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REZONING GONE BAD: THE HEIRS OF TÉMOINS DE JÉHOVAH DE ST-JÉROME-LAFONTAINE

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REZONING GONE BAD:
FAIRNESS IN THE MUNICIPAL SENSE

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I. INTRODUCTION

The exercise of zoning and rezoning powers gives rise to a plethora of legal considerations. Beyond issues of statutory compliance, these powers also trigger an intricate interaction between notions of legitimate exercise of municipal authority, lawful segregation in land-use[1], related use discrimination[2], and issues of justification and fairness. Why?

The exercise of power must be justifiable in a society like ours since arbitrary state action is not permissible.[3] After all, societies governed by the rule of law are marked by a certain ethos of justification. Thus, when a society is marked by a culture of justification, an exercise of public power is only appropriate when it can be justified to citizens in terms of rationality and fairness.[4] In this environment, the theory of zoning closely follows the rule of law value in that it seeks to provide certainty and predictability by limiting discretion.[5]

It is in this rationality and fairness environment that zoning and rezoning have always been fertile ground from which litigation has sprout consistently. This is one of the hallmarks of a democratic society where the aggrieved has access to justice and it should therefore be a welcome manifestation of a free and democratic society. However, despite the contentious potential of zoning powers, courts have not always held that a municipal council is under any obligation to provide reasons for

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[1] *See generally ROGERS, Ian Macf., **Canadian Law of Planning and Zoning**, (Toronto: Carswell, 1973) s.5.13*

[2] *Zoning by-laws by their very nature are inherently discriminatory: **Petro-Canada v. North Vancouver (District)** (2001), 17 M.P.L.R. (3d) 1 (B.C.C.A.), 6*

[3] ***Toronto (City) v. C.U.P.E., Local 79** [2003] 3 S.C.R. 77, LeBel J., at par. 130 (hereinafter **"C.U.P.E., Local 79"**); **Roncarelli v. Duplessis** [1959] S.C.R. 121*

[4] *McLACHLIN, Beverly, **"The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law"** (1998-1999), 12 C.J.A.L.P. 171, 174, cited by LeBel J. above*

[5] *MAKUCH, Stanley et al., **Canadian Municipal and Planning Law** (2nd Edition) (Toronto: Thompson Carswell, 2004), 190*

*refusing a zoning application. In **Service Corp. International (Canada) Inc. v. Burnaby** for example, a Justice of the British Columbia Supreme Court had stated when considering the extent of any duty of fairness owed in relation to the adoption of a zoning by-law:*

> ***"Whatever the content of the duty of fairness in this case, it surely does not extend to require that council give reasons for its decision. Municipal council is made up of elected officials who vote on issues as their individual consciences may dictate."***[6]

Congrégation des témoins de Jéhovah de St-Jérome - Lafontaine v. Lafontaine (Village)[7] *has brought forward several significant issues relating to the legitimate exercise of rezoning powers.*

II. THE INTRIGUING CASE OF LAFONTAINE

***Lafontaine** is one of the most intriguing municipal cases in recent times. It is a case of rezoning - or lack thereof - gone bad. It features key concepts of general administrative law, issues of fairness, reasonable expectations, and freedom of religion. It was brought to the attention of the Supreme Court of Canada as a freedom of religion case, but the majority ruling had nothing to do with the Charter. A fluid duty of fairness given the substance of a duty to give reason was identified by almost the full panel of the court, yet no party had argued it. It was greeted with significant trepidation by local politicians and municipal lawyers alike fearing it meant an unwarranted and unexpected burden on municipal councils in the context of rezoning applications. For all these reasons, it is worthy to showcase the manifold features of **Lafontaine**.*

*Before setting out on this journey, a consideration of the legal framework at play is necessary to fully understand the ramifications of **Lafontaine**.*

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[6] ***Service Corp. International (Canada) Inc. v. Burnaby*** *[1999] B.C.J. No. 2829 (S.C., Bauman, J.), appeal allowed in part (2001), 95 B.C.L.R. (3d) 301 (B.C.C.A.)*

[7] *[2004] 2 S.C.R. 650 (hereinafter **"Lafontaine"**); for easiness of reading, reference to McLachlin C.J.C. and to LeBel J. will be, with all due respect, to McLachlin and LeBel respectively.*

III. THE UNIQUE LEGAL NATURE OF MUNICIPALITIES

Municipal governments in Canada are delegates of their provincial masters. Lacking plenary powers, their inferior legal status has led the courts to scrutinize the exercise of local authority more intensely than they scrutinize the exercise of authority by the provinces or by the federal government.[8]

However, local governments play an extremely important role in their communities. Municipal councils are made of elected representatives of their citizens to serve a local purpose while serving fundamentally the democratic process. They are regularly involved in decision-making and implementation of programs involving the exercise of powers from purely administrative to purely legislative. Local governments may be perceived as important organizations, the primary task of which is to reflect and provide for the needs and priorities of individuals within their communities[9]*.*

Municipalities are corporate bodies whose collective decision-making councils are clothed with not only executive and administrative powers, but also extensive legislative and quasi-judicial decision-making authority affecting almost every aspect of the daily life of their constituents.[10] *They are not just like any other body corporate created by legislation or mere administrative boards. Thus, municipal governments can be seen as the distinct level of elected governments in Canada.*[11]

The unique legal nature of municipalities is a foremost concern in the current broad and purposive approach to the exercise of municipal powers. The modern approach is embodied in the dissenting judgment of McLachlin J. (as she then was) in ***Shell Canada Products Ltd. v. Vancouver (City)****, where she stated:*

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[8] *HOEHN, Felix,* ***Municipalities and Canadian Law - Defining the Authority of Legal Governments*** *(Saskatoon: Purish Publishing, 1996), 1*

[9] *MAKUCH, Stanley et al., supra note 5, 3*

[10] *Course Syllabus, GS Law G113P 6.0,* ***The Widening Scope of Municipal Jurisdiction****, Osgoode Professional Development, Osgoode Hall Law School, Winter 2007*

[11] ***McKinney v. University of Guelph*** *(1987), 46 D.L.R. (4th) 193 (Ont. C.A.) affirmed [1990] 3 S.C.R. 229. Nowadays, Canadian constitutional observers say there are four levels of government: federal, provincial and territorial, municipal, and native. Although there is a large body of academic studies on the first three levels of governments, both legal and otherwise, a comparative analysis of municipal and native governance has yet to be done. This seems to have a significant academic potential which remains untapped to this date.*

> ***"(...) courts must respect the responsibility of elected municipal bodies to serve the people who elected them, and exercise caution to avoid substituting their views to what is best for the citizens of those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but maybe implied, courts must be prepared to adopt the "benevolent construction", which this court referred to in Greenbaum and confers the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representative."***[12]

This expansive articulation of the broad judicial approach in reviewing municipal actions is now the standard. It adheres to the fundamental axiom that courts must accord proper respect to the democratic responsibilities of elected municipal officials, and the rights of those who elected them. This is important to the continued healthy functioning of democracy at the municipal level. If municipalities are to be able to respond to the needs and wishes of their citizens, they must be given broad jurisdiction to make local decisions reflecting local values.[13]

Despite these forceful views acknowledging the unique nature of local governments, hybrid creatures[14] *with equal features of administrative bodies and democratically elected governing powers, municipalities have nonetheless been subjected to administrative law principles as are pure administrative delegate entities like the Ontario Municipal Board.*

Strict scrutiny by the courts may be appropriate where municipalities take action that would put them in jurisdictional conflicts with higher levels of government, or where they act in bad faith. To treat municipalities merely as "creatures of statute" in other contexts, however, overlooks that they are very special creations whose governments are made of elected municipal councils having a legislative function within a

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[12] *[1994] 1 S.C.R. 231, at par. 19*
[13] *Ibid. at par. 20*
[14] ***Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*** *[1990] 3 S.C.R. 1170, Sopinka, J., at par. 55 (hereinafter "**Old St. Boniface**")*

limited and delegated jurisdiction.[15] *In comparison with statutory boards and tribunals, their legal cousins, which usually have narrowly defined functions, municipalities have a wide scope of responsibilities. More importantly, statutory boards and tribunals are generally not democratically elected, do not have the authority to tax, and are not directly accountable to those whom they serve or regulate; in short, they are not governments in the usual sense of the term.*[16]

Thus, "municipal law" in the Canadian experience is in many ways a subspecie of public administrative law instead of a field of the law in its own right. Accordingly, like any other administrative delegate, Canadian municipalities are under a duty[17] *to act fairly in certain circumstances.*

The existence of a general duty to "act fairly" is premised on three considerations:

1. *the nature of the decision to be made by the administrative body;*

2. *the relationship existing between that body and the individual; and*

3. *the effect of that decision on the individual's rights.*[18]

The content of that duty has been explored in ***Lafontaine****.*

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[15] ***Re Cadillac Development Corp. Ltd. and City of Toronto*** *(1973), 1 O.R. (2d) 20 (Henry J.), 43*

[16] *HOEHN, Felix, supra note 8, 44; See also LeBel in his forceful dissent first explained in* ***Chamberlain v. School District of Surrey*** *[2002] 4 S.C.R. 710 (hereinafter* ***"Chamberlain"****) and reiterated in* ***City of Toronto v. C.U.P.E., Local 79****, note 3. LeBel, in* ***Chamberlain****, raised concerns about the appropriateness of treating the pragmatic and functional methodology as an overarching analytical framework for substantive judicial review that must be applied, without variation, in all administrative law contexts, including those involving non-adjudicative decision makers like elected bodies, as, for example, municipal councils and school boards. In certain circumstances, such as those at issue in* ***Chamberlain*** *itself according to LeBel, applying this methodological approach in order to determine the appropriate standard of review may in fact obscure the real issue before the reviewing court. Are these views harbingers of an upheaval of the current methodology of judicial review analysis applicable to elected public bodies?*

[17] *See* ***Chapter VI, B, (ii)*** *below for a discussion on the limits of the reach of the duty to be fair in municipal law.*

[18] ***Knight v. Indian Head School District No. 19*** *[1990] 1 S.C.R. 653, at par. 24*

IV. LAFONTAINE - THE FACTS

*A review of the salient facts in **Lafontaine** is critical to understanding its ramifications.*

In the Village of Lafontaine, houses of worship could be construed only in P-3 community zones. The Jehovah's Witnesses had attempted to buy a main road lot from a private owner, but to no avail. The private owner had another available lot in the same P-3 community zone, but did not disclose this to the religious group.

Concluding that there was no P-3 land available, the Jehovah's Witnesses purchased a residential lot and applied unsuccessfully on three different occasions to the municipality to rezone it to P-3 status.

A. The First Rezoning Application[19]

On March 4, 1992, the Congregation entered into a purchase agreement for a parcel of land, conditional upon obtaining rezoning approval. The parcel was located in a residential zone. However, another P-3-zoned structure was already located in the area.

On May 12, 1992, the municipality referred the request to its planning advisory committee for a recommendation. Realizing that places of worship normally enjoy exemption from property taxes, it commissioned a study on the financial impact upon city taxpayers of granting the Congregation's request. This study concluded that granting the Congregation's zoning variance would result in increased property taxes for neighbouring residents. The committee recommended denial of the Congregation's request for a zoning variance to the municipality. At a subsequent public meeting, the municipality announced its final decision to deny the request, supported by detailed reasons in explaining its refusal by arguing that it would have placed too high a tax burden on residential taxpayers since churches did not pay taxes.

At the urging of the mayor, the Congregation met with the municipality's building inspector the next day. The building inspector indicated on a map the location of P-3 zones in which the Congregation could purchase land to build its place of

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[19] ***Lafontaine***, *supra note 7. The following review of the facts borrows liberally the factual description of McLachlin from par. 18 to par. 27.*

worship. He added that if no land were available for purchase in Zone P-3, the Congregation would have to reapply for a zoning variance.

B. The Second Rezoning Application

Following the building inspector's advice, the Congregation renewed its search for available land in Zone P-3, again to no avail. The Congregation took its search to other zones. It found a suitable lot in a commercial zone only 400 metres from another place of worship and entered into a conditional purchase agreement. Still following the building inspector's earlier advice, the Congregation filed a second request for a zoning variance.

The Congregation's accompanying letter, dated February 1, 1993, detailed its four-year-long effort to build a place of worship in the municipality and expressed its inability to find any available land in Zone P-3. It requested a zoning variance for the commercial-zoned property it now proposed to acquire. The Congregation asked for an audience with the municipality in order to personally present its construction plans.

Shortly after, the municipality sent the Congregation a letter summarily denying its request. The municipality contented itself with advising that lots in P-3 were available.

However, in contrast with its first processing of the Congregation's request for rezoning, the municipality:

1. *gave no reasons for this decision;*

2. *did not engage in an evaluative process like the one it undertook in response to the Congregation's first request for a zoning variance;*

3. *did not undertake any evaluative process at all;*

4. *did not refer the matter to its planning advisory committee;*

5. *did not study the financial impact of granting the zoning variance; and*

> ***6.*** *did not grant the Congregation the courtesy of meeting with its representatives to discuss the Congregation's construction plans, which by then had been derailed for four years.*
>
> *This had fatal consequences for the municipality.*

*C. **The Third Rezoning Application***

Having been told land was available in P-3 but not informed as to where, the Congregation yet again renewed its search for land in P-3. It canvassed landowners in this zone, but again concluded that no suitable properties were for sale. Armed with written confirmation from P-3 property owners attesting to the unavailability of land in Zone P-3, the Congregation presented its third request to the municipality for a zoning variance on May 31, 1993. The request related to the same property that had been the subject of the second request. In a series of letters to the municipality, the Congregation presented evidence of its fruitless search to identify any available land in Zone P-3.

The municipality responded by letter three months afterwards refusing the application for rezoning. Again, it offered no reasons. This time it did not even tell the Congregation that land was available in Zone P-3, but said:

> ***"[translation] You have made a number of applications to amend the zoning by-law. The Legislature has given the municipal council the responsibility for exercising this power, which is discretionary. Upon careful consideration, the municipality of Lafontaine has decided not to take action in respect of your applications. The municipal council of Lafontaine is not required to provide you with a justification and we therefore have no intention of giving reasons for the council's decision."***[20]

*With this, the applicants sought mandamus arguing that the municipality's refusal was an unjustifiable breach of their fundamental right of freedom of religion under s. 2(a) of the **Canadian Charter of Rights and Freedoms**.*

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[20] ***Lafontaine**, supra note 7, at par. 27*

D. ***The Basis for Leave to Appeal and its Aftermath***

Charter right violation was the basis of the Congregation and intervenors' arguments before the Supreme Court of Canada since leave to appeal had been granted on the following issues:

> ***1.*** *Do ss. 123 to 130 and 132 of the* ***Act respecting land use planning and development****, R.S.Q., c. A-19.1, infringe the right to freedom of religion guaranteed by s. 2(a) of the* ***Canadian Charter of Rights and Freedoms****?*
>
> ***2.*** *If so, is the infringement a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the* ***Canadian Charter of Rights and Freedoms****?*
>
> ***3.*** *Do ss. 123 to 130 and 132 of the* ***Act respecting land use planning and development****, R.S.Q., c. A-19.1, infringe the right to equality without discrimination guaranteed by s. 15(1) of the* ***Canadian Charter of Rights and Freedoms****?*
>
> ***4.*** *If so, is the infringement a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the* ***Canadian Charter of Rights and Freedoms****?*

Against all expectations, the majority of the Supreme Court of Canada entertained the appeal on more traditional judicial review grounds rather than addressing the Charter-based arguments.[21] *The majority did so despite LeBel's warning where he said that the appellants had declined to base their case on the principles of administrative law while preferring to focus on their arguments based on freedom of religion. As a result, according to LeBel, questions of administrative law could not form the basis of the court's decision, although he agreed that some comments were in order due to the importance of these questions.*[22]

It is regrettable that the majority has not addressed LeBel's concern. In fact, the Supreme Court of Canada seems

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[21] *WeirFoulds,* ***Municipal and Planning Law Client Bulletin*** *- Summer 2004, online: www.weirfoulds.com, 5.*

[22] ***Lafontaine****, supra note 7, at par. 85*

*lacking in consistency in its approach on court bound issues and appropriateness of rulings. A year before, a seven-judge majority in **C.U.P.E., Local 79**[23] had criticized LeBel's discussion of the administrative standards of review since that issue had not been argued before the court.[24] Given that he had been rebuked earlier, it is easy to understand his heedless caveat in **Lafontaine**.*

The unexpected majority ruling of the Supreme Court of Canada has drawn criticism both from practitioners and academics but for different reasons. Professor José Woehrling recently noted:

> ***"The attitude of the majority judges is surprising considering that the court had authorized the intervention of the Evangelical Fellowship of Canada, the Seventh Day Adventist Church in Canada and the Canadian Civil Liberty Association, which all intervened to submit arguments with respect to freedom of religion. Was it not illogical to authorize interventions for the sole purpose of a more significant debate on the freedom of religion only to adopt afterward a solution rendering this debate entirely irrelevant?"***[25] *(Translation is mine.)*

Practitioners had also expressed concerns but for reasons relating to the fallout of that case for local governance.[26]

*These criticisms may well be valid. They disregard however a fundamental principle recently restated in **Khadr v. Canada (Attorney General)** where Mr. Justice Phelan noted the following:*

> ***"However, in this case, the applicant's rights can be addressed sufficiently under the doctrine of***

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[23] ***C.U.P.E., Local 79**, supra note 3, at par. 17*

[24] *In a blatant show of inconsistencies, however, the court embarked on a standard of review analysis despite the absence of submissions on this issue!*

[25] *WOEHRLING, José, **La liberté de religion, le droit à l'"accommodement raisonnable" et l'obligation de neutralité religieuse de l'État en droit canadien**, Revista Catalana De Dret Públic, núm. 33, 2006, 369, see his footnote 31.*

[26] *For example, Beverly Spencer noted that municipal lawyers were uncertain about the fallout of that case. She cited Bruce Noble, city solicitor for the city of Fredericton and vice-chair of the CBA's National Municipal Law Section, stating that although the onus casted on municipalities as a result of **Lafontaine** would not be difficult to satisfy (i.e. obligation to provide reasons), the problem would be to determine what would constitute a sufficient explanation. Online: www.cba.org*

> ***legitimate expectation. I therefore will not decide this case on Charter grounds raised in the application for judicial review because as stated in Baker v. Canada (Minister of Citizenship and Immigration), courts should refrain from dealing with Charter issues raised in an application for judicial review where it is unnecessary to do so."***[27]

V. THE ADMINISTRATIVE LAW ISSUE IN LAFONTAINE

A. The McLachlin Views

McLachlin, for the majority of the court, saw the refusal to rezone as an administrative decision subject to the principles in ***Baker v. Canada (Minister of Citizenship and Immigration)***[28]*.*

Baker *is authority for the principle that the mere fact that a decision is administrative and affects the rights, privileges, or interests of an individual is sufficient to trigger the application of the duty of fairness. However, the court in* ***Baker*** *also noted that the duty of fairness is flexible and variable; it depends on an appreciation of the context of the particular statute and the rights affected. Moreover, the flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations.*

A non-exhaustive list of five factors was listed out in ***Baker*** *to determine the content of that duty in that case:*

1. *the nature of the decision being made and the process followed in making it;*

2. *the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;*

3. *the importance of the decision to the individuals affected;*

4. *the legitimate expectations of the person challenging the decision; and*

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[27] *[2006] F.C. 727 (CanLII), at par. 61*
[28] *[1999] 2 S.C.R. 817 (hereinafter "**Baker**")*

5. *the choice of procedure made by the agency must be taken into account and respected.*

Each factor was then explained as follows:

1. The nature of the decision being made and the process followed in making it

> *"The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness."*[29]

2. The nature of the statutory scheme and the terms of the statute pursuant to which the body operates

> *"Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute or when the decision is determinative of the issue and further requests cannot be submitted."*[30]

3. The importance of the decision to the individuals affected

> *"The more important the decision is to the lives of those affected and the greater its impact on ... those persons, the more stringent the procedural protections that will be mandated."*[31]

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[29] *Ibid. at par. 23*
[30] *Ibid. at par. 24*
[31] *Ibid. at par. 25*

4. The legitimate expectations of the person challenging the decision

> *"[They] may also determine what procedures the duty of fairness requires in given circumstances."*[32]

5. The choice of procedure made by the agency must be taken into account and respected

> *"(...) particularly when the statute leaves to the decision-maker the ability to choose its own procedures [the will of the legislature] or when the agency has an expertise in determining what procedures are appropriate in the circumstances."*[33]

The court noted that this was an open-ended list to assist a court in determining whether the procedures followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.[34]

The first ***Baker*** *factor has recently been explained as implying an assessment of the closeness of the administrative process to the judicial process.*[35]

The fifth ***Baker*** *factor has also recently been further explained by the Supreme Court of Canada in the context of the duty of fairness:*

> ***"Considerable deference is owed to procedural rulings made by a tribunal with the authority to control its own process. The determination of the scope and content of a duty to act fairly is circumstance-***

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[32] *Ibid. at par. 26*
[33] *Ibid. at par. 27*
[34] *Ibid. at par. 28*
[35] ***Vennat v. Canada (Attorney General)*** *2006 FC 1008 (CanLII) (Noel J.)*

> ***specific**, and may well depend on factors within the expertise and knowledge of the tribunal, including the nature of the statutory scheme and the expectations and practices of the Agency's constituencies. Any assessment of what procedures the duty of fairness requires in a given proceeding should "take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances."*[36] *(Emphasis is mine.)*

*In **Lafontaine**, the court carried out a **Baker** analysis to hold the municipality to a heightened duty of fairness in refusing the congregation's second and third applications. As a result, in its quest to determine the content of that duty, the court gave it substance in the form of a specific duty to give reasons.*[37] *The court analysed the five **Baker** factors as follows:*

1. ***The nature of the decision being made and the process followed in making it***

> *"The first factor — the nature of the decision and the process by which it is reached — merges administrative and political concerns. The decision to propose a draft by-law rezoning municipal territory is made by an elected council accountable to its constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to their own (...) What is in the public interest is a matter of discretion to be determined solely by the municipality. Provided the municipality acts honestly and within the limits of its statutory powers, the reviewing court is not to interfere with the municipal decision unless "good and sufficient reason be established" (...)*

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[36] ***Council of Canadians with Disabilities v. Via Rail Canada Inc.**, 2007 S.C.C. 15, at par. 231*

[37] *PATTERSON, Kara, "**Case Comment - National Administrative Law Section Newsletter**", in CBA.Org, November 2004, 6, online: www.cba.org*

However, the elected councillors cannot deny a rezoning application in an arbitrary manner. Where the municipal council acts in an arbitrary fashion in the discharge of its public function, "good and sufficient reason" exists to warrant intervention from the reviewing court in order to remedy the proven misconduct. The need for judicial oversight of arbitrary municipal decision making is only heightened by the aggravated potential for abuse of discretionary statutory authority."[38]

2. The nature of the statutory scheme and the terms of the statute pursuant to which the body operates

"The second factor is the statutory scheme and its provisions (...) which grants the municipality authority to consider a rezoning application. Even so, the absence of an appeal provision demands greater municipal solicitude for fairness."[39]

3. The importance of the decision to the individuals affected

"The stringency of procedural protection is directly proportional to the importance of the decision to the lives of those affected and the nature of its impact on them (...) Here, it becomes important that the municipal decision affects the Congregation's practice of its religion. The right to freely adhere to a faith and to congregate with others in doing so is of primary importance"[40]

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[38] ***Lafontaine***, *supra note 7, at par. 6*
[39] ***Lafontaine***, *supra note 7, at par. 8*
[40] ***Lafontaine***, *supra note 7, at par. 9*

4. The legitimate expectations of the person challenging the decision

> *"(...) Where prior conduct creates for the claimant a legitimate expectation that certain procedures will be followed as a matter of course, fairness may require consistency (...) Here, the Municipality followed an involved process in responding to the Congregation's first rezoning application, in so doing giving rise to the Congregation's legitimate expectation that future applications would be thoroughly vetted and carefully considered"*[41]

5. The choice of procedure made by the agency must be taken into account and respected

> *"[It] calls upon the reviewing court to acknowledge that the public body may be better positioned than the judiciary in certain matters to render a decision, and to examine whether the decision in question falls within this realm. Municipal decisions on rezoning fall within the sphere in which municipalities have expertise beyond the capacity of the judiciary, thus warranting deference from reviewing courts. However, this factor may not carry much weight where, as here on the second and third applications for rezoning, there is no record to indicate that the Municipality has actually engaged its expertise in evaluating the applications."*[42]

In effect, the court established the duty to give reasons in this specific case as a requirement of procedural fairness. If ***Baker*** *had expanded the scope of judicial review of administrative decisions by establishing standards for the content of the duty of fairness, it had not, however, clarified exactly when the duty to give reasons would come into play.*

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[41] ***Lafontaine***, *supra note 7, at par. 10*
[42] ***Lafontaine***, *supra note 7, at par. 11*

*The cumulative effect of **Baker** and **Lafontaine** is such now that it can be safely said that, on a sliding scale, the greater the impact of a decision will have on the rights or interests of the affected parties, the more likely there will be an accompanying requirement to give reasons, especially in the context of potential Charter rights infringements.*[43]

*One of the lesser known features of **Lafontaine** is that although the minority decision, delivered by LeBel, dealt mostly with the issue of freedom of religion, it nonetheless gave mitigated support to the majority's views in obiter dictum on the topic of administrative law.*

B. The LeBel Views

*LeBel defined the rezoning power of the municipality as discretionary. He noted that the municipality's decision to refuse to amend its zoning by-law was within the scope of its discretionary power, as it had to decide whether it would be appropriate to amend the by-law. The municipality had a range of options at its disposal, and its constituting act did not dictate which one it should select as in **Baker**[44]. According to both McLachlin and LeBel, a discretionary decision made by an administrative authority is subject to a duty of procedural fairness of a fluid nature.*

LeBel also had the foresight to clearly mark the connection between the administrative duty of fairness and the constitutional issue of freedom of religion:

> ***"When applied to the case at bar, these factors would, at the least, place the municipality under an obligation to give reasons for its repeated refusals to amend its zoning by-law. The municipality's decision regarding the application to amend the zoning by-law, which was not subject to a specific decision-making process, could not be appealed by the appellants even though it had a direct effect on their right to freedom of religion guaranteed by s. 2(a) of the Charter. Normally, the appellants could expect to receive reasons from the municipality for its decision."***[45]

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[43] ***Slaight Communications Inc. v. Davidson*** *[1989] 1 S.C.R. 1038*
[44] ***Lafontaine****, supra note 7, at par. 87*
[45] ***Lafontaine****, supra note 7, at par. 89*

Thus, according to LeBel, the very fact that the municipality's decision would have had an adverse effect on the Congregation's freedom of religion triggered the duty to give reason; not any prior conduct by the municipality as alluded to by McLachlin nor the result a ***Baker*** *analysis:*

> ***"The importance of a negative decision to the appellants, who as a result found it impossible to build the place of worship they needed to practice their religion, in itself placed the municipality under an obligation to give reasons for its decision."***[46] *(Emphasis is mine.)*

Apparently, even strictly from the administrative law angle, LeBel would have faulted the municipality for the inadequacy of the reasons given on the first rezoning application in contrast to McLachlin in the following passage:

> *"**The municipality did not give sufficient reasons for its decisions. After receiving the appellants' application to amend the zoning by-law in relation to their first offer to purchase the lot located in a residential zone, the municipality's explanation for its refusal was that such an amendment would result in an increase in the taxation rate and that the owners of adjacent lots who would be affected by this increase would not take part in the process of approval by way of referendum provided for in the ALUPD. Then, when the municipality refused to amend its zoning by-law in relation to the second lot the appellants wished to purchase, the one located in Zone C-3, it justified its decision on the basis that lots were available in Zone P-3 but did not identify the lots in question. The appellants, convinced that no lots were available in that zone, then applied to the municipality on four other occasions to amend the zoning by-law. The municipality simply repeated that lots were available in Zone P-3 and that it was therefore under no obligation to amend its zoning by-law."***[47] *(Emphasis is mine.)*

Without segregating any of the four episodes of refusal, LeBel held that the municipality should have given more detailed

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[46] ***Lafontaine****, supra note 7, at par. 89*
[47] ***Lafontaine****, supra note 7, at par. 90*

reasons for its decisions. Thus, LeBel implied that even the reasons given at the first rezoning application were inadequate:

> ***"More detailed reasons would have given the appellants a better understanding of the municipality's decision and, above all, demonstrated to them that there were in fact lots available in Zone P-3."***[48]

It is noteworthy that he was supported in his conclusions by two other judges of the court's panel. If such is the case, LeBel's views on the adequacy of reasons given by the municipality are more stringent than those of McLachlin and would cast an even greater burden on the municipality.

In the end, both LeBel and McLachlin agreed on the policy reasons at play to cast a heightened duty of fairness on the municipality by insisting on the need of transparency.

According to McLachlin:

> ***"Giving reasons for refusing to rezone in a case such as this serves the values of fair and transparent decision making, reduces the chance of arbitrary or capricious decisions, and cultivates the confidence of citizens in public officials."***[49]

While LeBel said:

> ***"A more precise and rigorous justification would therefore have given the municipality's decision-making process the required transparency and the appearance of procedural fairness."***[50]

VI. THE NEGLECTED ISSUE IN LAFONTAINE: STANDARDS OF REVIEW ANALYSIS

Lafontaine *is also interesting in relation to the relative silence of the court on the topic of standards of review.* ***Lafontaine*** *would have been another occasion since* ***Dr. Q. v. College of Physicians and Surgeons (British Columbia)***[51] *where the Supreme Court of Canada could have considered the intersection*

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[48] ***Lafontaine***, *supra note 7, at par. 92*
[49] ***Lafontaine***, *supra note 7, at par. 92*
[50] ***Lafontaine***, *supra note 7, at par. 13*
[51] *[2003] 1 S.C.R. 226*

of administrative law standards of review and those to be applied by an appellate court to the decision of a reviewing court.[52] That did not occur.

Standards of appellate review analysis calls for a determination of the degree of appellate deference to lower courts.[53] Standards of judicial review may call for a determination of the degree of judicial deference to an administrative body using the established functional and pragmatic approach.[54] They are two different notions.

*A. **Standards of Appellate Review***

*In **Housen**[55], the Supreme Court of Canada clearly indicated that an appellate court should not review the findings of fact of a trial court unless the trial court had made a palpable, serious and overriding error. This duty of deference is particularly strong in respect to assessment of facts.*

*In **Lafontaine**, although McLachlin did not expressly address the standard of appellate review analysis like LeBel, she nonetheless alluded to it indirectly. In doing so, however, she made a significant and intriguing point:*

> ***"14 It is necessary to deal with a preliminary question: does the trial judge's finding that Mrs. Jolicoeur was willing to sell a P-3 property to the Congregation resolve the matter and make it unnecessary to consider the Municipality's treatment of the Congregation's application for rezoning, as LeBel J. concludes?***
>
> ***15 Like LeBel J., I accept the finding of fact that land was available in Zone P-3. However, this does not resolve the issue, in my view, because the Municipality's duty of procedural fairness to the Congregation is not contingent upon the interactions of the Congregation with third parties, namely Mrs. Jolicoeur. The Municipality's duty exists independent***

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[52] *See EVANS, John M. (Judge, Federal Court of Appeal), **"The Role of Appellate Courts in Administrative Law"**, Vol. 20, No. 1, April 2007, C.J.A.L.P. 1*
[53] ***Housen v. Nicholaisen** [2002] 2 S.C.R. 235 (hereinafter **"Housen"**)*
[54] ***Pushpanatan v. Canada (Minister of Citizenship and Immigration)** [1998] 1 S.C.R. 982, reasons modified [1998] 1 S.C.R. 1222 (hereinafter **"Pushpanatan"**)*
[55] ***Housen**, supra note 53*

> ***of the Congregation's own conduct."*** *(Emphasis is mine.)*

LeBel would have dismissed the appeal on the basis of curial deference to the specific fact finding by the trial judge that land was available to the Congregation in Zone P-3. This would preclude a conclusion that the village had infringed the appellants' freedom of religion. On the other hand, McLachlin allowed the appeal under principles of pure administrative law regardless of that finding of fact. This calls for comments considering the availability of the equitable remedy of mandamus.

The majority in ***Lafontaine*** *essentially shielded the Appellant from the consequence of its own conduct by stating that the municipality's duty existed independent of the Congregation's own conduct. Granted that that conduct was blameless, however by making the municipality's duty absolute, has the majority in* ***Lafontaine*** *created an exception to one of the criteria of availability of mandamus at common law?*

In ***Apotex Inc. v. Canada (Attorney General)***[56]*, which is a guiding case in Canada on mandamus, it had been established that mandamus would not issue if there was an alternate remedy or course of action or if the applicant's conduct was a factor. This discreet point at the crossroads of appellate review and judicial review was left by the court in* ***Lafontaine*** *for another day.*

B. Standards of Judicial Review

On the other hand, there was also an underlying issue of the standard - if any - of judicial review, which was unaddressed by the entire court.

Consideration of judicial review calls for a closer look at ***Lafontaine*** *from the perspective of curial deference and legislative immunity in the municipal context.*

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[56] *[1994] 1 F.C. 742 (C.A.) affirmed [1994] 3 S.C.R. 1100*

(i) standard of review analysis and procedural fairness

Typically, judicial control of municipal authority is done by judicial review. Principles of administrative law are applied to municipal governmental actions since everything that a public officer, whose office has been created and defined by statute, does in his official capacity must find its ultimate legal foundation in statutory authority.[57]

Generally speaking, there can be two forms of judicial review:

1. *procedural review, which is concerned with the process by which an administrative decision is made;*

2. *substantive review, which deals with the content of an administrative decision.*

Procedural review is judicial review of the procedure by which a decision is made. It can issue where a public authority has contravened an express procedural requirement. Where there are no express requirements, procedural review may still be available if there has been a breach of natural justice[58] *or in the modern vernacular, a breach of procedural fairness:*

> ***"Although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature. Natural justice or procedural fairness are therefore those procedural rules that the courts will imply into legislative schemes."*** [59]

What really lies at the heart of judicial review for procedural control is due process. Want of fairness will cause the courts to exercise their supervisory role and render the decision void. Indeed, the notion of the duty of procedural fairness has been at the forefront of the explosion of due process in administrative law.[60]

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[57] ***Canada v. Newfoundland Telephone Company Ltd.*** *[1987] 2 S.C.R. 466, 478*
[58] *ELLIOT, David W.,* ***Introduction to Public Law, Readings on the State, the Administrative Process, and Basic Values****, 6th Edition in Canadian Legal Studies Series, (Toronto: Captus Press, 2007), 71*
[59] ***Cooper v. Wandsworth*** *(1863) Q.B. 24*
[60] *MULLAN, David,* ***"Tribunal Imitating Courts - Foolish Flattery or Sound Policy?"****, (2005), 28 Dalhousie Law Journal, 1*

One of the consequences, however, of lack of procedural fairness typically at the judicial level is that judges do not have jurisdiction to substitute their decisions for those of the administrative body. This is why it is not an appeal but only a review of the procedure. Accordingly, the appropriate remedy is to return the matter back to the administrative agency for reconsideration with instruction to follow a fairer procedure. This is what happened in ***Lafontaine****.*[61]

How does this relate to ***Lafontaine****?*

It is now held as an article of judicial faith that when courts must necessarily determine the standard for review when reviewing administrative decisions.[62]

The pragmatic and functional approach is the guiding principle to review decisions of administrative tribunals. It applies to all judicial reviews, whether that review is by way of application to the court or statutory right of appeal. Courts must always select and employ the proper level of deference. This calls for an assessment of the appropriate standard of judicial review.[63]

The issue in ***Lafontaine*** *should have therefore been whether assessing if the duty of fairness had been adhered to required an assessment of the standard of judicial review. It was ignored by the court because procedural fairness requires no assessment of the appropriate standard of judicial review. Rather, evaluating whether procedural fairness or the duty of fairness has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation.*[64]

Indeed, it has been said elsewhere that the content of the duty of procedural fairness seeks to insure the appropriate relationship between the citizen and the administrative decision-maker. In contrast, the standard of review analysis speaks to the relationship between the administrative decision-maker and the judiciary. In the former case, there is no need

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[61] *See also* ***Morneau v. Balian*** *2007 QCCA 315 (CanLII) at par. 13*
[62] ***Pushpanatan****, supra note 52*
[63] ***Law Society of New Brunswick v. Ryan*** *[2003] S.C.R. 20*
[64] ***Moreau-Bérubé v. New Brunswick (Judicial Council)*** *[2002] 1 S.C.R. 49;* ***Mo's Sports Parlour (2000) Ltd. v. Alberta (Gaming and Liquor Commission)*** *2006 ABQB 455*

to determine the degree of deference.[65] *As noted by Bastarache J. then in dissent in Moreau-Bérubé:*

> ***"... Nevertheless, the two inquiries proceed separately and serve different objectives. The content of the duty of procedural fairness seeks to ensure the appropriate relationship between the citizen and the administrative decision maker. In contrast, the standard of review speaks to the relationship between the administrative decision maker and the judiciary. In the former case, there is no need to determine a degree of deference."***

(ii) procedural review and legislative immunity

The court in ***Lafontaine*** *viewed the refusal to rezone as an administrative act rather than legislative. This distinction is critical, as otherwise, the common law legislative immunity would have exempted the municipality of any duty of fairness.*[66]

Municipal powers are exercised on a sliding scale from purely administrative to purely legislative. What triggers generally the duty of fairness is municipal action focussing on specific individuals rather than the community at large:

> ***"(...) a central determinate of whether a municipality must act in accordance with the principles of natural justice will be the extent to which a municipal action implicates private rights, as opposed to those instances where the municipal decision is of a more general policy oriented nature.***
>
> ***(...) the new approach incorporating a more contextual duty to be fair was applied in a municipal context by the Supreme Court of Canada in Old St. Boniface***

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[65] ***Re Retired Judges case*** *(2003) S.C.C. 29.*

[66] *In BOGHOSIAN, David J., and J. Murray Davisson's* ***The Law of Municipal Liability in Canada*** *(Markham: LexisNexis Butterworths, 1999), citing* ***Welbridge Holdings Ltd. v. Greater Winnipeg (Municipality)*** *[1971] S.C.R. 957, the authors noted:* ***"On further appeal, Laskin, C.J.C. held on behalf of a unanimous panel that, in exercising legislative or quasi judicial functions, as long as a municipality exercised its powers in good faith, it could not be found liable for negligence in the exercise of such authority. The Court then went further and held that all matters incidental to the quasi judicial or legislative function, for example, the manner in which a hearing is held or the provision of notice to interested party, were encompassed by the immunity."***

***Residents Assn. Inc. v. Winnipeg (City)* [1990] 3 S.C.R. 1170."**[67]

In ***Nicholson c. Haldimand - Norfork Regional Board of Commissioners of Police***[68]*, the court had quoted approvingly the judgment of Megarry J. in* ***Bates v. Lord Hailham***[69]*, a case where Megarry J. denied the application of procedural fairness obligations to a committee that set the fees to be charged by English solicitors. The principal basis for this decision is found in the following statement:*

> ***"Let me accept that in the sphere of the so-called quasi-judicial, the rules of natural justice run, and that in the administrative or executive field, there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated."***[70]

Thus, as pointed out by David Mullan[71]*, while Laskin, C.J.S., in* ***Nicholson*** *quoted only the first of the sentences and not the second, the second was shortly thereafter picked up and made the focal point of Estey J.'s judgment for the Supreme Court of Canada in* ***Attorney General of Canada v. Inuit Tapirisat of Canada***[72]*. This limit on the reach of procedural fairness has been acknowledged in municipal law along with the principle that there ought not to be any municipal liability flowing from the exercise of legislative authority:*

> ***"A municipality's choice to use its legislative powers to rezone land so that the municipality's zoning continues to reflect its best wisdom is a legitimate choice and a choice that is very much part of its legislative powers."***[73]

There is however a degree of uncertainty on the reach of procedural fairness in the field of legislative powers in instances where rezoning applications involving private property

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[67] *MAKUCH, Stanley et al., supra note 5, 252 and 253*
[68] ***Nicholson c. Haldimand - Norfork Regional Board of Commissioners of Police*** *[1979] 1 S.C.R. 311 S.C.C.*
[69] ***Bates v. Lord Hailham*** *[1972] 1 W.L.R. 1373 (Ch. D.)*
[70] *Ibid. 1378.*
[71] *MULLAN, David,* ***Natural Justice in Recent Developments in Administrative Law*** *(Toronto: Carswell, 1987), 8.*
[72] ***Attorney General of Canada v. Inuit Tapirisat of Canada*** *[1980] 2 S.C.R. 735 (S.C.C.).*
[73] ***Pacific National Investments Ltd. v. Victoria (City)*** *[2002] 2 S.C.R. 919, at par. 64*

*rights rather than the general rights of the community. In **Lafontaine**, that issue lied at the crossroads of municipal powers in circumstances where private rights were further compounded by the fact that freedom of religion was at stake.*

VII. THE MAJORITY ISSUE IN LAFONTAINE: ZONING AND FAIRNESS

Municipal politics is fraught with infinite possibilities of abuse of powers or typically, misunderstanding of such powers. Typically, municipal councillors are selected to take views and stands on a realm of local issues and do so regularly forcefully. However, they may cross the forbidden divide and they may also create with their constituents expectations that can be reasonable or unreasonable, depending on the circumstances, and which may have legal consequences.

*As shown in **Lafontaine**, administrative law provides for those situations. The duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority.*[74]

A. Legitimate Expectations

*Will the doctrine of legitimate expectations articulated in **Lafontaine** have lasting adverse effect on the exercise of municipal authority? Given its weak stature in Canadian case law, it seems not to hold any promise of growth.*

*In **Re Canada Assistance Plans***[75]*, Sopinka J. dealt with the notion of legitimate expectations in the context of a claim by British Columbia that the federal government was precluded from introducing a Bill by virtue of the legitimate expectation of the province that amendments to the Canada Assistance Plan would only be made with consent. Sopinka J. saw the issue as whether legitimate expectations could impugn the legislative process.*

According to Sopinka J., if the doctrine of legitimate expectations required consent and not merely consultation, then it would be the source of substantive rights; in that case, a substantive right to veto proposed federal legislation. This proposition was unacceptable, as it was not part of Canadian law that the doctrine of legitimate expectations could create substantive rights. It is merely a part of the rules of

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[74] ***Cardinal v. Director of Kent Institution*** *[1985] 2 S.C.R. 643, 653.*
[75] ***Re Canada Assistance Plans*** *[1991] 2 S.C.R. 525*

procedural fairness that can govern administrative bodies. Where it is applicable, it can create a right to make representations or to be consulted but it cannot fetter the decision following the representations or consultation.

Since the doctrine of legitimate expectation is only a source of procedural claims, it never generates a claim to a substantive outcome, only hearing entitlements. This point was reinforced in ***Baker*** *and more recently reaffirmed by Binnie J. in* ***Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)***[76]*, though the majority expressly declined to rule on the point.*

In certain circumstances, procedures will be required by reason of expectations generated in an affected person and not be entirely contingent on a detached analysis of the statutory power in question. How does it impact municipal dynamics?

In ***Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)***[77]*, it was argued that there was an expectation on the part of a residents association that there would be no more development of the kind in issue until such time as there was a new city plan in place, a process in which the association expected to participate. The court held that any such expectation could not prevail against the applicant developer in the face of all the other procedural protections provided for in the relevant legislation. Sopinka J. commented as follows on the reach of the doctrine:*

> ***"The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in such circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party had been led to believe that his or her rights would not be affected without consultation."***

The issue of legitimate expectations in the municipal context was argued unsuccessfully in ***Hamilton - Wenworth (Regional Municipality) v. Ontario (Minister of***

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[76] ***Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*** *[2001] 2 S.C.R. 281 (hereinafter "****Mount Sinaï****")*

[77] ***Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*** *[1990] 3 S.C.R. 1170 (hereinafter "****Old St. Boniface****")*

Transportation)[78]. *The Minister of Transportation of the newly elected N.D.P. government decided not to continue funding for a major highway construction project. The court held that such decision was outside the realm of its jurisdiction even by reason of appeals to legitimate expectations based on the previous government's fulfilment of its financial commitments and reliance by the applicants of continuation of the funding. The court noted that the applicant's claim played either in contract or restitution, but not in judicial review in the nature of mandamus.*

In an immigration context, in ***Shankaran v. Canada (Minister of Citizenship and Immigration)***[79]*, the applicant, a landed immigrant in Canada, had a substantial criminal record while living in Canada, which included violent offences. An immigration officer gave an adverse recommendation to the minister and the applicant was served with a Notice of Intention to seek the opinion of the minister. The applicant was also advised as to what documents would be provided to the minister for consideration. He was finally advised that he had 15 days to forward any representations, arguments or information to the minister before a decision would be made. After his lawyer had requested full disclosure of all documents and information being considered by the minister, the immigration officer sent back material and a letter of information would an assurance that a copy of any submission or final report would be sent to the applicant for his review. The minister ruled the applicant to constitute a danger to the public in Canada but the applicant had not received a copy of any submission or final report from Canada Immigration for his review prior to the rendering of the decision.*

In judicial review, the applicant claimed that his legitimate expectations had been denied. The Federal Court of Canada agreed with him and held that the letter advising him that he would receive a final summary prepared for the minister had created a legitimate expectation that the applicant would have it and then would have had the opportunity to respond.

The court concluded that it was unfair not to require that the promise be honoured but there again, it returned the matter for reconsideration. ***Shankaran*** *is a prime example of what a difference the procedural right to legitimate expectation can*

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[78] ***Hamilton - Wenworth (Regional Municipality) v. Ontario (Minister of Transportation)*** *[1991], 49 Admin. L.R. 169 (Ont. Div. Ct.)*

[79] *(1997) 40 Imm.L.R. (2d) 268, (FC)*

make while not interfering with or conflicting with statutory duties.

It is noteworthy that the Federal Court of Canada had cited in support of its ruling on legitimate expectation, the Privy Council in ***Attorney General of Hong Kong v. N.G. Yuens Chiu***[80] *where Lord Fraser of Tullybelton said at page 638:*

> ***"When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, as long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct."***

Although this principle established by the Privy Council is entirely applicable in Canada, not much more than that may be drawn from it since the Supreme Court of Canada has clearly nixed the concept of substantive legitimate expectation.

Two other cases have also dealt with the notion of legitimate expectation in a way that can impact municipalities.

Mount Sinai[81] *came to the attention of the Supreme Court of Canada by way of appeal by the Quebec Minister of Health and Social Services of a judgment of the Quebec Court of Appeal ordering the minister to issue an amended permit to the Mount Sinai Hospital Center. The centre had been established in Ste-Agathe as a long-term treatment facility. In 1984, negotiations began to move the centre to Montreal. At the time, it was operating under its original permit for 107 long-term care beds, even though it had been provided 50 short-term care beds for the past decade. The minister promised the centre on several occasions that the permit would be formally altered once it moved to Montreal. However, once the centre had moved, the minister refused to issue an amended permit. Mandamus was sought for an order compelling the minister to issue the permit. The Superior Court ordered the minister to hear submissions before deciding to issue the permit. The Court of Appeal ordered the minister to issue the permit.*

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[80] *[1983] 2. A.C. 269 (Hong Kong, P.C.)*
[81] ***Mount Sinai****, supra note 76*

At the heart of the case was the notion of legitimate expectations both in a procedural sense and a substantive sense.

Eventually, the majority of the Supreme Court of Canada in ***Mount Sinai*** *disposed of the issue on an administrative legality having to do with whether or not a permit been in fact initially issued.*

The court dismissed the appeal of the minister while holding that although the minister had the discretion to determine whether granting the permit was in the pubic interest that by his conduct, he had clearly indicated that he had exercised his discretion in favour of issuing the permit by making that promise.

Bastarache J. noted that it was unnecessary to decide whether the legitimate expectation created by the course of dealings between the centre and the minister could result in a substantive remedy beyond the procedural protection provided by the right to be heard either with an expanded doctrine of legitimate expectations or under public law promissory estoppel.

Binnie J., in a minority judgment, also dealt with the doctrine of legitimate expectation. Binnie J.'s comments are entirely relevant since the majority of the court did not express any opinion on the issues of legitimate expectation. This would suggest that the Supreme Court of Canada remained open and that one day, it would have to evaluate whether it agrees with the position of Binnie J.

The respondents in ***Mount Sinai*** *had argued that under a rapid current of evolution in Canada, the doctrine of legitimate expectation could be used to compel not only procedural protection, but also a substantive result provided such result is not contrary to law and is otherwise within the power of the minister.*

In addressing this argument, Binnie J. may well have laid the conceptual groundwork for a reassessment of the doctrine of legitimate expectation in Canada and its legal cousin, estoppel. He first noted that the prior case law of the court was against that proposition:

> ***"Canadian cases tend to differentiate for analytical purposes the related concepts of procedural fairness and the doctrine of legitimate expectation."***

Having thus noted the Canadian case law approach to procedural fairness and legitimate expectations, Binnie J. explained the competing concerns at play:

> ***"There is, on the one hand, a concern that treating procedural fairness as a subset of legitimate expectations may unnecessarily complicate and indeed inhibit rather than encourage the development of the highly flexible rules of procedural fairness. (...) On the other hand, there is a countervailing concern that using a Minister's prior conduct against him as a launching pad for substantive relief may strike the wrong balance between private and public interests, and blur the role of the court with the role of the Minister."***

Binnie J. then explained in the following way the differences in purpose and focus of procedural fairness and legitimate expectation:

> ***"(...) the availability and content of procedural fairness are generally driven by the nature of the applicant's interest and the nature of the power exercised by the public authority in relation to that interest. (...) The doctrine of legitimate expectations, on the other hand, looks to the conduct of the public authority in the exercise of that power (Old St. Boniface, supra, at p. 1204) including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified (...) The expectations must not conflict with the public authority's statutory remit."***

His Lordship then commented on the similarity in nature between legitimate expectation and estoppel:

> ***"The doctrine of legitimate expectations is sometimes treated as a form of estoppel, but the weight of authority and principle suggests that an applicant who relies on the doctrine of legitimate expectations may show, but does not necessarily have to show, that he or she was aware of such conduct, or that it was relied on with detrimental results. This is because the focus is on promoting "regularity, predictability,***

> ***and certainty in government's dealing with the public"."***

This analysis immediately raised a critical issue: would estoppel be available against a municipality?[82] *Before addressing this issue, further discussions of the merits of legitimate expectations in municipal affairs is warranted.*

In ***Canadian Pacific Railway v. Vancouver***[83]*, legitimate expectations were also at the heart of the case.*

In 1886, British Columbia granted Canadian Pacific Railway ("C.P.R.") a corridor of land for the construction of a railway line. Rail operations on the corridor later declined. C.P.R. proposed to develop the corridor for residential and commercial purposes. The City of Vancouver passed a by-law creating an official development plan designating the corridor as a public thoroughfare for transportation. The effect of the by-law froze the redevelopment potential of the land and limited C.P.R.'s economic uses of the land.

The British Columbia Court of Appeal held that the by-law was within the City's statutory power and that Vancouver was not obligated to compensate C.P.R. for the land. It also held that the by-law did not suffer from procedural irregularities. The Supreme Court of Canada agreed. In the process, it also rejected the legitimate expectation arguments raised by C.P.R.

C.P.R. had made three specific complaints about a hearing process held by the City of Vancouver:

> ***1.*** *The failure of the hearing notices to state that the proposed by-law "designates private land public";*
>
> ***2.*** *The change made to the by-law after the hearing, in contravention of alleged representations to C.P.R. and the general public that no decisions would be made on specific transit uses or routing; and*

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[82] *For a general discussion of the English law on legitimate expectations and estoppel, see CARTWRIGHT, John,* ***Protecting Legitimate Expectations and Estoppel in English Law****, Vol. 10.3, ELECTRONIC JOURNAL OF COMPARATIVE LAW (December 2006)*

[83] *[2006] 1 S.C.R. 227 (hereinafter* ***"Canadian Pacific"****)*

3. *The non-disclosure of relevant documents.*

The Court rejected C.P.R.'s arguments that its legitimate expectations were denied:

> ***"Whether the city acted contrary to legitimate expectations, it must be decided in the context of the nature of the City's decision making power, the statutory scheme and the city's role in arriving at a decision that is in the interest of the city. The statutory scheme empowers the city to prepare and revise development plans… adopt development plans as ODPs … and revise or amend ODPs, or any part thereof, … all without any requirement of a formal hearing. The decision making process is not judicial but legislative. The city council exercises discretionary power in the public interest. C.P.R. had a special interest because of its ownership of the land affected, but the impact of the by-law was much broader, potentially affecting many other private and public citizens."***[84]

The court then made a critical ruling clearly establishing subservient status of the doctrine of legitimate expectation to the legitimate exercise of municipal authority:

> ***"The city is called on to exercise its power in a responsive way, responding to relevant information, and in a responsible way, ultimately making a decision that it concludes is in the public interest. These considerations may attenuate any duty that might otherwise exist to meet the expectations of interested parties. While the duty of fairness may require the city to take any legitimate expectations into account, it does not necessarily require the city to fulfil them.***
>
> ***(...)***
>
> ***At the hearing, many residents expressed concerns … balancing these concerns with other visions for the future of the corridor, the city ultimately decided to exclude this use. In order to exercise its discretionary powers in a responsive and responsible***

[84] *Ibid. at par. 48*

manner, the city must have the flexibility to respond to developments as the process evolves and new aspects of the problem come to light."[85]

Canadian Pacific *therefore stands as another example of what little influence the doctrine of legitimate expectations exerts in the context of municipal law.*

Prior to ***Lafontaine****, the Alberta Court of Appeal also had the occasion to consider the doctrine of legitimate expectation in a municipal context* ***Wood v. Wetaskiwin (County) No. 10***[86]*.*

In ***Wood****, owners of homes located on the shore of a lake had built various structures on land between their homes and the water edge on land owned by the municipality. The county council ordered removal of structures built on municipal land. The homeowners asked the county council to review the orders. In the reviewing process, the council held a hearing with the landowners and their counsel present but on the following day, they were not invited. The council voted to uphold the orders and when asked by the homeowners for reasons, the county council refused to give any except for minutes of the council meeting that consisted of the report of the vote. Judicial review on ground of council's denial of natural justice was sought.*

In holding that the municipal council acted fairly, the court noted that it owed minimal duty of fairness to the homeowners and had met it. The statutory scheme under which the council was operating provided for no right of appearance so that it could not be said that that scheme called for significant duty of residual fairness. The court held that although the decision was important to the homeowners, their rights were deserving only of a low level of consideration.

The court held that the homeowners were afforded the right to be heard and made representation in the formal hearing but that by itself did not compel council to strictly adhere to that model where everything done by council was open to landowners. The statutory scheme required was review, not trial, and the duty of fairness owed to homeowners had been met. The same conclusion was also applied to lack of reasons, as there was no absolute requirement that reasons be given:

"The Appellants argued that natural justice encompassed the concept of legitimate expectations.

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[85] *Ibid. at par. 49*
[86] *(2003), 1 C.E.L.R. (3d) 1 (hereinafter* ***"Wood"****)*

> ***We agree. Legitimate expectations may arise where a party has been led to believe that his or her right would not be affected without consultation*** *(the court citing* ***Old St. Boniface*** *as authority for this principle).*
>
> ***(...)***
>
> ***[22] The final factor to be considered in dealing with reasonable expectations is the choice of process made by the adjudicating agency. The Appellants submit that the Respondent chose to use a hearing model and therefore is bound by that model. Again, we are not persuaded by this agreement. The hearing was afforded to the landowners so that their views could be advanced in what appears to have been an informal fashion. This fact by itself does not compel a council to strictly adhere to a model whereby everything done by it is opened to the land owners."***[87]

The underlying factor in ***Wood*** *is that the applicants were trespassers on municipal property. The Alberta Court of Appeal ruled on the issue of legitimate expectations in a way, it is submitted, that would not have been affected by the subsequent ruling of the Supreme Court of Canada in* ***Lafontaine****.*

Thus, the doctrine of legitimate expectations is a rather hollow notion in municipal law and is a mere factor in the duty of fairness. Having said this, it must be noted however that as indicated early in ***Baker*** *and reiterated in* ***Lafontaine****, the content of the duty of fairness is a flexible notion that is intensely fact driven in every case. In* ***Lafontaine****, the duty of fairness was articulated under the legitimate expectations created by the village's conduct in providing detailed reasons for refusing the first rezoning application. In other cases, the content of the duty of fairness arising from the conduct of the municipality could otherwise be different as, for example, in* ***Holt v. City of Bathurst***[88]*, where the court held that the municipal council was under a duty of fairness to fully process the rezoning application of the applicants on account of written representations made by staff.*

In ***Holt****, the applicants had begun construction of a house under circumstances that eventually led to stop orders being*

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[87] *Ibid. at par. 18*
[88] *(2006), NBQB 210 (CanLII) (hereinafter* ***"Holt"****)*

issued by the development officer of the municipality. Applicants applied for three different variances. The three variances were rejected. The matter was eventually appealed to the New Brunswick Assessment and Planning Appeal Board where one variance was finally granted. The applicants subsequently filed in judicial review attacking the decision of the Planning Appeal Board. They eventually withdrew that application in judicial review and chose to file for rezoning with the City of Bathurst.

In the course of tensed relations with both city staff and city council, the applicants were advised by the city building inspector that their rezoning application would be submitted to the attention of council with a request for spot zoning only if and when they would submit, at their own costs, a building location survey. The applicants complied with that request by the date set by the city's building inspector. However, at a special public meeting, the members of the city council defeated a motion providing for a schedule regarding the procedure to be followed in order to consider the spot-zoning request. This effectively ended the rezoning procedure. No reasons were given at that special meeting for the defeating of the motion. Ten days afterward, the applicants were advised by the city clerk that the request for rezoning of their property had been stopped. The city clerk did not articulate any reason for the city's refusal.

The court issued mandamus on account of the following finding of facts and conclusion:

> ***"The City of Bathurst terminated the procedure regarding the rezoning application during a special public meeting held on December 5th, 2005. The record on application does not disclose whether this decision was carried out with any discussion regarding the merits of the application itself and whether the municipality sought the views of the Planning Advisory Committee before making its decision.***
>
> ***The evidence does, however, clearly disclose that no reasons were provided to the applicants explaining the municipality's decision to stop the rezoning process which constituted a refusal of their spot zoning request. Moreover, the City at no time informed the applicants that it would refuse to consider their application for any reason during the first processing of their rezoning application, which was postponed pending the production of a building location survey.***

> ***The applicants had good reason to believe that by providing the requested building location survey, their rezoning application would be dealt with as any other rezoning application under the zoning by-law and pursuant to the provisions of the Community Planning Act (supra). In addition, the new proposed timetable for public consultation prepared by the City and considered by the Municipal Council on December 5th, 2005, provided that the City would seek the views of the Planning Advisory Committee before making a decision. The applicants reasonably believed that they were entitled to due process of their application provided that a building location survey would be produced as requested."***[89]

If the doctrine of legitimate expectations holds little promise for the future in municipal law, promissory estoppel seems however interesting.

B. Promissory Estoppel

*As noted above, Binnie J., in **Mount Sinai**, made extremely interesting comments on estoppel. He noted that while the Minister was not required by the doctrine of legitimate expectations to issue the modified permit, he was estopped by his earlier representations and conduct from refusing to do so.*

Binnie J. however noted the evidentiary imbalance between legitimate expectation and estoppel:

> ***"It is to be emphasized that the requirements of estoppel go well beyond the requirements of the doctrine of legitimate expectations. As mentioned, the doctrine of legitimate expectations does not necessarily, though it may, involve personal knowledge by the applicant of the conduct of the public authority as well as reliance and detriment. Estoppel clearly elevates the evidentiary requirements that must be met by an applicant."***

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[89] *Ibid. at par. 26 to 28*

Binnie J. parted ways with the lower court on the key definition of estoppel as it is applicable to public authorities:

> ***"In this case Robert JA adopted the private law definition of promissory estoppel provided by Sopinka J in Maracle v. Travellers Indemnity Co. of Canada [1991] 2 SCR 50, at p. 57:***
>
> > ***'The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, [1] by words or conduct, made a promise or assurance [2] which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, [3] in reliance on the representation, [4] he acted on it or in some way changed his position...***
> >
> > ***[T]he promise must be unambiguous but could be inferred from circumstances.'***
>
> ***If this were a private law case I would agree that the elements of promissory estoppel are present.***
>
> ***However this is not a private law case. Public law estoppel clearly requires an appreciation of the legislative intent embodied in the power whose exercise is sought to be estopped. The legislation is paramount. Circumstances that might otherwise create an estoppel may have to yield to an overriding public interest expressed in the legislative text.*** *(Emphasis is mine.)*
>
> ***There is a public law dimension to the law of estoppel which must be sensitive to the factual and legal context."***

Binnie J. then concluded as follows:

> ***"Estoppel is, in my view, not available on the facts of this case in the way in which it was applied by the Quebec Court of Appeal."***

As was noted recently:

> ***"Administrative law has been hesitating for a long time with these decisions that are neither ultra vires nor unreasonable nor patently unreasonable but which are against the notion of governance. As had been noted elsewhere, the challenge is to find ways in which decision makers' freedom of action can be preserved while protecting the trust that individuals reasonably and legitimately place in the promises or actions or officials.*** [90] *[my translation]*

VIII. THE MINORITY ISSUE IN LAFONTAINE: ZONING AND FREEDOM OF RELIGION

*Only the minority decision in **Lafontaine** dealt squarely with the issue of the freedom of religion. There is however substantial benefit for the lower courts in this minority decision since it offers significant markers and boundaries to guide themselves as shown in **Municipalité de Val-Morin v. Congregation of the Followers of the Rabbis of Belz to Strengthen Torah***[91]*.*

*In so doing, LeBel also marked another intriguing episode of **Lafontaine**. He provided guidelines to the questions before the court on the assumption that there would be no available land in or on the municipal territory for the Congregation to build its kingdom hall.*

Justice LeBel concluded that in such a situation, there would be an infringement on the freedom of religion, as the congregation could not possibly build its kingdom hall anywhere on the municipal land.

*In **Lafontaine**, Mr. Justice LeBel dealt in obiter dictum with the nature and the scope of the state's duty of neutrality as an essential element of the freedom of religion guaranteed by the Charter of Rights and Freedoms. According to Justice LeBel:*

> ***"[64] Freedom of religion is a fundamental right and represents a major triumph of our democratic society. The philosophical and political values***

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[90] *ROY, Claudine, **Droit adminstratif "L'expectative légitime après l'arrêt Mont Sinaï"**, (2001), 61 Revue du Barreau 537, 555; and see FORSYTHE, C., **Wednesbury Protection of Substantive Legitimate Expectations**, (1997) P.L. 375*

[91] *(2005) CanLII 32754 (Q.S.C.) 131-135*

> ***underpinning Canadian democracy recognize the need to respect the diverse opinions and beliefs that guide the consciences and give direction to the lives of all members of our society.***
>
> ***(...)***
>
> ***[68] (...) it is no longer the state's place to give active support to any one particular religion, if only to avoid interfering in the religious practices of the religion's members.***
>
> ***(...)***
>
> ***The guarantee of freedom of religion set out in s. 2(a) of the Charter prohibits the state from compelling an individual to adopt or renounce a particular belief or to practice a particular religion. This obligation remains essentially a negative one. As a general rule, the state refrains from acting in matters relating to religion. It is limited to setting up a social and legal framework in which beliefs are respected and members of the various denominations are able to associate freely in order to exercise their freedom of worship, which is a fundamental, collective aspect of freedom of religion, and to organize their churches or communities. In this context, the principle of neutrality must be taken into account in assessing the duty of public entities, such as municipalities, to actively help religious groups.***
>
> ***[73] The appellants submit that, because no land is available in Zone P-3, the zoning by-law, as it is drafted, combined with the municipality's refusal to amend it, constitutes an infringement of their freedom of religion under s. 2(a) of the Charter. If no land were in fact available, I would agree with them."***[92]

According to LeBel, the infringement of the appellants' freedom of religion would result not from the existence of the zoning by-law, but from the refusal to adapt it to evolving community needs in a situation in which no land was available in

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[92] ***Lafontaine***, *supra note 7*

the zone set aside for the establishment of places of worship. It is not always enough for the state to adopt a posture of restraint. In certain exceptional circumstances, positive government action may be required to make a fundamental freedom meaningful.

***Lafontaine**, according to LeBel, was one exceptional situation in which a posture of restraint on the municipality's part would have interfered with the appellants' freedom of religion. It would be utterly impossible for the appellants to establish their place of worship within the boundaries of the municipality if no land were available in the only zone where this type of use is authorized. As it would then be impossible to practise their religion, this would constitute direct interference with their freedom of religion. For LeBel, this was a clear example of a case in which freedom of religion can have no real meaning unless the public authorities take positive action. Since such positive action would be required, it would constitute a reasonable limit on the principle of state neutrality. Thus, for the appellants to enjoy their freedom of religion, the municipality would have to amend the by-law.*

LeBel however also fell short from suggesting that the court would order a form of "judicial zoning" even in the context of Charter rights violation.

According to LeBel, the court:

> ***"(...) could in fact have ordered the municipality to amend its zoning by-law, but (...) could not have imposed on the municipality [the] choice of location for the establishment of the appellants' place of worship. Thus, the only possible remedy that would have been appropriate was an order to the municipality to review its zoning by-law so as to make land available to the appellants on which they could build their place of worship.***
>
> ***(...)***
>
> ***In short, if no land had been available in Zone P-3, this Court would have found an infringement of the freedom of religion protected by s. 2(a) of the Charter and would have ordered the municipality to review the zoning by-law, taking into account all the interests, both public and private, at issue, in order to amend it, if necessary, to permit the appellants,***

> ***as far as possible, to build their place of worship within the municipality's boundaries. However, this Court would have had no valid reason to override the democratic control mechanisms provided for in Quebec's municipal legislation with respect to zoning."***[93]

It follows that if we consider the dicta of Justice LeBel, the municipal duty to act in order to strike down an impediment to the free exercise of freedom of religion exists only where this impediment is the consequence of the rigidity of a zoning by-law of the municipal authority or a consequence of this rigidity along with the fact that individual owners would refuse to sell. However, if the impediment results strictly from the refusal of private owners to sell, not only is the municipal authority not obliged to act in order to strike down the impediment, but the duty of neutrality would effectively prevent it from acting.[94] *This point will undoubtedly be the topic of future debates before the Supreme Court of Canada.*

IX. THE DISCREET ISSUE IN LAFONTAINE: ADEQUACY OF REASONS

One of the unexplained conclusions in ***Lafontaine*** *is the content of the duty to give reasons in the context of that specific duty of fairness. McLachlin had commented without much explanation that the original reasons given by the municipality complied with the duty at play. LeBel apparently suggested that even the original reasons were unsatisfactory. This raises the issue of the adequacy of reasons.*

It is now an established principle of administrative law that at common law, a decision-maker may be required to give reasons as part of a duty of procedural fairness. As noted in ***Baker****:*

> ***"Reasons, it has been argued, foster better decision making by insuring that issues and reasoning are well articulated and therefore "more carefully thought out". The process of fighting reasons for decisions by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered and are***

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[93] ***Lafontaine***, *supra note 7, at par. 81 and 83*
[94] *WOEHRLING, José, supra note 25, 382-384*

> ***invaluable if a decision is to be appealed, question or considered on judicial review."***[95]

*In **Lafontaine**, McLachlin also commented on the value of giving reasons by saying:*

> ***"Giving reasons for refusing to rezone in a case such as this serves the values of fair and transparent decision making, reduces the chance of arbitrary or capricious decisions, and cultivates the confidence of citizens and public officials..."***[96]

It is noteworthy that on this specific topic of the value of giving reasons, LeBel was also supportive of this view.

In the municipal context, it immediately raises the question as to what is the practical meaning of this duty to give reasons whenever it arises as a result of the general duty of fairness. From a practical standpoint, it begs the question as to whom on council should be required to give these reasons. Would it be the mayor or each individual councillor, and should it be required that his reasons be approved by a council resolution?[97]

*That issue remains clear. However, the topic of the adequacy of reasons was central to **Elite Swine Inc. v. Moosomin (Rural Municipality No. 121)***[98] *where the court dismissed an application for judicial review of a denial to issue a permit to establish a livestock operation in the rural municipality of Moosomin. Council had provided written reasons for the refusal on July 7th, 2005, as follows:*

> ***"1. The Applicant has not demonstrated to the satisfaction of council that the water supply is sufficient for the proposed operation and that the supply of neighbouring developments would not be adversely affected by the proposed operation as required by … the Planning and Development Act, 1983;***

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[95] ***Baker**, supra note 28, at par. 39*
[96] ***Lafontaine**, supra note 7, at par. 13*
[97] *HARDING, Reece, **Minutes of Municipal Law Section** – British Columbia Division – Canadian Bar Association – September 16th, 2004 (online: www.can.bar.org)*
[98] *(2006), S.K.Q.B. 314 (hereinafter **"Elite Swine"**)*

> ***2. The facts presented do not establish to the satisfaction of council that the proposed development will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity or injurious to property, improvements or potential developments in the vicinity required by the Planning and Development Act, 1983."***

The court also noted that it had been established that further information was provided by council on October 11th, 2005, when the council replied with a legal opinion, but the municipal council had no authority to grant conditional approvals and it also provided more detailed reasons for its July 7th, 2005, decision.

The court noted as follows:

> ***"[17] The duty of procedural fairness does include an obligation to provide reasons for administrative decisions. That is clear from the authorities and is not disputed by the Respondent. Disagreement between the parties concerns the adequacy of reasons."***

The court concluded on the basis of that authority that parties affected by any administrative decision must be able to understand why and upon what basis it was made. It concluded that the reasons provided on July 5th, 2005, by the council as supplemented by the letter of October 11th, 2005, met that test. In so concluding, the court held that there was precedent for regarding supplementary reasons (the letter of October 11th, 2005) as part of the record in judicial review proceedings. The reasons may not have been ample, but they were adequate.

Elite Swine *is therefore authority for the proposition that when a municipal council is duty bound to give reasons for a decision on rezoning as a result of its general duty of fairness. These reasons will be adequate if they provide enough information to understand the basis of the decision. This principle has been reaffirmed in the following case.*

Adequacy of reasons was also an issue addressed by the Federal Court of Appeal in ***VIA Rail Canada Inc. v. Canada (National) Transportation Agency****:*

> ***"[21] The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes***

> ***adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed.***[99] *(Emphasis is mine.)*

X. CONCLUSION

*Although in 2004 there was much trepidation about the implications of **Lafontaine**, subsequent cases had clearly shown that it only stands for the proposition that where a site-specific application for rezoning is made, and where fundamental freedoms under the Charter are affected, reasons for refusing the application must be given. It clearly is not authoritative for the broader interpretation that reasons must be given in all cases for refusing a site specific zoning application.*[100]

*Indeed, if a local government processes a rezoning application in accordance with its usual practices, if there is no evidence of arbitrary or highhanded conduct on the part of the local government, and if the applicant's interests in the matter do not go beyond the usual economic and property interest of a land owner, and in particular, do not involve any fundamental rights and freedoms as guaranteed under the Charter of Rights and Freedoms, one can reasonably argue that the concerns which gave rise to the court's decision in **Lafontaine** do not apply.*[101]

*The critical factor in **Lafontaine** that has led the Supreme Court of Canada to hold the municipality to a heightened duty of fairness was the fact that the freedom of religion of the congregation was at risk.*

*It is also noteworthy that in **Lafontaine**, the court highlighted the legitimate expectations of the affected parties in determining the content of the duty of fairness. As in **Baker**, the court held that past administrative practice may heighten the duty of fairness. Having said this, it is critical to note that while the court affirms Baker's expansion of judicial review to include the content of the duty of fairness, ultimately, the court deferred to the municipality's statutory authority in urban development. Clearly, the judiciary therefore*

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[99] *[2001] 2 F.C. 25*
[100] *See JOHNSON, Peter **"Logo NoteBook … a newsletter for local governments"**, Staples McDannold Stewart online: www.sms.bc.ca*
[101] *Ibid.*

only interferes within administrative process in terms of fairness of the decision and the decision making process and not with the decision itself.[102] *Thus, superior courts have a limited supervisory vote over public decision-makers.*[103] *This is in line with what is the ultimate goal of judicial review:*

> ***"... '[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation: U.E.S.' ... The Court's mandate on judicial review is to keep the statutory decision maker within the boundaries the legislature intended."***[104]

Lafontaine *is also an example of the narrow reach of the doctrine of legitimate expectations in Canadian administrative and municipal law. Lacking in substance, that doctrine appears to be consigned to history by case law and public promissory estoppel may well be the next generation of substantive right to fairness and limitation on the widening scope of municipal jurisdiction.*

Finally, ***Lafontaine*** *may mostly be authority in the future with respect to LeBel's discussion on the state duty of neutrality in the context of municipal zoning and freedom of religion even if these comments were made in dissent and in obiter dictum as explained in this paper.*

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[102] *PATTERSON, Kara,* ***"La Congrégation des témoins de Jehovah de St-Jérome Lafontaine et al. v. Municipalité du Village de Lafontaine et al."****, in National Administrative Law Section Newsletter, November 2004, online: www.can.bar.org*

[103] ***Central Halifax Community Association v. Halifax (Regional Municipality)****, 2007 N.S.C.A. 39 (CanLII)*

[104] ***Moreau-Bérubé****, supra note 64, p. 23*