IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mowatt v. British Columbia (Attorney General),* 2023 BCSC 1583

Date: 20230908
Docket: S2111001
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241

Between:

Mary Geraldine Mowatt and Earl Wayne Mowatt

Petitioners

And

Attorney General of British Columbia and
The Corporation of the City of Nelson

Respondents

Before: The Honourable Justice Blake

On judicial review from: A decision of the delegate of the Attorney General of British Columbia, dated July 28, 2021, pursuant to the *Escheat Act*, RSBC 1996, c. 120

Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. April 24 to 28, 2023
Place and Date of Judgment:	Vancouver, B.C. September 8, 2023

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I. INTRODUCTION

[1] The petitioners, Mary and Earl Mowatt, seek judicial review of a decision made by a delegate of the Attorney General of British Columbia (the "DAG") dismissing their application requesting that a parcel of land with the civic address of 1114 Beatty Avenue, Nelson, B.C. (the "East Lot") be transferred to them pursuant to the *Escheat Act*, R.S.B.C. 1996, c. 120 [*Escheat Act*].

[2] Both counsel agree that this petition appears to be the first judicial review of a decision made by the Attorney General under the *Escheat Act.*

[3] In 1992 the Mowatts purchased a parcel of land with the civil address of 1112 Beatty Avenue, Nelson, B.C. (the "West Lot"), which neighbours the East Lot. The West Lot and East Lot form one single property, are landscaped as a single property, and there are buildings on both lots. Since shortly after the Mowatts purchased the West Lot, there has been extensive litigation between the Mowatts and the City of Nelson (the "City") with respect to the legal ownership of the East Lot.

[4] In 2017 the Supreme Court of Canada dismissed a claim the Mowatts advanced, pursuant to the legal doctrine of adverse possession, seeking legal ownership of the East Lot. All parties now agree that the East Lot escheated to the Crown in 1930, for the reasons set out in detail below. After this decision, both the Mowatts and the City made applications to the Attorney General seeking title to the East Lot be transferred to them under the *Escheat Act*.

[5] The law of escheat ultimately rests on the notion that legal title to land derives from the Crown. It has a two-fold function: it ensures land is never without a legal owner in providing for the orderly administration of land upon a lapse in title; and it provides for the orderly resolution of claims to legal title which might survive the death or dissolution of the former owner by allowing a claim to be brought against the land in the hands of the Crown. In British Columbia, if a lapse in the chain of legal title occurs, legal title falls to the Province, pursuant to the *Escheat Act.*

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[6] On July 28, 2021, the DAG issued his decision in respect of these two competing applications: he dismissed both and exercised his discretion, pursuant to the *Escheat Act,* to sell the East Lot to the highest bidder as between the Mowatts and the City in accordance with an appraisal and sales process (the "Decision").

[7] The Mowatts now seek judicial review of the Decision, on the basis that they say it was not reasonably made. They argue that the Deputy failed to understand the fundamental principles of the law of escheat, misinterpreted the *Escheat Act,* and made numerous errors in his assessment of the law and the evidence. In all of the circumstances, they say he acted unreasonably in refusing to exercise his discretion to transfer the East Lot to the Mowatts. They seek orders setting aside his Decision and transferring the East Lot to them. The City has not sought judicial review of the Decision, and says that while they do not agree with the result, the Decision was not unreasonable. Their position is this judicial review petition should be dismissed, and they should be awarded their costs.

II. BACKGROUND

[8] The Mowatts have lived on the West Lot and the East Lot since 1993. The Mowatts acquired indefeasible title to the West Lot in 1992 by purchasing it from the previous owner, Gwen Marquis. In the same transaction, they say they bought whatever interest Ms. Marquis had in the East Lot. A house stands on the East Lot but it is not connected to municipal services. The Mowatts use it for storage and as a workshop.

[9] The Mowatts stress that the West Lot and the East Lot are integrated in the sense that there is no visible boundary between them and the landscaping "creates a harmonious whole." Stone retaining walls, stairways, pathways, and a waterfall and fountain feature join the West Lot and East Lot together as a single property. They argue that the known history of the land demonstrates that the two lots have been regarded as one property for over 100 years.

[10] There has already been protracted litigation between the Mowatts, the City and the Province of British Columbia (the "Province") with respect to the legal

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ownership of the East Lot. Ultimately, in *Nelson (City) v. Mowatt*, 2017 SCC 8 at para. 6 [*Mowatt SCC*], the Supreme Court of Canada determined that the East Lot escheated to the Province in 1930 or 1931.

[11] To understand the context of the competing applications under the *Escheat Act* before the DAG, it is important to briefly set out the relevant historical events and litigation background.

A. Historical Background

[12] The West Lot and East Lot were both originally part of a larger parcel of land fronting Kootenay Lake in the area known as Fairview. The original Crown grant of this parcel was made by the Province to Henry Anderson in 1889. Fairview was incorporated into the City in April 1921.

[13] The Nelson City Land and Improvement Company, Limited Liability (the "Company") acquired a portion of the land from Mr. Anderson on March 11, 1891, including the West Lot and East Lot. The Company registered its title to the land in absolute fee.

[14] In 1920, the Company transferred a parcel of land, including what is now the West Lot, to John Annable. Annexed to the deed of registration was Reference Plan No. 89281, which purported to dedicate the East Lot as a road allowance.

[15] The road dedication was ultimately ineffective, either because it was not filed for registration or it was not accepted at the Land Title Office. The result was that the Company remained the registered owner of the East Lot in absolute fee. However, the Company was not aware that the road dedication had not been effected.

[16] In 1929, despite still being the registered owner of the East Lot, the Company informed the Registrar of Companies that it had sold all its remaining lands to Mr. Annable, and that it had no assets and no liabilities. On November 13, 1930, the Company dissolved.

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[17] From at least 1909, a house on the East Lot was occupied by three families before the Mowatts: the Coopers, Gouchers, and Thorpes. In early 1923, the house on the East Lot was destroyed by fire. In 1932, Mr. Thorpe rebuilt a house on the East Lot—the house that stands there today. Ms. Marquis, Mr. Thorpe's daughter, lived with her husband in that house from the time of their marriage in 1932, and they raised their family there. After her mother died in 1954, Ms. Marquis moved into the house in the West Lot with her father. In 1959, Mr. Thorpe then conveyed the West Lot to his children (including Ms. Marquis).

[18] Ownership over the East Lot has been disputed by the City since before the Mowatts purchased the West Lot. Starting in 1979, the City directed Ms. Marquis to remove her house and shed from the East Lot so that it could install a power pole and anchors, claiming the road allowance over the property. Ultimately, the City re-routed its power lines around the property, but continued to claim the road allowance.

[19] In the 1980s, Ms. Marquis twice attempted to purchase the East Lot from the Province on the basis that it had escheated to the Crown; however, the Province rejected both applications on the basis that the East Lot was a municipal right-of-way or road allowance.

[20] The Province recommended in 1986 that the City should clarify the state of title for the East Lot through court proceedings. However, the City took the position that anyone disputing its claim to a road allowance should bear the burden of the expense of an investigation into title.

[21] In 1992, Ms. Marquis sold the West Lot to the Mowatts for $192,000. The Mowatts argue that they purchased the East Lot from Ms. Marquis at that time as well. However, as a result of *Mowatt SCC*, it is clear that Ms. Marquis had no legal interest in the East Lot, as it had already escheated to the Crown in 1930. The DAG noted specifically in his Decision that the Mowatts had not provided a copy of their contract of purchase and sale for the West Lot: Decision at para. 133.

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[22] Since the West Lot and East Lot became part of the City in 1921, the Thorpes, the Marquises, and the Mowatts paid taxes on the properties and buildings located thereon in the amounts and on the bases levied by the City. From at least 1923 to 1962, the City taxed the West Lot and the East Lot (owned in this period by the Thorpes and later the Marquises) as a single parcel. Then, from 1962 or 1963, the City began to tax the Marquises for the East Lot as a separate parcel as occupiers of a road or street allowance. Since 1992, the Mowatts have continued to pay taxes for the East Lot on the alleged basis that it is a road allowance owned by the City. The East Lot has never been used as road.

[23] After the Mowatts purchased the West Lot, difficulties continued with respect to the legal ownership of the East Lot. In 1998, the City demanded that the Mowatts remove the house on the East Lot within 60 days so that a developer on adjoining lands would have use of the alleged road allowance. The Mowatts refused this demand and instead pursued an alternative plan whereby they removed a shed (Mr. Thorpe's old forge) and one of the bedrooms from the house on the East Lot, so that they could preserve the rest of the house.

[24] In 2003 the City again renewed its demands for the removal of the house on the East Lot, and when the Mowatts refused, instructed a contractor to remove the house. Ultimately, the house on the East Lot was not removed.

[25] This is the background that led to over ten years of adversarial litigation between the Mowatts, the City and the Province, and then to the Decision of the DAG.

B. Litigation Background

1. The LWBC Proceeding

[26] In August 2004 both the Mowatts and the City filed competing applications with Land and Water British Columbia Inc. ("LWBC") with respect to the East Lot. The LWBC determined in February 2005 that it would authorise the dedication of the East Lot as a road allowance for the amount of $1,000 plus GST, as a direct sale for

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community/institutional purposes. The LWBC concluded that the failure to properly dedicate the East Lot to the City had been an administrative error that should be corrected. The City accepted LWBC's offer, and paid the purchase price and the statutory fee. However, the Mowatts then filed a caveat on title to prevent the transfer to the City.

2. The Mowatts' 2005 *Escheat Act* Application

[27] In May 2005 the Mowatts filed an application pursuant to the *Escheat Act* seeking a grant be made to them of the East Lot. By September 2005 the Attorney General's office had directed that the East Lot not be transferred until the Mowatts' escheat application was determined. After the Mowatts' commenced the two legal proceedings as set out below, this 2005 escheat application was stayed pending resolution of those two proceedings.

3. The Mowatts' Adverse Possession Claim

[28] The Mowatts commenced two legal proceedings with this Court in an attempt to obtain title to the East Lot. First, the Mowatts filed an action in 2006, in which they sought a declaration that the Province did not own the East Lot and could not transfer it to the City; in the alternative they argued they had a legal or moral claim under the *Escheat Act* (the "2006 Action"). Second, the Mowatts filed a petition in 2013, seeking a judicial investigation of the East Lot under the *Land Title Inquiry Act*, R.S.B.C. 1996, c. 251 [*LTIA*] and a declaration the Mowatts were the owners of the East Lot in fee simple in possession (the "2013 Petition"). They claimed they had established good, safe-holding, and marketable title in fee simple to the East Lot. After commencement of the 2013 Petition, the two proceedings were heard together as a claim for title by adverse possession.

[29] The central issue in both proceedings was whether the Mowatts had title to the East Lot either because the Company sold the East Lot to Mr. Annable in 1920 (the 2006 Action) or by way of adverse possession through their predecessors in possession (the 2013 Petition). The Mowatts claimed that 20 years of adverse possession was established against the Company, and in the alternative, if the land

had escheated to the Crown in 1931, 60 years of adverse possession was established against the Crown.

[30] At first instance Justice Kelleher found that the Mowatts had not demonstrated the adverse possession of their predecessors. In particular, the chambers judge held that the Mowatts had not sufficiently proven continuous possession of the East Lot between 1916 and 1920: *Mowatt v. British Columbia (Attorney General),* 2014 BCSC 988 at para. 111. After hearing further evidence, he maintained his determination that the Mowatts had failed to show continuous possession of the East Lot from 1916 to 1920: *Mowatt v. British Columbia (Attorney General),* 2014 BCSC 2219 at para. 46.

[31] The Mowatts appealed, and the Court of Appeal allowed the appeal: *Mowatt v. British Columbia (Attorney General),* 2016 BCCA 113 [*Mowatt BCCA*]. The Court determined that the Mowatts had sufficiently proven continuous adverse possession of the East Lot from 1909 to 1923, including in the contested period of 1916 to1920. The Court concluded that Ms. Marquis had succeeded to all of her father's interest in the East Lot, and that the Mowatts had succeeded to all of Ms. Marquis' interest in the East Lot. They remitted the proceeding under the *LTIA* back to the Supreme Court of British Columbia for determination of the adverse possession claim from 1923 onward.

[32] The City appealed this decision to the Supreme Court of Canada. The Attorney General of British Columbia was an intervenor in that appeal. The Supreme Court of Canada allowed the appeal and held that the Mowatts' claim for adverse possession failed. They concluded the East Lot had escheated to the Crown in 1930 or 1931: *Mowatt SCC* at para. 7.

4. 2017 Judicial Review Petition

[33] After the decision of the Supreme Court of Canada, the Mowatts filed a petition pursuant to the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241, seeking various relief, including an order setting aside the decision of the LWBC. However, they agreed to refrain from proceeding with that petition, pending the

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resolution of two applications made to the Attorney General, pursuant to the *Escheat Act*, for the East Lot.

5. The Two *Escheat Act* Applications

[34] Both the Mowatts and the City brought an application pursuant to the *Escheat Act* to the Attorney General.

[35] In their application, the Mowatts asserted that pursuant to s. 5(b)(i) of the *Escheat Act* they had legal and/or moral claims to the East Lot based on proprietary estoppel, unjust enrichment, the near success of their claim in adverse possession, s. 7 of the *Charter of Rights and Freedoms* and the heavy burden they had borne in quieting title. Pursuant to s. 5(b)(iii) they asserted that they were entitled to the land as discoverers of the escheat of the property. Finally, in the alternative, pursuant to s. 11 of the *Escheat Act* they argued that the Province should give them preference in any sale of the East Lot on the basis of their legal or moral claim against the Company.

[36] In their application, the City asserted a moral claim to the East Lot pursuant to s. 5(b)(i) of the *Escheat Act*, based in part on the incomplete dedication of the East Lot as a road allowance in 1920, and claimed a need for the property for community planning and development purposes. Further, the City asserted pursuant to s. 5(b)(ii) that it was entitled to the East Lot to carry into effect the Company's contemplated dedication as a road. Finally, in the alternative, pursuant to s. 11 of the *Escheat Act* they argued that the Province should give the City preference in any sale of the East Lot on the basis of its moral claim against the Company.

III. THE DOCTRINE OF ESCHEAT AND THE RELEVANT PROVISIONS OF THE *ESCHEAT ACT*

[37] To properly review the Decision for reasonableness, it is necessary to first understand the common law of escheat and the *Escheat Act.* Counsel for the Mowatts provided a clear and helpful history of the evolution of the doctrine of escheat, and the *Escheat Act,* which I have relied upon extensively in this section.

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[38] The doctrine of escheat rests on the notion that land title ultimately derives from the Crown. If a lapse in the chain of title occurs, title falls back to the Crown: *Mercer v. Attorney General for Ontario*, (1881) 5 S.C.R. 538 at 664–665, 1881 CanLII 6 [*Mercer* SCC]; *Attorney General (Ontario) v. Mercer,* [1883] UKPC 42, 1883 CarswellOnt 5 at paras. 3□–5□, 18 [*Mercer PC*]; *Scmlla Properties Ltd. v. Gesso Properties (BVI) Ltd.*, [1995] B.C.C. 793 at 797G–799E, 799H–800H, 801G (U.K.Ch.D.) [*Scmlla*].

[39] The doctrine of escheat has a two-fold function. It ensures land is never without an owner by providing for the orderly administration of land upon a lapse in title. The *Escheat Act* also provides for the orderly resolution of claims which might survive the death or dissolution of the former owner by allowing a claim to be brought against the land in the hands of the Crown.

[40] Escheat has been described as a “casual profit” because it falls to the Crown on the lapse of title by “chance and unlooked for”, taking effect “automatically”: *Mercer PC* at para. 4; *Scmlla* at 803B-804D; The Rt. Hon. Sir Robert Megarry & Sir William Wade, K.C., *The Law of Real Property*, 9th ed. (London, UK: Sweet & Maxwell, 2019) at 2-023. Land escheats to the Province without an overt act or investigation by the Province, and without any arm of the Province necessarily being aware of the event. For this reason an escheat can be “discovered” by a party other than the Crown.

[41] However, the land does not pass to the Crown unencumbered or for its full beneficial use. Escheat terminates the fee simple estate, but not an interest granted in the fee simple, such as a mortgage: *Mercer PC* at para. 4. At common law the Crown was not beneficially entitled to the land until an inquest of office was conducted to ascertain the Crown’s title. Until that point, the Crown held “nothing more than a bare right, and no beneficial enjoyment of the property”: *Scmlla* at 804A, citing Frederic W. Hardman, “The Law of Escheat” (1888) 4 Law Q Rev 318 at 336.

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[42] Two results follow from the automatic vesting of title in the Crown:

a) at times, the land title register will not reflect the correct state of title; and

b) the Crown may be exposed to liability as the owner of land without being aware that it has come into ownership.

See Victor Di Castri, K.C., *Registration of Title to Land*, Vol 1 (Toronto: Carswell, 1987) (loose-leaf updated 2013, release 8) at 5-14.

[43] The Province therefore benefits from receiving notice that it has come into title so that it may take steps to manage its risk. The reward for discovery provision of the *Escheat Act* encourages that result: *Escheat Act,* s. 5(b)(iii).

[44] In British Columbia, if a lapse in the chain of title occurs, title falls to the Province: *Escheat Act*, ss. 1, 4. However, the *Escheat Act* is not a codification of the common law; rather, it exists alongside, and depends upon, the common law of escheat. A lapse in the chain may occur where land is owned by a natural person who dies intestate and without heir, or when lands are owned by a company at the time of its dissolution: *Escheat Act,* ss. 3, 4. The *Escheat Act* allows a claim to be brought in respect of either category of owners, and allows the former owner's land to be applied in redress of such a claim. The Attorney General is statutorily charged with deciding such claims.

[45] For the purpose of this judicial review s. 5(b) and s. 11 of the *Escheat Act* are relevant, which provide:

Power to restore land to legal or moral claimants

5 The Attorney General may, as to the Attorney General seems proper,

(a) restore land which has escheated or become forfeited, or any portion of or interest in it, to a person, or

(b) transfer it to a person

(i) who has a legal or moral claim on the person to whom it had belonged,

(ii) to carry into effect any disposition of it which the owner may have contemplated, or

(iii) to reward a person who discovers the escheat or forfeiture.

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Sale of escheated land

11 The Attorney General may

(a) sell any land escheated to the government under this Act, at the price and on the terms as may be determined, and

(b) give a preference, in making any such sale, to a person who has a legal or moral claim on the person to whom the land had belonged.

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[46] The jurisprudence on escheat is old, and escheat cases are rare. In his Decision the DAG noted that neither the Mowatts nor the City provided any case law which judicially considered the phrase “legal or moral claim” in s. 5 of the *Escheat Act.*

[47] The Mowatts argue that there are a few cases which provide some assistance on the meaning of a “legal or moral claim” as provided for in s. 5(b)(i), which I address below.

IV. STANDARD OF REVIEW

[48] The parties agree that the Decision is reviewable on the standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 [*Vavilov*]. In considering this application for judicial review I must determine whether the Decision was reasonable, having regard to the constraints imposed by the factual and legal context: *Vavilov* at paras. 90, 105. The Mowatts bear the burden of demonstrating that the Decision was unreasonable: *Vavilov* at para. 100.

[49] In *Vavilov,* the majority emphasized that a reasonableness review is meant to ensure that courts intervene where necessary to safeguard "the legality, rationality and fairness of the administrative process": at para. 13. A reasonableness review is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability, but remains a robust form of review: *Vavilov* at para. 13.

[50] The Decision must be based upon internally coherent reasoning, and it must be justified in relation to the relevant factual and legal constraints that bear upon the decision: *Vavilov* at para. 101.

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[51] However, to the extent *Vavilov* promotes a more robust form of judicial review, it also reinforces deference to administrative decision makers and judicial respect for the legislature's choice to delegate the authority for making determinations with respect to the law of escheat to the Attorney General: *Vavilov* at paras. 31–32. The Decision must be read in light of the record before the decision maker as a whole, and with due sensitivity to the legislative regime within which it was given: *Vavilov* at para. 103.

[52] Where, as here, a decision maker gives reasons for its decision, those reasons are the focus of attention on an application for judicial review. They "are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts": *Vavilov* at para. 81. Where the standard of review is reasonableness, the reviewing court must consider "only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable": *Vavilov* at paras. 83, 87. A reasonableness review "is not a line-by-line treasure hunt for error"; rather, the court must be able to trace the decision maker's reasoning "without encountering any fatal flaws in its overarching logic": *Vavilov* at para. 102. The Decision must demonstrate internally coherent reasoning and must be "justified in relation to the constellation of law and facts that are relevant to the decision": *Vavilov* at para. 105. The Decision must not be assessed against a standard of perfection.

[53] The following non-exhaustive, interacting "elements" set out in *Vavilov* at para. 106 are relevant in evaluating whether a decision is reasonable:

a) the governing statutory scheme;

b) other relevant statutory law or common law;

c) the principles of statutory interpretation;

d) the evidence before the decision maker and facts of which the decision maker may take notice;

e) the submissions of the parties;

f) the past practices and decisions of the administrative body; and

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

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V. THE DECISION

[54] When reviewing the Decision for reasonableness, it is important to remember that the DAG was considering two separate and competing applications under the *Escheat Act*——one brought by the City and one brought by the Mowatts.

[55] First, the City applied to the DAG pursuant to s. 5(b)(i), s. 5(b)(ii) and s.11 of the *Escheat Act*, seeking to have the East Lot transferred to the City.

[56] Second, the Mowatts applied to the DAG pursuant to s. 5(b)(i), s. 5(b)(iii) and s. 11 of the *Escheat Act,* seeking to have the East Lot transferred to them.

[57] The DAG dismissed both applications. For the necessary context to understand his Decision, I will first briefly address the reasons he dismissed the City's application, and then turn to consider his Decision as it related to the Mowatts.

[58] The City's application focussed on:

a) the intended, but incomplete, dedication of the East Lot as a road allowance in 1920;

b) the decision by the LWBC in 2005 to transfer the East Lot to the City;

c) the City's engagement in over a decade of litigation in connection with determining the rights to the East Lot, including its ultimate success at the Supreme Court of Canada; and

d) its assertion it needs to use the land for the benefit of the residents and businesses of Nelson, B.C.

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[59] In his Decision, the DAG carefully reviewed the evidence and written submissions of the City. He determined that none of the grounds alleged by the City were sufficient to find they had a claim to the East Lot pursuant to s. 5 of the *Escheat Act.* Specifically, he concluded that:

a) despite the fact that granting the City's application would fulfill the intention of the previous owner of the East Lot, given the length of time that had passed, and the use of the East Lot by third parties, it did not seem proper to proceed with the road dedication (Decision at para. 178);

b) the decision by the LWBC to sell the land to the City was not the basis for a legal or moral claim against the Company (Decision at para. 182);

c) the City's success at the Supreme Court of Canada was in defeating the claim for ownership by the Mowatts, not success with respect to any claim to the East Lot by the City (Decision at para. 183); and

d) it did not appear from the facts provided that the need for a road allowance continues to exist, nor for the other possible future uses identified by the City (Decision at para. 217).

[60] The City stresses that it disagrees with the Decision; however, it does not take the position that what it alleges are the errors made by the DAG are sufficient to find he was not reasonable in his analysis. Given the deference that must be afforded to the DAG, they take the position that what they allege to be his errors cannot surpass the threshold required on an application for judicial review. They have not sought a judicial review of the Decision.

[61] I now turn to the Mowatts' application to the DAG. I note that the Mowatts advanced arguments on the basis of both unjust enrichment and s. 7 of the *Charter of Rights and Freedoms*, neither of which the DAG accepted. They have abandoned those arguments on this judicial review, and so I will not address those arguments made to the DAG. The Mowatts brought their application pursuant to s. 5(b)(i) (a legal or moral claim), s. 5(b)(iii) (reward to a person who had discovered the

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escheat) and s.11 of the *Escheat Act*: Decision at para. 4. He expressly noted that the further grounds for their claim included proprietary estoppel and adverse possession. As their legal claim for adverse possession failed at the Supreme Court of Canada, he proceeded on the basis that their claim in adverse possession was a moral claim only: Decision at para. 5.

[62] The DAG characterised their application for the East Lot in the following manner:

> [60.] The Mowatts apply for the Land pursuant to s. 5 and s.11 of the *Escheat Act.* The bases of their claim are:
>
> > a. The Land has been part of the Mowatts' home for the past 25 years. Since at least 1922, it has been occupied and used in association with the parcel at 1112 Beatty Avenue;
> > b. Proprietary estoppel and unjust enrichment. The unjust enrichment claim is based on the Mowatts' payment of taxes in respect of the Land;
> > c. A moral claim based on adverse possession;
> > d. The heavy burden they assert they have born in quieting the title; and
> > e. Section 5(b)(iii) *Escheat Act*, which is the section that allows the Attorney General to reward a person who discovers the escheat.
>
> [61.] Additionally, or alternatively, the Mowatts seek to purchase the Land at a preference under s.11(b) of the *Escheat Act.*
>
> [62.] The Mowatts raise s.7 of the *Canadian Charter of Rights and Freedoms* which guarantees the right to "life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Section 7 does not protect property rights [*Irwin Ltd. v. Quebec (Attorney General*), [1989] 1 S.C.R. 927, 1989 CanLII 87] and in particular, does not protect a moral claim directed at property owned by the Crown. As a result I do not consider section 7 to have application to this matter and have not considered it further.

[63] The DAG underwent a careful and thorough analysis of subsection 5(b)(i). He noted that on the question of the appropriate test to establish "a moral claim on the person to whom it had belonged", the parties provided no case law directly on point to him, nor was he aware of any. He concluded the wording made clear that the moral claim must be established on the person who owned the land immediately prior to the escheat to the Province, in these circumstances being the Company: Decision at paras. 68–70.

[64] The DAG considered at length what was necessary to establish a moral claim against the Company, including referring dictionary definitions and case law in contexts outside of escheat law for possible assistance: Decision at paras. 74–82.

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[65] The Mowatts asserted a legal claim under s. 5(b)(i) on the basis of the principle of proprietary estoppel. The DAG considered when a proprietary estoppel claim is found to exist, citing from *Cowper-Smith v. Morgan* 2017 SCC 61. He noted at para. 98 that a proprietary estoppel claim may arise where:

a) a representation or assurance (express or implied, including by acquiescence) is made to the claimant, on the basis of which the claimant expects that he or she will enjoy some right or benefit over the property;

b) the claimant relies on that expectation by doing or refraining from doing something and his or her reliance is reasonable in all of the circumstances; and

c) the claimant suffers a detriment as a result of the reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on his or her word.

He also considered jurisprudence as to when the benefits and burdens of proprietary estoppel flow to successor interest holders: Decision at paras. 101–113; *Young v. Beck*, 2017 BCCA 248.

[66] He concluded that in the circumstances, the Mowatts failed to meet the requirements of proprietary estoppel: Decision at paras. 119–135. Specifically, he concluded:

> [127.] In the case of the Mowatts, while they may argue that they relied on representations of the vendor of 1112 Beatty as to the situation involving the Land, the Mowatts did not rely on a representation from the owner of the Land (either the Company or subsequently the Province), that the Mowatts would have rights to the Land.
>
> [128.] In fact, at paragraph 56 of the BCSC decision, (2014 BCSC 2219), Mr. Justice Kelleher stated that the Mowatts "were aware of the dispute over the parcel of land from the time they purchased it."

> [129.] Based on the finding by Mr. Justice Kelleher that the Mowatts were aware that there was a dispute as to ownership of the Land at the time they purchased 1112 Beatty, there does not appear to be reliance on any representation or purported acquiescence.
>
> [130.] Even if the Company was found to have acquiesced and if such acquiescence was considered to be a representation that the Mowatts somehow relied upon, any reliance would not, in my view, be considered reasonable if the Mowatts were aware of a dispute as to the ownership at the time of their purchase of 1112 Beatty.
>
> [131.] With respect to the issue of detriment, the Mowatts assert they incurred costs in preserving the improvements and paying property taxes. They also state they purchased the buildings on the Land. However, they do not expressly assert that they purchased the Land when they purchased 1112 Beatty (paragraph 70 Mowatts' submissions).
>
> …
>
> [135.] In my view the Mowatts' assertion of representation or acquiescence and reliance has not met the requirements necessary to ground a claim in proprietary estoppel.

[67] The Mowatts also asserted a moral claim under s. 5(b)(i) on the basis of the adverse possession. The DAG also dismissed this claim, at paras. 145–152, noting:

a) s. 5(b)(i) of the *Escheat Act* would only apply where a moral claim is established on the person to whom the land belonged—the Company;

b) at the time the Mowatts purchased the West Lot, the Company had been dissolved for 62 years;

c) prior to that dissolution, the Mowatts' alleged moral claim in adverse possession did not exist;

d) a claim of adverse possession is unlikely to provide a basis for a moral claim, as by its nature, it seeks to defeat the owner's legitimate interest in the land; and

e) it seems incongruent to consider that a moral claim against an owner can be made out in a case which relies on adverse possession, particularly in these circumstances.

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[68] Finally, the DAG considered the Mowatts' argument that they were the discoverers of the escheat, and accordingly he should transfer the East Lot to them pursuant to section 5(b)(iii) of the *Escheat Act.* The Mowatts argued that either Ms. Marquis discovered the escheat, or they did through their legal action (which resulted in the SCC Decision and the finding the East Lot had escheated to the Crown in 1930).

[69] The DAG noted that a decision under that section is discretionary, and considered the evidence and arguments the Mowatts made as to why he should exercise his discretion in their favour. He concluded that "[s]imply discovering the escheat, by itself, is not sufficient in my view to fulfill section 5(b)(iii)": Decision at para. 159. He determined that "…I do not consider the facts in this case support an exercise of discretion in favour of the Mowatts as 'discoverers' of the escheat": Decision at para. 163. He referred in this paragraph to his conclusions as to what factors it was appropriate to consider when exercising his discretion, both pursuant to s. 5(b)(iii) and s. 11 of the *Escheat Act.* Specifically, he expressly noted:

> [210.] Discretion must be exercised fairly, having regard to all of the circumstances of the parties.
>
> [211] There are a number of factors relevant to the exercise of discretion in this matter, including:
>
> a. The historical connection of each of the parties to the Land;
> b. The proposed uses of each of the parties for the Land;
> c. The efforts which have been expended to date by each party in relation to their objective of successfully obtaining legal title to the Land;
> d. The conduct of the parties throughout the proceedings and court matter to date;
> e. Past actions by the Crown in relation to the Land and the parties;
> f. Any other factors which may be reasonable to consider in the circumstances.

[70] After declining to exercise his discretion to transfer the East Lot to either applicant under s. 5(b), the DAG nonetheless considered his discretion as set out in s. 11 of the *Escheat Act.* He considered the factors set out above: the historical connections of both the Mowatts and the City to the East Lot; the proposed uses they each had for the East Lot; their efforts to date to obtain legal title to the East

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Lot; the conduct of the parties throughout the various proceedings to date; and the past actions taken by the Crown in relation to the East Lot. He expressly noted:

> [226.] While I find the submissions by the Mowatts compelling, I am not satisfied that they are sufficient to meet the test for an exercise of discretion under the *Escheat Act* and as a result I do not exercise my discretion in favour of the Mowatts. I view the factors in favour of the City similarly compelling but inadequate to support an exercise of discretion in favour of the City.
>
> [227.] As a result, it is not my view that there is a sound basis for a successful claim under the *Escheat Act* for the City or the Mowatts and I do not exercise my discretion in favour of either.
>
> [228.] I have concluded that neither the City nor the Mowatts have been successful in meeting the requirements contemplated by section 5 of the *Escheat Act.*
>
> [229.] It is my view that the best course of action in the present circumstances would be to sell the Land pursuant to s. 11 *Escheat Act.*

[71] He ultimately set out a process for the sale: that the land be surveyed and appraised; that the appraised value was to set the minimum price for the East Lot; that both the Mowatts and the City were to submit a sealed bid for the East Lot; and the highest bidder was to be the successful party and allowed to buy the East Lot: Decision at para. 231.

VI. GROUNDS OF REVIEW

[72] The Mowatts raise the following issues for determination on this judicial review:

a) Did the DAG unreasonably refuse to exercise his discretion to transfer the East Lot to the Mowatts as a reward for their alleged discovery of the escheat under s. 5(b)(iii)?

b) Did the DAG unreasonably refuse to exercise his discretion to transfer the East Lot to the Mowatts as persons with a legal or moral claim under s. 5(b)(i)?

c) Did the DAG consider unreasonable factors when exercising his discretion pursuant to either s. 5 or s. 11 of the *Escheat Act?*

d) If the Deputy's Decision is unreasonable, should this Court exercise its discretion not to remit the matter to the Attorney General for reconsideration?

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VII. ANALYSIS

[73] The first three issues raised by the Mowatts include an argument that the DAG was unreasonable in exercising or refusing to exercise his discretion. Their arguments on these points have a degree of overlap. To avoid repetition, I will set out the Mowatts' position on the DAG's discretion under each issue, but consider the reasonableness of the DAG's exercise of discretion collectively under issue three.

A. First Issue: Discovery of the Escheat

[74] The Mowatts argue that the DAG unreasonably refused to exercise his discretion to transfer the East Lot to them as a reward for their alleged discovery of the escheat under s. 5(b)(iii).

[75] The Mowatts say they discovered the escheat of the East Lot. They argue that it was not until they pursued a declaration of adverse possession under the *LTIA*, and spent approximately $365,000 in legal fees, that the question was finally resolved and the escheat "formally discovered". They submitted to the DAG that in light of those circumstances, it would be appropriate and consistent with the purpose of the *Escheat Act* to reward their efforts as the discoverers of the escheat, and transfer the East Lot to them under s.5(b)(iii).

[76] The Mowatts say that the DAG made three unreasonable determinations in refusing this argument:

a) discovery of the escheat is not sufficient by itself to meet the terms of s. 5(b)(iii);

b) the Mowatts were engaged in proving their claim to legal title, rather than the Province's claim to title by escheat, and so did not discover the escheat; and

c) the circumstances did not support an exercise of discretion in favour of the Mowatts as discoverers of the escheat.

1. Requirements Under s. 5(b)(iii)

[77] First, I do not accept that the DAG unreasonably decided that discovery of the escheat was not sufficient, in and of itself, to meet the requirements of s. 5(b)(iii). This section clearly sets out a two-stage process: first, to determine if a person is the "discoverer" of the escheat; and second, to determine whether it is appropriate to transfer the escheated property to reward that person. The determination of the DAG that "[s]imply discovering the escheat, by itself, is not sufficient in my view to fulfill section 5(b)(iii)" was a reasonable interpretation: Decision at para. 159. I cannot accept the Mowatts' bald statement that "the ordinary meaning of s. 5(b)(iii) is that discovery of the escheat is enough to permit the land to be transferred as a reward, if the Attorney General so determines". Such a proposition ignores the importance of the requirement that the DAG must determine it to be reasonable in all of the circumstances, the second stage of the analysis.

[78] The DAG did not fetter his discretion as to whether to reward the Mowatts; rather, he expressly made a discretionary decision that considered all of the circumstances of the unique case before him. He did not determine that something more was necessary than discovering the escheat; rather, he confirmed the appropriate statutory operation of the provision was to consider if they were the discoverers; and if so, should he exercise his discretion to transfer the East Lot to the Mowatts. I accept this interpretation as reasonable and appropriate. The Decision clearly shows that the DAG was alive to the essential elements of the text, context and purpose of the *Escheat Act*, and considered them in a thoughtful and meaningful manner.

[79] I do not accept the Mowatts' argument that the DAG failed to exercise his discretion, as assigned to him by the legislature. Rather, he considered whether it was appropriate for him to exercise his discretion to reward them with the East Lot, and reasonably determined in all of the circumstances it was not.

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2. Discovery of the Escheat

[80] Second, I do not accept the Mowatts' argument that the DAG unreasonably determined they were not the discoverers of the escheat. The DAG did assume the Mowatts were the discoverers of the escheat for the purpose of s. 5(b)(iii).

[81] It appears from a careful review of their submissions to the DAG, that the Mowatts argued that in fact Ms. Marquis was the first person to take the position that the East Lot had escheated, and gave notice of her position to the Province. This leads to the conclusion that Ms. Marquis was the true "discoverer" of the escheat in all of the circumstances. However, on this judicial review, the Mowatts now argue that they were the "formal" discoverers of the escheat.

[82] The DAG accepted the Mowatts' narrative of the steps by which the escheat was ultimately discovered. However, he notes that the Mowatts were engaged in proving their claim to legal title through the litigation, not proving the Province's title by escheat. Nonetheless, the DAG appears to have assumed, for the purpose of his analysis, that the Mowatts were, in fact, the discoverers of the escheat: Decision at para. 163.

3. Refusal to Exercise Discretion

[83] Third, the Mowatts argue that the DAG unreasonably refused to exercise his discretion under s. 5(b)(iii) of the *Escheat Act* in their favour. Specifically, they argue he unreasonably:

a) listed a number of factors he considered to be relevant to the exercise of discretion, with no explanation as to where the factors come from;

b) balanced the Mowatts' claim against the City's claim; notwithstanding the City made no claim as the discoverer of the escheat; and

c) was unreasonably concerned that transferring the East Lot to the Mowatts under s. 5(b)(iii) would create a windfall for the Mowatts.

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[84] As mentioned, their arguments are considered further below, to avoid unnecessary duplication.

B. Second Issue: Legal or Moral Claim

[85] The Mowatts argue that the DAG unreasonably refused to exercise his discretion to transfer the East Lot to them, as persons who had established they had a legal or moral claim under s. 5(b)(i) of the *Escheat Act.* They say that the DAG applied an unreasonable threshold for recognising a legal or moral claim; unreasonably rejected their legal claim of proprietary estoppel; unreasonably rejected their moral claim in adverse possession; failed to consider their claims against the Company; and ultimately unreasonably failed to exercise his discretion in favour of the Mowatts.

1. Threshold

[86] The Mowatts argue that the DAG's assessment of whether they established successful claims on the grounds of proprietary estoppel or adverse possession were technical and legalistic, and that this approach "fundamentally misunderstood the purpose of s. 5(b)(i) under the *Escheat Act*". They rely upon *Mercer SCC*, *New Brunswick (Department of Natural Resources) v. Aiken*, 2009 NBCA 54 [*Aiken*], and a decision in the wills variation context of *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, 1994 CanLII 51. Their argument is:

> 164. Three appellate decisions therefore direct the Attorney General to take a flexible, justice-based approach to the question of whether the applicant has a legal or moral claim.
>
> 165. This is not the analysis that the Deputy conducted. Instead of asking himself whether the Mowatts were persons to whom the Attorney General could lawfully make a s. 5 transfer, the Deputy assumed the role of judge, minutely critiquing the Mowatts' submissions on proprietary estoppel, unjust enrichment, and adverse possession. But the Deputy is not a judge. He is the delegate of a statutory decision maker charged with exercising a discretion. If the legislature had intended that escheat claimants must advance and prove legal rights in order to qualify for s.5 transfers, it would have conferred escheat proceedings to the Supreme Court of British Columbia.
>
> 166. Instead, the legislature conferred decision-making authority on the Attorney General, with a broad discretion to grant escheated land to eligible claimants. The Deputy mistook his role and turned a threshold question

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> (does the claimant have a legal or moral claim on the person to whom the escheated land had belonged) into a legal hurdle the Mowatts were wrongly required to overcome.

[87] I cannot agree that this argument has merit. First, there was no jurisprudence brought to the attention of the DAG, nor this Court, to establish the method in which the DAG was to evaluate claims pursuant to s. 5 of the *Escheat Act.* Neither was there any jurisprudence directly on point brought to my attention to support the Mowatts' argument. Rather, the legislation itself clearly establishes that the Attorney General may exercise her discretion to transfer escheated land to a person who has established a "legal or moral claim on the person to whom" the escheated land had belonged.

[88] Second, the legislation itself clearly requires that the DAG determine whether the Mowatts' had a moral or legal claim.

[89] Upon a careful review of the Decision, I find the DAG carefully and thoughtfully considered the evidence and legal arguments made by the Mowatts, in determining whether they had a legal or moral claim on the Company, and whether that claim was sufficient for the DAG to consider exercising his discretion to transfer the East Lot to them.

2. Proprietary Estoppel

[90] The Mowatts argue that the DAG was unreasonable in rejecting their legal claim of proprietary estoppel. They argue:

a) the Company acquiesced by failing to take action to remove people who lived on the East Lot, after the Company thought they made the road dedication in 1920;

b) reliance was established by those individuals who lived and built a house on the East Lot and took other steps such as insuring the house, seeking approval for construction, and paying taxes on the East Lot; and

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c) detriment was established because the Thorpes integrated the East Lot and the West Lot, "such that their enjoyment of their registered lot became dependent on use of the East Lot", and not knowing their entitlement would be challenged, "they took no steps to quiet title before the court, either before the Company was dissolved or during the period when it could be readily revived".

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[91] The DAG found that the 1920 road dedication was inconsistent with the Mowatts' argument that the Company had represented or acquiesced in a transfer of ownership to the Gouchers. The Mowatts argue this was illogical, as it was not reasonable for the DAG to find the attempted dedication negated the representations made to squatters—namely the Gouchers—earlier in time. However, I find it was reasonable for the DAG to find that the Mowatts had not established that there was any acquiescence amounting to a representation on the part of the Company, in particular in light of the road allowance on the plan annexed to the deed of transfer to Mr. Annable in 1920. Likewise, I find his conclusion reasonable that the Company's "inaction" from the time of its dissolution in 1930 onwards was not evidence of acquiescence, but rather was due to the fact that a dissolved company is incapable of carrying out any acts: Decision at paras. 121, 123.

[92] Finally, I find his determination that the Mowatts could not establish reliance on their part, as they purchased the West Lot at a time when they knew there was a dispute over the true legal ownership of the East Lot, was eminently reasonable on the facts in all of these circumstances: Decision at paras. 127–130.

[93] Given these two findings, it is not necessary to consider the Mowatts' newly formulated argument on detriment: that in reliance on the inaction of the Company, the Thorpes did not take steps to quiet title before the Company was dissolved or during the period when it could readily be revived. I will note this was an argument that was not advanced in the manner it which it is now formulated before the DAG.

[94] I am satisfied that the DAG carefully considered the evidence and arguments that the Mowatts put forward, and reasonably concluded that they had failed to establish a legal claim of proprietary estoppel as against the Company.

3. Adverse Possession

[95] The DAG characterised the Mowatts' claim in adverse possession to be based upon a moral claim, as their legal claim had failed at the Supreme Court of Canada. The Mowatts do not take issue with this characterisation of their claim in adverse possession.

[96] The Mowatts characterise the decision of the DAG to be that a claim of adverse possession is immoral, and so cannot ground a moral claim under s. 5 of the *Escheat Act.*

[97] I do not accept that the DAG held that a claim in adverse possession is immoral. Rather, he determined that generally a claim in adverse possession is unlikely to provide a basis for a moral claim against a land owner for the purposes of the *Escheat Act*, as in most cases such a claim seeks to defeat the legitimate owner's interest in land. He did not conclude that a claim in adverse possession could never give rise to a moral claim: Decision at paras. 63, 155. This decision is reasonable on its face, in light of all of the circumstances.

[98] The Mowatts rely on *Aiken* as authority for the proposition that long occupation of the land, even if not sufficient to ground a legal claim, may nonetheless ground a moral claim to escheated land. Their argument before the DAG was that their own claim in adverse possession had come close to success, as the Court of Appeal had found in their favour.

[99] However, I agree with the DAG's determination that the *Aiken* decision was of limited guidance, as New Brunswick's escheat legislation is much broader than ours. Their legislation allows for consideration of a moral claim on the person to whom the land belonged, or alternatively, to the property itself. Our legislation does not

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recognise moral claims to the property itself, but only claims against the person to whom the land belonged.

[100] Further, I find the DAG's determination that it was not relevant that they claimed they had been "close to success" to be reasonable. The Mowatts failed in their legal claim based in adverse possession, and the Supreme Court of Canada concluded that the East Lot had in fact escheated to the Crown in 1930 or 1931. I do not accept the Mowatts' argument their alleged "near success" was a factor to be considered in the exercise of his discretion.

[101] The DAG concluded that the Mowatts did not have a moral claim against the Company. Essentially, he concluded that the Company's mistake with respect to the road allowance, did not give the Mowatts any moral claim against the Company. This was a reasonable conclusion in all of the circumstances.

4. Alleged Claims against the Company

[102] The Mowatts' argue that the DAG unreasonably failed to consider the Mowatts' claims against the Company for what they say is the "heavy burden they have borne in quieting title to the East Lot", and in concluding that no such claim could arise against the Company. They argue that the Company allowed itself to be dissolved while it was still the owner of the East Lot, with a squatter's house standing on it, and subject to an ineffective road dedication.

[103] First, they say that the DAG's conclusion that they did not incur costs in quieting legal title to the East Lot (because they incurred those costs in attempting to prove their own legal title to the East Lot) was a peremptory conclusion, with no rational chain of analysis, and was illogical. They argue that they "were forced into lengthy and expensive court proceedings to resolve problems the Company caused by its neglect of the East Lot, and its disorderly dissolution, decades earlier".

[104] Second, related to their allegation of a claim against the Company, the Mowatts' argue that the DAG considered that they knew there was an issue with the ownership of the East Lot when they purchased the West Lot from Ms. Marquis.

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They say his determination that this decreased the strength of their connection with the East Lot was an illogical proposition. They argue there was no rational connection between their knowledge of the cloud on title to the East Lot and the strength of their connection to the East Lot. They say this argument, pursued to its logical conclusion, would mean no one should have ever bought the West Lot (despite its good title), as the West Lot and the East Lot are functionally one property. They say this is an unreasonable interpretation of s. 5(b)(i) of the *Escheat Act.*

[105] First, I accept that the DAG's determination that both the Mowatts' and the City's expenses for litigation and research did not rise to the level of a legal or moral claim against the Company under the *Escheat Act* is reasonable, in light of the fact they failed to establish either a legal or moral claim as against the Company. I accept the City's argument that to find otherwise is illogical, as it would mean that money spent litigating unsuccessful claims could, in an of itself, be sufficient to establish a claim. Such an illogical determination would incentivise litigation, if the mere expenses of that litigation would form the basis of a claim to the land.

[106] Second, I do not accept that the DAG either blamed the Mowatts, nor did he find they should not have bought the West Lot. Rather, he reasonably concluded that their alleged claim against the Company, arising from their use of, or improvement to, the East Lot should be tempered in all of the circumstances by their knowledge that ownership of the East Lot was in dispute at the time they purchased the West Lot.

5. Refusal to Exercise Discretion

[107] The Mowatts argue that the DAG unreasonably refused to exercise his discretion under s. 5(b)(i) of the *Escheat Act* in their favour in that he:

a) feared giving a windfall to the Mowatts;

b) equated the strength of the Mowatts' and the City's claim to the East Lot;

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c) allowed the City to buy the East Lot having found the City had no use for it; and

d) directed an auction the Mowatts' say they cannot hope to win.

[108] Again, these arguments are considered further below, to avoid unnecessary duplication.

C. Third Issue: Refusal to Exercise Discretion

[109] The Mowatts argue that the DAG's refusal to exercise his discretion in favour of the Mowatts was unreasonable in five ways: he considered unreasonable additional factors; he wrongly balanced both parties' claims of discovery; he improperly considered the Mowatts' potential windfall; he equated the strength of the Mowatts claim and the City's claim; and he allowed the City to participate on a bid for the East Lot.

1. Relevant Factors

[110] The Mowatts point to the factors the DAG identifies as relevant to his exercise of discretion in these two competing applications, as set out above at para. [69], and argue that it is not clear where these factors come from, nor how they relate to the circumstances of discovery such that they indicate whether a reward is suitable in all of the circumstances.

[111] I am satisfied that the DAG, in all of the circumstances, clearly set out the basis for his decision whether or not to exercise his discretion in favour of either the Mowatts or the City pursuant to their claims advanced under s. 5 or s. 11 of the *Escheat Act.* The Mowatts advanced a claim pursuant to s. 5(1)(b)(i) and (iii), and the City advanced a claim pursuant to s. 5(1)(b)(ii). They both advanced claims pursuant to s. 11 of the *Escheat Act*.

[112] What is reasonable in a given context depends upon the constraints imposed by the legal and factual context of the decision under review: *Vavilov* at para. 102. In these circumstances, s. 5 of the *Escheat Act* grants the DAG broad discretion.

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The DAG was considering competing applications at the same time. In those circumstances, the clear elucidation by the DAG of the factors he considered relevant to his exercise of discretion are both coherent and reasonable. They provide a clear basis for his analysis of the Mowatts' claim pursuant to s. 5 of the *Escheat Act,* and his ultimate refusal to exercise his discretion in their favour. While it is not clear where the DAG obtained these factors, from a careful review of the entirety of the Decision I am unable to say in the context of the *Escheat Act* and the relevant jurisprudence, that any of these factors were unreasonable considerations for the DAG when considering whether or not to exercise his discretion under either s. 5 or s. 11 of the *Escheat Act.*

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2. Balancing of Claims

[113] The Mowatts argue that the DAG's analysis of the exercise of his discretion is framed as balancing their claim against the City's claim, but that the City made no claim as the discoverer of the escheat pursuant to s. 5(1)(b)(iii) of the *Escheat Act.* They argue that with respect to the discovery of the escheat the DAG should have only have weighed their claim, and if he had done so, then the analysis clearly should have pointed transferring the East Lot to the Mowatts.

[114] However, the context of the Decision is critical. The DAG was balancing not only two applications, but also considered the history of the litigation to date. Pursuant to s. 5(1)(b)(iii), he had broad discretion to determine whether it was appropriate to reward the Mowatts, even if they were the "formal" discoverers of the escheat. I am satisfied that in making that determination, he considered appropriate factors, as listed above. Further, I am satisfied that in the context of this piece of land, he reasonably balanced the competing interests of the Mowatts and the City, and arrived at a reasonable, thoughtful, and intelligible decision not to exercise his discretion to reward the Mowatts as the discoverers of the escheat.

3. Windfall

[115] The Mowatts argue that the DAG was concerned that transferring the land to the Mowatts under s. 5(b)(iii) would create a windfall for them. They say that the

Escheat Act clearly gives the Attorney General the discretion to reward discoverers of the escheat, and so it expressly allows any such alleged windfall to be conferred. They argue that this purpose is to incentivise people to regularise legal title, and to protect the Crown from unknown liabilities.

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[116] In any event, they reject any suggestion that they either sought, or would obtain, a windfall if they received a transfer of the East Lot. Rather, they argue that they purchased the East Lot from Ms. Marquis, and the Decision creates a windfall for the Province.

[117] I cannot agree with this proposition. The Mowatts rely upon the finding of the Court of Appeal that the evidence demonstrated that “whatever interest Mr. Thorpe’s daughter had in the [East Lot] was transferred to the Mowatts in 1992”: *Mowatt BCCA* at para. 49. However, this decision was overturned: *Mowatt SCC* at para. 3. It is the Supreme Court of Canada’s conclusion in *Mowatt SCC* that the East Lot escheated to the Province in 1930 or 1931 that is the binding factual determination. This conclusion confirms that at the time Ms. Marquis sold the West Lot to the Mowatts, the East Lot had, in fact, long before, escheated to the Province. It follows then that Ms. Marquis had no interest in the East Lot in 1992, and so the Mowatts did not in fact purchase the East Lot at that time. Accordingly, I cannot accept their proposition that they did not obtain the East Lot for free, but that they bought it from Ms. Marquis for $192,000.

[118] Second, the decision of the DAG that the Mowatts were engaged in proving their claim to legal title through the litigation, not in proving the Province’s title by escheat, is reasonable in all of the circumstances. For reasons already set out above, his conclusion that they did not incur costs in quieting legal title to the East Lot, but rather incurred them in an attempt to obtain legal title for themselves, was a reasonable one.

[119] Finally, the Mowatts argue that the DAG’s Decision actually results in a windfall for the Province. They say the Province earns the purchase price for the land twice (once when it was initially sold in 1889 and again in the 2020s), and that

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the Province takes the benefit of the Mowatts' decades of effort to quiet and regularise title to the East Lot. Further, they say that as the DAG set market value for the East Lot as the minimum price for the auction, each party must bid more than market value if they wish to acquire the land. They argue that this outcome is unreasonable on its face, and is contrary to the principles of escheat. They argue that the Attorney General's role under the *Escheat Act* is to exercise the Crown's discretion to redress wrongs, protect the injured, and advance the interests of justice—not to profit from the misfortune and injury caused to blameless citizens when a lapse in the chain of title occurs. They argue that the DAG "made no effort to explain why an auction of the East Lot in which the Province will profit best reflects the legislature's intention".

[120] However, I do not find that anything in the Decision is inconsistent with general jurisprudence from other jurisdictions that makes clear escheat is not meant to be a windfall to the Crown in the face of a party who has been injured by the former owner of the land. The DAG determined that the Mowatts did not have a legal or moral claim to the East Lot, pursuant to s. 5(b)(i). He likewise determined that even if they were the "formal" discoverers of the escheat, he was not satisfied it was appropriate to exercise his discretion to reward them pursuant to s. 5(b)(iii). After making those determinations, he chose, pursuant to s. 11 of the *Escheat Act*, to design an objective process to determine which party would acquire the land. Section 11 gives significant discretion to the Attorney General to sell the escheated property "at the price and on the terms" as may be determined. The process he chose was a fair and reasonable exercise of his discretion under the *Escheat Act.*

4. Strength of Competing Claims

[121] The Mowatts' argument is that the DAG rejected the s. 5 applications of both the Mowatts and the City, and concluded by equating the strength of the two claims. They say his conclusion is simply not tenable in all of the circumstances, and that a review of the discretionary factors identified by the DAG show the Mowatts have a far stronger claim to the East Lot.

[122] However, I am unable to accept that premise. The Decision clearly shows that the DAG carefully reviewed each of the Mowatts and the City's s. 5 applications, in significant detail, and carefully reviewed the facts he determined to be relevant to the exercise of his discretion in this matter: Decision at paras. 210–225. After doing so, he concluded that while both of their submissions were compelling, both were inadequate to support an exercise of his discretion in their favour. He declined to exercise his discretion in favour of either.

[123] The DAG did not consider whether the Mowatts or the City had a stronger claim; rather, he determined that neither had established a claim sufficient to cause him to exercise his discretion pursuant to s. 5 of the *Escheat Act.*

5. Auction

[124] The Mowatts argue that the DAG's decision to sell the land in a sealed bid sale between them and the City was unreasonable in four ways.

[125] First, the Mowatts argue that the DAG unreasonably allowed the City to buy the East Lot after having found the City had no use for it. Specifically the DAG determined:

> [216.] The interest pursued by the City is primarily in relation to the use of the Land as a road allowance, although the City has indicated a number of associated uses as well.
>
> [217.] It does not appear from the facts provided that the need for a road allowance continues to exist, nor for the other possible uses identified by the City.

[126] However, the "proposed uses of each of the parties for the Land" was only one of the factors the DAG considered relevant to the exercise of discretion. He clearly noted that this factor favoured the Mowatts, "as their proposed future use would be consistent with the status quo use of the Land to date": Decision at para. 219. He characterised this as a compelling, but not determinative, factor. I cannot find this conclusion was unreasonable in all of the circumstances.

[127] Second, the Mowatts argue that the consequences of the Decision upon them are severe: they say that they have lived on the property for 30 years, and they face

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the real prospect of being outbid by the City and losing part of their home. They say in the circumstances the Decision had particularly harsh consequences for them, and so the DAG was required to "explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood": *Vavilov* at para. 133. They argue he failed to do so. However, the DAG clearly rejected the Mowatts' s. 7 claim pursuant to the *Charter of Rights and Freedoms.* The Mowatts do not argue that this finding was in error. They do not now assert that the Decision nevertheless had consequences that threatened their life, liberty, dignity or livelihood and required any special consideration or justification on that basis. Rather, they say that they have lived on the property for 30 years, and they face the real prospect of losing part of their home, which deserves significant consideration. The Decision reasonably considered that argument, and clearly and articulately addressed why it was not persuasive in all of the circumstances.

[128] Third, the Mowatts argue that the DAG directed an auction take place between the Mowatts and the City, without offering any explanation as to why that is an appropriate remedy in the circumstances. They argue that the City—as a governmental authority— has far greater purchasing and borrowing power than most private citizens, and so the DAG "created a scheme by which the City can take the land at will". However, I accept the City's argument that the Mowatts have provided no evidence of their income or their assets, and so there is no basis for such a finding. Further, the City is constrained by the fact that it is accountable to the public in how it spends resources, whereas the Mowatts do not have these constraints.

[129] Finally, the Mowatts argue that the Decision gives a preference to the City, without a statutory basis for doing so. However, for the reasons already set out, I disagree.

[130] I am satisfied that the Decision exhibits a clear line of reasoning that supports the DAG's ultimate determination. He clearly sets out why the Mowatts' legal and moral claims failed, and listed and explored all of the factors he determined were

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relevant to his conclusion not to exercise his discretion pursuant to s. 5 of the *Escheat Act.* Although not put this way, his conclusion amounts to a determination that the Mowatts were not an injured party deserving of a grant of land pursuant to the *Escheat Act.* After finding that neither the Mowatts or the City had established a claim under s. 5 of the *Escheat Act*, he determined that an auction under s. 11 of the *Escheat Act* was the best way to bring this protracted controversy to a final conclusion. He gave the Mowatts and the City an opportunity no one else has—to purchase the East Lot. In these unusual circumstances, this determination is justified.

D. Fourth Issue: Transfer of the East Lot to the Mowatts

[131] Although my determination that the Decision is reasonable means I need not consider whether it is appropriate to refuse to remit the matter back to the Attorney General, for the sake of completeness I will address this issue briefly.

[132] The Mowatts argue that this is a matter in which remitting it back to the Attorney General would "stymie the timely and effective resolution of matters in a manner that no legislature could have intended": *Vavilov* at para. 142. They ask me to refuse to remit the matter back to the Attorney General, and rather order that the East Lot be transferred to the Mowatts. The Mowatts argue the East Lot should be conveyed to them as: there has been considerable delay; any further delay would be unfair to the Mowatts; they have already expended hundreds of thousand of dollars on this matter; and this Court should be spared from an "endless merry-go-round of judicial reviews and subsequent reconsiderations": *Vavilov* at para. 209.

[133] Had I found the DAG's decision to be unreasonable, none of their arguments would have persuaded me it was appropriate to exercise my discretion and depart from the normal remedy of remitting this matter back to the DAG for reconsideration Sections 5 and 11 of the *Escheat Act* provide the DAG with wide discretion, including the power to transfer or sell escheated land on the terms he finds appropriate. I am not satisfied that their critiques of the DAG's Decision establish there was only one reasonable result available to him, nor that the only available

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reasonable result he could have arrived at was transferring the East Lot to the Mowatts. Even if I had concluded that his Decision was unreasonable for any reason, I would not have concluded that the arguments of the Mowatts rise to the level it would have been appropriate to exercise my discretion and substitute my own determination.

VIII. DISPOSITION

[134] The Mowatts have not demonstrated that the Decision was unreasonable, and so their petition is dismissed, with costs payable to the City.

[135] Thank you to counsel for their helpful written submissions and eloquent oral arguments.

"Blake J."

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