Federal Court  Cour fédérale

Date: 20190614

Docket: T-508-18

Citation: 2019 FC 813

Ottawa, Ontario, June 14, 2019

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

ONTARIO LOTTERY AND GAMING CORPORATION

Applicant

and

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION

Respondent

and

FIRST NATIONS TAX COMMISSION

Intervener

JUDGMENT AND REASONS

[1] Ontario Lottery and Gaming Corporation [OLG] seeks judicial review of a decision of the First Nations Tax Commission [the Commission], which approved a law made by the

Mississaugas of Scugog Island First Nation [the First Nation] imposing a fee for the sewer and waste water treatment services for a casino operated by OLG. In a nutshell, OLG argues that the fee imposed lacks a nexus with the projected cost of the service and that the report provided by the First Nation to justify the fee is not supported by adequate financial data.

[2] I am dismissing OLG's application. OLG's arguments misconceive the role of the Commission. The Commission's mandate is to ensure compliance with statutory requirements. It is not to perform a detailed audit of the projected costs. On its face, the report provided by the First Nation showed a connection between the fee and the projected costs of the service.

I. Background

A. *The Great Blue Heron Casino*

[3] The Great Blue Heron Casino [the Casino] is established on the reserve lands of the First Nation. It opened its doors in 1997 and at that time, was operated by a non-share capital corporation associated with the First Nation, the Baagwating Community Association [BCA]. It then offered only what is referred to as "table gaming." BCA leased the Casino from the First Nation.

[4] In 2000, the Casino became a partnership between BCA and OLG. As a result, the Casino was expanded to offer "electronic gaming," operated by OLG, while maintaining table gaming operated by BCA. A single private operator was retained by OLG and BCA to operate each one's part of the Casino.

[5] As its operations grew, the Casino generated an increasing quantity of waste water. After the failure of the original treatment facility, that waste water had to be trucked away and treated by a nearby municipality. As that arrangement became less and less satisfactory, it was decided to build a new waste water treatment plant [the Treatment Plant] to service the Casino and possibly other users in the community. The cost of building the Treatment Plant was shared between OLG and BCA. The Treatment Plant was completed in 2010. Since then, the Treatment Plant has been owned and operated by the First Nation. The First Nation has invoiced the Casino's private operator for the operation costs, which in turn recouped the costs, in equal shares, from OLG and BCA.

[6] In 2016, new operating arrangements for the Casino were put in place. OLG became the sole operator of the Casino. Profit sharing arrangements were made so that the First Nation could receive a share of the Casino's profits. With respect to waste water, the 2016 agreements provided that the past invoicing practices would be discontinued and that OLG would pay service fees pursuant to a fee law adopted by the First Nation. The validity of that fee law is challenged in this application. The process through which that fee law was adopted is described below. Before I do so, however, it is necessary to provide some background as to the legislative framework that governs the adoption of First Nation fee laws.

B. *The First Nations Fiscal Management Act: Origins and Scheme*

[7] According to section 18 of the *Indian Act*, RSC 1985, c I-5, First Nations reserve lands are, in principle, reserved for the use of the members of a particular First Nation community (or "Indian band"). Nevertheless, there are a number of situations where reserve lands are occupied

by persons or corporations who are not members of the First Nation. Such a situation may result from the expropriation of rights of way for the benefit of railway, energy or telecommunication companies. It may also result from a First Nation's decision to lease part of its reserve land to non-members or to "designate" part of its reserve. Various provisions of the *Indian Act* authorize such uses.

[8] When parts of their reserve lands are used by non-members, First Nations have often sought to exercise their taxing power flowing from section 83 of the *Indian Act*. Section 83 allows First Nations to tax, for local purposes, "land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve." In *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 at paragraphs 18, 114 [*Matsqui*], the Supreme Court of Canada recognized that the purpose of First Nations' taxing power is the facilitation of self-government. The use of those powers has often led to litigation, for example with respect to whether certain lands form part of a reserve or not (*Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746), or whether the appeals mechanism created by a First Nation is adequate (*Matsqui*).

[9] With respect to their tax base and general scheme of operation, taxes imposed under section 83 of the *Indian Act* bear some similarities with real property taxes that municipalities across Canada are empowered to levy under provincial legislation. There is one important difference, however. Municipal corporations are typically composed of all their residents, and provisions are usually made to afford non-resident taxpayers, including corporations in some cases, the right to vote in municipal elections. In contrast, membership in a First Nation is usually transmitted by descent and cannot be acquired by non-Indigenous persons by virtue of

residence on reserve lands. Hence, non-member taxpayers are excluded from the democratic process of First Nation governments.

[10] Beginning in the 1980s, a number of First Nations have sought to modify their legal framework so as to encourage and facilitate economic development. This initially resulted in a series of amendments to the *Indian Act*, known as the "Kamloops amendments," which provided for the "designation" of reserve lands, a concept which facilitates the granting of interests in reserve lands to non-members: *St. Mary's Indian Band v Cranbrook (City)*, [1997] 2 SCR 657. In contrast to "surrendered" lands, "designated" lands remain within the reserve and their occupants may be taxed under section 83.

[11] A further development was the enactment of legislation allowing First Nations to "opt in" a regime that replaces certain parts of the *Indian Act*. One well-known component of this alternative regime is the *First Nations Land Management Act*, SC 1999, c 24, which empowers participating First Nations to adopt a "land code" replacing the provisions of the *Indian Act* concerning the management of reserve lands. The *First Nations Fiscal Management Act*, SC 2005, c 9 [the Act], which is directly relevant to this application, is another example.

[12] The Act is a complex legislative scheme. I will describe only the components that are relevant to this case. Section 5 empowers the council of a First Nation to enact "local revenue laws," including laws regarding land taxes as well as laws "respecting the charging of fees for the provision of services … in relation to … sewers." The latter component, being subsection

5(1)(a.1), was added by section 178 of the *Economic Action Plan 2015 Act, No 1*, SC 2015, c 36, and came into force on April 1, 2016.

[13] Section 5 also states that local revenue laws must be approved by the First Nations Tax Commission [the Commission], created by section 17. The approval process is set forth in section 31, to which I will return later. Pursuant to section 35, the Commission may also "establish standards … respecting … the form and content of local revenue laws" as well as "procedures respecting … approval of those laws."

[14] On December 13, 2017, the Commission established the *Standards for First Nations Fee Laws, 2017* [the Standards]. Particularly relevant to this case are the following parts of sections 3 and 4:

3. Basis of Fee	**3. Base d'imposition des droits de service**
3.1 The Law must state the basis on which the fee will be levied, in accordance with subsection 3.2, 3.5 or 3.7, as applicable.	3.1 Le texte législatif doit établir la base d'imposition des droits de service en conformité avec les paragraphes 3.2, 3.5 ou 3.7, selon le cas.
3.2 Where a fee is for a service provided to an interest or right in reserve lands, the Law must establish the fee based on one or more of the following:	3.2 Dans le cas des droits de service imposés pour un service fourni à un droit ou intérêt sur les terres de réserve, le texte législatif doit fonder les droits de service sur l'un ou plusieurs des éléments suivants :
(a) a single amount for each interest or right;	a) un montant forfaitaire pour chaque droit ou intérêt sur les terres de réserve;
(b) a single amount for each	b) un montant forfaitaire pour

service or aspect of the service;	chaque service ou aspect du service;
(c) the use or consumption of the service;	c) l'utilisation ou la consommation du service;
(d) the taxable area of the interest or right or buildings located on the interest or right ;	d) la superficie imposable du droit ou de l'intérêt ou des bâtiments situés sur celui-ci;
(e) the frontage of the interest or right.	e) la longueur de façade du droit ou ou de l'intérêt.
[…]	[…]
4. Cost of Service	**4. Coût du service**
4.1 The Law must establish rates and levels of fees that reflect the projected cost of providing for the administration, operation and maintenance of the service or portion of the service that is to be funded by the fee.	4.1 Le texte législatif doit établir des taux et niveaux de droits de service qui correspondent au coût projeté de l'administration, de l'exploitation et du maintien du service ou de la partie du service devant être financé par de tels droits.
4.2 The Law must establish rates and levels of fees that are supported by a report respecting how the fees levied under the Law were determined, and that includes the projected cost of the service, how the cost of the service was determined, and the proportion of the total cost that the First Nation will recover through the fee.	4.2 Le texte législatif doit établir des taux et niveaux de droits de service qui sont appuyés par un rapport portant sur le mode de détermination des droits de service imposés en vertu de la présente loi et qui fait état du coût projeté du service, de la manière dont ce coût a été calculé et de la portion du coût total que la première nation recouvrera au moyen des droits de service imposés.

[15] The Standards also establishes minimal requirements for every fee law, for example, that there must be provisions regarding collection, refunds and complaints, as well as requirements

regarding certain types of provisions that a First Nation may wish to include in a fee law, for example with respect to exemptions, interest and penalties.

C. *The Adoption of the Fee Law and its Approval by the Commission*

[16] On October 27, 2017, the First Nation published a notice of its intent to adopt the *Missisaugas of Scugog Island First Nation Sewer Service Fee Law, 2017* [the Fee Law] in the First Nations Gazette, pursuant to section 6(1)(a) of the Act. The draft of the Fee Law was later provided to OLG, together with a copy of a report describing the basis for the calculation of the service fee [the Sewer Fee Report].

[17] The Fee Law appears to have been drafted in consultation with the Commission. It deals with the administration of the sewer fee, invoicing, exemptions, penalties, interest, enforcement and complaints. The method of calculating the fee is set out in a schedule to the law. The total cost of providing the sewer service is set at $1,060,000. That amount is then apportioned among the users of the service, in proportion to the "volume of water inflow to the property" in relation to the total volume. While the phrase "water inflow to the property" is used, one understands that what is really meant is the flow to the Treatment Plant, from each property. It is common ground that the Casino is, by far, the largest source of waste water treated by the Treatment Plant. Another small commercial building was connected to the Treatment Plant in 2017, but, for the purposes of this application, produces a negligible amount of waste water.

[18] On November 27, 2017, OLG wrote to the First Nation to express its concerns with respect to the draft Fee Law and to ask that the First Nation provide additional information.

Several of those concerns pertained to the Sewer Fee Report. OLG stated that under Ontario legislation, municipalities wishing to levy similar charges were required to provide background studies prepared by qualified consultants and noted that the identity of the authors of the Sewer Fee Report was not disclosed. OLG also questioned whether there was duplication between certain items in the operations budget found in the Report and whether certain items were genuinely related to the operation of the sewer service. Thus OLG expressed the concern that the Sewer Fee Report "does not provide sufficient information or particulars to justify the fee." Other concerns related directly to the structure of the proposed Fee Law. OLG noted that the proposed fee was based on water flows, but that there was no methodology set out in the law to measure water flows or to attribute particular flows to the Casino. OLG also submitted that certain provisions of the Fee Law were contrary to the contractual arrangements between the First Nation and OLG. It should be noted that OLG's letter did not explicitly mention concerns related to the capital cost allowance that forms part of the budget.

[19] On December 7, 2017, the First Nation replied that OLG's concerns were not related to non-compliance with the requirements of the Act. It explained that it intended to ask the Commission to approve the Fee Law at its December 13, 2017 meeting, at the same time as the adoption of the Standards, and that it was concerned that OLG's submissions would delay the process until a subsequent meeting of the commissioners. For those reasons, it invited OLG to withdraw its submissions.

[20] The council of the First Nation adopted the Fee Law on December 20, 2017. Pursuant to section 7 of the Act, it informed OLG of this the same day, and invited it to make written submissions to the Commission.

[21] On January 25, 2018, OLG made written submissions to the Commission with respect to the Fee Law. Those submissions are substantially identical to those made to the First Nation in November 2018 and often repeat them word for word. However, OLG's submissions to the Commission are not framed as a request for more information, but as a request to amend the Fee Law and, implicitly, to defer its approval.

[22] The Commission approved the Fee Law on February 13, 2018. The commissioners had before them the Fee Law, the Sewer Fee Report, a technical review form and document checklist form completed by Commission staff, as well as OLG's written submissions.

[23] OLG brought the present application for judicial review on March 15, 2018, challenging the Commission's decision to approve the Fee Law. The Commission was granted leave to intervene in the proceedings.

II. Analysis

A. *Framing the Issues*

[24] OLG's application challenges the Commission's approval of the Fee Law. On judicial review, the role of this Court is simply to ensure that the Commission's decision was made

according to law. This comprises two aspects. First, I must determine if the process followed by the Commission was fair and complied with the requirements of the Act. Second, with respect to substance, I must assess whether the decision is reasonable. In other words, I must ask myself whether the Commission, on the basis of the record and the submissions that were before it, could reasonably reach the result that it did. My role is not to make that decision myself, nor to afford the parties an opportunity to redo the process.

[25] The parties to an application for judicial review have often been in a long-term relationship. In this case, the First Nation and OLG have been partners in the Casino for close to twenty years. As it focuses on a specific decision, however, an application for judicial review is not the proper forum to perform a full autopsy of those relationships.

[26] Moreover, on judicial review the issue is whether the decision challenged complies with the law. The fact that the decision may be incompatible with contracts between the parties is irrelevant unless, of course, the law requires the decision-maker to take such contracts into consideration. In this case, the Act does not restrict the First Nation's power to enact the Fee Law on that basis. See, in this regard, *Buffalo Point Cottagers Association Inc v Buffalo Point First Nation*, 2014 FC 1173 at paragraphs 20–21 [*Buffalo Point*]. Thus, while OLG made submissions before the Commission to the effect that there were inconsistencies between the Fee Law and the contract it had with the First Nation, this is not relevant to this application.

[27] Likewise, on judicial review the remedial powers of the Court are usually limited to quashing the decision challenged and sending it back for redetermination: *Canada (Citizenship*

and Immigration) v Yansane, 2017 FCA 48. The Court cannot issue monetary remedies. In this case, OLG asks this Court to order the reimbursement of moneys paid pursuant to the Fee Law. This is not an order that this Court can make.

[28] Thus, the issue before me is a narrow, albeit important one. I have to decide whether the Commission's decision was made in a procedurally fair manner and was substantively reasonable. That depends in large part on a proper understanding of the nature of the law approval power entrusted to the Commission. For that reason, I will begin my analysis with a review of that question. That will facilitate further consideration of OLG's arguments regarding procedural fairness and substantive reasonableness.

[29] Before doing that, however, I must address two preliminary issues raised by the parties.

(1) Admissibility of Evidence

[30] The first preliminary issue is the First Nation's motion to strike two affidavits filed by OLG.

[31] As I explained above, an application for judicial review is focused on an administrative decision. It is settled law that such an application must proceed on the basis of the evidence that was before the administrative decision-maker. Subject to narrow exceptions, the parties cannot file new evidence: *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paragraphs 67–100. Those exceptions are: background information, evidence of procedural

defects that are not apparent from the record and the complete absence of evidence on a particular topic.

[32] In support of its application, OLG filed the affidavits of Messrs. John MacFarlane, one of its executives, and Gerry Scandlan, an economist with significant expertise in municipal services. Mr. MacFarlane provides a history of the relationship between OLG and the First Nation, focusing on the construction and operation of the Treatment Plant and the adoption of the Fee Law. It is fair to say that he does so in an argumentative manner. On his part, Mr. Scandlan was commissioned to provide an opinion as to the sufficiency of the Sewer Fee Report. He does so by comparing it with reports that he has prepared for Ontario municipalities for similar purposes.

[33] To reply to those affidavits, the First Nation filed the affidavit of Mr. Stephen Burnett, a consultant who has provided services with respect to the Treatment Plant and who has helped the First Nation prepare the Sewer Fee Report. Among other things, Mr. Burnett expresses an opinion contrary to that of Mr. Scandlan and provides explanations with respect to certain expense items listed in the Report and that were questioned by OLG in its submissions to the Commission.

[34] On each side, the affidavits were supported by voluminous documentation. The affiants were cross-examined. As a result, the record before this Court is comprised of more than twenty bound volumes spanning over 3,000 pages. In contrast, the record before the Commission is comprised of a mere fifty pages.

[35] This is a textbook example of what should be avoided. Were it only for environmental considerations, parties should refrain from filing materials not forming part of the record below and not clearly falling within the narrow recognized exceptions. But there is more: I can only imagine the amount of resources expended by the parties in preparing evidence that, in the end, is irrelevant. Most importantly, applications for judicial review are meant to be expeditious proceedings. Restricting the record to what was before the administrative decision-maker is key to achieving that purpose.

[36] In addition to filing its own expert evidence, the First Nation reacted to OLG's affidavits by bringing a motion to strike. (This, incidentally, added another volume of paper to the record.) While the First Nation is correct that Mr. Scandlan's affidavit contains inadmissible evidence and that parts of Mr. MacFarlane's affidavit are improperly argumentative, I see no benefit in formally allowing the motion: *Clark v Abegweit First Nation Band Council*, 2019 FC 721 at paragraphs 30–33. I will simply not consider evidence that was not before the Commission and that cannot be described as background information. Accordingly, the First Nation's motion to strike OLG's affidavits is dismissed.

(2) Standing

[37] A second preliminary issue arises with respect to OLG's standing to bring this application. On January 23, 2018, OLG assigned all its rights with respect to the Casino to Ontario Gaming GTA Limited Partnership [OGGLP]. As a result, OLG is no longer the lessee of the Casino. Nevertheless, OLG says that it still has standing to bring the present application because, under the assignment, it remains liable to OGGLP for payment of the sewer fees.

[38] On its part, the First Nation argues that when it made submissions to the Commission, on January 25, 2018, OLG no longer had any interest in its reserve lands, as it no longer was the lessee of the Casino, and it never was liable to pay sewer fees according to the Fee Law.

[39] The First Nation's argument is based on the wording of section 31(2) of the Act as it stood at the time the Commission considered OLG's submissions and approved the Fee Law:

Before approving a local revenue law, the Commission shall consider, in accordance with any regulations made under paragraph 36(1)(b), any representations made to it under paragraph 7(b) in respect of the law by members of the first nation or others who have interests in the reserve lands of the first nation or rights to occupy, possess or use those lands.	Avant d'agréer un texte législatif sur les recettes locales, la Commission prend en compte, en conformité avec les règlements éventuellement pris en vertu de l'alinéa 36(1)b), les observations qui lui sont présentées par les membres de la première nation dans le cadre de l'alinéa 7b) ainsi que par les autres personnes qui ont des intérêts ou des droits d'occupation, de possession ou d'usage sur les terres de réserve de la première nation.

[40] Thus, says the First Nation, OLG, not having interests in reserve lands, was not entitled to have its representations considered by the Commission. It follows that OLG has no standing to challenge the Fee Law nor to bring this application.

[41] I would not give effect to the First Nation's arguments with respect to OLG's standing.

[42] As a practical matter, OLG was a party, or was actively involved, in the proceedings before the Commission. There is no question that OLG had a right to make representations to the

First Nation under section 6, and then to the Commission under section 7, as those sections are not limited to holders of interests in reserve lands. If OLG had a right to make representations to the Commission, it is difficult to understand why it could not apply to this Court for judicial review of the Commission's decision.

[43] While I recognize that section 31(2), as it stood when the Commission approved the Fee Law in February 2018, seems to require the Commission to consider only representations made by interest holders, such a narrow interpretation sits uneasily with the right of any person to make representations under sections 6 and 7. It would be illogical to allow someone to make representations that the Commission could not consider. Parliament appears to have remedied the inconsistency when it amended section 31(2) later in 2018 to refer simply to "any representations made to it under paragraph 7(b)."

B. *The Nature of the Fee Law Approval Process*

[44] At the core of this case lie two competing views of the purpose and functioning of the process through which the Commission approves fee laws enacted by First Nations. In a nutshell, the First Nation and the Commission argue that the latter's role is limited to verifying compliance with the Act and Standards. In doing so, the Commission must not delve into the merits of laws that it is asked to approve. OLG, on its part, argues that the Commission has to engage in a much closer scrutiny of fee laws. It must satisfy itself that the proposed fee "reflects the projected cost" of the service, as required by section 4.1 of the Standards, or, in other words, that there is a "nexus" between the fee and the cost. While it does not advocate for a full "rate hearing" of the kind performed by public utility boards (see, for an example, *Ontario (Energy*

Board) v Ontario Power Generation Inc, 2015 SCC 44, [2015] 3 SCR 147), OLG nevertheless asserts that the Commission must afford ratepayers a genuine opportunity of challenging the various cost items that form the basis of a proposed fee law.

[45] I generally agree with the Commission and the First Nation. While the approval process is not purely mechanical, the Act and the Standards do not empower the Commission to engage in a detailed audit of the projected cost of the service in order to decide whether the fee has a nexus with that cost. I reach this conclusion for four interrelated reasons.

(1) The Self-Government Principle

[46] The most basic reason is that OLG's interpretation would thwart First Nations self-government. As recognized by the Supreme Court in *Matsqui* and by Parliament in the preamble, the Act, alongside other recent initiatives with respect to taxation and economic development, is aimed at recognizing and facilitating self-government.

[47] To that end, Parliament has allowed First Nations to exercise their self-determination by opting into the regime of the Act, which affords federal recognition to their taxing power while setting out certain protections in favour of non-Indigenous ratepayers.

[48] Of course, all public bodies must exercise their authority within the constraints prescribed by law: *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paragraphs 71–72. But such constraints are not presumed. Despite the development of administrative law and the growth of Charter review, the basic principle remains that the wisdom of the choices made by public bodies

exercising a law-making function is not a matter for the courts: *Reference re Securities Act*, 2011 SCC 66 at paragraphs 10, 90, [2011] 3 SCR 837; *R v Comeau*, 2018 SCC 15 at paragraph 83, [2018] 1 SCR 342. This is especially so where the public body is elected and accountable to its constituency, such as in the case of municipalities, First Nations or professional corporations: *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at paragraph 19, [2012] 1 SCR 5 [*Catalyst*]; *Green v Law Society of Manitoba*, 2017 SCC 20 at paragraphs 21–23, [2017] 1 SCR 360 [*Green*].

[49] There is no indication that in adopting the Act, Parliament chose to set that principle aside. Rather, the explicit embracing of self-government in the preamble of the Act entails a narrow interpretation of substantive limits on the powers of the self-governing entity.

[50] Thus, in the context of self-government, where a power is recognized under certain substantive conditions, it is mainly for the self-governing entity to implement those conditions and to determine what they entail in a specific case. Unless explicitly granted, outside bodies do not have the power to impose their interpretation of those conditions on First Nations.

[51] Indeed, almost 25 years ago, Chief Justice Antonio Lamer of the Supreme Court of Canada said, in *Matsqui* at paragraph 44, “since the scheme is part of the policy of promoting Aboriginal self-government, issues should be resolved within the system developed by Aboriginal peoples before recourse is taken to external institutions.” Developments in administrative and Indigenous law since then have only strengthened the need to respect the policy

choices made by First Nations. See also, in this regard, *Edzerza v Kwanlin Dün First Nation*, 2008 YKCA 8 at paragraph 26; *Lafferty v Tlicho Government*, 2009 NWTSC 35.

(2) The Role of the Commission

[52] The Commission is not a First Nation. It does not itself exercise self-government. Nevertheless, Parliament intended the Commission to play a narrow, but significant role in the exercise of self-government by participating First Nations. In order to "reconcile the interests of taxpayers with the responsibilities of chiefs and councils to govern the affairs of First Nations" (section 29 of the Act), Parliament wished to ensure compliance with a set of minimal requirements regarding taxation, while minimizing restrictions on self-government. To that end, instead of prescribing those requirements itself, Parliament set up a joint body, the Commission, which is composed of representatives of First Nations and non-Indigenous ratepayers, and gave it the role to define those requirements and to apply them. That standard-setting power is found in section 35 of the Act, pursuant to which the Standards at issue in this case were adopted.

[53] Beyond the application of the standards, however, the Commission does not have a discretionary power to approve or disapprove local revenue laws. This is made abundantly clear by the use of the imperative in the English version of section 31(3) of the Act, and the present tense in the French version, which connotes an obligation:

Subject to section 32, the Commission shall approve a local revenue law that complies with this Act and with any standards and regulations made under this Act.	Sous réserve de l'article 32, la Commission agrée les textes législatifs sur les recettes locales qui sont conformes à la présente loi et aux règlements éventuellement pris en vertu de celle-ci, ainsi qu'aux normes

> établies en vertu de la présente loi.

[54] Thus, unless a proposed law breaches the Act or the Standards, the Commission has no discretion. This is no accident. The Commission's approval power replaces the Minister's veto or approval powers regarding First Nation by-laws made under sections 82 and 83 of the *Indian Act*. (The veto power under section 82 was repealed in 2014, but the approval power under section 83 remains.) It has been held that under those provisions the Minister has a wide discretion that may be exercised on the basis of a broad range of factors: *Twinn v Canada (Minister of Indian Affairs and Northern Development)*, [1987] 3 CNLR 118 (FCTD), at page 120; *St. Mary's Indian Band v Canada (Minister of Indian Affairs and Northern Development)*, [1995] 3 FC 461 at page 471, confirmed by [1997] 1 CNLR 206 (FCA). This has been frequently seen as a remnant of colonial authority. In contrast, the Act was carefully crafted so as to avoid subjecting First Nations to such a sweeping discretionary power.

[55] For those reasons, I agree with the conclusion reached by my colleague Justice Douglas Campbell in *Buffalo Point*, at paragraph 20:

> The only issue before the Commission for determination was whether the Tax Laws proposed by Buffalo Point met the Commission's standards. It is clear that the Commission had no authority to place a condition on the approval, nor could it deny the approval if the standards were met.

(3) The Contents of the Standards

[56] The Standards themselves show that the Commission understands its role in a manner consistent with the purpose of fostering self-determination. The constraints they impose on First

Nations mainly relate to transparency and process. Thus, they require fee laws to contain a number of informative elements: the description of the service, the basis for the fee or the manner in which payments must be made. Thus, taxpayers can know the extent of their obligations and how to comply with them. The Standards also require fee laws to provide certain procedural guarantees, including provisions regarding refunds, complaints and enforcement. In some specific cases there is a substantive limit. Thus, the interest rate on unpaid fees must not exceed 15%. Together, those requirements contribute to ensure that fee laws are applied in a manner consistent with the rule of law principle: *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at paragraphs 41–45, [2017] 2 SCR 289.

[57] In the context of the approval of a fee law, it follows that the Commission must simply ensure that the First Nation has established a fee that "reflects the projected cost" of the service. The manner in which this is done remains within the First Nation's powers of self-government. It is not for the Commission to decide how the service should be provided, what the cost should be, what cost items are appropriate or whether there is a cheaper alternative. The Act and Standards do not restrict the First Nation's policy choices in this regard. A fortiori, the Act and Standards are not intended to afford ratepayers an opportunity to impose their views regarding those issues on the First Nation.

[58] Certain provisions of the Act reinforce this conclusion, in particular with respect to fee laws. Section 8 describes the information that First Nations must provide to the Commission when asking for the approval of a law. With respect to real property taxation, subsection 8(1) requires that information regarding the lands and interests subject to taxation, the assessment

practices, the services to be provided, existing or proposed service agreements, the notices and consultation as well as evidence that the law was duly adopted. In contrast, with respect to fee laws, subsection 8(3) only requires the last two elements, which suggests that the Commission has no role inquiring into the substance of the law.

[59] Certain categories of laws are subject to a more stringent approval procedure. Section 32 of the Act provides that laws for the financing of capital assets cannot be approved unless the First Nation obtains a certificate of financial performance from the First Nations Financial Management Board and shows that it has unutilized borrowing capacity. Thus, the intensity of the Commission's scrutiny was carefully calibrated and the fee laws lay at the lower end of the spectrum.

(4) Other Provisions of the Act Regarding Transparency and Accountability

[60] Because the purposes of the Act include the protection of the interests of ratepayers and the promotion of transparency and accountability, OLG argues that the Commission must perform a robust review of the nexus between the proposed fee and the projected cost of the service before it approves a fee law. While the premise is undoubtedly true, the conclusion does not follow. The reason is simple: the measures that ensure transparency and accountability are found elsewhere in the Act.

[61] Under section 10(2), a First Nation that has enacted a fee law must also enact a yearly expenditure law or, in other words, a yearly budget. Section 13 requires First Nations to keep the revenues generated by fee laws in a separate account and provides that these moneys can only be

expended pursuant to a yearly expenditure law. Section 14 requires a yearly audit of those expenses, and the audit report must be made available to ratepayers who are not members of the First Nation.

[62] In addition, section 8 of the Standards provides that fee laws must contain a requirement that moneys collected be used for the sole purpose of providing the service in question as well as a requirement of separate accounting. Section 17 of the Fee Law reflects those requirements.

[63] As a result of the combined application of the provisions mentioned above, OLG can be assured that any revenues collected under the Fee Law will only be used for the provision of sewer and waste water treatment services.

[64] In addition, section 33 of the Act allows a ratepayer to ask the Commission to review the conduct of a First Nation that, in the opinion of the ratepayer, fails to comply with the provisions of the Act mentioned above or applies its laws in an unfair or improper manner. The *First Nations Tax Commission Review Procedures Regulations*, SOR/2007-239, provide for a full adversarial process for the hearing of such complaints. The Commission may issue compliance orders or ask the First Nations Financial Management Board to put the First Nation under co-management or third-party management. Thus, there may be very serious consequences if the First Nation attempts to divert funds collected under the Fee Law for purposes other than the provision of sewer and waste water treatment services.

[65] When the overall scheme of the Act is considered, it becomes apparent that Parliament sought to achieve transparency and accountability and to protect ratepayers' interests through mechanisms that ensure that fees are used for the purposes for which they were collected, rather than by allowing ratepayers to challenge the amount of the fees before they are approved.

[66] OLG also argued that, as a public body, it has increased transparency and accountability obligations towards the Ontario government and population. This is no doubt true. But it does not affect the manner in which the Act, a federal statute, should be interpreted or applied. All ratepayers, be they individuals, private businesses or public corporations, are treated alike.

C. *Was the Commission's Approval of the Fee Law Reasonable?*

[67] Having defined the scope of the Commission's power to review First Nations fee laws before approving them, I can now proceed to an assessment of the reasonableness of the approval of the Fee Law at issue.

(1) Standard of Review

[68] This inquiry begins with the identification of the proper standard of review. In recent years, the Supreme Court of Canada has repeatedly stated that there is a presumption to the effect that decisions made by administrative bodies in the application of their "home statute" are reviewed on a standard of reasonableness: see, for the most recent examples, *Barreau du Québec v Quebec (Attorney General)*, 2017 SCC 56 at paragraph 15, [2017] 2 SCR 488; *Groia v Law Society of Upper Canada*, 2018 SCC 27 at paragraph 46, [2018] 1 SCR 772. Insofar as the

Commission's approval can be said to be a component of a law-making process, the jurisprudence of the Supreme Court regarding the standard of review applicable to the enactment of rules or by-laws by bodies such as municipalities or professional corporations is also relevant: *Catalyst*, at paragraphs 19–25; *Green*, at paragraphs 20–23; *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at paragraph 9, [2018] 1 SCR 635. As the application of the Act is squarely within the Commission's mandate, the reasonableness standard would apply. This was the standard applied by Justice Campbell in *Buffalo Point*, at paragraph 19.

[69] OLG nevertheless argues that the Commission's decision should be reviewed on a standard of correctness. While the Commission may have expertise in real property taxation (at issue in *Buffalo Point*), OLG says that it lacks such expertise with respect to fee laws, as this component was only recently added to the Act. I reject those submissions. I acknowledge that there is a lively debate as to the degree of expertise actually possessed by administrative decision-makers: see, for example, *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at paragraphs 33, 81–85, [2016] 2 SCR 293. However, while the Supreme Court mentioned expertise as one of the rationales for deferring to administrative decision-makers, it does not require a demonstration of actual expertise, be it on an individual or institutional level, before deference is shown to a decision-maker. Moreover, there is no authority for the proposition that when a new component is added to their jurisdiction, administrative decision-makers are subject to a probationary period of sorts during which their decisions would be reviewed for correctness.

(2) The Requirements of the Act and Standards

[70] The requirements that are in dispute are found in sections 4.1 and 4.2 of the Standards, which are reproduced above. In a nutshell, they require that the fee reflect the projected cost of the service (section 4.1) and that they be supported by "a report respecting how the fees levied under the Law were determined, and that includes the projected cost of the service [and] how the cost of the service was determined" (section 4.2).

[71] As I mentioned above, these provisions do not mandate a full audit of the nexus between the fee and the cost of the service. The report required by section 4.2 is the principal means through which the nexus is to be assessed. Thus, the requirements of the Standards are complied with if the report, on its face, establishes the projected cost, explains how that cost was determined and demonstrates that the fee reflects the projected cost.

[72] Moreover, as those requirements were adopted by the Commission itself, the Commission is particularly well-placed to understand what they mean and how they should be applied.

(3) The Sewer Fee Report

[73] The minutes of the meeting of the Commission held on February 13, 2018 simply state that the Fee Law is unanimously approved. The Commission, however, had before it a Technical Review Form completed by Commission staff. That form includes the following standard

questions, which track the language of sections 4.1 and 4.2 of the Standards, and the corresponding answers pertaining to the Fee Law at issue:

> **12. Do the rates and levels of fees reflect the projected costs of providing for the administration, operation and maintenance of the service or portion of the service that is to be funded by the fee?**
>
> Yes. The total cost of the service was estimated as set out the First Nation's Report provided in accordance with section 4.2 of the Standards [*sic*]. The First Nation will allocate the costs based on each user's proportionate share of the service.
>
> The entire cost of the service will be funded from the fees.
>
> […]
>
> **13. Are the rates and levels of fees supported by a report respecting how the fees were determined, including the projected cost of the service, how the cost of the service was determined, and the proportion of the total cost that the First Nation will recover through the fee?**
>
> Yes. The First Nation provided a "Report Respecting the Calculation of Sewer Fees" which sets out the projected operating and capital costs of the wastewater treatment plant, including detailed budgeting charts. The Report states that the information is based on historical and projected costs. The Report states that the First Nation will recover all of the costs of the service through the fees.

[74] Those reasons are brief, but the decision is nonetheless reasonable.

[75] The Report is a six-page document. The first page explains that the projected costs were "derived from the historical costs of the Wastewater Treatment Plant and estimates of the future operational and capital costs." The second page is a budget for the year 2018 which comprises twenty or so line items, including a capital reserve account and a contingency. The next four pages consist of a monthly breakdown of those items. For some items, these charts provide some

additional information as to how the amounts were calculated or the name of the supplier. Finally, the last page is a five-year capital budget. It contains ten specific items and lists, for each item, amounts over the next five years.

[76] It was not unreasonable to approve the Fee Law on the basis of that report. The report contains the information required by section 4.2 of the Standards and, on its face, shows that the fee was established on the basis of the projected cost of the service. The various items listed all appear to be related to the provision of the service. In other words, there is no reason to believe that the First Nation improperly inflated the projected cost.

[77] The reasonableness of the decision must also be assessed in light of OLG's submissions to the Commission.

[78] OLG first asserted that the report contained insufficient information or particulars and queried whether the report had been prepared by qualified independent consultants. It suggested that the Fee Law should have been justified by background studies prepared by qualified independent consultants, in a manner similar to what Ontario municipalities usually do.

[79] The Commission reasonably declined to give effect to that argument. The requirements applicable to Ontario municipalities wishing to impose similar fees simply cannot be transposed to the regime of the Act. While in appropriate circumstances First Nations may avail themselves of certain benefits granted to municipalities (see, for example, *Otineka Development Corp v Canada*, [1994] 2 CNLR 83 (TCC)), they are not municipalities and there are important

differences between the legal regimes applicable to municipalities and to First Nations (see, for example, *Canadian Pacific Ltd v Matsqui Indian Band*, [2000] 1 FC 325 (CA) at paragraph 29). The Act is a self-contained regime that is structured in a manner that differs, in important aspects, from the municipal taxation schemes of the provinces. It does not call for the application of municipal legislation to fill perceived gaps. In this regard, two cases mentioned by OLG in its memorandum of argument may be distinguished, as the legislation at issue in those cases explicitly referred to the municipal taxation scheme in the relevant province: *Montréal (City) v Montreal Port Authority*, 2010 SCC 14, [2010] 1 SCR 427; *Halifax (Regional Municipality) v Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 SCR 108.

[80] Moreover, in its submissions to the Commission, OLG provided little information as to the requirements that would apply to Ontario municipalities, beyond citing section 391 of the *Municipal Act, 2001*, SO 2001 c 25. That provision, however, does not require municipalities to provide a report to justify the imposition of a fee. At the hearing of this application, OLG failed to identify any specific statutory or regulatory basis for such requirements.

[81] In any event, the Standards adopted by the Commission show that, had the Commission intended to require the filing of a report prepared by qualified professionals, it would have said so explicitly. Section 10.6 of the *Standards Establishing Criteria for the Approval of First Nation Borrowing Laws, 2016* provides that a First Nation must file with the Commission a report, certified by a registered professional, confirming, among other things, the estimated costs of construction and operation of an infrastructure project. The absence of similar language in the

Standards regarding fee laws demonstrates that the Commission did not intend to require certification by a qualified professional, as OLG suggests.

[82] OLG also submitted that some items in the budget should have been included in the contract with the Ontario Clean Water Agency and that some other items, such as telephone, computers and internet, had clearly no nexus to the service and should be excluded. It also asked for particulars with respect to another group of items that were said to be unclear.

[83] Again, the Commission reasonably declined to engage in the inquiry requested by OLG. Sections 4.1 and 4.2 of the Standards do not require the Commission to perform an audit of the projected cost established by the First Nation; that will be done yearly pursuant to section 14 of the Act. Moreover, it is far from obvious that the expense items impugned by OLG are unrelated to the provision of the service. In its submissions to the Commission, OLG did not bring evidence showing that any of the cost items contained in the Sewer Fee Report were unrelated to the service or otherwise inappropriate. In the context of the law approval process set forth by section 31 of the Act, it is not enough for OLG to raise questions regarding certain cost items or to ask the First Nation to provide more evidence. I reiterate that it is not the role of the Commission to second-guess choices made by the First Nation as to the need for certain items – for example, computers or grass cutting – in the provision of the service. I would also note that the expense items challenged by OLG pertain to relatively small amounts. In its submissions to the Commission, OLG did not explicitly challenge the much larger capital reserve and contingency allowance – even though it insisted heavily on those items in its memorandum of argument in this Court.

[84] OLG's submissions to the Commission also mentioned alleged inconsistencies between the Fee Law and the lease between OLG and the First Nation and uncertainty as to the method that would be used to measure water flows. These grounds do not appear to be related to an issue of compliance with the Act and the Commission reasonably declined to consider them. In any event, OLG did not press these issues before me.

D. *Procedural Fairness Issues*

[85] OLG also argues that the process followed by the First Nation and the Commission breached the requirements of procedural fairness. OLG contends that it did not know the "case to meet," as the First Nation and the Commission did not disclose enough information justifying the Fee Law.

[86] OLG's arguments regarding procedural fairness are based on a misconception of the process followed by the Commission. While it does not go as far as saying that the Commission had to hold a hearing, OLG nevertheless asks for procedural protections that are typical of an adversarial process. However, as I have explained above, this is not the appropriate characterization of the Commission's task. The First Nation and the Commission complied with the procedural requirements of the Act. OLG cannot turn to the common law to impose further requirements.

(1) Compliance with the Requirements of the Act

[87] Section 6 of the Act sets the procedural requirements for the adoption of the Fee Law by the First Nation. The First Nation must publish a notice of the law, make the draft of the law available upon request and invite representations. There is no question that this was done. Subsection 6(4) provides that the First Nation must consider any representations that are made. OLG asserts that the First Nation did not do this. However, an e-mail dated December 7, 2017 from the Chief of the First Nation to an OLG executive proves that the First Nation considered OLG's submissions, but was of the view that they did not pertain to an issue of compliance with the Act. A requirement to consider is not a requirement to accept.

[88] Section 7 of the Act states that after enacting the Fee Law, the First Nation had to send a copy to OLG and to invite OLG to make representations to the Commission. Compliance with section 7 is not in issue. Subsection 31(2) then requires the Commission to take into account any representations made. Both the Technical Review form prepared by the Commission's staff and the minutes of the meeting of February 13, 2018 refer to OLG's representations. Those representations were put before the Commissioners and they are presumed to have considered them.

(2) No Additional Requirements

[89] It is trite law that Parliament may displace the requirements of procedural fairness that would otherwise exist at common law: *Ocean Port Hotel Ltd v British Columbia (General*

Manager, Liquor Control and Licensing Branch), 2001 SCC 52 at paragraph 22, [2001] 2 SCR 781.

[90] Parliament clearly delineated the procedural rights of ratepayers who wish to make representations with respect to proposed local revenue laws. OLG cannot ask for more than what the Act provides for by relying on general administrative law principles. Nor can OLG invoke the promotion of transparency, mentioned among the purposes of the Commission in section 29, to add to the requirements of sections 6, 7 and 31.

[91] Other provisions of the Act provide examples of heightened procedural requirements. Subsection 8(1) requires First Nations to provide more information with respect to property taxation laws than with respect to fee laws, which are governed by subsection 8(3). Section 33 provides that the Commission may undertake a review of a First Nation's compliance with the Act. As mentioned above, the regulations set out a detailed procedure including an oral hearing.

[92] In any event, the only substantive documents before the Commission were the Fee Law and the Sewer Fee Report. OLG had those documents. It knew the "case to meet." What it is really asking for is a kind of right of discovery – to be able to force the First Nation to reveal financial information that would help OLG mounting a challenge to the Fee Law. Nothing in the Act provides for such a right.

(3) No Duty to Give Reasons

[93] Lastly, the Commission did not have, as OLG argues, a duty to give reasons for its decision to approve the Fee Law. A law-making body does not have a duty to give reasons for the adoption of a by-law or regulation: *Catalyst*, at paragraphs 29–30; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paragraphs 51–55, [2018] 2 SCR 293. The Commission's approval of the Fee Law is a component of a law-making process and, as such, does not require the giving of reasons.

[94] Such an argument was rejected in *Buffalo Point*, where Justice Campbell said, at paragraph 40:

> It appears that the Cottagers expected a form of decision that would normally be delivered as a result of contested litigation. That is, on the basis of conflicting evidence received, findings of fact would be made, the facts would be considered against the law to be applied, and a reasoned decision would be provided. In my opinion, this is an unreasonable expectation of the decision-making pursuant to s. 31(3) of the *Act*. As stated, in applying the provision, the only determination that is required to be made is whether a given tax law complies with the Commission's standards.

III. Disposition

[95] OLG has not shown that the Commission's approval of the Fee Law was unreasonable or breached the requirements of procedural fairness. In fact, the Commission did exactly what Parliament intended it to do and, in doing so, fully complied with the provisions of the Act. Accordingly, the application for judicial review will be dismissed with costs.

JUDGMENT in T-508-18

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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