COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Vancouver (City) v. Pender Lodge Holdings Ltd.,* 2024 BCCA 37

Date: 20240202
Dockets: CA48501; CA48504

Docket: CA48501

Between:

City of Vancouver

Appellant
(Respondent)

And

Pender Lodge Holdings Ltd.

Respondent
(Petitioner)

And

Downtown Eastside SRO Collaborative Society

Intervener

And

Rental Housing Council of B.C. dba LandlordBC

Intervener

And

Tenant Resource and Advisory Centre, Community Legal Assistance Society, and Together Against Poverty Society

Intervener

- and -

Docket: CA48504

Between:

City of Vancouver

Appellant
(Respondent)

And

0733603 B.C. Ltd.

Respondent
(Petitioner)

And

Downtown Eastside SRO Collaborative Society

Intervener

And

Rental Housing Council of B.C. dba LandlordBC

Intervener

And

Tenant Resource and Advisory Centre, Community Legal Assistance Society, and Together Against Poverty Society

Intervener

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Fitch
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated August 3, 2022 (*0733603 B.C. Ltd. v. City of Vancouver*, 2022 BCSC 1302, Vancouver Dockets S220064 and S220082).

Counsel for the Appellant:	G. Murray W.R. LeBlanc
Counsel for the Respondent, Pender Lodge Holdings Ltd.:	E.A. Cooke
Counsel for the Respondent, 0733603 B.C. Ltd.:	C. Ferris, K.C. T. Boyd
Counsel for the Intervener, Downtown Eastside SRO Collaborative Society:	R. Kantwerg
Counsel for the Intervener, Rental Housing Council of B.C. dba LandlordBC:	B. Love T.J. Gervin
Counsel for the Intervener, Tenant Resource and Advisory Centre, Community Legal Assistance Society, and Together Against Poverty Society:	J. Riddle
Place and Date of Hearing:	Vancouver, British Columbia November 7, 2023
Place and Date of Judgment:	Vancouver, British Columbia February 2, 2024

Written Reasons by:
The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Fitch

Summary:

In December 2021, the City of Vancouver adopted bylaws that sought to control rent increases between tenancies in privately-owned residential units designated as single room accommodation. The bylaws were adopted using the City's business licensing and regulatory powers. The respondents own and operate buildings in Vancouver that house single room units. They challenged the bylaws, alleging that the City does not have legislative authority to implement rent control. The respondents are landlords within the meaning of the Residential Tenancy Act and already subject to rent control. Relying on s. 272(1)(f) of the Vancouver Charter, the respondents argued that the bylaws exceeded the City's delegated authority because they resulted in the respondents being twice-regulated in respect of the same subject matter. It was the respondents' position that s. 272(1)(f) precludes duplicate regulation of this nature. A Supreme Court judge agreed. She found the City's decision to adopt the bylaws unreasonable and the bylaws were quashed. The City appealed.

HELD: Appeal dismissed. In resolving an appeal from judicial review of municipal bylaws, this Court applies a two-fold standard of review. It asks: (1) did the judge identify the correct standard of review? and (2) did she correctly find that the City's decision to adopt the bylaws was unreasonable? The judge identified the correct standard of review (reasonableness), and she correctly determined that the City's decision to adopt the bylaws was unreasonable. The Court agrees there is only one reasonable interpretation of s. 272(1)(f) of the Vancouver Charter. This provision prohibits the City from using its delegated authority to regulate businesses in relation to a subject matter for which those businesses are already subject to regulation under another statute, for the same predominant purpose. The judge found as a fact that the pith and substance or predominant purpose of the impugned bylaws was rent control in the specific context of residential tenancies. As such, with the bylaws in place, the respondents were regulated twice on the subject of rent control. Section 272(1)(f) precludes duplication of this nature and it was unreasonable for the City to assign itself a broader scope of authority when adopting the bylaws, notwithstanding the compelling issues it sought to address.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

[1] Since 2003, the appellant, City of Vancouver ("City"), has had a bylaw in place managing the supply of rental housing designated as single room accommodation ("SRAs"). For many of the City's most marginalized residents, SRAs offer housing of last resort.

[2] In December 2021, the City used its business licensing and regulatory powers to adopt a set of bylaws that implemented rent control between tenancies in privately-owned and operated SRAs. The bylaws were driven by concerns that rents continue to increase in SRAs, rendering them unaffordable. The rent increases significantly impact people with very low incomes and present a substantial challenge in responding to homelessness.

[3] This appeal is about the legality of the City's rent control bylaws. More specifically, it asks whether the City has legislative authority under the *Vancouver Charter*, S.B.C. 1953, c. 55 to use its business licensing and regulatory powers to restrict private SRA owners and operators from increasing rent.

[4] If the City has this authority, the bylaws were lawful and the decision to adopt them was reasonable. If the City does not have this authority, the bylaws fell outside the scope of the City's legislative jurisdiction, were invalid, and the decision to adopt them was unreasonable.

[5] A Supreme Court judge quashed the bylaws for reasons indexed as 2022 BCSC 1302 ("RFJ"). Whether she was correct to do so turns on the reasonableness of the City's interpretation of s. 272(1)(f) of the *Vancouver Charter*, and the effect of that provision on the scope of the City's authority to impose rent control on SRAs.

[6] Under the *Vancouver Charter*, the City is empowered to regulate businesses. Its council may adopt licensing bylaws for that purpose. The council may also attach terms and conditions to those licenses.

[7] However, the City's regulatory powers are not unlimited. The City can regulate businesses, "… except to the extent that [those businesses are] subject to regulation by some other Statute": *Vancouver Charter*, s. 272(1)(f), emphasis added.

[8] The respondents, 0733603 B.C. Ltd. and Pender Lodge Holdings Ltd., hold business licenses with the City. They also own and operate SRAs. They challenged the rent control bylaws on the basis that when the

bylaws were adopted, the respondents were already subject to rent control by some other statute, namely, the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*RTA*].

[9] From the respondents' perspective, s. 272(1)(f) of the *Vancouver Charter* precluded the City from imposing additional rent control on privately-owned and operated SRAs. The Supreme Court judge agreed and quashed the bylaws.

[10] The City says the judge erred because the *RTA* regulates rent increases within existing tenancies, not increases between tenancies. The impugned bylaws engage only the latter issue. The City argues that s. 272(1)(f) of the *Vancouver Charter* does not prevent the City from adopting a form or type of rent control that has not already been mandated by the provincial government (the "Province").

[11] For the reasons that follow, I agree with the judge that there is only one reasonable interpretation of s. 272(1)(f) and the City does not have legislative authority to regulate rent increases between tenancies for residential units. As well-intentioned as the bylaws may have been, they were not *intra vires* the City's legislative jurisdiction and the decision to adopt them was therefore unreasonable. The judge had no option but to quash the bylaws.

[12] Accordingly, the appeal must be dismissed.

Scope of the Appeal

[13] Before setting out the background to the case, it is important to clarify that this appeal is not about housing affordability in British Columbia, the role of SRAs in preserving affordability, or the policy objectives underlying the quashed bylaws.

[14] In the Supreme Court proceedings, there was ample evidence that:

> SRAs are often the most affordable housing available for people with low incomes and are the last resort before homelessness for many. A lack of affordable housing, coupled with low vacancy rates has resulted in increased competition for scarce affordable housing and those with the least income or who may find it more difficult to find appropriate housing, fall out of the bottom of the housing continuum into homelessness.

[15] There was also evidence that "[rent control] eliminates rapid rental escalations and speculative investment and encourages rental tenancy stability."

[16] On appeal, no one takes issue with these propositions or with the laudability of the City's efforts to encourage and maintain affordable housing for the most vulnerable. These are clearly compelling issues. Understandably, they are also of immeasurable significance to renters and affordable housing advocates, particularly in Vancouver's Downtown Eastside.

[17] However, these are not the matters before us.

[18] The City does not possess inherent legislative power. It is entitled to exercise only those powers delegated to it under the *Vancouver Charter*: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 at para. 15 [*Catalyst Paper*].

[19] Moreover, the City does not have unfettered discretion when exercising its delegated powers. The City must comply with the "… purview [or scope] of the statutory scheme under which [any measures have been]

adopted": *Catalyst Paper* at para. 15.

[20] In this appeal, the central question is whether the City's rent control bylaws exceeded the legal constraint imposed on its regulatory authority by s. 272(1)(f) of the *Vancouver Charter.*

[21] With that focus, the broader issues of housing affordability, the efficacy of governments' responses to housing, past and present, or the impact of the current rental situation on people with marginal incomes are not matters the Court has jurisdiction to consider.

[22] Accordingly, nothing I say in these reasons should be understood to opine on the importance of these issues, their urgent nature, or the value of the work that has been done by the City, affordable housing advocates, and others in their ongoing efforts to ensure housing availability, prevent homelessness, and protect those most at risk.

Factual Context

[23] Given the narrow ambit of the appeal, the salient background can be simply stated.

[24] In 2018, the premier of British Columbia established a rental housing task force to consider issues specific to renters and rental housing providers. In December 2018, the task force delivered a final report which recommended that the Province continue to tie rent "to the renter" and "not the unit".

[25] In making this recommendation, the task force rejected a submission by some renters and renter advocates that to improve housing affordability, rent increases should be tied to the unit and controlled between tenancies. Among other things, advocates suggested this would help end wrongful evictions that seek to terminate tenancies and create a vacancy because the landlord wants to raise rent beyond the allowable maximum prescribed under the *RTA.*

Lead-up to the bylaws

[26] After the task force released its final report, the City sought amendments to the *RTA* that would facilitate additional forms of rent control, specific to SRAs. The Province declined to make these amendments.

[27] In 2019, the City passed a motion directing the mayor and City staff to formally ask the Province to tie SRA rent increases to units. The motion also directed staff to investigate alternative ways of meeting the City's desired goal.

[28] The mayor wrote to provincial officials and made the request. In January 2020, the Minister of Housing responded and reiterated that the Province had accepted the recommendation of the task force. On that basis, the City's request for a different approach was declined.

[29] In November 2021, City staff generated a report on rent control specific to SRAs and presented the report to a Standing Committee on Policy and Strategic Priorities.

[30] The report acknowledged that over the years, the City had requested the Province to amend the *RTA* specific to the SRA stock and, among other things, tie rent to the unit. However, the Province declined to do so and, instead, adhered to its policy of tying rent to the renter. City staff understood that this choice "… was based on concerns that introducing [rent] control tied to the unit would cause landlords to remove their properties from the rental stock and limit new rental construction".

[31] The report presented to the Standing Committee noted that the *Vancouver Charter* authorizes the City to regulate business license holders and to attach terms to their licenses:

> … The powers set out in [ss. 203, 272 and 273 of the *Vancouver Charter*] are broad, and include the authority to require a business licence, regulate business licence holders and impose terms and conditions on business licence holders. The License By-law currently regulates businesses, but does not include any form of rent regulation.

[32] Based on these powers, staff proposed amendments to the City's business licence bylaw that would establish rent control specific to SRA-designated owners and operators (No. 13182: A By-law to amend License By-law No. 4450 Regarding Vacancy Control).

[33] Implementing this form of control would also require two other sets of amendments (By-law No. 13183: A By-law to amend the Ticket Offences By-law No. 9360 Regarding Vacancy Control, and By-law No. 13184: A By-law to amend License By-law No. 4450 Regarding Vacancy Control). These amendments were necessary to address administrative and enforcement issues associated with implementing the main set of changes under No. 13182.

[34] City staff recommended that the Standing Committee approve the amendments in principle. They acknowledged that if implemented, the amendments would represent "… the first use of the [City's] business regulation powers to regulate rents in this manner" (emphasis added).

[35] The Standing Committee was told that the proposed rent control would "not conflict" with the *RTA.* The amendments would simply provide "… an additional layer of rent regulation". They were "… intended to supplement the RTA and support addressing challenges that are unique to Vancouver".

[36] The Standing Committee approved the amendments in principle. At the relevant meeting, a Committee member asked City staff about the jurisdiction to adopt amendments regulating rent specific to SRAs. The Committee was told the City had wide authority to regulate housing providers as long as it did not require these businesses to "breach" the *RTA.* Staff said the City's jurisdiction to engage in rent control was governed by an "impossibility of dual compliance" test. As it would be possible for SRA owners and operators to comply with both the provincial and municipal schemes, there would be no conflict.

[37] On December 8, 2021, the City's council adopted bylaws implementing the amendments.

[38] At that meeting, staff provided a high-level summary of the status of SRAs in Vancouver:

> … before we talk about vacancy control I'd like to give a brief background on [SRAs]. There [are] approximately 6,700 residents who live in -- across 157 SRA designated buildings mostly in the Downtown Eastside. The province and the city have purchased several buildings to protect the stock and its tenants. And we can see in the chart on the left the current ownership distribution of SRA designated room that are currently in us[e]. Half the stock, 51 percent, is privately owned, 40 percent is government owned, 7 percent by non-profits and 2 percent by Chinese benevolent societies. And this is in addition to approximately 750 closed [SRA] rooms.
>
> [Emphasis added.]

[39] Consistent with the advice provided to the Standing Committee, the City's council was told it had lawful authority to implement the amendments because the amendments did not conflict with the *RTA*:

> It is staff's position that the city is authorized under the *Vancouver Charter* to regulate businesses through the licence bylaw and impose conditions on business licence holders. And this can be done

through the creation of a new licence category.

It's important to note that this would be the first time that the licence bylaw is used to regulate rents in this manner and that implementing vacancy control would not conflict with provincial *RTA* regulations.

…

My understanding of it is that we can create regulations in relation to businesses provided that they don't require you to breach the *Residential Tenancy Act.* My understanding of our program here is that nothing that we are doing requires you to breach, in any manner, the *Residential Tenancy Act.* We're authorized to regulate businesses. These are businesses. We're proposing regulations in relation to businesses.

And generally the test, as we understand it, is that -- it's called the test of impossibility of dual compliance. Does what we do require you to breach another statute, a provincial statute. If that was the case, we could not do that.

[Emphasis added.]

[40] The primary rent control bylaw, No. 13182, contained these provisions:

> 25.1A (1) Every single room accommodation operator, other than the government, its agencies or government owned corporations, is deemed to hold a single room accommodation operator licence pursuant to this By-law for any designated room it rents to tenants.
>
> 25.1A (2) After a period of vacancy for a designated room, every single room accommodation operator may cause, permit or allow the rent charged for a designated room to be increased to no more than the base rent plus an increase equal to the inflation rate, unless a tenant who vacated the designated room during the previous 12 months was subjected to an annual increase in the previous 12 months, in which case no further rent increase is permitted by this subsection.
>
> …
>
> (4) Subsections (2) and (3) only allow one rent increase following a period of vacancy in any 12-month period, regardless of how many times a period of vacancy may occur.
>
> …
>
> (9) Every single room accommodation operator must submit to the Chief License Inspector by January 31 of each year, in writing:
>
> (a) the name and address of the single room accommodation operator;
>
> (b) the address of each designated room, including unit numbers;
>
> (c) whether each designated room is occupied, empty, or permanently closed;
>
> (d) the monthly rent for each designated room; and
>
> (e) the reason for any rent increase since the previous report in writing.
>
> …
>
> (12) No single room accommodation operator shall charge a tenant in a designated room more than the maximum rent allowed under this By-law.

[Emphasis added.]

The *Residential Tenancy Act*

[41] The *RTA* applies to all “tenancy agreements, rental units and other residential property” in British Columbia unless explicitly exempted: ss. 2(1), 4. The respondents are landlords under the *RTA* and subject to its provisions.

[42] Section 41 of the *RTA* (titled “Rent Increases”), stipulates that “[a] landlord must not increase rent except in accordance with [Part 3]”. Rent is defined in the *RTA* as: “… money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities …”: s. 1. Security deposits, pet damage deposits, and certain prescribed fees are expressly excluded.

[43] Generally, rent increases under the *RTA* are limited to: (a) an amount calculated in accordance with the *RTA’s* regulations; (b) an amount ordered by a director appointed under the *RTA*, on application by the landlord; or (c) an amount agreed to in writing by the tenant: ss. 42, 43(1)(a)–(c), 69.

[44] It is not necessary for purposes of this appeal to set out all relevant provisions of the *RTA* or related regulations. The City acknowledges that the respondents are subject to the *RTA*, including its rent control provisions. The parties also agree that the *RTA* regulates rent increases within tenancies, but not between tenancies. The judge accepted this view of things. On appeal, no one suggests she erred in doing so.

Petition Proceedings

[45] The City acknowledged in the petition proceedings that the respondents had standing to challenge the impugned bylaws.

[46] In January 2022, each of the respondents filed a petition under ss. 2 and 7 of the *Judicial Review Procedure* Act, R.S.B.C. 1996, c. 241, seeking to have the rent control bylaws declared invalid. Section 524 of the *Vancouver Charter* also provides that “[o]n the application of an elector or a person interested in the by-law or resolution, a Judge may declare the by-law or resolution void in whole or in part for illegality”.

[47] Among other things, the respondents argued that the bylaws were *ultra vires* the City.

[48] The City filed responses, taking the position that s. 272(1)(f) of the *Vancouver Charter* “… should be interpreted as creating the test of the impossibility of dual compliance”. The City said s. 272(1)(f) is contained in the *Vancouver Charter* to “… prevent a conflict between City by-laws and Provincial statutes” (emphasis added). See also the RFJ at paras. 14, 45–46, 49, 81.

[49] The petitions were heard together by consent and the judge issued one set of reasons that applies to both. The Attorney General for British Columbia declined to participate in the proceedings.

[50] In deciding the petitions, the judge had access to the material that was before the Standing Committee and the City’s council, specific to the rent control bylaws. The respondents filed additional material, including correspondence between the City and the Province on the subject of rent control, and the report prepared by the premier’s task force. This evidence was admitted by the judge. Whether it was proper to do so is not an issue raised on appeal.

[51] The judge began her analysis of the case by reviewing the factual context, relevant statutory provisions, and legislative backdrop. She then instructed herself on the applicable standard of review. Citing *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*], she understood it was her task to “… review the [City’s] decision [to adopt the bylaws], together with [the] underlying reasoning, and determine [whether the decision] was unreasonable …”: RFJ at para. 38.

[52] The judge noted that a reasonable decision is one based on an "… internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": RFJ at para. 39, citing *Vavilov* at para. 85. In the circumstances of this case, the "law that constrain[ed]" the City's council was s. 272(1)(f) of the *Vancouver Charter*.

[53] The judge understood that whether the respondents succeeded in their *ultra vires* challenge depended on whether they could show that the rent control bylaws exceeded the City's regulatory authority over businesses: RFJ at paras. 2, 3, 60, 65.

[54] In answering that question, the judge assessed the "pith and substance or dominant purpose" of the bylaws: RFJ at paras. 60–62, 70. She did so because on its face, s. 272(1)(f) of the *Vancouver Charter* circumscribes the City's power to regulate businesses with explicit reference to the "extent" to which another statutory authority has already done so:

> [69] On a plain reading of s. 272(1)(f), taken in context with the *Vancouver Charter* as a whole, I conclude its language indicates that the City's authority to regulate business must reasonably be considered in light of the Province's existing regulation of the same persons engaged in the same business. This requires that the City consider the dominant purpose of provincial enactments regulating the same persons or businesses, and that the City's business regulation authority is limited in relation to the scope of this provincial regulatory scheme.
>
> [Emphasis added.]

[55] The judge distinguished the case before her from judicial review under the *Community Charter*, S.B.C. 2003, c. 26. The *Community Charter* is the enabling statute that governs all other municipalities in British Columbia.

[56] Similar to the *Vancouver Charter*, the *Community Charter* empowers municipalities to "… regulate in relation to business": s. 8(6). However, it does not circumscribe the scope of that authority using the same language as s. 272(1)(f) of the *Vancouver Charter*. Instead, the *Community Charter* recognizes municipalities and the Province as having concurrent legislative authority, and then delineates specific areas in which provincial approval is nonetheless required before a municipality can exercise its jurisdiction. See s. 9 of the *Community Charter*, titled "Spheres of Concurrent Authority".

[57] Importantly, the *Community Charter* expressly stipulates that municipal bylaws adopted under that legislation will only be of "… no effect if [they are] inconsistent with a Provincial enactment": s. 10(1), emphasis added. Furthermore, an inconsistency will not arise "… if a person who complies with the bylaw does not, by this, contravene the other enactment": s. 10(2).

[58] In *1193652 B.C. Ltd. v. New Westminster (City)*, 2021 BCCA 176, leave to appeal to SCC ref'd, 39773 (9 December 2021) [*New Westminster*], this Court ruled that it is not necessary (or appropriate) to apply a pith and substance or predominant purpose analysis when reviewing a bylaw adopted under the *Community Charter* that is not subject to the provincial pre-approval requirement embedded within s. 9.

[59] Instead, that analytical tool is reserved for cases where the challenge to a bylaw is grounded in a legislative direction that restricts overlap between the municipal power at issue and another specified power, thereby creating a division of powers type scenario: *New Westminster* at paras. 32, 77. A pith and substance or predominant purpose analysis, which examines the purpose and effect of an impugned law in assessing its validity, is properly engaged when a choice must be made between two sources of authority: *Canadian Plastic*

Bag Association v. Victoria (City), 2019 BCCA 254 at para. 43, leave to appeal to SCC ref'd, 38828 (23 January 2020) [*Canadian Plastic*].

[60] While acknowledging that s. 272(1)(f) is "unique to the *Vancouver Charter*", the City argued in the petition proceedings (and again before us), that similar to other municipalities in British Columbia, it has "overlapping [concurrent] jurisdiction" with the Province in regulating businesses: RFJ at para. 14.

[61] On that basis, the City advanced the position that s. 272(1)(f) is properly construed as the functional equivalent of ss. 10(1) and (2) of the *Community Charter*: RFJ at para. 45. Under this framework, a jurisdictional problem will only arise with a business bylaw if it would be impossible for the license holder to comply with both statutory schemes. As long as the municipal and provincial regulatory requirements are not in conflict, there is no jurisdictional concern. The two schemes can harmoniously co-exist and lawfully regulate distinct aspects of the same activity: at para. 49.

[62] The judge disagreed that an "impossibility of dual compliance" analysis was the correct interpretive lens for assessing s. 272(1)(f) and its impact on the scope of the City's regulatory authority. From her perspective, the difference in wording between the *Vancouver Charter* and the *Community Charter* is significant. Moreover, according to paras. 76–82 of *New Westminster*, it is a difference that carries substantive analytical impact.

[63] On a fair reading of her reasons, the judge found that s. 272(1)(f) is the kind of legislative direction that was held in both *New Westminster* (at para. 77) and *Canadian Plastic* (at para. 43), to require a pith and substance or predominant purpose analysis.

[64] Applying that tool, she found it "inescapable" that the pith and substance or predominant purpose of the impugned bylaws was "… rent control in the context of residential tenancies", specific to privately-owned and operated SRAs: RFJ at para. 70.

[65] The judge accepted that the *RTA* is "… not exhaustive and contemplates other legislative and regulatory schemes which address residential tenancies and overlapping and complementary jurisdiction": RFJ at para. 75, citing *New Westminster* at para. 81. See also *V.I.T. Estates Ltd. v. New Westminster (City)*, 2023 BCCA 183 at para. 28 [*V.I.T. Estates*].

[66] However, she concluded there is only one reasonable interpretation of s. 272(1)(f) and that this interpretation deprives the City of overlapping jurisdiction on the issue of residential rent control. The judge found that s. 272(1)(f) prohibits the City from using its business licensing and regulatory powers to "… regulate persons who are already subject to regulation by the Province, directed at the same dominant purpose, even if it is possible to comply with both legislative schemes": RFJ at para. 70.

[67] In settling on this interpretation, the judge took comfort from s. 279 of the *Vancouver Charter*, which stipulates that nothing contained in the *Liquor Control and Licensing Act*, S.B.C. 2015, c. 19, "… shall prevent the [City] from providing for the licensing of the holder of a licence under the said Act." The judge agreed with the respondents that if the City's council was correct in its interpretation of s. 272(1)(f), there would have been no need for the Legislature to include s. 279 in the *Vancouver Charter* and allow for overlapping jurisdiction in regulating businesses that hold liquor licences. The City would have been free to regulate these businesses without s. 279, as long as the nature of the regulation did not render it impossible for a licence holder to comply with both municipal and provincial requirements.

[68] The City argued that the *RTA's* silence on rent control between vacancies was intentional and reflected a clear policy choice by the Province to not regulate this aspect of residential tenancies: RFJ at para. 71. The municipality was therefore free to step in.

[69] The City also relied upon the principle of subsidiarity in support of its position, arguing that s. 272(1)(f) should be construed in a manner consistent with the generally-accepted proposition that effective law making and implementation is best achieved at the local level, "… closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity …": RFJ at para. 78. As explained at para. 69 of *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, "[t]he idea behind [the principle of subsidiarity] is that power is best exercised by the government closest to the matter".

[70] The judge found neither of these arguments persuasive.

[71] She acknowledged the City was entitled to "some deference" in interpreting the *Vancouver Charter*: RFJ at para. 40. However, she concluded that in light of the one reasonable interpretation of s. 272(1)(f), neither the City's understanding of its authority to adopt the bylaws, nor the "resulting outcome", were reasonable: at para. 40.

[72] The judge found as a fact that the City applied an impossibility of dual compliance test when determining the scope of its business licensing and regulatory authority for the purpose of adopting the bylaws: RFJ at para. 92. The report prepared for the Standing Committee grounded the City's authority to impose rent control in the fact that the bylaws would not "conflict" with the *RTA*. This was the same justification offered by staff at the hearing of the Standing Committee when asked about jurisdiction. As noted earlier, it was also the justification offered to council when the bylaws were presented for adoption.

[73] From the judge's perspective, the approach taken by the City's council was not supported by s. 272(1)(f). Accordingly, she declared the rent control bylaws *ultra vires* and ordered that: (1) the bylaws be quashed; and (2) the City destroy any information and documentation collected pursuant to the bylaws: RFJ at para. 94.

[74] Because of the conclusion on *vires*, it was not necessary for the judge to consider alternative arguments advanced by the respondents, including that the bylaws were patently unreasonable or adopted in bad faith: RFJ at para. 92. Consequently, these latter issues were left unresolved.

Standard of Review on Appeal

[75] This Court's review of the Supreme Court decision is governed by a correctness standard.

[76] Our task is to "step into the shoes" of the judge and determine: (1) whether she identified the correct standard of review; and (2) whether she applied that standard correctly: *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101 at para. 48 [*Whistler*]; *O.K. Industries Ltd. v. District of Highlands*, 2022 BCCA 12 at para. 43.

[77] In conducting the second component of this inquiry, we are bound by the judge's findings of fact: *Prophet River First Nation v. British Columbia (Environment)*, 2017 BCCA 58 at para. 48, leave to appeal to SCC ref'd 37510 (29 June 2017); *0940460 BC Ltd. v. Burnaby (City),* 2020 BCCA 142 at para. 23, citing *Fraser Mills Properties Ltd. v. Coquitlam (City)*, 2018 BCCA 328 at para. 12

Issues on Appeal

[78] The City alleges seven errors in principle. The respondents frame the appeal differently and contend that it raises three main issues.

[79] In an appeal from a judicial review hearing, it is not necessary for this Court to identify a specific error in the judge's analysis before it may intervene: *Whistler* at para. 48; *Central Saanich (District) v. McHattie*, 2023 BCCA 461 at paras. 28–30 [*McHattie*]. This is because, as noted, we step into the shoes of the reviewing judge and conduct our own reasonableness assessment of the administrative decision.

[80] Given this reality, I am satisfied the issues raised in the appeal can be effectively addressed by asking these questions:

a) did the judge correctly identify the applicable standard of review;

b) did the judge properly apply that standard; and,

c) if she did properly apply the standard, did she correctly find that the City's decision to adopt the bylaws was unreasonable?

Discussion

[81] I will answer each of these questions in turn.

Did the judge correctly identify the standard of review?

[82] At the petition hearing, the parties agreed that a reasonableness standard governed the judge's review of the City's decision to adopt the bylaws: RFJ at para. 38. The agreement was well-founded. Post-*Vavilov*, this Court has held more than once that the reasonableness standard applies to a municipality's decision to adopt bylaws. See, for example: *Whistler* at paras. 33–35; *New Westminster* at paras. 56, 59; *McHattie* at para. 20; *V.I.T. Estates* at para. 18; *Cowichan Valley (Regional District) v. Wilson*, 2023 BCCA 25 at paras. 14 and 59 [*Cowichan Valley*].

[83] In seeking review, the respondents bore the burden of showing that the City's decision was unreasonable: *New Westminster* at para. 60, citing *Vavilov* at paras. 99–100.

[84] In assessing that burden, the judge had to determine whether the decision was "… transparent, intelligible and justifiable in relation to the relevant factual and legal constraints …": *New Westminster* at para. 60, citing *Vavilov* at paras. 99–100.

[85] As made clear in *Vavilov*, "… what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review": at paras. 90, 105, emphasis added. These constraints will "… dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt": *Vavilov* at para. 90; *New Westminster* at para. 60.

[86] Relevant factual and legal constraints include:

(1) the governing statutory scheme;

(2) other relevant statutory or common law;

(3) the principles of statutory interpretation;

(4) the evidence before the decision maker and facts of which the decision maker may take judicial notice;

(5) the submissions of the parties;

(6) the past practices and decisions of the administrative body; and

(7) the potential impact of the decision on the individual to whom it applies.

[Enumerated in *McHattie* at para. 36, citing *Vavilov* at para. 106.]

[87] This list of constraints is not exhaustive. Nor is it "meant to be a checklist": *Cowichan Valley* at para. 14; *Vavilov* at para. 106. However, of the matters enumerated here, the "… governing legislative scheme is likely to be the most salient aspect of the legal context relevant to a particular decision": *Cowichan Valley* at para. 15, citing *Vavilov* at para. 108.

[88] Indeed, the "… greater the interpretive constraints in a given case, the greater the burden of justification on the decision maker in deviating from those constraints": *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at para. 66, internal reference omitted.

[89] If the City's decision was justifiable in light of the relevant factual and legal constraints, then the decision, and the bylaws that flowed from it, were reasonable. As succinctly stated in *V.I.T. Estates*, "[if a] municipality's implicit reasons for concluding that it had authority to enact the Bylaw meet the test of reasonableness, then the Court must accept that reasoning": at para. 39.

[90] However, if the City's decision was not justifiable in light of the relevant factual and legal constraints, the judge had no alternative but to set the decision and the bylaws aside. This is so even if the bylaws, divorced from their constraints, objectively reflect a reasonable response to the issue the City sought to address. The bylaws could not survive judicial review if they were adopted on a flawed understanding of the City's legislative authority: *Vavilov* at para. 86. In conducting a reasonableness review, it was not open to the judge to "… disregard the flawed basis for [the City's] decision and substitute [her] own justification for the outcome …": *Vavilov* at para. 96, citing *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at paras. 26–28. See also *Mason* at para. 101.

[91] The City did not provide reasons for adopting the bylaws. In these circumstances, the judge was entitled to discern the reasons "… from the debate, deliberations and policy statements that gave rise to the bylaw[s]": *New Westminster* at para. 61, citing *Vavilov* at paras. 123, 137; *McHattie* at paras. 32–33. There was considerable material before the judge on that point, including the staff report to the Standing Committee.

[92] Finally, because the bylaws flowed from the City's interpretation of its own authority to regulate rent between tenancies, the judge was entitled to consider the ordinary rules of statutory interpretation in assessing this aspect of the City's decision: *New Westminster* at para. 61, citing *Vavilov* at paras. 115, 120. See also *Yu v. Richmond (City)*, 2021 BCCA 226 at para. 55; *English v. Richmond (City)*, 2021 BCCA 442 at paras. 57, 64–65 [*English*].

[93] In my view, it is readily apparent from the judge's reasons that she identified the correct standard of review and, importantly, that she properly understood and instructed herself on the parameters of that standard. See, in particular, paras. 5, 21–22, 38–40, 92 of her reasons.

[94] This includes the fact that as an administrative decision maker, the City's council was entitled to deference in the interpretation of its enabling legislation: *Catalyst Paper* at paras. 19–21; *Onni Wyndansea Holdings Ltd. v. Ucluelet (District)*, 2023 BCCA 342 at para. 72.

[95] The City alleges the judge failed to show adequate deference to its interpretation of s. 272(1)(f). However, the entitlement to deference does not shield a decision maker from judicial intervention if the interpretation it adopts of its enabling legislation is inconsistent with the "… text, context and purpose of the [relevant] provision": *Vavilov* at para. 120. Reasonableness review:

> [68] … 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.
>
> [*Vavilov*, emphasis added.]

See also *Catalyst Paper* at para. 24.

[96] Accordingly, as this Court noted in *English*:

> [70] Whether the decision maker consists of a specialized tribunal, independent regulatory body, minister or front-line official, their "task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying [their] particular insight into the statutory scheme at issue": *Vavilov* at para. 121.
>
> [Emphasis in the original.]

[97] Once the judge concluded that the City's council failed in this task because there is only one reasonable interpretation of s. 272(1)(f) and it is inconsistent with the interpretation adopted on behalf of the City, any deference owed to the decision was necessarily displaced. If this Court agrees with the judge on this point (discussed below), it cannot be said that she erred in failing to defer.

Did the judge properly apply the standard?

[98] The next question to answer is whether the judge properly applied the reasonableness standard.

[99] The City argues the judge employed the wrong analytical framework in assessing reasonableness in the context of s. 272(1)(f). The City contends the judge unduly focused her attention on discerning the pith and substance or predominant purpose of the impugned bylaws. Once she concluded the bylaws were about rent control specific to residential tenancies (which the City does not deny), she effectively ended her analysis. She treated the matter as a division of powers case and assumed that the mere fact the *RTA* contains rent control provisions was fatal to the City's position.

[100] The City says this approach caused the judge to ignore or inadequately assess the whole of the factual and legal context relevant to the interpretation of s. 272(1)(f), including the specific wording of the provision. Had she adopted the proper analytical framework, the City says its interpretation of s. 272(1)(f) is more likely to have been found reasonable. From its perspective, the mere fact that a bylaw operates in the "same general field or area" as a provincial statute is not sufficient to transgress s. 272(1)(f).

[101] I see no merit to the City's complaint about the manner in which the judge approached her reasonableness review. It is evident from her reasons that she understood she was bound to assess factual and legal constraints in applying a reasonableness standard. She correctly articulated the parameters of that

standard, as well as the governing principles. As I read the judgment, she turned her mind to the pith and substance or predominant purpose of the impugned bylaws to assist in her reasonableness assessment, not to determine it. She used this lens as an analytical tool. Given the plain wording of s. 272(1)(f), which defines the scope or parameters of the City's legislative authority vis-à-vis the existence of regulation under another statute, she was entitled to do so: *New Westminster* at para 77*; Canadian Plastic* at para. 43.

[102] At the same time, this was not the judge's sole consideration. She also instructed herself that bylaws are presumed valid until proved otherwise: RFJ at para. 20. She reviewed and considered the provisions of the *Vancouver Charter* that were said to be directly relevant to the City's authority to adopt the bylaws (at paras. 11–13, 65); the relevant provisions of the *RTA* (paras. 16–19); the legislative, factual, and policy context in which the amendments proposed by City staff were developed and presented for consideration by council (paras. 23–34); the principles that inform the modern approach to statutory interpretation (paras. 20–22, 78–79, 84–88); and the placement of s. 272(1)(f) in relation to other parts of the *Vancouver Charter* that the respondents said shed light on legislative intent specific to the scope of the provision (at paras. 84–91).

[103] I agree with the respondents that the judge's reasons, considered in their entirety, reflect a comprehensive and broad-scoped reasonableness assessment, consistent with the framework established in *Vavilov.* She was entitled to consider the factual context she turned her mind to, as well as the legal and interpretive considerations she brought to bear in assessing council's approach to s. 272(1)(f).

Did the judge correctly find the City's decision unreasonable?

[104] This is the critical issue before us. It turns on the reasonableness of council's interpretation of its own legislative authority.

[105] At the petition hearing, the parties agreed that the authority to adopt rent control bylaws depended on the meaning and effect of s. 272(1)(f). In its factum, the City describes the interpretation of this provision as the "core question" on appeal.

[106] The City's general authority to regulate "persons carrying on a business" is found under s. 203 of the *Vancouver Charter*:

> 203. Where and to the extent that the Council is authorized to regulate, license, or tax persons carrying on a business, trade, profession, or other occupation, it shall have the power to
>
> …
>
> (b) differentiate and discriminate between groups or classes both as to the amount of any licence fee or tax to be paid and the terms and conditions under which any group or class may or may not carry on the business, trade, profession, or other occupation …
>
> [Emphasis added.]

[107] On plain reading, the introductory language to s. 203 recognizes that the power to regulate businesses is circumscribed. The City may only regulate "to the extent that the Council is authorized" to do so.

[108] In exercising its regulatory powers, the City's council may adopt licensing bylaws: *Vancouver Charter*, s. 272(1)(a). Business licences may include "terms and conditions":

> 273. (1) The Council may, by by-law, do one or more of the following:
>
> …

(b) establish terms and conditions of a licence referred to in section 272 (1);

(c) establish terms and conditions that must be met for obtaining, continuing to hold or renewing a licence referred to in section 272 (1);

(d) provide that terms and conditions for a licence referred to in section 272 (1) may be imposed, the nature of the terms and conditions and who may impose them …

…

[109] Section 272(1)(f) limits the scope of the conditions that may be attached to a license, with explicit reference to the existence of active regulation under another scheme. A licensing bylaw may regulate a business "… except to the extent that [the business] is subject to regulation by some other Statute" (emphasis added).

[110] The word "regulating" is "broadly defined" in s. 2 of the *Vancouver Charter*: *Doll and Penny's Cafe Ltd. v. Vancouver (City)*, 2000 BCCA 382 at para. 8. When that definition is incorporated directly into ss. 272(1)(a) and (f), the provisions read this way:

272. (1) The Council may from time to time make by-laws

(a) for providing for the licensing of any person carrying on any business, trade, profession, or other occupation;

…

(f) for [authorizing, controlling, limiting, inspecting, restricting, and prohibiting] every person required to be licensed under this Part, except to the extent that the person is subject to [authorizations, controls, limits, inspections, restrictions, and prohibitions] by some other Statute;

…

[Emphasis added.]

[111] The judge found as a fact that in adopting the rent control bylaws, the City proceeded on the understanding that s. 272(1)(f) restricts its authority over businesses only to the extent that the City cannot attach terms and conditions to a license that conflict with obligations or restrictions imposed under another statute: RFJ at paras. 31–34. If it is possible for a business licence holder to comply with both schemes, the bylaw will constitute a valid exercise of licensing and regulatory authority under the *Vancouver Charter*. This is so even if the bylaw authorizes, controls or limits the license holder in respect of an issue for which the Province is also directly engaged.

[112] This is the interpretation the respondents took issue with in the petition proceedings. It is the interpretation the City advanced in support of the bylaws. It is the interpretation the judge found to be unreasonable, and it is the interpretation that resulted in the rent control bylaws being quashed: RFJ at paras. 69–70.

[113] Given this history, and our obligation to defer to the judge's findings of fact, it is also the interpretation this Court must assess on appeal.

City's position on appeal

[114] The City says council's understanding of the scope of its authority under ss. 203, 272, and 273 of the *Vancouver Charter* was reasonable and should have been accepted by the judge.

[115] Consistent with the advice provided by staff in December 2021 (although articulated somewhat differently on appeal), the City says that before adopting a bylaw that regulates businesses, s. 272(1)(f) requires the City to consider the extent to which a senior level of government has already established a regulatory presence over those same businesses in relation to the same subject matter, and to then avoid regulating within those same boundaries. The City's position is stated this way in its factum: s. 272(1)(f) precludes "… municipal business regulation only if the business regulation is within the 'extent' of provincial or federal statutory regulation" (emphasis added).

[116] The City argues that its interpretation is supported by the Legislature's use of the word "extent". It is not the mere fact of regulation under another statute that defines the limits to the City's authority. Rather, it is the particulars of the other regulation that matter. The City is free to regulate businesses in relation to the same subject matter as the Province (in this case, rent control in residential tenancies). However, it cannot regulate the same aspect of the subject matter that the Province has chosen to control. From the City's perspective, s. 272(1)(f) is intended to avoid overlap and conflict in the particulars of business regulation, not the fact of duplication itself.

[117] In support of its interpretation, the City points to the way in which this provision has been approached in other cases, namely: *Fonent Properties Ltd. v. Vancouver (City of)* (1990), 45 B.C.L.R. (2d) 338, 1990 CanLII 601 (B.C.S.C.) [*Fonent*], and *Murray W. Schacher Enterprises Ltd. v. Vancouver (City)*, [1974] B.C.J. No. 741, 1974 CanLII 1824 (B.C.S.C.), aff'd on appeal (29 Oct 1975) (B.C.C.A.) [*Schacher*].

[118] In *Fonent*, business license holders sought a declaration that a certain bylaw purporting to prohibit them from assigning residential leases exceeding 20 years in length was *ultra vires* the City's authority. In advancing that position, the petitioners relied on s. 272(1)(f) of the *Vancouver Charter*, arguing that when the impugned bylaw was adopted, the petitioners were already subject to regulation in relation to residential tenancy agreements, including leases, under the *RTA*. The Supreme Court rejected that submission on the basis that residential leases in excess of 20 years were not subject to the *RTA*. As such, the bylaw was upheld.

[119] In *Schacher*, the City adopted a bylaw regulating the circumstances in which a rental agency could claim fees for assisting someone in finding rental accommodation. The petitioner challenged the bylaw on a number of bases, including that it was *ultra vires* the City because the petitioner was already subject to regulation under other statutes.

[120] Invoking s. 272(1)(f) of the *Vancouver Charter*, the petitioner argued in *Schacher* that the new bylaw was "… in conflict with and/or repugnant to valid provincial legislation upon the same subject matter …". A Supreme Court judge disagreed and declined to invalidate the bylaw. The judge found there was nothing in the other statutes cited by the petitioner that involved anything other than "… the most general application to the same subject matter".

[121] Finally, the City submits it was not unreasonable for council to inform its interpretation of s. 272(1)(f) with reference to the impossibility of dual compliance test. Asking whether the specific form of rent control imposed by the impugned bylaws and the form of rent control imposed by the *RTA* could reasonably co-exist was a logical way to approach the issue. It is consistent with how overlap in jurisdictional authority between a municipality and a senior level of government is approached generally. See, for example, *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 at paras. 36, 46 [*Spraytech*]).

[122] The City's rent control bylaws did not compel private SRA owners and operators to breach the *RTA.* They did not impose additional requirements or restrictions on the respondents specific to existing tenancies, and this was the only aspect of rent control that the Province has chosen to regulate.

Respondents' position

[123] The respondents say the City's interpretation of its regulatory authority was not reasonable. The interpretation is not supported by the plain text of s. 272(1)(f) or the surrounding provisions. It is an interpretation that is also at odds with the City's long-standing efforts to have the Province change its approach to rent control prior to adopting the bylaws. The respondents contend that the City's interaction with the Province on rent control impliedly recognized that this was a matter that properly falls within the scope of the Province's regulatory authority, not the City's.

[124] The respondents argue that taken to its logical conclusion, the City's jurisdictional view of its own regulatory authority, as made manifest when the bylaws were adopted, is a view that effectively allows the City to layer any requirements or restrictions in respect of residential tenancies "intricately over the provisions of the RTA", as long as they do not give rise to a direct contradiction. In doing so, the respondents and similarly situated landlords are not only rendered subject to duplicate regulation in respect of the same subject matter, but the City can use its business licensing and regulatory powers to undermine careful policy choices made by the Province in relation to that subject matter—policy choices that involve the balancing of relevant competing interests between landlords and tenants. The respondents say it is clear in the circumstances of this case that the bylaws were intended to get around the Province's choice of tying rent to the renter, rather than the unit.

[125] The respondents argue that the City's interpretation of its regulatory authority over businesses incorrectly presupposed concurrent jurisdiction with the Province, subject only to conflict. They emphasize that s. 272(1)(f) is worded differently than s. 10 of the *Community Charter*, which is explicitly focused on inconsistencies and the impossibility of dual compliance. Under the *Vancouver Charter*, the Legislature established a division of powers-type relationship between the City and the Province specific to business regulation.

[126] The respondents contend that the true object of s. 272(1)(f) is to prevent a business from "being regulated twice in relation to the same subject matter". In the words of the respondent 0733603 B.C., this provision is "… not focused on ensuring the technical harmony of different statutes, but on the person[s] who may be subject to double regulation". This is why it was necessary for the Legislature to incorporate s. 279 into the *Vancouver Charter.* The latter provision provides an exception to the limit imposed under s. 272(1)(f) by allowing the City to licence and regulate a business that is already licensed and regulated under another statute —namely, the *Liquor Control and Licensing Act.*

[127] The respondents say that neither *Fonent* nor *Schacher* assist the City. In *Fonent*, tenancies beyond 20 years had been expressly excluded from the *RTA*: s. 2(2)(d). As such, there was no other regulatory scheme in play. In *Schacher*, it was conceded on appeal that s. 272(1)(f) did not actually apply to the circumstances of the case.

[128] The respondents also contend that *Spraytech* is of no assistance. In that case, the Supreme Court of Canada made it clear that the principle of subsidiarity cannot be invoked to frustrate legislative intent and purpose: at para. 35. As stated by the respondent Pender Lodge Holdings, the subsidiarity principle does not "… imbue the City with authority that it otherwise lacks".

Interveners' submissions

[129] Three interveners participated in the appeal.

[130] The Tenant Resource and Advisory Centre, Community Legal Assistance Society, and Together Against Poverty Society, submit that a reasonable interpretation of s. 272(1)(f) is an interpretation that recognizes adequate housing as a core Canadian and international value. The City's rent control bylaws sought to give meaningful effect to that value and were adopted as urgent measures designed to combat a "severe humanitarian crisis" (homelessness). The bylaws were also adopted within a legal context that is "… fundamentally premised on concurrent regulation and respect for the democratic authority of municipalities". The judge failed to account for these important contextual factors and, in the result, endorsed a too-narrow view of the City's regulatory authority that fundamentally undermines its ability to meet its responsibilities towards the welfare of its own constituency.

[131] The Rental Housing Council of B.C. dba LandlordBC supports the judge's conclusion that the principle of subsidiarity has no application to this case because there is no concurrent jurisdiction on the issue of rent control. In any event, even if the principle does apply, it does not mean the City is best positioned to decide the issue of rent control. Given the complexity of the matter and the importance of an intersectional approach to housing affordability and combatting homelessness, it is the Province that is "optimally positioned" to determine and enforce rent control in the residential tenancy context.

[132] The Downtown Eastside SRO Collaborative Society played a crucial role in the lead-up to the City's adoption of the rent control bylaws. According to its factum, the SRO Collaborative Society spent more than four years "… organizing and advocating for municipal vacancy control, and was ultimately successful in assisting [SRA] tenants in participating in the local democratic process and convincing the City to pass the Bylaws". It says s. 272(1)(f) must be understood in light of the purpose and context of the *Vancouver Charter*, which "… empowers the inhabitants of the City with important statutory rights of democratic self-governance intended to promote collective welfare, reflecting the Legislature's acceptance of the principle of subsidiarity". The provision should be interpreted generously so as to give meaningful effect to this empowerment.

Analysis

[133] While appreciating the importance of the issue sought to be addressed by the bylaws, I agree with the judge that there is only one reasonable interpretation of s. 272(1)(f) of the *Vancouver Charter*. Furthermore, the reasonableness of the decision to adopt the bylaws must be measured against that interpretation.

[134] In my view, this provision prohibits the City from using its delegated authority to regulate businesses in relation to a subject matter for which those businesses are already subject to regulation under another statute, for the same predominant purpose. By "predominant", I mean primary, principal or overriding.

[135] This does not mean that once a senior level of government has elected to establish a regulatory presence in a subject area affecting businesses, the City is thereafter precluded from promulgating a bylaw that has implications for those same businesses in the same regulatory sphere. What s. 272(1)(f) prohibits is duplicate regulation that imposes obligations or restrictions on businesses in respect of the same subject matter for the same predominant purpose.

[136] I accept that courts will generally strive to uphold municipal bylaws enacted in good faith where the underlying purpose of the bylaw is one that, broadly speaking, falls within the municipality's enabling legislation. However, this general rule is subject to there being a "statutory restriction" that compels a different result: *Canadian Plastic* at para. 41.

[137] In my view, the judge correctly found that s. 272(1)(f) amounts to a statutory restriction that compels a different result.

[138] Consistent with the Court's approach to the requirement for provincial pre-approval in *Canadian Plastic* (see paras. 6, 40–42 of that decision), the plain wording of s. 272(1)(f) of the *Vancouver Charter* invites a division of powers type analysis in discerning its scope.

[139] On its face, s. 272(1)(f) limits the City's regulatory authority over businesses based on the "extent" (or degree) to which a senior level of government has already exercised its regulatory authority over those same businesses, in respect of the same subject matter. In that context, it was appropriate for the judge to discern the "leading feature or true character" of the bylaw: *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 481. In conducting that analysis, the purpose and effects of the bylaw (both legal and practical), were relevant considerations: *Morgentaler* at 482. A pith and substance or predominant purpose assessment was necessary to determine if the bylaws exceeded the City's jurisdiction by virtue of prohibited overlap.

[140] The City acknowledges that its bylaws sought to limit the extent to which private SRA owners and operators can increase rent for a residential unit once that unit has been vacated. It is clear from the factual record that this was the targeted issue. The City restricted the scope of its bylaws to rent increases between tenancies. However, this does not change the fundamental nature of what the City sought to do. The subject matter of the bylaws was indisputably rent control in the context of residential tenancies. Privately owned and operated SRA residential tenancy buildings and their landlords were the targeted audience.

[141] In its report to the Standing Committee, City staff labelled the subject matter of the bylaws as "vacancy control". However, it is clear from a fair reading of the report that the bylaws were intended to avoid "rapid rent escalation between tenancies" (emphasis added). Indeed, the report defined "vacancy control" in the following way:

> A limitation of rent increases between tenancies would prevent the average rents in rooms, buildings and the broader [SRA] stock from rising quickly in a short period of time, as documented in the Low Income Housing Survey and related research. Vacancy control would decrease the attractiveness of SRA designated properties to speculative investment, as its model is based on significantly increasing rents between tenancies over a short period of time. It could also increase tenant stability as there is less incentive from the landlord's perspective to end a tenancy as the next tenant's starting rent is regulated.
>
> [Emphasis added.]

[142] It is also a fact that rent control is regulated under the *RTA.* The Province has established a regulatory regime specific to that issue. The provincial regime reflects an intentional choice to tie rent to the renter, rather than the unit. The Province has elected to engage in rent control, albeit in a different form than desired by the City.

[143] The City says the fact that the Province is already regulating rent control matters not. Relying on the approach to concurrent jurisdiction applied under the *Community Charter*, City council adopted its rent control

bylaws on the understanding that rent control was permitted, as long as the obligations and restrictions imposed on landlords by the municipal and provincial schemes did not contradict each other, and the respondents were able to comply with both sets of requirements. Here, it was not impossible for the respondents to adhere to both forms of rent control. The two schemes imposed different requirements. Consequently, it is the City's position that the bylaws did not operate within the boundaries of the Province's regulation. They did not address the same aspect of residential tenancies that is regulated under the *RTA* (rent control within tenancies), and they did not give rise to conflict.

[144] In my view, it was not reasonable for the City's council to interpret the scope of its regulatory authority over businesses applying the same approach taken to jurisdictional overlap under the *Community Charter.* This interpretation fails to account for the palpable difference in wording between these schemes. Had the Legislature intended that the City's authority over businesses give way to the Province only where it would be impossible to comply with both schemes, it would have used the same language as embedded within s. 10 of the *Community Charter*. Clearly, the Legislature understood what was necessary to accomplish that goal.

[145] In *New Westminster*, the Court described the *Community Charter* as reflecting a "flexible and forward-looking approach to municipal powers" which "recognizes that municipal and provincial governments best serve their citizens when they acknowledge their respective jurisdictions; harmonize their enactments, policies and programs; and foster cooperative approaches to matters of mutual interest": at para. 4, internal references omitted.

[146] A municipality's jurisdiction under the *Community Charter* expressly includes concurrent authority to "regulate, prohibit and impose requirements in relation to … rental units and residential property, as … defined in the *Residential Tenancy Act*": ss. 8(3)(g), 63(f), emphasis added. Provincial pre-approval is not required: s. 9.

[147] The Court also held that s. 10 of the *Community Charter* incorporates the principle of subsidiarity: at para. 10. Consequently, when conducting a reasonableness review of a bylaw adopted under the *Community Charter*, including a bylaw specific to "rental units and residential property", a reviewing court must account for the fact that the bylaw's enabling scheme expressly supports "complementary legislation in areas of jurisdictional overlap to accommodate local circumstances": *New Westminster* at paras. 10, 79–80.

[148] The *Vancouver Charter* is neither structured nor worded the same way as the *Community Charter*, specific to business regulation. It does not have the same features that have been highlighted in these reasons. In light of these differences, it was not reasonable for the City's council to assume that the approach to jurisdictional overlap under the *Community Charter*, as laid out in *New Westminster*, also applies to the *Vancouver Charter*. It was not reasonable for the City to conclude that s. 272(1)(f) allows for concurrent jurisdiction on the subject matter of rent control, except to the extent that a City bylaw will conflict with the *RTA*.

[149] I agree with the judge (and the respondents) that if s. 272(1)(f) was meant to operate in the same way as s. 10 of the *Community Charter*, it would not have been necessary for the Legislature to include s. 279 in the *Vancouver Charter.*

[150] For ease of reference, s. 279 stipulates that "[n]othing contained in the *Liquor Control and Licensing Act* shall prevent the Council from providing for the licensing of the holder of a licence under the said Act". Among other things, the *Liquor Control and Licensing Act* prohibits the unlawful sale and purchase of liquor by businesses unless they hold a liquor license authorized by the Province: s. 8. Section 279 of the *Vancouver*

Charter clarifies that notwithstanding the fact the Province has elected to regulate these businesses through a licensing scheme, the City also has authority to license them. The existence of s. 279 supports the interpretation of s. 272(1)(f) adopted by the judge. It ensures the City can engage in duplicate regulation with respect to the same subject matter, namely, licensing.

[151] Before adopting the impugned bylaws, council's task was to interpret s. 272(1)(f) in light of its text, context and purpose, not the *Community Charter.* Moreover, in undertaking that task, a pith and substance or predominant purpose analysis was required. The City's council was duty bound to identify the pith and substance or predominant purpose of its proposed bylaws, and ask whether the businesses that would be bound by the bylaws were already subject to regulation under another statute in relation to the same subject matter, for the same purpose. Had council conducted a proper interpretive analysis, the answer would have been clear: in British Columbia, landlords of privately-owned residential tenancy buildings (including the respondents), are already "subject to [rent control] regulation by some other Statute".

[152] In their factums, the parties expended considerable effort on the question of whether the two regimes would give rise to conflict in operation. I need not address that issue in light of the conclusion that there exists only one reasonable interpretation of s. 272(1)(f), and it does not require the existence of demonstrable conflict.

[153] In my view, and contrary to the City's submission, the judge's interpretation of s. 272(1)(f) is consistent with the outcomes in both *Fonent* and *Schacher*, the two cases cited by the City in support of its position. In both of those decisions, s. 272(1)(f) did not pose a legal impediment to the impugned bylaws because the judges found that the subject matter of the bylaws was, in fact, not regulated by another statute. The same cannot be said here.

[154] In *Fonent*, leases in excess of 20 years explicitly fell outside the scope of the *RTA.* In *Schacher*, no provincial statute governed the nature of the activity at issue. Indeed, as noted, the petitioner in *Schacher* conceded on appeal that the limitation to the City's regulatory authority as provided for in s. 272(1)(f), was not engaged. As such, in both cases, there was no "… regulation by the Province, directed at the same [pre]dominant purpose …": RFJ at para. 70.

[155] I also agree with the judge that in the circumstances of this case, authorities such as *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 1982 CanLII 55, *B.C. Lottery Corp. v. Vancouver (City)*, 1999 BCCA 18, and *Spraytech* are distinguishable and of limited assistance.

[156] These are cases in which it was either assumed or found that the enacting body had concurrent authority over a particular subject matter, and the main question to be answered was whether the mere fact of overlap rendered the relevant provisions of the subordinate or delegate authority inoperative. The answer was "no", in the absence of a "true and outright conflict": *B.C. Lottery Corp.* at para. 20; *Spraytech* at para. 41.

[157] This case is different because it is focused on the limiting effect of a provision that is embedded within the City's enabling legislation and which, on its face, renders the business licensing and regulatory powers of the delegate authority subject to the dominant authority's choice to implement controls in respect of the same targeted entity, in relation to the same subject matter, and for the same predominant purpose.

[158] I agree with the judge that the principle of subsidiarity does not make a difference here. I accept, as made clear in *New Westminster,* that the principle of subsidiarity may attract considerable weight when

assessing the validity and interpretation of bylaws involving concurrent authority, and where the success of a *vires* challenge depends on the existence of conflict. Some of the interveners made compelling submissions in that regard. However, the law holds that the principle of subsidiarity cannot work to save an exercise of legislative authority that "… invade[s] another level of government's protected legislative sphere": *New Westminster* at para. 10, citing *Reference re Assisted Human Reproduction Act* at paras. 70,72. That is what happened here.

[159] I appreciate that under s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, every provincial enactment must be construed as remedial and in a manner that "… best ensures the attainment of its objects".

[160] In light of this provision, the City and some of the interveners have argued strenuously for a construction of s. 272(1)(f) that affords the City sufficient breadth of regulatory authority to achieve its policy objectives, limited only by direct conflict with other statutory requirements. Respectfully, similar to the principle of subsidiarity, this argument may carry considerable weight in a concurrent jurisdiction scheme. However, as I have indicated, I do not consider it reasonable to read s. 272(1)(f) of the *Vancouver Charter* that way, specific to the regulation of businesses.

[161] Finally, the Province did not participate in the petition proceedings. Nor has it participated in the appeal. As was the case in *Canadian Plastic*, I recognize that a court should be reluctant to invalidate a bylaw on grounds that it improperly treads into the regulatory sphere of a senior level of government, when that government has not challenged the bylaw's validity: at para. 58.

[162] However, I also agree with Justice Newbury's observation that this reluctance is subject to the court being satisfied that the bylaw reasonably comports with the text, context and purpose of the authorizing statutory provisions: *Canadian Plastic* at para. 58. I have reached the opposite conclusion.

Disposition

[163] For the reasons provided, I am of the view the interpretation of s. 272(1)(f) that grounded council's decision to adopt the impugned bylaws is not consistent with its text, context, and purpose.

[164] Accordingly, the judge correctly found that the decision was unreasonable, the bylaws were invalid, and the proper remedy was to quash them.

[165] I would dismiss the appeal.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Fitch"