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *MSA*, the object of the *MSA*, and the intention of the Legislature: ***Rizzo & Rizzo Shoes Ltd (Re)***, [1998] 1 SCR 27 at para 21 and ***Canada Trustco Mortgage Co*** **v** ***Canada***, 2005 SCC 54 at para 10. The history of the Métis people in Alberta set out at paragraph 7 of this decision is important to this purposive interpretation.

i. Tax policy versus Indigenous tax policy

[49] The background and rationale for Indigenous tax exemptions arises from historical context and has no connection with general tax policy itself: Vern Krishna, *Fundamentals of Canadian Income Tax* (Carswell: Toronto, 2014) at 93.

[50] This important historical context was also recognized in the context of the *Indian Act* taxation bylaws on reserve in ***Canadian Pacific Ltd.*** **v** ***Matsqui Indian Band***, [2000] 1 FC 325, 1999 CanLII 9362 (CA) [***Matsqui (FCA)***] at para 88:

> [88] ...Equally important are the concept of native self-government, which section 83 of the *Indian Act* seeks to promote through the aegis of taxation by-laws, and the historic reasons which warrant an exception to the common law rule prohibiting the enactment of discriminatory by-laws. Absent that historical framework, it would be unjust for this Court to sanction a quasi-legislative scheme in which only non-Indians are subject to taxation on reserve lands.

[51] The MSGC submit that though Métis people have a distinct history and are not governed by the *Indian Act*, similar historic reasons warrant an exception to the common law rule against the enactment of discriminatory bylaws. The MSGC points out there is no dispute by the parties

that the Métis in Alberta are a historically disadvantage community. In ***Alberta (Aboriginal Affairs and Northern Development)* v *Cunningham***, 2011 SCC 37 at para 70 [***Cunningham***], that history was summarized as follows:

> [70] Finally, as required by *Kapp*, there is a correlation between the program and the disadvantage suffered by the target group. In this case, the correlation is manifest. The history of the Métis is one of struggle for recognition of their unique identity as the mixed race descendants of Europeans and Indians. Caught between two larger identities and cultures, the Métis have struggled for more than two centuries for recognition of their own unique identity, culture and governance. The constitutional amendments of 1982 and, in their wake, the enactment of the *MSA*, signal that the time has finally come for recognition of the Métis as a unique and distinct people.

ii. The history, context and purpose of the *MSA*

[52] In ***Cunningham*** at para 66, McLachlin CJ spoke to the purpose of the *MSA*, finding the purpose was to provide Alberta's Métis Settlements with the same land protection enjoyed by Indian bands:

> [66] The history of the struggle that culminated in the *MSA* supports this view of the object of the challenged legislation. The *MSA*, as discussed earlier, is the result of a negotiation process between the Métis of Alberta and the Province and the outcome of an ongoing struggle for self-preservation. The Métis considered themselves as one of three Aboriginal groups in Canada, but this was not recognized until the *Constitution Act, 1982*. Unlike Indians, however, they enjoyed no land base from which to strengthen their identity and culture or govern themselves. Nor did they enjoy the protection of an equivalent to the *Indian Act*. Their aboriginality, in a word, was not legally acknowledged or protected. Viewed in this perspective, the ameliorative program embodied in the *MSA* emerges as an attempt to provide to Alberta's Métis settlements similar protections to those which various Indian bands have enjoyed since early times. [Emphasis added]

[53] The MSGC points out that the historical context and the legislative intention to protect the ability of historically disadvantaged Métis people to benefit from their property is apparent in the *MSA* and the rest of the Accord Legislation (*Métis Settlements Accord Implementation Act*, RSA 2000, c M-15; *Métis Settlements Land Protection Act*, RSA 2000, c M-16; *Constitution of Alberta Amendment Act, 1990*, RSA 2000, c C-24) as seen by the following:

(a) That "the Metis should continue to have a land base to provide for the preservation and enhancement of Metis culture and identity to enable the Metis to attain self-governance under the laws of Alberta" is an expressly stated objective of the *MSA*: s. 0.1(a)

(b) MSGC holds the letters patent/fee simple rights to all Settlement lands: *MSA*, s. 0.1(b), *Constitution of Alberta Amendment Act, 1990*, RSA 2000, c C-24

(c) Land protection takes a prominent role in the Accord Legislation

a. the fee simple estate in Settlement lands may not be mortgaged, charged or given away as security: *Metis Settlements Land Protection Act*, RSA 2000, c M-16, s. 5, and

b. the fee simple estate in Settlement lands may not be acquired through expropriation and is exempt from seizure and sale: *Constitution of Alberta Amendment Act, 1990*, RSA 2000, c C-24, ss. 3-4

[54] This land-based focus and self-governance objective was confirmed by McLachlin CJ in ***Cunningham*** at para 65. MSGC argues that as such, when assessing the Policies passed pursuant to the *MSA*, the Court's analysis cannot be limited to general tax policy considerations, but must be situated within the context of Indigenous tax policy, the history of the Métis in Alberta and the purpose of the Accord Legislation.

[55] The MSGC further argues that municipal tax law principles cannot by applied unequivocally to the *MSA* and the Policies because MSGC derives its authority not only from statute, but also from the history and constitutional position of the Métis people. This fundamental difference between Métis Settlements and municipalities was recognized by Devlin J in ***Elizabeth*** at para 100-101:

> [100] This principle finds traction in the taxation context. While Métis Settlements are broadly analogous to municipalities, they remain fundamentally different in their history, evolution, and context. That lens of difference must be applied when considering the revenue-generating powers granted to them under the *MSA*. As the Supreme Court of Canada held in ***Canadian Pacific Ltd* v *Matsqui Indian Band***, [1995] 1 SCR 3 ["***Matsqui***"] at para 18:
>
> > ...[I]t is important that we not lose sight of Parliament's objective in creating the new Indian taxation powers. The regime which came into force in 1988 is intended to facilitate the development of Aboriginal self-government by allowing bands to exercise the inherently governmental power of taxation on their reserves. Though this Court is not faced with the issue of Aboriginal self-government directly, the underlying purpose and functions of the Indian tax assessment scheme provide considerable guidance in applying the principles of administrative law to the statutory provisions at issue here. I will therefore employ a purposive and functional approach where appropriate in this ruling.
>
> [101] While the history and constitutional position of Métis people is not entirely the same as that of First Nations, similar principles apply here. In ***Matsqui***, Lamer CJ and Cory J characterized the broader purposes of First Nations' taxation powers in the following terms:
>
> > Here, the evidence indicates that the purpose of the tax assessment scheme is to promote the interests of Aboriginal peoples and to further the aims of self-government. Although the scheme resembles the kind of tax assessment regime we see at the municipal level of government in Canada, it is more ambitious in what it sets out to achieve. The scheme seeks to provide

> governmental experience to Aboriginal bands, allowing them to develop the skills which they will need for self-government: at para 43.

[56] I agree with the MSGC that it is apparent that the legislative intent of the *MSA* was not to create municipalities, but to establish something entirely different – a land base in the form of Settlements to preserve culture and identity and to enable the Métis to attain self-governance.

[57] There are other distinctions that set Settlements apart from municipalities, such as the MSGC and Settlements ability to control who may live on Settlement lands. A non-Settlement member is not permitted to reside on Settlement lands unless that person is immediate family of a Settlement member, a teacher or health care worker, an employee of the Settlement, or is permitted to reside on Settlement lands by a MSGC policy or Settlement bylaw: *MSA*, s. 92. As the MSGC points out, this power to exclude or distinguish between residents based upon race or ethnicity is not afforded to municipalities and would likely breach both the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 and the *Alberta Human Rights Act*, RSA 2000, c. A-25.5.

[58] The political rights granted to Settlement members are also very different than the political rights granted to municipal citizens: *MSA* ss. 6, 14, 55, 75, 216.

[59] In ***Matsqui (FCA)*** at para 29, Marceau J spoke to the difference between municipalities and Indian bands, finding that the rational behind the granting of taxation powers is clearly not the same.

> [29] Finally, it appears to me quite inappropriate to apply to Indian bands' new by-law powers the principles of interpretation developed in municipal law. There is a big difference between municipalities and Indian bands in that the existence of the Indian groupings is not like that of municipal units, wholly dependent on an act of government authority, and the rationale behind the granting of taxation powers to both such bodies is clearly not the same. The devolved taxation powers of municipalities exists, to my mind, only to further governmental objectives of efficiency in operation and administration. The recent granting of taxation powers to Indian bands has a much broader and humane objective, which can only be seen in the context of furthering the ability of natives to govern themselves and thus, to a certain extent, invokes rights and responsibilities that predate all Indian acts. It would be wrong, in my view, to subject both sets of rules to the same standard of inflexibility, rigidity and limitation.

[60] I agree with the MSGC, that the starting point for analyzing any complaints of discrimination must be the historical context of Indigenous tax policy, including the unique history of the Métis in Alberta, the ameliorative purpose of the *MSA*, and the important differences between municipalities and the MSGC.

iii. Must discrimination be expressly authorized?

[61] A decision-maker exercising discretionary authority may not enact a discriminatory regulation, unless the enabling legislation expressly provides for or implicitly delegates such power by necessary inference: ***Montréal (City of)* v *Arcade Amusements Inc***, [1985] 1 SCR 368 at 404, 413 [***Arcade Amusements***]. As per Beetz J at 413: "The principle transcends the limits of administrative and municipal law. It is a principle of fundamental freedom."

[62] The Applicants rely on McLachlin J's dissent in ***Shell Canada Products Ltd* v *Vancouver (City)***, [1994] 1 SCR 231 at 259 [***Shell***] for the proposition that discrimination in the context of taxation is generally viewed as requiring express authority "because of the presumption that the legislature intends all citizens to be treated equally on such matters. Therefore, unless the statute clearly provides the contrary, the municipality has no power to discriminate."

[63] However, Sopinka J, writing for the majority in ***Shell*** at 282, held that authorization to discriminate can also be implied:

> In dealing with this issue, Southin J.A. in the Court of Appeal was of the view that the approach taken in respect of the first point also applied to the discrimination point. On this approach, there being nothing in the legislation prohibiting the Resolutions, they were valid. With respect, this approach is directly at variance with the decision of this Court in *Sharma*, *supra*, and the authorities referred to therein. The appropriate question is whether discrimination is expressly or impliedly authorized. [Emphasis added]

[64] This finding is consistent with the Supreme Court's earlier decision in ***R* v *Sharma***, [1993] 1 SCR 650 at 667-668, where it was held that:

> I agree with Arbour J.A. that this case is governed by the decision of this Court in *Montréal (City of) v. Arcade Amusements Inc.*, *supra*, with respect to the discrimination in the by-law scheme. In that case, the Court held that the power to pass municipal by-laws does not entail that of enacting discriminatory provisions (i.e., of drawing a distinction) unless in effect the enabling legislation authorizes such discriminatory treatment. See also Rogers, *The Law of Canadian Municipal Corporations* (2nd ed. 1971), at pp. 406.3-406.4:
>
> (...)
>
> The rule against discriminatory by-laws is an outgrowth of the principle that, as statutory bodies, municipalities "may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation" (Makuch, *Canadian Municipal and Planning Law* (1983), at p. 115. [Emphasis added]

[65] I agree with the MSGC's position that these binding authorities make it clear that express authorization for discrimination is not necessary, but that "implicit delegation by necessary inference", implied authorization, authorization "in effect" or "necessarily or fairly implied by the expressed power in the statute" will be sufficient to authorize differential treatment.

[66] The *MSA* does not grant express authority for the MSGC to exempt Settlement members and their businesses from taxation. However, I find the general requirement of express authority does not apply in this case because the nature of the *MSA* rebuts the presumption of equal treatment. As per McLachlin CJ's description of the *MSA* at para 53 of ***Cunningham***, the *MSA* is an ameliorative program that is meant to "confer benefits on one group that are not conferred on others."

iv. Is there implication by necessary inference in the *MSA*?

[67] There is no case authority directly on point as to whether the *MSA* allows the MSGC to discriminate between Settlement and non-Settlement members for the purposes of taxation.

[68] In ***Matsqui (FCA)***, one of the two issues which the Federal Court of Appeal dealt with was whether Indian Bands were allowed to pass a bylaw exempting band members from taxation while simultaneously taxing non-Indians. Section 87 of the *Indian Act* states that the government cannot tax the on-reserve property of Indians; however, s. 83 allows band councils to collect taxes from their own members. ***Matsqui (FCA)*** was complex in that each member wrote a separate opinion, and the two that allowed the appeal did so on a different ground. However, two of the three members of the Court determined that the discriminatory tax bylaw was valid.

[69] Robertson J found that although the *Indian Act* did not expressly authorize band councils to discriminate between members and non-members, compelling policy considerations rooted in Aboriginal history and sovereignty supported an implied authorization to discriminate by necessary implication. As Robertson J explains at para 193-195:

> [193] ...The tax exemption in section 87 of the *Indian Act* for the Indian interest in reserve lands and property derives from the historic obligation of the Crown to protect Indian lands, an obligation which was first recognized by *The Royal Proclamation of 1763*. Such an exemption is also consistent with the notion of Aboriginal sovereignty over reserve lands or, in other words, Aboriginal self-government...
>
> [194] Accordingly, the tax exemption for reserve lands in section 87 may be seen as an inherent aboriginal right, stemming from the historic occupation of such lands by autonomous aboriginal societies...to the extent that the tax exemption for the Indian interest in reserve lands flows from notions of aboriginal sovereignty, such exemption should be protected in the absence of statutory directions to the contrary.
>
> [195] It is highly significant that the *Indian Act*, by its very nature, draws distinctions between Indians and non-Indians in Canada. Indeed, the codified tax exemption in section 87 constitutes a significant distinction between Indians and non-Indians. Such distinctions are within Parliament's jurisdiction to enact, due to its exclusive authority over "Indians and lands reserved for Indians" in class 24, section 91of the *Constitution Act, 1867*. By-laws enacted by an Indian band pursuant to section 83 of the *Indian Act* constitute subordinate legislation. Accordingly, it is reasonable to imply that the constitutional authority to distinguish between Indians and non-Indians for the purpose of taxation was delegated to the Indian band councils.

[70] Robertson J summarized at para 88:

> [88] ...Equally important are the concept of native self-government, which section 83 of the *Indian Act* seeks to promote through the aegis of taxation by-laws, and the historic reasons which warrant an exception to the common law rule prohibiting the enactment of discriminatory by-laws. Absent that historical framework, it would be unjust for this Court to sanction a quasi-legislative

> scheme in which only non-Indians are subject to taxation on reserve lands.
> [Emphasis added]

[71] In addition to Robertson J's analysis, Marceau J found that it would be "inconceivable" for Parliament to have intended Indians to give up their basic privilege of tax exemption as a necessary condition of Bands exercising their tax-levying power under s. 83. He also took issue with the application of municipal law interpretation principles to Indian Bands and the notion of discrimination itself in the Indigenous law context at para 28:

> [28] The learned Motions Judge speaks of the possibility of abuse. However, it seems to me that any such fear should be greatly alleviated by the realization that all such taxing by-laws must be approved by the Minister of Indian Affairs. On the other hand, the notion of discrimination which is being invoked is not easy to grasp. Where one speaks of the elements of the special status of a group of individuals within the community as determined by Parliament, one can speak of inequality, of course, but not necessarily discrimination.

[72] In dissent on this issue, Desjardins J found that the bylaw was invalid. She held that although band councils are a *sui generis* type of subordinate statutory body, they are nonetheless required to justify discriminatory bylaws on the principle articulated in ***Arcade Amusements***. She determined that although s. 83 allows Indians to tax their own property, it does not by necessary implication exempt Indians from being taxed by their own band councils. Even Robertson J commented that "any attempt by band council to impose the entire burden on taxation solely on non-Indians would not survive the light of day": ***Matsqui (FCA)*** at para 196.

[73] Ultimately, a majority of the Court in ***Matsqui (FCA***) recognizes a distinction between settler and Indigenous tax policy. This distinction arises out of the historical framework of Indigenous peoples in Canada, including their partially codified sovereign rights. For the majority of the Federal Court of Appeal, this historical framework and its related policy considerations were strong enough to overcome the tax law principle of equitable treatment and imply authority to discriminate on the basis of Indian status.

[74] A key difference between the *Indian Act* context and the *MSA* is that there is no provision in the *MSA* analogous to s. 87 of the *Indian Act*. Métis people have never held the "basic privilege" of tax-exempt status, and there is no inherent Métis right to be free of taxation by the Crown. Therefore, Métis Settlement members are not being asked to give up a benefit by enacting a non-discriminatory bylaw.

[75] However, Courts have recognized that the *MSA* exists as ameliorative legislation precisely because the Métis did not receive "benefits" under the *Indian Act* to start out with:

> "...the ameliorative program embodied in the *MSA* emerges as an attempt to provide to Alberta's Métis settlements similar protections to those which various Indian bands have enjoyed since early times": ***Cunningham*** at para 66
>
> "The historic disadvantages suffered by Métis communities, coupled with the unique challenges that arise in operating small-scale self-governing communities, suggest there is more leeway to what a "reasonable body" might decide is a reasonable taxation structure. Put simply, Métis Settlements did not begin with very much": ***Elizabeth*** at para 102

[76] Ultimately, the purpose of delegating law-making functions to First Nations and Métis Settlements is the same – to recognize and facilitate self-government. Speaking in the context of a First Nation, the Federal Court stated "the explicit embracing of self-government in the preamble of the [*First Nations Fiscal Management Act*] entails a narrow interpretation of substantive limits on the powers of the self-governing entity. Thus, in the context of self-government, where a power is recognized under certain substantive conditions, it is mainly for the self-governing entity to implement those conditions and to determine what they entail in a specific case": ***Ontario Lottery and Gaming Corporation* v *Mississaugas of Scugog Island First Nation***, 2019 FC 813 at para 49-50.

[77] Self-government is also explicitly embraced in the preamble of the *MSA*. As commented upon by McLachlin CJ in ***Cunningham*** at para 60:

> [60] I begin with the object of the *MSA* program. The discussion that follows establishes that the object of the program is to enhance Métis identity, culture and self-government through the establishment of a Métis land base. This is a special type of ameliorative program. Unlike many ameliorative programs, the object of the program is not the direct conferral of benefits onto individuals within a particular group, but the strengthening of the identity of the Métis as a group - one of three aboriginal groups recognized in the Constitution.

[78] Similar to the analysis in ***Matsqui (FCA)***, I find that the authority to differentiate between classes of people has not only been delegated to the MSGC via the *MSA* – it is the entire purpose of the *MSA*. With the history and context of the *MSA* in mind, it is clear the policies enacted under the *MSA* were never intended to be applied equally or with fair benefit to non-Settlement member owned businesses. To find that taxation policies have to treat Settlement members and Settlement member owned companies the same way as non-Settlement owned companies who do business on Settlement lands, would undermine the very goal of the *MSA* – to enhance the Métis identity, culture and self-government through the establishment of the Métis land base. I agree with the MSGC that to so find would erode any meagre advantage that Settlement members and member owned companies derive from residing and operating on the Settlements. I find that as an ameliorative program, the *MSA* implicitly authorized the MSGC to enact tax and assessment policies that differentiate between Settlement members/member owned corporations and non-Settlement member owned corporations.

d. Conclusion

[79] This issue involves the clash of two regimes: the ameliorative program of the *MSA* aimed at providing substantive equality for a historically marginalized group, and municipal tax law which operates based on common law principles of formal equality and horizontal equity.

[80] There is no caselaw that considers the limits of MSGC's tax policy powers. A straightforward application of municipal tax principles supports the Applicants' argument that discriminating as between classes based on identity offends the common law and is *ultra vires* the MSGC's statutory authority. However, there are cases which recognize a distinction between general tax law and taxation in the Indigenous context. Given the purpose of the *MSA* as ameliorative legislation designed to benefit Métis Settlement members and the deference that should be owed to self-governing Indigenous bodies, I find that the MSGC has authority to discriminate by necessary implication by exempting Settlement members' property from taxation. Thus, the Policies are *intra vires* the MSGC's statutory authority.

Issue 2: In enacting the Policies, was a duty of procedural fairness owed by MSGC to the Applicants?

(a) The Parties' Positions

(i) The Applicants

[81] The Applicants concede that typically no duty of procedural fairness arises when a decision is legislative in nature, but argue an exception arises where an executive decision singles out a person or business for financial or reputational harm. They say that where the legislative act is discriminatory, a duty of fairness arises to require that the targeted business be afforded a right of response. They submit that in seeking to impose a discriminatory taxation regime that was radically different from the prior regime, the MSGC had a duty to inform them of the proposed changes and provide them with the opportunity to make submissions.

(ii) MSGC

[82] MSGC submits that it is clear there is no duty of procedural fairness owed by MSGC to the Applicants pursuant to the common law to notify or consult with the Applicants in passing the Policies because the common law provides that there is no duty of procedural fairness owed in respect of legislative or policy decision making: ***Attorney General of Canada* v *Inuit Tapirisat et al***, [1980] 2 SCR 735 at 756-57 [***Inuit***]; ***Canadian Assn of Regulated Importers* v *Canada (Attorney General)***, [1994] 2 FC 247 (FCA) [***Regulated Importers***].

[83] Further, MSGC says there is no duty of procedural fairness owed to the Applicants under the *MSA* or MSGC policies as the process for enacting such policies under the *MSA* creates no rights to procedural fairness for or consultation with the Applicants.

(b) Standard of Review

[84] The question of whether a duty of procedural fairness is owed is considered on the standard of correctness: ***TransAlta*** at para 46, citing ***Anterra Sunridge Power Centre Ltd* v *Calgary (City)***, 2014 ABQB 223 at para 74, citing ***CUPE* v *Ontario (Minister of Labour)***, 2003 SCC 29 at para 100.

(c) Analysis

[85] A public authority that makes an administrative decision which affects the rights, privileges and interests of an individual has a duty to act fairly: ***TransAlta*** at para 88 citing ***Cardinal* v *Director of Kent Institution***, [1985] 2 SCR 643 at 653. But no duty of procedural fairness is owed in respect of legislative decision making: ***Inuit*** at 756-757. Likewise, high-level policy decisions are also generally immune from judicial review: ***Regulated Importers*** at para 19.

[86] The question then is whether the MSGC's decision to enact the Policies was legislative or administrative in nature. This distinction was recently reviewed by Price J in ***TransAlta*** at para 91:

> [91] The Applicants cite ***Potter* v *Halifax Regional School Board***, 2002 NSCA 88 at para 39 for the following discussion of the distinction:
>
> > As set out in ***Knight*** (*supra*), legislative decisions are to be distinguished from acts of a more administrative and specific nature. I have found the following passage from S.A. De Smith's

> text, *Judicial Review of Administrative Action*, [3rd ed.], 1973 London: Stevens at p. 60 on the distinction between administrative and legislative acts helpful for my analysis:
>
> > The distinction between legislative and administrative acts is usually expressed as being a distinction between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice.

[87] MSGC submits that it is the legislative branch or top level of Métis governance established by the *MSA*, and its policy making powers are more properly characterized as legislative or policy decision making, rather than administrative. MSGC points out that the Policies under consideration here are intended to respond to the very significant social and economic concerns facing the Settlements in Alberta, such as significant infrastructure gaps. Consequently, these legislative and policy decisions do not attract a common law duty of procedural fairness.

[88] I note MSGC's position on this point is supported by the comments in ***United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Local 170)*** **v** ***British Columbia (Ministry of Labour and Citizens' Services)***, 2007 BCSC 1518 said this at para 38:

> In conducting the analysis to determine whether procedural fairness applies, the court looks at whether the decision arises from a power that the legislature has reserved to the executive branch in order that it can respond to social, economic and political concerns of the moment. [Emphasis added]

[89] The Applicants rely on the decisions in ***Tesla Motors Canada ULC*** **v** ***Ontario (Ministry of Transportation)***, 2018 ONSC 5062 [***Tesla***] and ***Homex Realty*** **v** ***Wyoming***, [1980] 2 SCR 1011[***Homex***], to support their position that an exception to the general rule exists where executive decisions are discriminatory in that they single out a person or business for financial or reputational harm.

[90] In ***Homex***, a municipality passed a bylaw which deregistered a subdivision plan affecting a single party. The Supreme Court held that since the proposed bylaw directly and adversely interfered with the private rights of one person, that person was entitled to notice and a hearing: ***Homex*** at 1030-1031.

[91] The decision in ***Tesla*** was recently summarized by Price J in ***TransAlta*** at para 102:

> [102] In ***Tesla***, Tesla Motors Canada ULC brought an application to strike down the Ontario government's decision to exclude it and its customers from a government program that extended a government subsidy for electric car buyers who bought their cars before July 11, 2018. Tesla Motors received a customized

> letter from the Ontario government indicating that it was excluded from the program subsidy because it was not a franchised business. This had the effect of including all dealerships in Ontario except Tesla Motors. The Ontario Superior Court of Justice found that the Ontario government had "changed its role from policy-setting at a high level of abstraction to executive program administration": see *Tesla* at para 40. The Ontario government's decision to exclude Tesla Motors was an administrative, not legislative, decision. The Court found that the Ontario government's decision to exclude Tesla Motors was "egregious" and stated at para 64:
>
> > In conclusion, the decision to exclude Tesla by limiting the transition program to only franchised dealerships is arbitrary and unrelated to the purposes of the statutory or regulatory discretion being exercised. In my view, it is egregious, as that term was used by Dickson J. above, because, not only was it made for an improper purpose, but because the Minister singled out Tesla for reprobation and harm without provided Tesla any opportunity to be heard or any fair process whatsoever. [Emphasis added]

[92] I agree with MSGC that ***Homex*** and ***Tesla*** are distinguishable from the case at bar. The Policies arose from a high-level policy decision by the MSGC to tax only non-Settlement businesses in order to further the legitimate aims of the *MSA* to provide for the preservation and enhancement of Métis culture and identity and to enable the Métis to attain self-governance in the Settlements. The Policies do not single out a single taxpayer from other similar taxpayers or adversely interfere with the private rights of a single person. Rather, they address groups of taxpayers and enable Settlements to enact tax bylaws based on their own unique budgetary needs. I agree with MSGC that just because the Policies impact a small group does not change the nature of the act from legislative/policy making to administrative. Such was also the conclusion in ***Manitoba Metis Federation Inc* v *Brian Pallister et al***, 2020 MBQB 49 at para 136:

> [136] In Canada, courts have repeatedly held that interested persons hold no procedural rights in relation to Cabinet policy decisions apart from statutorily or constitutionally prescribed procedural requirements. This consistent approach has been taken irrespective of the fact that it is obvious that Cabinet policy decisions can have a sometimes profound impact on the rights, privileges and interests of individuals and communities. ...

[93] I further agree with MSGC that no duty of procedural fairness was owed to the Applicants under the provisions of the *MSA* or MSGC procedural policies. The *MSA* provides that MSGC may, after consultation with the Minister, make, amend or repeal General Council policies. MSGC is required to provide its policies to the Minister for approval or veto and the Minister's order or notice must be sent to each Settlement council: s. 222 – 225 *MSA*. The *MSA* does not otherwise mandate MSGC to notify or consult with the public or stakeholders, or even with Settlement members in passing its policies.

[94] Section 222(1)(ii)(v) of the *MSA* permits MSGC to make policies respecting the process and procedure for considering and voting on resolutions and policies, including public notice and consultation with Settlement members. MSGC has chosen to do so with its Process and

Procedure for Making Policies, GCP 2006/03 (March 31, 2007), A Gax I. 207 (*Procedure Policy*). Section 2 of the *Procedure Policy* clearly sets out that the purpose of that policy includes "public notice and consultation with settlement members." Section 9(1)(b)(ii) requires any such notice to be posted in all Settlement offices.

[95] Consequently, I agree with MSGC that its only obligation is to direct notice of proposed polices be posted in Settlement offices, the clear intention of which is to notify Settlement members, not the public or other stakeholders.

[96] I find there was no duty of procedural fairness owed by MSGC to the Applicants in relation to the passing of the Policies.

Issue 3: Procedural deficiencies and procedural unfairness relating to the Tax Bylaw

[97] The Applicants allege that as "affected persons" they were not given notice of, or an opportunity to speak at, the public meeting that took place on May 29, 2019 before Fishing Lake voted on the Tax Bylaw as required by the *MSA*: ss. 52-55. They further allege that the Tax Bylaw was not passed before May 15th, as required by s. 8(2) of the Taxation Policy, and that the budget was not passed before the Tax Bylaw.

(a) The procedural requirements of the *MSA*, the 2009 Fishing Lake Procedural Bylaw, and the Taxation Policy

[98] The *MSA* establishes mandatory procedures which must be followed to pass Settlement bylaws: *MSA* ss. 52, 54, and 55. These sections prescribe four key procedural elements necessary for a valid bylaw. These are:

(i) three readings of the proposed bylaw at two separate meetings (s. 52(1));

(ii) 14 days' notice between the second and third readings (s. 54(2));

(iii) an opportunity for affected persons to participate in discussions on the issues raised by the bylaw in a public meeting between second and third reading (s. 55(3)); and

(iv) a quorum of 15 Settlement members eligible to vote on the bylaw (s. 55(1)).

[99] Important to these proceedings are the notice provisions found in ss. 54-55 of the *MSA*:

> 54(1) Every proposed bylaw must be presented at a public meeting in the settlement area after second reading but before third reading.
>
> (2) At least 14 days' public notice of the date, time and place of the public meeting must be given.
>
> ...
>
> 55(3) Persons affected by an issue under discussions at a public meeting have the right to participate in the discussion of the issue but may not vote on it unless they are settlement members and eligible to vote on it.

[100] Public notice is defined in the *MSA* as notice given pursuant to s. 233 of the *MSA*. Section 233 requires that notice be posted in the Settlement office and also published at least once in a newspaper having general circulation in the Settlement area or posted in at least four other widely separated and conspicuous places in the Settlement area: *MSA*, ss. 1(m) and 233.

[101] In 2009, Fishing Lake passed procedural Bylaw 2009-0128 ("*2009 Procedural Bylaw*"), which requires that when motions are presented at a general meeting, persons affected by an issue under discussion have the right to participate in the discussion, but may not vote on it unless they are Settlement members and eligible to vote. This provision essentially mirrors that of s. 55(3) of the *MSA*.

[102] Sections 8(1) - (3) and 39(1) of the Taxation Policy are also relevant. They provide that:

> **Tax Levy**
>
> **8.**
>
> **(1)** No settlement council may pass a property tax bylaw in respect of a year unless the operating and capital budget for that year has been passed by the settlement council.
>
> **(2)** A property tax bylaw that sets the rate of tax to be applied to each assessment class must be passed by a settlement council on or before May 15 in each taxation year.
>
> **(3)** A tax rate is calculated by dividing the amount of revenue required pursuant to the budget by the total assessed value of all property [emphasis added]
>
> **Validity**
>
> **39.**
>
> **(1)** Nothing done under this Policy shall be deemed void or invalid, nor shall the liability of any person to pay tax or any other amount under this Policy by affected by
>
> **(c)** a failure of the settlement council, tax administrator or the assessor to do something within the required time. (emphasis added)

(b) Enactment of the Tax Bylaw

[103] As explained in paragraph 7, up until 1997, Métis Settlements had no industrial taxation power. Under the former *BPCP*, enacted in 1997, Métis Settlements were only allowed to set tax rates based on the tax rates set by adjacent municipalities. Thus, the *BPCP* taxation rates had no connection to the actual required expenditures of a Métis Settlement. Instead, taxation rates were tied to non-Métis municipalities simply because they were adjacent.

[104] The enactment of the Taxation Policy gave Métis Settlements equal taxation power to that historically enjoyed by municipalities under the *Municipal Government Act*, RSA 2000, c M-26 (*MGA*). A Métis Settlement could now set its own tax rate based on its budgetary needs.

[105] Fishing Lake's Record includes a number of relevant documents including a Strategic Plan, a Strategic Priorities 2018-2020, and a Business Case Strategic Plan for 2020 and Beyond ("2020 and Beyond Strategic Plan"). The 2020 and Beyond Strategic Plan is a comprehensive document that includes background information about the economic situation of Fishing Lake, including a significant infrastructure gap that impedes economic, social and community

developments. As stated in the 2020 and Beyond Strategic Plan, this gap makes it difficult to reach the achievement of self-determination and self-reliance.

[106] To assist in preparing its budget for use with the new Policies, Fishing Lake had an engineering report prepared that looked at roadways, water, wastewater, and drainage entitled 2018 Fishing Lake Metis Settlement Infrastructure Assessment and Capital Plan Report ("ISL Report"). The ISL Report included a prioritized capital plan for Fishing Lake that breaks down recommendations into three categories: high criticality, moderate criticality, and low criticality. The prioritized capital plan recommended that $3, 127, 768.27 needed to be spent in the next three years on repairs to critical infrastructure assets. To assist with costs, Fishing Lake applied for grants in relation to several capital projects. It is with this backdrop in mind that Fishing Lake approached the passing of its budget and tax bylaw.

[107] Fishing Lake passed its first budget on April 5, 2019. This budget did not cover all the needs of the settlement but did provide some of the needed upgrades and replacement of aging infrastructure.

[108] On May 14, 2019, a public vote of Property Tax Bylaw#004/2019 was held. This bylaw had a required tax revenue of $12, 512, 709 to be raised from a total of $31, 536, 200 in taxable property (397% tax rate). The bylaw did not pass.

[109] On May 15, 2019, a new property tax bylaw was submitted for 1st and 2nd reading. Property Tax Bylaw#005/2019 had a required tax revenue of $2, 800, 000 to be raised from a total of $31, 536, 200 in taxable property. The taxation rate was therefore 8.88%. The 3rd reading and public vote of Property Tax Bylaw#005/2019 occurred on May 29, 2019; it passed.

[110] On July 23, 2019, Fishing Lake passed an amended Budget Bylaw No. 005/2019. Given the reduced revenue from taxation, Budget Bylaw No. 005/2019 did not address many of the ongoing and critical infrastructure needs of Fishing Lake.

(c) Failing to pass the Tax Bylaw by May 15th had no effect on its validity

[111] Section 8(1) of the Taxation Policy states that no settlement council may pass a property tax bylaw in respect of a year unless the operating capital budget for that year has been passed by the Settlement council. This makes sense given that s. 8(3) of the Taxation Policy provides that the tax rate is set by dividing the amount of revenue required under the budget by the amount of assessable property.

[112] Section 8(2) of the Taxation Policy requires that a property tax bylaw that sets the rate of tax to be applied to each assessment class must be passed by a Settlement council on or before May 15 of each taxation year.

[113] There is no doubt that the Tax Bylaw was passed on May 29, 2019, after the May 15 deadline. This is because the initial Property Tax Bylaw #004/2019 did not pass the public vote that took place on May 14, 2019 and a new Property Tax Bylaw #005/2019 had to be introduced for first and second reading on May 15, 2019. Fourteen days notice was then required before third reading and a vote on Property Tax Bylaw #005/2019. The Tax Bylaw eventually passed fourteen days later on May 29, 2019.

[114] I disagree with the Applicants that the failure to pass the Tax Bylaw by May 15th means that it is void. Section 39 of the Taxation Policy contemplates that there may be failures by

Settlements to pass bylaws within the required timeframe, but such failures have no effect on the validity of the bylaw.

[115] Although it was not specifically argued in the Applicants' written submissions, I also disagree that the amendment to Budget Bylaw No. 005/2019 in July 2019 had any effect on the validity of the Tax Bylaw passed May 29, 2019. Although there is a requirement to have a budget passed before passing a tax bylaw, Fishing Lake did pass a budget first, but had to amend that budget after the first tax bylaw failed to pass. The budget was amended to reflect the decreased budget required by passing the Tax Bylaw which had a lower tax rate. Nothing turns on this point, but even if I am wrong, I find that any procedural irregularity was not of sufficient matter to result in the invalidity of the Tax Bylaw.

(d) The enactment of the Tax Bylaw did not comply with the procedural notice requirements of the *MSA*

[116] The Appellants argue that the *MSA* contemplates and requires that with respect to all non-budget bylaws, a public meeting will be held prior to third reading and all affected persons are entitled to at least 14 days' notice of the public meeting and may make representations at the public meeting.

[117] There is actually nothing in the procedural requirements under the *MSA* that entitles all affected persons to at least 14 days notice of the public meeting, as suggested by the Applicants. The *MSA* simply indicates that notice of the meeting shall be posted or published in the proscribed manner, and that any affected persons have a right to be heard at the meeting. While the *MSA* might not entitle those affected to *personal* notice, the clear intention is that notice will be given in such a way that it is likely to come to the attention of affected people. When the group of affected persons is small, and the impact of the bylaw substantial, the duty to ensure the notice comes to the attention of those affected is heightened. Following the legislation in form is not enough, there is a need to follow the legislation in substance.

[118] Here, the group of affected people includes the Applicants. They are the only four companies doing business in Fishing Lake whose tax bill is negatively affected by the enactment of the Tax Bylaw. Fishing Lake was well-aware of this fact, and also aware that the Applicants were unhappy with the tax increases in recent years as there is ongoing litigation between the parties under the prior *BCPC*. Posting notice of the May 29th meeting in a place where it was likely to come to the attention of these four companies would have been a simple endeavour. Actually providing it directly, while not strictly required, would have been even easier.

[119] Section 233 of the *MSA* requires notice be posted in two separate ways. First, in the Settlement office, and second, either published at least once in a newspaper having general circulation in the Settlement area **or posted in at least four other widely separated and conspicuous places in the Settlement area**. Counsel for Fishing Lake tells me there is no newspaper in general circulation in the Settlement, which means Fishing Lake was required to post notice in at least four other widely separated and conspicuous places in Fishing Lake.

[120] Fishing Lake argues that although there is no direct evidence that it posted notice of the third meeting scheduled for May 29, 2019, such notice can be inferred by 1) the fact that there was a resolution passed to give notice, and 2) the passing of the Tax Bylaw itself and the Minutes of the May 29th meeting, because 22 members of the Settlement were present for the vote.

[121] Fishing Lake takes the position that the onus is on the Applicants to prove the failure to comply with the procedural requirements of the *MSA*. It argues that there is no evidence before me that the Applicants did not receive notice, and the Affidavit evidence provided by the Applicants does not definitively say notice was not posted, it simply says as far as CN is aware, Fishing Lake did not give notice of any public meeting at which the Tax Bylaw was to be presented. It seems to me it would be difficult for the Applicants to say anything more definitive than that they are not aware of any public notice being given.

[122] Fishing Lake cites ***Fisher* v *Vaughan (Township)***, 1853 CarswellOnt 319 (UCCQB) at para 8 [***Fisher***] for the proposition that in the absence of direct evidence of the posting, it must be assumed that the notice was properly given. In ***Fisher***, the Court appears to have held that it is proper to first assume regularity in the passing of a bylaw otherwise great inconvenience might follow as it might be very difficult to show procedural compliance after a lapse of some years, or even a short period of time. The Court also commented that the applicant there ventured to go no further than file an affidavit of a person who said they have no recollection of having seen any notice, let alone assert that he does not believe due notice was given or that he did not have notice in time to oppose it.

[123] I disagree with Fishing Lake that the onus on proving a lack of notice is on the Applicants, and even if it is, I find that they have met that onus. In ***Thierman* v *Summer Village of Itaska Beach***, 2002 ABQB 343 [***Thierman***], Moen J was presented with a very similar situation to the one here. The allegation was that notice was not posted pursuant to the *MGA* requirements. Citing a number of cases, Moen J held that while the onus of proof is usually on the party who asserts a proposition, where the subject matter of the allegation is within the knowledge of one party, that onus may shift: ***Thierman*** at para 42. Moen J went on to point out that the law generally has an aversion to putting a burden on someone to prove a negative. She found, therefore, that the onus in ***Thierman*** lay with the respondent to prove that it did, in fact, post the notice in accordance with the legislative requirements. Having been provided with no such evidence, Moen J found there was no compliance (she did, however, go on to find that the non-compliance was not fatal to the validity of the bylaws in question because the applicants had an opportunity to attend the public hearing and voice their objections): ***Thierman*** at paras 55-66.

[124] The decision in ***Thierman*** makes good sense given that the judicial review system is set up so that those who have procedural and decision-making responsibilities are required to keep records of such procedures and decisions. Fishing Lake has provided no records to support the giving of notice and it is clear that the only people negatively affected by the Tax Bylaw were unaware of the May 29th meeting and proposed Tax Bylaw. Counsel for Fishing Lake indicated that the Tax Bylaw was passed in May 2019, and the judicial review application was not filed until July 2019, and was then amended in July 2020. He says it was not until the amendment that Fishing Lake was even aware that lack of notice was an issue as the original application plead reasonableness. However, as counsel for the Applicants pointed out in oral argument, the original application sought an order in the nature of *quo warranto* requiring Fishing Lake to produce a record of all matters concerning their consideration, adoption and implementation of the by-law, so there was actually notice early on with respect to the requirement to produce all documents, which would include those showing compliance with the notice requirements.

[125] The procedural notice requirements of the *MSA* are mandatory. Those who are given the power to make bylaws that affect other people, especially bylaws that are discriminatory in nature, surely have the obligation to follow the procedural requirements of the legislation that

gives them that power. Failing to keep and preserve procedural records is not a technicality. Those who have administrative power also have administrative responsibility, and part of that responsibility is keeping proper records to prove they have followed the rules relating to procedural fairness.

[126] As to the suggestion that an inference can be drawn that notice was properly given pursuant to the *MSA* (and the *2009 Procedural Bylaw*) simply because a resolution passed to give notice and enough Settlement members attended to reach a quorum to vote on the Tax Bylaw, I disagree. I could probably infer that some notice was posted somewhere, perhaps in the Settlement office, but that is not sufficient to comply with the mandatory notice requirements of the *MSA*. The notice requirement and opportunity to be heard serve an important purpose. As observed by Devlin J in ***Elizabeth*** at para 111:

> [111] Allowing impacted citizens to be meaningfully heard in the public consultation process preceding enactment of a bylaw is fundamental to the legality and legitimacy of the legislative process: ***Keefe* v *Clifton Corporation***, 2005 ABCA 144 at para 17. The failure to notify the small number of parties who were profoundly impacted by this proposed bylaw, together with the absence of a public hearing, are the sort of indicators of bad faith that erode the deference normally granted to a democratic decision-maker like the Elizabeth Settlement: ***HG Winton Limited and Borough of North York*** (1978), 20 OR (2d) 737 at 744.

[127] Affected persons have the right to make submissions, even if they cannot vote on the bylaw. I recognize that the situation here is different than that in ***Elizabeth*** where no public hearing was held at all. Here, there was a public hearing. However, that hearing was conducted without the knowledge of the Applicants, who were affected persons, and I find the reason it was conducted without the knowledge of the Applicants is because public notice was not properly given in accordance with the mandatory requirements of the *MSA*. There is no evidence before me that notice was posted in four widely separated and conspicuous areas of the Settlement. This was a mandatory procedural requirement under the *MSA*. Consequently, I find the duty of procedural fairness owed to the Applicants was breached when Fishing Lake failed to give notice in accordance with the mandatory requirements of the *MSA*.

(e) The failure to give notice is fatal to the Tax Bylaw

[128] Having found that Fishing Lake failed to give proper notice in accordance with the mandatory provisions of the *MSA*, it becomes necessary to consider whether the failure is fatal to the validity of the Tax Bylaw.

[129] The Applicants say that the appropriate remedy is a declaration that the Tax Bylaw is void as a result of the procedural deficiencies in its passing. Fishing Lake submits that even if there was non-compliance with the notice provisions, the non-compliance should not attract court sanction.

[130] In ***Janzen* v *Mountain View (County No. 17)***, 1997 CanLII 14958 (Alta QB), [1997] 9 WWR 540 [***Janzen***], Gallant J considered whether the failure to give proper notice of a public hearing respecting a proposed bylaw invalidated the subsequent passing of the bylaw. Gallant J provided a thorough review of the case law relating to statutory notice requirements for bylaws and set out the Supreme Court's decision in ***Costello and Dickhoff* v *City of Calgary***, [1983] 1 SCR 414 at 21, 23 Alta. LR (2d) 380 at 386 (SCC) [***Costello***], that strict compliance with

enabling legislation is only insisted upon when a municipality is exercising extraordinary powers or passing "by-laws concerning taxation, expropriation, or other interference with private rights."

[131] At para 39 of ***Janzen***, Gallant J concluded that where a municipality is not exercising extraordinary powers or interfering with private rights, courts may overlook a deviation from the mandatory requirements if:

(a) there was not a clear omission of some condition precedent;

(b) there was a mistake or omission done in good faith with intent to uphold the law; and

(c) where the mistake was wholly technical and nothing had occurred to create bias or suspicion of unfairness and the results would not have been different.

[132] Fishing Lake's position is that a review of the three factors set out in ***Janzen*** leads to the conclusion that this Court should overlook its deviation from the mandatory notice provisions. However, ***Janzen*** specifically relies on ***Costello***, where the Supreme Court held that strict compliance is *insisted* upon when a municipality is exercising extraordinary powers or passing "by-laws concerning taxation, expropriation, or other interference with private rights." That is exactly what Fishing Lake was doing in passing the Tax Bylaw, and therefore according to ***Costello*** and ***Janzen***, strict compliance with the *MSA* is required. Even if strict compliance was not required, I would not agree with Fishing Lake's position that the Court should overlook its failure to comply with the mandatory notice provisions.

[133] Fishing Lake's overall position with respect to the failure to adhere to the notice requirements of the *MSA* appears to be that it was already aware of the Applicants' displeasure with the previous years increases in the tax rate and there was nothing the Applicants could have said more than what Fishing Lake already knew. Fishing Lake argues that if the Applicants had valid reasons other than simply not liking a higher tax rate, that might have been useful for Fishing Lake to hear before the May 29th vote, presumably they would have made those same arguments in this application. Instead, the Applicants have failed to provide any evidence in this application that the tax rate would have an adverse effect on their business. Consequently, Fishing Lake argues that the notice deficiency had no effect on the ultimate passing of the Tax Bylaw and therefore this Court should decline to declare it void.

[134] I disagree. As affected persons, the Applicants are entitled to make submissions on the Tax Bylaw, which may include what effect its passage may have on the Applicants' operations. I find the Tax Bylaw is void for failure to comply with the mandatory notice provisions of the *MSA*. In particular, I find that where the pool of "affected persons" is so small, and so well-known to the taxing authority, there is a duty to ensure that notice is posted in a way that it is likely to come to their attention. There is no evidence in this case that the notice was posted at all, let alone in four widely separated and conspicuous areas of the Settlement.

[135] If, after proper notice is given, and after the Applicants have their opportunity to be meaningfully heard, Fishing Lake still decides a tax bylaw with an 8.88% tax rate is reasonable in all the circumstances, its decision will be entitled to a high level of deference, subject of course to any reasonableness argument made by the Applicants.

Issue 4: Is the Tax Bylaw substantively unreasonable?

[136] As was the case in ***Elizabeth***, quashing the Tax Bylaw for its procedural defects is dispositive of this judicial review application. However, like Devlin J in ***Elizabeth***, I am of the view that the parties would benefit from knowing whether taxation at the impugned rate of 8.88% would be reasonable if properly enacted, given that property tax is a recurring annual event: ***Elizabeth*** at para 90. My comments are obviously limited to the information known to the Court at this time.

a. The standard of reasonableness

[137] As stated above, ***Vavilov*** established reasonableness as the presumptive standard of review in administrative law. Reasonableness "remains a single standard" which "takes its colour from the context": ***Vavilov*** at paras 88-89. Therefore, the context and nature of the decision-maker's act constrains what will be reasonable for the decision-maker to decide.

[138] Reasonableness is a "robust" form of review which requires the reviewing court to examine whether the decision as well as the reasons justifying the decision are reasonable. In the context of bylaw creation, it is not likely that formal reasons will be available for scrutiny. In such cases, the reasonableness review will be no less robust but will take on a "different shape", with the focus being on the reasonableness of the decision itself: ***Vavilov*** at paras 137-138.

[139] Historically, municipal bylaws were considered a decision for which greater deference was owed on judicial review. The Supreme Court previously articulated a test for reasonableness in this context in ***Catalyst Paper***:

> [24] It is thus clear that courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal counsellors may legitimately consider in enacting bylaws. The applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside. The fact that wide deference is owed to municipal councils does not mean that they have *carte blanche*.
>
> ...
>
> [32] To summarize, the ultimate question is whether the taxation bylaw falls within a reasonable range of outcomes. This must be judged on the approach the courts have traditionally adopted in reviewing bylaws passed by municipal councils. Municipal councils passing bylaws are entitled to consider not merely the objective considerations bearing directly on the matter, but broader social, economic and political issues. In judging the reasonableness of a bylaw, it is appropriate to consider both process and the content of the bylaw.

[140] Post-***Vavilov***, courts have continued to treat the ***Catalyst Paper*** test as good law, granting greater deference to elected municipal decision-makers (see: ***Koebisch* v *Rocky View (County)***, 2021 ABCA 265 at para 22 [***Koebisch***], citing ***1120732 BC Ltd* v *Whistler (Resort Municipality)***; 2020 BCCA 101; ***Bergman* v *Innisfree (Village)***, 2020 ABQB 661 at para 127; ***Elizabeth*** at para 97; ***Ferguson Point Restaurants Inc* v *Vancouver Board of Parks and Recreation***, 2021 BCSC 1888).

[141] In ***Koebisch***, our Court of Appeal reviewed a pre-***Vavilov*** chambers decision which set-aside four bylaws for "patent unreasonableness." The Court stated that ***Vavilov*** "re-affirmed" the Supreme Court's decision in ***Catalyst Paper*** and did not change the applicable standard of review (at paras 19, 22). Rather, the Court found that "if anything, ***Vavilov*** reinforced the proper application of the reasonableness standard of review": para 22.

[142] In reviewing the impugned bylaw, the Court went on to ask whether the Council's decisions to enact the bylaws was "aberrant, overwhelming, or decisions that no reasonable municipality would have taken": at para 37 (borrowing the language from ***Catalyst Paper***, para 20). In concluding "no", the Court stated that the decisions of the Council were found to be transparent, intelligible and justified: at para 43.

[143] This analysis by our Court of Appeal suggests that the ***Vavilov*** test of reasonableness that requires decisions to exhibit the requisite degree of justification, intelligibility and transparency (at para 100) is to be applied when reviewing bylaws. However, ***Catalyst Paper*** continues to colour the reasonableness review in the context of bylaw judicial review, where the "requisite degree" of justification is impacted by the elected nature of the decision-makers and the lack of formal reasons that generally accompany bylaws.

[144] In ***Elizabeth***, Devlin J also addressed the impact of ameliorative legislation involving the Métis and First Nations on the issue of reasonableness:

> [98] An additional layer of context is added to the analysis of 'reasonableness' when reviewing administrative acts of Métis Settlements. In such cases, it is appropriate for the Court to take into account the unique role, structure, and mandate of the Settlements in preserving and promoting Metis life and culture. This is an additional component of the "context and nature of the impugned administrative act" under consideration and may, in certain cases, mean that the flexible deferential standard the court should apply will result in greater leeway being given to Settlement decisions: ***Catalyst Paper*** at para 23.
>
> [99] This approach honours the principle of prioritizing protection of Indigenous interests when interpreting legislation dealing with their rights. As explained by the Supreme Court of Canada in ***Osoyoos Indian Band* v *Oliver (Town)***, 2001 SCC 85 at para 49, citing La Forest J in ***Mitchell* v *Peguis Indian Band***, [1990] 2 SCR 85 at 143:
>
> > ... it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the Indian Act, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them ....
> >
> > At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote. [Emphasis in ***Osoyoos***]

[100] This principle finds traction in the taxation context. While Métis Settlements are broadly analogous to municipalities, they remain fundamentally different in their history, evolution, and context. That lens of difference must be applied when considering the revenue-generating powers granted to them under the MSA. As the Supreme Court of Canada held in ***Canadian Pacific Ltd*** **v** ***Matsqui Indian Band***, [1995] 1 SCR 3 ["***Matsqui***"] at para 18:

> ... [I]t is important that we not lose sight of Parliament's objective in creating the new Indian taxation powers. The regime which same into force in 1988 is intended to facilitate the development of Aboriginal self-government by allowing bands to exercise the inherently governmental power of taxation on their reserves. Though this Court is not faced with the issue of Aboriginal self-government directly, the underlying purpose and functions of the Indian tax assessment scheme provide considerable guidance in applying the principles of administrative law to the statutory provisions at issue here. I will therefore employ a purposive and functional approach where appropriate in this ruling.

[101] While the history and constitutional position of Métis people is not entirely the same as that of First Nations, similar principles apply here. In ***Matsqui***, Lamer CJ and Cory J characterized the broader purposes of First Nations' taxation powers in the following terms:

> Here, the evidence indicates that the purpose of the tax assessment scheme is to promote the interests of Aboriginal peoples and to further the aims of self-government. Although the scheme resembles the kind of tax assessment regime we see at the municipal level of government in Canada, it is more ambitious in what it sets out to achieve. The scheme seeks to provide governmental experience to Aboriginal bands, allowing them to develop the skills which they will need for self-government: at para 43.

[102] The historic disadvantages suffered by Métis communities, coupled with the unique challenges that arise in operating small-scale self-governing communities, suggest there is more leeway to what a "reasonable body" might decide is a reasonable taxation structure. Put simply, Métis Settlements did not begin with very much. They have limited sources of funding. They lack any traditional property tax base, as a result of the unique communal ownership structure of their land base. Their need for infrastructure development is often intense, as described by Ms. Zimmer in this case. They may also feel that they have historically received little or no benefit for the resource riches extracted from their lands. I expressly consider all of these factors in determining whether the Property Tax Bylaw in this case meets the broad range of "reasonable outcomes" defined by the Supreme Court's jurisprudence, including the direction to consider broader social, economic and political issues: ***Catalyst Paper*** at para 32.

[145] In ***Elizabeth***, Devlin J found a tax bylaw with a tax rate of 187%, made pursuant to the same Policies here, to be unreasonable. The circumstances in this case, however, are quite different from those in ***Elizabeth***.

b. Analysis

[146] The Applicants argue that the tax imposed pursuant to the Tax Bylaw is so excessive and discriminatory as to be unreasonable and unjust. They point out the tax imposed is more than double the highest rate imposed by any municipality in Alberta, six times higher than the tax rate of the adjacent municipality, and more than double the tax rate imposed in the prior year. They submit that now that Fishing Lake is unfettered by any limit in the Taxation Policy, it has chosen to increase its taxation of industry in a manner which is manifestly unreasonable.

[147] They say the tax is confiscatory, in that it destroys the value of the assets by attaching a disproportionate annual tax liability to those assets and constitutes a *de facto* expropriation of the property. They say the effect of the taxation is so extreme as to be prohibitory, because it discourages ongoing operation of the facilities, and confiscatory because it results in effective confiscation of all value inherent in the property.

[148] I disagree. The Applicants have failed to provide any evidence in support of these sweeping statements. This is not a case like ***Elizabeth*** where the Court had affidavit evidence before it with a statement that "the effect of the tax rate imposed by Elizabeth settlement is to make the operation of the assessed property uneconomic", an assertion Devlin J found had intuitive force and accepted as a fact: ***Elizabeth*** at para 43.

[149] Devlin J found that the tax rate was unreasonable *per se* given the nature and purpose of a property tax, and commented that the "raw quantum of this tax is breathtaking and beyond anything previously known in Canada": ***Elizabeth*** at para 114. He found that it was "difficult to comprehend how a tax of this magnitude is anything other than a functional expropriation" and that the "quantum of tax in this case is so extreme that the language of "manifest injustice" is properly invoked": ***Elizabeth*** at para 115, 120. He concluded that "Elizabeth appears to have decided to effectively take the Applicants' land, without proper process, deliberation, or even notice": ***Elizabeth*** at para 120. Devlin J went on to find that the bylaw was unreasonable for this and a number of other reasons which find no merit in the case before me.

[150] There is nothing in the Affidavit of Darrin Hyrcak filed in these proceedings to suggest that a tax rate of 8.88% will make the operation of the assessed property uneconomic, and such a conclusion does not have intuitive force. The Affidavit evidence in this case simply says that the property taxes imposed by Fishing Lake have been a growing concern of CN over the last several years and sets out the contrast between the Tax Bylaw rate of 8.88% and the rates of other municipalities which are much lower. Having a higher tax rate, even a much higher tax rate, is not conclusive of unreasonableness; it is but one consideration for the Court. As counsel for Fishing Lake pointed out in oral argument, tax rates of other municipalities without any consideration of the needs of those municipalities is unhelpful, especially when considering the broader social, economic and political issues that Fishing Lake is dealing with when passing its bylaws.

[151] Procedural defects will compromise the deference afforded to taxation policy choices: ***Elizabeth*** at para 104. Where such choices are reached through an inclusive and consultative decision-making process, they will be afforded a higher level of deference: ***Elizabeth*** at para 104

citing ***Catalyst Paper*** at 17-20, 24. This "stems from the belief that the available policy alternatives, and the costs and benefits associated with them, have been openly and thoroughly considered": ***Elizabeth*** at para 104; ***Catalyst Paper*** at 29-30. I have already found that the Tax Bylaw in this case should be quashed for non-compliance with the procedural requirements of the *MSA*, because notice to affected parties and an opportunity to be heard were not afforded to the Applicants. However, if after being given the opportunity to make submissions to the people of Fishing Lake, the Applicants have no further evidence to provide than that which is before me, it is difficult to see how this Tax Bylaw could be found to be unreasonable.

[152] In ***Elizabeth***, Devlin J noted that the tax bylaw there was passed without discussion, debate or examination, using emergency procedures resulting from a self-made emergency. The policy options and implications were not considered, in part, because of the absence of a public hearing, and the minutes of the meeting reflect no substantive discussion of the tax rates being imposed. Devlin J concluded that if the "merits and viability of this approach to taxation was ever discussed, this was done in secret": paras 105-106. Devlin J found that the contrast with what happened in ***Catalyst Paper*** was stark:

> [107] Elizabeth's failure to undertake any public deliberation of the social and economic impact wrought by the Property Tax Bylaw strikes at the core of the rationale for deference to municipal councils on what constitutes reasonable policy. On this point, the Supreme Court of Canada's decision in ***Catalyst Paper*** is illuminative. In that case, the struggle between the industrial taxpayer and the municipality over the former's share of the municipal tax burden had been going on for decades. Conscious of the impact of squeezing out one of its largest employers and taxpayers, the municipality conducted extensive studies into the problem of tax burden allocation. The issue was examined from numerous perspectives. The industrial taxpayer even proposed a detailed alternative model of tax allocation. The municipality undertook corrective steps to achieve a more sustainable balance. The social and economic impact of the competing policy alternatives were studied, discussed and publicly debated. In the end, the municipality made its difficult social choice; it did so on the basis of a thorough understanding of the problem and the economic realities involved. The Supreme Court deferred to the Council's decision, notwithstanding the grave impact on the industrial taxpayer upon whom an undue burden of funding the community fell: ***Catalyst Paper*** at para 36; 2010 BCCA 199 at paras 15-23; 2009 BCSC 1420, at paras 94-108.
>
> [108] The contrast with the present case is stark. Here, the impacted taxpayers were never informed about the proposed Property Tax Bylaw and never given the opportunity to be heard, despite both of those rights being statutorily guaranteed: *MSA*, ss 54, 55(3).

[153] The ultimate question is whether the Tax Bylaw suffers sufficiently serious shortcomings that it cannot be said to exhibit the requisite degree of justification, transparency and intelligibility such that it is unreasonable. This question is colored by the fact that the Fishing Lake Council is an elected body, entitled to consider not merely the objective considerations bearing directly on the matter, but broader social, economic and political issues: ***Catalyst Paper*** at para 32. Further, the "historical disadvantages suffered by Métis communities, coupled with the unique challenges that arise in operating small-scale self-governing communities, suggest

that there is more leeway to what a reasonable body might decide is a reasonable funding structure": ***Elizabeth*** at para 102. The Métis did not begin with much, they have limited sources of funding, and they lack any traditional property tax base: ***Elizabeth*** at para 102. Fishing Lake submits that these factors lean toward a higher tax rate because the factors for Fishing Lake are much different than those found in any adjacent municipality.

[154] Unlike the situation in ***Elizabeth***, Fishing Lake held a meeting where the Tax Bylaw was considered and voted on by Settlement members as to what they thought would be reasonable. While the Applicants were not afforded a proper opportunity to be heard at the meeting, it is clear that the impact of the tax bylaw on non-Settlement businesses was an issue for Fishing Lake. The history of what transpired with respect to the Fishing Lake Tax Bylaw shows consideration was given. The original tax bylaw #004/2019 was defeated when put to a vote. That tax bylaw had a tax rate of 397%. A new tax bylaw #005/2019 was then put forward the next day on the basis of a much-reduced budget that did not even address all of Fishing Lake's critical needs as set out in the ISL Report. That Tax Bylaw with a rate of 8.88% passed on May 29, 2019.

[155] The Fishing Lake Record includes several documents which support a conclusion that Fishing Lake's decisions are based on a knowledge and understanding of the social and economic issues that face its community. The 2020 and Beyond Strategic Plan, for example, discusses the goals for the Settlement and talks about creating and developing a diverse economy. These documents show that Fishing Lake is very much aware of the issues of taxation, infrastructure and social need. As counsel for Fishing Lake asserted, it is a small community who appear to be trying to find a middle ground for funding for the severe need of the community while trying to keep industry going with a reasonable tax rate.

[156] The 2020 and Beyond Strategic Plan directly addresses the issue of the tax rate and its effect on industry within Fishing Lake. As counsel for Fishing Lake put it, they know the higher tax rate will take away profits from the Applicants, but they are faced with the dilemma of a huge infrastructure gap as outlined in the ISL Report. Even at 8.88%, Fishing Lake will not be able to keep up with their critical infrastructure needs without finding other sources of funding. One can see a correlation between the factual situation in ***Catalyst Paper*** and the factual situation here, except that in ***Catalyst Paper***, full consultation was undertaken with the business being affected by the bylaw. Whether full consultation here will have an impact on the tax bylaw remains to be seen.

[157] In ***Elizabeth***, Devlin J concluded that "[w]hile Elizabeth's Property Tax Bylaw is unreasonable, it did not come about in a vacuum" and "the lack of adequate capital funding for Métis Settlements, or a viable model for the Settlements to raise capital funds through economic benefits derived on their territory, has driven Elizabeth to enact a measure that would severely, if not fatally, impair its ability to attract the investment it needs to develop a viable tax base in the future": at para 132. While Fishing Lake is in the same position as Elizabeth with respect to the lack of adequate capital funding and a viable model for raising capital funds through economic benefits derived on their territory, they have chosen a more reasonable path than the 187% tax rate under review in ***Elizabeth***.

[158] Fishing Lake is faced with an almost insurmountable amount of community need, including infrastructure that is in critical condition. They voted on a compromised solution – have a higher tax rate of 8.88%, repair some urgent needs, and continue to plan for a better

future. I agree with Fishing Lake that this was a reasonable choice that was available to them and it cannot be said that the tax rate of 8.88% transcends the spectrum of reasonable policy options available or that the Tax Bylaw was an "act of raw irrationality": ***Elizabeth*** at para 97. Fishing Lake chose a reasonable compromise between ongoing need and economic sustainability. I find the Tax Bylaw is reasonable. It exhibits the level of justification, transparency and intelligibility that is required in this unique context.

[159] On the basis of the evidence before the Court, I would have found that the Tax Bylaw falls within a reasonable range of outcomes. I would have dismissed the Applicant's claim that the Tax Bylaw is unreasonable.

Heard on the 29th and 30th days of June, 2021.
Dated at the City of Edmonton, Alberta this 18th day of January, 2022.

M. Hayes-Richards
J.C.Q.B.A.

Appearances:

Gilbert J. Ludwig, Q.C. and Aimee Louis
for the Applicants

Glenn Epp
for the Respondent Fishing Lake Metis Settlement

Annemarie Clark
for the Respondent the Metis Settlements General Council