SCC COURT FILE NO.: 39773

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

1193652 B.C. LTD.

APPLICANT
(Appellant)

AND:

THE CORPORATION OF THE CITY OF NEW WESTMINSTER

RESPONDENT
(Respondent)

AND:

TENANT RESOURCE & ADVISORY CENTRE and
RENTAL HOUSING COUNCIL OF BRITISH COLUMBIA dba LANDLORDBC

INTERVENERS
(Intervenors)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL (THE CORPORATION OF THE CITY OF NEW WESTMINSTER, RESPONDENT)

(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. This application for leave is in respect of a moot matter. Even if it were not in respect of a moot matter, the application does not raise any issue of public importance requiring this Honourable Court's attention. The City's Bylaw 8123 (the "Impugned Bylaw") – which places restrictions on the practice of "renoviction" – is no longer operable.[1] It has been made entirely inoperable by legislation that came into force on July 1, 2021. On this basis alone, the City says that the Court should decline to hear the appeal, which will have no practical effect.

2. The applicant says that this case raises issues concerning the standard of review to be applied to a jurisdictional boundary issue. This case raises no such issue. The Court below dealt only with the powers of the City. It did not decide any question concerning the jurisdiction of any other administrative body. The Court of Appeal soundly described and applied the principles set down by this Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 (*Vavilov*).

3. On the merits of the administrative decision under review, the applicant argues that this Court should provide guidance on the principles to be applied in deciding whether a municipal bylaw is ousted by provincial legislation dealing with the same general subject matter. Such guidance is not required. In British Columbia, the issue is governed by section 10 of the *Community Charter,* which the Court below correctly found sets out the only way in which a municipal bylaw in British Columbia may conflict with another provincial enactment. The applicant did not seek to establish an inconsistency of the kind contemplated by that section. Instead, it advanced a theory of implied inconsistency that is incompatible with it.

4. In British Columbia, the principles around conflict of municipal bylaws and provincial enactments, set out by this Court in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town),* 2001 SCC 40 (*Spraytech*) have been codified in British Columbia by section 10 of the *Community Charter*, S.B.C. 2003, c. 26. Those principles and the effect of that section require no further explication. The applicant does not offer an alternative interpretation of section

[1] The Impugned Bylaw amended and is part of the City's *Business Regulations and Licensing (Rental Units) Bylaw*.

10. Instead, it maintains a theory of inconsistency that is incompatible with it. Municipal bylaws in British Columbia cannot be ousted by provincial enactments except as contemplated by section 10.

B. THE DECISIONS BELOW

5. This case was originally heard in the British Columbia Supreme Court by Chief Justice Hinkson.[2] At the hearing, which was one month prior to the release of *Vavilov*, the parties agreed that the standard of review was correctness.[3] Chief Justice Hinkson applied the correctness standard to all issues before him, including: (1) whether the Impugned Bylaw was unauthorized by section 8(6) of the *Community Charter* because it was not a "regulation" within the meaning of that term;[4] (2) whether, as a matter of statutory interpretation, the Impugned Bylaw was authorized by section 8(3)(g) of the *Community Charter*;[5] and (3) whether, because the Impugned Bylaw was in pith and substance a bylaw that deals with landlord and tenant matters, the Impugned Bylaw was impliedly precluded by the presence of *Residential Tenancy Act*, S.B.C. 2002, c. 78 (*RTA*), which occupied the field.[6]

6. Chief Justice Hinkson dismissed all three of the arguments above. Regarding the two statutory interpretation questions posed, Chief Justice Hinkson performed his own interpretation of sections 8(6) and 8(3)(g) of the *Community Charter* and found that the Impugned Bylaw was authorized on the correctness standard. On the third ground of review, the Chief Justice noted that the applicant urged the Court to apply an "occupied field" approach that the Supreme Court of Canada had renounced in its decision in *Spraytech*.[7] However, his judgment rested centrally on section 10 of the *Community Charter*:

> More importantly, s. 10 of the *Community Charter* governs the relationship between municipal bylaws and provincial enactments in British Columbia. Section 10 contemplates an overlap between municipal bylaws and provincial enactments and does not prohibit a municipal bylaw from dealing directly with the same subject

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[2] *1193652 B.C. Ltd. v. New Westminster (City)*, 2020 BCSC 163 ("BCSC Reasons")
[3] BCSC Reasons at para. 30 citing *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19
[4] BCSC Reasons at paras. 50-55
[5] BCSC Reasons at paras. 56-60
[6] BCSC Reasons at paras. 41-49, 61-77
[7] BCSC Reasons at paras. 71-74

> matter as a provincial enactment, unless there is an inconsistency in the manner specified by s. 10.[8]

7. In the British Columbia Court of Appeal, the applicant abandoned its two statutory interpretation grounds of review and focused only on its implied exclusion argument, alleging that because the Impugned Bylaw trenched on an all-inclusive legislative scheme, it was unauthorized.[9] The applicant also argued that the case engaged two of the exceptions to the presumption of reasonableness review – the exception for "general questions of law of central importance to the legal system as a whole" and the exception for a question that determines the "jurisdictional boundaries between two competing administrative bodies".[10]

8. The Court rejected the applicant's characterization of the single question on appeal, noting that the question was not whether a municipality was authorized to legislate in respect of an exhaustive provincial scheme. Such a question, which includes an assertion of exclusive jurisdiction, presupposed a lack of municipal jurisdiction. Rather, it characterized the question posed as whether the *Community Charter* authorized the Impugned Bylaw despite the fact that the *RTA* also regulated in relation to landlord-tenant matters.[11]

9. To this question, the Court applied a reasonableness standard of review, finding that neither of the exceptions to the presumption of reasonableness review were applicable. On the "general questions" exception, the Court found that, while the Impugned Bylaw and its effects may have been a matter of public concern, it was not a question of importance to the legal system as a whole.[12] The Court also noted that the question posed by the applicant was "too abstract to constitute a centrally important general question of law".[13]

10. Dealing with the "jurisdictional boundaries" exception, the Court reviewed the relevant cases in detail, including *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, *Quebec (Commission des droits de la personne et des droits de la*

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[8] BCSC Reasons at para. 75
[9] *1193652 B.C. Ltd. v. New Westminster (City),* 2021 BCCA 176 (BCCA Reasons) at para. 37
[10] BCCA Reasons at paras. 47-58
[11] BCCA Reasons at para. 46
[12] BCCA Reasons at paras. 47-48
[13] BCCA Reasons at para. 48

jeunesse) v. Quebec (Attorney General), 2004 SCC 39, and *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929, finding that the exception did not apply.[14]

11. On the merits, the Court found that section 10 of the *Community Charter*, as recognized by the Chief Justice in the lower court, governed the relationship between municipal bylaws and provincial enactments.[15] No assessment of the comprehensiveness of provincial legislation could, in British Columbia, be done without accounting for this provision, the object of which is to delineate the circumstances in which a municipal bylaw can be found to be inconsistent with a provincial enactment. Further, the Court found that the *RTA* included no express right to charge market rent after a tenant exercised a right of first refusal following a renoviction, and there could therefore be no operational conflict or "statutory disharmony" occasioned by the operation of the Impugned Bylaw.[16] Finally, the Court found that the City's interpretation of its enabling provisions in the *Community Charter* was reasonable and based on a textual, contextual, and purposive approach to the statute. In contrast, the applicant had identified no ambiguous statutory language, relying largely on dated extrinsic evidence.[17]

C. FACTS

12. The City agrees with the facts as set out at paragraphs 4 to 11 of the applicant's leave memorandum, except to the extent indicated below.

13. In response to paragraph 5, where the applicant states that it "requires vacant possession in order to perform the renovations because of their scope", the City notes that this is merely an assertion, as the applicant has never proven, for example, in a proceeding before the Director of the Residential Tenancy Branch, that the renovations are necessary.

14. Similarly, the applicant never sought to avail itself of the exemption provision in section 48 of the Impugned Bylaw, which allowed a landlord to seek an exemption from the City Council if the renovations are proven to be necessary.

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[14] BCCA Reasons at para. 56
[15] BCCA Reasons at para. 80
[16] BCCA Reasons at para. 81
[17] BCCA Reasons at para. 82

PART II – QUESTIONS IN ISSUE

15. The questions raised by the applicant at paragraphs 12(a) and (c) of its leave memorandum are tautological and thus plainly not in issue on this appeal. Those paragraphs describe questions in which the premise of the question (the Legislature intends the *RTA* to be the only legislation dealing with landlord/tenant matters) is also the answer to it (a municipality may not enact legislation dealing with such matters). It is simply nonsensical to ask, as the applicant does at paragraphs 12(a) and (c), whether the City may regulate in an area intended to be exhaustively dealt with by the *RTA*, because if the Legislature did indeed intend the matter to be exhaustively dealt with by the *RTA* (which is the whole issue in the case), then of course the City cannot regulate in that area.

16. The issue raised at paragraph 12(b), regarding the framework for assessing whether a provincial scheme is exhaustive, to the exclusion of municipal legislation and despite a lack of conflict, is not of public or national importance. Such matters are entirely governed by the legislation of the particular province at issue, and in British Columbia are governed by section 10 of the *Community Charter*. The applicant does not ask this Court to interpret or apply section 10. Instead, it asks this Court to ignore that section and entertain an appeal based on outdated occupied field principles, since displaced by this Court's own jurisprudence.

PART III – ARGUMENT

A. MOOTNESS

17. The City says that any appeal is now moot. As to the first step in the test set out in *Borowski v. Canada*, 1989 CanLII 123 (SCC), it is clear that a decision in this case will have no practical effect on the rights of the parties. This is because the Impugned Bylaw no longer has any legal effect.

The Impugned Bylaw has no Legal Effect

18. Bill 7-2021: *Tenancy Statutes Amendment Act, 2021,* received Royal Assent on March 25, 2021.[18] When it came into force on July 1, 2021, Bill 7 repealed section 49(6)(b) of the *RTA*, which had previously been the key provision of the *RTA* at issue in this case, and which stated:

> 49(6) A landlord may end a tenancy in respect of a rental unit if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to do any of the following:
>
> > (b) renovate or repair the rental unit in a manner that requires the rental unit to be vacant**;**

19. Section 49(6)(b) of the *RTA* was permissive, allowing the landlord to end the tenancy by issuing a notice to end a tenancy pursuant to section 49(2)(b), if the set of conditions in section 49(6)(b) had been satisfied. A tenant, who had been served with a notice to end a tenancy and who believed that the landlord did not meet all of the conditions required by section 49(6)(b), was free to apply to the Residential Tenancy Branch for dispute resolution under section 49(8).

20. On July 1, 2021, section 49(6)(b) was replaced with section 49.2, which states:

> 49.2 Subject to section 51.4 *[tenant's compensation: section 49.2 order]*, a landlord may make an application for dispute resolution requesting an order ending a tenancy, and an order granting the landlord possession of the rental unit, if all of the following apply:
>
> > (a) the landlord intends in good faith to renovate or repair the rental unit and has all the necessary permits and approvals required by law to carry out the renovations or repairs;
> >
> > (b) the renovations or repairs require the rental unit to be vacant;
> >
> > (c) the renovations or repairs are necessary to prolong or sustain the use of the rental unit or the building in which the rental unit is located;
> >
> > (d) the only reasonable way to achieve the necessary vacancy is to end the tenancy agreement.

[18] The Court of Appeal had this proposed legislation before it, referencing it at para. 20 of their reasons rendered on April 30, 2021, but did not comment on its potential legal effect.

21. Section 49.2 creates a process where the landlord is no longer able to end a tenancy by serving notice on the tenant. Rather, the landlord must apply for an order of possession pursuant to the dispute resolution process.

22. The Impugned Bylaw can no longer apply because the circumstances that would have triggered its application – the service of the notice to end a tenancy under section 49(2)(b) – as a textual matter, can no longer exist. Section 47 of the Impugned Bylaw begins with the words "[n]o *owner* shall deliver to any tenant a notice of termination of their tenancy of a *rental unit* in order to renovate or repair the *rental unit*…". Since there is no ability for a landlord to serve a tenant with a notice to end a tenancy – as that procedure has been replaced by an application for dispute resolution followed by an order of possession – the Impugned Bylaw cannot operate.

23. The applicant is therefore, along with all other landlords in the City, no longer bound by any of the requirements in the Impugned Bylaw. A landlord wishing to proceed with renovations, for which it believes that vacant possession is required, must apply for dispute resolution as the *RTA* now contemplates. Because the Province has stepped in and created a process that renders the Impugned Bylaw inapplicable, this Court's decision would not resolve any controversy that affects the rights of the parties.

24. This is, as this Court in *Borowski* highlighted, a case in which an event has occurred such that there is no longer any live controversy between the parties.[19] One of the examples cited in *Borowski* was *Moir v. The Corporation of the Village of Huntingdon (1891),* 19 S.C.R. 363, where a municipal bylaw challenged on the ground that it was *ultra vires* was repealed prior to the hearing. This meant that the appealing party had no real interest in the decision, which would only affect the parties as regards costs.[20] While here the Impugned Bylaw has not been repealed, the situation is analogous, as it no longer has any effect on a landlord's ability to gain an order of possession in relation to the units it wishes to renovate.

25. The authorities further confirm that an appeal can be rendered moot where the "legislative matrix" has changed.[21] For example, in *McKenzie v. British Columbia (Minister of*

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[19] *Borowski* at para. 16
[20] See also *Norman v. Port Moody (City of),* 1996 CanLII 3027
[21] *McKenzie v. British Columbia (Minister of Public Safety and Solicitor General),* 2007 BCCA 507 at para. 25; *Vancouver (City) v. Weeds Glass and Gifts Ltd.,* 2020 BCCA 46

Public Safety and Solicitor General), 2007 BCCA 507 (*McKenzie*), the appellant residential tenancy arbitrator challenged her without cause termination based on both an interpretation of the relevant provision of the *Public Sector Employers Act,* R.S.B.C. 1996, c. 384 and an argument that such a termination was unconstitutional through its violation of the unwritten constitutional principle of judicial independence. The respondents conceded that the summary manner in which the appellant was dismissed did not meet the requirements of procedural fairness and consented to an order quashing the Minister's decision to terminate her.[22]

26. After that case was decided by the British Columbia Supreme Court, which included a decision on both the constitutional question and the statutory interpretation question, and very shortly after the notice of appeal was filed, amendments to the *RTA* were brought into force. These amendments created a "dispute resolution" scheme, which no longer included persons defined as "residential tenancy arbitrators", and specifically created a system in which dispute resolution officers were no longer subject to *PESA.*[23] Despite the fact that the parties urged the Court to decide the matter on appeal, the Court declined to decide either issue.[24]

27. The reasoning in *McKenzie* reveals analogous concerns to those presented by this case. When Bill 7 became law on July 1, 2021, the legislative matrix within which the British Columbia Supreme Court and the Court of Appeal considered the Impugned Bylaw ceased to exist. Leaving aside the fact that there is no live dispute between the parties, because the City's bylaw has no operation, the questions posed regarding inconsistency and jurisdictional conflict should not be adjudicated by this Court on a first instance basis. The larger question at issue – whether "landlord-tenant matters" is a subject-matter in which the Province has occupied the field so as to preclude municipal regulation – has become academic insofar as it will have no practical effect on the rights of the applicant.[25] The matter would become non-academic only in a proceeding challenging a new bylaw that had been adopted in accordance with the current legislative matrix.

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[22] *McKenzie* at para. 5
[23] *McKenzie* at para. 17-18
[24] *McKenzie* at paras. 25-26
[25] *Borowski* at paras. 15-16

This Court Should Not Exercise its Discretion to Hear the Moot Appeal

28. This Court should not exercise its discretion to hear a moot appeal in this case. In *Borowski,* Sopinka J. set out a list of three criteria to consider in deciding whether to hear a moot appeal: (1) a requirement for an adversarial context; (2) the concern with judicial economy; (3) the proper law-making function of the Court.

29. Here, the requirement for an adversarial context is met.[26] The City disagrees with the applicant's framework through which it would have courts adjudicate allegations of inconsistency between municipal bylaws and provincial enactments. While the City asserts that such allegations are governed only by section 10 of the *Community Charter,* and must account for the interpretation of that provision, the applicant asserts that municipal regulation in a subject-area may be found to be inconsistent with the *implied* intention of the Legislature, as inferred from the comprehensiveness of its legislation, even though the conditions of inconsistency identified in section 10 are not satisfied.

30. Regarding the second criterion – the concern with judicial economy – the City says that it would be a waste of judicial resources for this appeal to be considered. This issue is not evasive of review. Cases that fall into this category are ones which, by their very nature, are "recurring in nature, but brief in duration", such as, for example, a *habeas corpus* application.[27]

31. Were the City, or any other local government, to adopt a subsequent bylaw regulating evictions, it would be open to the applicant or any other person, subject to the law of standing, to challenge it either on judicial review or pursuant to section 623 of the *Local Government Act*. Any such legislative action on the part of a local government would, however, need to be undertaken in full view of Bill 7's amendments to the *RTA.*

32. As regards the third consideration – the proper law-making function of the Court – the City says that the words of Stratas J.A. in *Canadian Union of Public Employees (Air Canada Component) v. Air Canada,* 2021 FCA 67 (*CUPE*) are apt:

> As for the third consideration, gratuitously interpreting the former wording of the provision in issue, in a case with no practical consequences, just to create a legal

[26] *Wilson Olive and Friends Aquifer v. Keys (Rural Municipality),* 2020 SKCA 124 at para. 19
[27] *Mission Institution v. Khela,* 2014 SCC 24 at paras. 13-14

> precedent, would be a form of law-making for the sake of law-making. That is not our proper task.
>
> The mootness issue assumes greater significance following *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1. There, the Supreme Court underscored that courts must consider expediency and cost-efficiency when considering applications for judicial review and should not grant remedies when they serve no useful purpose: at para. 140, citing *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 55.[28]

33. The two rationales above are applicable to this case. Absent an ability to make any order that would affect the applicant's rights, which are now solely governed by the *RTA*, this Court would be engaging in law-making with no practical consequences. The applicant poses wide-ranging questions, which by implication ask this Court to vary or overturn its reasoning in *Spraytech*, and quite clearly ask this Court to provide an opinion on the application of section 10 of the *Community Charter*. Those questions – which go to conflict and inconsistency – ought not to be decided without the benefit of considered reasons from the lower courts dealing with the legislation at issue. The inconsistency analysis set down by this Court in *Spraytech*, as codified by section 10 of the *Community Charter*, is fundamentally an exercise grounded in statutory interpretation of the particular provisions that are said to conflict with each other.[29] Such questions should not be decided by this Court at first instance.

34. The two rationales highlighted by Stratas J. in *CUPE* are augmented in this case by the fact that the decision is a legislative one. As noted above, any subsequent bylaw that a local government might choose to pass would have to be undertaken in view of Bill 7's amendments to the *RTA*. Without speculating on either the merits or wisdom of any future bylaw dealing with the issue of evictions, it is quite clear now that there are different considerations at play than were present under the old regime. It may be that all local governments in British Columbia, including the City, will determine that section 49.2 of the *RTA* adequately addresses the problem of 'renovictions' through its mandatory dispute resolution process and applicable legal test. Any subsequent local government bylaw dealing with this particular subject-matter would need to be

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[28] *CUPE* at paras. 13-14
[29] *Spraytech* at para. 38 citing *British Columbia Lottery Corp. v. Vancouver (City)*, 1999 BCCA 18

evaluated by a reviewing court taking into account the text of the bylaw and the new section 49.2 of the *RTA*.

B. THERE IS NO QUESTION OF PUBLIC IMPORTANCE

Introduction

35. If this Court does not consider the appeal to be moot, denying leave on that basis, the City opposes the granting of leave on the merits. The issues raised by the applicant are not of sufficient public importance as to warrant the attention of this Court.

36. The applicant alleges that the Court of Appeal improperly deferred on a question of "jurisdictional boundaries". That is not correct. The Court did not decide the line between the jurisdiction of the City and Director of Residential Tenancies, as the leave application implies. This case is much simpler than that. It concerned only the question whether the City has the statutory authority to enact a bylaw governing evictions, having regard to all relevant statutory provisions, including provisions in both the *Community Charter* and the *RTA*. In answering that question, the Court of Appeal evaluated the reasonableness of the City's interpretation of its enabling statute, but in doing so it did not adopt an interpretation of any statutory provision governing the authority of the Director of Residential Tenancies (who clearly does not have authority to adopt a bylaw of the kind adopted by the City), let alone defer to the City as regards the interpretation of any such provision.

37. As will be explained below, the applicant's proposed framing of the issues is almost entirely inaccurate. When the issues decided by the Courts below are properly identified, it becomes clear there is no reason for this Court to be concerned about the implications of the Court of Appeal's approach to the resolution of them, nor with the resolutions themselves.

The City's Authority

38. The City adopted a bylaw establishing conditions that must be met by a landlord before the landlord may terminate a tenancy agreement for the purpose of renovating the rental unit to which the tenancy agreement relates. It adopted the Impugned Bylaw pursuant to both sections 8(6) and 8(3)(g) of the *Community Charter*, both of which provide clear authority for it. Those sections are as follows:

> 8(6) A council may, by bylaw, regulate in relation to business.
>
> 8(3) A council may, by bylaw, regulate, prohibit and impose requirements in relation to the following:
>
> > (g) the health, safety or protection of persons or property in relation to matters referred to in section 63 *[protection of persons and property]*;

39. Section 8(3)(g) refers to section 63 of the *Community Charter*, which is as follows:

> 63 The authority of a council under section 8 (3) (g) *[spheres of authority — protection of persons and property]* may be exercised in relation to the following:
>
> > (f) rental units and residential property, as those are defined in the *Residential Tenancy Act*, that are subject to a tenancy agreement, as defined in that Act.

40. Section 8(6) authorizes British Columbia municipalities to regulate in relation to "business", including the business of renting residential premises. The applicant did not plead or argue that it was not carrying on the business of renting rental units. In the Court of Appeal, it offered no *interpretation* of the text of section 8(6) that would support a construction of it under which the Impugned Bylaw is not a business regulation bylaw authorized by the section. Instead, it took the position that a municipality's authority to regulate the business of renting residential premises under section 8(6) is *impliedly* excluded by the comprehensiveness of the *RTA*, a provincial regime under which residential tenancy matters are also regulated.

41. Moreover, the applicant took that "implied exclusion" position despite section 10 of the *Community Charter*, which is as follows:

> Relationship with Provincial laws
> 10 (1) A provision of a municipal bylaw has no effect if it is inconsistent with a Provincial enactment.
>
> (2) For the purposes of subsection (1), unless otherwise provided, a municipal bylaw is not inconsistent with another enactment if a person who complies with the bylaw does not, by this, contravene the other enactment.

42. In the courts below, the applicant did not identify any provision of the *RTA* that establishes as regards the Impugned Bylaw an inconsistency test different from that specified in subsection (2) of section (10) of the *Community Charter*, so as to engage the exception incorporated by the words "unless otherwise provided" in subsection (1). It also did not identify

any way in which the Impugned Bylaw would require a contravention of the *RTA* so as to make the Impugned Bylaw inconsistent with that Act in the manner described in subsection (2).

43. Instead, the applicant took the position that its "occupied field" theory could operate despite the presence of section 10.[30] The applicant argued that a bylaw may be ousted by the comprehensiveness of a provincial enactment dealing with the same subject matter, even if the enactment does not conflict with a specific consistency test that is provided for in that enactment (so as to bring the case within alternative analytical framework contemplated by the opening words of subsection (2) of section 10)) or require a contravention of the provincial enactment so as to satisfy the default test described in that subsection. It took the position, in other words, that both the text of section 8(6) and the text of section 10 are irrelevant to the question whether the City has the authority to regulate those engaged in the business of renting residential premises.

44. The applicant took the same approach in respect of section 8(3)(g). The City's position, accepted by the British Columbia Supreme Court and Court of Appeal, is that section 8(3)(g) also provides clear authority for the Impugned Bylaw.[31] That section authorizes a municipality to regulate in relation to the "protection" of "persons" in relation to the matters referred to in section 63 of the *Community Charter*, one of which is "rental units and residential property, as those are defined in the *Residential Tenancy Act*, that are subject to a tenancy agreement, as defined in that Act". The City adopted the Impugned Bylaw to "protect" "persons" (namely tenants) in relation to rental units of the kind described in section 63(f) and so its position is that the Impugned Bylaw clearly fits within the authority conferred on it by section 8(3)(g).

45. In the Court of Appeal, the applicant did not dispute the City's interpretation of section 8(3)(g).[32] Instead, it took the same approach in relation to section 8(3)(g) as it took in relation to section 8(6). It maintained that the authority of the City to regulate for the protection of persons in relation to their rental units under section 8(3)(g) has been *impliedly* ousted by the *RTA*. Remarkably, it took this position as regards section 8(3)(g) – while not only ignoring section 10 of the *Community Charter* – even though "rental units and residential property, as those terms are defined in the *Residential Tenancy Act*" are expressly identified in section 63(f) as a matter in

[30] BCSC Reasons at paras. 70-71
[31] BCSC Reasons at paras. 56-60; BCCA Reasons at paras. 77, 82
[32] BCCA Reasons at para. 82

relation to which a bylaw for the protection of persons may be adopted under section 8(3)(g). The only questions before the Court of Appeal were (1) whether the City's authority to adopt the Impugned Bylaw was impliedly precluded by the *RTA*; and (2) if not, whether the City's interpretation of sections 8(6) and 8(3)(g) was reasonable.[33]

46. On the first issue, the Court of Appeal rejected the approach advanced by the applicant finding that as a matter of law (particularly in view of section 10 of the *Community Charter*), the *RTA* did not impliedly preclude the City from adopting the Impugned Bylaw under either section 8(6) or 8(3)(g) of the *Community Charter*. The Court did not defer to the City on the approach to be taken in determining questions of inconsistency between municipal bylaws and provincial enactments as the applicant's memorandum implies. It did not apply a reasonableness standard when explaining the legal principles to be applied in answering the first question. Instead, it *declared* those legal principles and made no error in doing so.[34] The Court not only explained the correct legal principles, it expressly noted that in British Columbia, a municipality's authority to adopt bylaws dealing with matters also regulated under a provincial enactment is expressly preserved by section 10 of the *Community Charter*, except in the circumstances described in the section, neither of which obtain in this case.[35]

47. As regards section 10, the Court stated the following:

> In addition, as the Chief Justice recognized, s. 10 of the *Community Charter* contemplates overlapping municipal and provincial jurisdiction by providing that a municipal bylaw is inconsistent with a provincial enactment only if it requires contravention of that enactment: at paras. 70, 75–77. Accordingly, it was reasonable for the City to conclude that the Impugned Bylaw would not frustrate the *Residential Tenancy Act* scheme unless it required contravention of the provisions of that Act, which it did not.[36]

48. The Court was faced with no alternative interpretation of section 10 of the *Community Charter* and therefore did not defer to the City as to the meaning of that section. Rather, it simply declared that, as the Chief Justice had found on a standard of correctness, section 10 was applicable to the jurisdictional overlap inquiry. While the Court found that it was reasonable for

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[33] BCCA Reasons at para. 46
[34] BCCA Reasons at paras. 63-68
[35] BCCA Reasons at para. 80
[36] BCCA Reasons at para. 80

the City to believe that the Impugned Bylaw would not frustrate the *RTA* scheme, that was because it concluded that the City was *correct* that section 10 sets out the only way in which a municipal bylaw may be found to be inconsistent with the *RTA* and the conditions set out in section 10 were not satisfied.

49. Having determined that the Impugned Bylaw was not *impliedly* precluded by the *RTA*, the Court then answered question (2). On that issue - the question of the *interpretation* of sections 8(6) and 8(3)(g) – it found the City's interpretation of those sections reasonable, which is all that is required by *Vavilov*, while noting that, in any event, no alternative interpretation of those sections had been advanced by the applicant.[37] The Court of Appeal can hardly be blamed for accepting the City's interpretation as reasonable when no alternative interpretation had been put before it.

50. The approach taken by the Court of Appeal in dealing with the two issues raised in this case is not only the correct approach generally, it is consistent with the principles described by this Court in *Vavilov,* including the principle that questions that determine the jurisdiction of two or more administrative tribunals are to be decided without deference to any one of them. No such issue was raised in this case, let alone addressed inappropriately by the Court of Appeal on a standard of reasonableness.

Comprehensiveness and Conflict in British Columbia

51. The principles governing conflict between municipal bylaws and provincial enactments are long-settled and do not require revision. At common law, this Court's decision in *Spraytech* continues to govern the relationship between municipal bylaws and provincial enactments where the matter is not addressed statutorily. However, as noted by this Court in *Spraytech*, the provincial legislatures are free to create a different test.[38]

52. Because the relationship between local government powers and those of the province is one of *delegation* – to be distinguished from the relationship between the federal and provincial governments, which is one of *division* – provincial legislatures have complete freedom to dictate the terms of that relationship. Provinces can, therefore, create whatever conflict test they want. In

[37] BCCA Reasons at para. 82
[38] *Spraytech* at para. 36

British Columbia, section 10 of the *Community Charter* was passed a mere two years after this Court's decision in *Spraytech*, which confirmed the application of the *Multiple Access* test ("the impossibility of dual compliance") to inconsistency between municipal bylaws and provincial enactments.[39] Section 10(2) states:

> (2) For the purposes of subsection (1), unless otherwise provided, a municipal bylaw is not inconsistent with another enactment if a person who complies with the bylaw does not, by this, contravene the other enactment.

53. The adoption of section 10 can only be seen as a direct endorsement of the test confirmed in *Multiple Access* and *Spraytech*. The Legislature did, however, explicitly recognize in section 10 that a provincial enactment may specify a different test and that where it has done so that different test applies. The question in a given case is whether a different test has been specified. If so, that test is to be applied. If not, the default test in subsection (2) of section 10 applies. Provincial legislatures are never precluded from "occupying the field", as they are the sole source of local government power. However, as this Court noted in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13 (*Rothmans*), the intention to occupy a given field must be very clearly expressed.[40]

54. One of the purposes of section 10 was to make this requirement for clear statutory language itself a statutory requirement. Section 10 provides that, unless a provincial enactment includes a provision that excludes a municipal bylaw, the bylaw is to be considered consistent with the enactment unless it requires a contravention of it.

55. In British Columbia, many statutes contain legal tests that fit within the words "unless otherwise provided" in section 10(2) of the *Community Charter.* These provisions include: section 46 of the *Agricultural Land Commission Act,* S.B.C. 2002, c. 36; section 5 of the *Building Act,* S.B.C. 2015, c. 2; section 6 of the *Safety Standards Act*, S.B.C. 2003, c. 36; section 21 of the *Private Managed Forest Land Act,* S.B.C. 2003, c. 80; section 2(3) of the *Farm Practices Protection (Right to Farm) Act,* R.S.B.C. 1996 c. 131; and section 37 of the *Environmental Management Act,* S.B.C. 2003, c. 53. Many more statutes, including the *RTA*, do not contain such a provision. For those statutes, questions as to whether a municipal bylaw is

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[39] *Multiple Access Ltd. v. McCutcheon*, 1982 CanLII 55 (SCC)
[40] *Rothmans* at para. 21

inconsistent with them for section 10 purposes are to be determined in accordance with the default test in subsection (2).

56. The applicant's implied exclusion theory is an attempt to avoid section 10 of the *Community Charter*, a provision for which they never offered an alternate interpretation and which, in the City's submission, is quite clear. If, as the applicant suggests, there exists some other principle by which a court may find that certain legislation ousts municipal jurisdiction, absent an express ouster in the statute and leaving aside a municipality's reasonable interpretation of its home statute, such a principle would create substantial confusion in the law where none currently exists.

57. In sum, instead of having municipalities (1) look to the relevant statutory authority and interpret it in accordance with all applicable principles of statutory interpretation; and (2) apply section 10 of the *Community Charter* to determine whether a particular bylaw that otherwise fits within that authority is inconsistent with a provincial enactment, the applicant would have municipalities ignore the interpretation of their enabling legislation and section 10 and instead assess their authority by asking whether an inference of exclusion can be gleaned from the "comprehensiveness" of a provincial enactment that regulates in the same field. Such a principle not only ignores the clear intention of the Legislature as expressed in section 10, but also creates an unworkable and nebulous standard by which municipalities are to assess their jurisdiction to regulate in particular subject-areas.

Conflict Tests Across Canada

58. The approach to conflict between municipal bylaws and provincial enactments is not uniform on a national scale. This undercuts the applicant's submission that it has identified a question of broader impact for local governments across Canada. For example, in Ontario, the second branch of the operational conflict test is codified. Section 14 of the *Municipal Act*, S.O. 2001, c. 25 states:

> 14 (1) A by-law is without effect to the extent of any conflict with,
>
> (a) a provincial or federal Act or a regulation made under such an Act; or

> (b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation. 2001, c. 25, s. 14.
>
> Same
> (2) Without restricting the generality of subsection (1), there is a conflict between a by-law of a municipality and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument. 2006, c. 32, Sched. A, s. 10. (emphasis added)

59. This provision is much broader than section 10. It imports the impossibility of dual compliance test through the use of the words "without restricting the generality of subsection (1)" but also specifies that a conflict exists where a municipal bylaw "frustrates the purpose of" a provincial enactment. Section 10, in contrast, is framed in the negative and dictates that a bylaw is not inconsistent with a Provincial enactment unless a Provincial enactment so provides or the bylaw requires the contravention of a Provincial enactment.

60. Just as in British Columbia, the Ontario Legislature (and by extension, all others) is also free to "otherwise provide". In *Peacock v. Norfolk*, 2006 CanLII 21752 (ON CA), the Ontario Court of Appeal considered a case, prior to the passage of the current version of section 14 of the *Municipal Act*, in which a municipal bylaw was said to be inconsistent with the *Nutrient Management Act, 2002*, S.O. 2002, c. 4. There, Rouleau J.A. found that the *Nutrient Management Act* contained a different conflict test at section 61, one which displaced the impossibility of dual compliance test and reserved a protected subject matter.[41] Other provinces have taken a simpler approach to conflict, creating a more general rule that does not describe a particular legal test. For example, the Alberta *Municipal Government Act*, R.S.A. 2000, c. M-26 states:

> Relationship to Provincial Law
>
> 13 If there is a conflict or inconsistency between a bylaw and this or another enactment, the bylaw is of no effect to the extent of the conflict or inconsistency.[42]

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[41] *Peacock* at para. 32

[42] See similar provisions in the *Municipalities Act*, SS 2005, c. M-36.1, s. 11; the *Municipal Act*, CCSM, c. M225, s. 230; the *Local Governance Act*, SNB 2017, c. 18, s. 2; the *Municipal Government Act*, S.N.S. 1998, c. 18, s. 171; the *Municipal Government Act*, R.S.P.E.I. 1988, c.

61. These conflict tests do not define the term "inconsistency" in the manner that the British Columbia and Ontario legislation does and would therefore need to be applied with reference to the common law.[43]

62. In sum, it is clear that the applicant does not pose a question of broader public importance. British Columbia has a uniquely narrow conflict test, which is consistent with the intention of the Legislature that the *Community Charter* be the broadest possible municipal enabling legislation in Canada.[44] It is also clear that the nature of section 10 of the *Community Charter* is a discrete administrative law question without broader application throughout Canada.

The Standard of Review

63. The City also submits that this case raises no standard of review question requiring this Court's attention. The British Columbia Court of Appeal faithfully applied this Court's recent decision in *Vavilov,* finding that a reasonableness standard applied to the City's decision concerning its authority to enact the impugned bylaw.

64. There is no question regarding "jurisdictional boundaries", as alleged by the applicant. As set out in *Vavilov,* such a question can only arise where there are "conflicting orders and proceedings…pulling a party in two different and incompatible directions".[45] In this case, there was no parallel order or proceeding, as there was in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14 and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39. As noted above, the applicant never engaged any parallel process under the *RTA* – only the City's decision to enact the Impugned Bylaw was at issue. Moreover, by finding the City had the jurisdiction adopt the bylaw, the Court did not assign to the City a power that might otherwise rest with the

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M-12.1, s. 5; the *Municipal Act*, R.S.Y. 2002, c. 154, s. 264; and the *Cities, Towns and Villages Act*, S.N.W.T. 2003, c. 22, Sch B., s. 70.

[43] See for example, *Croplife Canada v. Toronto (City),* 2005 CanLII 15709 (ON CA), which considered an earlier version of the section 14 of the Ontario *Municipal Act*, and *R v. K.P.*, 2011 ABCA 233.

[44] British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 37th Parl, 4th Sess, (29 April 2003) at 6301

[45] BCCA Reasons at para. 57 citing *Vavilov* at para. 64

Director under the *RTA*. The power to make bylaws under section 8 of the *Community Charter* is clearly a power given to the City, not the Director, and so construing the scope of that power is not a jurisdictional boundary question of the kind contemplated by this Court in *Vavilov.*

65. Lower courts across Canada have uniformly applied the "jurisdictional boundaries" exception to the presumption of reasonableness review, dismissing cases in which the rationales provided by the Court in *Vavilov* were inapplicable.[46]

66. Finally, the City notes that the application of a correctness standard made no difference in the case's outcome at the British Columbia Supreme Court level.

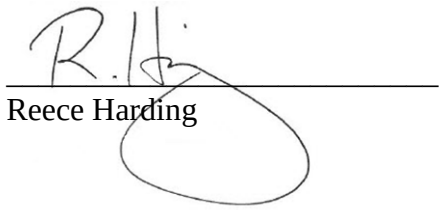
PART IV – COSTS

67. The City seeks its costs in responding to this application for leave to appeal. In the event that leave is granted, costs should be in the cause of the appeal.

PART V – ORDER SOUGHT

68. The City seeks an order that this application for leave to appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON 15 SEPTEMBER, 2021.



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Nick Falzon

[46] See the following cases in which courts have dismissed arguments for correctness review based on this exception: *Yue v. Bank of Montreal,* 2021 FCA 107 at paras. 7-8; *Manitoba Government and General Employees Union v. The Minister of Finance for the Government,* 2021 MBCA 36 at paras. 25-27; *English v. Richmond (City),* 2020 BCSC 1642 at para. 61; *McDonald v. Creekside Campgrounds and RV Park,* 2020 BCSC 2095 at para. 19; *The Owners, Strata Plan BCS 435 v. Wong,* 2020 BCSC 1972 at paras. 62-68; *United Food and Commercial Workers Union of Canada, Local 175 v. Silverstein's Bakery Ltd.,* 2020 ONSC 5649 at paras. 18-20; and *Syndicat des charges et charges de cours de l'Universite de Montreal – SCCCUM c. Tribunal administratif du travail,* 2020 QCCS 3780 at paras. 61-66.

PART VI – TABLE OF AUTHORITIES

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