SUPREME COURT OF NOVA SCOTIA
Citation: *Long v. Antigonish (Municipality)*, 2023 NSSC 394

Date: 20231205
Docket: 520479
Registry: Antigonish

Between:

Anne Marie Long, J. Therese Penny, Alicia Vink

Applicants

v.

Municipality of the County of Antigonish

Respondent

Judge:	The Honourable Justice Timothy Gabriel
Heard:	July 7, 2023, in Antigonish, Nova Scotia
Written Release:	December 5, 2023
Counsel:	Donald MacDonald, for the Applicants Robert Grant, K.C. and John Shanks, for the Respondent

By the Court:

[1] On October 20, 2022, Council of the Municipality of the County of Antigonish ("the County") and Council of the Town of Antigonish ("the Town") each adopted the following resolution:

> Municipal Council requests the Provincial Government to consolidate the Municipality of the County of Antigonish and the town of Antigonish into one municipal unit through special legislation.
>
> *(Affidavit of Anne-Marie Long July 11, 2023 Exhibit "D", p. 2)*

[2] The County passed the resolution by majority of 5 to 3. Two members of Council abstained due to conflict-of-interest concerns. The Town vote split 4 to 3 in favour.

[3] The Applicants ask this court to quash the resolution. They cite s. 189 of the *Municipal Government Act*, SNS, 1998, c. 18 ("MGA"). Among other things, their position is that if the County and the Town wish to consolidate, they must follow the procedures outlined in Parts XVI and XVI I of the MGA.

[4] There is a salient history which led up to the passage of this resolution. I will proceed to outline some of the more pertinent details.

Background

[5] In the early years of this century, similar actions on the part of the Town and the County were bruited. In 2004, the Nova Scotia Utility and Review Board (the "UARB") heard two applications possessed of related subject matter. One was from the Town to annex approximately 3,800 acres of area from the County. Another was an application by the Town (in 2001) to amalgamate the Town and the County. Although it did conclude that positive financial and social benefits for the inhabitants could be obtained through amalgamation, the UARB did not consider either the status quo or annexation to be desirable options at the time. It did, however, order a plebiscite to test community support for the amalgamation (*Affidavit of Glenn Horne, March 27, 2023, para. 8*).

[6] The turnout for the vote was 42.6% in the County, and 45.1% in the Town (*Affidavit, Long and Vink, April 26, 2023, para. 5*). The vote was nonetheless close: 52% of County residents, and 51% of Town residents who voted were in

favour of amalgamation (*Affidavit, Long and Vink, para. 3*). Ultimately, the UARB denied the application for amalgamation at the time.

[7] In the aftermath, both the County and the Town continued to maintain a general interest in pursuit of a merger (*Affidavit of Glenn Horne, paras. 9-10*). In furtherance of that interest, in early 2021, the two sides began to hold discussions exploring whether such action could be mutually beneficial.

[8] The Chief Administrative Officers of the Town and the County (Jeff Lawrence and Glenn Horne, respectively) were asked to do some research into the nature of the process and, specifically, to study the experience of other municipal units who had effected consolidation as a result of special legislation passed by the Province.

[9] One such unit was the West Hants Regional Municipality. It had previously consisted of the separate municipal units of Windsor and West Hants, prior to their legislated consolidation in 2020.

[10] Their research led the CAO's to arrange a meeting with representatives of the Nova Scotia Department of Municipal Affairs ("DMA"). Messrs. Horne and Lawrence were provided with information about the various options available to effect a merger between the Town and County. These included the two processes already set out in the MGA. It was explained that a third option was available: that of consolidation through enactment of special legislation by the Province.

[11] One of the documents with which they were provided by the DMA representatives was entitled "Structural Change in Nova Scotia Municipalities". It was submitted as Exhibit B to the Affidavit of Mr. Horne. It provides a flowchart-like overview of the amalgamation processes contemplated by the MGA, as well as the process of consolidation which could be brought about by special legislation.

[12] The Respondents have summarized the latter process, as outlined in the document with which they were provided, thus:

> The document indicates that the consolidation process begins when the municipalities pass resolutions asking that the province assist them in their consolidation efforts; then the government considers the request, and, if appropriate, passes a special legislation to form a new municipality on a given date; the legislation provides for the appointment of a transition committee comprised of counsellors from each municipality and a transition coordinator, appointed by Order in Council; then the transition committee works with relevant stakeholders, including the DMA, to build the new municipality.

(Respondent's Brief, para. 12)

[13] In addition, the DMA representatives advised that the process would have to be a municipal initiative and process. They further explained that the DMA would remain neutral on the question but would support whatever decision was made by the councils. Some limited funding could be made available if they wished to further explore legislated consolidation. If such legislation were to ultimately be requested, the decision whether or not to introduce it would rest solely with the government. The DMA representatives further explained that, even if ultimately introduced, the legislation would still require passage in the Legislature, which could (of course) not be guaranteed. It would also require proclamation, in order to come into effect. (*See Horne Affidavit, paras. 20-21*).

[14] Messrs. Horne and Lawrence apprised their respective councils of this information. On September 13, 2021, each council unanimously passed a resolution to further explore the potential consolidation of the two units.

[15] Pursuant to the resolution, the councils established a joint consolidation steering committee. That committee, in turn, consulted with representatives of both West Hants Regional Municipality and Queens Municipality, to explore the aftermath of legislated consolidation in each. With the assistance of "Brighter Communities Planning and Consulting", an engagement plan was developed to disseminate information to, and engage with, community stakeholders in the Town and County on the matter of consolidation.

[16] The Applicants take the position that the public engagement process which ensued on April 11, 2022, and the lead up to it, was inadequate and in many respects factually misleading. They contend, among other things, that attempts to make use of the online survey which was promulgated as part of the process was problematic. Moreover, they contend that the consultants designated to meet with the community stakeholders were "...engaged primarily to record questions and did not answer any of those questions." (*See Affidavit of Long and Vink, April 26, 2023, paras. 20-21, 23-24*).

[17] Ultimately, as earlier noted, the councils of both Respondents passed the resolution, on October 20, 2022.

[18] The Applicants say that the resolution was illegal and should be quashed. The issue to be addressed is, consequently, whether this is so.

[19] Preliminarily, the applicable standard of review, as well as the scope of the statutory powers conferred upon the Respondents by the MGA, merit some discussion.

A. Should the resolution be quashed for illegality?

(i) What is the applicable standard of review?

[20] As this involves a review of the actions of the Respondent, we begin with the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65. The Applicants do not contend that the Respondents acted in a procedurally unfair manner in passing the resolution. As a consequence, except in relatively rare cases, the two former potential standards of reasonableness (questions of policy and adjudicative functions) and correctness (on issues of law and jurisdiction) have been discarded. The current state of the law, post *Vavilov*, in so far as it relates to the decisions of municipalities, was succinctly summarized in *Colchester (County) v. Colchester Containers Limited*, 2021 NSCA 53 at paragraph 32:

> *Vavilov* served to compress the former two-stage analysis into one for the vast majority of municipal decisions. The single inquiry is now whether a challenged decision is unreasonable (at para. 83). The Court also provided assistance in the application of the reasonableness standard:
>
> > [68] Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. **Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker — perhaps limiting it one. Conversely, where the legislature has afforded a decision maker broad powers in general terms — and has provided no right of appeal to a court — the legislature's intention that the decision maker have greater leeway in interpreting its enabling statute should be given effect**. …
> >
> > [Bolding added]

[21] To similar effect, the Applicants have referenced the British Columbia Court of Appeal's recent decision in *Cowichan Valley (Regional District) v. Wilson*, 2023

BCCA 25, which discusses the interplay between the reasonableness framework and the statutory powers wielded by municipalities:

> [14] The parties agree that the reasonableness standard of review applies to the central issues on appeal. As explained in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*], what is reasonable will take its meaning from constraints imposed by the legal and factual context of the decision under review: at paras. 90, 105. The legal and factual context relevant to determining whether a decision is reasonable includes: the governing statutory scheme; the common law; the principles of statutory interpretation; the evidence before the decision maker; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual(s) to whom it applies: at para. 106. These elements may vary depending on the context of a given case and are not meant to be a checklist. Rather, they highlight the essential contextual factors that, when applied, can cause a reviewing court to lose confidence in the outcome reached: at para. 106.
>
> [15] Because administrative decision makers, including local governments, receive their powers by statute, the governing legislative scheme is likely to be the most salient aspect of the legal context relevant to a particular decision: *Vavilov* at para. 108. Decision makers must comply with the rationale and purview—the purpose—of the statutory scheme under which they operate: *Vavilov* at para. 108. They cannot wield powers they were never intended to have: at para. 109.
>
> [Emphasis added]

[22] The applicable legal standard of review is uncontroverted. Rather, it is upon the effect of the application of that standard to the case at bar, that the parties differ.

(ii) What are the statutory powers conferred upon the Respondents by the MGA?

[23] Municipalities are creatures of statute. Their ability to act is circumscribed by the powers conferred upon them by the enabling legislation. In this case, the relevant legislation is the MGA. What are these powers?

[24] Section 189 of the MGA tells us that:

> (1) A person may, by notice of motion which shall be served at least seven days before the day on which the motion is to be made, apply to a judge of the Supreme Court of Nova Scotia to quash a by-law, order, policy or resolution of the council of a municipality, in whole or in part, for illegality.

> (2) No by-law may be quashed for a matter of form only or for a procedural irregularity.
>
> (3) The judge may quash the by-law, order, policy or resolution, in whole or in part, and may, according to the result of the application, award costs for or against the municipality and determine the scale of the costs.
>
> (4) No application shall be entertained pursuant to this Section to quash a by-law, order, policy or resolution, in whole or in part, unless the application is made within three months of the publication of the by-law or the making of the order, policy or resolution, as the case may be. 1998, c.18, s.189.

[25] The Respondent benefits from a presumption of legality which tracks its actions. Accordingly, the onus lies with the party(ies) who have challenged the legality of what was done, in this case, the Applicants, to demonstrate the illegality of the impugned resolution.

[26] Both parties have made specific reference to those portions of the MGA which are engaged in any consideration of whether the Respondents proceeded in an illegal manner. Primarily, these are ss. 2, 14A, 9A, 48(3), and 3 (az).

[27] Section 2 of the MGA states that the purpose of the legislation is to:

> (a) give broad authority to councils, including broad authority to pass bylaws, and to respect their right to govern municipalities in whatever ways the councils consider appropriate within the jurisdiction given to them;
>
> (b) enhance the ability of counsel to respond to present and future issues in their municipalities; and
>
> (c) recognize the purposes of a municipality set out in section 9A.

[28] Section 14A provides that:

> The powers conferred on a municipality and its council by this Act must be interpreted broadly in accordance with the purpose of this Act as set out in Section 2 and in accordance with the purposes of a municipality as set out in Section 9A.

[29] As for Section 9A itself, it provides that:

> The purposes of a municipality are to:
>
> (a) provide good government;
>
> (b) provide services, facilities and other things that, in the opinion of the council, are necessary or desirable for all or part of the municipality;
>
> and

> (c) develop and maintain safe and viable communities.

[30] Section 48(3) of the MGA states:

> In addition to matter specified in this Act or another Act of the Legislature, the council may adopt policies on any matter that the council considers conducive to the effective management of the municipality.

[31] Finally, Section 3(az) of the MGA defines policy:

> "policy" means a resolution of the council that is required pursuant to this Act, to be recorded in the by-law records of a municipality, except where the context otherwise requires;

[32] The latter sections (ss. 48(3) and 3(az)) refer to an argument which the Respondents initially put forward in their brief, namely, that the actions of the councils in adopting the impugned resolution involved the expression of a policy within the meaning of the MGA. In oral argument, the Respondents properly conceded that the adoption of the resolution in question did not fall within the ambit of Section 3(az), hence the specific wording of Section 48(3) was inapplicable.

(iii) Summary of applicant's position

[33] To paraphrase the crux of the applicants' argument, it references the legislative history of the MGA. The lead -in to that argument, however, begins with a reference to Ruth Sullivan's oft cited text, *Construction of Statutes*, which stresses the importance of a "purposive analysis", in the following terms:

> A purposive analysis of legislative text is based on the following propositions:
>
> (1) all legislation is presumed to have a purpose. It is possible for courts to discover or adequately reconstruct this purpose through interpretation.
>
> (2) legislative purpose must be taken into account in every case and at every stage interpretation, including initial determination of texts meaning.
>
> (3) insofar as the language of the text permits, interpretations that are consistent with or promote legislative purposes should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided. (Seventh edition, p. 257)

[34] This (the argument continues) is reflected in the observation in *British Columbia Human Rights Tribunal v. Schrenk*, [2017] SCC 62, at para 50:

> The modern principle of interpretation requires that courts approach statutory language in the manner that best reflects the underlying aims the statute. This follows from the obligation to interpret the words of an Act harmoniously with the object of the Act and the intention of Parliament.

[35] Often, the manner in which the legislation in question has evolved is critical to that interpretation. In *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, the court noted at paragraph 28:

> It is well-established that the legislative history of statutes can be relied on to guide the interpretation of statutory language... Legislative evolution of an enactment forms part of the "entire context" to be considered as part of the modern approach to statutory interpretation.

[36] The applicants point out that amalgamation and annexation (as well as town incorporation) became statutorily regulated with the inauguration of the *Municipal Boundaries and Representation Act* SNS 1964 c.8 (MBRA). The statutory process envisioned (at the time) is summarized in the applicants' brief as such:

> The Board of Commissioners of Public utilities, vested with jurisdiction over applications, would receive an application from the Minister, the Council of a municipality or a given number of ratepayers. The Board was, in dealing with an application, to consider the "necessity" or expediency of the order sought, the burden on taxpayers and the financial positions of municipalities involved. Prior to making an order, the board had to hold a public hearing, and had the discretion to order a vote. Finally, the effect of an amalgamation order would be suspended for 28 days during which notices of objection could be sent to the Governor in Council who could either affirm the order or direct the board to have a new hearing.
>
> (Applicants' brief, para 37)

[37] Until 1982, the process contemplated by the MBRA remained in place. The Municipal Board retained exclusive jurisdiction over amalgamation at that time, but other amendments were introduced. Once again, it is convenient to reference the applicants' description of these changes:

> In dealing with an amalgamation application the board is [now] directed to advertise and hold a hearing for a "preliminary" order following which it could direct the preparation of studies to be undertaken into the financial implications of

> amalgamation or annexation and such other studies as deemed appropriate. Following the completion and filing of the studies, there would be a final public hearing at which evidence could be presented and submissions made after which an order could issue. (Applicants' brief, para 38)

[38] As such, while the board was still empowered to require a vote of the affected ratepayers, the role of the Governor in Council to deal with objections was not retained. Moreover, in 1992, the Utility and Review Board was substituted for the Municipal Board.

[39] Next was the inauguration of the MGA, which repealed the MBRA and folded its provisions into Part XVI, with a twist. That "twist" is to be found in section 354 of the MGA, specifically, section 354 (5) which reads as follows:

> The boundaries of the county or district municipality continue to be as they were on July 1, 1996, unless altered by the Board pursuant to this Act or a regional municipality is incorporated that includes the county or district municipality.

[40] There are two legislated ways to effect either an amalgamation or create a municipality under the MFA. The most pertinent aspects of the first method are excerpted below:

> Amalgamation or annexation
> 358 Municipalities may be amalgamated or the whole or part of a municipality may be annexed to another upon application to the Board by
>
> (a) the Minister;
> (b) a municipality; or
> (c) the greater of ten percent or one hundred of the electors in the area proposed to be amalgamated or annexed.
>
> Application for preliminary order
> 359(1) An applicant for amalgamation or annexation shall apply for a preliminary order.
>
> 359(2) The application for a preliminary order shall include
>
> (a) the boundaries of the area proposed to be amalgamated or annexed sufficient to identify the area;
> (b) an estimate of the population of the area proposed to be amalgamated or annexed;
> (c) the total assessed value of taxable property and occupancy assessments in the area proposed to be amalgamated or annexed;
> (d) where the area is or contains a village, the audited financial statements of the village for the fiscal year immediately preceding the year in which the application is made;

(e) a brief statement of the reasons for the application; and
(f) such other matters as the applicant considers relevant to the application.

359(3) The applicant shall serve a copy of the application for a preliminary order on the clerk of any municipality that would be affected by the annexation or amalgamation if granted, on the Minister, and on such others as the Board directs.

Hearing notifications

360(1) Upon the Board setting the date for a hearing of the application for a preliminary order, the Board shall, at the expense of the applicant, advertise the hearing in a newspaper circulating in the area to be amalgamated or annexed, including the date by which any person wishing to be heard must notify the Board.

360(2) Any interested person may appear and be heard at the hearing for a preliminary order by notifying the Board at least one week before the date fixed for the hearing.

Persons heard

361 At the hearing of the application for a preliminary order the Board shall hear

(a) the applicant;
(b) a representative of any municipality that would be affected by the amalgamation or annexation if granted;
(c) the Minister; and
(d) any person who has previously notified the Board.

…….

Order for amalgamation or annexation

363(1) After the application has been heard, the Board may, if satisfied that the order is in the best interests of the inhabitants of the area, taking into account the financial and social implications of the order applied for, order an amalgamation or annexation upon such terms as it considers advisable.

363(2) The order of the Board for an amalgamation or an annexation shall

(a) fix the effective date of the amalgamation or annexation;
(b) make provision for any necessary revision of polling districts;
(c) make provision for any election that the Board considers necessary including setting the dates for nomination day and ordinary polling day for the election and providing for returning officers and the conduct of the election;
(d) direct the Director of Assessment to make any necessary adjustment in the assessment roll applicable to the area;
(e) provide for any other matter that is necessary or desirable to effect the amalgamation or annexation; and
(f) from time to time make such determinations, issue such orders and directions and do, or cause to be done, all such other matters and things as, in the opinion of the Board, are necessary or incidental to the annexation or amalgamation.

363(3) An order of the Board may

(a) adjust assets and liabilities among those affected by the order as the Board considers fair;
(b) annex, amalgamate, continue or dissolve boards, commissions, villages and service commissions and allocate their assets as the Board considers fair; and
(c) require compensating grants for a period of not more than five years from a benefiting municipality to a municipality that loses assessment as a result of an order.

363(4) The Board may make an interim order and reserve further directions.

363(5) The Board may make an order granting the whole or part of an application, and may grant such further or other relief as the Board considers proper.

363(6) Where the Board considers that, as a result of an annexation it is desirable to annex the whole or part of the municipality remaining after the order to some other municipality, the Board after such notice and hearing as it considers desirable may order the annexation.

363(7) A copy of an order for an amalgamation or an annexation shall be published in the Royal Gazette as a regulation, and shall be filed and advertised as directed by the Board.

[41] The second method is found in Part XVII of the Legislation. Its primary features are described in the MGA as such:

Interpretation
371 In this Part,

(a) "plebiscite" means a vote of the electors of the municipalities that are affected;
(b) "study" means a review conducted by or under the control of the Board, with input from the residents of the municipalities that are affected.

Establishment of regional municipality
372(1) The Board may, if requested by all of the councils of the municipalities in a county, undertake a study of the form of municipal government in the county to determine whether a regional municipality would be in the interests of the people of the county.

372(2) Where

(a) a study of the form of municipal government in a county to determine whether a regional municipality would be in the interests of the people of the county has been undertaken, whether the study was undertaken by the Minister or otherwise prepared; and

(b) a plebiscite has taken place and its results show that a majority of the electors who voted in the plebiscite are in favour of the establishment of a regional municipality for the county, the Governor in Council may, on the recommendation of the Minister, order that a regional municipality be established for the county.

> 372(3) Sections 373 to 382 of this Part apply to a county for which a regional municipality is established from and after the date of the order establishing the regional municipality.
>
> …

[42] The second method was created by the Legislature in 1998. It provided an alternative to the formal board application envisioned by the first method. The Applicants argue that the process followed while doing so sheds light on the intentions of the legislature with respect to municipal mergers. Once again, it is convenient to quote counsel in this respect:

> ... [It] was introduced on first reading on November 3, 1998 as Bill 47... That bill (in section 373) provided that the Minister of municipal affairs "if requested by a majority of councils in a county" could order a study as to whether a regional government would be "in the interests of the people of the County". Where that study takes place, and the majority of the Councils request the establishment of a regional municipality, the Governor in Council, on the recommendation of the Minister, could declare one to have been formed. Bill 47 was referred to the Law Amendments Committee on November 6, 1998.

[43] However, the Part XVII that emerged from committee was substantially altered:

> First, all, rather than a majority of municipalities in the county could request the study. The board rather than the minister would receive the request for the study, as to whether a regional entity would be in the interest of the people of the county and that it would be the Board, again, rather than the minister, which would conduct or "control" the study in which input from residents would be required. The final significant addition was a requirement for a plebiscite with the majority of electors voting in favour. (Applicants' brief, para 42 – 43)

[44] These dual processes, and the role of the Board in relation to them, were discussed by Oland, JA., in *Antigonish (County) v. Antigonish (Town)*, 2006 NSCA 29:

> [31] It is noteworthy that the predecessor of s. 358 as contained in the Municipal Boundaries and Representation Act, supra, did not disappear when the *Act* was passed by the Legislature. Rather, that provision was transposed to Part XV1 (Boundaries) of the *Act* as s. 358. It continued to refer to amalgamations as well as to annexations. Moreover, although somewhat modified, the provisions which set out the procedures to be followed regarding preliminary orders for amalgamations or annexations (now s. 359-362), were incorporated in the *Act*. Indeed, in some instances such as ss. 362(2)(3) [required studies] and s. 367 [effect of annexation

> or amalgamation “unless the Board otherwise orders”], the Board’s powers were increased.
>
> ...
>
> [44] The *Act* provides for two distinct processes in respect to the joining of municipalities. One, that under s. 358, is essentially adjudicative in nature. Under it, municipalities may apply to the Board for a hearing to determine whether amalgamation would be “in the best interests of the inhabitants of the affected area” (s. 363(1)). The second, under s. 372, is heavily political in nature. Under that process, the Minister must recommend to the Governor in Council the creation of a regional municipality and it is the Governor in Council which determines whether one will be formed. The consent of the municipalities involved and the support of the electors in the area, as expressed through a plebiscite, are also required.

[45] The Applicants proceed to argue that the last occasion upon which the legislature dealt with municipal mergers, it strengthened the board and provided that it would not only have jurisdiction over amalgamations, but also that no border could be changed absent either a board order or the formation of a regional municipality under part XVII. ln fact, the legislature expressly rejected those portions of the Bill would have empowered the minister with control of the study to be conducted. This, the applicants argue, "ensured that majority vote of electors was required before any recommendation to the Governor in Council. That legislation has not been amended since" (*Brief para 44*).

[46] The crux of the applicant's argument is, effectively, that the county has adopted a resolution to make a "request" of the Province for special consolidation legislation. This, the argument continues, is nothing less than an application for amalgamation by "another name". By adopting this process, it obviates or bypasses the requirement for any study, for a public hearing and, "if the board's past practice is any guide, a vote of electors". (*Brief para 45*).

[47] The further point is made that the Legislature clearly intended that there are required processes that must be undertaken to effect a merger, amalgamation, or regional municipality. Even if these processes are unwieldy or inconvenient, or are considered such by the municipalities, it is the Legislature that must act to change them, and it has not. The applicants argue that it is the Respondent, by passing the resolution, that is acting to change the procedure set out in the MGA, and that it is "attempting, in adopting the resolution, to accomplish indirectly what it has chosen not to do pursuant to its governing statute" (*Brief para 46*)

(iv) Summary of Respondent's position

[48] The respondent's argument may be more concisely stated. First, it disputes the contention that there is no essential difference between an amalgamation as provided for in the MGA, and specifically legislated consolidation. It concedes that while the end result of both processes may appear to be similar, the steps to be taken are actually quite disparate. It points out that the first method, which is regulated by sections 358 to 363 of the MGA, envisions oversight and direction of the procedure being assumed by the UARB. This latter entity is ultimately empowered to render the final decision. Section 362, in particular, empowers the UARB to provide for studies to be undertaken into, among other things, the financial implications amalgamation and provides for the municipality seeking same to bear the cost of those studies. It does not require a plebiscite or vote, but the board did implement one in 2004, as has been discussed earlier.

[49] The second is a heavily politicized process and requires a plebiscite.

[50] The Respondent stresses that, even if amalgamation is ordered, the UARB (under the first method) has very broad discretion under section 363 of the MGA, to structure the order. This “structure” could include, among other things, provision for the dissolution of municipal boards and commissions and the allocation of their assets and to provide for "any other matter that is necessary or desirable to affect the amalgamation" (s. 363 (2) e). Of course, the board may refuse to grant amalgamation altogether.

[51] On the other hand, consolidation, while it may be viewed as amalgamation by special legislation rather than through the board, is directed by the provincial Legislature. The process involved (the argument continues) is more collaborative and under that process, "a transition committee made up of counsellors from the municipalities that seek to be consolidated would work with stakeholders, including the Department of municipal affairs, to build a numinous totality." (*Brief paragraph 58*). Among its advantages, it is argued that it is less divisive, and it avoids the possibility that significant expense could be incurred on studies legislatively required by the amalgamation process, only to have the application for amalgamation turned down in the end result.

[52] At the end of the day, the respondent argues, all that it has done is make a request of the province. The province may refuse to act on this request. Or it may do so, and despite such efforts, the Legislature itself may refuse to pass any bill that is introduced in that regard. As the respondent puts it "[it] remains in the hands of the government to decide whether or not to introduce legislation to the Legislature which may accept it, modify it, or refuse it." (*Brief para 60*)

(iv) Analysis

[53] As discussed, the stance which the court must adopt with respect to the impugned actions on the part of the respondent must be one of deference. Was it reasonable (ie. legal) for the respondent to have passed the resolution in question in all of the circumstances? This merits a fuller examination of the powers conferred upon it pursuant to the MGA, including its powers pursuant to the MGA. Clearly, an illegal action cannot be a reasonable one.

[54] The difference between a reasonableness standard and a statutorily provided basis upon which to challenge a "bylaw, order, policy or resolution" in the empowering legislation (such as section 189 of the MGA) can often be difficult to discern. Municipalities may only exercise powers that have been conferred upon them, or delegated to them, by the Province through enabling legislation.

[55] In *E. A. Farren, Limited,* Norton, J. observed that:

> [33] Illegality is not defined by the statute. Charron J., in *London (City) v. RSJ Holdings Inc.*, 2007 SCC 29, stated that: “In its ordinary meaning, it is a broad generic term that encompasses any non-compliance with the law”. In *Fortin v Sudbury (City),* 2020 ONSC 5300, Justice Ellies, at para 72, noted that courts have quashed by-laws or considered doing so where there has been statutory procedural non-compliance; procedural unfairness; a party’s reasonable expectation to be heard has not been met; a by-law has been passed for an improper purpose; council has suffered from disqualifying bias; or, a by-law was passed “in bad faith”.
>
> [34] The onus is on the person challenging the by-law or resolution to prove illegality: *Ottawa (City) v Boyd Builders Ltd*., 1965 CanLII 1 (SCC), [1965] S.C.R. 408, at p. 413.

[56] The MGA provides that a bylaw, order, policy or resolution of Council may be quashed "in whole or in part, for illegality" (s. 189). However, it has already been noted that the acts of council are cloaked with a presumption of legality.

[57] The MGA is, in part, intended to "... respect their right to govern municipalities in whatever ways the councils consider appropriate within the jurisdiction given to them." The subsection goes on to advert to the fact that the legislation intends to augment or "... enhance [council's ability] to respond to present and future issues in their municipalities... (s. 2 (b))", and, in general, to fulfil the legislatively defined (s. 9A) purposes of a municipality.

[58] These notions receive additional emphasis in s. 14A of the *Act*, which requires that the powers with which the municipalities are provided under its auspices must not only be interpreted broadly, but that the interpretation must accord "...with the purpose of this *Act* as set out in section 2 and in accordance with the purposes of a municipality as set out in section 9A."

[59] Finally, it will be recalled that 9A provides that a municipality's purpose is to not only provide good government, but to "provide services, facilities and other things that, in the opinion of the Council are necessary or desirable for all or part of the municipality"; and to "develop and maintain safe and viable communities" (MGA, s. 9A (b) and (c)).

[60] There is consensus between the parties that the Province has the authority to enact legislation merging municipal units should it so choose (*see for example applicants' prehearing brief at para 33*). However, the applicant argues specifically that there is no authority on the part of a municipality to initiate the process itself, by requesting the enactment of special legislation, when there is an extant statutory procedure specific in the MGA which already gives it two different ways to do just that, provided that one or the other legislated process is properly observed. The Applicants argue forcefully that the impugned resolution passed by council in this case "... set in motion the enactment of legislation [by the Province]" (prehearing brief para 27).

[61] With respect, I have not been referred to any evidence that such a process has been “set in motion” or has even been initiated, as a result of the request. On its own, the request made by the Respondent has no legal effect. The Province could decide to ignore it, and do nothing whatsoever.

[62] In addition, as pointed out earlier, even if the Province does decide to set in motion such a process, that does not mean it will ultimately culminate either in the outcome which the Respondent desires, or in any outcome whatsoever. Passage of special legislation by the Province is contingent upon a number of other factors which have been earlier noted.

[63] Both parties have referred to *De Havilland Aircraft v. Toronto (City)*, 1980 Carswell Ont. 490 (ON DIV CT). In *De Havilland*, that Court dealt with a number of applications concerning the validity of a by-law passed by the city which outlined its policy with respect to the desired use of land upon which the Toronto Island Airport was operated. This was land which the city had leased to the Toronto Harbor Commission.

[64] Specifically, the bylaw facing challenge in *De Havilland* was one in which the city had express a policy of "discouraging" the use of the airport for "high-frequency scheduled services" and to, reciprocally, encourage its use for "general aviation purposes". The same bylaw also stipulated that the city would not renew its lease with the Toronto Harbor Commission unless the airport facilities were operated in compliance with that policy.

[65] An attack was mounted upon the impugned bylaw on the ostensible basis that it was purporting to regulate and control aeronautics at the Toronto Island Airport, which was exclusively within the legislative demesne of the federal government, and therefore *ultra vires* the city's legislative authority. The Court disagreed:

> In our opinion insofar as the bylaw expresses an intention on the part of the city of Toronto to renew the lease on its own lands subject to certain conditions, albeit conditions which significantly restrict the use of such lands is an airport, it was within the competence of the city to determine the use to which its own lands will be foot and to express its intention regarding such use by bylaw. To the extent by-law 505 – 79 expresses the conditions for renewal of the lease of lands owned by the city, it is a valid exercise of the legislative powers of the city.
>
> The more difficult problem, and our view, is the confidence of the city to state as definite policy, in the manner expressed in para 1 and to a lesser extent in para 2, that all lands of the Toronto Island Airport shall be used for parks or parks and housing or for general aviation as defined in the bylaw. Clearly, if the bylaw is to be regarded as having the legal effect of prohibiting or restricting to any degree the airport or aviation aeronautics on lands not owned by the city is ultra vires and should be struck down.
>
> We have concluded that the bylaw in general insofar as it purports to express a policy concerning all lands of Toronto Island Airport has no legal effect in the sense that even if it was affirmed by the Minister, it will in no way operate to regulate or control aeronautics. At best the bylaw amounts to a statement of policy, which is beyond the legal capacity of the City of Toronto to implement. We have concluded that it is open to a municipality to express its policy, in the form of a bylaw on matters outside the legislative competence of the municipality. In our view, the bylaw having no regulatory effect in aeronautics ought not to be quashed. (*De Havilland, at page 5*)
>
> [Emphasis added]

[66] Both briefs also refer to a case subsequent to *De Havilland*, that of *Toronto (City) v. Metropolitan Toronto (Municipality),* 1991 Carswell Ont 511 (ON Ct J (GD). In that case, Metropolitan Toronto (to which the parties, in their briefs, have referred as "Metro") had requested the provincial government to enact legislation

that would permit the municipality to implement market value assessment of all properties within the metropolitan area. Metro was an entity separate from the City of Toronto and the other municipalities in the area. In fact, the metropolitan area encompassed four separate regions, each of which carried out its own individual real property assessments. The practical upshot of this was that real property in each separate region was only assessed using other properties in that specific region as comparators, rather than properties in neighbouring regions, or the whole of the metropolitan area, for that matter.

[67] As the court in that case went on to observe:

> 5. Assessment is entirely the responsibility of the Province and the Province is to provide an annual assessment roll for each municipality, at the market value of property. The Assessment Act, and in particular s. 58 (3), refers to requests to be made by municipalities. If such a request is made, the Minister of Revenue may take certain acts to eliminate or reduce inequalities in the assessment of any class or classes of real property. In the metropolitan area there are four assessment regions with the obligation to provide assessment rolls for each of the individual area municipalities.
>
> 6. Prior to the province assuming the power to assess, Metro had assessment power, and the last uniform assessment of property in the metropolitan area was completed in 1953, based on 1940 values. Since then, the area municipalities have experienced varying levels of growth in property value inflation. Accordingly, the relative assessments of property in different area municipalities no longer reflect a uniform relation to the market value of properties.

[68] At the time, Metro did not possess any explicit authority to deal with assessment matters. After it had referred the matter to a task force, specifically empaneled to study the issue, that task force provided a report which recommended that a request be made to the Province of Ontario to enact the necessary legislation that would permit metropolitan wide property assessments. Council duly promulgated a resolution to that effect.

[69] When the City contended that Metro lacked authority to make such a request, as it had no statutory power to deal with assessment matters, the court countered that assertion with the following:

> 10. In our opinion, Metro Council does not have the power to make a request under s. 53 (3) of the Assessment Act that would trigger the specific powers of the minister thereunder. This point was conceded by counsel for Metro. However, it is apparent that Metro Council recognized this because it requested specific legislation to implement the proposal. <u>In effect, the resolution simply asked for the</u>

> enactment of legislation to give Metro powers that it does not have. Even though the resolution was adopted by bylaw, it merely expresses a policy concerning assessment. The resolution has no legal effect...
>
> [Emphasis added]

[70] These cases possess many features similar to the one at bar. They do not rely on any principles that are foreign to the MGA. I say this notwithstanding that these Ontario cases treated the actions of the municipal councils in question as expressions of policy. In this case, the actions of council do not entirely fit within the definition of "policy" as contained in s. 3(az) of the *Act*, which, as earlier noted, the respondent has conceded.

[71] However, the crucial feature of these cases seems to be that none of the actions taken on the part of the municipalities, viewed in isolation, has necessarily triggered any events, or the enactment of other legislation, at all.

[72] Like the *Metro* case, here we are dealing simply with a request made by the respondent. As earlier noted, the Province could decide to ignore it. Or, it could take some initial steps, and then abandon the "project". Or, the Minister could attempt to draft legislation, which may never get introduced. Finally, the Bill could get introduced, not pass muster in the Legislature, and thus never either be enacted or proclaimed.

[73] In fact, merely by making its request of the Province to enact special legislation, the Respondent has acknowledged that it is bereft of the power to do what it wants in the manner in which it wants. It is difficult to see how an acknowledgement of "powerlessness" in a particular area, and a consequent request to the Province to exercise its acknowledged legislative competence, could constitute an illegal exercise of the municipality’s "power".

[74] Perhaps, should it decide to act upon the request, the Province itself will require that the will of the affected populations would be canvassed, whether by plebiscite, or in some other fashion. Perhaps, as noted above, the Province will do nothing at all.

[75] Does a Municipal Council, bearing the powers and obligations conferred upon it by the MGA, whose actions are presumed to be legal, whose statutory powers are to be interpreted generously, have the ability to legally ask the Province to enact enabling legislation, to permit it to do something which it plainly acknowledges that it presently has no power to do on its own? The answer, in these circumstances, is "yes".

[76] Should a Municipal Council, as described above, go ahead and make that request without a plebiscite or vote of the affected populations? That question is a profoundly political one. For a Court to even attempt to address it, in my view, would be inappropriate.

Conclusion

[77] The application is dismissed. I will hear from the parties on costs within 30 days, if they are unable to agree.

Gabriel, J.