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COURT OF QUEEN'S BENCH OF MANITOBA

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	)	JUDGMENT DELIVERED:
	)	October 8, 2020

REMPEL, J.

Background

[1] At the heart of this application lies the interpretation of ***The Local Vehicles for Hire Act***, C.C.S.M. c. L195 of Manitoba ("***LVFH Act***"), which came into force in February

of 2018 (see Schedule "A" attached). The ***LVFH Act*** was enacted after a total overhaul of the regulatory regime of the vehicle-for-hire ("VFH") industry in Manitoba. Prior to the enactment of the ***LVFH Act***, all vehicles operating as a VFH, including taxicabs, were regulated by The Motor Transport Board of Manitoba ("the Board") under the provisions of ***The Highway Traffic Act***, C.C.S.M. c. H60 ("the ***HTA***").

[2] Under the regulatory regime in force prior to February of 2018, the applicant, Lockport Taxi Ltd., operated a licensed taxi service in the respondent Rural Municipalities (cumulatively the "RMs") under an inter-municipal livery licence issued by the Board. This licence authorized the applicant to operate across different municipal boundaries. The Board authorized the rates all taxi companies or VFH services operating within the municipalities could charge and set licensing requirements that were fixed and consistent across all municipalities.

[3] Section 6 of the ***LVFH Act*** eliminated the jurisdiction of the Board to regulate the VFH industry in Manitoba and municipalities were given authority to regulate drivers or companies operating a VFH business within their boundaries. To date the RMs have declined to enact by-laws regulating the VFH industry within their boundaries and the applicant maintains that this inaction by the RMs has caused it to suffer financial losses resulting from competitors who are operating within the boundaries of the RMs. Some of these competitors include taxi services based in the City of Winnipeg and ride services arranged online or via smart phone apps.

[4] The applicant has urged the RMs to enact by-laws regulating all vehicles carrying on business as part of the VFH industry within their boundaries, in the hope that such

by-laws would create a level playing field through the imposition of uniform safety and licensing standards. The RMs have declined to act on the applicant's requests.

Relief Sought

[5] The applicant seeks an Order of mandamus to compel the RMs to draft by-laws regulating VFH drivers and businesses operating within their boundaries under the provisions of the ***LVFH Act***. The RMs maintain the ***LVFH Act*** does not require them to regulate the VFH industry and the court has no jurisdiction to intervene in their policy decision not to pass by-laws of the kind the applicant is demanding.

Decision

[6] I am dismissing the application for an order of mandamus that the applicant is requesting. My reasons follow.

Facts

[7] In 2017 the applicant brought an application for mandamus demanding the Board (as it then was) enforce the existing regulations under the ***HTA*** that prohibited taxi cabs licensed exclusively in Winnipeg from picking up passengers in the RMs. At that time, the applicant had a licence that explicitly permitted it to pick up passengers in the RMs and it alleged that competitors from Winnipeg who did not have that kind of licence were picking up passengers in the RMs, causing financial loss to the applicant. Shortly before the hearing of that application, the province enacted the ***LVFH Act***, which removed the licensing jurisdiction of the Board over the VFH industry.

[8] Counsel for the applicant was active in demanding that the RMs enact by-laws regulating the VFH industry before the ***LVFH Act*** came into force, to ensure that clear rules were in place for the allocation of VFH licences and the applicable fees. The demands by counsel for the applicant also clearly stated the applicant's keen interest in the enactment of by-laws prohibiting passenger pickups in the RMs by unlicensed VFH operators. The applicant also approached the RMs directly demanding action on the enactment of by-laws regulating the VFH industry but no answers satisfactory to it were forthcoming.

[9] On April 30, 2018, the Deputy Minister of Municipal Relations issued a letter to the applicant confirming the view of the provincial government that the RMs had discretion under the ***LVFH Act*** to enact by-laws governing the VFH industry within their boundaries, but there was no provision in the ***LVFH Act*** compelling or obligating them to do so. The letter indicated, in part, that the discretionary provision in the ***LVFH Act*** to pass a by-law:

> … recognizes the wide range of circumstances and transpiration needs in Manitoba's diverse municipalities and allows decisions about this critical industry to be made whereby they have the greatest impact: at the local level.
>
> With respect to your concerns with taxis based in Winnipeg operating in surrounding communities, I must inform you that this is not in contravention of any provincial legislation. A municipality may pass a by-law requiring vehicles-for-hire doing business within its boundaries to acquire an operating licence. But, if no such by-law is in force, then taxi drivers based in any jurisdiction are free to operate, provided they have the appropriate insurance.

[10] Given this response by the province and the inaction of the RMs with respect to the enactment of VFH by-laws, the applicant proceeded with this application.

Position of the Applicant

[11] The applicant insists that its business model is not viable in an unregulated marketplace and it has suffered devastating financial losses due to unregulated competition flooding into what was once the territory it was licensed to operate in. In a nutshell, the applicant maintains that when read in the historical context of the old VFH licensing regime and in context with the ***LVFH Act*** as a whole, certain key provisions of the ***LVFH Act*** create a positive duty on RMs to enact by-laws regulating VFH operators within its boundaries.

[12] With respect to the historical context, as already noted, the ***LVFH Act*** removed the jurisdiction of the Board over the VFH industry in s. 6, which reads:

> **No jurisdiction for Motor Transport Board**
>
> 6
>
> Despite any other Act, The Motor Transport Board established under *The Highway Traffic Act* no longer has any jurisdiction over the vehicle-for-hire industry, including a vehicle for hire that crosses one or more municipal boundaries or any person carrying on a vehicle-for-hire business that operates in two or more municipalities.

[13] In place of the Board, s. 3(1) of the ***LVFH Act*** grants municipalities the authority to enact their own by-laws to regulate their respective local vehicle-for-hire industries:

> **General by-law making authority for municipalities other than Winnipeg**
>
> 3(1)
>
> The council of a municipality may make by-laws under *The Municipal Act* for the purpose of regulating the vehicle-for-hire industry, including vehicles for hire and vehicle-for-hire businesses.
>
> [Emphasis mine]

[14] Section 11(1) of the ***LVFH Act*** states that where a municipality had by-laws regulating the VFH industry prior to the enactment of the ***LVFH Act,*** those by-laws must remain in place until they have been amended or repealed:

> *By-laws made by municipalities (other than Winnipeg) continued*
>
> 11(1)
>
> *A by-law of a municipality that was authorized under section 23 of* ***The Highway Traffic Act****, as that section read immediately before the coming into force of this Act, is continued as a vehicle-for-hire by-law as if it were a by-law made under this Act until the by-law is amended or repealed.*

[15] The applicant argues that a fair reading of s. 11(1) of the ***LVFH Act*** goes further than merely keeping existing by-laws regarding the VFH industry passed under the old regime alive until they are amended or repealed. Section 11(1), according to the applicant, demands that municipalities which never enacted VFH by-laws must now enact them for the first time. Central to the applicant's argument is that the word "may" in s. 3(1) of the ***LVFH Act,*** should be interpreted *as* imposing a positive obligation on the respondents, even though s. 15 of ***The Interpretation Act,*** C.C.S.M. c. 180, of Manitoba notes that generally, the word "may" is permissive, not imperative.

[16] The application also points to s. 4 of the ***LVFH Act***, which explicitly states that each municipality "must" consider the needs of its local vehicle-for-hire industry when crafting regulations. Section 4 reads:

> **Considerations for municipality**
>
> 4
>
> In regulating the vehicle-for-hire industry, a municipality must have regard for the desire to create and maintain a sustainable industry that meets the needs of the travelling public within the municipality as well as those who work in the industry.

[17] The applicant submits that when read in their entirety, these sections of the ***LVFH Act*** contemplate that municipalities have a positive obligation to enact by-laws in order to regulate VFH industries operating within their boundaries. Section 5 of the ***LVFH Act***, for example, provides that if a trip crosses one or more municipal boundaries, the by-laws of the municipality where the trip originated apply. According to the applicant, passengers injured in an accident after travelling from a regulated municipality into an unregulated municipality, would lose the benefit and protections a by-law would provide.

[18] Finally, the applicant points to s. 6 of ***The Interpretation Act*** which explicitly requires that an Act be given a broad interpretation in order to ensure that the Act achieves its objectives:

> **Rule of liberal interpretation**
>
> 6
>
> Every Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

Analysis

Historical Context – VFH Industry in Manitoba

[19] It is impossible to escape the conclusion that the legislature intended to reconstruct how the VFH industry operates in Manitoba by passing the ***LVFH Act***. Given the ubiquity of mobile phones, the disruptive technology now available through the internet or mobile phone apps can turn almost any vehicle into a VFH with virtually no additional costs to the owner or operator. The new legislative regime established by the

LVFH Act provides for the regulation of all vehicles hired for a trip be they online or through traditional means.

[20] Manitoba municipalities already had the power to regulate livery and taxicab businesses by by-law under s. 23 of the ***HTA***. The ***LVFH Act*** repealed this section but maintained the municipal power to regulate the VFH industry by way of a by-law passed under ***The Municipal Act***, C.C.S.M. c. M225. The ***LVFH Act*** also gave municipalities expanded powers for regulating the VFH industry and removed any prior jurisdiction the Board had over either the VFH industry or inter-municipal liveries.

[21] By passing the ***LVFH Act***, the legislature also repealed ***The Taxicab Act***, C.C.S.M. c. T10, and dissolved the Taxicab Board and its authority over the VFH industry within the City of Winnipeg. The ***LVFH Act*** explicitly uses compulsory language in s. 3(3), which obligates the City of Winnipeg to enact by-laws regulating the VFH industry but maintains discretionary powers for the City in s. 3(2) as to what the provisions of these by-laws might be. Section 3(3) of the ***LVFH Act*** reads as follows:

> **Winnipeg must make vehicle-for-hire by-law**
>
> 3(3)
>
> The council of The City of Winnipeg must make by-laws under *The City of Winnipeg Charter* for the purpose of regulating the vehicle-for-hire industry, including vehicles for hire and vehicle-for-hire businesses, and in doing so the City may also exercise the powers set out in subsection (2).
>
> [Emphasis mine]

Historical Context – *The Municipal Act*

[22] The regime change in the VFH Industry in Manitoba must also be viewed through the lens of the evolution in municipal law.

[23] In ***United Taxi Drivers' Fellowship of Southern Alberta* v. *Calgary (City)***, 2004 SCC 19 (CanLII), the Supreme Court of Canada addressed the shift away from provincial legislation that narrowly defined the limits of municipal powers as set out in by-laws and towards legislation that granted municipalities greater flexibility in passing by-laws that could effectively respond to the evolving needs of their communities. As a result, provincial legislation increasingly grants municipalities broad authority over generally defined matters instead of granting them only specific powers in particular subject areas.

[24] The evolution in the legislative approach reviewed in ***United Taxi*** also shifts the approach that the courts are required to take in the interpretation of the statutes that empower municipalities. Paragraph 8 of that decision reads as follows:

> 8 A broad and purposive approach to the interpretation of municipal legislation is also consistent with this Court's approach to statutory interpretation generally. The contextual approach requires "the words of an Act . . . to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26. This approach is also consistent with s. 10 of Alberta's *Interpretation Act*, R.S.A. 2000, c. I-8, which provides that every provincial enactment must be given a fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

[25] Part 7 of ***The Municipal Act*** gives municipal councils broad powers to pass by-laws for municipal purposes. Municipal purposes include providing good government and services, facilities or other things that, in the opinion of the municipal council, are necessary or desirable for all or part of the municipality. A council's power to pass by-laws for these purposes is stated in general terms in s. 231 of ***The Municipal Act***:

Guide to interpreting power to pass by-laws

231

The power given to a council under this Division to pass by-laws is stated in general terms

(a) to give broad authority to the council and to respect its right to govern the municipality in whatever way the council considers appropriate, within the jurisdiction given to it under this and other Acts; and

(b) to enhance the ability of the council to respond to present and future issues in the municipality.

[26] Section 232(2) of ***The Municipal Act*** sets out broad and general powers as follows:

Exercising by-law-making powers

232(2)

Without limiting the generality of subsection (1), a council may in a by-law passed under this Division

(a) regulate or prohibit;

(b) adopt by reference in whole or in part, with any changes the council considers necessary or advisable, a code or standard made or recommended by the Government of Canada or a province or a recognized technical or professional organization, and require compliance with the code or standard;

(c) deal with any development, activity, industry, business, or thing in different ways, or divide any of them into classes and deal with each class in different ways;

(d) establish fees or other charges for services, activities or things provided or done by the municipality or for the use of property under the ownership, direction, management or control of the municipality;

(e) subject to the regulations, provide for a system of licences, permits or approvals, including any or all of the following:

(i) establishing fees, and terms for payment of fees, for inspections, licences, permits and approvals, including fees related to recovering the costs of regulation,

(ii) establishing fees for licences, permits and approvals that are higher for persons or businesses who do not reside or maintain a place of business in the municipality,

(iii) prohibiting a development, activity, industry, business or thing until a licence, permit or approval is granted,

(iv) providing that terms and conditions may be imposed on any licence, permit or approval, and providing for the nature of the terms and conditions and who may impose them,

(v) providing for the duration of licences, permits and approvals and their suspension or cancellation or any other remedy, including undertaking remedial action, and charging and collecting the costs of such action, for failure to pay a fee or to comply with a term or condition or with the by-law or for any other reason specified in the by-law, and

(vi) providing for the posting of a bond or other security to ensure compliance with a term or condition;

(f) except where a right of appeal is already provided in this or any other Act, provide for an appeal and the body that is to decide the appeal, and related matters;

(g) require persons who do not reside or have a place of business in the municipality to report to the municipal office before conducting business in the municipality; and

(h) require pawnbrokers to report all transactions by pawn or purchase to the head of council or to the police.

Permissive Versus Imperative Language

[27] Can the use of the word "may" in s. 3(1) of the ***LVFH Act***, as the applicant maintains, be reasonably interpreted as "must"? At the core of the applicant's argument lies the fundamental tenat that the legislature could not possibly have intended to create a regulatory void in the VFH industry in Manitoba, notwithstanding the content of the letter issued by the Deputy Minister On April 30, 2018 that I have already cited in these reasons.

[28] Interpreting "may" as "shall" or "must" is not without precedent, even though s. 15 of ***The Interpretation Act*** provides:

Imperative and permissive language

15

In the English version of an Act or regulation, "shall" and "must" are imperative and "may" is permissive and empowering. In the French version, obligation may be expressed by using the present indicative form of the relevant verb, or by other verbs or expressions that convey that meaning; the conferring of a power,

> right, authorization or permission may be expressed by using the verb "pouvoir", or by other expressions that convey those meanings.

[29] In ***Old St. Boniface Residents Assn. v. Winnipeg (City)***, 1989 CanLII 177 (MB CA), 58 Man. R. (2d) 255 (C.A.), the Court of Appeal cited *Halsbury's Laws of England*, 4th ed., vol. 44, para. 933, p. 583, noting that the meaning of discretionary language requires a contextual interpretation. Page 266 of that case reads in part:

> No universal rule can be laid down for determining whether provisions are mandatory or directory; in each case the intention of the legislature must be ascertained by looking at the whole scope of the statute and, in particular, at the importance of the provision in question in relation to the general object to be secured. Thus it is not possible to generalise by reference to the nature of what is prescribed. No great reliance can be placed, either, on the suggestion that provisions framed purely in affirmative language are normally construed as directory, although the converse proposition, that negative provisions are prima facie mandatory, would seem on principle to be less open to criticism.

[30] In ***Allen v. Man. (Judicial Council)***, 1990 CanLII 8040 (MB CA), 70 Man. R. (2d) 234 (C.A.), the Manitoba Court of Appeal found that notwithstanding ***The Interpretation Act***, R.S.M. 1987, c. 180, the word "may" could be interpreted as imperative when the context so required. In that case, the right of a judge to a fair process was at stake and the question the court grappled with was if the Manitoba Judicial Council had jurisdiction to proceed to hold an inquiry when there was no request from the Minister to do so under s. 31(1) of ***The Provincial Court Act***, R.S.M. 1987, c. C275, and when there was no reference by the council for an investigation and a report under s. 29(2) of that ***Act***. The Court of Appeal issued an order of prohibition, ruling that although in general terms the use of the word "may" in statutes is interpreted as permissive and empowering, its use had to be examined in the context of Part IV of ***The Provincial Court Act*** in its entirety.

[31] The Court of Appeal concluded at paras. 6 and 7:

> [6] Section 27(3) says the Council "may" determine its own procedures and conduct. I am unable to conclude, however, notwithstanding the use of the word "may" in that subsection that the Council can ignore its power to determine its own procedures and conduct and carry out its duties without any acknowledged and accepted rules.
>
> [7] That same reasoning is applicable to s. 29(2). The Council is not obliged to refer the matter for an investigation and report after its preliminary determination under s. 29(1). But if an inquiry is to be convened, it must be convened in accordance with the legislation. The intermediary step of an investigation and report is required. In my view, that is the way s. 29(2) must be interpreted. I find support for that view in the statement of Coté, in the *Interpretation of Legislation in Canada*, at p. 375:
>
> > It is accepted that a law infringing on recognized rights and freedoms of the individual should be construed restrictively. If there is real difficulty in interpretation, the Court should apply the statute in order to respect them.
> >
> > This principle has two facets. First, it suggests that statutes should be interpreted strictly, in that the courts should ensure that statutory conditions be applied meticulously before allowing infringement upon individual rights and freedoms. Second, where there is genuine doubt as to the meaning or scope of a statute, the principle directs the Court to resolve the ambiguity in favour of these rights.

First Principles of Statutory Interpretation

[32] The first principles of statutory interpretation were confirmed by the Manitoba Court of Appeal in ***Boles v. Director, River East/Transcona***, 2019 MBCA 65 (CanLII), at para. 23:

> [23] As previously indicated, the parties agree on the approach to be taken when interpreting a provision in a statute. The applicable principles include the following:
>
> - Section 6 of *The Interpretation Act* mandates that, "Every Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects."
> - The modern approach to statutory interpretation requires that, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 21, quoting Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87; see also *Manitoba Housing v Amyotte et al*, 2014 MBCA 54 at paras 50-52).

- The entire context of a provision must be considered before determining whether it is reasonably capable of multiple interpretations. Ambiguity results only "where a statutory provision is subject to differing, but equally plausible, interpretations" (*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 62; see also para 29).
- When interpreting legislation, *Charter* values are considered only where there is a "genuine ambiguity" (*ibid* at para 62).
- Any ambiguities in social welfare legislation "should be resolved in favour of the claimant" (*Finlay v Canada (Minister of Finance)*, 1993 CanLII 129 (SCC), [1993] 1 SCR 1080 at 1114, quoting *Abrahams v Attorney General of Canada*, 1983 CanLII 17 (SCC), [1983] 1 SCR 2 at 10).

Context

[33] Before the ***LVFH Act*** came into force, the taxicab industry operated in the City of Winnipeg but was regulated by the Taxicab Board under ***The Taxicab Act***. The Taxicab Board had the power to issue taxicab business licences and set license terms and conditions. The City only had discretion with respect to setting license fees under the by-law. The ***LVFH Act*** eliminated the jurisdiction of this Board but provided for the continuation of the regulation of the VFH industry in the City of Winnipeg. The new legislative regime in s. 3(3) of the ***LVFH Act*** carried over the existing historical regulation policy with regard to the VFH industry within the boundaries of the City of Winnipeg.

[34] Before the ***LVFH Act*** was enacted, the ***HTA***, also used the word "may", in granting all municipalities outside the City of Winnipeg the power and discretion to pass by-laws regulating taxicab businesses. The ***LVFH Act*** maintains these discretionary powers and now includes them in a municipality's by-law making powers under ***The Municipal Act***.

[35] The power of the RMs to decline the right to make by-laws regulating the VFH industry must be construed within the context of the broad and general municipal by-law making powers granted to municipal councils. The RMs must be able to govern their

municipalities in a manner they consider appropriate and be able respond to present and future issues as they evolve.

[36] Recognizing this need for flexibility as well as individual and varying circumstances, a municipal council exercising by-law making authority under Division 7 of ***The Municipal Act*** is not directed to pass any by-law in particular. Similarly, the power to pass a by-law regulating the VFH industry is not expressed in mandatory terms. Rather, council "may make by-laws" and, as with any other issues that arise, must be able to deal with matters related to the VFH industry, as it deems necessary or desirable for the municipality.

[37] I am satisfied that the legislature's intention to ensure continuity for the VFH industry in Winnipeg is demonstrated by its use of the word "must" in s. 3(3) of the ***LVFH Act*** which requires the City to make by-laws regulating the VFH industry. In accordance with the modern approach to the drafting of municipal legislation, the legislature has granted the City flexibility in s. 3(2) as to the contents of the mandatory VFH by-law it must impose.

[38] To interpret s. 3(1) of the ***LVFH Act*** as requiring, without exception, that every municipal council in Manitoba, no matter what its population, location or needs might be, must enact a by-law regulating the VFH industry, is inconsistent with the overall legislative scheme and objects of ***The Municipal Act*** and the regulatory regime and objects reflected in the by-law making powers delegated to municipalities by the ***LVFH Act***. The legislature intended to give municipalities broad and flexible authority to enable them to

exercise all of their bylaw making powers effectively, including the power not to enact by-laws regulating the VFH industry.

Plain Meaning of Words

[39] The use of contrasting wording ("may" versus "must") in ss. 3(1) and 3(3) of the ***LVFH Act*** is also demonstrative of the legislature's clear intention to maintain the discretionary nature of a municipality's power to regulate the VFH industry in contrast to the obligation of the City of Winnipeg to have a VFH by-law in place. This is consistent with and recognizes the practical and historical differences between Manitoba municipalities and the City in the regulation of the VFH industry, as well as the unique nature of municipal circumstances and needs in contrast to the City of Winnipeg. To interpret the word "may" in the case of a municipality's authority to make a VFH bylaw as provided for by s. 3(1) of the ***LVFH Act*** as "must" would render the legislature's distinctive choice of the word "must" for the City of Winnipeg in s. 3(3) meaningless.

[40] If the legislature really wanted to mandate compulsory VFH by-laws in every city and municipality in Manitoba, it is reasonable to conclude it would have issued a universal requirement to communicate that intention, instead of using two substantially different words ("may" versus "must") in two different sub-sections.

[41] Other words in the ***LVFH Act***, when read in their entire context and in their ordinary grammatical sense also support the conclusion that the use of the word "may" was intentionally used by the legislature as a permissive term. Section 7(1), for example, provides as follows:

> **Information for drivers and vehicles licensing purposes**
>
> 7(1)
>
> The registrar may request from a municipality that has made a vehicle-for-hire by-law any information that the registrar considers reasonably necessary for the purpose of administering and enforcing *The Drivers and Vehicles Act*.
>
> [Emphasis mine]

[42] Section 7(2) of the ***LVFH Act*** uses the identical form of the past tense ("that has made") in describing the obligation of municipalities to disclose data to the Manitoba Public Insurance Corporation. That section reads:

> **MPI may require registrar to collect information**
>
> 7(2)
>
> The Manitoba Public Insurance Corporation may request the registrar to collect from a municipality that has made a vehicle-for-hire by-law any information on its behalf that the corporation considers reasonably necessary for the purpose of administering and enforcing *The Manitoba Public Insurance Corporation Act*. The registrar must comply with the corporation's request.
>
> [Emphasis mine]

[43] The use of the past tense in ss. 7(1) and (2) clearly show the legislature was contemplating a regulatory scheme in which some municipalities would decide on policy grounds that a VFH by-law was not necessary. The discretionary nature of a municipal council's power to make a VFH industry bylaw is consistent with the general scheme set out ss. 7(1) and 7(2) of the ***LVFH Act***. These provisions only apply to a municipality that has actually enacted a VFH by-law and recognize that a municipality may not have a VFH by-law at all. The use of the term "that has made" would be absurd if the legislature intended to make VFH by-laws compulsory for the City of Winnipeg and all Municipalities in the Province.

Policy Considerations

[44] In ***Nielsen v. Kamloops***, 1984 CanLII 21 (SCC), [1984] 2 S.C.R. 2, the Supreme Court of Canada confirmed the principle that policy decisions of a statutory entity are not actionable but operational considerations could be. In that case the Supreme Court of Canada applied the principle in ***Anns v. Merton London Borough Council***, [1978] A.C. 728, confirming that the City of Kamloops had discretion under statute to regulate construction standards through a by-law, if it chose to do so. The discretion as to whether or not the City of Kamloops exercised a statutory power was described by the Supreme Court of Canada as a "policy" decision.

[45] In ***Nielsen*** the City not only made a policy decision in favour of regulating construction through a by-law, it also imposed on its building inspectors a duty to enforce the provisions of the construction by-law. The enforcement provisions created an "operational" duty, which no longer permitted inspectors to exercise discretion as to whether or not the by-law should be enforced. Discretion only applied to the manner in how inspectors were to go about enforcing the by-law.

[46] The distinction between policy and operational decisions in the context of municipal liability was considered by Cummings, J. in ***Dmitruk v. City of Dauphin et al.***, 2015 MBQB 80 (CanLII). In ***Dmitruk***, the plaintiff sought a mandatory injunction requiring the City of Dauphin to enforce its zoning by-law. Cummings, J. distinguished the ***Nielsen*** decision on its facts because the by-law passed by the City placed no legal obligation on building inspectors to enforce the by-law. The enforcement duty fell on the City itself under the provisions set out in ***The Planning Act***, C.C.S.M. c. P80, and these

provisions were permissive. Ultimately Cummings, J. concluded that the City's decision to decline enforcement of the by-law was not an operational decision, but rather one of policy which was not reviewable by a court.

[47] In ***Thunder Bay Seaway Non-Profit Apartments v. Thunder Bay (City) (Div. Ct.)***, 1991 CanLII 7100 (ON SC), 5 O.R. (3d) 667, the Ontario Superior Court of Justice declined to make an order of mandamus compelling the city council to enact a by-law. It was held that the court had no jurisdiction to analyze the reasons or motives behind the refusal of a municipal council to pass a by-law when the legislation did not explicitly demand that they do so. Absent a positive legal duty to enact a by-law it was held that an order of mandamus could not be granted. The court concluded at p. 676:

> It is not for a court to analyze the reasons and motives why a municipal council did not pass a by-law; the by-law may have failed to be enacted for the best or the worst of reasons. It is not the court's duty to look at "what might have been" in the legislative forum; our duty is to look at the "legislated product."

[48] The reasonableness of the decisions made by the RMs not to enact a VFH by-law is a policy decision that a court cannot interfere in the absence of proof of bad faith or illegality. In this case, the RMs made policy decisions declining their right to pass VFH by-laws, which in their wisdom was in the best interests of their constituents.

Conclusion

[49] When the reconstruction of the VFH industry established under the ***LVFH Act*** is considered in its historical context, along with the discretionary powers of municipalities under ***The Municipal Act***, the use of the word "may" in s. 3(1) of the ***LVFH Act*** makes it impossible for me to interpret that as anything other than a discretionary or empowering term. The interpretation suggested by the applicant, that the RMs are compelled by the

LVFH Act to enact VFH by-laws is unsustainable considering the entire context of all of it's provisions and the plain reading of the ***LVFH Act*** in a manner consistent with the principles of statutory interpretation.

[50] The distinction between "may" and "must" in ss. 3(1) and (3) is significant and could not have arisen from oversight – it is intentional. Further, the distinction between the two words is consistent with the broad discretionary by-law making powers the legislature intended municipalities to exercise under ***The Municipal Act***. This broad discretion recognizes and respects the right of a municipal council to govern in the public interest and to make decisions as to policy that are not subject to judicial review.

[51] The discretionary nature of the by-law making power granted to municipalities and absence of a duty to enact a by-law of any kind, including a by-law regulating the VFH industry, is consistent with the plain wording of ***The Municipal Act***, and the ***LVFH Act***. It is also consistent with the modern approach to statutory interpretation and the interpretation of municipal powers.

[52] On a final note, I disagree with the submissions of the applicant that there is a positive duty on all municipalities in Manitoba in s. 4 of the ***LVFH Act*** to pass VFH by-laws. That section reads in part that municipalities "*must have regard for the desire to create and maintain a sustainable industry that meets the needs*" of the travelling public and VFH industry workers. Section 4 cannot be stretched so far as to say that municipalities have a positive legal duty to ensure that the business models of all VFH operators under the old regulatory regime must continue to be viable after the coming into force of the ***LVFH Act***. Such an interpretation imposes an impossibly high burden on municipalities.

[53] There is no positive legal duty on the RMs to enact a VFH by-law under the ***LVFH Act***. The remedy of mandamus is therefore not available to the applicant and I am dismissing the application. The parties can speak to costs if they cannot agree.

REMPEL J.