Court of Queen's Bench of Alberta

Citation: Jacobson v Newell (County), 2021 ABQB 505

Date: 20210630
Docket: 2103 00316
Registry: Edmonton

Between:

Donald Jacobson and Kathleen Jacobson

Applicants

- and -

County of Newell

Respondent

Reasons for Decision
of the
Honourable Mr. Justice T.G. Rothwell

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I. Introduction

[1] Donald and Kathleen Jacobson [Jacobsons] are the Applicants in this matter. The Jacobsons reside within the County of Newell. The County of Newell [County] has approximately 7500 residents and is located in southern Alberta and its municipal office is located in the city of Brooks. It is largely a rural county bounded by the Red Deer and Bow rivers.

[2] The County passed Bylaw 1998-20 [the Bylaw] in December of 2020 reducing the number of electoral divisions and corresponding councillors in the County from ten to seven.

[3] The Jacobsons commenced this judicial review challenging the Bylaw on the basis that the County did not comply with s 231(4) of the *Municipal Government Act*, RSA 2000, c M-26 [*MGA*].

[4] A bylaw of this nature must be advertised in a specific manner and electors are entitled to file a petition challenging such a bylaw. If the County receives a valid petition it must either abandon the bylaw or put the bylaw to a vote.

[5] This application presents a sequencing issue that turns largely upon the interpretation of section 231 of the *MGA*.

[6] For the reasons that follow, I accept the Jacobsons' interpretation of the Bylaw and conclude that the County did not comply with the *MGA*; and accordingly, I declare the Bylaw invalid.

II. Issue

[7] The primary issue in this application is whether or not the County complied with the *MGA* when it passed the Bylaw?

III. Standard of Review

[8] In ***Canada (Minister of Citizenship and Immigration) v Vavilov,*** 2019 SCC 65 [***Vavilov***], the Supreme Court of Canada directed that when a court is reviewing an administrative decision on its merits, reasonableness is the presumptive standard of review. Reviewing courts should only depart from this presumption when there is a clear legislative intent or by the rule of law.

[9] The County in this case was acting in a legislative, as opposed to administrative capacity, when it passed the Bylaw and the Jacobsons' challenge is based upon the County's failure to wait for the 60-day petition period to expire.

[10] The Jacobsons rely upon s 536 and 537 of the *MGA* which read:

> 536(1) A person may apply to the Court of Queen's Bench for
>
> (a) a declaration that a bylaw or resolution is invalid, or
>
> (b) an order requiring a council to amend or repeal a bylaw as a result of a vote by the electors on the amendment or repeal.
>
> (2) A judge may require an applicant to provide security for costs in an amount and manner established by the judge.
>
> 537 A person who wishes to have a bylaw or resolution declared invalid on the basis that
>
> (a) the proceedings prior to the passing of the bylaw or resolution, or
>
> (b) the manner of passing the bylaw or resolution
>
> does not comply with this or any other enactment must make an application within 60 days after the bylaw or resolution is passed.

[11] They do not seek to challenge the Bylaw on its merits (i.e. moving from 10 to 7 councillors is unreasonable or on the basis that the *MGA* does not authorize the substance of the Bylaw).

[12] Instead, they challenge the process the County followed.

[13] With respect to a legislated standard of review applicable to this issue (i.e. compliance with the *MGA*), the Jacobsons noted s 539 of the *MGA* which states: "No bylaw or resolution may be challenged on the ground that it is unreasonable."

[14] Justice Jeffrey extensively considered s 539 in ***Terrigno v Calgary (City)***, 2021 ABQB 41.

[15] He concluded that Legislature did not intend to create a standard of review by passing s 539, but instead intended to address a *ground* of review. I agree with Justice Jeffrey and adopt his reasoning in this regard: ***Terrigno*** at paras 28-49.

[16] The Supreme Court in ***Vavilov*** at para 23 stated:

> Where a court reviews the *merits* of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
>
> [*Emphasis added*]

[17] The Court in ***Vavilov***, in my view, carves out an exception to the default position of reasonableness for matters of natural justice and/or the duty of procedural fairness.

[18] Matters of natural justice and procedural fairness have historically been reviewed on a correctness standard because "the court decides whether the fairness standard has been met without affording deference": ***Nortel Networks Inc v Calgary (City)***, 2008 ABCA 370 at para 32, 39 [***Nortel***]. Similarly, in ***Khela v Mission Institution***, 2014 SCC 24 at para 79, the Supreme Court held that "the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be 'correctness.'"

[19] Justice Feth, recently considered both substantive and procedural review of a municipal bylaw in ***Bergman v Innisfree (Village)***, 2020 ABQB 661 [***Bergman***].

[20] At paragraph 124-126, Justice Feth stated:

> A municipal council's decision or bylaw may be judicially reviewed for two types of error: procedural and substantive.
>
> The requirements of procedural fairness and the legislative scheme governing a municipality may require that the municipality comply with certain procedural requirements, such as notice or voting requirements. If a municipality fails to abide by these procedures, a decision or bylaw may be invalid.
>
> The correctness standard applies when determining whether a decision maker complied with the duty of procedural fairness: ***Mission Institution v Khela,*** 2014 SCC 24 at para 79 **[*Mission Institution*]**; ***Springfield Capital Inc v Grande Prairie (Subdivision and Development Appeal Board),*** 2016 ABCA 136 at para 10 [***Springfield Capital***].

[21] I adopt the reasoning of Justice Feth and his reliance on the ***Mission Institution*** and ***Springfield Capital*** decisions in support of a correctness standard. See also ***Catalyst Paper Corp v North Cowichan (District)***, 2012 SCC 2 at para 12 [***Catalyst***].

[22] That said, I also acknowledge the jurisprudence that stands for the principle that questions of procedural fairness are not measured by whether they are "correct" or "reasonable," but rather "whether the proceedings met the level of fairness required by law": ***Fitzpatrick v College of Physical Therapists of Alberta***, 2019 ABCA 254 at para 29; ***Sysco Canada, Inc v Miscellaneous Employees***, 2021 ABQB 459 at para 19, citing ***Cenovus TL ULC v Alberta (Energy)***, 2019 ABQB 301 at paras 18-19.

[23] In my opinion, the statements of Slatter JA, in ***Nortel*** at para 32, unify the two streams of jurisprudence regarding the review standard applicable for scrutinizing the duty of procedural fairness. He noted:

> … The fairness of the proceedings is not measured based on whether they are "correct" or "reasonable" in the ***Pushpanathan/Dunsmuir*** sense. Rather these issues are reviewed based on whether the proceedings met the level of fairness required by law: [….]. Because the court decides whether the fairness standard has been met without affording deference, in that sense fairness is reviewed for "correctness": [***Boardwalk Reit LLP v Edmonton (City)***, 2008 ABCA 220] at para. 174.

[24] The County points to the decision of ***Envision Edmonton Opportunities Society v Edmonton***, 2012 ABCA 188 [***Envision***] to support its argument that the standard of review is reasonableness.

[25] The ***Envision*** case considered whether a petition requesting a new bylaw fell within the definition of s 232(2) of the *MGA*. Section 232(2) imposed a 60-day limitation period for petitions that sought to amend or repeal a bylaw. The petitioners argued that their petition requested a new bylaw as opposed to amendment or repeal, and therefore they were not caught by the 60-day limitation period.

[26] The reasoning regarding the standard of review in the ***Envision*** case is no longer helpful in light of ***Vavilov*** at paras 47-48, 69 and its rejection of the contextual approach that was articulated in ***Dunsmuir v New Brunswick***, 2008 SCC 9.

[27] In addition, the ability to file a petition and the 60-day time limit contemplated by s 231 of the *MGA* are, in my view, procedural requirements as opposed to a substantive matter such as the actual subject matter of the Bylaw or whether the County had the authority to pass the Bylaw.

[28] For the reasons set out above, I conclude that the question of whether or not the County complied with the procedural requirements outlined in the *MGA* when it passed the Bylaw engages the question around the duty of procedural fairness issue; and consequently, the appropriate and applicable standard of review is correctness. This finding is not inconsistent with the alternative position that the central inquiry or question is whether the process is fair: ***Nortel*** at para 32.

IV. Position of the Parties

The Jacobsons

[29] The Jacobsons argue that the County breached the *MGA* because it did not wait until the 60-day petition period had passed prior to passing the Bylaw. The Jacobsons point to the use of the word "proposed" in s 231 and argue that the section requires a municipality to wait and see if it receives a valid petition prior to passing a bylaw that is subject to s 231. Put another way, the expiry of the petition period is a pre-condition to the passage of a bylaw subject to s 231.

The County

[30] The County notes that it did not receive a petition from the Jacobsons or otherwise during the relevant petition period. It argues that s 231 is aimed at potential petitioners and, in essence, only imposes an obligation upon a municipality if a valid petition is filed. The County rejects the Jacobsons' interpretation that the expiry of the petition period is a pre-condition to it being authorized to pass a bylaw subject to s 231. The County argues that if it had received a valid petition within the 60-day period it would have dealt with it in accordance with the *MGA*. The County asserts that it complied with the *MGA* and that this application should be dismissed.

V. Analysis

Preliminary Issue – Application to Strike and Addition to the Certified Record of Proceedings

[31] Prior to hearing submissions, the County sought to include in the Certified Record of Proceedings [Record] a copy of the Bylaw. As a result of an administrative oversight the Bylaw

had not been included. The Jacobsons consented, and I granted leave for it to be included in the Record.

[32] The County included in its Book of Authorities copies of bylaws from Vulcan County, County of Stettler No. 6, Town of Bassano and Cardston County [Other Bylaws] that passed similar bylaws under similar circumstances (i.e., prior to the expiry of the 60-day petition period). The County also included minutes and briefing materials from the relevant meetings wherein the Other Bylaws were read and passed by the relevant municipal council. The County referenced these authorities in their Brief as well.

[33] The Jacobsons brought an application to strike out the Other Bylaws and associated materials from the County's Book of Authorities, and references to them in the County's Legal Brief, on the basis that they constitute evidence and not argument; and that the County had not brought an application under Rule 3.22 of the *Alberta Rules of Court*.

[34] Layne Johnson, Director of Corporate Services, for the County swore an affidavit in response to the striking motion. I summarize his evidence as follows:

- On December 10, 2020 County Council, himself and the County Chief Administrative Officer had a videoconference meeting with legal counsel. Legal counsel verbally outlined the details, dates and sequencing of the Other Bylaws that were included in the County's brief.
- Given the privileged nature of the meeting no transcripts or records were made of the meeting.
- The timing of the passage of the Other Bylaws was considered by County Council.
- The County waives its litigation privilege over the portion of the December 10, 2020 video conference wherein the Other Bylaws were discussed.

[35] I heard the Jacobsons' Application to strike prior to hearing submissions on the merits of the judicial review.

[36] During the course of argument concerning the striking motion, the County sought leave to have the materials, which the Jacobsons were seeking to have struck, added to the Record.

[37] I advised the parties that I would rule on this issue when I provided my decision on the merits of the judicial review application.

[38] I will deal with the striking motion first.

[39] Materials contained in a legal brief, whether in the body or authorities, are not evidence. Evidence must be set out in an affidavit, received by oral testimony or authorized in some other manner (e.g., s 56.4 and s 201 of the *Land Titles Act*, RSA 2000 c L-4).

[40] The Jacobsons advanced the position that even if the materials were not evidence, I should use my inherent authority to strike out the materials.

[41] It is not appropriate to include materials in a Book of Authorities that should be included in either the Record or introduced through an affidavit. I conclude in the following reasons that the materials should be struck because they are irrelevant to the determination of the issue at stake in the within proceedings.

[42] Turning to the County's request to have the materials added to the Record, I note that it is well established that a judicial review is generally conducted upon the basis of the documents

that were before the public body or decision maker. Rules 3.18 and 3.19 of the *Alberta Rules of Court* outline the procedure for the filing of the Record.

[43] In this case Mr. Johnson certified the Record in these proceedings and did not include the Other Bylaws and associated minutes/briefings. Rule 3.22 requires a Court to consider *only* the following evidence on a judicial review:

> (a) the certified copy of the record of proceedings of the person or body that is the subject of the application, if any;
>
> (b) if questioning was permitted under rule 3.21, a transcript of that questioning;
>
> (c) anything permitted by any other rule or by an enactment;
>
> (d) any other evidence permitted by the Court.

[44] I also note that Rule 3.18(2) sets out what is to be included in the Record and reads as follows:

> The notice must require the following to be sent or an explanation to be provided of why an item cannot be sent:
>
> (a) the written record, if any, of the decision or act that is the subject of the
>
> originating application for judicial review,
>
> (b) the reasons given for the decision or act, if any,
>
> (c) the document which started the proceeding,
>
> (d) the evidence and exhibits filed with the person or body, if any, and
>
> (e) anything else relevant to the decision or act in the possession of the person or body.

[45] The County, in my view, first sought to inappropriately supplement the Record by including the materials in its Book of Authorities, and then sought to have them admitted to supplement the Record on the morning the judicial review oral hearing commenced. An attempt to introduce new evidence or in this case, supplement the Record by including them as authorities, has been referred to as "bootlegging evidence in the guise of authorities"': ***Langan v Watson***, 2007 ABCA 94 at para 5.

[46] If the County wished to add these materials to the Record, they should have sought the Jacobsons' consent and/or brought an application in accordance with the *Alberta Rules of Court*. While this matter is time sensitive the County was aware that the Jacobsons took issue with the inclusion of materials in their legal brief.

[47] Mr. Johnson's affidavit offers the explanation: "due to the privileged nature of the December 10, 2020 meeting no written transcripts or records were made by the County…"

[48] The Record sworn by Mr. Johnson was filed on March 4, 2021, and specifically noted that certain documents were not being produced because they were subject to legal privilege.

[49] It is entirely appropriate for a municipality to obtain legal advice with respect to the interpretation of the *MGA* and the passage of bylaws. The County is not required to disclose the legal advice that they received.

[50] If the County received legal advice that their actions were consistent with the *MGA*, they can place similar arguments before this Court if (or where) their actions are challenged. However, the receipt of such advice is not relevant to this Court's determination of the issue before it.

[51] More importantly, the fact that 4 other municipalities in Alberta passed similar bylaws prior to the expiration of the 60-day petition period is not relevant to the legal issues that I must resolve. I do not accept the County's argument that the similar actions of 4 other municipalities supports a finding that the County acted reasonably or correctly. It is my role to determine whether the County complied with the *MGA*.

[52] In summary, I decline to allow the materials to supplement the Record because, first, the materials are not relevant to the legal issue that is before the Court; second, the Certified Record of Proceedings is to contain documents that were considered by the decision maker and it is unclear, at a minimum, when these materials came into the possession of the decision maker.

[53] I will have no regard to these Other Bylaws and associated minutes/briefings that have been improperly included in the County's Book of Authorities: ***Covenant Health v Alberta (Information and Privacy Commissioner***), 2014 ABQB 562 at footnote 8.

Primary Issue - Did the County comply with the MGA when it passed the Bylaw?

Background leading up to the passage of the Bylaw

[54] The Bylaw was first proposed at a County Council meeting on October 22, 2020. The next municipal general election in Alberta is scheduled for October 18, 2021.

[55] In order for the Bylaw to be in effect for the October 18, 2021 election, it had to be passed by December 31, 2020.[1] County Council initially thought it had until April 8, 2021 to pass the Bylaw in order for it to take effect for the 2021 municipal general election, but then realized it only had until December 31, 2020.

[56] The Bylaw received first reading on November 5, 2020, and briefing materials contained in the County's Record confirm that the County was aware that it had to be passed by December 31, 2020 to be in effect for the 2021 general election. The Record indicates that the next Council meeting would be held on December 10, 2020 and that survey results concerning the proposed Bylaw would be considered.

[57] The County began advertising the proposed Bylaw on November 2, 2020, and continued to advertise it up until November 25, 2020.

[58] The Jacobsons raised concerns with the sufficiency of the County's advertising, by letter dated December 9, 2020. They also noted that the 60-day petition period contemplated by the *MGA* could not be complied with if the proposed Bylaw was passed on or before December 31, 2020.

[59] The Jacobsons did not support the proposed Bylaw.

[60] The Record confirms that Kathleen Jacobson read her December 9, 2020 letter to County Council.

[1] Sections 144(1) and 149(1) of the *MGA*.

[61] County Council, on December 10, 2020, voted to re-advertise the proposed Bylaw and schedule a special meeting for December 29, 2020 to consider approving the proposed Bylaw.

[62] The County advertised the proposed Bylaw again between December 14, 2020 and December 23, 2020 and addressed the deficiencies in the earlier advertisements.

[63] The advertisements specifically advised electors that they had to submit a petition by 4:30 pm on February 22, 2021, if they wished to petition against the proposed Bylaw.

[64] The proposed Bylaw was given 2nd and 3rd reading on December 29, 2020, and was passed.

Section 231

[65] While the Jacobsons allege that the County did not comply with s 231(4), it is useful to set out the section in its entirety in order to allow for a greater understanding of the petition process:

> 231(1) Except for a bylaw under section 22, a resolution under Part 15.1 or a bylaw or resolution under Part 17, after a proposed bylaw or resolution that is required to be advertised under this or another enactment has been advertised, the electors may submit a petition for a vote of the electors to determine whether the proposed bylaw or resolution should be passed.
>
> (2) A separate petition must be filed with respect to each advertised bylaw or resolution even if a council advertises 2 or more bylaws or resolutions in a single advertisement.
>
> (3) A petition under this section for a vote of the electors on a proposed bylaw required to be advertised by Part 8 is not sufficient unless it is filed with the chief administrative officer within 15 days after the last date on which the proposed bylaw or resolution is advertised.
>
> (4) A petition under this section for a vote of the electors on a proposed bylaw or resolution required to be advertised by another Part of this Act or another enactment is not sufficient unless it is filed with the chief administrative officer within 60 days after the last date on which the proposed bylaw is advertised.
>
> (5) If a sufficient petition is received under this section, the council must either
>
> (a) decide not to proceed with the proposed bylaw or resolution, or
>
> (b) decide to proceed with the proposed bylaw or resolution and submit the bylaw or resolution to a vote of the electors within 90 days after the chief administrative officer declares the petition to be sufficient.
>
> (6) If a vote of the electors approves the proposed bylaw or resolution, the council must proceed to pass it.
>
> (7) If a vote of the electors does not approve the proposed bylaw, the council must not give the bylaw any further readings and any previous readings are rescinded.

> (8) If a vote of the electors does not approve the proposed resolution, the motion for the resolution is rescinded.
>
> (9) If a sufficient petition is not received, the council may pass the proposed bylaw or resolution.

[66] The principles of modern statutory interpretation require me to read the words of the relevant sections in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and intention of the legislature***:*** ***Rizzo and Rizzo Shoes Ltd (Re)***, 1998 1 SCR at para 21, and ***Canada Trustco Mortgage Co v Canada***, 2005 SCC 54 at para 10.

[67] The County urges me to consider s 9 of the *MGA* which confirms that municipalities have a broad authority to govern, and that provisions of the *MGA* must be construed in a broad and purposive manner: ***United Taxi Drivers' Fellowhip of Southern Alberta v Calgary (City),*** 2004 SCC 19 at paras 6-7.

[68] It is trite law that municipalities derive their power from the *MGA* and are created by statute. The *MGA* is comprised of over 700 sections. The County urges me to consider that municipalities are granted broad powers by the *MGA* and are generally entitled to broad deference regarding their decisions. I accept the County's submission in this regard: ***Catalyst*** at para 20. However, this judicial review application does not seek to challenge the substance of the County's decision.

[69] In my view, a broad and purposive interpretation requires me to consider s 231 in its appropriate context, and I note the following in that regard:

- Section 231 is found in Part 7 of the *MGA*, which addresses Public Participation.
- The statutory right of electors to petition is limited. The petition process can be time consuming and if a municipality is required to have a vote it will require municipal resources: ss 231 and 232 of the *MGA*.
- Petition rights are often referred to as "grass roots" or "direct" democracy as they allow the electors to communicate their views to elected officials in a direct and potentially binding manner.
- The Legislature requires bylaws concerning the number of councillors and location of associated wards to be advertised and therefore, subject to the petition process: ss 148 and 149 of the *MGA*. Both of these matters are fundamental to how electors are represented and their ability to influence their elected officials.

[70] The Jacobsons, in support of their argument that s 231(4) requires a municipality to wait for the 60 days to pass prior to passing a bylaw, point to the decision of ***Girouard v Sturgeon (Municipal District No 90)***, 2001 ABQB 709 [***Girouard***], which considered s 231(4).

[71] In ***Girouard*** at para 15, Justice Burrows considered a similar situation and after extensively reviewing s 231 in its entirety, held:

> Though an express statement to the effect that council may not proceed to enact a bylaw required to be advertised before the expiry of the period for presenting

> petitions would make the effect of s 231 clearer, I conclude that it must be interpreted as having that effect in any event.

[72] Justice Burrows, in my view, correctly noted that s 231 speaks of a proposed bylaw in subsection 1, 3, 4, 5, 6 and 7 and held that this was a significant factor. If one reads s 231 like a set of directions, it sets outs a series of decision points for both electors and councillors that is consistent with Justice Burrows' reasoning and the Jacobsons' position.

[73] The "directions" are as follows:

> a) First reading of a bylaw occurs;
>
> b) Section 606(3) requires advertising prior to second reading;
>
> c) Advertising occurs;
>
> d) Petition must be delivered within 60 days from last date of advertising – s 231(4);
>
> e) If a valid petition is received council must either not proceed or submit the bylaw to a vote within 90 days - s 231(5);
>
> f) If no petition is received within 60 days council can proceed to 2nd and 3rd reading and may pass the bylaw – s 231(9);
>
> g) If the vote (of electors) approves the bylaw, council must pass it – s 231(6); and
>
> h) If the vote does not approve the bylaw, council must not give the bylaw any further readings and previous readings are rescinded – s 231(7).

[74] The County argues that I should distinguish ***Girouard*** because both parties agreed that the bylaw in question was not in force and because a petition had been filed. I am not persuaded to accept that distinction. Notwithstanding the fact that the Jacobsons did not file a petition, the core focus here relates to the statutory interpretation of the procedural requirements prescribed by s 231(4). In ***Girouard***, the parties disagreed on the interpretation of s 231(4), and Justice Burrows did not merely accept one interpretation but carefully considered the matter.

[75] Importantly, s 231(9) explicitly directs that a council shall not pass a bylaw until the petition period has expired. Justice Burrows interpreted that section and clearly stated in ***Girouard*** at para 14(d) that:

> [...] The section says that "if a sufficient petition is not received, council may pass the proposed bylaw . . ." (s. 231(9)). *This creates a mandatory precondition to the passing of a bylaw required to be advertised after first reading*. It may not be passed until it is known that no sufficient petition has been received. *That condition cannot be satisfied before the expiry of the period for presenting petitions*.
>
> [Emphasis added]

[76] Accordingly, I conclude that s 231 is designed to enhance the democratic rights of electors, and the decision points set up by the provisions of that section inescapably lead me to the same conclusion as Justice Burrows.

[77] In my view, when s 231 of the *MGA* is read as a whole, the intent is clear. Additionally, the sequencing structure, plain wording and purpose of the section requires that it be interpreted as prohibiting the passing of a bylaw until the petition period has expired.

Non-Compliance with MGA Invalidates Bylaw

[78] When assessed on a correctness standard it is clear that the County did not comply with s. 231(4) of the *MGA* because it passed the Bylaw prior to the expiry of the petition period.

[79] In addition to the ***Girouard*** decision, the Jacobsons also rely upon the Supreme Court's decision in ***Costello v Calgary (City)***, [1983] 1 SCR 14 [***Costello***], for the proposition that the failure to strictly comply with a provision of the *MGA* will render a bylaw void.

[80] In ***Costello***, the City of Calgary was seeking to expropriate land and failed to comply with a 21-day notice period. Only 17 days of notice was provided. The Court held that strict compliance was necessary and that "… the line should be drawn where the Legislature chose to put it and not where the individual judicial discretion may fix it on a case by case basis": ***Costello*** at 27.

[81] In ***Costello***, Justice Mcintyre explained that a court must examine each case and determine the nature of the non-compliance. He cited the passages from Rogers, *The Law of Canadian Municipal Corporations,* (2nd ed), [§72.1] at 432-33, with approval that stand for the proposition that failure to comply with a condition precedent that is necessary to exercise a statutory power will generally be fatal to the validity of a bylaw: ***Costello*** at page 22.

[82] Justice Shelley similarly considered the effect of non-compliance with procedural requirements in the ***Society for Promotion of Alternative Arts and Music v Edmonton (City),*** 2008 ABQB 629 [**Society**] and noted at paragraph 21:

> Alberta courts have consistently held that the decision in ***Costello*** requires strict compliance with notice requirements in enabling legislation only when a municipality is exercising extraordinary powers or passing bylaws dealing with taxation, expropriation or other interference with private rights (***Janzen v. Mountain View No. 18 (County)***, [1997] 9 W.W.R. 540 [Alta QB]; ***Thierman v. Itaska Beach (Summer Village)***, 2002 ABQB 343; and ***Robertson v. Edmonton (City)*** (1990), 104 A.R. 374[Alta QB]. Other jurisdictions have similarly limited strict compliance to situations where notice was not given for the exercise of extraordinary powers like expropriation (for example, ***Society Promoting Environmental Conservation v. Canada (Attorney General)***, 2003 FCA 239; ***Dysart School District v. Cupar School Division No. 28***, [1996] S.J. No. 524.)

[83] In ***Janzen v Mountain View No 18(County)*** (1997) 205 AR 114 (Alta QB), the Janzens did not receive notice of a public hearing regarding a redistricting application. The Janzens' concerns related primarily to issues that arose in the subdivision process as opposed to the redistricting process. The Janzens were able to participate in the subdivision hearing. The Court in ***Janzen*** declined to grant a declaration that the redistricting bylaw was invalid on the basis that the subdivision process provided an adequate venue for the Janzens' concerns to be considered.

[84] The present case does not deal with expropriation; however, changes to the number of councillors and the boundaries of wards is still a significant matter and does affect "private rights". Local governments provide day to day services to their residents and, in some ways,

have a more direct and tangible impact upon their residents than other orders of government. Local governments are also often more accessible and visible as well.

[85] In the present case, the Bylaw was passed in an expedited fashion and the Jacobsons were not afforded the opportunity to assemble a petition in a manner consistent with s 231 of the *MGA*. The Legislature saw fit to provide electors with an ability to petition prior to a bylaw being passed and, in my view, that opportunity should be respected.

[86] While the Jacobsons and others who were opposed to the Bylaw will have the opportunity to express their views at the ballot box in October of 2021 that is not sufficient. The purpose of the petition process is to allow electors the opportunity to directly influence the legislative powers of their elected officials regarding the structure and contours of how electors are represented. The electors of the County were deprived of that opportunity.

[87] The County's failure to allow the 60-day period to lapse prior to passing the bylaw constitutes breach of a condition precedent and did not represent a technical irregularity that had no impact upon the Jacobsons or other electors: ***Costello*** at page 22.

[88] The County argued that if I found that they did not comply with the *MGA* that this Court issue an Order allowing the electors the opportunity to petition against the Bylaw. The additional 60 days would be determined by this Court.

[89] The next general municipal election will be heard in approximately 110 days. While the County's proposal has some merit, Courts should be hesitant to grant remedies that may have unknown or unintended consequences. I decline to grant this remedy and instead prefer to allow the County to act within the structure set out in the *MGA*. Following the 2021 municipal election the newly elected council will have the ability to revisit this issue and determine what course of action they wish to pursue.

[90] For the reasons set out above I have determined that this a case where it is appropriate to declare the Bylaw invalid and of no force and effect.

[91] The Jacobsons also seek an Order that the "law as it existed prior to the passage of the Bylaw regarding electoral divisions and the number of councilors in the County be in effect". The Bylaw did not repeal any existing bylaws. Therefore, my decision to invalidate the Bylaw will not have any effect upon any other existing County bylaws.

[92] Counsel for the Jacobsons also advised in submissions that the prior regime of 10 councillors and electoral divisions was set by Ministerial Order. It is trite law that "[because] courts are adjudicative bodies that, in the usual course of things, are called upon to decide the legal consequences of past happenings, they generally grant remedies that are *retroactive* to the extent necessary to ensure that successful litigants will have the benefit of the ruling": ***Hislop v Canada (Attorney General)***, 2007 SCC 10 at para 86 (emphasis added), citing S Choudhry & K Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003), 21 SCLR (2d) 205, at 211, 218. Accordingly, I decline to make the Order requested by the Jacobsons.

VI. Disposition

[93] With respect to the preliminary issues, I grant the Jacobsons' application to strike the Other Bylaws and associated materials from the County's Legal Brief and Book of Authorities and dismiss the County's application to have them added to the Record as supplementary materials.

[94] I grant the Jacobsons' primary application and declare the Bylaw invalid and of no force and effect.

[95] The Jacobsons have been successful and are entitled to costs. If the parties wish to speak to costs, they may make arrangements to speak with me within 30 days of the issue of this judgment.

Heard on the 27th day of May, 2021.
Dated at the City of Edmonton, Alberta this 30th day of June, 2021.

T.G. Rothwell
J.C.Q.B.A.

Appearances:

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Alberta Counsel
for the Applicants

Luke M. Day and Joe W. Eisenlohr
Stringam LLP
for the Respondent