COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Mowatt v. British Columbia (Attorney General),* 2024 BCCA 157

Date: 20240426
Docket: CA49387

Between:

Mary Geraldine Mowatt and Earle Wayne Mowatt

Appellants
(Petitioners)

And

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

Respondents
(Respondents)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Horsman
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated September 8, 2023 (*Mowatt v. British Columbia (Attorney General)*, 2023 BCSC 1583, Vancouver Docket S2111001).

Counsel for the Appellants:	G. van Ert S.L. McHugh F.A.M. Harland
Counsel for the Respondent, Attorney General of British Columbia:	D.G. Cowie
Counsel for the Respondent, Corporation of the City of Nelson:	A.S. Boucher E. Friedman
Place and Date of Hearing:	Vancouver, British Columbia March 11, 2024
Place and Date of Judgment:	Vancouver, British Columbia April 26, 2024

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Horsman
The Honourable Justice Winteringham

Summary:

Appeal from judicial review of a decision of the Deputy Attorney General ("DAG") pursuant to the Escheat Act, rejecting appellants' claims for transfer of property ("East Lot") to them and ordering a blind auction to occur between the appellants and respondent City. East Lot adjoins a parcel owned by the appellants ("West Lot"). In 1920, a company that owned East Lot purported to dedicate it as a road allowance in favour of the City, but dedication was unsuccessful and title to East Lot lapsed when company was dissolved. East and West Lots have been landscaped as a single property, and appellants have used them for residential purposes since they purchased all rights of previous owner in both Lots in 1992. Since then, title to East Lot has been the subject of litigation.

Supreme Court of Canada held in 2017 that East Lot had escheated to the Crown in 1930 or 1931. The Escheat Act permits the Province to transfer escheated land to certain persons, including persons with a "moral claim" or persons who "discovered" the escheat. Competing applications by Appellants and City were filed with Attorney General for transfer of the East Lot under ss. 5 and 11 of the Act. Attorney General appointed DAG as his delegate under the Act and in 2021, DAG decided that neither application should be granted. He ordered blind auction under which either party could bid at price not less than assessed value of East Lot. On judicial review, decision was upheld as reasonable. On appeal, the appellants allege that the judge failed to conduct a proper reasonableness review, and that when reviewed properly, DAG's decision is not reasonable. City did not appeal.

Held: Appeal allowed. DAG's decision is not reasonable under the Vavilov analysis, He failed to address appellants' "moral claim" in light of the entire legal context, including purposes of the Crown's prerogative to transfer escheated land, as confirmed by s. 5 of the Act; failed to state a conclusion on whether appellants had a "moral claim"; failed to decide whether they had "discovered" the escheat and, assuming they had, failed to explain why discovery alone was insufficient to merit transfer to the appellants. Justification, transparency and intelligibility of decision were undermined within the meaning of Vavilov. CA remitted the matter to the Attorney General for reconsideration.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This appeal and the many related legal proceedings that have preceded it are the result of the purported dedication of a 40' by 52' area of land near Nelson, B.C. as a road allowance in 1920. The grant was made by the then owner of the land, the Nelson City Land and Improvement Company ("NCLIC") in favour of the City of Nelson. Unfortunately, the plan of the dedicated area prepared for registration purposes did not comply with applicable requirements: the area was not outlined in

red on the reference plan (Plan 89281) referred to in the legal description of the property, and no approving officer signed the plan. Given that the plan was never corrected or registered, no roadway ever came into existence; nor has the City ever used the land as roadway. The property remained owned by NCLIC, which had purchased it in 1891. NCLIC's title was never registered in "indefeasible title"; rather, it was registered in 1891 in "absolute fee". I will refer to the property as the "East Lot".

[2] NCLIC also owned a larger piece of land to the immediate west of the East Lot. Both properties were bounded by Kootenay Lake to the north and a railway corridor to the south and were within the confines of an area called Fairview. It became part of the City of Nelson in 1921.

[3] Evidently, NCLIC was owned, or at least controlled, by Mr. John Annable. In late 1920, the company conveyed to him approximately 1.58 acres located to the west of the East Lot, but *not* the East Lot itself, which he presumably considered to be road allowance. (It may also have been occupied by 'squatters' at the time.) Mr. Annable's title to the 1.58 acres was registered in "indefeasible title" on December 7, 1920. In 1922, the easternmost 70 feet of the parcel (i.e., the land bordering on the East Lot) was purchased by Mr. Herbert Thorpe, creating what the parties have called the "West Lot".

[4] As already suggested, the East Lot has been the subject of much litigation: see 2014 BCSC 988, 2014 BCSC 2219 (both decisions of Mr. Justice Kelleher), and 2016 BCCA 113*, rev'd* by 2017 SCC 8. In his first reasons, Kelleher J. described the details of NCLIC's dissolution:

> Since the "road allowance" on Reference Plan No. 8928I was never properly dedicated as such in 1920 or thereafter, NCLIC continued to be the registered owner in absolute fee of the Disputed Area [the East Lot] .
>
> In early August 1929, the Registrar of Companies wrote to NCLIC and warned that corporate filings had not been made for two consecutive years, and that dissolution of the company could result.

> NCLIC replied on August 16, 1929. It was prepared to have itself struck off the list of registered companies. The letter explained why:
>
> > … the Company disposed of its assets several years ago to J.E. Annable, of Nelson, B.C., and … the Company then having no assets and no liabilities the Directors and Officers retired and it was not deemed necessary to either elect new officials nor to incur any other expenditure in winding up the Company.
>
> It would seem from this letter that NCLIC believed the Disputed Area had been properly dedicated as a road allowance.
>
> On November 13, 1930, NCLIC was dissolved. [At paras. 41–45; emphasis added.]

[5] As noted by Kelleher J. (and later confirmed by the Supreme Court of Canada) the East Lot escheated to the Crown as a result of NCLIC's dissolution, in accordance with what was then s. 3A of the *Escheat Acts*, R.S.B.C. 1924, c. 81, as amended by S.B.C. 1929, c. 23, s. 2. The Supreme Court of Canada found that escheat occurred in either 1930 or one year later, when the escheat became 'absolute'. The fact of the escheat, however, was *unknown to anyone until 2014,* when Kelleher J.'s first reasons were released.

[6] Mr. Thorpe and his family succeeded the Cooper and Goucher families, respectively, in occupation of the East Lot. The Thorpes built a house on the West Lot, living in the smaller building (later destroyed by fire) on the East Lot during construction. A larger stone house was erected on the West Lot and when Mr. Thorpe's daughter married in 1932, Mr. Thorpe rebuilt the building on the East Lot, where his daughter, now Mrs. Marquis, and her husband began living. In 1958, Mr. Thorpe transferred the West Lot to his children. (The legal description of the transferred lot referred to the land west of the "westerly boundary of the Road Allowance shown on Reference Plan [No. 89281]".) The Marquises moved into the stone house on the West Lot after Mr. Thorpe died in 1961.

[7] Between 1923 and 1962, the City taxed the two Lots essentially as a single parcel. It was not until Mr. Thorpe died that an annotation identifying the East Lot as a "road allowance" was added to the tax roll. Nelson then began to tax the

Marquises for the East Lot as a separate parcel and as “occupiers” of a “road allowance”. They continued to pay what was demanded.

[8] The Province, the City of Nelson, and Mrs. Marquis took disparate positions regarding the East Lot over the years. These were described in general terms by Kelleher J. in his first reasons as follows:

> There has been considerable confusion over the years as to who owns the Disputed Area [the East Lot]. None of the parties can be accused of consistency in the positions they have all taken.
>
> The Province has at times taken the position that the Disputed Area is a road allowance and therefore belongs to the City. At other times, it has claimed that the land escheated to the Crown upon the dissolution of NCLIC.
>
> The City formerly took the view that the land is a municipal road allowance. In the past, the City has directed the petitioners and the former owner, Ms. Marquis, to remove their buildings from the Disputed Area on the basis of it being City land. The City now concedes that the Disputed Area never was a road allowance and never belonged to the City. The City agrees with the Province that the Provincial Crown owns the Disputed Area by escheat.
>
> Ms. Marquis, based on the City’s claim that the Disputed Area constituted a road allowance at the time, asked the City for a life estate in the lot in 1979. In 1980, she asked the Province to sell her the land.
>
> The petitioners have at various times stated that the Disputed Area’s buildings encroach on City land, have asked the Province to sell them the land, and have also alleged that the land was theirs. [At paras. 55–59; emphasis added.]

Shortly after Mr. Marquis’s death in late 1977, the City entered the East Lot and surveyed it. A year later, the City directed Mrs. Marquis to remove her house and shed from the East Lot. She attempted twice to buy the East Lot from the Province in the 1980s on the basis that it had escheated to the Crown, but the Province insisted it was a road allowance or municipal right-of-way. In 1992, Mrs. Marquis sold her interests in both the West and East Lots to the appellants herein, Mr. and Mrs. Mowatt. I note parenthetically the Mowatts’ acknowledgment in a written argument filed in 2018 that it was Mrs. Marquis who had first identified the possibility of escheat. The Mowatts of course were her successors in title.

[9] In 1998, the City demanded that the Mowatts remove the small house on the East Lot within 60 days. In the reasons now under appeal (see 2023 BCSC 1583), the chambers judge below recounted:

> ... 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.
>
> In 2003 the City again renewed its demands for the removal of the house on the East Lot, and when the Mowatts refused, [the City] instructed a contractor to remove the house. Ultimately, the house on the East Lot was not removed. [At paras. 23–4; emphasis added.]

[10] By 2004, a provincial body called Land and Water British Columbia ("LWBC") had also become involved:

> 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 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. [At para. 26.]

I emphasize that all of this took place before it was known that the East Lot had in fact escheated to the Province in 1930 or 1931.

[11] As Kelleher J. noted at para. 26 of his first reasons, there is at present no "visible boundary" between the East and West Lots. We were referred to some photographs as well as a diagram prepared by the Public Works Department of the City that show the existence of similar rock walls interconnecting along the lakeside of the two Lots, as well as a fountain installed by the Mowatts and a separate building, now used for storage, on the East Lot. The effect of the improvements is that the two Lots give the appearance of a unified whole.

[12] The Mowatts commenced their first proceeding under the *Escheat Act*, R.S.B.C. 1996, c. 120, against the City and the Province by petition in 2005, but it

proceeded slowly and was ultimately stayed. In May 2013, they changed direction and filed a new petition invoking the procedure under the *Land Title Inquiry Act*, R.S.B.C. 1996, c. 251 ("LTIA"), formerly known as the "*Quieting Titles Act*". The LTIA allows a person who purports to have an estate or interest in land, or the Attorney General, to apply to the Supreme Court of British Columbia for an investigation of the title and a declaration of validity. This petition was heard in the Supreme Court and was rooted in the Mowatts' claim that they were entitled to the East Lot "by way of adverse possession". In order to succeed, they had to establish that the East Lot was acquired by continuous adverse possession against the 'paper owner' for 20 years before it became Crown land in 1930; or for 60 years before May 1, 1970, when s. 6 of the *Land Act*, S.B.C. 1970, c. 17, eliminated the doctrine of adverse possession against Crown land. (See generally Kelleher J.'s first reasons at paras. 19–23.)

[13] The Mowatts were not successful in satisfying the Court of continuous adverse possession of the East Lot for the 20-year period beginning in 1910. Kelleher J. found a "sizable evidentiary gap" between 1916, when it was known Mr. Cooper had lived there, and 1920, when the Goucher family lived there. In the Court's words:

> Putting the petitioners' case at its highest again, even if I find the Cooper and Goucher residences were one and the same and on the Disputed Area, there is no evidence of continuity of the Coopers' adverse possession with the Gouchers. In arriving at my conclusions, I am cognizant of the standard of record-keeping nearly a century ago; however, I am not satisfied that the evidence is "as satisfactory as could reasonably be expected, having regard to all the circumstances": *Tweedie* at 220. The fact that the Gouchers are recorded as living back on Baker Street in Nelson in 1916 is not something I can ignore. Further, according to Ms. Mowatt's Affidavit #1, the 1918 Directory lists neither the Coopers nor the Gouchers. The petitioners have provided no evidence of adverse possession of the Disputed Area for 1917-1919. [At para. 108; emphasis added.]

[14] As required by s. 11 of the LTIA, Kelleher J. gave the Mowatts an additional 30 days after his initial ruling to provide further evidence. Such evidence was provided, but the Court remained unpersuaded that continuous occupation of the

East Lot had been shown. In dismissing the Mowatts' prayer for costs in any event of the cause, he added:

> I am mindful of the fact that the petitioners have not brought the petition out of any public interest. They seek to retain land which the Crown wishes to convey to the City. Moreover, they were aware of the dispute over the parcel of land from the time they purchased it. [At para. 56 of 2014 BCSC 2219; emphasis added.]

[15] In 2016, this court allowed an appeal from the Supreme Court's order dismissing the adverse possession claim (see 2016 BCCA 113), finding that Kelleher J. had not fully addressed the Mowatts' evidence concerning the occupancy of the East Lot between 1916 and 1920. (See in particular paras. 100–109.) The Court of Appeal set aside the orders made in the Supreme Court; declared that possession of the Disputed Area (i.e., the East Lot) had begun no later than December 1909 and continued until at least February 1923; and remitted the remedies sought by the petitioners to the Supreme Court for final determination under the LTIA.

[16] In 2017, however, the Supreme Court of Canada allowed the City's appeal and restored the chambers judge's finding that the Mowatts had failed to establish uninterrupted adverse possession between 1916 and 1920 — even while acknowledging that the Court of Appeal's finding of continuous possession was "not unreasonable." (At para. 38.) The Supreme Court relied on the applicable standard of review to find reversible error in this court's intervention. (See 2017 SCC 8.) Interestingly, the Supreme Court noted that an adverse possessor who successfully obtains title need not be the same person whose possession triggered the running of the limitation period. Thus in the words of Justice Brown, successive adverse possessors can 'tack' onto the original adverse possession, "provided the possession is continuous in the sense that there is always someone for the true owner to sue." (At para. 18.)

[17] After receiving the Supreme Court of Canada's reasons, the Mowatts applied for relief under the *Escheat Act*, as did the City of Nelson. (The Mowatts also sought to buy the East Lot at a preference under s. 11 if they failed under s. 5.) Both

"competing applications" of the Mowatts and the City under the *Escheat Act* were delivered to the Attorney General in 2018.

The Law of Escheat

[18] The chambers judge below neatly summarized the principle of escheat and its two purposes as follows:

> 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, [*Mercer SCC*]; *Attorney General (Ontario) v. Mercer*, [1883] UKPC 42, 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*].
>
> 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. [At paras. 38–9; emphasis added.]

[19] Since this appeal is less about the law of escheat than it is about the remedies provided by the *Escheat Act after* land has escheated, I will resist the temptation to review the interesting (but obscure) history of escheat at common law, as supplemented by many statutory provisions over many centuries. Most lawyers will know that escheat began in the feudal system of land tenure dating from around the time of the Norman Conquest. The Crown seems always to have had the prerogative to restore or transfer escheated land to persons who 'traversed' the Crown's entitlement, at that time mainly family members of deceased owners. A complex procedure ("inquest of office") developed for the investigation of such traverses by governmental officials or local commissioners with the assistance of 12-person juries. (This was necessary given that Article 39 of the *Magna Carta* prohibited the sovereign from 'disseizing' any "free man" except by "legal judgment of his peers or by the law of the land.")

[20] In the Victorian period, many reforms were introduced to prevent abuses on the part of government agents carrying out the inquests. I refer the reader to

Frederick W. Hardman, “The Law of Escheat”, 4 L.Q.R. 318 (1888) for a learned discussion of the history of escheat. Notably for our purposes, at the time Mr. Hardman’s article was written, the *Intestates’ Estates Act, 1884* (U.K.), 47 & 48 Vict., c. 71, had recently been passed in England. That statute confirmed the authority of the Crown:

> … when entitled by escheat, to make grants of the escheated lands, for the purpose of restoring the same to any of the family of the person whose estates the same had been, or of carrying into effect any intended grant, conveyance or devise of any such person in relation thereto, or of rewarding any person or his family making discovery of any such escheat. [At 342; emphasis added.]

These provisions have been carried forward in the *Escheat Act* provisions that concern us in this appeal.

[21] As far as the history of escheat in Canada is concerned, authors Andrew MacKay, Ingrid Tsui and Amanda Winters write in “The Law of Escheat in Canada”, 34 Est. Tr. & Pensions J. 40 (2014) that the law of escheat became a cause célèbre in pre-Confederation Prince Edward Island, as well as the subject of dispute between the federal and provincial governments immediately after Confederation. The question of constitutional jurisdiction over escheat was ultimately settled in favour of the provinces by the Privy Council in *Ontario (Attorney General) v. Mercer* (1882–83) L.R. 8 App. Cas. 767, reversing (1881) 5 S.C.R. 538.

[22] Canada and each of the provinces now have modern forms of escheat legislation vastly different from that in force in England, even in the late 19th century. Of course the land registration systems of many of the provinces, including British Columbia’s invaluable Torrens system, have made escheat very rare in Canada. Victor DiCastri writes in *Registration of Title to Land*, vol. 1, §101 that the most frequent cause of escheat under modern Canadian statutes is the ‘deemed’ dissolution of corporations following their failure to file returns required by provincial corporations authorities; and indeed as we have seen, it was the dissolution of NCLIC following its failed dedication of a road allowance that led to the escheat of

the East Lot in 1930 — though again, that fact was not known with any certainty until 2014.

The Escheat Act of British Columbia

[23] As the chambers judge below noted, the *Escheat Act* does not attempt to codify the common law, but "exists alongside it". (At para. 44.) I reproduce below those sections of the *Escheat Act* of British Columbia that are relevant to this appeal. First, s. 3(1) states:

> 3 (1) If a person dies without an heir and intestate in respect of any real estate consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditament, or of any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the will of that person, the law of escheat applies in the same manner as if that estate or interest were a legal estate in corporeal hereditaments.

Section 4, first introduced in British Columbia in 1924, deals with the escheat of land on dissolution of a corporation in the following terms:

> 4(1) If a corporation is dissolved, land in British Columbia owned by or to which the corporation is entitled at the time of its dissolution escheats to the government.
>
> (2) The law of escheat and the provisions of this Act apply in respect of that land in the same manner as if a natural person had been last seised or entitled to it and had died intestate and without lawful heirs.
>
> (3) The Attorney General must not, within 2 years from the date of the dissolution of a corporation, make any grant or other disposition of land of the corporation which escheats to the government.
>
> (4) If, within 2 years from the date of its dissolution, a corporation is revived under any Act, the revival has effect as if the land of the corporation had not escheated to the government, and, subject to the terms of any court order, the land vests in the corporation.
>
> (5) If an application is made to the Supreme Court to revive a corporation after the expiry of the 2 year period referred to in subsection (4) or is made in respect of a corporation that has been revived after that period, the Supreme Court may, if notice of the application has been served on the government, order that land of the corporation that had escheated to the government under this section vest in the corporation. [Emphasis added.]

[24] Section 5 confirms the authority of the Crown to restore or transfer land that has escheated, to certain persons. It provides:

> 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. [1]
>
> [Emphasis added.]

Again as noted by the chambers judge, the Province benefits from receiving notice that it has "come into title" so that it may take appropriate steps to preserve the value of the property. The reward for discovery provided by s. 5(b)(iii) "encourages that result." (At para. 43.)

[25] Finally, ss. 11–13 provide:

> 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.
>
> 12 If any property or any interest, legal or equitable, in it, has escheated or become forfeited to the government, the Attorney General may do one or more of the following:
>
> (a) appoint a person to take possession of it, or of any part of it, and manage it for the time the Attorney General thinks proper;
>
> (b) rent it or any part of it;

[1] The wording of s. 5 is essentially the same as s. 4 of the Province's first *Escheats Act*, S.B.C. 1898, c. 21. Canada's *Escheats Act*, R.S.C. 1985, c. E-13, uses broader wording, referring to "any person who … had a legal or moral claim on the previous owner, or a just and natural right or claim to succeed to the previous owner's property or to any part thereof." (s. 3(a).) It does not appear that the notion of "moral claim" was ever adopted in England, despite the many statutes that were adopted over the centuries broadening the scope for escheated land to be transferred by the sovereign to other persons.

> (c) sell it or any part of it by private sale;
>
> (d) advertise it or any part of it for sale by tender;
>
> (e) cause it or any part of it to be sold by public auction under the conditions the Attorney General considers proper.
>
> 13 (1) Any money arising from the exercise of the powers conferred by section 12 is freed from any claims on it, whether legal, equitable or moral, and must be paid into the consolidated revenue fund.
>
> (2) If the Attorney General is satisfied that a person had a legal, equitable or moral claim on money paid into the consolidated revenue fund under subsection (1), the Attorney General may authorize the Minister of Finance to pay to that person out of the consolidated revenue fund an amount of money the minister considers appropriate. [Emphasis added.]

Decision of the Deputy Attorney General

[26] Both the Mowatts and the City of Nelson applied for the transfer of the East Lot under the *Escheat Act* — the Mowatts relying on ss. 5(b)(i), 5(b)(iii) and 11, and the City on ss. 5(b)(i) and (ii) and 11. The parties filed their final submissions to the Attorney General in June 2018. The Attorney designated Mr. Richard Fyfe, K.C. as his delegate for purposes of determining the "competing claims," presumably acting under s. 1.1 of the *Escheat Act*, which states:

> 1.1 In this Act, "Attorney General" in a section includes a person designated by the Attorney General for purposes of the section.

(See also s. 23(1) of the *Interpretation Act*, R.S.B.C. 1996, c. 238.) Like counsel, I shall refer to Mr. Fyfe as the "DAG", intending no disrespect. The decision was reserved for approximately three years until the release of his decision on July 29, 2021.

[27] The DAG began his reasons by summarizing the history of the "Land" (i.e., the East Lot) in very general terms. He then set out the overall conclusion he had reached, namely that:

> … neither of the applicants has made out a successful claim for a transfer based on the identified provisions of the *Escheat Act*. Instead, I recommend a process for disposition of the Land which is intended to provide a fair opportunity to both parties. This is discussed further below. [At para. 14; emphasis added.]

[28] Then followed a detailed description of the East Lot, the appraised value of which had been $225,000 in 2004. The DAG recounted the past legal proceedings involving the East Lot and LWBC, to which the Mowatts had applied in 2004 to purchase the East Lot as Crown land. LWBC had turned down the application. In early 2005, it was determined that a road dedication plan "could not be accomplished under the *Land Act* s. 80 or under the *Land Title Act* s. 107, based on advice from the Surveyor General's Office in the Land Title Office." (At para. 27 of the DAG's decision.) The LWBC requested that administration of the East Lot be transferred to the Ministry of Sustainable Development.

[29] Shortly thereafter, the Mowatts applied in their original petition for the transfer of the East Lot to them under the *Escheat Act*. Although the LWBC told the City that it did not object to the dedication of the East Lot as a road, that did not, as the DAG confirmed, amount to a transfer to the City. (At paras. 34–5.)

[30] As matters stood at the time of the DAG's decision, then, the administration and control of the East Lot had been transferred to the provincial Ministry of Forests, Lands, Natural Resource Operations and Rural Development; no legal disposition of the East Lot had occurred; and the decision regarding the claims of the Mowatts and the City was, in the DAG's words, "appropriately within the responsibility of the Deputy Attorney General." (At para. 37.)

[31] The DAG turned to *the City's* application for the East Lot and the evidence in support. Since this appeal is brought only by the Mowatts, I need not recount that evidence here. He then began his analysis of the Mowatts' application at para. 60, setting forth what he understood were the bases of their claim:

> a. The Land [The East Lot] 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 [the West Lot];
>
> 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 borne 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.

Alternatively, the Mowatts sought to purchase the East Lot at a preference under s. 11(b) of the Act. An additional claim raised under s. 7 of the *Canadian Charter of Rights and Freedoms* was found not to have application; I understand that ruling is not now contested.

[32] At para. 63, the DAG commented as follows on the Mowatts' grounds for their application:

a. The history of the Mowatts' connection to the land for the past 25 years is a factor relevant to an exercise of discretion (discussed below) but does not provide a factual basis for a claim of moral rights against the Company;

b. In support of their application based on proprietary estoppel and unjust enrichment, the Mowatts rely on their payment of taxes and costs incurred in preserving the improvements on the Land. The City states that the property tax payments by the Mowatts were for the structures only and not for the Land itself. In light of the time elapsed since the Company was dissolved, I conclude that the payment of any taxes and any costs incurred by the Mowatts to preserve the improvements on the Land appear to be for building occupancy and not for the land, and to have been incurred for the benefit of the Mowatts alone and not for the benefit of the long-dissolved Company [NCLIC];

c. A claim of adverse possession, while it may give rise to a legal claim against land, is unlikely, in my view to provide a basis for a moral claim, since in most cases, by its nature it seeks to defeat the owner's legitimate interest in lands.

d. While there is no question that both the Mowatts and the City have incurred significant expense in litigation and research, such expenditures do not give rise to any claim (whether of moral rights or otherwise) against the Company, as the person who owned the Land prior to escheat, nor a basis for a claim under the *Escheat Act*; in reality it appears that the majority of these expenditures were incurred in relation to the litigation regarding the legal claim for adverse possession by the Mowatts.

e. Section 5(b)(iii) and section 11(b) are both discretionary and will be considered below. [Emphasis added]

From subpara. a. above and other references, it might be inferred that the DAG approached his task on the basis that deciding whether a moral claim existed was completely separate from deciding whether he should exercise his discretion in

favour of an applicant. However, no ‘stand-alone’ discretion to transfer escheated land is given (or confirmed) by the Act outside of ss. 5, 4 and 11(b). Thus where no legal or moral claim is found, it is not necessary for the decision-maker to go on to consider whether to exercise discretion, except for purposes of s. 5(b)(iii).

[33] Under the heading “Evidence Provided by the Mowatts”, the DAG noted statutory declarations Nos. 1 and 2 filed by Mrs. Mowatt, and one provided by a legal assistant to the Mowatts’ counsel. The latter exhibited various documents relating to the East Lot. The DAG then listed various “notes”, many of which pointed out very minor deficiencies he found in the exhibits to Mrs. Mowatt’s affidavit No. 1. Exhibit 35, for example, was “provided upside down”; exhibit 43 was “unreadable in parts”; and there were mistakes in some of the dates in the documents.

[34] Without further comment, the DAG began his analysis at para. 65, where he set out s. 5 of the Act, inferring from the word “may” and the phrase “as to the Attorney General seems proper” that the decision-maker under the Act has a discretion whether or not to grant a claim. (At para. 67.) He continued:

> Section 5(b)(i) states that the Attorney General may transfer land to a person (i) who has a legal or moral claim on the person to whom it had belonged. On the question of the test for a "moral claim on the person to whom it had belonged", no case law directly on point was provided [;] nor am I aware of any. However, the wording indicates that the target of the moral rights claim is the person who owned the land prior to the escheat to the Province. I have not considered any claim directly against the Province as I do not understand either of the parties to be asserting such a claim in the present case.
>
> When the applicant is relying on section 5(b)(i) as the basis for a claim, the legal or moral claim must be on the person, in this case the Company [NCLIC], that owned the Land prior to the escheat to the Province.
>
> Therefore, to base a claim on section 5(b)(i), either the Mowatts or the City would need to provide evidence of a legal or moral claim against the Company. [At paras. 68–70; emphasis added.]

[35] The DAG said that neither party had provided, nor was he aware of, any judicial authority concerning the phrase “legal or moral claim” in s. 5, although a “legal claim” would mean one “enforceable at law against the Company [NCLIC], if it were not dissolved.” Given that the courts had already carried out an exhaustive consideration of the Mowatts’ legal claim on the basis of adverse possession, it was

obvious they did not have a *legal* claim to the East Lot *on that ground*. Their claims in relation to proprietary estoppel and unjust enrichment were reviewed later in his reasons but were rejected because the legal elements of each principle were not shown: see paras. 98–135 and 136–144 respectively. Since these conclusions are not challenged on appeal, I will not elaborate further on them.

[36] Returning to the phrase "moral claim", the DAG at para. 74 set out definitions of "moral" taken from three different dictionaries. For example, the *Canadian Oxford Dictionary* (1998) provided the following definition:

> "1a concerned with goodness or badness of human character or behaviour, with the distinction between right and wrong"
>
> "b concerned with accepted rules and standards of human behaviour"
>
> "2a conforming to accepted standards of general conduct"
>
> "3 (of rights or duties, etc.) founded on moral law."

[37] The DAG made no further comment on his understanding of "moral" *per se*, but noted that the term "moral claim" has sometimes arisen in the context of claims to estates. In *Tataryn v. Tataryn Estate* [1994] 2 S.C.R. 807, the Court had adopted a "moral duty" approach, referring to "society's reasonable expectations of what a judicious person would do in the circumstances, by reference to community standards." (At 821.) As well, the New Brunswick Court of Appeal had stated in *obiter* in *New Brunswick (Department of Natural Resources) v. Aiken* 2009 NBCA 54 that a moral claim to land might arise on the part of a person who has been in occupation thereof but is unable to establish possessory title for the requisite period. However, the DAG noted, *Aiken* involved circumstances that were "quite different from those being considered here." (At para. 77.)

[38] The DAG also referred to *R. v. Lincoln Mining Syndicate Ltd. (N.P.L.)* [1959] S.C.R. 736, a case that, as he said, dealt primarily with reconciling priorities between the then *Escheats Act*, R.S.B.C. 1948, c. 112, and *Companies Act*, R.S.B.C. 1936, c. 42, in relation to a company that had been dissolved and then restored to the register. The Court seemed to accept in passing that the payment of taxes on the subject property by one of the company's shareholders while it was still dissolved

could constitute a "moral claim". (See the Court of Appeal's decision at (1958) 14 D.L.R. (2d) 659 at 665 and the Supreme Court of Canada's decision at [1959] S.C.R. 736 at 739, 742.)

[39] However, the DAG saw two "difficulties" in "basing a claim to escheated land on *payment of property taxes alone*". (My emphasis.) First, the value of the land might have increased significantly more than the total amount of property taxes paid by the applicant. In his analysis:

> Therefore, while payment of property taxes on the Land may be a factor supporting a claim, particularly, for example, if paid on behalf of the dissolved company which is in the process of seeking to be restored, it might not be sufficient, by itself, as the basis of a claim (legal or moral). [At para 80; emphasis added.]

The second factor, he said:

> A second factor, in the present case, as discussed earlier, is that it appears that previous tax payments (a) were in relation to the use of buildings located on the Land rather than for the Land itself; and (b) were contemporaneous with use. [At para. 81.]

In any event, since the property taxes in the present matter had not been paid by the Mowatts *on behalf of NCLIC*, as occurred in *Lincoln Mining*, the juge said it "*could not*" give rise to a claim against the company. (At paras. 81–82; my emphasis.) Presumably, the DAG was referring here to both types of claim.

[40] Under the heading "Creation of Roads in 1920" the DAG confirmed that a public road had never been effectively created on the East Lot. He continued:

> In the present case, the amount of time that has passed since the original reference plan, and the events, including use of the Land by third parties for an extended period of time, operate, in my view, against the approach advocated by the City. In other words, it does not "seem proper" after all that has taken place, to simply proceed with a road dedication. [At para. 178; emphasis added.]

[41] At para. 97, he began his analysis of the Mowatts' claim under s. 5(b)(i) of the Act in particular. Having ruled at para. 63 that their "connection to the Land for the past 25 years" did not provide a "basis for a claim of moral rights against [NCLIC]",

he described this claim as being based on proprietary estoppel, unjust enrichment and adverse possession. (At para. 97.) As already mentioned, he found that the latter two doctrines were not engaged as a matter of law — i.e., that no *legal* claim arose from them.

[42] Given that the Mowatts' claim in adverse possession had failed in the Supreme Court of Canada, *adverse possession* was apparently relied on as supporting a *moral* claim before the DAG. He reiterated that this part of the claim involved the exercise of discretion on his part, and emphasized that in contrast to the New Brunswick legislation considered in *Aiken*, which referred to "moral claims *to the property*", s. 5(b)(i) of the *Escheat Act* of this province requires a moral claim "on the person to whom the land belonged". (At para. 152.) That person was NCLIC — which of course had ceased to exist in 1930. The DAG reasoned on this point:

> The Mowatts purchased 1112 Beatty [the east Lot] in 1992, while the Company dissolved in 1930. Therefore, when the Company was active (that is, not dissolved), no claim by the Mowatts (as opposed to their predecessors in title) existed based on adverse possession.
>
> The Mowatts would have to rely on a "moral right" equivalent to the common law principle that successive adverse possessors can "tack" on to the original adverse possession, as stated in *Nelson (City) v. Mowatt* 2017 SCC 8 [at para. 18]. Such an extension of principle does not appear to fulfill the requirement of s. 5(b)(i) [of the] *Escheat Act*, which requires a moral claim on the person to whom the land belonged, namely, the Company.
>
> As discussed earlier 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 the present circumstances where the Company believed that it had dedicated the Land as road. [At paras. 153–5; emphasis added.]

I note that having rejected this claim, the DAG did not consider, at least expressly, whether the Mowatts' connection to the East Lot *together with* their other arguments—including their having come so close to proving adverse possession and the payment of taxes over the years — might form the basis for a moral claim against NCLIC.

[43] Next, the DAG turned to s. 5(b)(iii) of the *Escheat Act*, which allows the Attorney General to transfer escheated land to a person who 'discovered' an

escheat. Again, there was no case law on this topic. However, the DAG acknowledged that the provision gives the Attorney General a "broad discretion" to grant land to a person who determines that land has escheated and brings it to the government's attention. He summarized the Mowatts' arguments under this rubric and stated his preliminary conclusion thus:

> The basis of the Mowatts' claim under section 5(b)(iii) is that:
>
> a. Ms. Marquis first refers to a possible escheat in a letter to the Province in 1980, but the Province originally did not agree with this view, and
>
> b. it was the Mowatts who subsequently revived the possibility of an escheat, as they obtained the legal opinion of Daryl Johnson (August 24, 2004) and
>
> c. the Mowatts, at their expense, commenced and tendered almost the entire record in the *Land Title Inquiry Act* proceedings by which the Supreme Court of Canada judicially confirmed the escheat.
>
> Therefore, the Mowatts argue, either Ms. Marquis discovered the escheat or the Mowatts did so and the Mowatts incurred costs in doing so. The costs which the Mowatts incurred were in support of their goal of obtaining definitive ownership of the Land through their legal claim in adverse possession. …
>
> While a decision under *Escheat Act* 5(b)(iii) is discretionary and will be considered in more detail in the section below on "discretion", I state here 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. [At paras. 160–1, 163; emphasis added.]

[44] He then described three other factors which the Mowatts argued should inform the exercise of his discretion under s. 5. The first was s. 7 of the *Canadian Charter of Rights and Freedoms*, which the DAG, correctly in my view, did not regard as bearing on a claim for property rights; the second related only to the City's claim; the third was that the subject land had "heritage value" that should be protected. The DAG was not satisfied that the evidence supported this conclusion or that it provided a "compelling basis for an unrestricted transfer of the fee simple estate" to the Mowatts. (At para. 167; my emphasis.)

[45] After an analysis of the *City's* claims under ss. 5(b)(i) and 5(b)(iii) at paras. 163–209, the DAG addressed "Discretion" under a separate heading,

acknowledging first that discretion must be exercised fairly and having regard to all the circumstances of the parties. He listed the factors he saw as relevant in this instance, which 'included':

> 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 matters 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. [At para. 211.]

[46] He then proceeded to review the extent to which each of these factors supported the claims of the Mowatts *and the City*, respectively — even though he ultimately found that the City had no moral claim: see para. 190. The following is a summary of his conclusions:

Historical Connection to the East Lot

- The parties' respective historical connections to the East Lot were of course very different. The Mowatts had occupied and used it, together with the West Lot, since 1992, made improvements to it and paid money to the City over the years either as taxes or some type of occupational rent. They had done so, however, "with full knowledge of the dispute regarding the [East Lot]."

- The City had "operated for many years on the incorrect belief that the land was a road allowance."

- The DAG concluded that although the connection of each party was different, neither party had "demonstrated a stronger connection than the other in my view." (At para. 215; my emphasis.)

Uses Proposed by the Parties for the Land

- Although the City argued that it was hoping to use the East Lot as a road allowance, it did not appear from the evidence that the need for such an allowance still existed. The same was true of other possible purposes identified by the City. (At para. 217.)

- The Mowatts had occupied the East Lot and used it in connection with the West Lot and "presumably" intended to continue that use in future.

- The DAG concluded that "discretion under this element favours the Mowatts", as their continued use would preserve the *status quo*. He saw this as "compelling but not determinative". (At para. 219.)

Efforts Expended to Obtain Title

- The parties had expended "significant amounts in litigation costs" in pursuit of title to the land, either personally or "public/governmental (in the case of the City)." (The Mowatts asserted that they had spent approximately $365,000 in legal fees.) The DAG said this element *did not favour either party over the other*. (At para. 221.)

Parties' Conduct in Court Proceedings

- In the DAG's view, although the Mowatts had brought forward, after extensive research, much of the information about the history of the East Lot, this work was "largely undertaken outside the *Escheat Act* as it was in relation to the unsuccessful litigation claiming legal title based on adverse possession." (My emphasis.) The same was true of costs incurred by the City in defending the Mowatts' legal challenge.

- In the end, the DAG found that this factor favoured the City, given that it had been acting *in the public interest* — as compared to the Mowatts, who were "clearly acting in their own interest". But although this factor was "compelling," it was "not determinative" in his view. (At para. 224.)

Past Actions by the Crown in Relation to the Land

- Under this heading, the DAG found that the only relevant action by the Crown related to LWBC's decision purporting to authorize the dedication of a public road and a later decision to transfer the East Lot to the City for $1,000. Each of these decisions had failed (as noted by the DAG at para. 51) and did not "carry weight at present." (At para. 225.)

Again, these conclusions regarding "discretion" appear to be unconnected to his earlier analysis of "moral claim".

[47] At the end of his reasons, the DAG expressed his overall conclusions in six pithy paragraphs, which I will quote here given their significance in this appeal:

> 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.
>
> 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.
>
> 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*.
>
> 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*.
>
> It is my view that an updated survey, taking into account matters such as accretion, be completed, followed by an updated appraisal.
>
> The updated appraisal would set the minimum price for the Land and a sale could then be conducted by inviting each of the Mowatts and the City to provide a sealed bid with the final price for the Land being that offered by the highest bidder. [At paras. 226–231; emphasis added.]

Judicial Review of the DAG's Decision

[48] In December 2021, the Mowatts filed a petition in the Supreme Court of British Columbia seeking judicial review of the DAG's decision. The City of Nelson did not seek judicial review, being satisfied that the decision was reasonable.

The Petition

[49] The Mowatts' Amended Petition asserted that the DAG had committed several reviewable errors, including the following:

- incorrectly or unreasonably failing to articulate a test for what constitutes a "moral claim" under s. 5 of the *Escheat Act*;
- incorrectly or unreasonably denying the Mowatts' moral claims in proprietary estoppel, unjust enrichment and adverse possession by ignoring certain evidence, departing from the law in relation to those three matters, and failing to consider the Mowatts' position as assignees or successors in title to their predecessors;
- failing to find that the petitioners had "met the threshold for the existence of a moral claim" under s. 5(b)(i) of the Act;
- ruling that the mere discovery of the escheat was not sufficient "by itself" to justify the invocation of s. 5(b)(iii) of the Act;
- failing to consider or to comply with the rationale and purpose of the *Escheat Act*;
- failing to respond to the Mowatts' argument that they had a moral claim against NCLIC as a result of the "heavy burden" (financial and psychological) they had borne in quieting title, in proprietary estoppel, in unjust enrichment, in adverse possession and as discoverers of the escheat;
- proceeding on the assumption that the Mowatts' efforts in quieting title did not count in their favour because it was undertaken on their own behalf and not on behalf of the Province;
- permitting the City an opportunity to purchase the East Lot even though it now has no use for it;

- ordering an auction, which (they contend) obviously favours that the City as the party with greater economic resources — a decision the Mowatts characterize as “harsh”; and

- failing to explain why the remedy chosen by the DAG was seen as best reflecting the intention of the Legislature.

The Mowatts sought an order directing the DAG to allow their application for the transfer of the East Lot to them under s. 5 or s. 11 of the *Escheat Act*; or alternatively, an order quashing the DAG’s decision and remitting it to the Attorney General for reconsideration on terms to be specified by the Court.

The SCBC Decision

[50] The parties are agreed that on appeal, this court “steps into the shoes” of the lower court to determine whether the DAG correctly formulated the standard of review and correctly applied it. (See *Mason v. Canada (Citizenship and Immigration)* 2023 SCC 21 at paras. 36, 51.) Accordingly, I do not find it necessary to rehearse the chambers judge’s decision (released on September 8, 2023 and indexed as 2023 BCSC 1583) here in any detail. It will, I hope, be sufficient to note that the chambers judge found the DAG’s decision to be reasonable, and indeed it appears she agreed with his various conclusions.

[51] I do note that with respect to the Mowatts’ argument that the exercise of the DAG’s discretion had been “framed” as ‘balancing’ their claim against that of the City, the chambers judge observed that:

> ... 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 [towards] transferring the East Lot to the Mowatts.
>
> 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. [At paras. 113–14; emphasis added.]

[52] In concluding her reasons leading to the dismissal of the petition, the judge also observed:

> 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 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.[At para. 130; emphasis added.]

On Appeal

[53] In this court, the Mowatts submit in their factum that the DAG's decision is unreasonable in the following respects:

a. He failed to consider and apply the common law of escheat, which establishes the purpose of the discretion he was required to exercise;

b. He failed to recognize that the Mowatts come within s. 5 of the *Escheat Act* both as persons with a moral claim against the Company and as discoverers of the escheat;

c. He declined to exercise his discretion under s. 5 to transfer the East Lot to the Mowatts for reasons contrary to the statutory scheme, the common law it depends upon, and the factors he adopted to guide his decision;

d. He failed to consider the impact of his decision on the Mowatts; and

e. He exercised his power under s. 11 contrary to the meaning and purpose of the provision.

They also submit that the chambers judge erred in law by "not conducting a reasonableness review as required by *Vavilov*" (*Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65). Had she done so, they submit, she would have found the DAG's decision to be unreasonable. As already mentioned, however,

this court's focus must be on the DAG's decision and of course on whether it is "unreasonable" in the senses described in *Vavilov*.

Reasonableness Review

[54] At the outset, I acknowledge some basic principles discussed at length in *Vavilov*. First, the reasonableness standard was said by the Supreme Court to be the "starting point" for a court's review of an administrative decision, leaving behind earlier approaches, including the "contextual analysis": see especially paras. 47–48. "Reasonableness review" is rooted in the principle of judicial restraint and shows respect for the role of administrative decision-makers. At the same time, "it is not a 'rubber stamping' process or a means of sheltering administrative decision-makers from accountability. It remains a robust form of review." (At para. 13.) The Court continued on the topic of deference:

> It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": para. 28; see also *Ryan*, at paras. 50-51. Instead, 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.
>
> As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.
>
> ...

> Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid*. In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis. [At paras. 83–84, 86; emphasis by underlining added.]

[55] In reviewing an administrative decision, the reviewing court must recognize that reasonableness in a given situation "will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (at para. 90) and should read the decision "in light of the history and context of the proceedings in which they were rendered." (At para. 94.) Administrative decision-makers should provide "intelligible and transparent justification for their decisions." Again in the Court's words:

> A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.
>
> The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

> What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is, however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable. [At paras. 99–101; emphasis added.]

(See also paras. 103–4.)

[56] Thus a decision will be found to be unreasonable if, read holistically, it "fails to reveal a rational chain in analysis" or where "the conclusion reached cannot follow from the analysis undertaken." (At para. 103.) A decision must also be "justified in relation to the constellation of law and facts that are relevant to the decision" (at para. 105) and must "ultimately comply 'with the rationale and purview of the statutory scheme under which it is adopted.'" (At para. 108.)

[57] The reasonableness standard applies fully to issues of statutory interpretation, which again is to be carried out "consistent with the text, context and purpose" of the legislation in question. (At para. 121.) The Court continued on this point:

> It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. Where such an omission is a minor aspect of the interpretive context, it is not likely to undermine the decision as a whole. It is well established that decision makers are not required "to explicitly address all possible shades of meaning" of a given provision: *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405, at para. 3. Just like judges, administrative decision makers may find it unnecessary to dwell on each and every signal of statutory intent in their reasons. In many cases, it may be necessary to touch upon only the most salient aspects of the text, context or purpose. If, however, it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances. Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker. [At para. 122; emphasis added.]

[58] Finally, with respect to the choice of remedy to be made by a reviewing court, the Court observed:

> Where the reasonableness standard is applied in conducting a judicial review, the choice of remedy must be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide: see *Delta Air Lines*, at para. 31. However, the question of remedy must also be guided by concerns related to the proper administration of the justice system, the need to ensure access to justice and "the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place": *Alberta Teachers*, at para. 55.
>
> Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines*, at paras. 30-31. [At paras. 140–141; emphasis added.]

[59] The Mowatts assert that the DAG's decision displays both of the "fundamental flaws" referred to at para. 101 of *Vavilov* as examples of unreasonableness, namely that his exercise of discretion and his conclusions are "internally incoherent"; and that the decision is untenable because it misinterpreted the *Escheat Act*, failed to apply the common law of escheat, misinterpreted or ignored evidence and submissions from the Mowatts, and "trivialized" the impact of that decision on them. It would follow in their submission that the chambers judge's order upholding the DAG's decision on review should also be set aside.

[60] The City responds that the arguments advanced by the Mowatts in this court have "evolved significantly, in a manner the City submits offends the principles and considerations of judicial review." I am not persuaded that the arguments made by the appellants in this court differ substantially from those made to the DAG. In any case, the City's position is that there is nothing unreasonable about the DAG's decision and that indeed both the decision itself and the outcome were "completely

reasonable in the circumstances." The City also says this in summarizing the background facts relating to the East Lot:

> Since they purchased the West Lot, the Mowatts have engaged in litigation with the City and the Province to try to acquire the East Lot for themselves. They have made strategic decisions in their own interest, leaving behind a wake of convoluted and abandoned positions and proceedings, resulting in significant legal expense for all parties. The Mowatts now try to use the costs of their unsuccessful litigation as a basis for obtaining the East Lot gratuitously, arguing that it was unreasonable for the DAG to decide otherwise. This Court should wholly reject this reasoning.

"Moral Claim"

[61] Against this backdrop, I turn first to the Mowatts' submissions concerning the context of the DAG's decision — i.e., the common law relating to escheat, which as the chambers judge acknowledged is not codified by the *Escheat Act*, but "exists alongside it". (At para. 44.) Mr. van Ert on behalf of the Mowatts argued that the DAG failed to familiarize himself with the history and purposes of escheat, which had been reviewed at some length in the judgment of the Supreme Court of Canada in *Mercer* (1881). He noted in particular Mr. Justice Henry's reference to the fact that the sovereign eschews any personal benefit from escheated lands and that the sovereign:

> … restores, or rather grants, the subject-matter to those who, but for the accident [the failure of heirs], would most probably have succeeded to it. The power to remedy the injurious result of such an accident in many cases that happen, must be highly prized by any right feeling sovereign; and it is one not yet controlled by Imperial legislation. It must, therefore, have been considered wise and proper that such should continue to be exercised. [At 665; emphasis added.]

In a similar vein, Mr. Justice Gwynne referred to various statutes passed during the reign of King George III relating to escheated lands:

> The effect of the recited Acts was to cause to be paid over to the commissioners of his Majesty's land revenues the surplus only of the revenue which might be derived or arise from the sale of any such escheated or forfeited lands, after the full and free exercise by the Crown of its prerogative right of disposing at pleasure and *ex speciali gratiâ* of the whole of such lands, or of the proceeds of the sale thereof to all or any of the purposes mentioned in the recited Acts; they were, in fact, Acts passed for the purpose of maintaining the prerogative right of the Crown of graciously restoring such

> lands to persons who were, or who were considered as being of, or adopted into, the family of the person whose estate the property had been; that gracious exercise of the Sovereign's prerogative right those statutes maintained and preserved. [At 681–2; emphasis added.]

[62] Counsel also referred us to J. Chitty, *Treatise on the Law of the Prerogatives of the Crown* (1820), where the learned author observed that because the exercise of the Crown's right by escheat would in many cases be "harsh" to the relatives of persons who died without heirs, etc., it had become the practice of the Crown on petition by such relatives to "restore" the lands to them "or of carrying into effect any intended grant, conveyance, or devise of any such person or persons in relation thereto, or rewarding any person or persons making discovery of such escheat, or of his Majesty's right and title thereto, as to his Majesty, his heirs or successors respectively, shall seem fit." (At 235.)

[63] From this antique language one may discern that the harsh effects of escheat on the failure of heirs or other events leading to a lapse in tenure of interests in real property have been relieved against for centuries — first by the sovereign, later by the sovereign upon "investigation" by Crown officials, and now by the Crown in the circumstances set out in modern escheat legislation. Thus the references, rare in this day and age, in the British Columbia statute to "moral duty" and what "seems proper" to the Attorney General, are in fact echoes of the kinds of considerations that have historically informed the exercise of the sovereign's prerogative with respect to escheated land.

[64] Mr. van Ert argues that these considerations should have informed the DAG's treatment of the Mowatts' moral claim, which he says was based on the "heavy burden" of relational, psychological and financial harm, or "injury", they experienced as a result of NCLIC's neglecting its affairs. In the Mowatts' submission, the company's failure for years to evict a series of 'squatters' from what became the East Lot (and on which the small house had been built), giving rise to the Mowatts' later claim based on adverse possession; the company's failure to grant a valid road allowance, which gave rise to the City's later claim to it; and the company's erroneous advice to the Registrar of Companies that it had sold all of its land to

Mr. Annable, amounted to "mismanagement" that ultimately led to the escheat, unbeknownst to everyone involved until 2014.

[65] Counsel characterizes the effects of the City's conduct on the Mowatts (described in Mrs. Mowatt's statutory declaration No. 1 at paras. 193–200) as constituting the kind of injury that, like the "accident" of a failure of heirs, supports a moral claim under s. 5 or 11 of the Act. The Mowatts say that instead of considering their claim in its proper legal context, the DAG simply reproduced various dictionary definitions of "moral" without considering their relevance to this case. (See his para. 74.) Although he referred in passing to *Tataryn*, *Aiken* and *Lincoln Mining*, he found them to be distinguishable and evidently of no assistance. He did mention the financial "difficulties" experienced by the Mowatts at paras. 80–82 of his reasons, but disregarded them, given that the Mowatts had not paid the taxes "on behalf of the [dissolved] company", as had been the case in *Lincoln Mining*.

[66] I am not persuaded that the *history* of escheat supplies any concrete basis for questioning the reasonableness of the DAG's decision, but I do agree that the *purpose* of the law relating to escheat was a contextual "constraint" that was relevant. In particular, escheat was intended not to enrich the Crown, but to redress wrongs suffered by *subjects of the Crown* due to a failure of heirs or other lapse in tenure; and by exercising its prerogative to restore the land to 'deserving' subjects, the Crown acts *for the public good*. As observed by MacKay, Tsui and Winters, *supra*:

> One major final theme is the Crown's ability to re-vest escheated property to individuals who have a moral claim to the property, or against the individual from whom the property escheated. This feature of escheat legislation suggests a normative acceptance that the legitimate claims of private individuals should trump any claim the government has to use escheated property for the common good of all Canadians. [At 49; emphasis added.]

(See also *Veilleux v. Boulevard Heights, Ltd.* [1915] 26 D.L.R. 333 at 336.)

[67] Admittedly, it is difficult in these modern times to arrive at a definition of "moral" that finds "normative acceptance." But a modern way of looking at the phrase "moral claim" may be found in the Canadian Oxford Dictionary's reference to

"conforming to accepted rules and standards" of what is "right" or, I would suggest, "fair". In the present context, it seems to me that the central issue before the DAG was whether it was "right" or "fair" for the Mowatts to assert a claim against NCLIC given their connection to the East Lot, their expenditure of a great deal of money in an effort to quiet title, the improvements they have made to the property, the taxes or 'occupation fees' they paid over the years in the hope that they were entitled to possession of the East Lot, and the uncertainty and stress to which they have been subjected.

[68] It will be recalled that the chambers judge below described the DAG's decision as a "determination that the Mowatts were not an injured party deserving of a grant of land". (At para. 130.) The word "deserving" might imply some "moral" judgement, but with respect, I do not read the DAG's reasons as addressing the claim on anything other than a purely transactional basis. Indeed the fact the Mowatts had acted in their own interest in pursuing the legal proceedings they did, and the fear that the value of the subject land might exceed the amount of taxes paid over the years were said to be major "difficulties". As we have seen, however, the sovereign historically granted relief from the harsh effects of lapses in title to private persons 'traversing' escheat *in their own interests.* We were not referred to any case in which self-interest disqualified a claimant from seeking redress; nor one in which the financial value of the land in question defeated a claim, either at common law or under the Act; nor indeed one in which a governmental body such as a municipality or city was awarded escheated land. As it transpired, moreover, it is the *Mowatts* who have expended large amounts of money in their efforts to quiet title and now to pursue the statutory claim. On this point, they note correspondence between the Province and the City in 1986 that indicates the City was unwilling to initiate an investigation under the LTIA. It expressed the view that such an investigation "should be pursued by those who dispute the City's position on this, at their own expense." That is exactly what the Mowatts did.

[69] Mr. van Ert submits that the severe effects of the perennial uncertainty regarding the East Lot on the Mowatts' finances and on their psychological

well-being over the years, and the possibility of losing what they regard as part of their home, were relevant to their moral claim and should have been considered fully. In terms of reasonableness review, he referred us to the following passage from *Vavilov*:

> It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must 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.
>
> Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable. ...
>
> Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law. [At paras. 133–4; emphasis added.]

I agree that at the least, the DAG's reasons failed to "reflect the stakes" of his decision on the Mowatts or to consider, and perhaps justify, its consequences on them.

[70] When the DAG did return to the Mowatts' moral claim later in his reasons, he focused on the statutory requirement that a claimant's moral claim be "on" the last owner, in this instance, NCLIC. I repeat here his reasoning on this point:

> The Mowatts would have to rely on a "moral right" equivalent to the common law principle that successive adverse possessors can "tack" on to the original adverse possession, as stated in *Nelson (City) v. Mowatt* 2017 SCC 8. Such an extension of principle does not appear to fulfill the requirement of s. 5(b)(i) [of the] *Escheat Act*, which requires a moral claim on the person to whom the land belonged, namely, the Company.

> As discussed earlier 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 the present circumstances where the Company believed that it had dedicated the Land as road. [At paras. 154–5; emphasis added.]

[71] Of course NCLIC was *mistaken* in the belief that it had dedicated the road allowance. Its errors (and likely some carelessness on the City's part) led to the present controversy. Was it 'right' or 'fair', then, to insist that the Mowatts were not entitled to assert a claim "on the company", either because NCLIC no longer exists, or as a matter of 'incongruity' or statutory interpretation? (I am unsure which alternative was adopted by the DAG.) If the former was intended, then taken to its logical conclusion, his reasoning would eliminate from consideration under ss. 5 and 11 of the Act any land that previously belonged to a company that has dissolved and was never revived. The same reasoning might also be applied to reject out of hand the claim of an 'illegitimate' child against a deceased parent who owned the property — e.g., the father in *Mercer*. In my opinion, this cannot be correct.

[72] The Mowatts are the successors in title to the Marquises and arguably stepped into their shoes to the extent they may have had a moral claim, if not a legal one, against NCLIC as "the person to whom [the East Lot] had belonged" (and in this instance as the person whose mismanagement led to the necessity of this proceeding.) Section 4(2) of the Act states that the law of escheat and the Act apply to escheated land formerly owned by such a company "in the same manner as if a natural person had been last seised or entitled to it and had died intestate and without lawful heirs". It does not appear this wording was considered by the DAG.

[73] If on the other hand the DAG meant at paras. 154–5 that the Mowatts could have no claim against NCLIC because the notion of 'tacking' a claim onto those of previous owners is limited to adverse possession claims, that legal rule is just that — a *legal* rule. Surely the alternative of a *moral* claim in ss. 5 and 11 was intended to relieve against such *legal* obstacles such as this, just as the legal rule against 'illegitimate' children taking as heirs was overcome many decades ago.

[74] Later in his reasons, under the heading “Discretion”, the DAG set out the five factors he saw as relevant to the exercise of his discretion in this matter. He did not indicate whether he was considering the parties’ moral claims or simply a “discretion” given by the Act, or whether he saw the two as connected. As mentioned earlier, the relevant provisions of the Act do not create a separate discretion in the Attorney General to transfer escheated land or sell at a preference, to a person other than one with a legal or moral claim (ss. 5(b)(i) and 11), a person to whom the owner contemplated a disposition (s. 5(b)(ii)), or as a reward to a person who discovered the escheat (s. 5(b)(iii).) In this case, the DAG did not make a finding, or at least an express one, as to whether the Mowatts had a moral claim *at all*, or a moral claim but one that was inadequate for the exercise of his discretion upon considering the factors he thought to be relevant. With respect, this failure to ask and answer the central question before him seriously undermines any justification of the ultimate result.

[75] In contrast, the DAG did find that the City did *not* have a moral claim: see para. 190. Nevertheless, he went on near the end of his reasons to analyze his five ‘discretionary’ factors with reference to *both* applicants, weighing one against the other. Given his finding at para. 190, it was unreasonable to make the comparisons he did — though most of them favoured the Mowatts over the City. At the end, he stated that neither had succeeded in “meeting the requirements contemplated by s. 5 of the *Escheat Ac*t.” (at para. 228) without explaining what exactly he meant.

[76] In my opinion, these omissions alone are enough to conclude that the Mowatts’ appeal must be allowed. In addition, the DAG’s failure to consider *all* aspects of their claim *together* — as opposed to as items on a checklist each of which *alone* had to be met in order to justify the claim — adds to the unreasonableness of the decision. (See in particular paras. 63(a), 80, 82 , 159, 167 and 219 of his reasons.) The result might well have been different had the DAG considered all the Mowatts’ arguments and the decision-maker’s own “factors” *holistically* and asked himself “what a judicious person would do in [all] the circumstances, by reference to community standards.” (See *Tataryn* at 821.)

Discovery

[77] With respect to the Mowatts' claim under s. 5(b)(iii) as persons who 'discovered' the escheat, the DAG reasoned that "simply discovering the escheat, by itself, is not sufficient in my view." (At para. 159.) A reading of s. 5(b)(iii) does not require that a discoverer prove anything other than his or her status as such, and the DAG does not explain ("justify") what else was necessary. As seen earlier, later in his reasons, dealing under the heading "Discretion" with the conduct of the court proceedings, he acknowledged that "much of the information" about the East Lot had been brought forward as a result of the Mowatts' "extensive research". However, he dismissed this fact because the research work was undertaken in the adverse possession litigation and was therefore "outside the *Escheat Act*". (At para. 222.) He found the same was true of the City: its costs had been incurred "outside the *Escheat Act*". (At para. 223.) He found that this factor (i.e., the conduct of the court proceedings) favoured the City on the basis that it had been acting in the public interest. However, since the City had not asserted a claim under s. 5(b)(iii), the comparison was not appropriate. On the other hand, the DAG did not state a conclusion as to whether or not the Mowatts had discovered, or helped discover, the escheat in this case.

Conclusions

[78] Returning finally to *Vavilov*, it is my view that the DAG's decision is not reasonable in the sense that he failed to address the issue of "moral claim" in light of the "constraints imposed by the entire legal and factual context" (my emphasis); failed to state a conclusion on whether such a claim was shown; failed to find whether the Mowatts had "discovered the escheat" within the meaning of s. 5(b)(iii); and, assuming they had, failed to explain why "discovery" alone was insufficient. As a result, the decision does not bear the "hallmarks of reasonableness" — justification, transparency and intelligibility — which the parties were entitled to expect.

[79] Given these conclusions, it is not necessary for me to examine in detail the DAG's order permitting the parties to bid in a blind auction to purchase the East Lot from the Province — at a price not less than the appraised value thereof. However, this solution seems to me to promise the worst of both worlds as far as the parties are concerned. The Mowatts, who paid for Mrs. Marquis's interest in the Lot many years ago, must either pay the Province for it again, or the City must pay the Province for land it no longer has use for and which it will likely transfer to the Province. Nor does the order provide for what is to happen to the East Lot if no one bids.

[80] Neither party sought an order of this kind and in my view, it was not "justified" as the "best course of action in the present circumstances". Nor, it appears, was any consideration given to the alternatives provided in ss. 11 and 12 of the Act.

Disposition

[81] Being mindful of the Court's comments in *Vavilov* in favour of returning an administrative decision to the decision-maker on an appeal, I would allow the appeal, set aside the decisions of the chambers judge below and of the DAG, and remit the matter to the Attorney General.

[82] We are indebted to counsel for their able arguments.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Justice Winteringham"