IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kits Point Residents Association v. Vancouver (City),* 2023 BCSC 1706

Date: 20230929
Docket: S227987
Registry: Vancouver

Between:

Kits Point Residents Association, Eve Munro and Benjamin Peters

Petitioners

And:

City of Vancouver and Squamish Nation

Respondents

On judicial review from: An *in camera* resolution, dated July 20, 2021 passed by Council of the City of Vancouver

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Petitioners:	N. Baker A. Schleichkorn
Counsel for the Respondent, City of Vancouver:	I.K. Dixon
Counsel for the Respondent, Squamish Nation:	N.R. Hughes K. Hanowski L. Frame
Place and Dates of Hearing:	Vancouver, B.C. April 18-21, 2023
Place and Date of Judgment:	Vancouver, B.C. September 29, 2023

Introduction

[1] The Squamish Nation (the "Nation") intends to design and create, on a 10.5-acre irregularly shaped parcel of reserve land located adjacent to and under the Burrard Bridge, a development called Sen̓áḵw (the "Development").

[2] The planned Development will consist of 11 towers, with building heights reaching 56 stories, with an estimated 6,000 or more residential rental suites, along with office and commercial space and community amenities**.**

[3] The petitioner, Kits Point Residents Association (the "Association"), is a society representing residents of a neighbourhood called Kits Point. The Association was incorporated on September 30, 2022, and is a volunteer-run organization formed in or about 1906 as an unincorporated group led by an executive team. The petitioners, Eve Munro and Benjamin Peters, are Kits Point residents. Ms. Munro is also the director of the Association.

[4] The Development is located within the boundaries of the City of Vancouver (the "City") but it is conceded that it is not subject to the City's land use planning and zoning bylaws because it will be located on reserve lands which are subject to federal jurisdiction.

[5] On July 20, 2021, City Council passed an *in camera* resolution to authorize and execute a proposed services agreement with the Nation to facilitate the Development (the "Resolution").

[6] On May 25, 2022, the City and the Nation entered into a services agreement (the "Services Agreement") which governs the terms on which the City has agreed to provide municipal services and infrastructure to the Development. Prior to entering into the Services Agreement there was no public consultation with the residents of Vancouver by the City.

[7] The petitioners submit that the Resolution and the resulting Services Agreement (the "Decision") was adopted in contravention of the provisions of the *Vancouver Charter,* S.B.C. 1953, c. 55 [*Vancouver Charter*] and that:

a. the secrecy surrounding the Services Agreement was unlawful and contravened the requirement that council meetings be open to the public;

b. the City contravened the rules of procedural fairness and natural justice;

c. the City acted in bad faith; and

d. its decision is substantially unreasonable.

[8] The petitioners seek an order quashing the Resolution and the Services Agreement.

[9] The Nation submits that the petitioners are seeking to have the City use indirect means to oversee and regulate the Development, despite not having the power to do so directly. It argues that the City Council's decision should be given significant deference, submitting that the Decision should only be set aside if it is a decision that no reasonable municipal council could have made in the circumstances. It submits that the petitioners have not met the high burden required to disturb a municipal council's decision and that the petitioners' interpretation of the *Vancouver Charter* is one that is not only incorrect and unreasonable, it is fundamentally inconsistent with the *United Nations Declaration on the Rights of Indigenous People,* 13 September 2007, A/RES/61/295 (2007) [*UNDRIP*] and the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 [*DRIPA*], which all statutory delegates must take into consideration when interpreting and applying their enabling legislation.

[10] The City submits that it had the authority pursuant to the *Vancouver Charter* and *Indian Self Government Enabling Act*, R.S.B.C. 1996, c. 219 [*ISGEA*] to enter into the Services Agreement in the way that it did, and that the decisions it made were reasonable and within the range of possible, acceptable outcomes given the totality of the circumstances.

[11] There is a significant historical context which forms the backdrop of the execution of the Services Agreement. I will begin by providing an overview of the Seȟáḵw lands, including past litigation and its reserve status, the legal status of Vanier Park, the history of the Development, the concerns of the Association, and the history and overview of the Services Agreement, before considering the legal issues.

Relevant Background

The Seṅáḵw Lands

[12] Seṅáḵw was the name of an ancestral Squamish village located on the southern shores of False Creek. For generations, the Squamish families at Seṅáḵw would hunt, fish, harvest traditional resources, host potlaches, and trade with neighbouring Musqueam and Tsleil-Waututh peoples.

[13] Sometime before 1867, 37 acres of the Seṅáḵw village lands were set aside as a reserve by the Government of British Columbia. In 1877, the reserve, known as Reserve No. 6 or the "Kitsilano Reserve" was enlarged by the federal government to include approximately 80 acres. The Kitsilano Reserve covered the area that forms part of the land on which the Development is to be located, as well as what is now known as Vanier Park and portions of lands now encompassed by Kits Point.

[14] In 1886, the Canadian Pacific Railway ("CPR") expropriated approximately 3.5 acres of the Kitsilano Reserve for the construction of a rail line. In 1902, a further 7 acres of the Kitsilano Reserve was expropriated so that subsidiaries of CPR could connect additional rail lines to the CPR line. These railway expropriations carved a 10.5 acre "T" shaped parcel in the heart of the Kitsilano Reserve.

[15] In 1913, the provincial government induced the Squamish people to sell and ultimately had them removed from the Kitsilano Reserve illegally. The Squamish people were evacuated by barge to the North Shore and their homes at Seṅáḵw were burnt down.

[16] By 1946, the Kitsilano Reserve had been completely dismantled.

[17] From 1977 to 2001, the Nation pursued litigation in the Federal Court and in the British Columbia Supreme Court seeking compensation for the Canadian government's mismanagement of the Kitsilano Reserve and seeking the return of the 10.5-acre land that had been expropriated by the railways. In *Canada (A.G.) v. Canadian Pacific Ltd.*, 2000 BCSC 933, [*Canadian Pacific*], the Court found that Canada's reversionary interest in the 10.5 acres of reserve land was "held for the

benefit of whichever Indian Band, Squamish, Musqueam or Burrard, which, in other proceedings, may be found to be entitled to it": at para. 239. This decision was affirmed by a five-justice division of the Court of Appeal, 2002 BCCA 478 [*Canadian Pacific Appeal*].

[18] The Musqueam and Tsleil-Waututh had also initiated proceedings claiming that the federal government had failed to protect its interests when allocating the Kitsilano Reserve to the Nation. In 2000, the Nation settled their action and received $92.5 million. The claims by the Musqueam and Tsleil-Waututh were dismissed in 2001. As a result, the original grant of the reserve lands to the Nation was affirmed.

[19] The 10.5-acre parcel is an Indian reserve under the *Indian Act*, R.S.C. 1985, c. I-5, and as such is subject to federal jurisdiction (the "Seṅáḵw Lands").

Legal Status of Vanier Park

[20] Vanier Park, which is adjacent to the Seṅáḵw Lands, is owed by the federal Crown but is subject to a 99-year lease with the City under a lease agreement dated August 15, 1966 (the "Lease"). Under the Lease, Vanier Park must be used for "park, museum or recreational use, and solely for these uses". After entering into the Lease, the Vancouver Board of Parks and Recreation (the "Park Board") became responsible for Vanier Park under Part XXIII of the *Vancouver Charter*.

History of the Development

[21] In 2019, the Nation held a referendum on the development of the Seṅáḵw Lands. The people of the Nation voted in favour of two resolutions: a "designation" proposal that would authorize the Government of Canada to lease the Seṅáḵw Lands, and a "business terms" proposal that authorized the guiding principles for a partnership with a private developer.

[22] In 2019, the initial proposed development was for a residential and commercial development that would include approximately 3,000 residential units that would house roughly 6,000 residents.

[23] In December 2019, the Nation publicly announced its partnership with Westbank Project Corporation, a private developer under the name Nch'kay West Partnership ("Nch'kay West" or the "Partnership"). Shortly thereafter, the Nation announced its plans to double the number of residential units being constructed to 6,000, increasing the projected population to approximately 11,000. A portion of the rental units will include 1,200 Canada Mortgage and Housing Corporation ("CMHC") affordable homes.

[24] The Development will proceed in four phases. Pre-construction activities began in the summer of 2022 and are ongoing, including site preparation and remedial excavation of contaminated soils along the historic railway lines. The development of Phase 1 is expected to take three years, with occupancy planned for November 2025.

Concerns of the Association

[25] The Association's initial concerns related to the Development's scale and lack of publicly available information. The concerns centered on the Development's size and density, the height of the towers, and the impact on neighbouring residential communities, including on traffic, infrastructure, and the use of Vanier Park.

[26] On March 9, 2020, the Association wrote to Mayor Stewart expressing the Association's concerns and requesting that the City implement a "comprehensive planning process" so that the Development could be "designed and completed in accordance with the interests of the developer and the adjacent neighbourhoods, businesses and [City] citizens." The letter stated, in part:

> …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 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.

[27] The Association requested that the planning process include “robust citizen engagement” to allow the Association to “meaningfully participate, contribute and make submissions”. There was no response to this letter.

[28] In approximately February 2021, an illustration of the Development on the Seȟáḵw Lands was posted on the developer’s website at which time the petitioners learnt that the Development contemplated a new access road through Vanier Park. The petitioners sought information from the City, but the City staff refused to discuss the Development because all discussions were being held *in camera*.

[29] On February 15, 2021, the Association wrote again to Mayor Stewart and other City staff, requesting an “urgent meeting” with the City to consult on a “critical neighbourhood issue” regarding the Development. The Association wished to “comment constructively [on] where the development can avoid negative neighbourhood and community consequences” for surrounding residents. The letter noted that there had been no opportunity for community or neighborhood consultation or input. It further requested that the City “disclose its process for determining the relevant issues that require to be negotiated … and seeking meaningful input from significantly affected parties”. It further stated that:

> Our focus point is quite simple, but critically important to our residents: the historic Kits Point neighbourhood clearly cannot handle any more traffic and parking load, and particularly that generated by 9 – 15,000 moreresidents [*sic*] and visitors, when it is not necessary and can be avoided.

[30] By letter dated April 23, 2021, Paul Mochrie, the City Manager, replied and stated in part:

> …The purpose of this letter is to provide some clarification on the City’s role in this process, as well as matters related to engagement and planning with the surrounding area.
>
> The City of Vancouver is a City of Reconciliation that supports and respects Squamish Nation’s inherent rights to the Seȟáḵw lands and the exercise of their jurisdiction to develop them. The Seȟáḵw development is taking place on lands under the governance of the Squamish Nation, and the City of Vancouver land use policies and regulations are not applicable to these lands, nor is the City directly involved in any part of the planning or design of the development. As one of the Squamish Nation’s government partners, the City of Vancouver is supporting the Seȟáḵw Development by responding to

> their request to provide those municipal services…with the intent to enter into an agreement for the provision of those services similar to what the City has with other neighboring jurisdictions (e.g. UBC). The discussions of these requirements are confidential at this time but are expected to be submitted to [the] City and the Squamish Nation's respective Councils once they are sufficiently developed into a mutually recommended Services Agreement. For these reasons, 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 Squamish Nation Lands.

[31] With respect to the proposed access road through Vanier Park, Mr. Mochrie noted:

> …the project proposes an access road through Vanier Park, which is former reserve lands, and connected to the Kits Point community. This proposed road would traverse land leased from the Crown for park purposes. Where there are significant changes to traffic circulation within a community, the City consults with the community to minimize and mitigate impacts. We will be engaging with the Kits Point community and others in the area with ideas on transportation improvements based on a comprehensive transportation study being undertaken as part of the process. This conversation will focus on how to best accommodate the changes the Seȟáḵw Development will bring to the City. There is no firm timeline on when to expect this engagement as it is related to the ongoing negotiations.
>
> …
>
> With regard to Vanier Park generally, as with any park surrounded by significant new development, there will be a need for the Park Board to embark on a park master planning process. This typically would include a robust public engagement process, and in the instance would be integrated with the City's planning for cultural facilities within the park.

[32] Mr. Mochrie acknowledged that the "size and scale of this initiative is significant" and raised many questions for the community. He noted that: "The Seȟáḵw project is anticipated to deliver a significant amount of new rental housing, key amenities, and other benefits."

[33] By email dated May 19, 2021, Dave Hutch, Director of Planning and Park Development at the Park Board, confirmed that there would be a public engagement process regarding Vanier Park.

[34] On May 26, 2021, members of the Association and City staff met virtually to discuss the proposed "Vancouver Plan", a long-range land use plan for the entire

City, then under review. The City's presentation included information on Vanier Park and 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 potential park master plan process has yet to be determined.
> - The process would include public engagement. We would be in contact with the [Association] to ensure your participation.

[35] On June 15, 2012, the Association emailed the City providing further feedback including:

> 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 Seȟáḵw 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 costs 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.
>
> …
>
> …while the reserve development is not subject to [City] zoning and land use policies, these impacts on the City are nevertheless matters which should give rise to negotiation.
>
> Currently there is little public information being made available and there a perceived lack of transparency regarding the issues the City is negotiating. We are looking for assurances that [the City] is considering and addressing all of the impacts and issues. While we understand that the financial details of the services negotiations may be confidential, we do expect that there should be open and clear statements as to the position [the City] is taking in their negotiations to protect the interests of the residents that it represents.

[36] The position of the Association was that consultation should have been undertaken before the negotiations, as noted: "It is doubtful that consultation after a lengthy negotiation process will be meaningful consultation as consultation after the decisions are made can be expected to have limited impact." The expectation of the

Association was that the City should be using its leverage to protect the interests of the City residents:

> …Vancouver's citizens expect that [the City] will use the leverage it has as essential service provider to the Squamish Nation/Westbank development to negotiate for the City's benefit. This would include negotiating to reduce the size of the development so that it is more in scale with surrounding neighbourhoods and protecting much needed park lands.
>
> This is a large and important issue. At a very minimum, however, it is expected that [the City] will not actively facilitate a larger development on the Seńáḵw lands than the reserve land would on its own support.

[37] In September 2021, the City provided the Association with a memorandum summarizing the May 26, 2021 meeting with City staff which included the following:

> **It was highlighted that this session was not a meeting on consultation on the proposed Seńáḵw development, which is on Federal Reserve land and there outside of the City of Vancouver's jurisdiction with respect to land use regulation…**
>
> …City staff highlighted the scope of the technical work to assess servicing needs for the project underway and that considerations for a service agreement were subject of Council in-Camera (confidential) discussions due to the nature of the project. …
>
> [Bold in original.]

[38] The memorandum also answered a series of questions including one relating to the proposed road through Vanier Park and provided the following answer:

> The project has proposed an access road from the south edge of Vanier Park. The land was leased from the Federal government to the City of Vancouver, and by extension Vancouver Park Board. The Park Board is working with Federal and Provincial partners to explore this request.

[39] On September 27, 2021, Ms. Munro emailed the Park Board seeking information about the proposed road through Vanier Park. On October 14, 2021, she received a response from Commissioner Dumont stating that the Commissioners were "getting a lot of public correspondence regarding this issue", that he was "interested to hear more from the developers, City and Parks staff and community groups and members as the plans for this significant change to the neighborhood progresses". He noted that there was "nothing concrete before the board for consideration at this time."

[40] On August 9, 2021, the Association responded to Mr. Mochrie's April 23, 2021 letter noting that they had been trying to get basic information from the City, Park Board and Partnership, but that the City and Park Board policy of engaging in negotiations *in camera* and with absolute confidentiality continues to make it extremely difficult to gain pertinent information about the complex issues. There were five issues of concern identified:

> **1) [City] Executive Responsibility to Vancouver citizens**
>
> [City] management and Council have … a legal duty, to decide and negotiate in the best interests of the citizens how the Development will impact the City's liveability, environment, infrastructure and transportation and how these impacts will be mitigated and financed by Services Agreements and the [City] taxpayers…
>
> **2) Sena'kw Density**
>
> The density being proposed for this 10.5 acre development is 6,000 mostly rental units in 11 towers, rising to 59 stories, with an estimated range of 9,000-12,000 residents.
>
> This would be an extraordinary, precedent setting density, far outside any previous norm in [City] history or pre-existing city planning. It will far exceed the highest density of any municipal area in Canada or the US.
>
> Using a mid-estimate of 10,500 residents, Sena'kw will have a population density of 1000 people per acre which will be 11.6 times more dense than the Concord Pacific Expo lands….
>
> So, this proposed Development will be an exceedingly high insertion of people, buildings and resulting resident and service vehicles. Accommodating this proposed Development will require a complete re-set of the balance of Vancouver city planning, requiring a sophisticated re-think of all existing and to-be-planned civic infrastructure and zoning.
>
> **3) Environmental Impacts**
>
> Significant environmental impacts will result during and subsequent to the construction of the Development, given the location of the Sena'kw site near the coast of False Creek and bordering Vanier Park…
>
> **4) Lack of Transparency**
>
> The [City] and Park Board…is actively negotiating, without publicly disclosing the major issues or facilitating any civic process for citizens to discuss, comment or provide input….
>
> This approach relegates the citizen interests to "after the fact". Give the unprecedented scope and density of this Development Partnership proposal, the appropriate process would be that Vancouver citizens, particularly those most directly impacted, be apprised of the main issues and basic planning information and be consulted to provide input, *before and during* the negotiations. Otherwise, the confidential negotiations to

> achieve a "mutually recommended Service Agreement" will be determinative of all major issues without any public input.
>
> **5) Use of Vanier Park Land**
>
> …
>
> Actively considering a road intersecting Vanier Park land will be an issue for many citizens who value the preservation of the park land. Similar proposals have resulted in significant opposition in the past…
>
> Providing a roadway through Vanier Park to assist the Development Partnership's ability to propose an unprecedented density is not a "park purpose". Therefore, considering a use of park lands for the *purpose of assisting or enabling a developer to increase the density or size of development* would constitute a breach of [the City] and Park Board Duty to properly exercise their executive decision making.
>
> [Underling and italics in original.]

[41] There was no response from the City and the Association followed up on December 15, 2021, noting that:

> …Notwithstanding the extraordinary density of this project, [the City] 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 <u>not</u> 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.
>
> …In this case for some unknown reason, [City] 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.*
>
> …
>
> 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…
>
> [Italics and underlining in original.]

[42] On January 20, 2022, Mr. Mochrie responded reiterating that the City does not have jurisdiction over the site and the Development that is occurring on the site. He further confirmed that the City was not in the position to disclose or discuss the details of the ongoing government-to-government negotiations on the terms of a municipal services agreement. The City confirmed it would undertake an appropriate

consultation process to engage the public on integrating transportation changes into the community within the City's jurisdiction. Finally, Mr. Mochrie confirmed that the Park Board was working with the Seȟáḵw Partnership and the Government of Canada to better understand the approval process for the proposed road. It notes that the Park Board respects the Nation's inherent rights to the Seȟáḵw Lands and the exercise of their jurisdiction to develop them.

[43] On July 21, 2022, Ms. Munro emailed the Park Board expressing concerns on the clearing that was taking place on the Seȟáḵw Lands and the fencing off of some of Vanier Park. She notes that "this is raising concerns in the public that the decision making on this issue is being made behind closed doors and with a lack of transparency."

[44] On August 1, 2022, Ms. Munro emailed the federal government to find out the application process for the "Head Licence" contemplated in the Services Agreement. On August, 11, 2022, Mr. Lymburner, Associate Assistant Deputy Minister, Real Property Services, responded and advised that the Head Licence had already been issued. He further advised on September 12, 2022, that:

a. the City, Park Board, Nation, and the Partnership had approached the Government of Canada requesting an access route on Vanier Park; and

b. a licence had been issued concurrently with the Services Agreement.

[45] On August 23 and 24, 2022, Ms. Munro submitted two requests under the *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165 [*FIPPA*] seeking records relating to the Resolution and any preliminary traffic studies provided by the Nation to the City that are referenced in the Services Agreement.

[46] On August 25, 2022 Mr. Mochrie and Donnie Rosa, the General Manager of the Park Board, stated in an email which was later provided to the Association, in part:

> The City of Vancouver and the Vancouver Board of Parks and Recreation are committed to reconciliation, and recognize the right of the Squamish Nation to develop their lands.
>
> As the Sen̓áḵw development and the proposed road in Vanier Park connecting to Chestnut Street are on Federal land, neither the City nor the Park Board have regulatory authority, including the authorization of any access roads.

[47] On September 7, 2022, the City advised that all responsive records to the *FIPPA* requests were being withheld under s. 12(3)(b) of *FFIPA,* citing the justification for this being s. 165.2 of the *Vancouver Charter*.

[48] Section 12(3)(b) of *FFIPA* allows a local public body to refuse to disclose to any application information that would reveal "the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public."

[49] By email dated September 12, 2022, Ms. Munro asked the City to advise on which subsection of s. 165.2 of the *Vancouver Charter* it was relying on to justify the *in camera* proceedings and the meeting date when the decision to proceed *in camera* was made.

[50] The City responded on September 13, 2022, and stated:

> Thank you for you e-mail. City Council passes a motion to enter into in-camera meeting during a public meeting, which is a requirement of the Vancouver Charter under section 165.3; the basis under the applicable subsection of section 165.2 on which the meeting or part is to be closed is also noted in the motion. Unfortunately, under s. 12(3)(b) of FIPPA, we are unable to disclose the basis under section 165.2 of the Vancouver Charter, nor the meeting date, when it is in relation to a specific in-camera item. Thank you for your understanding.

[51] On February 16, 2023, the City held "information sessions" regarding the planned transportation changes in Kits Point resulting from the Development. It also put out a public survey relating to the proposed changes. Ms. Munro responded to the City's survey noting that the City was not engaging in true consultation because the decisions had already been made.

[52] The preliminary traffic studies that the Association requested on August 24, 2022 under *FIPPA* have not been disclosed.

History of the Services Agreement

[53] Ben Polland, Senior Manager of Strategic Business Advisory for the City, prepared an Administrative Report dated October 17, 2019 ("2019 Report"). The purpose of the report was to provide Council with the historical and legal context of the proposed Development so that Council could provide City staff with direction regarding the City's engagement with the Nation on issues relating to the Development.

[54] The 2019 Report provided that the justification for the report being heard *in camera* was:

> The report is recommended for consideration by Council on the In Camera agenda as it relates to Section 165.2(1) of the *Vancouver Charter*: (k) 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 interest of the city if they were held in public.

[55] The 2019 Report included the following statements:

a. the Development 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 British Columbia or Canadian law that requires the parties to enter into a contract (i.e., the services agreement) to provide or pay for services;

c. the Nation could elect to fund its own services;

d. the negotiations 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 an appropriate level of public amenities and infrastructure to support the growth resulting from the Development; and

f. the Nation was partnering with Westbank with the intent to build rental housing but, if needed, they may also consider the potential to deliver some housing units in the form of condominiums and/or strata leaseholds.

[56] The 2019 Report confirmed that the Development has been revised to double the number of planned residential units (from 3000 units to potentially 6,000) and that this "significantly expanded scope" would likely result in "considerable concern from the surrounding neighborhood". It notes that since the Development is not within the City jurisdiction, the standard community engagement approaches do not apply. It recommends there be no external City communications until the results of the Nation's vote is known, and that the primary communication of the Development is through the Nation. Staff will "develop a communication strategy" for the City if the Development is approved.

[57] The discussion report, attached as Appendix C to the 2019 Report, notes that:

- First Nations are under no obligation to acquire services from local governments, and local governments are under no obligation to provide services to Reserve Lands.
- Service agreements are business contracts, not social contracts.
- Local governments have a fiduciary responsibility to their tax and fee payers.

[58] City Council held an *in camera* meeting on November 5, 2019, to consider the 2019 Report. At the conclusion of the *in camera* meeting, Council passed the following resolution:

A. THAT Council approve the proposed approach (and provide staff with such other guidance and direction as Council considers beneficial) as set out in the Administrative Report dated October 17, 2019, entitled "Squamish Nation – Proposed Development of Sen̓áḵw (False Creek Indian Reserve No. 6 also known as the Kitsilano Indian Reserve)" to

guide staff in the first phrase of working with Squamish Nation regarding Seȟáḵw.

B. THAT Council provide initial input on preliminary guiding principles for the City's approach regarding Seȟáḵw, to inform staff who will develop a recommended set of Guiding Principles for Council approval if the Seȟáḵw project is approved by the Squamish Nation.

C. THAT staff report back to Council, once the results of the Squamish Nation vote are known and after the conclusion of the first phase, so as to advise Council on:

    i. the result of the vote on Seȟáḵw by the members of the Squamish Nation, and

    ii. if the vote is in favour of Seȟáḵw,

        1. the results of City staff's work during the first phase,

        2. recommended Guiding Principles,

        3. a project plan and resource request (if necessary), and

        4. recommended approach for entering into formal negotiations with Squamish Nation for a comprehensive Services Agreement in support of Seȟáḵw

[59] On October 6, 7 and 9, 2020, City Council held an *in camera* meeting. The Council considered the *in camera* report authored by Mr. Pollard and dated September 8, 2020 (the "2020 Report"). This report provided Council with a comprehensive update on the status of the Development and the engagement between City staff, the Nation, and the developer. It provided a number of recommendations, including that the Council delegate to the City Manager the authority to negotiate a services agreement with the Nation.

[60] The 2020 Report noted that the Nation's band members had approved the Partnership and that City staff was working directly with the Partnership as representatives of the Nation.

[61] The 2020 Report explained that the Nation wanted to enter into a services agreement with the City for the provision of both "hard" (e.g. transportation and utilities infrastructure) and "soft" (e.g. police, fire) municipal services for the Development.

[62] The 2020 Report noted the following:

i. The Nation's plans for the Lands had changed since initially presented in 2019;

ii. The number of more affordable units was much lower than what would typically be required of rental projects off-reserve, given the Development's "significant additional density";

iii. The Nation was proposing rental housing but could change "their mind at any time";

iv. City staff were concerned the scope and scale of the initially proposed on-site amenities would not address the amenity needs of the Development's residents;

v. Despite the proposed on- and off-site amenities, the unmet amenity demands would create pressure on existing facilities or require additional investment;

vi. The Partnership intended to construct a Low Carbon District Energy Facility operated by Creative Energy as part of the Development's first phase and the City staff would "seek to ensure the facility is designed suitably", given its location and proximity to residential uses;

vii. The Partnership was engaging with "other Stakeholders": Musqueam and Tsleil-Waututh, TransLink, the Vancouver School Board, and Metro Vancouver;

viii. The Development was of a significant scale and inconsistent with the current planning context, and would result in the City's densest project;

ix. The City's planning policies and considerations were inapplicable and, as such, "there [would] be impacts on the surrounding neighbourhood", including on the "existing transportation network, and nearby amenities and public services";

x. To address the Development's needs, the Partnership had proposed amenities outside the Lands, in existing City-owned cultural spaces within Vanier Park;

xi. The Development's proposed density limited the opportunities to achieve on-site amenities, such as new park space;

xii. The Partnership's proposed on-site amenities would "not offset the Seȟáḵw's growth impacts on the existing community";

xiii. The amenity needs would be "substantial" given the scope and scale of the Development, the existing amenities, and the physical site constraints;

xiv. Impact beyond the Development site on the community amenity needs was anticipated, which may have financial implications for the City or result in the reduction in the level of service for residents; and

xv. If the Development were within the City's planning framework, the Development's proposed density would have unlikely been supported by any planning process given the neighbourhood context.

[63] Additionally, the 2020 Report noted that the geometry of the Seȟáḵw Lands and their proximity to Vanier Park necessitated a road within Vanier Park "to make the project's form of development viable".

[64] The 2020 Report recommended that the City approve certain "Guiding Principles" in negotiating with the Nation, including the City's commitment to being a "City of Reconciliation" and, as such, that the City:

a. recognizes the Nation as a separate order of government and respects their right to develop the land as they see fit;

b. take guidance from the Nation on how they would like to engage in the development of the communication and operating protocol;

c. would work to support the integration of the Development recognizing the significant impacts and opportunities the Development will have for both the Nation and the City; and

d. would work with the Nation to ensure an appropriate level of public amenities and infrastructure are available to build a liveable and sustainable community for those who live on the Development, within the context of its surrounding neighborhoods.

[65] Under the heading “Community Integration Stance”, the 2020 Report notes that the Development should be “well-integrated in terms of land use, built form and public amenities into the broader community.”

[66] The 2020 Report noted that correspondence had been received from the Association expressing interest in ensuring effective integration of the Development within the local context given its potential impacts, and requesting local area planning to address this. Under the heading “Community Interest”, the 2020 Report states:

> The development is likely to have significant community interest. The [Nation] will be doing some community outreach regarding the development, and have developed a website for those community members who are interested in finding out more about the project.
>
> The City is not intending to undertake public consultation about the project *per se* as to do so would imply that the City had some regulatory control over the [Nation’s] land use decisions, which it clearly does not. However, parallel planning processes including the Vancouver Plan, and the Vanier Park and Cultural Spaces Master Plan will provide mechanisms to support community engagement related to the amenities and areas surrounding Seṅáḵw.
>
> Off-site transportation improvements within public road rights of way resulting from Seṅáḵw would undergo typical notification and consultation processes based on the nature of that works proposed and required.

[67] At the conclusion of the October 2020 Council meeting the following resolution was passed:

> A. THAT Council approve the proposed Guiding Principles for the City’s engagement with the Squamish Nation (“SN”) on municipal services infrastructure and amenities (the “Services”) for the Seṅáḵw development.

> B. THAT Council approve the proposed Initial Negotiating Stance for the negotiation of the potential agreement to provide those Services ("Services Agreement") with the SN.
>
> C. THAT Council (if Consideration F is not approved) direct staff to commence negotiations with SN regarding cost recovery for the City staff and consultant costs associated with this development.
>
> D. THAT Council approve the delegation of authority to the City Manager to negotiate a Services Agreement as described in this report with the Squamish Nation based upon the Guiding Principles and Initial Negotiating Stance, recognizing that staff will return to Council for approval of the proposed Services Agreement.
>
> E. THAT, subject to Council's approval of Recommendations A through D above, City staff be authorized to discuss (on a confidential basis) to the authorized representatives of the SN Council's decisions out of this report so as to provide an open and transparent disclosure to SN of the negotiating mandate provided by staff by Council.

[68] The City staff proceeded to negotiate the proposed terms with the Nation and these initial negotiations were completed by early July 2021.

[69] On July 16, 2021, Mr. Pollard authored another report for an *in camera* meeting scheduled for July 20, 2021 (the "2021 Report"). This report included the recommendation that Council authorize the City Manager and City Solicitor to approve the form of the agreement attached to the report, and for the Mayor to execute it on behalf of the City.

[70] On July 20, 2021, Council resolved to proceed to consider certain matters at an *in camera* meeting later that day which included:

> THAT Council will go into meetings later this week which are closed to the public, pursuant to Section 165.2(1) of the *Vancouver Charter*, to discuss matters related to paragraphs:
>
> …
>
> (k) 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.

[71] The 2021 Report notes that the draft service agreement is the result "of an intense period of negotiating a complex and comprehensive" agreement. It attached a draft of the services agreement.

[72] Under the heading "Fair and reasonable terms and conditions" the City Staff opined that the terms and conditions ensured that:

- residents of the Senakw development receive the municipal services they require to ensure this neighbourhood is livable, safe and sustainable,
- the City is appropriately compensated for the municipal services provided to the Senakw neighbourhood,
- potential risks associated with municipal service delivery to the Senakw neighbourhood are fairly and appropriately apportioned and mitigated for both the Squamish Nation and the City of Vancouver,
- there is sufficient flexibility to adjust the terms of this Service Agreement over its 120-year term, in order to ensure that it remains relevant, fair and effective over time, and
- the City and the Squamish Nation will continue to work together on their shared commitment to their share communities over time.

[73] The 2021 Report noted that a major term that has not been agreed to between the City and the Nation concerns the public release of it and related agreements. The Nation's position was that the agreement itself should remain confidential. Attached to the 2021 Report was a letter dated June 24, 2021, from the Nation to the City explaining why the Nation wished for the Services Agreement to remain confidential. It provides, in part:

> We wish to begin by making a few observations, which we believe will assist in greater understanding of the reasons why we wish to precede in this direction.
>
> The history of this land being forcibly taken from us with little compensation and recourse and the subsequent multi-decade fight to restore our rightful ownership to a very small fraction of the original parcel influences all the decisions we have made and continue to make with regards to its development. We were not consulted as a Nation when the various parties expropriated our lands and on any of the developments when the City of Vancouver built up around our land over the intervening decades while we fought for restitution and recompense.
>
> As the City recognizes and accepts, we are a fourth level of government within the Federal and Provincial framework, however our primary obligation is to our band members and Council. This Services Agreement, while it is between our respective governments, is ultimately a private business arrangement which would not normally be open to public view.
>
> …
>
> We look forward to our continuing discussions and finalizing the Services Agreement to the mutual satisfaction of both of our constituents.

[74] The 2021 Report reviewed the options of publishing the full text of the Services Agreement but notes concerns that this could lead to "an impasse and a significant delay or failure to sign the Agreement."

[75] The 2021 Report further notes that:

a. timelines had been tight because the Partnership was seeking financing from CMHC, which was contingent on an executed services agreement with the City. To accommodate the timelines, City staff recommended that Council approve the form of the agreement appended to the report and instruct staff to finalize it;

b. as part of the 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 up to $700,000. The City did not intend to ask the Nation to reimburse this cost due to "sensitivities around asking the Nation to fund the purchase of lands that were formerly part of the Reserve";

c. the Seȟáḵw development is unprecedented in size and scale, and is located in an area of the city that is anticipated to see significant changes over the coming years;

d. discussions on land use and built form were "very sensitive" and negotiations on these topics were "relatively limited"; and

e. the agreement would have significant interest from the community, especially for the neighboring residents.

[76] The 2021 Report highlighted the conflicting legal positions respecting the Burrard Street bridge (the "Bridge"). The City taking the position that it legally has a valid right of way for the Bridge and the Nation taking the position that the Court of Appeal's decision in *Canadian Pacific Appeal* invalidated the City's right of way and that the Bridge is therefore trespassing on their land. As stated:

> The Nation has proposed a contribution of continued use and access to the Burrard Bridge and rights of way on parts of the surrounding streets. Because this element is rife with legal, historical and financial sensitivities, significant effort has been exerted to create a position to which both the City and the Nation can agree.
>
> - **History of Burrard Bridge.** From the Nation's perspective, the Bridge is especially significant, as the Right of Way for the bridge was created after the land was expropriated for CP Rail's use (the land was expropriated from the Reserve in 1901, and the Bridge built in 1930).The topic is a very sensitive one for the Nation and its Council, as their legal perspective is that the bridge is trespassing on their land, and is a significant hindrance to their ability to use their land.

[77] The City and Nation agreed that the development plans for the Development will accommodate the Bridge and ensure that no detrimental impacts to the Bridge will result from the project. There was an outstanding issue on whether the Nation wished to reserve the right to litigate this matter during the term of the agreement. The recommendation was that City staff request the Nation to accept the status quo for as long as the agreement is in place and to agree not to litigate this matter until the agreement expires in 120 years or is sooner terminated.

[78] The 2021 Report attached as Appendix 7 a current draft of the Services Agreement. It noted that:

> *This Appendix contains the most recent draft of the City of Vancouver Service Agreement of Senakw. It is noted that as this is still a working draft, there are elements of this document that are not the most recently negotiated terms.*
>
> *The most recently negotiated terms that are being recommended to Council are contained in the body of this Council report. This report recommends that Council approve the form of this Agreement, and direct staff to incorporate the terms and conditions that are articulated in the main body and Appendices 1 to 5 of this Council report.*
>
> **NOTE: This discussion draft has been prepared by COV on an expedited basis at the request of the Nation to highlight the main unresolved issues. While the non-redlined portions of the text have been preliminarily reviewed for alignment with City Council's Guiding Principles/Equity Principle, such portions of text have not yet been fully reviewed in detailed by COV.**
>
> [Emphasis in original.]

[79] The draft contains many NTDs, being "notes to draft" throughout.

[80] At the July 20, 2021 *in camera* Council meeting the 2021 Report was reviewed and debated (the "July 2021 Meeting). The Council passed a resolution:

> A. THAT Council authorize the City Manager and City Solicitor to approve the form of the Seṅáḵw Service Agreement (the "Agreement") that is contained in Appendix 7 of the Report dated July 16, 2021, entitled "Servicing Agreement between City of Vancouver and Squamish Nation Regarding Proposed Development of Seṅáḵw (False Creek Indian Reserve No. 6, also known as the Kitsilano Indian Reserve)", to be updated to reflect the terms and conditions articulated in the body of and in the Appendices 1 to 5 of the aforementioned Report and for the Mayor or Deputy/Acting Mayor to execute on behalf of the City based on the following key elements:
>
> i. the City providing most of the municipal services to the Squamish Nation's Indian Reserve No. 6 (the "Lands") as are provided in the rest of Vancouver, in return for fees analogous to those payable by the rest of the City's residents and businesses;
>
> ii. the incorporation the key principles that were approved by Council on October 6, 2020 (RTS 14027) – a set of Guiding Principles, an Initial Negotiating Stance (defined in the Agreement as the "Equity Principle"), and the principle of neither government subsidizing the other, with the exception of making the Agreement public, as set out in E below;
>
> iii. otherwise on substantially the same terms and conditions as the draft form of the Agreement attached as Appendix 7 to the above-noted Report (that will be updated to reflect the terms and conditions articulated in the body of and in Appendices 1 to 5 of the same Report), and otherwise on such terms and conditions which are consistent with the draft Agreement, the Equity Principle, and Councils' decisions concerning E below;
>
> iv. with the issue of the degree to which the Service Agreement and future Service Coordination Agreements are made public as still outstanding and under negotiation; and
>
> v. to be approved by the City Manager the Director of Finance, the City Engineer, the General Manager of Arts, Culture and Community Services and the City Solicitor.
>
> B. THAT no legal rights or obligations be created by the adoption of A above, until the execution of the Agreement by the Squamish Nation and the City of Vancouver.
>
> C. THAT Council direct staff to continue to negotiate with the Senakw Partnership and/or the Squamish Nation the degree to which and the mechanism by which the Service Agreement and associated future Service Coordination Agreements are to be made public, and if necessary, subject to Council's decision about E below, bring this issue back to Council for a final decision no later than July 31, 2021.

D. THAT Council direct staff to communicate the Council direction concerning the Service Agreement in A through C above and E below, to the Squamish Nation and/or Senakw Partnership leadership, in order to facilitate the finalization of the Service Agreement.

E. THAT Council direct staff to maintain the negotiating position that all elements of the Service Agreement and associated future Service Coordination Agreements are to be made fully available to the public, with the exception of select commercially sensitive elements.

[81] It is this resolution, the Resolution, that the petitioners seek to have set aside.

[82] After July 20, 2021, negotiations on the proposed terms of the Services Agreement continued between City staff and the Partnership.

[83] On October 21, 2021, Kelly Oehlschlager prepared a report dated October 29, 2021 (the "October Report") advising that the Nation had requested two material deviations from the draft service agreement. The two issues being (1) the rights of cancellation and (2) the limitation on the City's liability.

[84] The October Report also set out the various aspects of the Services Agreement that were incomplete or only informally articulated in the text of the draft agreement being:

- confirming the final wording of the recitals to align with the reconciliation objectives and Guiding Principles as well as the Equity Principle
- finalizing how the assessment-based service payments are to be calculated based on assessed value from BC Assessment
- clarifying property valuation methodology…
- detailing all risk allocation and implementation provisions for the Triggered Infrastructure, …
- finalizing the very sensitive legal and operation text around the Burrard Bridge to ensure both parties are comfortable with how they will interact as landowner and "right of way" user over the Term of the [Services Agreement]
- finalizing the text around City staff and consulting costs (for expenses normally recoverable from developers of off-reserve developments via the City permitting system)
- confirming text on Final [Services Agreement] being a public document once signed by the parties

- finalizing text on public amenities, …to create contractually binding baseline on certain amenities such as rental and affordable housing and childcare, and finalized text of the fire, public art and other infrastructure described in prior City staff reports and referred to in the Draft [Services Agreement]
- finalizing the detailed legal text on how the parties will work together to develop Nation bylaws (to be enacted by Squamish Council) to support the enforcement and administration of City services in the same manner as off-reserve

[85] On November 2, 2021, Council resolved to proceed to consider certain matters at an *in camera* meeting later that day. The October Report was considered and debated by City Council at an *in camera* meeting on November 2, 2021, Council resolved:

A. THAT Council authorize the City Manager and City Solicitor to approve as to form the revisions to the Sen̓áḵw Services Agreement attached as Appendix A to the Report dated October 29, 2021, entitled "Key Liability Elements of the Sen̓áḵw Services Agreement ("SSA") between City of Vancouver and Squamish Nation (the "Nation") Regarding Proposed Development of Sen̓áḵw (False Creek Indian Reserve No. 6 also known as Kitsilano Indian Reserve"), (dealing with limitation of liability and cancelation rights).

B. THAT no legal rights or obligations be created by the adoption of A above until the execution of the Sen̓áḵw Services Agreement by the Squamish nation and City of Vancouver (pursuant to Council's authorization/resolution of July 20, 2021).

[86] After the *in camera* meeting on November 2, 2021, there were several key terms that needed to be addressed at the negotiating table relating to infrastructure and contributions, as well as terms which were contingent on parallel negotiations between the federal government and the Nation.

[87] The negotiating teams for the City and Nation successfully resolved the remaining substantive issues over the next several months. Ultimately, the Nation agreed to make the terms of the Services Agreement public after it had been executed.

[88] On May 25, 2022, the City announced the execution of the Services Agreement with the Nation, although few details were made public. The agreement

was subject to an escrow agreement pending settlement on certain items of the final legal text of the Services Agreement. At the time of the announcement, the City had undertaken no consultations with its residents regarding the Development or any related matter.

[89] On July 19, 2022, the Services Agreement was made public and the petitioners learnt the specific details of the agreement and the Development.

[90] The Services Agreement was posted on the City's website which included the following statement 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 Seȟáḵw 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 Seȟáḵw 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.

Overview of the Services Agreement

[91] The Services Agreement is a 246-page document and is for a 120-year term. The City submits that the Services Agreement terms are predicated on the critical "Equity Principle" which requires the Nation to be responsible for the full costs of the services and infrastructure required to support the Development, and that payment for these services and infrastructure will be determined broadly in the same way as it would be for a development that is regulated by the City, while recognizing the government to government relationship.

[92] Some of the key components of the Services Agreement under the legal context are:

> **BACKGROUND**
>
> A. Service Agreement Context/Legal Framework

> 1) The Nation wishes to have a phased residential and commercial project to be known as Seȟáḵw (the "**Development**") developed on the Nation's Lands.
>
> 2) The City is the local municipal government for Vancouver and wishes to assist the Nation by providing Municipal Services to the Development, and calculating the payment for them on the same basis as they are provided and paid for across Vancouver.
>
> 3) Despite the Lands being "lands reserved for Indians" under Section 91(24) of the Constitution Act, 1867, and therefore being subject to federal laws and jurisdiction:
>
> […]
>
> (d) the City's normal taxation and user fee collection powers do not apply to the Reserve and the City's normal municipal services are not required to be provided to the Reserve except to the extent that the Nation and the City enter into a contractual agreement to do so.

[93] The City set out a series of Guiding Principles which are intended to guide the City's overall engagement regarding the Development. The Guiding Principles included:

a) the commitment to being a City of reconciliation recognizing that the Nation has a right to develop the Lands as it sees fit;

b) the promotion of shared interests in a shared community;

c) effective service capacity planning to ensure appropriate infrastructure and amenities; and

d) consistent and fiscally responsible global service approach which requires the City to provide to the Nation the same services it delivers elsewhere in Vancouver in exchange for fair and equitable compensation by the Nation

[94] The costs associated with the Development are covered, with the parties agreeing on what infrastructure is required to be built (the "Triggered Infrastructure") and how it will be paid, the Nation agreeing to provide on-reserve, public amenities and contributions, the Nation paying for full service delivery costs, and the Nation reimbursing the costs incurred by the City associated with understanding, assessing, and reflecting the needs of the Nation. The Nation agreed to pay the City for the

actual project costs for staff/consultant time, to total approximately $1,000,000, including contingency and overheads, for the time up to the signing of the Services Agreement. Future costs will be addressed under a Service Coordination Agreement that will be negotiation after the Services Agreement being executed.

[95] The Services Agreement acknowledges the need for community integration and specifically that the Development be well-integrated in terms of transportation, land use and public amenities and infrastructure into the broader community.

[96] The Services Agreement sets out the contributions being provided as on-site amenities, as summarized in the City's submissions:

> **a. Rental and Affordable Housing** - Seńákw will provide 6,080 rental housing units, primarily in studio and 1BR apartments, with 25% to be 2BR and 3BR, and 20% to be CMHA-defined affordable units that meet the following conditions: 1. Rents below or at 100% of Average Market Rents, City of Vancouver CY (CMHC Housing Market Information Portal); and 2. Rents no higher than 30% of Median Total Income, All families Vancouver (Statistics Canada).
>
> **b. Childcare** – The Nation will provide a childcare facility on site, for 69-74 spaces, which will be owned by the Seńákw Partnership. Using projections for the number of children that will be living in a primarily studio and 1 bedroom apartment development, that childcare should be sufficient to keep the City's ratio of childcare spaces/children ratio the same as it currently is.
>
> **c. Public Art** – The development will provide significant public art, with a focus on art from the Squamish Nation tradition. The provision of public art is consistent with the requirements for projects within the City.

[97] In addition, the Services Agreement provides proposed contribution by the Development to the development of amenities to offset the Development's impact, this includes fire infrastructure; parks, recreation and cultural and community amenities; and contributions to parks, recreation, arts and culture and community services.

[98] The issue of the Bridge is addressed in Schedule K to the Services Agreement, which sets out how the parties have addressed how each one of them will be able to utilize and be responsible for the Bridge. A summary of Schedule K in the Services Agreement provided:

> … the Parties have addressed how each of them will be able to utilize and be responsible for the Burrard Bridge, as well as certain other roads and underground utilities within the Reserve which have typically been operated and maintained by the City, in a manner that works best for the occupants of the Development and the rest of Vancouver while respecting the City's and the Nation's existing claims.

[99] Under the heading of "Open Government and Transparency" it notes that:

> As a government-to-government agreement with a significant public impacts and profile, the Parties have agreed to make this Agreement a public document and therefore available to members of the public.

[100] Under the heading "Implementation of the Agreement" it provides that:

> 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 this Agreement.

[101] The resolution being referenced is the Resolution.

[102] Section 11 relates to changes in the scope of the services and provides that the Services Agreement "has been settled on the assumption that the Nation will undertake the Development in substantially the form, density, schedule, and other features and details set out in the Schedules attached to the agreement, but that the "Nation has unfettered authority and jurisdiction to modify the Development in any way at any time."

[103] The plan was for the Nation to adopt the by-laws required to facilitate the provision of municipal services. The Nation bylaws were to be enacted to essentially mirror the City's bylaws. The City agreed to enforce and prosecute at the City's expense on the Nation's behalf.

[104] Schedule F.13 of the Services Agreement addresses the Vanier Park Road and notes that Canada has advised the Nation that a head licence is ready to be issued after certain infrastructure is built. Appendix F.6 provides that the head licence is between Canada and the Nation, it provides that Canada agrees that "upon the joint written request of the Nation and the City, Canada will enter into a modification of this Licence."

[105] The plan was that the City would consult with the community on potential Seṅáḵw-related transportation changes in early 2023. As of the date of the hearing of the petition, the consultation had not commenced.

Issues

[106] The pleadings and submissions raise the following issues:

1. What is being challenged and what relief is sought?
2. What is the standard of review?
3. Was the City's interpretation of ss. 165.1, 165.2, and 165.3 of the *Vancouver Charter* reasonable?
4. Did the City meet the requirements of procedural fairness?
5. Did the City have the delegated statutory authority to enter into the Services Agreement?
6. Did the City act in bad faith?
7. Did the City fetter its discretion?
8. What is the proper remedy, if any?

Issue 1: What is being challenged and what relief is sought?

[107] At the time the petition was filed the petitioners did not know when the decision had been made to enter into the Services Agreement, since the City had refused to disclose the information. In the petition, the petitioners sought relief in relation to the *in camera* resolution made on or before May 25, 2022, authorizing the execution of the Services Agreement.

[108] The petitioners requested records and on February 13, 2023, the City disclosed redacted minutes of the *in camera* meetings and *in camera* staff reports. It

was after reviewing these documents that the petitioners determined when the decisions were made.

[109] The petition challenges two distinct decisions of Council in relation to the Resolution being:

1) to consider the issue of the Services Agreement *in camera* (the "*In Camera* Resolution"); and

2) the decision at the *in camera* meeting which delegated the authority to approve the form of the Services Agreement to the City Manager and City Solicitor.

[110] The petitioners seek the following relief:

a. 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 the Resolution at an *in-camera* meeting 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;

b. a declaration that the City's decision not to consult or hear from the Petitioners and other residents of the City before entering into the Services Agreement was made in bad faith and, alternatively, [is] unreasonable;

c. a declaration that the Resolution is unlawful, contrary to the provisions of *Vancouver Charter*, and incorrect, or alternatively, unreasonable;

d. an order quashing the Resolution authorizing the execution of the Services Agreement;

e. an order quashing the Services Agreement executed by the City pursuant the Resolution;

f. costs; and

g. such further and other relief that this Honourable Court deems just.

Issue 2: What is the standard of review?

Legal Principles

[111] The framework for determining the appropriate standard of review was revised by the Supreme Court of Canada in *Canada (Minister of Citizenship and*

Immigration) v. Vavilov, 2019 SCC 65 [*Vavilov*] replacing the former framework set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9. Under the *Vavilov* framework, reasonableness is the presumptive standard of review: paras. 16, 23.

[112] The presumption of reasonableness can be rebutted in two types of situations: *Vavilov* at para. 17. The first is where the legislature has indicated that it intends a different standard to apply (e.g., where the legislature explicitly prescribes the standard of review, or where there is a statutory appeal mechanism). Second, the presumption is rebutted where the rule of law requires that the correctness standard be applied. This will apply to certain categories of questions, including for constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies: *Vavilov* at paras. 17, 53.

[113] The category of general questions of law of central importance to the legal system is limited to questions that "require uniform and consistent answers" because they tend to "impact on the administration of justice as a whole", having "significant legal consequences for the justice system as a whole or for other institutions of government": *Vavilov* at para. 59.

[114] Examples given were:

a) when an administration proceeding will be barred by the doctrines of *res judicata* or abuse of process;

b) the scope of the state's duty of religious neutrality;

c) the appropriateness of limits on solicitor-client privilege; and

d) the scope of parliamentary privilege.

Vavilov at para. 60.

[115] The Court stressed that "the mere fact that a dispute is of 'wider public concern' is not sufficient for a question to fall into this category – nor is the fact that

the question, when framed in a general or abstract sense, touches on an important issue": *Vavilov* at para. 61.

[116] In *Portnov v. Canada (Attorney General)*, 2021 FCA 171, the Federal Court of Appeal noted that questions only qualify under this category in exceptional circumstances. Each of the questions that have qualified has raised a "sweeping, transcendent point suffused with constitutional or quasi-constitutional principle": at para. 13.

[117] The fact that a decision will have a significant legal consequence for municipal governments across British Columbia does not engage this exception. In *G.S.R. Capital Group Inc. v. White Rock (City)*, 2022 BCCA 46, [*G.S.R. Capital*] leave to appeal to SCC ref'd, 40140 (8 December 2022), the Court of Appeal noted:

> [22] G.S.R. acknowledges that the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (S.C.C.) establishes that the default standard of review is a deferential one (i.e., "reasonableness"). It says, however, that the default position is displaced in this case because the interpretation of s. 463 of the *Local Government Act* raises "general questions of law of central importance to the legal system as a whole". Such questions require a court to apply a non-deferential (i.e., correctness) standard of review (*Vavilov*, paras. 53 and 58–62).
>
> …
>
> [25] The *Vavilov* framework establishes that administrative bodies, including municipal institutions, are normally entitled to deference in the interpretation of the statutes from which they derive their powers, subject only to narrow exceptions necessary to preserve fundamental values of rule of law. A municipality's interpretation of the scope of its powers under provisions of the *Local Government Act* will normally be subject to review on a standard of reasonableness: *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101 (B.C.C.A).
>
> [26] Correctness review is confined to exceptional situations. The category of "general questions of law of central importance to the legal system" is a narrow one. The interpretation of s. 463 of the *Local Government Act*, as important as it is to the parties in this case, does not raise issues falling into that category. The mere fact that the *Local Government Act* regulates a large number of municipalities does not make the interpretation of its provisions of "central importance to the legal system", nor does it transform the interpretation of specific statutory provisions into "general questions of law".

Position of the Parties

[118] The parties agree that on questions of procedural fairness the standard of review is one of correctness. They disagree on the standard of review respecting the review of the substantive decisions made.

Petitioners' Position

[119] The petitioners submit that although municipal decisions are generally reviewable on a reasonableness standard, in this case the rule of law requires a correctness standard. They submit that a central issue in this case relates to the open meeting requirement, and the extent to which a local government can shield its decisions from public oversight because the matter relates to development on reserve land. They further submit that a broader issue raised is whether a local government's statutory powers and its duty to act in good faith, in the best interests of citizens, and in a procedurally fair manner, are to be interpreted or applied differently in such cases. The petitioners argue that these are questions of central importance to the legal system as a whole and will have significant legal consequences to municipal governments across British Columbia, the citizens they are elected to represent, as well as other government institutions and thus, attract the standard of correctness

[120] The petitioners point out that the respondents rely on a variety of other legislation and argue that as such, it is not simply a question of interpretation of the enabling statute but it involves the interplay among numerous other provincial statutes governing First Nations and the regulatory authority of the City.

[121] The petitioners rely on the Court of Appeal's decision in *O.K. Industries Ltd. v. District of Highlands*, 2022 BCCA 12 to justify their position that the rule of law requires consistency and final and determinate answers to the questions raised in the petition.

City's Position

[122] The City submits that in order to determine if the impugned decisions fall into a category of decisions to be considered on a correctness standard it is necessary to review the substance of each decision. It argues that the *in-camera* Resolution required the Council to consider the application of s. 165.2 of the *Vancouver Charter*, a statue which relates only to the City, and there is no wider public concern with respect to the interpretation of this particular section.

[123] The City argues that the interpretation of the authority of a municipality governed by a unique statute to enter into a specific agreement in the context of the highly unusual situation of a development on land within the geographical boundaries of the municipality, but not within the jurisdiction of the municipality, is not of central importance to the legal system as a whole.

[124] The City submits that the impugned decisions cannot be construed as making a substantive legal finding on general questions of law of central importance to the legal system as a whole that requires a single determinate answer. The presumption of reasonableness is not rebutted.

Nation's Position

[125] The Nation submits that the municipal decisions under review in this case involve the City's interpretation and application of its enabling legislation and related statutes. The decisions being the City's interpretation of its powers to hold meetings *in camera* and its discretionary decisions to negotiate and enter into the Services Agreement. The Nation acknowledges that the decisions may be of "wider public concern" (*Vavilov,* at para. 61), but argues that the decisions themselves do not engage "transcendent" (*Portnov,* at para. 13) questions of law that are of a central importance. The Nation's position is that the appropriate standard of review is reasonableness.

Analysis

[126] I am not persuaded that the questions at issue involve general questions of law that are fundamentally important and broadly applicable, with significant legal consequences for the justice system as a whole: *Vavilov* at para. 59. The category of "general questions of law of central importance to our legal system" is a narrow one: *G.S.R. Capital* at para. 26.

[127] I am required to interpret the *Vancouver Charter* as a statute that only applies to the City and not to any other municipalities. The City is unique and distinct from how other municipalities in British Columbia are operated. I disagree with the petitioners' assertion that this is not simply a question of interpretation of the enabling statute. It is the enabling statute that grants the authority to the City as a creature of statute, and the City must act within the powers conferred by this legislation: *1193652 B.C. Ltd. v. New Westminster (City)*, 2020 BCSC 163, aff'd 2021 BCCA 176, leave to appeal to SCC ref'd, 39773 (9 December 2021) at para. 18 [*New Westminster BCSC*]. Other legislation, *UNDRIP,* and *DRIPA* may give some context but they are not determinative of the issue. As noted by the Court of Appeal in *G.S.R. Capital,* the interpretation of a section of the *Local Government Act*, R.S.B.C. 2015, c. 1 being important to the parties in the case, does not raise the issues into that category: at para. 26. This equally applies to the interpretation of s. 165.2 of the *Vancouver Charter*.

[128] As I stated in *G.S.R. Capital Group Inc. v. The City of White Rock*, 2020 BCSC 489:

> [71] …In my view, the Court in *Vavilov* was very clear that reasonableness review applies to questions on whether administrative decision makers have acted within the scope of their lawful authority, and that the basis for recognizing any new category of correctness review would be exceptional: paras. 67, 70. I do not think that such an exceptional circumstance can be said to arise here.

[129] While the categories that attach a correctness standard are not closed, I also am not persuaded that the circumstances of this case are exceptional in this regard, such that a new category of correctness review would be warranted.

[130] For these reasons, I find that the presumption of reasonableness review has not been rebutted.

Issue 3: Was the City's interpretation of ss. 165.1, 165.2, and 165.3 of the *Vancouver Charter* reasonable?

Legal Principles

[131] As I have found that the standard of reasonableness applies to the decisions challenged by the petitioners, a brief outline of the guiding principles that apply in a reasonableness review is warranted.

[132] In addition to setting out a new framework for assessing the standard of review, *Vavilov* also provided guidance to reviewing courts on how to conduct a reasonableness review in practice.

[133] The focus of reasonableness review is on the decision actually made by the decision-maker, with respect given to both the reasoning process and the outcome: *Vavilov* at para. 83. A reasonable decision is one "that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Vavilov* at para. 85. Where those criteria are met, a reviewing court must defer to the decision: *Vavilov* at para. 85.

[134] The Court in *Vavilov* recognized that the particular context in which the decision under review was made will impact the reasonableness review, particularly in circumstances where decision makers are not required to give reasons: *Vavilov* at paras. 76-77, 81, 89-90. The review "can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings": *Vavilov* at para. 91. A reasonable decision must also meaningfully consider the central issues and concerns raised by the parties (*Vavilov* at paras. 127-28) and the impact of the decision on affected parties (*Vavilov* at paras. 133-35).

[135] Where the decision-making process does not easily lend itself to producing a single set of reasons, an approach to judicial review prioritizing the decision maker's justification may be challenging. However, in *Vavilov* the Court held that in those

circumstances, the reasoning process that underlies the decision – discerned from reviewing the record as a whole – may be used to understand the rationale for the decision:

> [137] … 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*.

[136] The governing statutory scheme is particularly relevant to reviewing the reasonableness of a decision. As the majority in *Vavilov* wrote:

> [108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given... Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion...

[137] While reasons may be required when a municipality is acting in a quasi-judicial function, municipal councils are generally not required to explain or record formal reasons when acting in non-adjudicative capacities, such as passing a bylaw: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 at paras. 29-31 [*Catalyst Paper*].

[138] If the reasons for a municipal decision can be discerned or inferred from the record, the court conducts a reasonableness assessment on the basis of those reasons, but where the reasons cannot be discerned from the record or larger context, the court's role is to determine "whether that provision could be 'reasonably be interpreted in [the decision-maker's way]'" or whether there are any reasonable interpretations that would have authorized the act in question. This is done by examining the decision in light of the constraints of the decision-maker: *Pinnacle Care Group Ltd. v. White Rock (City)*, 2022 BCSC 2272 at para. 37.

[139] Courts have historically shown deference when reviewing municipal decisions in light of the political nature of municipal decision making. Municipal councils are elected bodies that are tasked with making decisions that balance a myriad of political, economic, cultural and social considerations: *Catalyst Paper* at para. 19. The reviewing court is to focus on the decision actually made, including any justification for it, not to "impose the conclusion that it would have made in the administrative decision maker's place": *Vavilov* at para. 15.

[140] Considering the context in which the decisions were made, it is necessary to consider whether there were any legal constraints on the City in the context of Indigenous self-government. I will canvass this issue further when considering how this impacts the statutory interpretation process.

[141] An administrative body interpreting its home statute, or a statute closely related to its functions, will be granted deference: *Alberta (Information & Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 39; *Vavilov* at para. 222.

[142] Questions of statutory interpretation are also presumptively reviewed on a standard of reasonableness, unless a correctness exception is engaged. Courts are to apply the general approach to reasonableness review, as outlined above; however, the Court provided additional guidance for matters of statutory interpretation: *Vavilov*, at para. 115. Courts should not undertake a *de novo* analysis of the question; rather, as with other reasonableness review, they should ask

whether the decision was reasonable based on the reasons and the outcome: *Vavilov* at para. 116. While the form and justification required of administrative decision makers undertaking statutory interpretation may vary, the merits of the decision maker's statutory interpretation must be consistent with the text, context, and purpose of the provision: *Vavilov* at para. 120.

[143] Finally, the burden is on the party challenging the decision to show that a decision is unreasonable: *Vavilov* at para. 100.

Position of the Parties

Petitioners' Position

[144] The petitioners' position is that the Resolution and resulting Services Agreement is unlawful, or in the alternative, unreasonable, because it was discussed and passed *in camera* contrary to ss. 165.1 and 165.2 of the *Vancouver Charter*. The petitioners submit that this was not permitted by s. 165.2(1)(k).

[145] They point out that the general rule is that meetings be open to the public and rely on the Supreme Court of Canada's commentary in *London (City) v. RSJ Holdings Inc.*, 2007 SCC 29 [*RSJ Holdings*] that the "open meeting requirement was intended to increase public confidence in the integrity of local government, by ensuring the open and transparent exercise of municipal power": at para. 19. The Supreme Court of Canada further notes that:

> [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.
>
> [References omitted.]

[146] The petitioners further submit that given the open meeting requirement discussed in *RSJ Holdings*, the statutory interpretation principles restated in *Vavilov*, and s. 165.1 of the *Vancouver Charter*, the provisions in the *Vancouver Charter*

permitting closed meetings should be interpreted strictly with a view to favouring open meetings.

[147] The petitioners argue that the City's interpretation of s. 165.2(1)(k) was both unlawful and unreasonable on three bases:

1. the stage the negotiations for the Services Agreement were no longer "preliminary";

2. the "interest of the city" is the interests of the Vancouver residents in their communities and not solely the interest of the Nation; and

3. the hearing was not required *in camera* since it could not reasonably be expected to harm the "interests of the city".

[148] The petitioners argue that negotiations and related discussions respecting the Services Agreement were no longer at their "preliminary" stages and thus, the exception to the open meeting requirement provided in s. 165.2(k) could not be invoked. They submit that the word "preliminary" must carry the connotation of "introductory, preparatory; initial", relying on the definition in The Canadian Oxford Dictionary (2ed) and considering the purpose of the section and the *Vancouver Charter* generally. They emphasize that s. 165.2(k) does not speak of "preliminary agreements", but rather negotiations and discussions that are at their "preliminary stages". The petitioners further argue that s. 165.2(1)(k) must be interpreted within its entire context, including s. 165.2(1)(e), which permits the City to consider "the acquisition, disposition or expropriation of land or improvements" from the preliminary to final stages, entirely *in camera*. They submit that if the legislature meant to protect every aspect of the negotiations and discussions relating to the provisions of municipal services, it would have drafted s. 165.2(1)(k) in the same manner as s. 165.2(1)(e), which does not limit the discussions to those at their "preliminary stages".

[149] The petitioners argue that by the time of the July 2021 Meeting the Services Agreement was no longer at its "preliminary" stages of negotiations, but instead, it

was nearing or at its final stage of execution. They provide two bases to support this argument. First, they allege that the only major term not yet agreed to between the City and the Nation concerned the public release of the Services Agreement and related coordination agreements. A draft of the Services Agreement was attached to the 2021 Report. Second, they assert that City staff were recommending to authorize the City Manager and City Solicitor to approve the proposed Services Agreement and the Mayor to execute it.

[150] The petitioners further argue that even if s. 165.2(1)(k) applied at the time of the July 2021 Meeting, once the Resolution was passed authorizing the execution of the Services Agreement, all meetings held thereafter had to be open to the public.

[151] Consequently, they argue that the decision to hold the July 2021 Meeting, to pass the Resolution, and ultimately execute the Services Agreement *in camera* was unlawful, and the decision must be set aside.

[152] The petitioners say that the phrase “interests of the city”, although not defined in the *Vancouver Charter,* should be interpreted as meaning in the interests of Vancouver residents in their communities. They rely on the Court of King’s Bench of Alberta decision in *Landrex Developers Inc. v. St. Albert (City)*, 2004 ABQB 732 [*Landrex*]. The petitioners argue that the negotiations and related discussions respecting the Services Agreement could not reasonably be expected to harm the “interests of the city” if held in public. The City had a duty to hear from and look after the residents’ interests and in their failure to do so have harmed the “interests of the city” within the meaning of s. 165.2(1)(k) by not hearing the public’s opinion. The City’s exercise of its discretion to hold the July 2021 Meeting *in camera* was not done to prevent harm to the interests of the city, but out of concern for the Nation’s request to keep everything confidential. Any potential harm to the City’s relationship with the Nation that may have resulted from considering the agreement in public is not “harm” within the meaning of the s. 165.2(1)(k). They assert this interpretation was incorrect or unreasonable.

[153] Further, they submit that the City cannot argue that, if held in public, the Nation would have known its negotiating stance since Council agreed to release to the Nation the City's approved "Guiding Principles" and "Initial Negotiating Stance".

City's Position

[154] The City's position is that the 2021 Report discusses a government to government services agreement with the Nation that was at a preliminary stage. It relies on *Community Association of New Yaletown v. Vancouver (City),* 2015 BCCA 227 [*New Yaletown*], in which the Court found that under the *Vancouver Charter*, the Council, when acting pursuant to its business powers, has the ability to consider issues related to real property at a closed meeting: at para. 73.

[155] The City submits that it cited s. 165.2(1)(k) as the authority for holding the July 2021 Meeting *in camera* and that it was not required to provide more detailed reasons for doing so. The City submits that each of the three distinct requirements under s. 165.2(1)(k) was satisfied in order for the meeting to be closed to the public. The first being that the 2021 Report was in respect to "negotiations respecting the provision of an activity or facility". This is not disputed by the petitioners.

[156] The second requirement is that the Council considered that holding the meeting in public "could reasonably be expected to harm the interests of the city". The City argues this requirement was met since the 2021 Report provides only a draft of the proposed Services Agreement which neither party had agreed to accept, the negotiations were not complete, and the Nation had not agreed to release the document to the public. The City further submits that the 2021 Report contains significant information on the City's negotiating strategy and the reasons behind it that could potentially compromise the City's position in negotiations. There was also the expectation from both negotiating parties that the negotiations would remain confidential. Relying on *New Yaletown,* the City argues that reneging on that understanding could harm the interests of the City with respect to this specific negotiation and generally harm the City's reputation as a trustworthy business partner.

[157] The City disputes the petitioners' interpretation that the "interests of the city" equates to the "interests of Vancouver residents in their communities". It argues the sections of the *Landrex* decision relied upon by the petitioners are general statements about the responsibilities of elected representatives and the benefits of representative government, which do not shed light on the interpretation of the phrase "in the interests of the city" in the context of s. 165.2 of the *Vancouver Charter*. It argues that Council reasonably interpreted that phrase to encompass both the interests of Vancouver residents and the corporate interests of the City.

[158] The third requirement is that the negotiations and related discussions must be "at their preliminary stages". It argues that the dictionary definition of "preliminary" varies and include more general definitions which emphasize that it describes something that must come before some other action or event. The City submits that the question before the Court is whether it was reasonable to interpret the phrase "preliminary stages" in the context of s. 165.2(1)(k) as encompassing all negotiations prior to the final signing of the Services Agreement. It argues that the purpose of the section is to allow Council to be privately advised on the progress of contract negotiations and give directions to staff regarding the negotiations without the other party having access to this information. To provide the other party with access to this information at any stage leading up to the final agreement would be detrimental to the City. There is no finality in contract negotiations until the agreement is signed. Thus, it is reasonable that "preliminary stages" be interpreted to include all negotiations up until the final signing of the agreement.

[159] It further argues negotiations continued after the July 2021 Meeting. It points out that two material issues were raised which City staff agreed to take back to Council for further direction, which were later discussed in a subsequent *in camera* meeting in November 2021. The City argues this is illustrative of the preliminary nature of the stage of negotiations at the time of the July 2021 Meeting.

[160] With respect to the petitioners' arguments relating to the procedure required for moving to an *in camera* session, the City's position is that it met the procedural

requirements set out in s. 165.3 when it unanimously passed a resolution stating that a closed meeting would be held later in the week, which cited the authority to do so under ss. 165.2(1)(a), (c), (i), (j), and (k) and when the July 2021 Report states that it is being considered *in camera* pursuant to s. 165.2(1)(k).

Nation's Position

[161] The Nation submits that the petitioners ask the Court to adopt a paternalistic interpretation of the *Vancouver Charter* that would have municipalities influence or even supervise the development of Indigenous reserve land if it affects nearby off-reserve residents. It argues that this interpretation is fundamentally inconsistent with *UNDRIP*, *DRIPA*, and with their constitutionally protected right to self-government.

[162] The Nation's position is that the City's interpretation of s. 165.2(1)(k) was reasonable, and as such, the City was entitled to hold all meetings about the Services Agreement *in camera* until such time as the agreement was finalized and binding on the parties. It further submits that the proper procedure with respect to holding a closed meeting, as required by s. 165.3 of the *Vancouver Charter*, was followed.

[163] Relying upon *Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*, 2014 BCCA 271 and *New Yaletown*, the Nation argues that the purpose of s. 165.2(1)(k) is to preserve the City's negotiating position during contractual negotiations by preventing the premature disclosure of information. They argue that allowing the public access to the various City reports which outlined the City's priorities and goals would have created an informational disadvantage between the parties and threatened the agreement by undermining the City's negotiating position.

[164] The Nation argues that the preliminary nature of the negotiations at the time of the July and November 2021 meetings are illustrated by a term in the relevant resolutions which provided that no legal rights or obligations were created by the authorization to approve the form of the agreement until the agreement was final,

and the fact that a number of terms of the Services Agreement remained unresolved in July 2021 and still, in November 2021.

[165] The Nation's position is that the City met the requirements under s. 165.3.

Analysis

Was the City's interpretation of ss. 165.1, 165.2 and 165.3 of the Vancouver Charter reasonable?

[166] The relevant portions of ss. 165.1, 165. 2 and 165. 3 of the *Vancouver Charter* provide:

> **General rule that meetings must be open to the public**
>
> **165.1** (1) A meeting of the Council must be open to the public, except as provided for in sections 165.2 to 165.8.
>
> (2) The Council must not vote on the reading or adoption of a by-law when its meeting is closed to the public.
>
> **165.2** (1) A part of a Council meeting may be closed to the public if the subject matter being considered relates to or is one or more of the following:
>
> (e) the acquisition, disposition or expropriation of land or improvements, if the Council considers that disclosure could reasonably be expected to harm the interests of the city;
>
> …
>
> (k) negotiations and related discussions respecting the proposed provisions of an activity, work or facility that are at their preliminary stages and that, in the view of the Council, could reasonable be expected to harm the interests of the city if they were held in public; …
>
> **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.

Principles of Statutory Interpretation

General rules

[167] Section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 [*Interpretation Act*], requires that "every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[168] The guiding rule of statutory interpretation is the "modern principle", that is, that 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": *Vavilov* at para. 117. To be reasonable, 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* at paras. 117-120.

Rules specific to statutes that effect the rights of Indigenous peoples

[169] *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; 1983 CanLII 18 at para. 25 established the statutory interpretation principle of large and liberal interpretation of statutes affecting Indigenous peoples or the exercise of their rights.

[170] Section 8.1(2) of the *Interpretation Act* expressly mandates that every enactment must be construed as upholding, not abrogating or derogating from, the Aboriginal and treaty rights of Indigenous peoples as recognized and affirmed by section 35 of the *Constitution Act, 1982*. Section 8.1(3) of the *Interpretation Act* mandates that every statute and regulation must be construed as being consistent with *UNDRIP*. Section 8.1 is an "umbrella that covers the entirety of the [statutory interpretation] process": *Gitxaala v. British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 at para. 417.

[171] *UNDRIP* emphasizes the importance of Indigenous self-government, including the right of Indigenous peoples to:

a) self-determination, including the right to “freely pursue their economic, social and cultural development” (Article 3);

b) “autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions”: (Article 4);

c) “maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State” (Article 5);

d) “determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in development and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions” (Article 23).

[172] In light of this statutory ”overlay”, the relevant statutory provisions of the *Vancouver Charter* must be construed in a manner that upholds the rights of Indigenous peoples and in a manner that is consistent with *UNDRIP: Gitxaala* at para. 418.

Was the City’s interpretation of s. 165.2(1)(k) of the Vancouver Carter reasonable?

Was the City’s interpretation of the word “preliminary” reasonable?

[173] I am persuaded that the City’s interpretation was reasonable. The dictionary definitions of “preliminary” includes something coming before an event. In these circumstances, the event being the execution of the Services Agreement.

[174] The evidence supports that as of the July 2021 Meeting the Services Agreement was still being negotiated. The Resolution states that there were no legal

rights or obligations created by Council's authorization to approve the form of the Services Agreement and execute the same, until the execution of the Agreement by the Nation and City.

[175] A review of the draft Services Agreement attached to the 2021 Report made it clear that there were terms that were unresolved, including:

1. the degree to which the Services Agreement would be made public;
2. how to address sensitive issues respecting the Nation's claim to the land on which the Bridge is located, and the City's competing position;
3. methods for calculating taxes and valuing property;
4. certain terms were only agreed to in principle with the wording of the terms to be settled on; and
5. terms related to the cancellation of services and limitations on liability.

[176] Appendix 7, attached to the 2021 Report, specifically notes that the Services Agreement was only a working draft and there were unresolved issues. The title page states that what was attached as the current draft of the agreement being negotiated.

[177] Further support for the preliminary stage of the negotiations as of the July 2021 Meeting is the ongoing negotiations that took place thereafter.

[178] In October 2021, the October Report supports that the Nation had requested two material deviations from the draft Services Agreement. The two issues being (1) the rights of cancellation and (2) the limitation on the City's liability. These were significant issues that required Council's input. The October Report also set out the various aspects of the Services Agreement that were incomplete or only informally articulated in the text of the draft agreement.

[179] The Services Agreement was signed on May 25, 2022; however, the text of the second recital in the Escrow Agreement, signed on May 24, 2022 provided:

> Due to the pressures of time, the Parties do not expect their final review and negotiation of the Seȟáḵw Services Agreement before the Execution Date and now wish to make arrangements to sign the execution page of the Seȟáḵw Services Agreement…and deliver the signed Execution Page into escrow, on the understanding that each of the parties will thereafter make reasonable, diligent and good faith efforts to finalize the text of the Seȟáḵw Services Agreement by close of business on June 3, 2022…

[180] Pursuant to the Escrow Agreement, the Services Agreement would only become final and binding once the parties satisfied the "Conditions of Release". These conditions included "confirmation that the Parties have reached agreement on the final text of the Seȟáḵw Services Agreement, including all schedules and attachments."

[181] I accept that the first requirement of s. 165.2(1)(k) was met at the time that the Resolution came before Council.

Was the City's interpretation of "the interests of the city" reasonable?

[182] I disagree with the submission of the petitioners that the "interests of the city" equates only to the interests of the Vancouver residents in their communities. While I acknowledge the Development will undoubtably affect the interests of many Vancouver and Kits Point residents, I do not accept such a narrow and limited definition of the term as it is used in s. 165.2(1)(k). Such a definition ignores the interests of the City itself, and also those of the Nation. It is my view, that "the interests of the city" encompass a variety of considerations including the reputation of the City, fiscal issues, and the consideration to be given to a wide variety of stakeholders, including the relationship between the City and the Nation. When consideration is given to the City's interests in its relationship with the Nation, it was incumbent on the City to recognize the historical and legal context of the Development, and an interpretation of the *Vancouver Charter* consistent with *UNDRIP* and the *DRIPA* legislation. Given this context and the unique circumstances of this Development, the City's approach was to recognize its

jurisdictional limitations, and to choose not to use the negotiations for the Services Agreement as a leverage to change the Development. In my view this was a reasonable approach within the meaning of the "interests of the city".

[183] The City took the position that it had no ability to regulate or control the Development as it was on reserve lands. Legally, this is correct. The City staff considered whether there should be any type of public consultation and concluded in the 2020 Report that the City "is not intending to undertake public consultation about the project per se as to do would imply that the City had some regulatory control over the [Nation]'s land use decisions, which it clearly does not". This was a reasonable position for the City to take in relation to the facts and law that constrain this decision maker in the unique situation it faced.

[184] I find that the City's interpretation of the "interests of the city" was reasonable and thus, the second requirement of s. 165.2(1)(k) was met.

Was the City's interpretation of "harm" to the interests of the City reasonable?

[185] The third requirement relates to the "harm" that could occur if negotiations and related discussions were held in public. The negotiations were complicated and lengthy. They dealt with a number of very sensitive topics including the future use of the Bridge. I am persuaded that if the meetings were held in public it could have undermined the City's negotiating position. I reject the petitioners' submissions that because the City had decided to share the Guiding Principles and the initial negotiating stance that means that the City's full negotiating stance was known to the Nation.

[186] The petitioners submit that the 2021 Report ought to have been considered in an open Council meeting. A review of that report supports that it contains sensitive information about land rights issues, issues relating to the Bridge and the competing claims to the land on which it stands, the use of Vanier Park, and the confidentiality of the terms of the Services Agreement.

[187] The negotiations were ongoing and I accept, had the 2021 Report been made public, it could have negatively impacted the negotiations respecting the outstanding issues that needed to be resolved. This could have disadvantaged the City's negotiating position with the Nation in respect to the various business decisions that were not yet finalized. I find that in the context of these negotiations the use of *in camera* procedures were justified "because the glare of publicity will frequently undermine business planning, negotiation and deal-making": *New Yaletown* at para. 73.

[188] I accept that it could reasonably be expected that harm could arise to the interests of the City if the 2021 Report and the Council meeting at which it was discussed was open to the public. As such, the City's interpretation of s. 165.2(1)(k) was reasonable and thus, the City acted reasonably when it decided to hold the July 21, 2021 meeting *in camera*.

[189] I also find that the record shows the requirements of s. 165.3 of the *Vancouver Charter*, setting out the procedure the Council must follow for a subsequent meeting to be closed to the public, was followed in respect of the July 2021 Meeting. On July 20, 2021, Council unanimously passed a resolution in a public meeting stating that a closed meeting would be held later that week. The resolution specified the applicable subsections of s. 165.2 that formed the basis on which the meeting or part of it was to be closed. I find that the appropriate process was followed under s. 165.3.

[190] With regard to the record as a whole, the context in which the City made its decision, and the deference owed to the City as an elected body, I have concluded that s. 165.2(1)(k) could reasonably be interpreted in the way the City did. Thus, it was reasonable for the City to hold the July 2021 Meeting *in camera* in reliance on this provision.

Issue 4: Did the City meet the requirements of procedural fairness?

Legal Principles

[191] The general principles of procedural fairness were set out in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, which remains the leading authority on the common law duty of fairness. The Court held that the duty of fairness applies to administrative decisions that affect "the rights, privileges, or interests of an individual": *Baker* at para 20.

[192] The considerations for whether an action by a municipality attracts procedural fairness were discussed by this Court in *667895 B.C. Ltd. v. Corporation of Delta*, 2016 BCSC 2356 at paras. 39-40, rev'd in part in 2018 BCCA 38 (the section on procedural fairness was upheld on appeal):

> [39] The SCC has made clear that municipal councils have a duty of fairness to the party affected by the decision in question when making adjudicative decisions which impact the rights of individuals: *Nanaimo* at para. 28.
>
> [40] On this point, David Jones & Ann de Villars, *Principles of Administrative Law*, 6th ed (Toronto, ON: Carswell, 2014), state the following at 130-131:
>
> > Although all municipal bylaws and resolutions are legislative in form, the courts have long recognized the quasi-judicial nature of bylaws affecting the rights or property of particular individuals (for example, by-laws dealing with rezoning, subdividing or granting permission to develop an individual's land have been held to be quasi judicial [sic] in nature). Given the quasi-judicial nature of these types of by-laws, the duty of fairness applies and a municipality can only pass such bylaws if it complies with the common law principles of procedural fairness.
>
> [41] Clearly, in these circumstances, the Bylaw was of a specific nature, rather than a general legislative nature. It was directed at the property rights of a single individual, the petitioners, and not to a matter of general importance.

[193] Where the duty of fairness applies, the requirements or content of the duty, including the required participatory rights, will differ depending on the circumstances and the context in each case: *Baker* at paras. 21-22. The underlying purpose of the participatory rights contained within the duty is:

> [22] … to ensure that … decisions are made using a fair and open procedure appropriate to the decision being made and its statutory, institutional and

> social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker. …

[194] The (non-exhaustive) factors that should be considered when determining scope of the duty of fairness in the circumstances, including the participatory rights required by the duty, include:

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

b. the statutory scheme under which the decision maker operates;

c. the importance of the decision to the individual(s) affected;

d. the legitimate expectations of the person challenging the decision; and

e. respect for the choices of procedure made by the decision maker (particularly where the statute allows them to do so or they have a particular expertise).

See *Baker* at paras. 23-28; *Vavilov* at para. 77.

Position of the Parties

Petitioners' Position

[195] The petitioners challenge the decisions made by the City on the ground that they were not accorded procedural fairness. The petitioners acknowledge that there is no procedural obligation arising from statute that requires the City to hold a public hearing regarding the Development and the decision to provide services to the Nation. However, they argue that the common law duty of fairness required the City to consult with and hear from the residents of Kits Point on whether to enter into the Services Agreement. The petitioners place reliance on the decision in *Canadian Pacific Railway v. Vancouver (City)*, 2006 SCC 5 [*CPR*], arguing that the City ought to have conducted an appropriate public process similar to a public hearing even though a public hearing was not statutorily required. They argue that the duty of

fairness required the City to consult with the Kits Point residents given the impact the Development will have on the rights, privileges and interest of the petitioners and Vancouver residents generally.

[196] Further, the petitioners claim they had a legitimate expectation they would be consulted in advance of Council's decision to adopt the Resolution and execute the Services Agreement that arose from statements and correspondence from the City. The legitimate expectation was that the City would at least hear the residents on whether or not to enter into the Services Agreement.

City's Position

[197] The City's position is that for the action of a municipality to attract a requirement of procedural it must have quasi-judicial elements. It argues that a municipal decision will be "quasi-judicial" if it is specific in nature, affecting the property rights of a specific individual, or is concerned with a specific balancing of rights and interests relating to a particular property. The City's position is that the impugned decisions are not quasi-judicial, and thus, they do not trigger the duty of fairness. It argues that the decision to enter into the Services Agreement does not require the balancing of rights and interests relating to a particular property as contemplated in the case law, and was an exercise of the City's business powers.

Nation's Position

[198] The Nation's position is that the City owed no procedural fairness obligations to the general public when exercising its business powers to enter into the Services Agreement. The Nation argues that the petitioners provide no authority in which the City was found to have a duty to the general public to hold a public hearing where the *Vancouver Charter* does not expressly require one. It distinguishes *CPR* on the basis that the Supreme Court of Canada only found that the City owed procedural fairness duties to CPR when it was considering an amendment to a development that would directly and significantly impact the permitted uses of the Arbutus Corridor because the property was owned by CPR and thus, the decision specifically affected CPR's property rights. Relying on the Court's decision in *New Yaletown*, the

Nation argues that the negotiation and exercise of the Services Agreement was an exercise of the City's business powers and that the City was not required to hold a public hearing prior to its execution, and that its decision not to was a reasonable exercise of the City's discretion.

[199] The Nation notes that s. 184 of the *Vancouver Charter* does not empower the City to seek comment or hold a public hearing on the terms of a business transaction. It argues that it empowers the City to hold a referendum or plebiscite, but that to do so when the City wished to enter into a significant agreement or transaction pursuant to its business powers would bring the City's ability to conduct business to "grind to a halt": *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231; CanLII 115 at 260.

Analysis

[200] With regard to procedural fairness, the issue is whether the City acted fairly in making its decision, not whether the decision itself is fair. Specifically, the issue is whether the City was obligated to engage in public consultation with the petitioners prior to negotiating and executing the Services Agreement.

[201] As the petitioners acknowledged, there is no statutory requirement to hold a public hearing regarding the Development and the decision to provide services to the Nation. However, the petitioners argue that due to the potential impacts of the Services Agreement on the residents of Vancouver and Kits Point, the City not only had the authority but the duty to implement an appropriate consultation process. I disagree.

[202] I am not persuaded that the impugned decisions in this case attract a duty of procedural fairness owed to the petitioners or the general public. The decision to enter into the Resolution and execute the Services Agreement does not impact the property rights, privileges or interests of any one individual. I agree with the Nation that *CPR* is distinguishable from the circumstances of this case. In *CPR* the duty of fairness was triggered because the Court found that the decision directly impacted the rights of CPR as the owner of the Arbutus Corridor.

[203] The decision, to enter into the Services Agreement that provides services to a particular development, although of significant interest not only to Kits Point residents but to all of Vancouver residents, does not involve the balancing of their rights and interests, such that it comes within the ambit of a quasi-judicial decision and attracts procedural fairness obligations.

[204] Even if I am wrong and the common law duty of fairness does apply with respect to the City's impugned decisions, I do not find that the City was required to engage in public consultations in order to meet its procedural fairness obligations.

[205] The law is clear that municipalities are not required to engage in public consultation prior to entering into commercial agreements. In many aspects the Services Agreement is akin to the types of commercial agreements that the City enters into. There is no obligation on the City to hear from interested citizens when the City is exercising its business powers as set out by the Court of Appeal in *New Yaletown* at paras. 73-74.

[206] I acknowledge that the Development will certainly impact the residents of Kits Point and Vancouver more generally given its size, scale and unprecedented nature; however, I do not find that the level and nature of the impact is one that necessitates participatory rights in the form of public consultation.

[207] Turning to the petitioners' argument that a legitimate expectation of consultation had been created I am not persuaded this has been established. Under *Baker*, this analysis involves consideration of whether the City, in its correspondence to the petitioners, created a legitimate expectation that they would be consulted prior to the Services Agreement being entered into: at para. 26. The doctrine of legitimate expectation was considered by the Supreme Court of Canada in *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29 at para. 131, where Mr. Justice Binnie for the majority wrote:

> 131 The doctrine of legitimate expectation is "an extension of the rules of natural justice and procedural fairness": *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. It looks to the conduct of a Minister or other public authority in the exercise of a discretionary power

> including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants (here the unions) a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken. To be "legitimate", such expectations must not conflict with a statutory duty. See: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Baker*, *supra*; *Mount Sinai*, *supra*, at para. 29; Brown and Evans, *supra*, at para. 7:2431. Where the conditions for its application are satisfied, the Court may grant appropriate procedural remedies to respond to the "legitimate" expectation.

[208] I reject the petitioners' assertion that the doctrine of legitimate expectation applies for two reasons.

[209] First, I have found that the impugned acts were acts of legislative authority and the doctrine of legitimate expectation does not apply to legislative acts: *Green Dragon Medicinal Society v. Victoria*, 2018 BCSC 116 at para. 44. If I am wrong on this, I further find that the statements made by the City did not create any reasonable expectation that the particular procedural step, being the consultation with the Kits Point residents prior to entering into the Services Agreement, would take place. The converse is true. The correspondence from the City made it clear that the City's position was that there would be no consultation on the Services Agreement but a consultation process with respect to any transportation changes on City land that would result from the development.

[210] There was no "clear, unambiguous, and unqualified" undertaking for consultation prior to entering into the Services Agreement. I reject that any type of legitimate expectation was created on the evidence respecting the entering into the Services Agreement.

[211] I am mindful that I must give weight to the "choice of procedures made by the [decision maker] itself and other institutional constraints": *Baker* at para. 27. Here, the City chose not to engage in public consultation on the ground that it does not have the jurisdiction to regulate the land belonging to the Nation. This is legally correct. Further, I find that the City was in the best position to determine whether public consultation is appropriate with respect to its exercise of its business powers.

Finally, I accept that it was appropriate for the City to choose not to engage in public consultations in order to use the Services Agreement negotiations for the collateral purpose of impeding, regulating, influencing or controlling an Indigenous government's development of its reserve lands.

[212] As such, I find that there was no requirement – statutory or under the common law duty of fairness – for the City to engage in public consultation prior to the execution of the Services Agreement.

Issue 5: Did the City have the delegated statutory authority to enter into the Services Agreement?

Legal Principles

[213] The relevant provisions of the *Vancouver Charter* provide that:

> **City's powers exercisable by Council generally**
>
> **145** (1) Except as otherwise provided, the powers of the city shall be exercisable by the Council.
>
> (2) Without limiting subsection (1) and subject to any express limitation in this Act, the city has full power to engage in any commercial, industrial or business undertaking.
>
> **Joint exercise of powers with other municipalities**
>
> **192.1** (1) The city may join with another municipality to exercise a power conferred on the city by this Act.
>
> (2) An agreement under this section is not valid until ratified by a by-law adopted by each council.
>
> **City may enter into agreements pursuant to Statutes**
>
> **192** The Council shall have power to make the city a party
>
> (a) to any agreement to which under the terms of any Act of the Dominion or the Province is contemplated that municipalities may be parties and which the Council deems will be for the benefit of the city, including an agreement to borrow money in any case where the Act of the Dominion authorizes or provides for the lending of money to municipalities….

[214] Section 37 of the *ISGEA* provides:

> **Contracts for local services with Provincial taxing authorities**

> **37** In anticipation of or after the enactment by a band or Indian district of an Indian land taxation law, a Provincial taxing authority may contract with a band for the purpose of Part 1 and Part 2, or an Indian district for the purpose of Part 3, to provide to the band or Indian district for the area to which the Indian land taxation law applies, and its residents or occupants, any services that the Provincial taxing authority is obligated or permitted to provide under its usual mandate.

Position of the Parties

Petitioner's Position

[215] The petitioners' position is that the City incorrectly, or in the alternative, unreasonably interpreted the *Vancouver Charter* as authorizing it to enter into the Services Agreement with the Nation.

[216] They dispute the City's argument that the Resolution and the Services Agreement enacted thereto is an agreement under s. 37 of the *ISGEA*, and thereby authorized under s. 192 of the *Vancouver Charter*. The petitioners argue that the Services Agreement is not a simple agreement to provide access to City services and then authorize taxation for those services, but is akin to an agreement under s. 192.1.

[217] The petitioners argue however that s. 192.1 of the *Vancouver Charter* does not apply since the Nation has not incorporated under s. 9 of the *Local Government Act* and therefore is not a "municipality". Further, s. 192.1 requires that agreements between municipalities must be ratified by bylaw adopted by each municipality's respective Council in an open meeting. This did not happen.

[218] The petitioners further argue that the City did not have the statutory power to enter into an agreement to take on the responsibility and costs of enforcing the Nation's bylaws and to collect penalties imposed under those bylaws to recoup the City's costs. They argue that while s. 333 of the *Vancouver Charter* authorizes Council to enforce its own bylaws, the statutory scheme does not authorize the City to enforce another entity's bylaws via contract. They dispute the City's argument that the enforcement is "service" and that it therefore has the authority to enter an agreement under s. 37 to enforce the Nation's bylaws.

City's Position

[219] The City argues that s. 145(2) of the *Vancouver Charter* provides the City with broad authority to enter into the Services Agreement as the provision of services to the Development is a commercial, industrial or business undertaking. It further agues that s. 192 gives the City the authority to enter into the Services Agreement because it is an agreement entered into pursuant to the *ISGEA*, which gives a municipality the specific authority to contract with a band for the provision of services that the City "is obligated and permitted to provide under its usual mandate": s. 37.

[220] With respect to the issue of bylaw enforcement, the City submits that it has the authority to enforce bylaws under s. 192 of the *Vancouver Charter*, and thus, pursuant to s. 37 of the *ISGEA*, it can contract with the Nation to enforce its bylaws. Alternatively, the City argues that, if the City is found not to have the delegated authority to enforce the Nation's bylaws, those sections of the Services Agreement can be severed, such that the rest of the agreement is not invalidated.

Nation's Position

[221] The Nation argues that the City's interpretation of the *ISGEA* and *Vancouver Charter* was reasonable based on a plain reading of the relevant provisions as well as the overarching principles of statutory interpretation.

[222] It first argues that the City had authority to enter into the Services Agreement pursuant to s. 192 of the *Vancouver Charter* and s. 37 of *ISGEA*. It further argues that the City is empowered by ss. 145 and 199 of the *Vancouver Charter* to enter into the Services Agreement and enforce the Nation's bylaws. It argues that the City is empowered to enter into business contracts as any person would, so long as it is for a municipal purpose: *Independent Canadian Business Assn. v. Vancouver (City)* (1988), 49 D.L.R (4th) 302; 1988 CanLII 3003 (B.C.C.A.) at para. 9. Its position is that the Services Agreement is a commercial agreement that falls within the scope of the City's business powers.

[223] The Nation submits that the *ISGEA* and the *Vancouver Charter* ought to be given a large and liberal interpretation consistent with the overarching principles prescribed by *DRIPA,* and the other statutory and common law authorities canvassed earlier in this judgement.

[224] The Nation submits that the City had the authority to enter into the bylaw enforcement provisions under s. 37 of the *ISGEA* and s. 192 of the *Vancouver Charter*. It further submits that there is no need to decide this issue at this time since the City has not yet exercised the enforcement powers and the doctrine of ripeness exists to prevent courts from "entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties" relying on *Atkins v. Anmore (Village)*, 2014 BCSC 2402 at para. 45.

Analysis

[225] I will first address whether the City's interpretation of its authority to enter into the Services Agreement was reasonable. I will then address the specific issue of the City's authority to enforce the Nation's bylaws. Ultimately, I find that the City's interpretation of its delegated powers with respect to entering into the Services Agreement was reasonable.

[226] I accept that the Services Agreement is the type of agreement contemplated by s. 37 of the *ISGEA.* First, the evidence establishes that the Nation has established an Indian land taxation law, pursuant to Part 2 of the *ISGEA*, which provides that it is the sole taxing authority on the Seȟáḵw Lands. In September 2010, the Nation delivered notice that the band intended to impose independent band taxation on the Kitsilano Reserve in accordance with ss. 9-10 of the *ISGEA*. In 2021, the Nation also enacted a taxation law, being the *Squamish Nation Annual Tax Rates Law*, *2021* enacted pursuant to the *First Nations Fiscal Management Act*, S.C. 2005, c. 9, which was in effect as of May 22, 2022, being the effective date of the Services Agreement. This meets the first requirement of s. 37 of *ISGEA.*

[227] Second, I find that what is being provided under the Services Agreement comes within the description of “any services that the Provincial taxing authority is obligated or permitted to provide under its usual mandate”. The Services Agreement covers the provision of basic services, which I accept fall within the City’s usual mandate pursuant to statutory delegation by the Province.

[228] Section 192 of the *Vancouver Charter* authorizes the Council to make the City a party to any agreement so long as a provincial or federal statute contemplates that municipalities may be parties to such an agreement and Council deems the agreement to be for the benefit of the City. Given that I have found that the Services Agreement properly falls within the scope of s. 37 of the *ISGEA,* at least in so far as it provides basic services to the inhabitants of a City, this first requirement under s. 192 is satisfied. I am also satisfied on the record that Council clearly deemed the Services Agreement to be for the benefit of the City.

[229] The final issue is whether the Services Agreement goes beyond the services the City is obligated or permitted to provide “under its usual mandate”, as required by s. 37 of the *ISGEA*, by agreeing to enforce the Nation’s bylaws. I am satisfied that bylaw enforcement is a service and that it forms part of the City’s usual mandate.

[230] With regard to the totality of the evidence, I find it was reasonable for the City to enter into the Services Agreement on the basis of the statutory authority provided by s. 192 of the *Vancouver Charter* and s. 37 of the *ISGEA.*

Issue 6: Did the City act in bad faith?

Legal Principles

[231] In the context of municipal and administrative cases, bad faith covers a range of conduct. This includes**:**

a) "dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, unreasonable conduct, and conduct based on an improper motive or undertaken for an improper, indirect or ulterior purpose”: *Rocky Point Metalcraft Ltd. v. Cowichan*

Valley Regional District, 2012 BCSC 756 at para. 82 [*Rocky Point Metalcraft*]; *MacMillan Bloedel Ltd. v Galiano Island Trust Committee* (1995), 10 B.C.L.R. (3d) 121 (C.A.) at para. 153 [*MacMillan Bloedel*]; and

b) the illegal exercise of delegated authority (in the sense of acting beyond the scope of the delegated power): *Rocky Point Metalcraft* at para. 82; *MacMillan Bloedel* at para. 154.

[232] In *338186 B.C. Limited v. City of Vancouver*, 2011 BCSC 336 at para. 80, the Court adopted the broader definition of "bad faith" set out by the Ontario Court of Appeal in *Equity Waste Management of Canada v. Halton Hills (Town)*, (1997), 35 O.R. (3d) 321; 1997 CanLII 2742 (C.A.):

> To say that council acted in what is characterized in law as 'bad faith' is not to imply or suggest any wrongdoing or personal advantage on the part of any of its members: […] But it is to say, in the factual situation of this case, that Council acted unreasonably and arbitrarily and without the degree of fairness, openness, and impartiality required of a municipal government ...

[233] In *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City),* 2021 BCCA 160, the Court of Appeal held that at para. 3:

> These issues [regarding whether a decision was made in good faith] must be reviewed not on a standard of reasonableness, but on a standard that is sometimes described as a correctness — although it simply involves deciding "whether the rules of procedural fairness or natural justice have been adhered to" ... If procedural fairness or good faith is found to be lacking, the decision is subject to being set aside as void...
>
> [References omitted.]

Position of the Parties

Petitioners' Position

[234] The petitioners submit that the City acted in bad faith by conducting a non-transparent process via its *in camera* meetings and representing to the public that the City did not have any jurisdiction or control over the Development. Further, they argue the City created a false public belief that there would be some type of

meaningful public engagement on the important issues of transportation, road access and the use of Vanier Park lands despite having no intention to do so.

[235] The City and Nation dispute that the City acted in bad faith.

Analysis

[236] The foundation of the allegation made by the petitioners is that the City did have the jurisdiction to influence what was being built on the Sen̓áḵw Lands and acted in bad faith in the adoption of the Resolution and the execution of the Services Agreement.

[237] The petitioners have a fundamental disagreement with the approach taken by the City and the process it followed. On my review of the totality of the evidence before me, I see no evidence that any City official acted in bad faith. I have found that the City's interpretation of s. 165.2(1)(k) was reasonable. I have further found that the City did not fall short of its procedural fairness obligations in its choice of procedure. As such, the process used was not unreasonable nor arbitrary.

[238] I have also found that the City did not act beyond the scope of its statutory authority.

[239] The decision made by the City that it would not use the negotiation of the Services Agreement as a means to force the Nation to change the density of the Development was based on the City's view of whether this was an appropriate strategy in all of the circumstances. After fully considering the issues, the City concluded it was not.

[240] I see no basis to find that the City officials acted in a bad faith manner in this regard.

Issue 7: Did the City fetter its discretion?

Position of the Parties

[241] The petitioners argue that the City had the power under s. 184 of the *Vancouver Charter* to submit questions to the electors. The City stated publicly that it did not have such power. They argue that the City did have significant control over what ultimately will be built on Seńáḵw Lands and the power to hear from the City's residents through the negotiation of the Services Agreement. The petitioners assert that the City fettered the its discretion by adopting the following "Guiding Principles" which provide that the City:

a) respected the Nation's right to develop its lands as it saw fit;

b) would learn the Nation's aspirations for the Seńáḵw development and how best to support the integration of the Project; and

c) would take guidance from the Nation on how it would like to "engage in the development of the communication and operating protocol."

[242] The petitioners argue that the City fettered its discretion when it set out the above Guiding Principles at the outset of the Services Agreement negotiations and delegated to the City Manager the authority to negotiate based on these principles. They argue that by doing so, the City precluded its ability to negotiate with the City over the scale of the Development in exchange for the provision of services and to engage in consultation with residents.

[243] The City and Nation dispute that any fettering of discretion took place.

Analysis

[244] The concept of fettering was described by the Court of Appeal in *Halfway River First Nation v. BC (Ministry of Forests)*, 1999 BCCA 470:

> [62] The general rule concerning fettering is set out in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, which holds that decision makers cannot limit the exercise of the discretion imposed upon them by adopting a policy, and then refusing to consider other factors that are legally relevant. Other

> cases to the same effect are *Davidson v. Maple Ridge (District)* (1991), 60 B.C.L.R. (2d) 24 (C.A.) and *T(C) v. Langley School District No. 35* (1985), 65 B.C.L.R. 197 (C.A.). Government agencies and administrative bodies must, of necessity, adopt policies to guide their operations. And valid guidelines and policies can be considered in the exercise of a discretion, provided that the decision maker puts his or her mind to the specific circumstances of the case rather than blindly following the policy: see *Maple Lodge Farm*, *supra* at pages 6-8 and *Clare v. Thompson* (1983), 83 B.C.L.R. (2d) 263 (C.A.). It appears to me, with respect, that the learned chambers judge applied correct legal principles in her consideration of whether the District Manager fettered his discretion.

[245] I am not persuaded that the Guiding Principles required the City to exercise their discretion in a particular way. The 2019 Report extensively canvassed the proposed development and sets out the jurisdictional issues and sought direction from Council on how staff should engage with the Nation on the proposed development. The City determined it would not negotiate with the Nation on the scale of the project in exchange for entering into a services agreement. The evidence supports that the City recognized that the Nation could have sought services from Metro Vancouver and/or provided their own services to avoid negotiating with the City.

[246] I am satisfied that the City considered the specific circumstances of this project and the significant competing priorities and decided it was appropriate to enter into negotiations with the Nation, guided by the principles it adopted.

[247] I see nothing in the substance of the Guiding Principles that demonstrates they were used to improperly fetter the City's ultimate discretion. The first principle was to respect the Nation's ability to develop their lands as they saw fit. That position is legally correct in that municipalities do not have the power to regulate zoning and land use planning on Indian reserve lands: *Surrey (District) v. Peace Arch Enterprises Ltd.* (1970), 74 W.W.R. 380; 1970 CanLII 1118 (B.C.C.A.) at para. 16.The petitioners suggest that the City should have used its ability to refuse to provide services to the Nation as a bargaining tool to try to exert control over the density and composition of the Development. The City, in my view, reasonably rejected that as the appropriate course to follow in light of their legal constraints and

political interests. In 2014, the City made the decision to become a “City of Reconciliation” and the City recognized that this should be honored when negotiating the Services Agreement.

[248] The second principle is also supportable. To recognize the Nation’s aspirations and then work towards how best to integrate the project is a role that the City should undertake and does not indicate the City’s discretion was improperly fettered. There was the potential for a great deal of benefit to the City in achieving a mutually beneficial agreement that included a resolution of a difficult and significant issue relating to the use of the Bridge.

[249] The third principle respecting taking guidance from the Nation does potentially support that the City fettered its discretion. However, the evidence does not demonstrate that City officials blindly followed this. As it turned out, the City did not agree with the Nation’s position that the Services Agreement should remain confidential and not be disclosed to the public. After considering the Nation’s position, the City decided that it should be made public, and that is what happened.

[250] I find there is no evidence to support that the City fettered its discretion as a result of adopting the Guiding Principles.

[251] I do not accept the suggestion that the City should have utilized s. 184 of the *Vancouver Charter* as a means to get public input and its failure to do so supports that it fettered its discretion.

Conclusions

[252] Given my above findings, it is unnecessary for me to consider the issue of what is the appropriate remedy.

[253] I conclude that the Resolution and the Services Agreement are valid and decline to grant the orders sought by the petitioners. The amended petition is dismissed.

[254] I have considered the issue of costs. I understand the frustration of the petitioners since they were impeded at every step in trying to obtain information about the process and how the Services Agreement came into existence. In order to access this information, the petitioners had to resort to bringing this petition. Their concerns are legitimate in respect to the impact the Development will have on traffic congestion, transportation challenges, and many other concerns. They were provided with no public forum to bring forward their concerns and have them heard. In my view, although the City was successful in defending this petition, it should consider whether costs should be pursued.

[255] If the parties wish to make costs submissions they should do so on the following basis:

1. The submissions of the City and Nation to be served and provided to the Court within 60 days of the release of these reasons;

2. The reply submissions of the petitioners to be served and provided to the Court within 30 days of the receipt of the respondents' submissions; and

3. Any reply submissions of the City and Nation to be served and provided to the Court within 7 days of receipt of the petitioners' reply submissions.

[256] If no written submissions are provided to the Court within 60 days of the release of these reasons, the order is that each party shall bear their own costs.

[257] I am indebted to all counsel for their excellent, articulate, and comprehensive submissions.

"The Honourable Justice C. Forth"