

Original filed on 05 October 2022

SUPREME COURT  
OF BRITISH COLUMBIA  
VANCOUVER REGISTRY

No. S-227987  
Vancouver Registry

**MAR 16 2023** IN THE SUPREME COURT OF BRITISH COLUMBIA

*Re: In the matter of the Judicial Review Procedure Act, RSBC 1996 ch. 241*

BETWEEN:

KITS POINT RESIDENTS ASSOCIATION,  
EVE MUNRO and BENJAMIN PETERS

PETITIONERS

AND:

CITY OF VANCOUVER

RESPONDENT

**AMENDED PETITION TO THE COURT**

**ON NOTICE TO:**

Vancouver Board of Parks  
and Recreation  
2099 Beach Avenue  
Vancouver, BC V6G 1Z4

**AND TO:**

Squamish Nation  
320 Seymour Blvd  
North Vancouver, V7J 2J3

**AND TO:**

Ministry of Attorney General  
Legal Services Branch  
PO Box 9280 STN PROV GOVT  
1001 Douglas Street.  
Victoria, BC V8W 9J7

This proceeding is brought for the relief set out in Part 1 below, by Kits Point Residents Association, Eve Munro, and Benjamin Peters, the persons named as petitioners in the style of proceedings above. If you intend to respond to this petition, you or your lawyer must:

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s):
  - (i) 2 copies of the filed response to petition, and
  - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

**Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.**

### **TIME FOR RESPONSE TO PETITION**

A response to petition must be filed and served on the petitioner,

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is:  The Law Courts 800 Smithe Street Vancouver, BC V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the petitioners is:  Eyford Partners LLP 1744-1055 Dunsmuir Street Vancouver, BC V7X 1L2 <b>Attention: N. Baker</b>
(3)	The name and office address of the petitioners' lawyer is:  Same as above

## CLAIM OF THE PETITIONERS

### PART 1: ORDERS SOUGHT

1. A declaration that the 20 July 2021 *in camera* resolution (the "**Resolution**") passed by Council of the City of Vancouver (the "**City**") ~~on or before 25 May 2022~~ authorizing the execution of a services agreement dated 25 May 2022 with Squamish Nation (the "**Services Agreement**") is unlawful, unreasonable and contrary to the provisions of *Vancouver Charter* S.B.C. 1953, c. 55 (the "**Vancouver Charter**").
2. A declaration that City's decision not to consult or hear from the Petitioners and other residents of the City before entering into the Services Agreement was unreasonable and made in bad faith.
3. A declaration that the City contravened section 165.2 of the *Vancouver Charter* and breached the rules of procedural fairness and natural justice by passing a the ~~r~~Resolution at an *in camera* meeting authorizing the execution of the Services Agreement and without first providing residents affected by the development contemplated in the Services Agreement with an opportunity to be heard and to make representations to Council.
4. An order quashing City Council's ~~in camera~~ the ~~r~~Resolution authorizing the execution of the Services Agreement;
5. An order quashing the Services Agreement executed by the City pursuant to Council's ~~in camera~~ the ~~r~~Resolution.
6. Costs; and
7. Such further and other relief that this Honourable Court deems just.



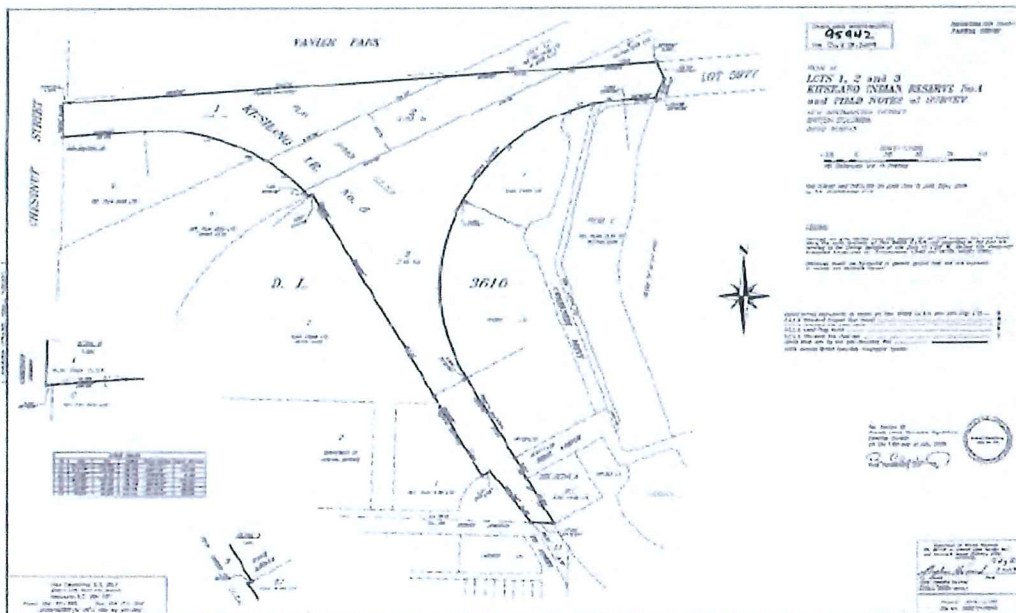
## PART 2: FACTUAL BASIS

### A. THE PARTIES

1. The Petitioner, Kits Point Residents Association (the "**Association**"), is a society representing residents of an area known as "Kits Point" in the City, with an address for services in this proceeding only at 1744-1055 Dunsmuir Street, Vancouver, British Columbia, V7X 1L2.
2. The Petitioner, Eve Munro, is a resident of Kits Point and an elector of the City with an address for services in this proceeding only for this proceeding only at 1744-1055 Dunsmuir Street, Vancouver, British Columbia, V7X 1L2
3. The Petitioner, Benjamin Peters, is a resident of Kits Point and an elector of the City with an address for services in these proceedings only for this proceeding only at 1744-1055 Dunsmuir Street, Vancouver, British Columbia, V7X 1L2.
4. The Respondent City is a municipal corporation incorporated pursuant to the *Vancouver Charter*, and having a business office at 453 West 12<sup>th</sup> Avenue Vancouver, B.C..

### B. THE LANDS

5. Squamish Nation (the "**Nation**") is an Indian Band constituted pursuant to the *Indian Act*, R.S.C. 1985 c. I-5.
6. In or about April 2019 the Nation formally announced its intention to develop a 10.5-acre irregularly shaped parcel with reserve status known as Kitsilano Indian Reserve No. 6 (the "**Lands**").





7. The Lands were previously part of a larger area, encompassing lands at Kits Point including Vanier Park, which were subject to land and other claims by the Nation. In or about 2000, the Nation voted in favour of a \$92.5 million settlement with the Federal Crown and abandoned its claims to Kits Point.
8. In separate but related proceedings indexed at *Canada (Attorney General) v. Canadian Pacific Ltd.*, 2002 BCCA 478, the Lands, which had been expropriated under the Railway Act, were returned and restored to the Nation as reserve.
9. The Lands are at the foot of, and bisected by, the Burrard Bridge and border the shoreline, Vanier Park and Kits Point.
10. Vanier Park is owned by the federal Crown but subject to a 99-year lease with the City (the "**Lease**"). The federal Crown and the City entered into the Lease on 15 August 1966. The Lease states that Vanier Park is to be used for 'park, museum or recreational use, and solely for these uses'.
11. After entering the Lease, the Vancouver Board of Parks and Recreation (the "**Park Board**") became responsible for Vanier Park.
12. Although the Lands are within the boundaries of the City, they are not subject to City bylaws or other City regulations.

### C. THE PROJECT

13. The Nation's initial 2019 proposal for the Lands was to build a residential and commercial development, known as Señákw, which would include approximately 3000 residential units and house approximately 6000 residents.
14. According to an April 2019 news article in Business In Vancouver around the time of the announcement, City staff acknowledged that if the Nation's plan was to build 3,000 housing units on the Lands, it would be a very dense development for the City. However, the City Manager noted that if there was a lot of "pushback from the proposed project", there would be pressure on Council to "look hard" at the proposed services agreement.
15. However, a month later Mayor Stewart was quoted in the Vancouver Sun as stating that if residents oppose the project there are few ways to fight it because the development is on Squamish land and outside the City's jurisdiction. He stated: "The shoe's on the other foot and there's really not a lot of need for Squamish to consult with the local community".

### D. NOVEMBER 2019 IN CAMERA COUNCIL MEETING

16. On 05 November 2019 City Council met *in camera* under section 165.2(1)(k) of the Vancouver Charter to discuss the proposed development of the Lands by the Nation (the "**November 2019 Closed Meeting**"). At this meeting, a confidential staff report dated 17 October 2019 from the City Manager made various

recommendations to Council regarding the proposed approach for working with the Nation ("October 2019 Report"). The report includes the following statements:

- a. The project is on the Nation's land, which means that the City does not have authority over the project in terms of approvals or taxation;
  - b. There is no law that requires the parties to enter into a contract (i.e. services agreement) to provide services or to pay for them;
  - c. The Nation could elect to fund its own on-site services;
  - d. The negotiation and conclusion of a services agreement, if any, depends completely on the mutual benefits and interests of the City and the Nation;
  - e. The services agreement must ensure the City receives fair compensation for services and that there is an appropriate level of public amenities and infrastructure to support the growth resulting from the development; and
  - f. The Nation is partnering with Westbank Corporation ("**Westbank**") on the project and that their intention is to build rental housing but that, if needed, they would also consider delivering other forms of housing such as condominiums and/or strata leaseholds.
17. The report also explains that the planned development for the Lands has now changed to include approximately double the number of residential units, from units 3000 to 6000, and that while there was a "fairly balanced" reaction from the broader population in response to the initial proposal, the "significantly expanded scope" will likely result in "considerable concern from the surrounding neighbourhood". The report further explains that members of the Nation must vote on the proposal before it can proceed, and that once the result of the Nation's vote on whether or not to proceed with the project is known, the City staff "will develop a communications strategy".
  18. According to the minutes of the November 2019 Closed Meeting, Council approved the recommendations in the October 2019 Report.
  19. In or about December 2019, the Nation publicly announced that it was partnering with Westbank Corporation ("**Westbank**") to develop the Lands.
  20. Shortly after the Nation's partnership with Westbank was announced, the Nation also announced that it intended to double the number of residential units being constructed on the Lands to 6000 and the projected population to approximately 11,000. The Nation's new proposal was to build 11 towers with building heights reaching 56 stories (the "**Project**").



21. Other than very basic drawings of the planned towers and the projected number of residential units, few details were provided about the Project.

22. The Project, once completed, will not only be significantly denser than what is permitted in the residential areas surrounding the Property, which are subject to the City's Zoning Bylaw, but the City in general.

**E. KITS POINT NEIGHBOURHOOD EXPRESSES CONCERNS AND ATTEMPTS TO OBTAIN INFORMATION FROM CITY**

23. The eastern boundary of Kits Point borders a portion of the Lands and Vanier Park. Approximately 1,100 households live in Kits Point, including in low rise apartments, duplexes, townhouses and single-family homes with suites. Many of the residential units in Kits Point are rentals.

24. The Association is a volunteer-run organization representing residents of Kits Point. The Association was first formed in or about 1906 and operated as an unincorporated group, lead by an executive team, until it was incorporated on 30 September 2022. The purposes of the Association include:

- a. Acting on behalf of Kits Point residents to protect and enhance the livability of Kits Point; and
- b. to raise awareness and provide information regarding issues of interest and concern to the community.

25. While the Association has been supportive of the Nation's intention to develop the Lands, since the initial 2019 proposal was first announced, it has been very concerned about the proposed scale and lack of information about the Project. Specifically, it is concerned about its size, density, heights of towers, and the impact it will have on the neighbouring residential area, including on traffic, infrastructure and the use of Vanier Park.

26. On or about 9 March 2020, Scott Dunlop, a member of the Association's then executive (now a director) wrote to Mayor Stewart about the Association's concerns about the recently announced "massive residential development" announced by the Nation in partnership with Westbank. In his letter, Mr. Dunlop requested that the City implement a comprehensive planning process to address these issues in conjunction with the planning of the Project, and to ensure that the needs of both the proponent of the Project and neighbours adjacent to it, are taken into consideration. His letter states:

To our knowledge there has not been any research or reports undertaken on traffic, biking, parking and pedestrian safety in our neighborhood for well over a decade. In respect to the Squamish Nation/Westbank Partnership proposal, there is no need to state anything other than the obvious: the development as currently projected by the Squamish Nation/Westbank Partnership is an extremely high density proposal (6000



residential units) which will undoubtedly have a fundamental and comprehensive impact on Kits Point, Kitsilano and False Creek South Neighborhoods in all of the most basic attributes of civic livability: including schools, day cares, recreation centres, parks, public transportation, traffic patterns, traffic congestion, safety, parking, sewage and pedestrian, vehicle and bike ingress and egress to and through Kits Point.

Presently there is significant existing vehicle, bike and pedestrian traffic to, from and through the Burrard Bridge, Cornwall and 1<sup>st</sup> Ave intersections on Burrard which lead to False Creek South, Granville Island, Kits Point Neighborhood and the Kits Park Amenities. The Squamish Nation/Westbank Partnership and Concord Molson land developments will obviously add a huge load to these intersections. Therefore it is in every Vancouver citizen's interest that the COV institute a comprehensive planning process to ensure public transportation, vehicle, bicycle and pedestrian traffic and parking is very carefully considered with appropriate data and analysis.

So it is clear that there is a fundamental need to determine a community plan for the communities adjacent to these three major new developments and the impact on the Kits Point Parks and Kits Point Amenities in order to accentuate the positive attributes these developments will contribute to the current and expected COV standards of living and lifestyle and to mitigate the impact on Kits Point Neighborhood and Parks, including in particular the vehicle, bike and pedestrian traffic in and around the Burrard and Cornwall traffic corridors. Further, with an estimated construction period of twenty years, the ways and means this intense construction will be carried out needs to be carefully considered and planned.

KPRA is simply requesting that the COV implement a comprehensive planning process to address the significant issues identified above in conjunction with the imminent Squamish Nation/Westbank Partnership's development. This process will take into consideration the needs and requirements of this development, the neighborhoods adjacent to it and any related COV and Vancouver residents' interests. This planning process should include robust citizen engagement, with KPRA as a party from inception, to ensure we are able to meaningfully participate, contribute and make submissions.

27. The Association did not receive a response to its letter of 9 March 2020.

**F. OCTOBER 2020 IN CAMERA MEETING**

28. On 06 October 2020 Council met *in camera* under section 165.2(1)(k) to further discuss the Project. A September 2020 confidential staff report made various recommendations to Council, including that Council delegate to the City Manager

the authority to negotiate a services agreement with the Nation (the “October 2020 Report”).

29. The October 2020 Report explains that the Nation was required to submit the proposed development to their band members for a land vote and that in or about December 2019 the members voted in favour of proceeding with the Project. The report further explains that the band members also approved a partnership with Westbank (the “Partnership”) and that staff are working directly with the Partnership as representatives of the Nation.
30. With respect to the Project, the report further notes:
  - a. The number of more affordable units is much lower than what would typically be required of rental project off-reserve given the “significant additional density” of the Señákw development;
  - b. Staff are concerned that the scope and scale of the initially proposed on-site amenities will not address the amenity needs of the development’s residents;
  - c. Even with the proposed on and off-site amenities, there will be unmet amenity demands that will create pressure on existing facilities or may require additional investment;
  - d. The Partnership intends to construct a Low Carbon District Energy Facility, operated by Creative Energy, as part of the first phase and that staff “will seek to ensure the facility is designed suitably” given its location and proximity to residential uses;
  - e. The Project is of a significant scale which is inconsistent with the current planning context and would result in the densest project in the City;
  - f. The City’s planning policies and considerations do not apply and as such “there will be impacts on the surrounding neighbourhood” including on the existing transportation network, and nearby amenities and public services;
  - g. To address the needs of the Project, the Partnership has proposed providing amenities outside the Lands, in existing City owned cultural spaces within Vanier Park to support its development;
  - h. The proposed density of the Project limits the opportunities to achieve on-site amenities such as new park space. The on-site amenities proposed by the Partnership “will not offset the Señákw’s growth impacts on the existing community”;



- i. It is anticipated that there will be impacts beyond the site with regard to community amenity needs which may have financial implications for the City or a reduction in the level of service for residents; and
  - j. If the Project was within the City's planning framework, it is unlikely the proposed density would have been supported by any planning processes given the neighbourhood context;
- 31. The report further explains that the Lands are immediately adjacent to Vanier Park and that a road within the park adjacent to the Lands "is required to make the project's form of development viable". The report further notes that the Park Board has already given in principle approval to the Nation to build a new road in Vanier Park to facilitate the Nation's development.
- 32. City staff recommended that the City approve certain "Guiding Principles" in negotiating with the Nation, including the principle that the City is committed to being a City of Reconciliation and, as such, the City:
  - a. respects the Nation's right to develop the Lands as "they see fit";
  - b. will work to "support the integration of the project, recognizing the significant impacts and opportunities"; and
  - c. will take guidance from the Nation on how it would like to "engage in the development of the communication and operating protocol".
- 33. Staff also recommended that the City take the "negotiating stance" that the Project should be well integrated in terms of land use, built form and public amenities.
- 34. In the report, City staff also specifically referenced correspondence received from the Association, which staff stated indicated an "interest in ensuring effective integration" within the local context given the potential impacts and requesting local area planning. The report, however, makes clear that the City did not intend to hold any "public consultation about the project per se" because that would "imply that the City has some regulatory control" over the Project.
- 35. According to the minutes of the October 6, 7, and 9 2020 Closed Meeting, Council approved the recommendations in the October 2020 Report.

#### **G. CORRESPONDENCE WITH THE CITY**

- 36. In or about February 2021, an illustration of the Project was posted on the Lands and on the developer's website and the Petitioners each learned for the first time the Project also contemplated an access road through Vanier Park to service the Project.



37. The Petitioners became increasingly concerned. They tried to get details about the Project, but the City refused to provide information. City staff repeatedly advised the Association that they could not discuss the Project because all discussions were being held *in camera*.
38. On or about 15 February 2021 Scott Dunlop again wrote to Mayor Stewart, and other City Staff, to set out the Association's main concerns regarding the Project. He also set out details of the Association's previous requests for information and requested a meeting with the City.
39. By letter dated 23 April 2021 Paul Mochrie, the City Manager, acknowledged that the "size and scale of the initiative was significant" and raised many questions for the community but stated:
- a. The City land use policies are not applicable to the Parcel;
  - b. The City is not "directly involved" in any part of the planning or design of the Proposed Development;
  - c. The City is supporting Squamish Nation's request to provide municipal services with the intent of entering into an agreement for the provision of services, but discussions are confidential; and
  - d. The City "does not have the jurisdiction nor mandate to lead and facilitate the sort of public consultation process that would typically take place for a similar development outside the Squamish Nation Lands."
40. Mr. Mochrie further advised that:
- a. The Project contemplates access through the Park but the City consults with the community where there are "significant changes to traffic circulation within a community";
  - b. The City will be "engaging with the Kits Point community and others in the area" but there is no "firm timeline on when to expect this engagement as it relates to ongoing negotiations"; and
  - c. Regarding the Park generally, "there will be a need for the Park Board to embark on a park master planning", which would "typically include robust public engagement".
41. After receiving Mr. Mochrie's 23 April 2021 letter, the then Chair of the Association, Gloria Sully, emailed Dave Hutch, Director of Planning and Development at the City, stating that the Association "was pleased" to hear there would be engagement regarding Vanier Park. She also enquired when the engagement would begin and requested that the Association be included in the

process. She also requested a copy of the Lease. By email dated 19 May 2021, Dave Hutch, confirmed that there would be a public engagement process regarding Vanier Park and that the City would be in contact with the Association to ensure its participation. Mr. Hutch attached a copy of the Lease, as requested.

42. On 26 May 2021 City Staff met with members of the Association via Zoom, including Eve Munro, Gloria Sully (the then chair of the Association) and other members of the Association's executive team, to discuss the proposed "Vancouver Plan", a long-range land use plan for the entire City, that was currently under review. The City's presentation at the meeting included information relating to Vanier Park and included a slide show with the following bullet points:
- Vanier Park is situated on land that is leased by the City from the Federal and Provincial Government;
  - As with any park surrounded by significant development, there will be a need for the Park Board to embark on a park master planning process for Vanier Park.
  - In this case, it would be integrated with the City's planning for cultural facilities in the park.
  - The timeline for a potential park master plan process has yet to be determined.
  - The process would include public engagement. We would be in contact with the KPRA to ensure your participation.
43. The City provided the Association with a memo summarizing the 26 May 2021 meeting with City staff. The memo confirmed that the session "was not a meeting or consultation on the proposed Señákw development, which is on Federal Reserve land and therefore outside the City of Vancouver's jurisdiction with respect to land use". The memo further stated that consideration of a services agreement was underway but it was subject to "Council in-camera (confidential discussions due to the nature of the project)".
44. On 15 June 2021, Eve Munro emailed City staff and council to set out some of the community's concerns and to provide further feedback in order to continue the dialogue:

As you could tell from the meeting the largest issues facing our community at the present time are the many pressures that will be created by the Señákw development: traffic congestion during and after construction, resulting safety issues for pedestrians and cyclists, parking, scale and density, essential livability, and environmental impacts on parks. Beyond the cost of the services we understand are being negotiated, we are also



concerned about who is paying for the increased park and community facility usage, schools, transportation infrastructure etc. created/necessitated by this development and typically funded through property taxes.

45. Around the same time, Ms. Munro emailed the Park Board and requested an opportunity to make submissions regarding the proposal to use Vanier Park as an access road to service the Project. She received a response from commissioner Dumont that commissioners were getting “a lot of public correspondence regarding the issues”, that he was interested in hearing more from the various stakeholders “as the plans for this significant change to the neighbourhood progresses” but that there was “nothing concrete before the board for consideration at this time”.

#### **H. JULY 2021 IN CAMERA MEETING**

46. On 20 July 2021 Council met again *in camera* under section 165.2(1)(k) of the Vancouver Charter to discuss the Project. Council considered a 16 July 2021 confidential staff report, attaching the proposed services agreement (the “July 2021 Report”).
47. The July 2021 Report set out a series of staff recommendations, including that Council authorize the City Manager and City solicitor to approve the proposed Services Agreement. It also explains that:
- a. despite the proposed Project’s “unprecedented in size and scale” and Council’s previously approved “negotiating stance” that the Project should be well integrated in terms of land use, built form and public amenities, City staff had “relatively limited” discussions regarding land use and built form;
  - b. as part of the necessary transportation changes in the Kits Point neighbourhood, the City would have to purchase a portion of land for road widening purposes, which the City anticipated would cost approximately \$700,000. The City did not intend to request that this amount be paid by the Nation;
  - c. the only major term that has not yet been agreed to between the City and the Nation concerns the public release of the Services Agreement and related coordination agreements;
  - d. that while Council provided earlier direction to make the entire Services Agreement public given the “significant public impacts and profile”, the Nation wanted it to remain confidential with only a “short, high-level summary of key terms to be made public”; and
  - e. the Services Agreement will have “significant interest from the community, especially for the neighbouring residents”.



- 48. A 24 June 2021 letter from the Nation to the City explaining why the Nation wished for the Services Agreement to remain confidential is attached the July 2021 Report.
- 49. According to the minutes of the 20 July 2021 closed council meeting, Council adopted a motion that Council authorize the City Manager and the City Solicitor to approve the draft Services Agreement and that the Mayor execute it.
- 50. On 02 November 2021, Council held a further *in camera* meeting under section 165.2(1)(k) of the *Vancouver Charter* to discuss the Services Agreement.

#### I. FURTHER CORRESPONDENCE WITH THE CITY

- 51. On 9 August 2021 Mr. Dunlop responded to Mr. Mochrie's 23 April 2021 letter. In his letter, Mr. Dunlop noted that the Association had been trying to get basic information from the City and Park Board for over a year and half but that it was proving extremely difficult to "gain pertinent information about the complex issues", City's goals, and the overall process. The 5 main complex issues identified in his letter were: (1) the City's responsibility to Vancouver residents; (2) Señákw density; (3) the environmental impacts; (4) lack of transparency; and (5) the use of Vanier Park. Mr. Dunlop requested a call or meeting to discuss these issues.
- 52. In response to questions about the proposed road through Vanier Park a representative of the Park Board was quoted in the Vancouver Sun as stating that it "leases this area of the park from the federal government. As such, the ultimate approver for the right to construct the proposed road is the federal government."
- 53. Mr. Dunlop did not receive a response from Mr. Mochrie and followed up with him on 15 December 2021:

We have not received a reply to our August 9, 2021 letter, copied to the Parks Board.

To summarize, the Nch'kay West Partnership (**Nch'kay West**) has published detailed plans to develop 12 high story buildings on Señákw, a plot of Squamish Nation land bisected by a major Vancouver arterial bridge (Burrard) which borders on shoreline, a landmark park (Vanier) and Kits Point. Using the Nch'kay West average estimate of 10,500 residents, Señákw will have an unprecedented population density of 1000 people per acre, which will be 11.6 times more dense than the Concord Pacific Expo lands and 7.5 times denser than the most populated municipal areas (by census) in the United States and Canada.

A host of interests and issues need to be addressed and negotiated by Nch'kay West and the City of Vancouver (**COV**), including impacts on services, infrastructure, environment, public amenities, parking, traffic and

transportation, livability and local taxes (**Impacts**). Notwithstanding the extraordinary density of this development, COV Council and Management decided to negotiate a comprehensive set of necessary Municipal Services and Infrastructure Agreements with Nch'Kay West, under strict *in camera* confidentiality, in effect, deciding not to disclose to Vancouver citizens any pertinent information about the Impacts or the proposed management of them. It appears the Parks Board has also agreed to be subject to this confidential process.

COV Council and management *certainly has the legislated authority and jurisdiction* to manage and determine the negotiations of the Services and Infrastructure Agreements and therefore the due process capacity *to inform and consult with its citizens*. In other development projects amongst First Nations and/or the Federal Government and a Municipal Government, the parties *comprehensively* inform and consult the affected public, *prior* to finalizing development plans. In this case for some unknown reason, COV Council and executives has taken a strict, self-initiated position that *any* public consultations will *only* take place *after* the design is finalized and the Services and Infrastructure Agreements are completed, *which essentially renders public consultation meaningless*.

(...)

In our previous correspondence, we identified a particularly acute issue which will have a significant impact on Señákw's most immediate neighbors, Vanier Park and Kits Point: the Nch'Kay West request (and COV decision to attempt to secure) the construction of an access roadway through Vanier Park land to enable the unprecedented Señákw density. Vanier Park is leased by the Federal Government to the Parks Board on express terms that the land is to be used *only for park purposes*.

(...)

A related significant issue is Kits Point's long-standing traffic, parking, and pedestrian and bicycle safety issues. *These issues will obviously be enormously magnified when 10,500 new residents, and their visitors and service providers, travel to and from the Señákw development*. The proposed Señákw access roadway through Vanier Park intersects Kits Point residential streets awkwardly at a "T" in the middle of Chestnut St., notwithstanding there are less intrusive access options which require no park construction or access through Kits Point residential streets. *This issue is merely an example of the kind of issues that should/must be brought forward to Vancouver citizens for explanation and input before the Services and Infrastructure Agreements are finalized.*

Proceeding without any transparency or consultation on how traffic and parking will be managed throughout Kits Point *during and post*



*construction* is also surely an issue that must be brought to affected neighbours prior to final decision making by the parties. In stark contrast and highly relevant, there is presently a comprehensive public COV and Parks Board process underway on the western side of Kits Point to deal with bike and vehicle access and parking on Arbutus St. *There is no legal restriction we are aware of that would indicate that COV management is prevented from undertaking a comprehensive process of disclosing and consulting with affected citizens prior to final agreements with Nch'Kay West being approved by Council.*

(Underlining added)

54. On 20 January 2022 Mr. Mochrie advised the Association:

As you are aware, the development is on reserve land. Accordingly, the City does not have jurisdiction over the site or development that is occurring on the site. Any questions or comments regarding the form of the development would be best addressed to the Nation. With your consent, I am happy to forward your letter to the Nation for consideration.

(...)

As per our prior undertaking, the City will undertake an appropriate consultation process to engage with public on integrating transportation changes into the community within the City's jurisdiction.

(emphasis added)

J. **ESCROW AGREEMENT AND ANNOUNCEMENT OF EXECUTION OF SERVICES AGREEMENT ANNOUNCED**

55. On 24 May 2022 the City and the Nation entered into an "Escrow Agreement" whereby the parties would sign the execution page of the Services Agreement while they continued to work towards finalizing it.

56. On or about 25 May 2022 the City announced the execution of a Services Agreement with the Nation, but few details were made public. At the time of the announcement, the City had not undertaken any consultation with its residents.

57. After the execution of the Services Agreement was made public, Mayor Stewart was quoted saying that when he first learned of the project, which he described as unique and unprecedented, he knew he would do everything he could to support it.

58. In another article from 16 July 2022 Mayor Stewart, in response to a comment by the Association that the City had abdicated its authority, is quoted as saying that Kits Points residents were "not wrong about reserves relying on municipal



services” but that “We have an obligation to provide services as a good neighbour.”

#### K. SERVICES AGREEMENT MADE PUBLIC

59. On or about 29 July 2022, the Services Agreement was made public and the Petitioners learned the specific details of the agreement and Project.
60. The entire Services Agreement was posted on the City’s website. It is approximately 250 pages and addresses the provision of municipal services and infrastructure by the City to the Nation, including fire, police, utilities, public works and library services. It also addresses the process by which the Nation will secure a licence from the Federal government to permit it to build a road through Vanier Park.

61. The City’s website also included the following statement by the City under the heading “Next Steps”:

While we do not have the jurisdiction nor mandate to lead and facilitate the sort of public consultation process that would typically take place for a similar development on City lands, we will be engaging residents on how best to integrate potential transportation changes into the surrounding community.

We will be engaging with the Kitsilano and Burrard Slopes community around Seṇákw with ideas on transportation improvements based on a comprehensive transportation study undertaken as part of developing the Services Agreement. This engagement will focus on how best to accommodate the changes the Seṇákw Development will bring to the City.

There is no firm timeline on when this engagement will take place as we continue to work with the Squamish Nation and their development partner on implementation and construction planning.

62. The Services Agreement includes the following provisions under the heading “Background”:

- a. “The City represents and warrants to the Nation that a City Council resolution has been passed by City Council authorizing the City’s execution and delivery of the Agreement” (the “**Resolution**”);
- b. “As a government-to-government agreement with significant public impacts and profile, the Parties have agreed to make this Agreement a public document and therefore available to all members of the public.”

63. According to the City, the resolution referred to in the Services Agreement is the Resolution passed by council at its 20 July 2021 *in camera* meeting.

64. The Services Agreement also includes provisions and details regarding:
- a. The location of the 11 towers on the Property (Schedule L);
  - b. The location of the access road through Vanier Park and how the City would relinquish control of a portion of the leased area to facilitate the Nation's Project;
  - c. The services to be provided by the City to the Lands (Schedules B, D and E, F);
  - d. The mechanism for enforcement of the Nation's Bylaws by the City (Schedule C).

65. Section 13 of the Services Agreement provides:

### **13.0 Bylaws**

#### **Timing and Process**

The Parties have acknowledged the complexity of the laws applicable to the Reserve in Background A and have set forth their understanding of timing and process for the adoption by the Nation of by-laws required to facilitate the provision of the Municipal Services, in Schedule C [Adoption and Enforcement of Señákw Versions of City By-laws].

#### **Inability of City to Provide Municipal Services**

The Nation acknowledges and agrees that the City may not be able to provide the Municipal Services if the Nation does not adopt the Utilities Services By-laws in the manner contemplated by Schedule C [Adoption and Enforcement of Señákw Versions of City By-laws], and that the City may therefore elect not to enter into a TI Implementation Agreement with respect to the construction of any relevant Triggered Infrastructure Works, pending the completion of such adoption.

66. Schedule C relates to the "Adoption and Enforcement of Señákw Versions of City Bylaws. Section C.3(a) provides that the Nation will enact bylaws that essentially mirror the City's bylaws:

#### **Relationship Between City and Nation By-laws**

The Parties acknowledge and agree that:

- (i) the Sewer and Water Utilities By-laws are an integral part of the sewer and water municipal services provided off-Reserve;



(ii) to the extent that the Sewer and Water Utilities By-laws, Business Licensing and Regulations By-laws, and Other Bylaws are not laws of general application or otherwise not effective or enforceable on the Reserve, similar versions of same or portions of same need to be adopted or enacted as Nation SSA By-laws in order to have legal force and effect on the Reserve; and

(iii) the Nation has the authority pursuant to the Indian Act to enact by-laws relating to the use and occupation of land within the Reserve.

67. Schedule C.3(c) further provides that the City will enforce the Nation's Bylaws on its behalf:

#### **Enforcement by City**

The Parties agree that any and all proposed Nation SSA By-laws should provide for the City to enforce and prosecute them in the name of, or as agent of, the Nation, including all related administrative steps, communications and procedures, without further direction, permission or authority from the Nation. The City will take all steps and measures to enforce the Nation SSA By-laws as it would in comparable circumstances anywhere else within Vancouver. Subject to the Equity Principle, the Main Agreement, and any amendment to this Schedule C attached as an Appendix to this Schedule C:

(i) the City will be fully responsible for all costs of any steps or measures it may take or incur pursuant to such Nation SSA By-laws in order to enforce them;

(ii) the City will be entitled to receive and apply, as it consider appropriate, any money paid or collected pursuant to the Nation SSA By-laws as a result of its rights of inspection and enforcement;

(iii) the Nation will have no obligation to reimburse the City for any shortfall between the City's inspection and enforcement costs and the money received or collected by the City in relation thereto;

(iv) the City will be under no obligation to report to the Nation on its activities under such Nation SSA By-laws or the outcome of any enforcement process unless requested by the Nation; and

(v) the Nation SSA By-laws will provide that the Nation will have the right, with the prior agreement of the City, to enforce the Nation SSA By-laws, where the Parties agree that it would be appropriate and in such case the Nation will be entitled to any money paid or collected in connection with such enforcement by the Nation.

68. Schedule F.13 addresses the “Vanier Park Road and Storm Sewer” and provides:

(a) Within Vanier Park. The Vanier Park Road and Storm Sewer Area is located on land owned by Canada and leased (the “**Vanier Park Lease**”) for park purposes to the City, as represented by its Park Board.

(b) Within Park Board Jurisdiction. Pursuant to the Vancouver Charter, the Park Board has exclusive administration, jurisdiction and control over the City’s interests under the Vanier Park Lease. Accordingly, with respect to all Triggered Infrastructure taking place within Vanier Park, the Nation acknowledges that the City will be consulting with and seeking the agreement and approval of the Park Board with respect to all applicable TI Implementation Agreements related to Vanier Park, including without limitation and by way of example only with respect to the as yet undetermined final location of the Vanier Park Storm Sewer alignment as well as the grading plan for the transition of elevations between the Licence Area and the adjacent areas of Vanier Park.

(c) Access Rights and Permits Needed. The Nation acknowledges that, in connection with the Vanier Park Road and Vanier Park Storm Sewer:

(i) the Nation will need to acquire a licence or right of way (the “**Head Licence**”) over Vanier Park from Canada for the Vanier Park Road and Vanier Park Storm Sewer;

(ii) the City or the Nation will need to acquire a licence or right of way over those provincial Crown lands located between the northern limits of Vanier Park and the proposed outflow location at the low water mark of False Creek for that section of the Vanier Park Storm Sewer as well as a licence or right of way over those lands not owned by the City and required to provide access rights for the Creekside Drive Outflow (collectively, the “**Provincial Storm Licence**”); and

(iii) the City or the Nation may need to acquire applicable outflow/discharge permits to build and operate the Vanier Park Storm Sewer as well as the Creekside Drive Outflow (the “**Discharge Permits**”) from any authorities having jurisdiction, such as the Province, GVS&DD, or the City.

(...)

(e) Head Licence Ready to Issue. Canada has advised the Nation that it will issue the Head Licence to the Nation shortly after the Effective Date over:

(i) the Road and Storm Sewer Area for road access and storm sewer purposes;

(ii) the Storm Sewer Area for storm sewer and related access;



(iii) the Temporary Turnaround and Storm Sewer Area for emergency vehicles to turn around until such time as there is public access through the Reserve, and for storm sewer purposes; and

(iv) other ancillary rights, substantially in the form attached as Appendix F.6 [Form of Head Licence].

(f) Sub-Licence Ready to Issue. Concurrently with Canada issuing the Head Licence to the Nation, the Nation will grant a Sub-Licence (the "**Sub-Licence**") to the City substantially in the form attached as Appendix F.7 [Form of Sub-Licence].

69. Section 19.5 of the Services Agreement provides:

**Openness/Transparency**

As a government-to-government agreement, this Agreement will be considered and treated as a public document available for review by any member of the public.

70. The City did not provide residents of Kits Point or Vancouver generally, with any details of the Services Agreement or an opportunity to be heard in relation to it or the Project before passing the *in camera* Resolution to execute it, despite (1) City staff's assurances that it would engage with community; and (2) the impact of the Project on the surrounding neighbourhood, including the Petitioners.

L. **FURTHER ATTEMPTS TO OBTAIN INFORMATION**

(1) City of Vancouver

71. On 23 August 2022, Eve Munro submitted a request under the Freedom of Information and Protection of Privacy Act ("**FIPPA**") for the following records:

The resolution of Council approving the Municipal Services Agreement (MSA) with Squamish Nation, made effective May 25, 2022, and all minutes, Agendas, and other documents before Council when the resolution was made.

(the "**FOI Request**")

72. By letter dated 7 September 2022 the City advised that all responsive records were being withheld under section 12(3)(b) of FIPPA:

In camera meetings are meetings held in the absence of the public. Council is only authorized to hold in camera meetings under the circumstances set out in section 165.2 of the Vancouver Charter. All responsive records are withheld under s.12(3)(b) of the Act. You can read or download this section here:

[http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/96165\\_00](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96165_00)

In camera decisions and reports are released when they are no longer considered sensitive. Released in camera items may be viewed online here: <https://vancouver.ca/your-government/city-council-meetings-and-decisions.aspx> (select “get agendas and minutes”).

73. By email dated 12 September 2022, Ms. Munro asked the City to advise:
  - a. which section of section 165.2 of the *Vancouver Charter* it was relying on to justify the *in camera* proceedings; and
  - b. the meeting where the decision to proceed *in camera* was made.
74. The City responded by email dated 13 September 2022 and advised:
  - a. That the motion to enter *in camera* was passed at a public meeting as required under the *Vancouver Charter*;
  - b. The basis under the applicable subsection of section 165.2 of the *Vancouver Charter* under which the meeting was closed was noted in the motion; but
  - c. Under section 12(3)(b) of the FIPPA, the City is unable to disclose:
    - i. the basis under section 165.2 of the *Vancouver Charter* that the City relied on to go *in camera*; or
    - ii. the meeting date at which the motion was made and passed.
75. On 26 September 2022 Ms. Munro submitted a request for review and complaint regarding the handling of her FOI Request to the Office of the Information and Privacy Commissioner.

(2) Federal Government

76. On 01 August 2022, Ms. Munro emailed the Federal Government to find out the application process for the “Head Licence” contemplated in the Services Agreement.
77. On 11 August 2022, Mr. Lymburner responded and advised that the Head Licence had already been issued.
78. On 22 August 2022, Eve Munro contacted responded to Mr. Lymburner requesting further details.
79. On 12 September 2022 Mr. Lymburner advised Ms. Munro that:



- a. The City, Park Board, Nation, and a partnership between Westbank and Squamish Nation approached the Government of Canada requesting an access route on Vanier Park;
- b. A licence was issued concurrently with the Services Agreement.

**M. APPLICATION SUBMITTED BY THE CREATIVE ENERGY SEÑÁKW LIMITED PARTNERSHIP TO BRITISH COLUMBIA UTILITIES COMMISSION (THE “BCUC”)**

- 80. On or about 20 October 2022 Creative Energy Señákw Limited Partnership applied to the BCUC for a Certificate of Public Convenience and Necessity (the “Certificate”) to construct, own and operate a thermal energy system to service the Project, as required under section G.6 of the Services Agreement.
- 81. Although the Nation sought to be exempted from the required public consultation process, on 30 November 2022 the BCUC ordered that the application proceed to public hearing. In its reasons, the panel determined:  
  

Given the lack of public consultation prior to this Application, the Panel considers that there may be additional interests and stakeholders to consider. The Panel, therefore, finds that an opportunity for affected parties to participate in the hearing is required, and there is a need for additional evidence to determine whether the Application can and should be approved as being in the public interest; therefore, additional process is warranted.
- 82. The BCUC’s public hearing process relating to the Certificate is scheduled to be completed in or about May 2023.

**N. INFORMATION SESSION ON TRANSPORTATION CHANGES**

- 83. On 16 February 2023 the City held an information session regarding its planned transportation changes in Kits Point resulting from the Señákw Development. The City also put out a public survey relating to the proposed changes.

**PART 3: LEGAL BASIS**

- 1. This is an application for judicial review brought pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (“JRPA”) to review Council’s *in camera* Resolution passed on or before 25 May 2022 authorizing the City to execute the Services Agreement.
- 2. Section 2 of the JRPA provides:
  - 2 (1) An application for judicial review must be brought by way of a petition proceeding.

(2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:

- (a) relief in the nature of mandamus, prohibition or certiorari;
- (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

#### **A. STANDARD OF REVIEW**

3. This case is about the extent of the duty of fairness owed by the City to its citizens when negotiating agreements to provide services to lands that are not subject to the City's rules and regulations.
4. It is also about the interplay and tension between the City's power to regulate land use, infrastructure, resources, and services within the City, and the Nation's rights and authority over reserve land that is within the City's boundaries but not subject to the City's jurisdiction (including bylaws and taxation). Specifically, it raises the question of the City's jurisdiction or authority to impose conditions, acting within its mandate of governing in the best interest of its citizens, on a development that is not subject to City bylaws but requires City services and access to, and the use of, City lands.
5. The standard of review applicable to Council's decision to pass the *in camera* Resolution authorizing the City to execute the Services Agreement is reasonableness. However, matters of procedural fairness and allegations of bad faith are reviewed on a correctness standard. The City is not entitled to deference on these matters. of procedural fairness.

*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("**Vavilov**")

*0733603 B.C. Ltd. v. City of Vancouver*, 2022 BCSC 1302

*RNL Investments Ltd. v. British Columbia (Agricultural Land Commission)*, 2021 BCCA

*Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2021 BCCA 160

#### **B. CITY BREACHED THE RULES OF PROCEDURAL FAIRNESS AND NATURAL JUSTICE**

6. The City's Zoning Bylaw does not apply to the Lands and the Nation is not required to apply to the City for rezoning to proceed with a development to the size and scale it intends to build. The Project is not subject to sections 565 and 566 of the *Vancouver Charter* and there is no statutory requirement to hold a public hearing.
7. However, while there is no statutory requirement for the City to hold a public hearing, given the potential impact of the City's decision on the residents of Vancouver and Kits Point, including the Petitioners, the City had not only the



authority to implement an appropriate consultation process, but a duty to do so in the circumstances.

*Canadian Pacific Railway Co. v. Vancouver (City)* ("**CPR**"), 2006 SCC 5 (CanLII), [2006] 1 SCR 227 at para. 40

8. The confidential City staff reports recognized that (1) the City was under no obligation to enter into an agreement to provide services, (2) the scale of the Nation's proposed development was "unprecedented" and inconsistent with the current planning context, (3) there will be unmet amenity demands that will create pressure on existing facilities, which may require additional investment (4) the Nation needed access and use of City property, including Vanier Park, to be "viable", and (5) there would be significant impacts on the surrounding residents. Nevertheless, the City decided not to consult its residents on the theory that doing so would "imply that the City has some regulatory control" over the Project.
9. The City incorrectly and unreasonably (discussed further below) believed that since the Nation was (1) not required to consult City residents and (2) did not want the City to consult its residents, it the City could not conduct any public consultation process relating to the Services Agreement. too was not required to consult or hear from its residents. In fact, the City went so far as to state that it did not have the "jurisdiction nor mandate" to do so.
10. However, the City not only had an unfettered discretion to consult its residents, including under section 184 of the Vancouver Charter, in addition to the requirement that it consult but an obligation to do so in the circumstances. as part of its general duty of fairness owed to its resident. Section 184 of the *Vancouver Charter* expressly empowers the City to submit questions for the opinion of the electors. *Section 184 of the Vancouver Charter provides:*  
  
*Questions may be submitted for the opinion of the electors*  
**184.** The Council, for its own information, may submit for the opinion of the electors any question with which the Council has or desires to have the power to deal.
11. Fundamental to the City's decision not to hear from its residents and to shield the Services Agreement from any public oversight was the belief that the goal of reconciliation and the Nation's desire to keep everything confidential required the City not to engage in any public consultation with its electors.
12. Reconciliation and the Nation's rights over the Lands, however, did not prohibit or otherwise limit the City from consulting with its residents on whether or not it should enter into a services agreement that would allow the Nation to build a

Project on the Lands at scale that was so inconsistent with the City's planning context and that would impact the surrounding neighbourhood.

13. The City is a creature of statute, and its goal of reconciliation cannot limit or expand its powers under the *Vancouver Charter*. The City's decision not to consult electors, including residents of Kits Point, on the basis that it would "imply that the City has some regulatory control" was not only contrary to its duty of fairness, but also unreasonable (as discussed further below).
14. Further, despite statements to the contrary, the City did have some control over what would ultimately be built on the Lands and the power to hear from residents. The Nation requires City services and access through Vanier Park to proceed, both of which had to be negotiated with the City to build the Project to the Nation's desired size and scale. This was recognized early on by the City Manager i.e. if there was "push back", the City could address it through the Services Agreement. It was also noted in the confidential staff reports. Under the circumstances, the City owed a duty of fairness to its residents and required that it provide an opportunity to make submissions and to be heard by before it passed the Resolution and executed the Services Agreement with the Nation.
15. In *Pitt Polder Preservation Society v. Pitt Meadows (District)*, 2000 BCCA 415, the B.C. Court of Appeal explained the importance of participatory procedures in the context of public hearings, and more generally:

[45] A public hearing on land use and zoning bylaws serves at least two important functions: it provides an opportunity for those whose interests might be affected by such a decision to make their views known to the decision-maker and it gives the decision-maker the benefit of public examination and discussion of the issues surrounding the adoption or rejection of the proposed bylaw.

[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.

16. In addition, even where a public hearing is not required, where a statement is made that gives rise to an expectation of consultation, the doctrine of legitimate expectations may also apply. The doctrine, which is a component of procedural fairness, operates where an official statement gives rise to a reasonable expectation that a particular procedural step will be followed.



*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36

17. In this case, the Petitioners had a legitimate expectation that they would be consulted and heard in advance of council's decision to adopt the Resolution and execute the Services Agreement as a result of statements and correspondence from the City, including the City Manager's 23 April 2021 and 20 January 2022 letters to the Association, promising that there would be public "engagement".
18. Although the City Manager did not commit to a timeline for this "engagement", in order for any consultation to be meaningful, it would have to happen before Council made its decision to execute the Services Agreement and requested the issuance of the Licence to the Nation in relation to the road through Vanier Park, not after the decision had already been made. Further, even where an opportunity to be heard is not required, where a local government decides to give the public an opportunity to be heard and received their comments, it is required to do so in a procedurally fair manner. Consultation cannot be "fair" if it occurs after the decision has already been made.

*Rocky Point Metalcraft Ltd. v. Cowichan Valley Regional District*, 2012 BCSC 756 at para. 109

*Fisher Road Holdings Ltd. v. Cowichan Valley (Regional District)*, 2012 BCCA 338, at para. 26

19. The City was dealing with a huge and unprecedented project that will have a major impact on the City and its ratepayers for years to come. Under the circumstances, the City had to "move with scrupulous care to meet the requirements of procedural fairness", regardless of whether the Project was subject to the public hearing requirement under the *Vancouver Charter*.

*Eddington v. Surrey (District)*, [1985] B.C.J. No. 1975 (B.C.C.A) at para. 19, 25

20. Council's *in camera* resolution to execute the Services Agreement and the Services Agreement executed thereunder must be quashed.

#### C. CITY FETTERED ITS DISCRETION

21. Fettering occurs where a decision maker focuses unduly on a policy or an extraneous consideration and refuses to put his or her mind to the specific circumstances and legally relevant factors in the case, effectively failing to exercise his or her discretion.

*Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 at para. 62.

22. Where a decision maker has a broad statutory discretion, it is unreasonable to fetter that discretion.

Vavilov, at para. 108

Party A v. The Law Society of British Columbia, 2021 BCCA 130 at paras. 62-63

23. Fettering of discretion also raises legal issues of procedural fairness. An unlawful fettering of discretion may occur where a decision maker binds itself to policies or guidelines rather than exercising its discretion. While decision-makers may properly be influenced by policies and guidelines, they must still exercise their discretion in accordance with the principles of procedural fairness and natural justice and consider legally relevant factors that relate to the specific circumstances of the case.

Halfway River First Nation v. British Columbia (Ministry of Forests), 1999 BCCA 470 at para. 58

Maple Lodge Farms v. Government of Canada, 1982 CanLII 24 (SCC), [1982] 2 SCR 2

Minhas v. British Columbia (Superintendent of Motor Vehicles), 2017 BCCA 304

24. In 2019, the City recognized that it had a broad discretion and that the successful negotiation of a services agreement depended “completely on the mutual benefits and interests” of the City and the Nation.
25. However, in October 2020 Council adopted “Guiding Principles” for the City’s engagement with the Nation including that the City recognize the Nation as a separate order of government and that as a City of reconciliation it:
- a. respects the Nation’s right to develop its land as it sees fit;
  - b. will learn the Nation’s aspirations for the Señákw development and how best to support the integration of its Project; and
  - c. will take guidance from the Nation on how it would like to “engage in the development of the communication and operating protocol”.
26. By adopting the Guiding Principles, and delegating to the City Manager the authority to negotiate the services agreement based on these principles, the City fettered its discretion to:
- a. Negotiate with the Nation over the scale of development in exchange for the provision of the necessary City services; and
  - b. To consult with its residents.
27. The City treated the approved “Guiding Principles” as a “mandate” prohibiting public consultation.



28. The impact of the Project on adjacent neighbours and residents, which the City recognized would be significant, ought to have been considered when negotiating the Services Agreement and the decision of whether or not to provide services at the proposed scale. Instead, the City applied the Guiding Principle that the Nation could develop its land as it sees fit, such that it could not exercise its discretion to consult its residents or to negotiate over the scale of development as this would be seen as “impinging” on the Nation’s “right to develop/regulate their own land”.
29. The City’s adoption and application of the Guiding Principles, resulted in the City refusing to consider factors that were highly relevant to the exercise of its discretion whether to:
- a. consult Kits Point residents and other the affected neighbours;
  - b. negotiate over the scale of the development; and
  - c. enter into the Services Agreement.

**D. IN CAMERA DECISION RESOLUTION IS UNLAWFUL, UNREASONABLE AND WAS MADE CONTRARY TO THE VANCOUVER CHARTER**

30. When a local government improperly acts with secrecy, it undermines the democratic legitimacy of its decisions. Such decisions, even when they are within their statutory authority, are less worth of deference:

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

*London (City) v. RSJ Holdings Inc., 2007 SCC 29 (“RSJ Holdings”)*

31. In *Vavilov*, the majority emphasized that reasonableness review is meant to ensure that courts intervene where necessary to safeguard “the legality, rationality and fairness of the administrative process.” For this reason, a reasonableness review is not a “rubber stamping” process or a means of sheltering administrative decision-makers from accountability. It remains a robust form of review (*Vavilov*, para. 13).
32. Typically, reasonableness review takes place against the backdrop of a decision-maker’s reasons for decision. However, the majority in *Vavilov* recognized that this transparency does not always exist, as in the context of municipal decision making:

[137] Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst; Green; Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision: *Baker*, at para. 44. For example, as McLachlin C.J. noted in *Catalyst*, "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw": para. 29. In that case, not only were "the reasons [in the sense of rationale] for the bylaw . . . clear to everyone", they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.

[138] There will nonetheless be situations in which no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape. [underlining added]

33. When interpreting a statutory provision, the court will continue to apply the "modern principles" of statutory interpretation: the words of a statute must be read in "their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature". The merits of a decision-maker's interpretation of a statutory provision must be consistent with the text, context, and purpose of the provision under consideration.

*Vavilov*, paras. 117-120

34. Where a decision maker fails entirely to consider a pertinent aspect of the text, context or purpose that is a key element, and that if they had considered that key element they would have arrived at a different result, the failure to consider that element "would be indefensible and unreasonable in the circumstances". What the court must consider is whether council has properly justified its interpretation of the statute in light of the surrounding context. That interpretation cannot be



justified if it strays beyond the limits set by the statutory language it is interpreting.

*Vavilov*, paras. 109-110 and 121-122

35. Further, both the statutory and common law impose constraints on what a decision maker can lawfully decide. Precedents on the issue before the decision maker or on a similar issue limit what the decision maker can reasonably decide i.e. where there is a relevant case in which the court considered a statutory provision, it would be unreasonable to interpret or apply it without regard to the precedent.

*Vavilov*, paras. 111-112

(1) Contraventions of sections 165.1 and 165.2 of the *Vancouver Charter*

36. Local governments are creatures of statutes and can only act within the powers conferred upon them by the provincial legislature. Judicial review is the means by which courts supervise decision makers exercising their statutory powers, and ensure that they do not overstep their legal authority. The purpose of judicial review is to “ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes”.

*RSJ Holdings* at para. 37

*Dunsmuir v. New Brunswick*, 2008 SCC 9 (“**Dunsmuir**”), paras. 27-33

37. Section 165.1 of the *Vancouver Charter* provides that a meeting of Council must be open to the public, except as provided in sections 165.2 -165.8.
38. Section 165.2(1) sets out the City’s discretion to close a meeting to the public if the subject matter relates to one of the enumerated topics in (a) – (n). Section 165.2(2) is mandatory and requires the City to close a meeting to the public if it relates to one of four types of matters.
39. Section 165.3 provides:

*Requirements respecting closed meetings*

- 165.3** (1) Before holding a meeting or part of a meeting that is to be closed to the public, the Council must state, by resolution passed in a public meeting,
- (a) the fact that the meeting or part is to be closed, and
  - (b) the basis under the applicable subsection of section 165.2 on which the meeting or part is to be closed.
- (2) The minutes of a meeting or part of a meeting that is closed to the public must record the names of all persons in attendance.

40. Section 8 of the *FIPPA* provides:

Contents of response

**8** (1) In a response under section 7, the head of the public body must tell the applicant

(...)

(c) if access to the record or to part of the record is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) the contact information of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

(iii) that the applicant may ask for a review under section 53 or 63.

(a) Refusal to disclose dates of *in camera* meetings and basis for proceeding *in camera* unlawful

41. Based on a review of the *Vancouver Charter* as a whole, *FIPPA*, and Supreme Court of Canada decisions, including *RSJ Holdings* and *Dunsmuir*, the City must disclose not only what specific section of the *Vancouver Charter* it is relying on to proceed *in camera*, but also the date it passed the motion. The City refused to do both.

42. If the City can refuse to disclose the basis and date an *in camera* decision was made (despite having to make the decision to go *in camera* at a public meeting and disclose the basis), persons affected by the decision cannot review the minutes of the meeting to find out (1) when the decision was made; (2) the basis upon which it was closed, and (3) the persons in attendance (as required under the *Vancouver Charter*) to determine whether the decision to go *in camera* met the statutory requirements of section 165.2 of the *Vancouver Charter*.

43. Such an interpretation would insulate Council decisions to go *in camera* from judicial review. However, the Supreme Court of Canada has confirmed that even closed meetings are subject to public scrutiny.

*RSJ Holdings* at paras. 24-26

44. Even if the court finds that the City did not owe a duty of fairness and a right to be heard in the circumstance, citizens did have a right to a transparent and open process. In *RSJ Holdings*, the Court held that even if the public does not have a right to make submissions to council, *it does* have a right to basic transparency:

Further, while RSJ did not have the right to notice of the City's intention to pass the by-law nor any right to make representations at a public hearing, it did have the right, along with other citizens, to a transparent and open process. The Court of Appeal was correct to conclude that the potentially draconian effects of interim control by-laws accentuate the need for the courts to jealously require that "the



meeting in which an interim control by-law is discussed be open to the public as required by s. 239(1) of the Act” (para. 27). In these circumstances, I do not accept the contention that RSJ suffered no prejudice.

45. The City’s interpretation of the *Vancouver Charter* and *FIPPA* as authorizing it to withhold from the public *when it went in camera*, and thus *why*, and who was in attendance, is contrary to the principles of statutory interpretation and the common law, and therefore unreasonable under *Vavilov*.

46. Further, ~~the City’s decision to pass the Resolution at an *in camera* meeting appears to be contrary to section 165.1–165.3 of the *Vancouver Charter*. the City has now confirmed that it held numerous *in camera* meetings at which it discussed the Services Agreement and that it relied on The only section of 165.2(1) that appears to authorize *in camera* discussions relating to the Services Agreement is section 165.2(1)(k) of the *Vancouver Charter* throughout the process:~~

“negotiations and related discussions respecting the proposed provision of an activity, work or facility that are at their preliminary stages and that, in the view of the Council, could reasonably be expected to harm the interests of the city if they were held in public.”

47. However, at the time the Resolution was passed in July 2021 to authorizing the execution of the Services Agreement, the City and Nation were no longer at the “preliminary stages” of the negotiations but rather at the final stage of execution. The 16 July 2021 council meeting was required to be held in public, as were the following *in camera* meetings at which Council discussed the Services Agreement.

48. In addition, Council did not go *in camera* because the negotiations and discussions relating to the proposed works “could reasonably be expected to harm the interests of the city if they were held in public” but rather because the Nation wished for the negotiations and discussions to be kept confidential.

49. The City exercises an array of powers in performing its various functions including (1) its legislative function, (2) its business functions; and (3) its quasi-judicial functions. While those powers are to be interpreted broadly, the City is still a creature of statute and only has those powers delegated to it by the Provincial legislature. It cannot rely on broad grants of power to escape these constraints.

*Toronto (City) v. Ontario (Attorney General)*, [2021] S.C.J. No. 34 at para. 2

*Community Association of New Yaletown v. Vancouver (City)*, 2015 BCCA 227 at paras. 58-65

50. In *Community Association of New Yaletown v. Vancouver (City)*, *ibid*, the court noted that when the City was exercising its “business power” to buy, sell or exchange real property, Council may authorize such transactions *in camera*.
51. However, while the entire decision-making process relating to the “the acquisition, disposition or expropriation of land or improvements” can be considered *in camera* under section 165.2(1)(e), only “negotiations and related discussions respecting the *proposed* provision of an activity, work or facility that are at *their preliminary stages*” may be considered *in camera*. Once negotiations and discussions regarding the provision of “an activity, work or facility” are no longer proposed or at their preliminary stage, the discussions must be held in an open meeting, regardless of whether the public had a right to make representations at the meeting.
52. The City, however, continued to meet *in camera* to discuss the Services Agreement, not only after the negotiations and related discussions had long passed the “preliminary” stage, but after the Resolution had been adopted.
53. Accordingly, the Resolution, including the City’s staff report in support of it, had to be considered in an open meeting of council under section 165.1 of the *Vancouver Charter*, as did the *in camera* meetings held thereafter. Although the public might not have had a right to be heard at such these meetings, it had a right “to a transparent and open process.”
- (2) No Statutory Authority to enter Agreement to enforce Nation’s Bylaw at City’s expense
54. In adopting the Resolution and executing the Servicing Agreement, the City and Nation agreed that:
- a. The Nation will adopt certain bylaws to mirror the City’s;
  - b. The Nation’s bylaws will provide for the City to enforce and prosecute the Nation’s bylaws in the name of, or as agent of, the Nation;
  - c. City will take all steps and measures to enforce the Nation By-laws at the City’s costs;
  - d. The City can keep any money paid or collected through the City’s enforcement of the Nation’s Bylaws but the Nation is not responsible for any shortfall.
55. Under section 333 of the *Vancouver Charter*, Council may “make by-laws for the purposes of enforcing its by-laws”.
56. Further, section 334(1) provides that a by-law of City Council or the Park Board can be enforced, and the contravention restrained, by the Supreme Court in a



proceeding brought by the city or the Park Board. Under 334(2) such bylaws may also be enforced by the registered owner of property or an incorporated society representing registered owners.

57. The City does not have the statutory power to enter into an agreement to take on the responsibility and cost of enforcing the Nation's Bylaws and to collect penalties imposed under those bylaws to try to recoup the City's costs.

58. Although the City has the power to join another municipality in the exercise of a power conferred under the *Vancouver Charter*, such agreements can only be entered into between the City and a municipality (as defined in the *Community Charter* and *Local Government Act*) and must be ratified by by-law adopted pursuant to the respective municipality's enabling legislation (*Vancouver Charter*, *Community Charter*, or *Local Government Act*) at an open meeting of Council, not by resolution at an *in camera* meeting.

Section 165.1 of the *Vancouver Charter*.

59. In this case, the City voted in closed meeting to adopt a resolution to enter into an agreement to enforce the Nation's Bylaws, at the sole cost of the City (taxpayers). This is unlawful and contrary to the *Vancouver Charter*.

(3) Unreasonable Chain of Analysis

60. Further, numerous comments by City representatives indicate that the City understood that since the City's bylaws did not apply to the Lands, the City had no say or "jurisdiction" over the Project.

61. While it is true that the City's bylaws do not apply to the Lands, the Services Agreement itself highlights that the City did in fact have considerable say and thus a considerable degree of "jurisdiction" over the Project. This is because the *Vancouver Charter* gives the City the statutory power to manage and regulate its services and resources, which the Nation needs access to in order to proceed with the Project. It also has the statutory power to seek the opinion of electors.

62. As highlighted by the lengthy and detailed negotiations that took place between the City and the Nation, and as confirmed in the confidential staff reports, the City had did have the power to (1) ensure that the size, scale and scope of the Project fit generally within existing surrounding neighborhoods, and (2) to take neighbourhood concerns into account. For example, the City could have agreed to provide services for up to a maximum number of residential units.

63. As discussed above, the City could (and should) have consulted and listened to the electorate, including the residents of Kits Point, and taken their concerns into account when negotiating the Services Agreement. Since the City had the statutory authority to negotiate and agree to terms on the wide range of issues contemplated in the Services Agreement, it had a corresponding power to hear from its residents and to request changes to the Project, if appropriate.

64. Accordingly, the ~~The~~ City's decision to adopt the Resolution and execute the Services Agreement was "grounded upon or activated by" erroneous assumptions, including that since the City's bylaws did not apply to the Lands, Council had no authority or say over the Project and the City it could not hear from the very people it was elected to represent before deciding to enter into the Services Agreement.

*Sunshine Valley Co-operative Society v. Grand Forks (City)*, 1948 CanLII 237 (BC CA)  
*Kollen and Piercey v. City of Vancouver et al.*, 2004 BCSC 684  
*Vavilov*, paras. 101-105

65. In the circumstances, the City's failure to take into account highly relevant considerations, such as its statutory authority over services and the interests of surrounding residents, was just as erroneous as taking into account improper extraneous conditions.

*Oakwood Development Ltd. v. St-François Xavier*, 1985 CanLII 50 (SCC), [1985] 2 SCR 164, para. 15-18

66. Given the lengthy confidential negotiations between the City and the Nation over the Services Agreement and the Nation's need for access through Vanier Park in order to proceed with the Project as contemplated, the City's "overarching logic" leading to its decision to adopt the Resolution and execute the Services Agreement without hearing from affected residents was fundamentally flawed, undermining the City's decision and rendering it unreasonable.

67. ~~Further, if a~~ Despite the City's public comments to the contrary, the City knew it had the power to hear from neighbouring residents and to take their concerns into account when negotiating the Services Agreement but decided not to. The City's decision not to consult affected residents and stakeholders regarding a project that it recognized was "unprecedented" and would have significant impacts on nearby residents and the City in general was also unreasonable. ~~under Vavilov.~~

#### **E. CITY ACTED IN BAD FAITH**

68. The City repeatedly stated that since it did not have any regulatory control over the scale of the development, it did not have the jurisdiction or mandate to consult with or hear from Kits Point residents.
69. The confidential staff reports show that City knew that it could negotiate with the Nation over the scale of the development, and to hear from residents, but decided not to.
70. The City acted in "bad faith" throughout the process leading to the adoption of the Resolution and execution of the Services Agreement.

338186 B.C. Limited v. City of Vancouver, 2011 BCSC 336



**PART 4: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Eve Munro affirmed 5 October 2022;
2. Affidavit #1 of Benjamin Peters affirmed 5 October 2022;
3. Affidavit #1 of Scott Dunlop to be filed;
4. Affidavit #1 of Ben Pollard made 09 December 2022;
5. Affidavit #2 of Ben Pollard made 13 February 2023;
6. Affidavit #2 of Eve Munro affirmed 16 March 2023;
7. Affidavit #2 of Melissa Dionne affirmed 16 March 2023;
8. Affidavit #1 of K. Sully affirmed 16 March 2023;
9. *Vancouver Charter*, R.S.B.C. 1953, c. 55;
10. *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241;
11. Rules 2(l)-(2), 14-1, and 21-3(1) of the Supreme Court Civil Rules; and
12. The inherent jurisdiction of the court.

The petitioners estimate that the hearing of the petition will take 2 3 days.

Date: October 5, 2022 March 16 2023



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Nathalie Baker  
EYFORD PARTNERS LLP  
Solicitor for the petitioners

***To be completed by the court only:***

Order made

- ☐ in the terms requested in paragraphs \_\_\_\_\_ of Part 1 of this notice of application
- ☐ with the following variations and additional terms:

Date: \_\_\_\_\_  
 Signature of ☐ Judge ☐ Master

ENDORSEMENT ON ORIGINATING PLEADING OR PETITION FOR  
 SERVICE OUTSIDE BRITISH COLUMBIA

The plaintiff(s) claim(s) to serve this pleading/petition on the defendant(s), ♦, outside British Columbia on the ground that: ♦