

**Integrity in Local Government:
Legal Challenges to Local Government Decisions and Best Practices
for Decision Makers**

This paper was prepared by Nathalie Baker for the conference *Integrity in Local Government: Mitigating the Risks of Conflict of Interest, Fraud and Corruption*, to be hosted by the International Centre for Criminal Justice Policy and Criminal Law Reform on February 19, 2016.

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I. **Introduction**

This paper has been developed in conjunction with the accompanying paper entitled “Integrity in Local Government: Key Legal Definitions and Cases” by Maegen Giltrow and Connor Bildfell. Both papers have been developed as resources for the upcoming conference *Integrity in Local Government: Mitigating the Risks of Conflict of Interest, Fraud and Corruption*, to be hosted by the International Centre for Criminal Justice Policy and Criminal Law Reform on February 19, 2016.

From a risk management perspective there is significant value in local governments understanding how and why citizens and business owners seek legal recourse and judicial oversight of local government decision-making. By understanding and managing against conditions that will lead to legal challenge, governments will be effecting the sort of informed internal oversight that has been identified as an important tool to protecting against conflict of interest, fraud, and corruption.

This paper explains the mechanisms by which citizens will challenge decisions that to the public eye may appear arbitrary, made in bad faith, or unreasonable. The premise is that good decision-making has to be good all the way through—lack of transparency, over-delegation without proper oversight, and lack of expertise in oversight can not only lead to unreasonable decisions (that may be overturned on judicial review), but also foster conditions in which illegal conduct may take hold. From a risk management perspective, local governments are well advised to take informed steps to protect against this whole range of legal challenges.

Conflict of interest, fraud, and corruption can be notoriously difficult to detect inside an organization. These papers together approach key areas of vulnerability from different angles:

- 1) What are the relevant legal standards?
- 2) What are examples of conduct that has or has not been found to breach these standards?
- 3) What role does judicial review play in oversight of good decision-making and in protection against conflict of interest, fraud, or corruption?

II. Mechanisms for Challenging Decisions of Local Governments

A. Municipal Legislation

A local government's powers are derived from the provincial government and, accordingly, it only has those powers that have been expressly or implicitly given to it by the legislature.¹ This is why local governments are referred to as "creatures of statute".

For most of British Columbia, the applicable statutes are the *Community Charter*² and *Local Government Act*³ ("LGA"). Section 623 of the *LGA* allows an elector of a municipality or a person interested in a bylaw, order, or resolution to bring an application to set aside Council's decision. The City of Vancouver has its own enabling legislation, the *Vancouver Charter*.⁴ Much like the *LGA*, the *Vancouver Charter* allows an elector or person interested in a bylaw or resolution to bring an application to set aside a decision of council for "illegality".⁵ The term "illegal" applies to all bylaws that can be set aside, regardless of the grounds of attack.⁶

There are very short limitation periods for commencing applications pursuant to municipal legislation.⁷ While these provisions allow electors to challenge decisions of their local governments, applicants have to act very fast. Fortunately, there is another way to challenge decisions of council and municipal staff that does not have such onerous limitation periods: judicial review.

B. Judicial Review

Courts play an important supervisory role over decision makers to ensure that they act within their powers. This legal process is called judicial review. Judicial review is constitutionally guaranteed in Canada,⁸ although the power of the courts to review decisions is circumscribed by statute as well as the common law. In British Columbia, we have the *Judicial Review Procedure Act*⁹ ("JRPA"). The *JRPA* allows a person that is affected by a decision or proposed decision to have it reviewed by the courts. There is no time limit for an application for judicial review unless (a) an enactment otherwise provides, and (b) the court considers that substantial prejudice or hardship will result to any other person by reason of delay. The courts have held that the strict

¹ *R. v. Sharma*, [1993] 1 SCR 650.

² *Community Charter*, SBC 2003, c. 26.

³ *Local Government Act*, RSBC 2015, c. 1 [LGA].

⁴ *Vancouver Charter*, SBC 1953, c. 55.

⁵ *Ibid*, s. 524.

⁶ *London (City) v. RSJ Holdings Inc.*, [2007] 2 SCR 588; *Ridley Bros. Development Co. Ltd. v. Colwood (City)*, 2010 BCSC 670.

⁷ *Vancouver Charter*, *supra* note 4, s. 526; *LGA*, *supra* note 3, ss. 623-624.

⁸ *Dunsmuir v. New Brunswick*, 2008 SCC 9 [Dunsmuir].

⁹ *Judicial Review Procedure Act*, RSBC 1996, c. 241.

limitation periods in the *LGA* and *Vancouver Charter* do not apply to applications for judicial review under the *JRPA*.¹⁰

In *Dunsmuir v. New Brunswick*,¹¹ the Supreme Court of Canada held that the purpose of judicial review is to “ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.”¹² Where a decision maker acts without legal authority, he or she “transgresses the rule of law”. In *British Columbia (Attorney General) v. Christie*,¹³ the Supreme Court of Canada explained the principal of the rule of law:

19 The rule of law is a foundational principle. This Court has described it as “a fundamental postulate of our constitutional structure” (*Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 142) that “lie[s] at the root of our system of government” (*Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at para. 70). It is explicitly recognized in the preamble to the Constitution Act, 1982, and implicitly recognized in s. 1 of the Charter, which provides that the rights and freedoms set out in the Charter are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. And, as this Court recognized in *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, at p. 750, it is implicit in the very concept of a constitution.

20 The rule of law embraces at least three principles. The first principle is that the “law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power”: *Reference re Manitoba Language Rights*, at p. 748. The second principle “requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order”: *ibid.*, at p. 749. The third principle requires that “the relationship between the state and the individual . . . be regulated by law”: *Reference re Secession of Quebec*, at para. 71. (See also *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49 (CanLII), at para. 58; *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9 (CanLII), at para. 134.)

Judicial review permits the court to review decisions of not only city councils, but also city staff that have been delegated the power to make administrative decisions. For example, a staff decision to issue, or refuse to issue, a business licence, building permit, or development permit is subject to judicial review.

¹⁰ *Loring et al v. Victoria (City)*, [1989] BCJ No. 1695; *Bates v. Delta (District)*, 56 BCLR 319.

¹¹ *Supra* note 8.

¹² *Ibid* at para. 28.

¹³ *British Columbia (Attorney General) v. Christie*, [2007] 1 SCR 873.

A decision may be set aside on a variety of grounds, but this paper will focus on the most common, which include:

- 1) lack of authority or “jurisdiction”;
- 2) unreasonableness;
- 3) failure to comply with procedural requirements; and
- 4) breach of the rules of procedural fairness

1. True Jurisdictional Error

The provincial legislature confers powers to local governments, either expressly or implicitly, through enabling statutes. These powers constitute the local government’s “jurisdiction”. Whenever a decision maker has exercised or purported to exercise its powers, the court may review the decision to ensure that the decision maker has not exceeded its jurisdiction. “True jurisdiction questions” arise when the decision maker must explicitly determine whether the enabling legislation, such as the *LGA*, *Community Charter*, or *Vancouver Charter*, gives it the authority to decide a particular matter.¹⁴

When courts are reviewing true jurisdiction questions, the decision maker must be “correct” that it had the power and authority to make the decision that it made. This is referred to as the correctness standard of review. While the court will take a broad and purposive approach to the interpretation of municipal enabling legislation, it will not defer to the decision maker on matters that involve true jurisdiction questions; the court will undertake its own analysis of the question.¹⁵

*Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*¹⁶ provides an example of a true jurisdiction question. In that case, the issue before the Court was whether the Township could issue a heritage alteration permit to allow for a particular development. The Court held that “it is a true jurisdictional issue whether council varied density of use contrary to the statutory prohibition in s. 972(4)(a) of the LGA.”¹⁷ In *TimberWest Forest Corp. v. Campbell River (City)*,¹⁸ the question before the Court was whether Campbell River had the jurisdiction to adopt a bylaw taxing two areas of managed forest lands at different rates. The answer turned on whether the applicable legislation allowed a municipality to impose different tax rates within a property class. The Court held that the standard of review was correctness because it was a question of jurisdiction. It held that the bylaw was valid.

¹⁴ *Dunsmuir*, *supra* note 8 at para. 59. See also *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 553 at para. 18.

¹⁵ *Dunsmuir*, *supra* note 8 at para. 50.

¹⁶ *Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*, 2014 BCCA 271.

¹⁷ *Ibid* at para. 10.

¹⁸ *TimberWest Forest Corp. v. Campbell River (City)*, 2016 BCCA 49.

There are many examples, however, of cases where bylaws have been set aside for being outside of jurisdiction. In *Windset Greenhouses (Ladner) Ltd. v. Delta (Corp. of)*,¹⁹ the Court set aside Delta's Business Licence Bylaw as being outside Delta's powers because it was in effect a "farm bylaw" requiring Ministerial approval. In *Sevin v. Prince George (City)*,²⁰ the Court set aside a zoning bylaw on the basis that it was inconsistent with the City's Official Community Plan, contrary to the LGA. In *Loucks v. Abbotsford (City) and 90617 BC Ltd.*,²¹ the Court set aside a zoning bylaw on the basis that the City entered into a contract to rezone (i.e., in consideration for the company's conferring a pecuniary benefit on the City, the City agreed to change its bylaws). The Court held this was illegal because the City cannot sell zoning.

Cases such as these focus on the interpretation of the enabling legislation. There is no judicial deference to the judgment of City Council as to whether the legislation allows it to make the decision under review.

2. Unreasonableness

When it is clear that the decision under review is within the decision maker's jurisdiction, the decision may be reviewed for unreasonableness. In *Catalyst Paper Corporation v. North Cowichan (District)*,²² the Court explained that the rationale for an unreasonableness review is that local governments have only those powers that have been delegated to them by the legislature. Their discretion is not unfettered: "The rule of law insists on judicial review to ensure that delegated legislation complies with the rationale and purview of the statutory scheme under which it is adopted. The delegating legislator is presumed to intend that the authority be exercised in a reasonable manner."²³

In *Dunsmuir*, the Supreme Court of Canada set out the test for reasonableness as follows:

In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.²⁴

A year after *Dunsmuir*, the Supreme Court of Canada in *Canada (Citizenship and Immigration) v. Khosa*²⁵ explained that what is reasonable depends on the context. There may be more than a single reasonable outcome but "as long as the process and the outcome fit comfortably with the

¹⁹ *Windset Greenhouses (Ladner) Ltd. v. Delta (Corp. of)*, 2003 BCSC 570.

²⁰ *Sevin v. Prince George (City)*, 2012 BCSC 1236.

²¹ *Loucks v. Abbotsford (City) and 90617 BC Ltd.*, 2006 BCSC 1859.

²² *Catalyst Paper Corporation v. North Cowichan (District)*, [2012] 1 SCR 5 [*Catalyst*].

²³ *Ibid* at para. 15.

²⁴ *Dunsmuir*, *supra* note 8 at para. 47.

²⁵ *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 SCR 339.

principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome".²⁶

Although unreasonableness is a very high standard to meet, decisions of council and staff have been set aside on this basis. In *338186 BC Ltd. v. City of Vancouver*,²⁷ the Court set aside a decision of Council on the grounds that the company's application for a conversion permit was unreasonably refused. In setting aside the decision, the Court found that there was evidence that members of Council acted "unreasonably and arbitrarily, and without the degree of fairness, and impartiality required of a municipal government."²⁸

In *Norgard v. Anmore (Village)*²⁹ (*Norgard 1*), the BC Supreme Court set aside a decision of the Village Approving Officer on the grounds that his decision to require that a triangular parcel "hooked" to the remainder of the property be excluded from the proposed subdivision was patently unreasonable (the applicable standard of review prior to *Dunsmuir*). Other aspects of the Approving Officer's decision, in particular the appropriate standards for the proposed access route to the proposed bare land strata, were remitted back for reconsideration. A second application for judicial review relating to the same subdivision application was brought in 2008. In *Norgard v. Anmore (Village)*³⁰ (*Norgard 2*), the Court once again set aside the decision of the Approving Officer with respect to the proposed access route and remitted the matter back for reconsideration. The Approving Officer reconsidered his decision, but the Norgards were again unsatisfied. The Court reviewed the approving officer's decision for a third and final time (*Norgard 3*).³¹ The Court held that the Approving Officer's decision was unreasonable and this time ordered the Approving Officer to approve the Petitioner's proposed subdivision.

In *Catalyst Paper Corp. v. North Cowichan (District)*,³² the Supreme Court of Canada considered unreasonableness in the context of a local government bylaw. The Court held that a taxation bylaw that levied a tax on industrial properties that was significantly higher than the rate on residential properties was not unreasonable. The Court held that the applicable test for reviewing bylaws for reasonableness is as follows: only if the bylaw is one no reasonable body informed by the factors a municipal council may legitimately consider could have passed will the bylaw be set aside.³³ However, the Court also pointed out that just because wide deference is owed to municipal councils does not mean that they have *carte blanche*: the substance of a municipal bylaw must conform to the rationale of the statutory regime set up by the legislature such that the range of reasonable outcomes is circumscribed by the legislation that empowers the

²⁶ *Ibid* at para. 59.

²⁷ *338186 BC Ltd. v. City of Vancouver*, 2011 BCSC 336.

²⁸ *Ibid* at para. 85.

²⁹ *Norgard v. Anmore (Village)*, 2007 BCSC 1571.

³⁰ *Norgard v. Anmore (Village)*, 2008 BCSC 1236.

³¹ *Norgard v. Anmore (Village)*, 2009 BCSC 823.

³² *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 SCR 5 [*Catalyst*].

³³ *Ibid* at para. 24.

local government to enact the bylaw.³⁴ The Court ultimately held that the bylaw was not a decision that no reasonable council could have made and upheld the bylaw.

Although there have been few successful challenges to local government bylaws on the grounds of unreasonableness, they do exist. In *Canadian National Railway Co. v. Regional District of Fraser-Fort George*,³⁵ the BC Court of Appeal upheld a decision of the BC Supreme Court setting aside an establishing bylaw on the grounds of unreasonableness.

However, despite the *CNR* case, decisions setting aside bylaws on the grounds of unreasonableness are extremely rare and, in light of the decision in *Catalyst*, will remain the exception. This is particularly true in the City of Vancouver. The *Vancouver Charter*, unlike the *LGA* and *Community Charter*, expressly states in s. 148 that a bylaw or resolution passed by Council in good faith shall not be open to question or set aside on “account of unreasonableness or supposed unreasonableness”.³⁶ In order to have a bylaw or resolution set aside on the grounds of unreasonableness, the person challenging the decision would have to establish bad faith. Good faith, however, is presumed³⁷ and conclusively established by the absence of bad faith.³⁸

Interestingly, in the *Residents Association of Mount Pleasant v. Vancouver (City)*,³⁹ the Court applied s. 148 of the *Vancouver Charter* to a decision of an administrative body, notwithstanding the express wording of the section stating that it applies to bylaws and resolutions of Council. The Court’s application of s. 148 to a decision of the Development Permit Board, comprised of unelected City staff, is troubling. The rationale for the high degree of judicial deference to decisions made within a local government’s jurisdiction is that there is another, more appropriate remedy for such decisions: the ballot box. City staff is unelected and cannot be voted out at the next election.

In the more recent decision in *F.C.R.A. False Creek Residents Association v. City of Vancouver and One West Holdings Ltd.*,⁴⁰ the Court applied the reasonableness standard of review to a decision of the Director of Planning and did not apply s. 148. There was, however, no discussion of the applicability of s. 148 to decisions of unelected staff. Nevertheless, in light of the express wording of s. 148 of the *Vancouver Charter* and case law, the approach in *F.C.R.A.* is the preferable approach to reviewing decisions of unelected decision makers.

³⁴ *Ibid* at para. 25.

³⁵ *Canadian National Railway Co. v. Regional District of Fraser-Fort George* (1996), 26 BCLR (3d) 81 (C.A.) [*CNR*].

³⁶ *Vancouver Charter*, *supra* note 4, s. 148.

³⁷ *MacMillan Bloedel Ltd. v. Galiano Island Trust Committee* (1995), 10 BCLR (3d) 121 (C.A.).

³⁸ *Martin v. Vancouver (City)*, 2008 BCCA 197.

³⁹ *Residents Association of Mount Pleasant v. Vancouver (City)*, 2014 BCSC 2494.

⁴⁰ *F.C.R.A. False Creek Residents Association v. City of Vancouver and One West Holdings Ltd.*, 2015 BCSC 322.

3. Procedural Requirements

The failure to comply with statutorily mandated procedural requirements may result in the decision being set aside.⁴¹ For example, before adopting an Official Community Plan and/or zoning bylaw, a local government must provide notice to the affected public in the form prescribed in the statute and hold a public hearing.

In *Ridley Bros. Development Co. Ltd. v. Colwood (City)*,⁴² the Petitioner applied to set aside three bylaws adopted by the City of Colwood relating to financing and taxation of a sewer system. The Court held that the Certificate of Sufficiency was non-compliant because it was not possible to determine from the results that were certified whether the requisite approvals were properly obtained. The Court held that the requirement for certified determination of sufficiency and validity was mandatory and the invalidity of the certificate constituted sufficient grounds for setting aside the bylaws for illegality pursuant to s. 262 of the *LGA*.

In *London (City) v. RSJ Holdings Ltd.*,⁴³ the City passed an interim control bylaw effecting a one-year freeze on all development along a particular corridor. One of the affected land owners applied to set aside the bylaw on the ground that the City discussed and effectively decided to pass the bylaw at two closed meetings, contrary to the statutory obligation to hold council meetings in public. The Supreme Court of Canada held that the fact that an interim control bylaw could be adopted without a public hearing in no way obviated the statutory requirement to hold council meetings in public. The interim bylaw was not a matter that was exempt from the open meeting requirement. The Court set aside the bylaw. The Court held at para. 38:

38 In light of the particular statutory provision that occupies us — the open meeting requirement — I would add the following comment on the principle of deference. The dissent of McLachlin J. (as she then was) in *Shell Canada* is often cited as a broad statement of the deference that courts owe to municipal governments. In large part, this deference is founded upon the democratic character of municipal decisions. Indeed, McLachlin J. recognized that deference to municipal decisions “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 elect them” (p. 245). Municipal law was changed to require that municipal governments hold meetings that are open to the public, in order to imbue municipal governments with a robust democratic legitimacy. The democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law. When a municipal government improperly acts with secrecy, this

⁴¹ *Highlands Preservation Society v. Corp. of the District of Highlands*, 2005 BCSC 1743; *Peterson v. Whistler (Resort Municipality)*, 1982 CanLII 710 (BCSC).

⁴² *Supra* note 6.

⁴³ *Supra* note 6.

undermines the democratic legitimacy of its decision, and such decisions, even when *intra vires*, are less worthy of deference.

The Court went on to hold that while Council acted within its jurisdiction in passing the bylaw in the sense that it had the power to pass an interim control bylaw, the failure to comply with statutory procedural requirements that do not go to jurisdiction may nevertheless provide sufficient grounds for setting aside the decision. The Court held that the City's conduct in closing the two meetings to the public was neither "inadvertent nor trivial" and was reminiscent of what led to the passing of the statutory open meeting requirement some 20 years ago.⁴⁴

4. Procedural Fairness

As noted above, municipal enabling legislation imposes certain procedural requirements, such as the requirement to hold a public hearing, prior to the adoption of zoning bylaws. Where the Council fails to comply with these statutory preconditions, the decision may be set aside. The decision may also be set aside if Council holds the required hearing but breaches its duty of procedural fairness.

Decision makers are required to act fairly "in coming to decisions that affect the rights, privileges or interests of an individual".⁴⁵ The duty to act fairly "is a cornerstone of modern Canadian administrative law."⁴⁶ Courts do not show deference on questions of procedural fairness. Although Courts have held that the standard of review of matters of procedural fairness is one of correctness,⁴⁷ it has also been held that the standard of review is simply a standard of "fairness".⁴⁸

The concept of procedural fairness is variable and its content is decided in the specific context of each case, after a consideration of all the circumstances.⁴⁹ A variety of factors must be considered to determine the extent to which a person affected by a decision is entitled to participate in the decision making process. Such factors include:

- 1) the nature of the decision being made and the process followed 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 individual or individuals affected;
- 4) the legitimate expectations of the person challenging the decision; and

⁴⁴ *Ibid* at paras. 40-42.

⁴⁵ *Dunsmuir*, *supra* 8 at para. 79.

⁴⁶ *Ibid*.

⁴⁷ *Khela v Mission Institution*, 2014 SCC 24.

⁴⁸ *Seaspan Ferries Corp. v. British Columbia Ferry Services Inc.*, 2013 BCCA 55 at para. 55, citing *Moreau-Berube v. New Brunswick (Judicial Council)*, 2002 SCC 11.

⁴⁹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

5) the choice of procedures made by the decision maker.

In the context of local government decisions, matters of procedural fairness that tend to arise include:

- the right to make representations;
- the right to reasons for the decision;
- the right to an unbiased decision maker; and
- the right to access information relevant to the decision.

Allegations of breaches of procedural fairness frequently arise in the context of mandatory public hearings. Both the *LGA* and *Vancouver Charter* require that a public hearing be held prior to the adoption of the Official Community Plan and Zoning bylaw. At the hearing, those who consider themselves affected by the proposed bylaw must be given an opportunity to be heard. Although the legislation does not expressly require the disclosure of documents at the public hearing, the Courts have imposed a requirement that all documents that are relevant to the matter and that will be considered by Council in determining whether to adopt a bylaw must be made available to the public.

In *Pitt Polder Preservation Society v. Pitt Meadows*,⁵⁰ the BC Court of Appeal held that public hearing requirements serve at least two important functions: they allow members of the public to make their views known to the decision maker and they give the decision maker the benefit of public examination and discussion around the issues surrounding the proposed bylaw. The Court held:

[46] Procedures aimed at ensuring a minimum standard of rationality in the decision-making process are more likely to enhance the quality of the decision and the public's acceptance of it than decisions based on undisclosed information, or on incomplete or ill-considered facts.

[47] As well, participatory procedures such as public hearings on land use or zoning bylaws tend to dispel perceptions of arbitrariness, bias or other impropriety on the part of local government in the decision-making process and tend to enhance public acceptance of such decisions. Put another way, the perception, if not the fact, of arbitrariness or bias is more likely to arise if the duty to ensure procedural fairness is not observed.

The Court held that, in order to provide the opportunity for "informed, thoughtful, and rational presentations in relation to proposed land use and zoning bylaws, it is necessary that interested

⁵⁰ *Pitt Polder Preservation Society v. Pitt Meadows*, 2000 BCCA 415.

members of the public have the opportunity to examine in advance of a public hearing not only the proposed bylaws but also reports and other documents that are material to the approval, amendment or rejection of the bylaws by local government.”⁵¹ The test for disclosure set out in *Pitt Polder* was adopted by the Supreme Court of Canada in *Canadian Pacific Railway Co. v. Vancouver (City)*.⁵²

Recently, however, the BC Court of Appeal in *Community Association of New Yaletown v. Vancouver (City)*⁵³ construed the disclosure requirements more narrowly and held that the public had the right to present informed, thoughtful, and rational comments only on those matters strictly contained in the proposed bylaw. The Court held that if the public disagrees with the City’s decisions on what constitutes the public interest, its remedy is the ballot box.

The 2010 BCSC case of *Vancouver Island Community Forest Action Network v Langford (City)*⁵⁴ provides a useful discussion of when courts will set aside a decision in the municipal context based on a failure to make adequate disclosure at a public hearing. On the facts, the City was found to have made adequate disclosure. The Court nonetheless provides a thorough discussion of when disclosure would be inadequate, thus leading the court to set aside the decision. At para. 61 the Court held that while there is no hard and fast rule for the degree of disclosure required, whether the public is entitled to more expansive or restricted access depends on several factors including:

- Does the bylaw create a conflict of interest for the municipality? (*Eddington*)
- Does the rezoning significantly affect only one or two people, or is it a broad legislative decision? (*Jones*)
- Do the disputed records add anything to the debate? (*Jones; Harrison; Hubbard*)
- Does the contemplated rezoning result in a significant change in land use from the previous zoning? (*Pitt Polder*)
- Do the disputed records pertain to the concerns of the petitioner? (*Botterill v. Cranbrook (City)*, 2000 BCSC 1225 (B.C. S.C.))
- Was the public hearing mandatory? (CPR)
- Was the petitioner already aware of the contents of the records? (CPR)
- Are the documents relevant to zoning, or are they relevant to site-specific development or other concerns? (*Eaton, Hastings Park Conservancy v. Vancouver (City)*, 2008 BCCA 117 (B.C. C.A.), *Eadie*)
- If the impugned document is an agreement, was that agreement still subject to negotiation? (*Hastings Park*)

⁵¹ *Ibid* at para. 54.

⁵² *Canadian Pacific Railway Co. v. Vancouver (City)*, [2006] 1 SCR 227 at para. 54.

⁵³ *Community Association of New Yaletown v. Vancouver (City)*, 2015 BCCA 227

⁵⁴ *Vancouver Island Community Forest Action Network v. Langford (City)*, 2010 BCSC 1357.

III. Risk Management Strategy for Local Governments

Although the pendulum has swung, and continues to swing, in the direction of increasing deference, administrative decisions are not immune from review. From a risk management perspective, local governments are not advised to take a false sense of security from this trend.

- 1) In a democratic society governed by the rule of law, citizens will continue to seek judicial review and oversight of government action that is not transparent and appears arbitrary or unreasonable. The Supreme Court of Canada and the courts in British Columbia have said that the local governments will not enjoy the benefit of deference in the absence of sufficient transparency.⁵⁵
- 2) Moreover, merely having to defend litigation—even if the local government or its councillors or staff have not acted unlawfully—is a tremendously expensive and onerous drain on municipal resources.
- 3) Complacency inside local government in thinking that court intervention is unlikely can accompany complacency regarding oversight inside the organization. This complacency can lead to failures to detect conflict of interest, fraud, and even corruption early and efficiently.

As long as there remains a right to judicial review, citizens will continue to challenge decisions of local governments if there is a legal basis for doing so. Discretion is never untrammelled and decisions must be made in accordance with the purposes for which the powers have been granted. In *Roncarelli v. Duplessis*,⁵⁶ Rand J. said:

In public regulation of this sort there is no such thing as absolute and untrammelled “discretion”, that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the ‘Commission may not be mentioned in such statutes but they are always implied as exceptions. “Discretion” necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.

In addition to ensuring that decisions are lawful, reasonable, and fair, there is another simple way for municipalities to avoid litigation: being open and transparent. The importance of this simple

⁵⁵ *London (City) v. RSJ Holdings Ltd.*, *supra* note 6; *Ridley Bros. Development Co. Ltd. v. Colwood (City)*, *supra* note 6; *338186 BC Ltd. v. City of Vancouver*, 2011 BCSC 336.

⁵⁶ *Roncarelli v. Duplessis*, [1959] SCR 121.

risk management strategy was overlooked and recently highlighted in the *Jordan v. Vancouver (City)*,⁵⁷ in which the Court ultimately dismissed the plaintiff's claim for defamation but found that if the City of Vancouver had extended to Mr. Jordan the "simple courtesy" of a reply to his requests for information, the "needless lawsuit" could have been avoided.⁵⁸ The Court's comments with respect to costs are also worth noting. Although the Court noted that costs are usually payable to the successful party, the Court was inclined not to award costs to the City. The Court found that the City unreasonably refused to respond to Mr. Jordan's requests for information and deliberately failed to reply. It also found that the City's reply to the Plaintiff's Freedom of Information and Protection of Privacy Act Request as "nothing short of insulting" and that the City's actions with respect to lost video footage was "particularly disturbing".⁵⁹

Although the Court's findings were made in the context of a claim for damages in defamation, its criticisms of the City's conduct and its observations that the litigation could have been avoided by simple courtesy underscores the importance of operating local government in a transparent and open manner. Lack of transparency and courtesy towards the public often lies at the heart of municipal litigation and can tip the balance in favour of setting aside a decision.⁶⁰ As was noted in *London (City) v. RSJ Holdings Ltd.*,⁶¹ when a local government acts with secrecy "it undermines the democratic legitimacy of its decision, and such decisions, even when *intra vires*, are less worthy of deference".⁶² When decisions are made following a procedure that is open and transparent, the public is far more likely to accept it and the court is more likely to defer to the decision maker.

⁵⁷ *Jordan v. Vancouver (City)*, 2016 BCSC 167.

⁵⁸ *Ibid* at para. 1.

⁵⁹ *Ibid* at paras. 176, 178.

⁶⁰ *Ridley Bros. Development Co. Ltd. v. Colwood (City)*, *supra* note 6.

⁶¹ *Supra* note 6.

⁶² *Ibid* at para. 38.