

Court of Queen's Bench of Alberta

Citation: Calgary (City) v. Alberta (Municipal Government Board), 2010 ABQB 719

Date: 20101119
Docket: 0801 13148
Registry: Calgary

Between:

The City of Calgary

Applicant

- and -

**The Municipal Government Board and BTC Properties II Ltd. also known as “BTC
PROPERTIES II LTD.”**

Respondents

Corrected judgment: A corrigendum was issued on November 22, 2010; the corrections have been made to the text and the corrigendum is appended to this judgment.

**Reasons for Judgment
of the
Honourable Madam Justice B. E. Romaine**

[1] The City of Calgary applies for judicial review of Municipal Government Board Order 057/08 (the Impugned Order). The issue is whether BTC Properties II Ltd. was properly assessed for business tax on parking facilities located in each of three office buildings owned by it. This largely depends upon whether BTC or the tenants renting the parking operated a business in the parking facilities.

I. BACKGROUND

[2] Prior to 2003, it was not the City's practice to assess business tax on parking space or facilities associated with office buildings and rented to the tenants of those buildings. This changed as a result of the MGB's decision in *Tonko Development Corporation v. Calgary (City)*, MGB 078/03 in which various parking operators, both property owners and third parties operating under leases or other agreements with the owners, challenged 2002 business tax assessments relating to numerous parking facilities operated by them. One basis for the challenge was that the assessments were inequitable. The MGB found that the parking operators were assessable but agreed that the assessments were inequitable and reduced each to \$1.00. The MGB found a systemic inequity resulting from the fact that the owners/landlords of parking facilities in office buildings were competing businesses but were not being assessed. As a result, the City began assessing both parking operators and owners/landlords of office building parking facilities for 2003 business tax.

[3] BTC and numerous other parking operators and owners/landlords appealed the 2003 assessments, and like assessments for the 2004, 2005 and 2006 taxation years, to the Calgary Assessment Review Board (ARB).

[4] On further appeal to the MGB, BTC's 2004 assessments on the subject parking facilities were affirmed. BTC's grounds for appeal of the 2004 assessments were the same as its grounds for appeal of the 2005 and 2006 assessments, the appeals under review in the present case. The 2004 assessments were affirmed on the basis that there was insufficient evidence to decide the matter: *Altus Group Calgary v. Calgary (City)*, MGB 016/06. In the Impugned Order, the MGB granted BTC's 2005 and 2006 appeals. The MGB distinguished its decision affirming the 2004 assessments on the basis, in this case, BTC had brought forth considerable evidence, in the form of the leases governing the subject parking facilities, to support its appeals: Impugned Order p. 13.

[5] This judicial review relates to BTC's appeal to the MGB of its 2005 and 2006 business tax assessments on the subject parking facilities. The facilities are underground parkades located in each of three multi-storey, multi-tenanted office buildings in the Calgary core and beltline areas. The buildings are owned by BTC and are referred to respectively as the IBM Building, the Energy Plaza Building and the BP Centre Building. The parking facilities in each of the buildings were rented at all material times exclusively to the business tenants of the buildings.

[6] BTC, as well as numerous other owners/landlords and parking operators of parking facilities, appealed their 2005 assessments to the ARB. BTC's Issue Statement raised the following grounds of appeal:

Issue - Assessment incorrectly determined. Support - Bylaw 8M2005 does not identify parking as an assessable use, the bylaw is applied inconsistently within the same property. Current application of the NARV assigns a Business Asmt. and tax to vacant space...

Issue - Incorrect Person Assessed. Support - The owner of the premises has been levied the assessment and tax instead of the occupant and the associated business...

Issue - The NARV is unsupported by evidence and market fact. Support - No evidence is provided by the assessment office to substantiate how the NARV is achieved...

Issue - Some assessed occupancies are tax exempt...

[7] BTC's appeal was heard in conjunction with appeals on approximately 40 other properties. On August 24, 2005, the ARB affirmed the 2005 assessments. Each of the ARB decisions relating to each of the three parking facilities is one page in length and states the following under the section entitled "Decision with Reasons":

...It is the Board's decision that in most instances it is the owners or landlord and not the tenant who is the properly assessed person. The owner has care and control of the parking spaces and receives the revenue. Although the development permit requires that parking be provided, it does not indicate who shall manage the parking spaces. With regards to the allegation that many similar parking facilities have not been assessed, the Board finds there is inconclusive evidence to support this position...

[8] BTC, and numerous other owners/landlords and operators of parking facilities, also appealed their 2006 assessments to the ARB. BTC's Issue Statement raised the following grounds of appeal: (1) the NARV for the facilities may be incorrect for a number of reasons; and (2) the City erred in assessing and levying a business tax in respect of the parking facilities for the subjects as: (i) Bylaw 9M2006 does not contemplate a business tax assessment of the subjects; (ii) City applied the bylaw in a manner that was incorrect and contrary to its purpose and intent in respect of the assessed person. BTC's appeal to the ARB was heard in conjunction with approximately 47 other appeals. The ARB affirmed the 2006 assessments. No formal decision was rendered other than a one page form letter mailed May 24, 2006 indicating that the assessment was confirmed.

[9] BTC and other parking operators and owners/landlords appealed both the 2005 and 2006 ARB decisions to the MGB. The 2005 Applications for Assessment Appeal state the grounds for appeal as follows: (1) the assessment is incorrectly determined and NARV is unsupported by evidence and market fact; (2) "incorrect assessed person"; and (3) "the owner of the property should not be the assessed person under bylaw 8M2005". The 2006 Application for Assessment Appeal reasons for appeal were as follows: (1) Bylaw 9m2006 does not specifically address assessment of parking facilities; Bylaw is applied inconsistently and contrary to intent and purpose; (2) incorrect stall counts are assessed; (3) NARV may not represent actual rents (net) the subject achieves; (4) comparison analysis identifies potential inequity in treatment of similar situations.

[10] The MGB hearing took place over four days, on January 14, 16, 17 and 18, 2008. Prior to the hearing, all property owners except BTC withdrew their 2005 and 2006 appeals. At the hearing, the MGB received and reviewed the ARB Record, heard evidence from BTC's two

witnesses and the City's witness, examined building leases provided by BTC, and heard extensive argument from both the City and BTC. On May 26, 2008, the MGB rendered the Impugned Order allowing the appeals and setting the assessments to nil. It stated in its reasons that while BTC was not the proper assessed person, the tenants of the buildings may be.

[11] On January 19, 2009, the MGB denied the City's request to reconsider the Impugned Order: see *Calgary (City) v. BTC Properties II Ltd.*, MGB 006/09.

II. LEGISLATION

A. MUNICIPAL GOVERNMENT ACT

[12] The imposition of business tax is authorized under the *Municipal Government Act*, R.S.A. 2000, c. M-26 (MGA), Part 10, Division 3.

[13] Business tax must be imposed under a business tax bylaw. Section 371 of the MGA gives the City power to pass a business tax bylaw. Section 372 of the MGA gives the City power to impose a business tax bylaw on all businesses operating in the municipality unless the business was exempt from tax. Section 373 of the MGA requires the person operating the business to pay the business tax.

[14] Section 374 of the MGA specifies the contents of the bylaw. The business tax bylaw is to contain assessments of businesses to be prepared and recorded on a business assessment roll: s. 374(1). The bylaw is to specify one or more methods to be used to prepare business tax assessments. One method, the method chosen by the City in the present case, is on "a percentage of the net annual rental value of the premises" (the "NARV method"): s. 374(1)(b)(i.1). The bylaw is also to specify the basis upon which a business tax may be imposed by prescribing, for the NARV method, "the percentage of the net annual rental value": s. 374(1)(c)(i.1).

[15] "Business" is defined under s. 1(1)(a) of the MGA as follows:

- (i) a commercial, merchandising or industrial activity or undertaking;
- (ii) a profession, trade, occupation, calling or employment, or
- (iii) an activity providing goods or services,
whether or not for profit and however organized or formed, including a co-operative or association of persons;

[16] ARB functions and decisions are dealt with in Part 11 of the MGA. Section 460 specifies the types of complaints that can be made to the ARB and includes complaints about matters shown on an assessment or tax notice including a description of a property or business (s. 460

(5)(a)); the name and mailing address of an assessed person or taxpayer (s. 460(5)(b)); an assessment (s. 460(5)(c)); and whether the property is assessable (s.460(5)(i)).

[17] Part 11, s. 467 of the MGA deals with decisions of the ARB:

467 (1) An assessment review board may make any of the following decisions:

...

(b) make a change with respect to any matter referred to in section 460(5);

(c) decide that no change to an assessment roll or tax roll is required.

(2) An assessment review board must not alter any assessment that is fair and equitable, taking into consideration assessments of similar property or businesses in the same municipality.

[18] Part 12, s. 499(1) of the MGA deals with appeals to the MGB:

499 (1) On concluding a hearing the Board may make any of the following decisions:

...

(d) make any decision that the assessment review board could have made, if the hearing relates to the decision of an assessment review board;

(2) The Board must not alter

(a) any assessment that is fair and equitable, taking into consideration assessments of similar property in the same municipality, and...

[19] In proceedings before the MGB, the MGB is not bound by the rules of evidence and may hear new evidence: s 496 (1).

B. CALGARY BUSINESS TAX BYLAWS 8M2005 AND 9M2006

[20] The City passed the business tax bylaws in question, Bylaws 8M2005 and 9M2006 (the Bylaws). They are identical. There is no dispute that the Bylaws complied with the foregoing provisions of the MGA.

[21] NARV is defined under s. 3(e) of each Bylaw as “the typical market annual rental value of the Premises exclusive of operating costs, but inclusive of the costs of leasehold improvements”.

[22] Section 4(2) of each Bylaw states that the business assessments are based on 100 percent of the NARV of the premises.

[23] The definition of “business” in s. 3 (c) of the Bylaws is the same as the definition of “business” in s. 1(1)(a) of the MGA.

[24] The term “premises” is not defined in the MGA but is defined in s. 1(g) of the Bylaws as follows:

- 1(g) “Premises” means any space occupied or used for the purpose of or in connection with a Business, and without limiting the generality of the foregoing includes:
 - (i) land and buildings or part of buildings on such land; and
 - (ii) any store, office, warehouse, factory, facility, hotel, motel, enclosure, yard or other space.

[25] Section 18(1) of each Bylaw states that if a business would not have been subject to the imposition of business tax under the *Municipal Taxation Act*, R.S.A. 1980, c. M-31 (MTA), it continues to be non-taxable.

III. ISSUES

1. What is the appropriate standard of review?
2. Applying the appropriate standard of review, did the MGB err in its findings?

IV. DISCUSSION AND ANALYSIS

A. STANDARD OF REVIEW

1. Position of parties

[26] The City’s approach appears to be that where a party alleges that an administrative decision maker’s reasons are not only unreasonable or incorrect, but also inadequate, a double-barrelled approach to the standard of review analysis may be employed. It challenges the MGB’s decision based on procedural unfairness, applying a correctness standard of review, and on a reasonableness/correctness standard of review applying the analysis in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[27] The City argues that the appropriate standard of review is correctness based on three alleged errors made by the MGB. First, it argues that the MGB’s decision is procedurally unfair because its reasons are so deficient as to constitute an error of law. Second, it argues that it was procedurally unfair for the MGB to decide that the tenants had exclusive use of the parking premises and imply that they were liable for the business tax when the tenants were not represented at the MGB hearing. Third, it argues that the MGB’s decision exempted BTC from

the payment of business tax and that decisions regarding exemption from tax are outside the MGB's jurisdiction. In the alternative, the City argues that if a judicial review analysis under *Dunsmuir* is conducted, applying either a correctness or reasonableness standard, the MGB's reasons and decision should be quashed and the matter returned to a different hearing panel of the MGB for rehearing. It argues that if a correctness standard is applied, the reasons and decision of the MGB are not correct. It argues that if a reasonableness standard is applied, the reasons and decision of the MGB are not reasonable because the reasons are not transparent or intelligible and do not provide appropriate justification for the MGB's conclusions.

[28] The MGB made submissions to the Court confined to explaining the Record, addressing the standard and scope of judicial review, and explaining the MGB's practices and policies within its statutory mandate relative to the matters in issue. It took no position on the correctness, reasonableness or fairness of its decision.

[29] The MGB resists the application of a parallel judicial review analysis. It submits that the requirement to give reasons should not be so expanded that it "eats up" the judicial review analysis of the substantive reasons required under *Dunsmuir*. It argues that a parallel review goes directly against the Supreme Court of Canada's intention in *Dunsmuir* to simplify the judicial review analysis. It submits that the standard to be applied depends, in part, on the characterization of the issues before the MGB, which it characterizes as issues of fact and mixed law and fact attracting a reasonableness standard of review. It submits that the issue before the MGB was whether BTC was assessable for business tax on the parking facilities. This required the MGB to interpret the MGB and the Bylaws and make findings of fact and law related to whether parking facilities are assessable, whether BTC was operating a business in the City of Calgary, and whether it was operating its business in the parking facilities.

[30] The MGB challenges the characterization of its decision to reduce the business tax assessment to nil as a jurisdictional issue. It argues that the MGA specifically gives the MGB the authority to deal with assessment appeals. It submits that the issue before the MGB was not whether it had jurisdiction to exempt BTC from tax or to hear an appeal which could result in an exemption. The issue was whether BTC was assessable under the MGA, which is wholly within its jurisdiction to decide. It also submits that it did not decide, in the tenants' absence, that the tenants were assessable for business tax on the parking facilities. It left that issue open.

[31] BTC submits that the standard of review is reasonableness. It characterizes the issue as one of mixed law and fact. It submits that the MGB embarked on a fact finding mission and then applied those facts to the legislative scheme and the Bylaws. It considered the evidence and business tax assessment policy and equity. It submits that this was a classic case of applying the facts and findings to the law.

2. Law re standard of review for procedural fairness issues

[32] Generally, the standard of review for issues of procedural fairness and the legal obligation to give reasons is correctness: *Clifford v. Ontario (Attorney General)*, 2009 ONCA 670, 98 O.R.

(3d) 210, leave to appeal to the SCC dismissed [2009] S.C.C.A. No. 461; *Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission)*, 2008 ABQB 595, 450 A.R. 1 at para. 56. In *Clifford*, the Court held at paras. 22 - 23 that if there is a legal obligation to give reasons, there can be no deference granted to a tribunal's decision to not give reasons.

a. Doctrine of legitimate expectations

[33] The Supreme Court of Canada expanded the duty of procedural fairness in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39. Reasons are required from tribunals such as the MGB where the decision has an important significance for the individual or if there is a statutory right of appeal. In doing so, the Supreme Court of Canada commented on the doctrine of legitimate expectations, at para. 26:

[...] the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights [citations omitted]. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: [citations omitted]. Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded [citations omitted]. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain....

[Emphasis added]

[34] The doctrine of legitimate expectations provides that a certain process will be followed rather than assuring a particular result. Further, in certain cases, more extensive procedural rights are afforded, however, the doctrine of legitimate expectations does not produce or deal with substantive rights. Put another way, a decision maker's discretion to reach a certain result is unfettered by the doctrine of legitimate expectations. Examples of procedural rights arising from this doctrine include the right to make representations and the right to be consulted: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249 at para. 78. The City cites *Edison v. Canada*, 2001 FCT 734, 208 F.T.R. 58 at para. 23 which confirms that legitimate expectations arise "where an individual relies on procedural norms established by past practice or published guidelines...".

[35] *Baker* expanded a tribunal's duty to give reasons but also confined the application of the doctrine of legitimate expectations to procedural rights. The City cannot use this doctrine to argue for a different determination outside of the procedural domain.

b. Difference between adequacy of reasons and the substantive decision made

[36] The difference between challenging the procedural fairness of a decision based on the inadequacy of reasons under *Baker* and challenging the substantive decision applying the *Dunsmuir* standard of review analysis has recently been analysed by the Ontario and the Newfoundland and Labrador Courts of Appeal.

[37] In its 2009 decision in *Clifford*, the Ontario Court of Appeal found that where a lack of procedural fairness based on the inadequacy of reasons is alleged, two separate analyses must be conducted for judicial review purposes. The initial threshold review requires an analysis of whether the administrative body has satisfied its procedural fairness obligation to give reasons. The second review requires an analysis of whether the administrative body's substantive reasons and decision are reasonable or correct applying the *Dunsmuir* analysis. The Court stated at paras. 31 - 32:

In addition, in my view, it is important to differentiate the task of assessing the adequacy of reasons given by an administrative tribunal from the task of assessing the substantive decision made. A challenge on judicial review to the sufficiency of reasons is a challenge to an aspect of the procedure used by the tribunal. The court must assess the reasons from a functional perspective to see if the basis for the decision is intelligible.

This is to be distinguished from a challenge on judicial review to the outcome reached by the tribunal. That may require the court to examine not only the decision but the reasoning offered in support of it from a substantive perspective. Depending on the applicable standard of review, the court must determine whether the outcome and the reasoning supporting it are reasonable or correct. That is a very different task from assessing the sufficiency of the reasons in a functional sense.

[38] Jeffrey J. recently adopted and applied the foregoing passage from *Clifford* in *Calgary (City) v. Calgary Firefighters Assn.*, 2010 ABQB 226, [2010] A.J. No. 367 at para. 28.

[39] The majority of the Newfoundland and Labrador Court of Appeal subsequently took a different approach in *Newfoundland and Labrador (Treasury Board) v. Newfoundland and Labrador Nurses' Union*, 2010 NLCA 13, 294 Nfld. & P.E.I.R. 161, leave to appeal to the SCC granted [2010] S.C.C.A. No. 137. The majority decision frames the issue as whether the trial division judge erred in concluding that the arbitrator's decision was unreasonable because the

decision-making process lacked justification, transparency and intelligibility. This is the test for reasonableness developed in *Dunsmuir*. The Court split on the issue of whether it must conduct both a procedural fairness analysis as to the adequacy of the reasons and a separate *Dunsmuir* analysis as to the reasonableness or correctness of the substantive reasons. Welsh J., for the majority, preferred a simplified approach, stating at para. 12:

Finally, a comment may be of assistance regarding the interplay between adequacy of reasons in the context of procedural fairness and the first prong of the *Dunsmuir* analysis, this is, the aspect of reasonableness directed to the process of articulating the reasons, requiring justification transparency and intelligibility in the decision-making process. Clearly, the *Dunsmuir* analysis requires a consideration of the reasons provided by the tribunal. A failure to give reasons, or inadequate reasons, would be decisive in the reasonableness assessment. A complete lack of or inadequate reasons could not be said to provide the justification, transparency and intelligibility in the decision-making process required to satisfy reasonableness under the *Dunsmuir* analysis. Unless legislation eliminates the necessity for reasons, reasonableness is the standard required to be met by a tribunal. Since reasons, including adequacy thereof, constitute a component of reasonableness, a separate examination of procedural fairness is an unnecessary and unhelpful complication.

[Emphasis added]

[40] Cameron J., in dissent, appeared to prefer the two-step approach applied in *Clifford*, stating at para. 38:

The distinction between the first part of a *Dunsmuir* review for reasonableness of a decision of an arbitrator (a substantive review) and a review of adequacy of reasons in response to a claim based on procedural fairness turns on the purpose of the review. The two procedures often use the same vocabulary: words such as "transparency" and "intelligibility" appear in the discussions of both. The difference is that a substantive review is concerned with the reasonableness of the decision and, to that end, it looks at the reasons articulated. A procedural fairness review examines the fairness of the process. It is directed to the ability to discern the reasons without reference to the question of whether the decision falls within the range of acceptable outcomes. In my opinion, where procedural fairness requires reasons be provided, *Dunsmuir* has not changed how a reviewing court would approach the task of reviewing adequacy of reasons. Issues of procedural fairness do not involve any deferential standard of review [citations omitted]...

[41] Thus, the approach to judicial review of this type of issue is different. The majority of the Newfoundland and Labrador Court of Appeal took a more simplified approach than the two-pronged approach adopted by the Ontario Court of Appeal. It found, in effect, that *Baker* is

subsumed in *Dunsmuir*. There is no need to assess every decision firstly on whether the reasons are adequate applying a correctness standard and secondly on whether the reasons are reasonable or correct applying the *Dunsmuir* analysis. Welsh J. notes that if there is a total lack of reasons or inadequate reasons, justification, transparency and intelligibility cannot exist within the decision-making process.

[42] In my view, the requirement in *Baker* to give reasons does not occupy precisely the same ground as the Supreme Court of Canada's framework for analysing the sufficiency of reasons in *Dunsmuir*. However, there is some crossover since both involve an evaluation of the justification, transparency and intelligibility of the reasons. As the issue is not settled in Alberta, I will conduct two separate reviews, although I agree with the view of the majority of the Newfoundland and Labrador Court of Appeal which is consistent with the *Dunsmuir* goal of clarity and simplicity.

[43] It is noteworthy that the Supreme Court of Canada in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 at paras. 55-56 had the following to say on the topic of the reasonableness standard of review:

A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam* at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation, even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).

...At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result...

[44] This description of reasonableness can be taken as a description of the process for determining whether the reasons given by the tribunal are sufficient, whether the basis for the decision is intelligible and thus whether the process was fair, the first step in the two-step analysis adopted in *Clifford*. To isolate the first step and characterize it as being subject to some standard of "correctness" rather than "reasonableness" is to bring "correctness" in through the back door in an analysis that does not require such a standard, as reasons that do not meet such a test would surely, as Welsh J. has put it in *Newfoundland and Labrador Nurses' Union*, be unreasonable.

3. Law re standard of review for substantive issues

a. General principles

[45] The Supreme Court reconsidered the analytical process employed by a court to ascertain the appropriate standard of review in the judicial review of administrative tribunal decisions in *Dunsmuir*. Where a standard of review analysis is required, a two-step process is now to be applied: *Dunsmuir* at paras. 62 and 64.

[46] First, the court determines whether the standard has been settled by the jurisprudence. Judicial precedent must have “determined in a satisfactory manner” the degree of deference to be accorded to “a particular category of question”. It is not necessary to perform a fresh standard of review analysis in every case if the standard has already been set for the type of question in issue: *Dunsmuir* at paras. 57, 62.

[47] Second, if the standard of review has not been satisfactorily determined, the court must perform a contextual standard of review analysis to determine whether the administrative decision maker should be given deference and a reasonableness standard applied. This involves the consideration of the following four factors: (1) presence of a privative clause; (2) purpose of the administrative decision maker as determined by its enabling legislation; (3) nature of the question(s) at issue; (4) expertise of the administrative decision maker: *Dunsmuir* at paras. 53 - 57 and para. 64.

[48] An exhaustive review of these factors is not required in every case and no one factor is determinative. The applicable factors must be weighed together to determine the proper level of deference required and thereby the appropriate standard of review: *Dunsmuir* at para. 56. Where the reviewing court determines that little or no deference is called for, a correctness standard of review is applied. Where the reviewing court determines that considerable deference is called for, a reasonableness standard of review is applied.

[49] In *Dunsmuir*, the Supreme Court of Canada gave guidelines as to the types of issues that normally attract a reasonableness standard of review and those that attract a correctness standard of review: at paras. 53 - 54:

Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop* at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil

law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

[50] A correctness standard necessarily applies where the nature of the issue before the tribunal is one of constitutional interpretation involving “true questions of jurisdiction” that arise where the tribunal must “explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter”: *Dunsmuir* at para. 59; where the issue is a general question of law of “central importance to the legal system as a whole and outside the adjudicator’s specialized areas of expertise”: *Dunsmuir* at paras. 55 and 60; and, where the issue involves the jurisdictional lines between two or more competing specialized tribunals: *Dunsmuir* at para. 61. It is noteworthy that the issue of adequacy of reasons does not fit well into any of these categories.

[51] The expertise of a tribunal is determined relative to the expertise of the court. Determining expertise requires the court to identify the nature of the issue before the tribunal, characterize the expertise of the tribunal relative to the nature of the issue, consider the court’s own expertise relative to the nature of the issue, and determine whether the tribunal has relatively more expertise than the court with respect to the issue. The reviewing court determines the expertise of the tribunal by considering both the general expertise of the tribunal as well as its expertise regarding the issue under appeal or judicial review. Greater deference is indicated if the tribunal is more expert than the court and the issue under appeal or judicial review falls within the tribunal’s greater expertise: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226.

[52] The Supreme Court of Canada explained the reasonableness standard in *Dunsmuir* at para. 47:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

b. Existing Case Law

[53] The existing case law indicates that a reasonableness standard of review should be applied to the MGB's decision in this case.

[54] One of the issues before the MGB was whether the parking facilities were occupied or used for the purpose of or in connection with BTC's business. Where the issue before the MGB was whether various properties used to provide food and beverage services were "...used in connection with educational purposes and held by . . . the board of governors" of a university under s. 362(1)(d)(i) of the MGA, the Alberta Court of Appeal applied a reasonableness standard of review: *University of Alberta v. Edmonton (City)*, 2005 ABCA 147, 363 A.R. 378. The Court ruled that the nature of the problem was one of mixed fact and law, and that a moderate level of deference was called for.

[55] In *Calgary (City) v. Municipal Government Board (Alta.)*, 2008 ABCA 187, 432 A.R. 202 (*Hudson's Bay* decision), the MGB interpreted s. 460(3) of the MGA, specifically whether a party was "an assessed person" that could make a complaint as to "any assessed property or tax", even though it did not own the property assessed. The Alberta Court of Appeal ruled that the nature of the issue involved the interpretation of the MGA and was subject to a reasonableness standard of review.

c. Standard of Review Analysis

[56] In the event that a standard of review analysis is required, it also leads to the application of a reasonableness standard of review.

[57] Section 506 of the MGA states that there is no appeal from a decision of the MGB and has been characterized as a weak privative clause attracting a moderate degree of deference: *Alberta (Minister of Municipal Affairs) v. Telus Communications Inc.*, 2002 ABCA 199, 312 A.R. 40 at para. 3, leave to appeal to S.C.C. refused, [2002] S.C.C.A. 440.

[58] The purpose of the MGB is to supervise the assessment of real property for municipal taxation purposes with the objective of ensuring that all property in the Province subject to municipal taxation is fairly and equitably assessed. Where the MGB applies its expertise to assess the economic and operational realities which, in turn, impact upon its interpretation of the MGA, a reasonableness standard is applied. The assessment of economic and operational realities is a factual assessment which the MGB is uniquely equipped to make: *Telus*.

[59] The nature of the question before the MGB involved the interpretation of the MGA and the Bylaws and fact finding with regard to that interpretation. This can be characterized as an issue of mixed law and fact; however, the issues before the MGB were primarily factual. It was required to determine whether BTC occupied or used the subject parking facilities for its business. This required the MGB to examine the provisions of the leases applicable to the buildings and the facts regarding the occupation and use of the parking facilities. A reasonableness standard of review is indicated.

[60] The expertise of the MGB relative to the courts on issues of property valuation and assessment also indicates that deference be given to the MGB. In *Telus*, the Court ruled that the MGB “may have developed, through experience, a level of expertise in the area of property assessment...”. The Court also considered the chambers judge’s comment that the MGB had been given “an important expert role to play in determining whether it would be fair and equitable in light of the taxation of other linear property to include feature software in the definition of ‘telecommunications system’”. In assessing the relative expertise of the MGB and the reviewing court, the Court of Appeal ruled that the MGB was “uniquely equipped to assess the factual context and its expertise in that regard” was owed greater deference. As a result, the Court of Appeal ruled that, as the nature of the issue before the MGB was one of mixed law and fact, the standard of review was patent unreasonableness: *Telus* at paras. 33 - 34.

[61] Alberta courts have found that the MGB has “a particular expertise in appreciating the impact of various possible interpretations of the statutory provisions on its ability to fulfill its mandate to administer the appeal process relating to the taxation of property fairly and equitably”: *Calgary (City of) v. Northland Property Ltd.*, 2003 ABQB 668, [2003] A.J. No. 970 at para. 13.

d. Conclusion

[62] Balancing the foregoing factors to be considered in a standard of review analysis, I find that a reasonableness standard of review is applicable. In this case, the MGB interpreted the provisions of the MGA and the Bylaws, made findings of fact, and applied the facts and its findings to the law. I do not agree with the City’s argument that the MGB’s decision to reduce the tax assessment to nil has the effect of granting a tax exemption to BTC and that this is a matter outside the MGB’s jurisdiction. The issue was whether the City had properly assessed BTC for business tax under the MGA and the Bylaws. This was an issue which was clearly within the jurisdiction of the MGB.

B. APPLICATION OF STANDARD OF REVIEW

1. Application of standard of review to substantive issues

[63] A court conducting a review for reasonableness inquires into the qualities that make the decision reasonable. An administrative body’s decision will be reasonable if two conditions are satisfied. First, justification, transparency and intelligibility must exist in the decision making process. Second, the decision must fall within a range of possible, acceptable outcomes which are defensible given the law and the facts: *Dunsmuir*. If the process employed by the administrative body and the outcome “fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.”: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59.

[64] The law applicable to the MGB's Impugned Order is the MGA and the Bylaws and the case law interpreting it. Further, although this Court is not bound by decisions of the MGB, it is informed by them.

[65] Business tax is assessable against those who operate a "business" in "premises" in the City of Calgary. To determine whether BTC was assessable for business tax on the subject parking facilities, the MGB was required to consider whether the subject parking facilities were "premises" as defined in the Bylaws; whether BTC was operating a "business" as defined in the MGA and the Bylaws; and whether the subject parking facilities were spaces being occupied or used by BTC to operate its business.

a. Decision that parking facilities are taxable under the Bylaws

[66] The MGB found that the definition of "premises" includes parking facilities.

[67] The City's position was that the term "premises" as defined in the Bylaws should be interpreted expansively as encompassing parking spaces and entire parking facilities.

[68] BTC argued that it was not the intention of the legislature or the City that parking facilities be assessed for business tax. It argued that business tax is in essence an occupancy tax and was intended to be a tax levied on the premises from which a business operates. BTC pointed to several provisions of the MGA, for example, s. 379 (3) (a), which provides for supplemental assessments where the business "moves into new premises" or "increases the storage capacity or floor space of the premises occupied for the purpose of a business..." It also referred to s. 2 of the Bylaws which states that the purpose of the Bylaws is to "...authorize the assessment, supplementary assessment and taxation of Businesses operating in Premises within the City...".

[69] Section 1(g) of the Bylaws states:

1(g) "Premises" means any space occupied or used for the purpose of or in connection with a Business, and without limiting the generality of the foregoing includes:

- (i) land and buildings or part of buildings on such land; and
- (ii) any store, office, warehouse, factory, facility, hotel, motel, enclosure, yard or other space.

[Emphasis added]

[70] The term "space" has been interpreted by the MGB as having its common meaning and including "...space, whether that space is used for parking of vehicles or for retail space": *Tonko* at p. 14.

[71] In *Tonko*, the MGA found that the term "premises" should be given a broad and expansive interpretation based on the purpose of business tax assessment under the MGA and

business tax bylaws. Section 372 of the MGA authorizes the City to impose a business tax on all businesses. The Bylaws do not exempt any businesses and more specifically, do not exempt parking businesses. It found that the purpose of the business tax bylaw was to apply to all businesses and the definition of “premises” should be read in a manner that achieves that purpose: *Tonko* at p. 14.

[72] In *Tonko*, the MGB also found that the phrase “used for the purpose of or in connection with a Business” is to be interpreted as providing the flexibility needed to apply a business assessment to the entire space occupied or used. The MGB found that where a parking business is being operated from premises in the City, the entire parking facilities, including the physical parking spaces in which vehicles are parked, may be assessed for business tax. A business tax bylaw must apply to all businesses operating in the municipality and must therefore be adaptable to a wide variety of business circumstances: *Tonko* at p. 18.

[73] In the Impugned Order, the MGB concluded that “premises” includes parking facilities. It adopted the reasoning from a passage in *Tonko* as support for its conclusion, stating at pp. 13 - 14 of the Impugned Order:

Tonko Development Corporation et al. v. City of Calgary (MGB 078/03) on page 14 reads as follows:

This broad and expansive interpretation of the definition is supported by an examination of the purpose of a business assessment in the Act and the Bylaw. Section 372 of the Act authorizes a municipality to impose a business tax on all businesses operating within the municipality with the exception of businesses that are exempt. Section 4(1) of the Bylaw 3M2002 requires that every person who operates a business in a premises within the city shall be assessed for the purposes of imposing a business tax. The MGB interprets this to mean all businesses. Bylaw 3M2002 has no section which identifies businesses which are exempt, and more specifically does not exempt a business which operates parking facilities. Thus, the MGB comes to the conclusion that the purpose of the bylaw is to apply to all businesses and that the definition of premises should not be read in a restrictive manner in order that this purpose cannot be achieved.

While recognizing that it is not bound by its previous decisions, the MGB still accepts the reasoning in the passage above. Thus, if a parking business is operated on the premises, it is taxable. The parties disagree over whether a parking business was in operation.

[Emphasis added]

[74] The MGB concluded that the MGA and the Bylaws were intended to impose a business tax on all businesses operating in premises in the City, including parking businesses. This was a reasonable conclusion, consistent with the plain meaning and purpose of the business tax provisions of the MGA and Bylaws. It is also evident from the MGB’s reasoning how it came to

this conclusion. The question was whether BTC was operating a business in the subject parking facilities.

b. Decision that BTC did not operate a parking business in the parking facilities

[75] The MGA and the Bylaws provide that business tax is assessable on those operating a business in premises in the City of Calgary. The MGB found that BTC did not operate a parking business in the subject parking facilities.

(i) Position of the Parties

[76] The City argued that this issue had been decided in *Tonko* and affirmed in a line of subsequent MGB decisions. It argued that prior to *Tonko*, the standard practice had generally been to include a charge for parking in the rent for office space. As a result, the business assessment on the office space captured the NARV of office and parking space. The MGB had decided in *Tonko* and subsequent decisions that the practice had changed. Owners/landlords of parking in office buildings were now charging a separate and additional rent for parking, over and above the rent for office space. As a result, they were operating parking rental businesses separate from their office rental businesses. The City argued that the leases in question and the evidence of the City's witness, the City's former tax assessment officer, supported the City's position that there is a separate market for parking and office space. It argued that since the building leases charged a separate and additional rent for parking, BTC was operating a separate parking business in the subject parking facilities and was therefore assessable for business tax on those facilities.

[77] The City argued that the decisive factor was that BTC charged its tenants a separate and additional fee for parking and was thus in the business of selling parking. It did not matter whether the parking was rented to the tenants, their employees or the public. What mattered was that the owner/landlord generated a separate revenue stream from the rental of its parking space and was thus in the business of renting parking space, in addition to its business of renting office space.

[78] BTC argued that it had always been a standard industry practice in the office building lease market to charge a separate and additional rent for parking space. It argued that the fact that the building leases charged a separate amount for parking over and above the rent for the office space was irrelevant. The relevant factor was whether BTC carried on its business in the parking facilities. It referred to s. 4(1) of the Bylaws as the "liability-creating" section, which states that every person "who operates a Business in Premises within the City shall be assessed..." for business tax. It argued that this contemplates a tax on the space in which the business operates and that BTC did not operate its business in the physical parking spaces, but rather in the offices from which it managed its business. It argued that, in its previous decisions upholding business tax assessments on parking facilities or spaces, the MGB had misdirected itself by failing to address this initial question. It had rather jumped straight to the issue of whether the parking facilities were occupied or used for the purpose of or in connection with the business. It argued

that if that was the test, a business tax would apply to all types of space such as vacant space and storage space. The City was not assessing these spaces. The issue was not whether the parking owners/landlords required the space for their businesses but whether they operated their businesses in the space. BTC argued that because the MGB had misdirected itself, it had upheld assessments of business tax on parking facilities, although the parking owners and operators did not operate their businesses in those facilities. If a business does not operate its business in the premises, it is not necessary to take the next step and determine whether the premises are “occupied or used for the purpose of or in connection with a Business.”

[79] BTC argued that owners/landlords of office buildings are in the business of renting space, and that the tenants of those office buildings are engaged in the businesses carried on in their respective office spaces. It submitted that, as a result, neither the owners/landlords nor the tenants of the office buildings operated their businesses in the parking facilities. It argued, in the alternative, that if anyone was operating a business in the parking facilities, it was the tenants.

(ii) Law and Prior MGB Decisions

[80] Section 372(1) of the MGA states that a business tax bylaw authorizes the City to impose a tax in respect of all “businesses operating in the municipality”. Section 4 of the Bylaws requires every person operating a “...Business in Premises within the City” to be assessed for the purpose of imposing a business tax.

[81] In *Bryce, Kipp & Co., Agent for Campeau Corporation v. Calgary (City of)* (23 January 1987), AAAB Order 05/87, the Alberta Assessment Appeal Board (AAAB) allowed the owner’s appeal of the 1986 business tax assessed against parking spaces associated with a commercial office building owned by it and rented to tenants of the office space in the building. The AAAB found that the owner was in the business of developing and operating office buildings, rather than the parking business. It also found that the owner did not occupy the parking spaces and did not carry on a business in the parking spaces. The parking spaces were rented to the building tenants, and the AAAB found that this would lead one to believe that the tenants occupied the spaces.

[82] BTC argued that the AAAB’s decision in *Bryce/Campeau* was based on the finding that the office tenants occupied the parking stalls, and not on the fact that the lease payments covered both the office and parking space. BTC referred to a passage in *Bryce/Campeau* noting that the tenants paid for parking separate from and in addition to the rent paid for the office space. Based on BTC’s interpretation of *Bryce/Campeau*, the fact that BTC’s lessees paid for parking space in addition to and separate from the office space had no bearing on whether or not BTC was operating a parking business in the subject parking facilities. The relevant fact in *Bryce/Campeau* was the AAAB’s finding that the tenants occupied both the office space and parking space and therefore, that if anyone was assessable for business tax on the parking space, it was the tenants. BTC argued that the City and the MGB had subsequently misinterpreted the findings in *Bryce/Campeau*. This was evident from the City’s position, in *Tonko*, that it was not its practice to assess owners/landlords of office buildings on parking space, because the rent for parking was captured in the NARV of the office space. This was obviously wrong, as the industry practice

was to charge tenants a separate amount for parking over and above the amount charged for office space.

[83] The City agreed that the AAAB had decided in *Bryce/Campeau* that the owner of the building was not assessable for parking space in the building because it did not operate a business in the parking facilities. However, it submitted that the case did not turn on whether or not there was a separate and additional charge for parking. It argued that the parking rental market had changed since 1986. In 2005 and 2006, when the subject assessments were made, the City had more information, gathered partly from the Assessment Request for Information (ARFI) forms provided to the City by property owners, that led the City to the conclusion that the owners/landlords of parking facilities in office buildings operated parking rental businesses separate from their office rental businesses. This was not only based on the fact that the owners/landlords charged a separate fee for parking but also on the fact that they occupied and used the parking for their parking businesses.

[84] As noted earlier, the MGB began assessing owners/landlords of office buildings for business tax on the parking facilities in their buildings as a result of the MGB's decision in *Tonko*. In *Tonko*, various parking facility operators, such as Impark, successfully challenged 2002 business tax assessments on parking facilities owned or operated by them on the basis that a number of competing businesses were not being assessed business taxes on their parking facilities. The competing businesses referred to were principally owners/landlords of parking facilities associated with office buildings. There was evidence that the City assessed only the parking space in those buildings that was allocated to public parkers, but not that allocated to building tenants. The City submitted that the owners/landlords were not assessed for tenant parking space because it was assumed that the rent paid by the tenants for office space included rent for the tenants' associated parking space. As a result, it was the City's view that the assessment for the parking space was included in the assessment for the office space. The MGB found that the parking operators/owners had led sufficient contradictory evidence to show that parking space was not included within the office space rental values. Rather, it was often the practice to charge additional rent to tenants for parking. Since the City had not varied the NARV applied to premises where rent for parking space was charged for separately from rent for office space, the MGB found a systemic inequity in the application of the business tax bylaw. The MGB distinguished *Bryce/Campeau* on the basis that when it was decided, it was customary to include a charge for parking in the rent for the office space.

[85] Subsequent to *Tonko*, the City began to assess certain property owners, including office building owners, for business tax on their associated parking facilities, and those owners launched a succession of appeals. In many cases, the MGB upheld the business tax assessments. One of the grounds upon which the MGB upheld these assessments was that market conditions had changed. It was no longer a standard practice to include rent for parking space in the rent for office space. The market for parking space was now generally separate from the market for office space. If property owners charged separately for parking, they were operating separate parking businesses in their parking facilities and were to be assessed separate business taxes on those facilities: see, for example, *BTC v. Calgary (City of)*, MGB Order 116/03; *Fortune Properties*

Holdings Ltd. v. Calgary (City of), MGB 055/05; *Various Owners, represented by Derbyshire Viceroy Consultants Ltd. v. Calgary (City of)*, MGB Order 124/05; *Queen Creek Land Co. Ltd. v. Calgary (City of)*, MGB 007/06; *Various Owners represented by Deloitte & Touche LLP Property Tax Services v. Calgary (City of)*, MGB Order 064/07.

(iii) Evidence

[86] It is not in dispute that approximately 58 individual leases were in effect at all material times in the three buildings. Nor is it in dispute that BTC submitted only six of those leases in evidence to the MGB and that three of those were incomplete. Under the leases, the building tenants were charged a separate and additional charge for parking, over and above that charged for office space.

[87] The MGB heard evidence from BTC's witnesses, Mr. Kerslake and Mr. Fairgrieve-Park. Mr. Kerslake represented the Altus Group, the company representing BTC on the appeal. Mr. Kerslake's testimony was that he had been involved in commercial real estate in Alberta for over 30 years, and that he was an accredited appraiser with the Appraisal Institute, AACI, and had done extensive commercial real estate valuation work in Alberta and specifically in Calgary. Mr. Fairgrieve-Park was an experienced property manager in the office leasing market in Calgary and elsewhere and the senior vice-president of operations for BTC responsible for property operations and property management.

[88] The MGB also heard evidence from the City's witness, Ms. Hess, the City's manager of business. Ms. Hess was previously the City's manager for commercial and multi-residential assessment and in that position was responsible for conducting the business assessments and property assessments for multi-residential and commercial properties from 2001 through 2005.

[89] Both of BTC's witnesses testified that although BP Centre and Energy Plaza had been built in the early 1980s, the City had never assessed the owners/landlords for the parking facilities until 2003. Mr. Kerslake testified that it was the City's practice to assess a parking owner/operator only on the parking space that was rented to the public on an hourly basis. In his experience, it was not the City's practice to assess parking owners/operators for space rented to building tenants. The reason, in his opinion, was that owners renting parking space to their tenants were not operating a parking business. Only where the owner/landlord was charging non-tenants for hourly parking was the owner/landlord assessable for parking. It was Mr. Kerslake's understanding that owners/landlords provided parking to their building tenants as part their space leasing businesses. The parking was therefore incidental to their space leasing business and was not a stand-alone parking business.

[90] The leases in evidence charged for parking in addition to office space. Mr. Kerslake's and Mr. Fairgrieve-Park's evidence was that it was always the practice of owners/landlords to charge separately for parking and that this continued to be the standard practice at all material times. It was therefore Mr. Kerslake's opinion that this factor did not affect whether an owner/landlord was assessable for business tax on the parking facilities.

[91] Ms. Hess testified that it was the practice in the 1980's and up until 2002 to include parking in the rent paid for the office space. However, Ms. Hess testified that subsequent to *Tonko*, the City updated its information on the circumstances under which office building parking was operated and this information revealed that office building owners/landlords were charging a separate and additional rent for their parking space, over and above that charged for their office space. This information was relied upon as a basis for the subsequent business tax assessments on office building owners/landlords.

[92] It was Ms. Hess's evidence that the City also based its business tax assessments on information contained in the ARFIs sent out to all property owners in the City. Ms. Hess testified that the ARFIs submitted on the subject parking facilities did not indicate that the parking was occupied or used by the tenants.

(iv) MGB's Decision

[93] The MGB found that BTC was in the business of leasing space but that it was not in the parking business. It stated that this conclusion was based on an examination of the provisions of the leases and other evidence provided by BTC.

[94] The MGB acknowledged that it had found in previous decisions that building owners/landlords were operating parking businesses separate from office lease businesses in the same premises, but distinguished those cases based on the differing terms of the leases or agreements governing the parking in those cases. It stated at p 14:

With respect to the other provisions in the leases, the MGB recognizes that many arguments brought up by the Respondent, such as the fact that parking is charged separately from the office space, and the degree of control were accepted in previous orders; however, in this case the MGB finds that the other provisions in the leases are more indicative that the parking space being part and parcel of the agreement between the parties for office space. After examining the leases in their entirety, the MGB concludes that the parking is incidental, and is provided to complement the leasing of office space, rather than being operated as a secondary business.

[Emphasis added]

[95] The other lease provisions considered significant were those giving the tenants the right to additional parking space, and in two cases, giving the tenants the first option on additional parking and tying the allotment of parking space to the square footage of the office space leased. The MGB also found that the access and maintenance provisions of the subject leases indicated that the parking was incidental to BTC's office leasing business and that the tenants were the end users and controlled access to the parking facilities. It stated at p. 14:

...When the access and maintenance provisions are examined, they indicate that while the landlord is responsible for the maintenance and upkeep, it is the tenant who is the end

user, and who generally controls the general access to the parkade. These are all factors that indicate that the parking is incidental to the office lease.

[96] Although the MGB did not expressly state what other evidence it relied upon, it did state that “[i]n coming to this conclusion, the MGB placed weight on the fact that the parking agreements are solely with the tenants with no public access (other than visitor parking and parking for deliveries to the office space) ...”: at p. 14. This evidence did not relate to various provisions of the leases provided by BTC but to the fact that the parking was in fact rented to and used exclusively by the tenants of the buildings. This was not the case in some of the previous MGB decisions in which the owners of buildings were found to be operating a separate parking business: see *Tonko and BTC v. Calgary*, MGB Order 116/03.

[97] The MGB agreed with BTC that the leases in question incorporated the prior practice of encompassing both the office space and the parking facilities in one premises and that the parking was provided to complement the leasing of office space rather than being operated as a separate business. It stated at p 14:

The MGB concludes from a careful examination of the leases for the subject office buildings and other evidence provided that the Appellant is not operating a parking business. Rather, the Appellant’s business is that of leasing space, which encompasses space in both the office portion and the parking facility. The primary relationship between the tenants and the Appellant arises from the lease agreement for the office space. The MGB notes that is consistent with the previous practice of landlords, as noted in the Respondent’s position above.

[Emphasis added]

(v) Conclusion

[98] The MGB’s conclusion that BTC was not operating a parking business in the subject parking facilities was consistent with a reasonable interpretation of the MGA and the Bylaws. The MGB recognized that the City only had the power to assess business tax on those operating a business in the parking facilities. It based its decision on the evidence before it, including an evaluation of the provisions of the leases presented to it and the testimony of expert practitioners in the office leasing market. It considered the fact that the leases governed both the office space and the parking space, obligated BTC to provide parking in proportion to the office space leased, and in two cases gave the tenant the first option of obtaining parking. The MGB also considered it significant that the tenants were, in fact, the sole occupiers or users of the parking. The MGB heard arguments from both parties as to the law and the facts over four days of hearings and can be taken to have considered those arguments. It would have been helpful if the MGB had more extensively referred to the specific lease provisions and other evidence that it relied upon, but the fact that it did not does not make the decision unreasonable. Based on the law, evidence and arguments made by the parties, it was reasonable for the MGB to conclude that the provision of parking was complementary to the lease of the office space and that BTC did not operate a separate parking business. It is also clear from its reasons how it came to that conclusion.

c. Decision that the parking facilities were not premises occupied or used by BTC for its business and that the tenants occupied and used the parking

(i) Position of Parties

[99] The Bylaws define “premises” as including “... any space occupied or used for the purpose of or in connection with a Business...”.

[100] This issue revolves around whether parking facilities or parking spaces in office buildings that are rented exclusively to the building tenants are occupied or used by the building owners/landlords or the building tenants.

[101] The City argued that both the tenants and BTC occupied and used the parking premises, which required the MGB to apply the paramount occupancy test in *Gottardo, infra*, to determine who was the proper person to be assessed for business tax purposes. It argued that while the office spaces were demised to the tenants, the parking spaces were shared. It submitted that the parking spaces were more in the nature of common areas to which the tenants had access. There was no expectation of privacy or exclusive possession of the parking spaces, as there was for the tenants’ office space. The majority of the parking spaces were unreserved, and if reserved, could be moved by the owner/landlord. The majority of the parking spaces were also accessed by multiple tenants on a random basis.

[102] BTC argued that it did not “occupy or use” the parking facilities for the purpose of or in connection with its business because it did not operate a parking business and did not operate its business in the parking facilities. It also argued that the tenants had exclusive use of the parking, and as a result, it was not necessary to apply the tests articulated in *Gottardo* to determine who had paramount occupancy. It argued that the paramount occupancy test need only be applied where more than one business occupies or uses the premises for their business. As a result, the issue of who had paramount occupancy of the parking premises did not arise. Only the tenants occupied or used the parking facilities.

[103] BTC argued that many of the MGB’s previous decisions finding that owners/landlords or parking operators were operating parking businesses in parking facilities could be distinguished on the basis that in those cases all or part of the parking was rented to the public. In this case, BTC rented the parking space exclusively to those renting its office space. Further, in this case, one lease covered both the office space and the parking space and obligated BTC to allocate parking to its office tenants. Former decisions did not deal with the specific facts in this case.

(ii) Law and MGB Orders

[104] Where two or more parties have access to space, “occupancy” is established for municipal tax purposes, by determining who has paramount occupancy of the space.

[105] In *Qu'Appelle Developments Ltd. v. Regina (City)* (1989), 77 Sask. R. 20, 20, [1989] S.J. No. 386 (C.A.), the issue was whether the lessee of parking space or the parkade owner/operator “occupied” the parking facilities and was thus assessable for business tax. The term “occupied” was not defined, as it is in the subject Bylaws, to include premises “used for the purpose of or in connection with a business” however, the Court gave the term an expansive interpretation. It ruled that the term “occupy” was not confined to physical occupancy but extended also to the exercise of power over as well as control and or use of property.

[106] BTC distinguished *Qu'Appelle* on a number of grounds, including the fact that the parking was rented to individuals who worked in nearby buildings as well as to other persons, rather than to business tenants of the building associated with the parking. They were rented on a first-come-first-served basis. It was argued that in contrast, the leases governing the subject parking facilities granted exclusive occupancy and use of the parking stalls to the business tenants in the building.

[107] The test to determine who has “occupancy” of premises for municipal tax purposes was further refined in *Gottardo Properties (Dome) Inc. v. Toronto (City)*, 111 O.A.C. 272, 162 D.L.R. (4th) 574 as the person with paramount occupancy, at para 40:

The principle of paramount occupancy holds that when two persons occupy or use the same land at the same time assessability depends on who has the paramount occupancy or use of the land for its business.

[108] In *Gottardo*, the Ontario Court of Appeal applied a three-part test to determine whether the owner or licensee of stadium boxes used to entertain business clients had paramount occupancy of the boxes. The first consideration, although not a determining factor, was who had the greater physical presence in the premises. The Court found that the physical presence of the licensee of the stadium boxes was transitory. The second consideration was what controls were imposed by one occupant over the other’s use of the premises and what was the purpose and effect of those controls. In *Gottardo*, the court noted that it is expected that the owner will retain some measure of control, such as the right of access and other restrictions normally attached to a licence. The third consideration was the relative significance of the activities carried out on the premises to the primary business of each of the competing occupants.

[109] BTC distinguished *Gottardo* on its facts. Those renting the stadium boxes used the boxes to entertain clients of their businesses. BTC submitted that a key factor in the court’s conclusion that the owner/landlord had paramount occupancy of the boxes was that it continued to operate a food and beverage service in the boxes while they were rented. BTC submitted that the ongoing business being conducted in the boxes by the owner/landlord was the critical fact that compelled the Court to take the analysis further than deciding who occupied the premises, to deciding who had paramount occupancy. BTC argued that unlike the owner/landlord in *Gottardo*, BTC had no ongoing business interest in the subject parking facilities. The subject leases gave exclusive occupation and use of the parking to the tenants. The primary purpose of the parking was for the use of the tenants, while it was incidental to BTC’s business. Further, and most importantly, BTC argued that the *Gottardo* test was only applicable where two or more businesses occupied or used

a space for their businesses. If BTC did not operate a parking business and did not operate its business in the subject parking facilities, and if the parking was exclusively occupied and used by the office tenants, there was no need to apply the paramount occupancy test.

[110] BTC argued that the present case was similar to *Bryce/Campeau*. There, the AAAB concluded that the owner/operator of an office building did not operate a parking business but was in the business of leasing space, that the tenants of the office space occupied and used the parking space, and that if anyone was assessable for business tax on the parking space, it would appear to be the tenants.

[111] The City argued that the MGB was required and had failed to apply the *Gottardo* test and that applying the test, the parking premises were occupied or used for the purpose of or in connection with BTC's business. It argued that the parkers in the subject parking facilities, who were mostly employees of the tenants, had a transitory physical presence in the facilities, but neither BTC nor the tenants had a physical presence. It argued that the leases gave BTC significant control by giving it the right to impose rules regarding entry and exit machinery, to control access hours, to restrict use, to move the reserved parking stalls and to require the tenants to provide it with lists of parkers or vehicles using the facilities. It argued that the collection of rent in exchange for access to the facilities was integral to BTC's parking business. It submitted that the leases provided by BTC were additional evidence that BTC was the proper assessed person for business tax purposes. The leases charged the tenants separately for the parking space and the office space, did not include parking in the definition of the leased premises and showed the significant control that BTC exercised over the parking facilities.

[112] The City argued that the MGB has repeatedly applied *Qu'Appelle* and *Gottardo* to determine which of two or more persons "occupy or use" parking facilities for their business and are thereby assessable for business tax, and that it should continue to apply the principles in those cases.

[113] In *Tonko*, the MGB relied on *Qu'Appelle* to support its conclusion that the office building owners/landlords were in the parking business and occupied or used the parking facilities for their businesses.

[114] In *BTC Properties II Ltd. v. Calgary*, MGB Order 116/03, the MGB granted Impark's appeal of 2002 business tax assessments on a parkade managed by it, but owned by BTC. Impark operated the parkade under a management agreement rather than a lease. All parties agreed that a business was being operated in the parkade. The main issue was who had paramount occupancy of the parkade for their business operations - the commercial tenants renting space in the parkade, Impark (the parkade operator) or BTC (the parkade owner). The MGB found that the tenants were not the paramount occupants of the premises. It based its decision on the fact that the "use of the parking stalls by the tenants is transient and temporary in nature, as the use of the stalls is random and without specific assignment, nor of unrestricted use/access.": at p. 19. The lessees' occupation was distinguished from lessees who had exclusive possession of leased premises. Here, both Impark and BTC could access the entire parkade at any time whether or not there were

vehicles parked there. The MGB found that the facts were very similar to those in *Qu'Appelle* and placed considerable weight on that decision. The MGB found that the principles in *Gottardo* also supported its decision.

[115] The final issue was whether BTC or Impark was the paramount occupant of the parking facilities. Based on a review of the management agreement between Impark and BTC, the MGB found that BTC had paramount occupancy. The level of control exercised by Impark was limited to managing the parkade. While Impark had day-to-day control over the parkade, its management was subject, "at all times, to the satisfaction and final approval of [BTC] with respect to car parking and operating policies." BTC had ultimate control over the most significant aspects of the arrangement including the hours of operation, the approval of parking fees, responsibility for operating and capital costs, the right to review policies and the right to terminate the management agreement with Impark. Although Impark could restrict access, it was only because it was given that power by BTC under the management agreement. The fact that Impark received a percentage of the revenue after it reached a certain point was characterized by the MGB as compensation for the added services required to manage the parkade when the number of parkers increased.

[116] In *Various Owners, Deloitte & Touche LLP Property Tax Services v. Calgary*, MGB Order 124/05, various property owners, including BTC, again appealed 2004 business tax assessments on parking space owned by them. The parking space was associated with the owners' respective office buildings and leased to commercial tenants of its buildings. There was no dispute that the property owners were operating a business and that the definition of "premises" was broad enough to include parking spaces occupied or used for the purpose of or in connection with a business. The issue was whether the parking spaces were occupied or used for the purpose of or in connection with the property owners' businesses or the tenants' businesses: at p. 4.

[117] The MGB examined the tenant leases entered as evidence. It noted that one lease used the words "for the exclusive use of the Lessee" but could not find that the owners had given the tenants exclusive occupation or demised the parking to the tenants, because it had been given only two pages of the lease. It conceded that "there may be leases that are exceptions to the finding that property owners have paramount occupancy." It noted that the office space and the parking space were dealt with separately in the lease. It noted that the rent charged for parking was additional to the rent charged for the office space.

[118] The MGB applied the *Qu'Appelle* and the *Gottardo* tests to determine who had paramount occupancy and use of the of the parking facilities. First, the tenants' physical occupancy of the parking stalls was transitory in nature. Second, the owners exercised greater control over the parking premises. The leases gave the owners the right to limit access, move parkers from stall to stall, terminate the parking leases separately from the office leases, determine hours of access for unreserved stalls, and close the parkade for purposes of maintenance and access at all times. This was greater control than that exercised over the tenant office space. The MGB found at p. 17:

There is no indication that the property owners have demised the property to the tenants in the same way that they have demised the office space. The MGB found that the difference

in respect to the level of control exerted by the property owners in the office leases versus the parking leases to be instructive. These factors lead the MGB to conclude that the property owners exert a greater level of control with respect to the parking space than the tenants.

[119] Third, the parking space was more significant to the primary activities carried out on the premises by the owners. The MGB found that the use of the parking facilities by the tenants was incidental to their businesses as they had the option of making other arrangements for parking, and could use other forms of transportation, such as the transit system, which would reduce or eliminate the need for parking. Parking was not central to the operation of their businesses. It rejected, as it had done previously, the owners' argument that the parking space was only provided to comply with parking requirements prescribed under municipal land use bylaws (LUB). It affirmed that *Tonko* was based on the finding that the parking owners/operators were operating a parking business and not on the basis that lessees of parking have paramount occupancy.

[120] *In Various Owners represented by Derbyshire Viceroy Consultants Ltd. v. Calgary (City of)*, MGB Order 064/07, business tax assessments against various owners and operators of parking facilities were appealed. The operators either leased the parking from the property owners/landlords and rented it to parkers with the owners' permission or entered into management agreements with the property owners/landlords and rented the parking spaces to parkers on behalf of the property owners/landlords. The MGB concluded that the parking operators were operated parking businesses in the parking facilities, and were the proper parties to be assessed for business tax as they had paramount occupation and use of the parking facilities

(iii) Evidence

[121] In each of the three leases offered as representative leases for each of the buildings, the section dealing with the "demised premises" does not refer to parking. On the other hand, the three leases show that the tenant's right to parking space is tied to its right to office space and each lease governs both types of spaces. In two of the leases, the amount of parking allotted to each tenant increases or decreases in proportion to office space leased.

[122] There was evidence that the parking was provided for and used solely by the tenants of each of the buildings and that the owners/landlords had no kiosk or other presence in the parking area and did not control access to the parking. Only the office tenants had access to the parking facilities and the parking could only be accessed through the use of electronic key cards provided only to the tenants. BTC did not physically control access to the parkade through the use of parking kiosks or other means.

[123] It was Mr. Kerslake's opinion that where parking space in an office tower is committed to the tenants of the office space under the same lease, it has the effect of transferring occupation and use of both spaces to the tenants. It was Ms. Hess's opinion that the leases in question were

confined to granting the lessees the ability to have parking and to pay separately for it but did not grant the same rights as those granted to the demised office space.

[124] The MGB heard evidence that the three leases provided to the MGB by BTC were typical of those in all of the office buildings. BTC's witnesses testified that each lease corresponded to leases in the building governed by the lease and was typical of leases for that building.

[125] Neither the City's written submissions nor its oral submissions to the MGB raised the issue of the sufficiency of the leases provided by BTC. The City raised no issue as to the sufficiency of the number of leases provided or that the leases were not typical of the leases in each building. The City did not ask the MGB to compel BTC to provide further leases, as it was entitled to do under s. 497 of the MGA.

[126] The MGB also heard evidence that the parking was used exclusively by the tenants and was committed to the use of the tenants. Although the leases did not expressly prohibit BTC from renting the parking space to the public or to businesses other than the tenants, in practice it could not and would not do so specifically because the leases committed the parking to its tenants and because there was always a shortage of parking in comparison to the demand for parking by the tenants.

(iv) MGB's decision

[127] The MGB's reasons refer to the sample leases governing the buildings, which were provided by BTC and said to be typical of those in force in each of the buildings. It found that the provisions of these leases were evidence that the parking was occupied and used by the tenants. The MGB referred to BTC's position that the leases gave the tenants the right to use and occupy the parking stalls, determine who could use the stalls and for what periods, and increase or decrease the number of parking stalls subject to availability. It referred to BTC's position that the leases stipulated that the amount of parking space allocated to a tenant was tied to the amount of office space leased; that it was the tenant's responsibility to ensure that users of the parking facilities did so safely; and that it was the tenant's obligation to indemnify and save BTC harmless against all liabilities, actions, costs and expenses incurred by BTC for expenses arising from the use of the parking facilities: at p. 3 of the Impugned Order. Although it did not refer to the specific provisions of the leases granting these rights, the leases do contain such provisions. The City argues that the MGB only referred to BTC's position on these issues and not the evidence. This evidence was clearly before the MGB and it can be assumed that it not only considered BTC's position but the actual evidence before it.

[128] The MGB distinguished its decision in *Altus v. Calgary (City of)*, MGB 016/06, affirming the 2004 business tax assessment of BTC for the subject parking facilities, on the basis that there was insufficient evidence to support the appeal in that case.

[129] The MGB also distinguished its decision in *Various owners, represented by Derbyshire Viceroy Consultants Ltd. v. Calgary (City)*, MGB 124/05 in which it affirmed the assessment

against the owners/landlords rather than the tenants of the parking space. It stated that in that case, the parties had agreed that the owners/landlords were operating a parking business. It is not clear from the decision that this was the case. However, the MGB also based its decision on the finding that there was insufficient evidence before it, based on only two pages of a specific lease, to determine that the tenant had been given exclusive control and occupancy of the parking: at pp. 17 - 18.

[130] In the Impugned Order, the MGB stated that its finding that there was no parking business did not mean that there was no business at all being operated from the parking facilities. There was no dispute that BTC was in the business of renting property and that the tenants of the buildings were also operating businesses. The MGB stated, but did not conclude, that based on the wording of the Bylaws, the parking facilities appeared to be part of the tenants' premises. It stated at p. 15:

The wording of the bylaws appears to capture the parking facilities in the tenants' premises, since (1) the tenants use and occupy the space, and (2) the leases demise space to the tenants for the purpose of their businesses, and the spaces demised include both the office space and parking space. While the leases do differentiate between these spaces, an examination of these provisions indicates that the differences relate to the nature of the spaces themselves. For example, the office spaces have different use and occupancy considerations such as fixturing periods, tenant improvements and custodial standards that need to be considered in the lease separately from the considerations such as communal parking and the use and occupancy provisions related thereto. Accordingly, having two separate leases, tied to each other, is understandable.

[131] The MGB stated that the above considerations inclined it to the view that the City could have assessed the tenants for business tax on the parking facilities if their businesses "used the parking facilities as part of the premises from which they carried on their businesses.": at p. 15.

[132] Finally, the MGB expressly stated that it was not necessary in these circumstances to apply the control tests set out in *Qu'Appelle* and *Gottardo*. This was based on its finding that BTC did not operate a parking business in the subject parking facilities and did not occupy or use the parking facilities for the purpose of or in connection with its business of renting property. As a result, there was no issue of who had paramount occupancy of the facilities.

(v) Conclusion

[133] The MGB's conclusion that the parking facilities were not occupied or used for the purpose of or in connection with BTC's space leasing business, was reasonable based on the legislation, the law and the arguments made by the parties. Central to its conclusion was its finding that the building tenants were, in fact, the exclusive users of the parking facilities. The public was not granted access. As a result, although the leases did not prohibit BTC from renting the parking to the public or other third parties, in practice, it did not do so as the parking was committed to its tenants. The MGB also considered the fact that the leases covered both the office

space and the parking space. The MGB's conclusion was reasonable and the MGB's reasons show the path from its reasons to its conclusion.

d. Decision as to whether BTC's business tax assessment was correct, equitable and fair

[134] The MGB has the authority to determine if the business tax bylaw is applied correctly, fairly and equitably. Section 499(2) of the MGA states that the MGB "must not alter any assessment that is fair and equitable, taking into consideration assessments of similar property in the same municipality...". Given the MGB's conclusion that BTC did not operate a parking business and did not occupy or use the parking facilities as premises for its business, it was reasonable for the MGB to conclude that it was not necessary to decide whether the assessment was correct, equitable and fair.

e. Decision on issue of exemption under the MTA

[135] The MGB decided that it was unnecessary to decide BTC's claim for an exemption under the Bylaws stemming from the non-taxable status of parking facilities under the MTA, having concluded that BTC was not operating a parking business in the subject parking facilities: Impugned Order at p. 15. If there was no business being operated, there was no need to decide if such a business would have been exempt under the MTA. This was a reasonable conclusion.

f. Decision to reduce the business tax assessment to "nil"

[136] The MGA gives the City the power to assess business tax. An assessment must be paid by the party operating the business in premises within the City of Calgary. In this case, the MGB found that BTC was not operating a parking business, was not operating a business in the subject parking facilities, and did not occupy or use those premises for the purpose of or in connection with its business. It was entitled and required to make this determination under the MGA. This is not the equivalent of granting an exemption from tax. Exemption from tax was not an issue before the MGB in the subject proceedings. I agree with the MGB's submission that to characterize the MGB's decision as the grant of an exemption would be to negate the requirements of a judicial review analysis and sidestep the application of the appropriate standard of review.

[137] Further, the MGB did not decide that the tenants were assessable for business tax although they were not represented at the ARB or MGB hearings, as the City argues. Rather, the MGB recognized that it could have added the tenants as assessed persons on the assessment roll but rightly concluded, as it had done in *BTC v. Calgary*, MGB Order 116/03, that this should only occur if the party being added has had a reasonable opportunity to become involved in the proceedings. In that case, BTC and Impark were represented and involved in the proceedings, thus no unfairness to BTC resulted. The tenants in the office buildings in issue in the Impugned Order were not represented at the ARB or MGB hearings. There was no determination regarding the assessability of the tenants for business tax and thus no breach of procedural fairness in this

regard. The MGB reasonably found that it would have been unfair to add the tenants to the assessment roll in the circumstances.

g. Decision on disclosure of settlements

[138] At the MGB hearing, as a preliminary matter, BTC requested disclosure of information contained in settlement agreements reached in 2007 between the City and other appellants who had been assessed business tax on parking facilities. After the MGB had received written submissions from both parties and subsequent to the hearing, Imperial Parking requested that it be granted intervener status on the disclosure issue. In light of its decision and reasons, the MGB found it unnecessary to order disclosure of the settlement agreements. As a result, it also found it unnecessary for it to decide the issue of Imperial Parking's right to intervener status. This was a reasonable decision.

2. Application of standard of review to procedural fairness issues

[139] To summarize, the main issue with regard to the City's allegations regarding procedural fairness is that the MGB's reasons are so deficient as to constitute an error of law. If there is a legal obligation to give reasons, there can be no deference granted to the MGB's decision not to give reasons.

[140] The City also argued that it was procedurally unfair for the MGB to decide in the tenants' absence that they were assessable for business tax. As explained earlier, the MGB did not decide that the tenants were assessable. It is therefore not necessary to address this issue in terms of procedural fairness.

[141] Whether or not the judicial review of the adequacy of the reasons is assessed separately from the judicial review of the reasonableness or correctness of the substantive reasons under *Dunsmuir*, the adequacy of the MGB's reasons must be evaluated from a functional perspective.

a. Functional approach to review of adequacy of reasons

[142] The principles for assessing the adequacy of reasons was set out in *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 at paras. 16 to 30. The reasons are to be read as a whole. The reasons must reveal why an issue was decided but do not have to explain how it was decided. In other words, the decision maker is not required to explain every step and finding made in the process of arriving at its conclusions. There is no requirement to explain the findings on each piece of evidence as long as the evidential findings are logically linked to the decision. It is only necessary that the "path" that was taken is clear. Inferences can be drawn from the record. The Court concluded at para 35:

In summary the cases confirm:

(1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *Morrissey*, at p. 524.)

(2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.

(3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.

[143] Reasons serve three main functions: to explain the decision to the parties, to provide public accountability and to permit effective appellate review: *R. v. R.E.M.* at para. 11. Reasons will be adequate if they satisfy these functions: *R. v. R.E.M.*, at para. 25.

[144] *R. v. R.E.M.* was a criminal law case however, in *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193, 99 O.R. (3d) 1, the Ontario Court of Appeal confirmed that the adequacy of reasons of administrative tribunals is also determined by assessing whether they satisfy these three functions. The Court stated at paras. 60 - 62:

....it is important that the Law Society explain its discipline decisions to complainants and members of the public at large in a way which renders those decisions comprehensible and transparent. A Hearing Panel can achieve those ends only through the reasons it gives...

Reasons for a decision serve several salutary purposes. Where there is a right of appeal from that decision, reasons must provide a sufficient window into the decision to allow a meaningful appellate review to the extent contemplated by the permitted scope of the appeal. Reasons for a decision that describe both *what* is decided and *why* that decision was made are susceptible to effective appellate review. Whatever other shortcomings may exist in reasons that adequately explain the "what" and the "why", those shortcomings will not render the reasons so inadequate as to justify appellate intervention on that basis: *R. v. Sheppard*, [2002] 1 S.C.R. 869, at paras. 25-26; *R. v. Braich*, [2002] 1 S.C.R. 903, at para. 31; *R. v. R.E.M.*, [2008] 3 S.C.R. 3, at paras. 15 - 18, 52 - 53.

A determination of whether reasons fulfill their purpose and admit of effective appellate review can only be made by examining those reasons in the context of the proceedings that gave rise to the reasons. Context includes the nature of the issues raised before the tribunal, the evidence adduced and the submissions made...

[Emphasis added]

[145] Similar principles have been adopted in a number of Alberta decisions: see *Keephills Aggregate Co. Ltd. v. Parkland (County of) Subdivision and Appeal Board*, 2003 ABCA 242, 348 A.R. 4 at paras. 19 - 24; *Strathcona (County) v. Allan*, 2006 ABCA 129, 394 A.R. 290 at paras. 19 and 23; and *Sawatzky v. Alberta (Universities Academic Pension Plan Board)* (1992), 9 Admin. L.R. (2d) 109, [1992] A.J. No. 965.

[146] The above passage from *Neinstein* also explains how a court assesses whether reasons satisfy their three functions. Reasons explain the decision to the parties and make the decision maker publicly accountable by being sufficiently comprehensible and transparent to explain “what” was decided and “why”. Reasons permit effective appellate review if they are adequately based upon the issues, the evidence and the submissions before the decision maker.

[147] Reasons are inadequate if there is a total lack of evidence on the essential points to support them. In *Cuff v. Edmonton School District No. 7*, 2009 ABCA 6, [2009] A. J. No. 5, the the Alberta Court of Appeal stated at para. 8 that “lack or absence of evidence to support a particular conclusion warrants judicial intervention regardless of whether the correctness or reasonableness standard of review applies.” Reasons are also inadequate, even if there is some evidence on the essential points supporting them, if that evidence is counter to the overwhelming evidence to the contrary: *Mountain Creeks Ranch Inc. v. Yellowhead (County of) Subdivision and Development Appeal Board*, 2004 ABCA 177, [2004] A.J. No. 561 at paras. 14 - 15. In both cases, the inadequacy of the reasons results in a jurisdictional error. This should not be taken as putting a positive duty on a decision maker to expressly indicate all relevant considerations that have been taken into account, particularly those that are not problematic: *Strathcona v. Allan*, at para. 19.

[148] The City’s argument that the MGB’s decision is procedurally unfair is based on two main deficiencies that, either individually or cumulatively, are said to result in the reasons being inadequate: deficiencies in its findings of fact; and deficiencies in its application of the law.

b. Adequacy of the reasons based on MGB’s findings of fact

[149] The City alleges that the MGB’s findings of fact are insupportable based on the evidence because its fact-finding is based on non-existent evidence, on insufficient evidence and on specific evidence which was contrary to the overwhelming contradictory evidence.

[150] The City submits that there was insufficient evidence, based on the six leases (out of a possible 58), entered as evidence, to make conclusions as to the terms on which parking was provided to all the tenants of the buildings. This issue was not raised at the MGB hearing. The City had the opportunity to request additional leases, or question the sufficiency of the leases, but it did not do so. There was unchallenged and uncontradicted evidence that each of the three leases provided by BTC as evidence was with a major tenant of each of the buildings and was typical of leases in each of those buildings. The MGB’s decision is based on this evidence and the leases are sufficient in number and completeness to support its decision. The reasons state that the decision is based on the leases put in evidence and explain that this is one of the reasons why the MGB came to the conclusions it did.

[151] The City submits that the lease provisions not only do not support the MGB's findings of fact but are, for the most part, contrary to its findings. It argues that although the MGB referred to the leases, it failed to indicate which provisions it was relying upon. The MGB referred to provisions in the leases giving the tenants the right to additional parking space, and in two cases, giving the tenants the first option on additional parking and tying the allotment of parking space to the square footage of the office space leased. The MGB also found that the tenants controlled access to the parking and in fact occupied and used the space to the exclusion of all others. The MGB was not required to refer to all of the evidence that supported its decision, but only to relevant evidence essential to its decision.

[152] The City spent some time arguing that the leases gave BTC exclusive control and management of the parking. However, the MGB's reasons state that it did not have to determine who had exclusive control but rather, whether the parking was occupied or used by the tenants or BTC. The tenants were the only ones who had access to and used the parking. The MGB's reasons adequately explain what facts it relied upon in coming to its conclusion that the parking was not occupied or used by BTC in operating its business. This evidence was not counter to the overwhelming evidence to the contrary.

[153] The City submits that although the MGB stated that its findings of fact were based on "other evidence" it did not identify that evidence and there was no other evidence supporting its findings of fact. The Impugned Order states at p. 14:

The MGB concludes from a careful examination of the leases for the subject office buildings and the other evidence provided that the Appellant is not operating a parking business.
[Emphasis added]

The above passage clearly indicates that the MGB relied upon the provisions of the leases provided to it. The nine volumes of the Return also contain considerable "other evidence" on which the MGB could base its decision. Although it would have been convenient if the MGB had identified the "other evidence" it considered, its failure to do so does not deprive the parties of an explanation, the public of accountability or the court the opportunity of effective judicial review. The reasons show how the MGB interpreted the MGA and Bylaws, determined the facts that were applicable to its interpretation and applied those facts to the law. Its reasons were adequate given the issues, evidence and arguments which were before it.

c. Adequacy of reasons based on the law

[154] The City attacks the MGB's decision on grounds that it is not based on the applicable and established law and a proper application of the facts and evidence to that law. It contends that it had a legitimate expectation that BTC was assessable for business tax on the subject parking facilities based on nearly ten years of the MGB's previous decisions relative to the same or a similar fact pattern. It submits that in these previous decisions, the MGB had unequivocally

determined that there was a business being conducted in parking facilities rented to tenants or third parties and that the parking operators or owners/landlords were operating their businesses in those facilities.

[155] The legitimate expectations of the City do not give rise to a right to a particular substantive result or determination by the MGB, but rather enhanced procedural rights: *Moreau-Bérubé, Baker*. The City's contention that it had a legitimate expectation of a substantive result is therefore not well founded. The City does not take issue with its right to make representations or be consulted by the MGB. Instead, the City contends that the MGB's reasons departed from a long line of authority. The result of the MGB's decision is more properly considered in the standard of review analysis of the MGB's substantive reasons, rather than in a procedural fairness analysis: *Clifford*.

[156] The jurisdiction of the MGB to decide the issues before it is distinct from the functional adequacy of its reasons and decision. Although *Cuff* and *Mountain Creeks Ranch* are authority for the proposition that an unreasonable finding results in a jurisdictional error, *Cuff* required a complete lack of evidence and *Mountain Creeks Ranch* required that factual determinations be either unsubstantiated or alternatively, contrary to the vast wealth of relevant evidence, in order to find a jurisdictional error.

[157] In *Dunsmuir*, the Supreme Court of Canada cautioned against an unduly broad view of jurisdictional questions, at para. 59:

Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.

d. Conclusion

[158] I find that the reasons of the MGB were sufficient to satisfy procedural fairness requirements. This is not a situation where there is a total lack of evidence supporting the MGB's decision or where the essential facts relied upon by the MGB were contrary to the majority of the evidence.

[159] The MGB defined the issues as whether the subject parking facilities were "premises" under the MGB and the Bylaws, whether BTC was operating a business, and whether it was

operating its business in the subject premises. It had the jurisdiction and obligation to make these determinations. Its reasons explain why it came to the conclusion that BTC did not operate a business in the parking facilities. They are sufficient to explain to the parties why it came to that conclusion and to satisfy the need for public accountability. The reasons are based upon the issues, the evidence and the submissions presented to the MGB and are thus adequate for purposes of conducting an effective judicial review.

3. Onus/burden of proof

[160] One of the arguments made by the City, expressly or by implication, is that BTC has not satisfied its onus of proof. For example, the City argues that it is not possible to determine, from only six out of 58 leases, the significant factors bearing on the issue of who occupies or uses the parking spaces in the subject parking facilities in the buildings.

[161] The onus on the parties on an appeal of a tax assessment to the MGB was summarized by the MGB in *Imperial Parking, represented by Deloitte & Touche LLP Property Tax Services v. Calgary (City)*, MGB Order 140/02 as follows at p. 10:

...The ultimate burden of proof or onus rests on the Appellant, at an assessment appeal, to convince the MGB their arguments, facts and evidence are more credible than that of the Respondent. However, if the Applicant leads sufficient evidence at the outset to establish a prima facie case, the evidentiary onus shifts to the Respondent. In order to establish a prima facie case, the Appellant must convince the MGB panel that there is merit to the appeal.

The Appellant must establish that it is more probable than not that the assessed value is incorrect or inequitable. Once the evidentiary onus shift occurs, then the validity of the assessment is in question. In order to rebut the Appellants prima facie case, and in order to raise a legitimate inference that the assessment is correct, the Respondent must lead evidence to counter the Appellant's evidence. At the end of the hearing, the MGB considers all the evidence presented and determines which party has established their case on a preponderance of evidence. In theory this means the party with the strongest case should succeed.

In that case, Impark appealed 2002 business tax assessments on various properties operated by it. As the whole of Impark's appeal was based on six hypothetical scenarios unsupported by any substantive factual information, the MGB found that a reasonable person could not conclude that there might be a problem of equity with the assessments and that Impark had therefore failed to meet its onus of proof and the assessment must stand.

[162] In *BTC Properties II Ltd., represented by Derbyshire Viceroy Consultants Ltd. And MacLeod Dixon v. Calgary (City)*, MGB Order 116/03, the MGB found that although Impark and BTC were able to raise some questions as to the correctness and equity of the assessment, there was a considerable lack of evidence to prove their case and that "making broad statements in

narrative form, without any supporting documentation, is simply insufficient to meet the onus”: at p. 24.

[163] In *Tonko*, the MGB found that the appellants had provided sufficient evidence that the 2002 office leasing market was substantially different from the 1986 market and that the City had failed to demonstrate that parking space rent was usually included in office space rent. The parking operators had provided evidence to shift the onus of proof to the City. The MGB found that the City had failed to show that the business tax assessments were equitably and fairly applied because they had failed to provide substantive evidence to support their assumption that rent for parking space was included in the rent for the office space: at p. 35.

[164] BTC had the initial onus of proving its case to the MGB, which required it to provide sufficient evidence to establish its case.

[165] As explained above, I find that BTC provided sufficient evidence to the MGB to satisfy the onus of proving that it was not the proper assessed person under the MGA and the Bylaws. It provided three complete leases and three incomplete leases. There was testimony from Mr. Kerslake and Mr. Fairgrieve-Park that each lease was representative of the leases in the building to which it applied. The City did not challenge or contradict this evidence at the MGB Hearing nor request that further leases be provided and it did not provide sufficient contradictory evidence to rebut BTC’s *prima facie* case.

V. SUMMARY CONCLUSION

[166] The arguments of both parties, as evidenced in the MGB hearing transcripts, extensively canvassed the relevant issues, and the MGB clearly understood and grappled with those issues.

[167] It is implicit in the MGB’s reasons for decision that it had regard to relevant business tax considerations. The MGB was required to consider three key factors: whether parking facilities were “premises” under the MGA and the Bylaws; whether BTC was operating a business in the parking facilities and whether BTC occupied or used the parking premises for the purpose of or in connection with its business. As the foregoing cases illustrate, these issues have been considered and decided before by both the MGB and the courts. Each decision is based on the interpretation of the applicable legislation and bylaws, the prior decisions of the courts and business tax appeal bodies, and the facts of each case. The MGB has not, as the City argues, found unequivocally that the owners/operators of parking facilities in office buildings operate parking businesses separate from their office leasing businesses and that they occupy or use the parking facilities for their businesses. Each case must be decided on its own facts.

[168] It should not be assumed that the MGB failed to have regard to the relevant law or evidence simply because its reasons do not specifically refer to such. The MGB is not obliged to expressly indicate that all relevant considerations have been taken into account. The Record before the MGB included a wealth of materials relating to the law and facts in issue. The MGB

also heard extensive arguments from both parties on the law and the facts and the correct interpretation of the law in the context of the case before it.

[169] The MGB's reasons highlight the law and facts on which it relied in coming to its conclusions and logically link the evidence to the MGB's conclusions. Its findings were within a reasonable range of conclusions based on the law and the facts. As a result, the Impugned Order stands and the applications are hereby dismissed.

[170] The Consent Order granted March 2, 2010 that preceded this judicial review states that costs of the judicial review will be in the cause. If for any reason there are issues with respect to costs, the parties may speak to them within a reasonable period of time.

Heard on the 18th day of May, 2010.

Dated at the City of Calgary, Alberta this 19th day of November, 2010.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Susan Trylinski
for the Applicant

Gilbert J. Ludwig
for the Respondent BTC Properties II Ltd.

Andrew Sims, Q.C.
for the Respondent Municipal Government Board

**Corrigendum of the Reasons for Judgment
of
The Honourable Madam Justice B. E. Romaine**

Page 7, para. 30, line 5, “MGB” has been corrected to read “MGA”.

Page 11, para. 44, last line, Law Society of New Brunswick has been corrected to read *Newfoundland and Labrador Nurses’ Union*.