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Aboriginal Title Declared Over Fee Simple Lands in Landmark Decision

In a landmark decision, already the subject of an appeal by the Province, the British Columbia Supreme Court has granted the Cowichan Tribes Aboriginal title over a large swathe of land in the southeastern portion of the City of Richmond. Cowichan Tribes v. Canada (Attorney General)*, 2025 BCSC 1490 is not only important because it represents a rare instance of a successful claim for Aboriginal title, but also because it is the first time that a Canadian court has granted remedies that include the invalidation of certain fee simple titles within the claim area. Of particular relevance and concern to local governments in British Columbia, the Court invalidated the title of certain lands held by the City of Richmond in fee simple. Notably, the claim area also included lands held by other fee simple owners. While the Court did not invalidate those titles, as the Cowichan Tribes did not seek such a remedy, it did declare that Cowichan Tribes has Aboriginal title over those lands.*

Fee simple title is, in general terms, as close to absolute ownership as exists in the Canadian system of property law. As homeowners know, fee simple title carries with it a right of exclusive use and occupation. While fee simple titles are subject to regulation by the government, and the exercise of rights on fee simple titles is also limited by common law principles like the law of nuisance, fee simple title has always been reliable, secure, and constant.

Aboriginal title is a concept that courts have found to be recognized by section 35 of the *Constitution Act*, which states that "the existing aboriginal and treaty rights of aboriginal peoples of Canada are hereby recognized and affirmed". Aboriginal title, like fee simple title, is a form of land ownership that carries with it an exclusive right of use and occupation. However, unlike fee simple, which is registered in a land title system created provincially, Aboriginal title has been called by Canadian courts a *sui generis* interest. This means that Aboriginal title is "of its own kind, or "unique". Canadian courts have said that Aboriginal title is a collective form of title that attaches to a particular indigenous body. It carries with it three things: (1) the right to exclusive use and occupation of the land; (2) the right to determine the uses to which the land is put; and (3) the right to enjoy the economic fruits of the land.

Until the *Cowichan Tribes* decision, no court had ever directly grappled with a circumstance in which fee simple title was challenged as being invalid on the basis of a claim for Aboriginal title. That was exactly what was put to the Court in this case. Among other findings, the Court found that the Province of British Columbia has no jurisdiction to extinguish Aboriginal title through the granting of fee simple interests.

While the decision is very lengthy and complex, and is being appealed, its implications could be far-reaching if upheld. If indigenous bodies can prove Aboriginal title to a fee simple parcel in British Columbia, then a Court may invalidate that title. The Court also appears to contemplate certain circumstances in which Aboriginal title and fee simple title might co-exist, with Aboriginal title as a "burden" on fee simple estates that were granted by the Province. How such titles could co-exist is not a question that the Court answers, as the specific remedy granted in relation to Richmond's title allowed the Cowichan Tribes' title to overcome and displace that of Richmond.

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Aboriginal title to a fee simple parcel in

British Columbia,

then a Court may invalidate that title.

We will continue to report on this landmark case as we come to understand other implications that affect BC local governments.

Reece Harding, Gregg Cockrill & Nick Falzon



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Legal Notations – When to Pay Attention

When asking us to review a title search for a BC property, clients will often also request a review of the "Charges, Liens and Interests" heading and for help identifying any concerns. While doing so is certainly important, there is another portion of each title search that is sometimes ignored called "Legal Notations".

While some legal notations are for a property owner's benefit (see, for example, my March 2025 Newsletter article regarding Builders Lien Act Notices of Interest), there are others that may restrict the use of the property, or at least impact the intended use of the property. Accordingly, it is important for local governments to give those legal notations due consideration prior to dealings with a particular property.

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Though not an exhaustive list, the following are some examples of legal notations that local governments would be prudent to review:

1) THIS CERTIFICATE OF TITLE MAY BE AFFECTED BY THE AGRICULTURAL LAND COMMISSION ACT

This notation generally means that the lands are very likely located in the Agricultural Land Reserve ("ALR"). The impact this may have on a local government will depend on its intended use of the land. For example, if the local government owns the land and wishes to subdivide or to use the land for non-farm use, then the local government must apply to the Agricultural Land Commission ("ALC") to do so, unless otherwise permitted by law. If a local government is seeking to register a statutory right of way in its favour over land located within the ALR, the Land Title Office will not register the statutory right of way unless and until the local government has submitted to the ALC a notification of the statutory right of way, and provided proof of that notification to the Land Title Office.

2) HERETO IS ANNEXED EASEMENT CB1234567 OVER LOT 1 PLAN EPP123456

This type of legal notation indicates that the lands benefit from the noted easement. That being said, it can be important for the local government to review the terms of the easement. Consider, for example, a scenario where a local government is seeking to acquire a piece of land and that land requires access over a portion of an adjacent piece of land to a well. In that scenario, the local government would want to review the easement terms to confirm that it grants all necessary rights over a sufficient area of land for its intended purpose.

3) EXPROPRIATION ACT NOTICE, SEE CB1234567 FILED 2025-01-01. DEALINGS RESTRICTED.

Although in many scenarios the local government itself may be the expropriating authority under the *Expropriation Act*, a legal notation of this nature indicates that expropriation proceedings have been commenced in relation to the property. The local government would want to carefully review to confirm the nature of the expropriation as well as, if it is not the local government itself, the party that has commenced the expropriation (e.g. the Province).

4) ZONING REGULATION AND PLAN UNDER THE AERONAUTICS ACT (CANADA) FILED 01.01.75 UNDER NO. M12345 PLAN NO. 54321

Legal notations of this nature are typically indicative that the property is within a certain proximity of an airport, and accordingly, restrictions are set in connection with the maximum height of any building, structure, or object, or any natural growth at the property.

While the above legal notations are just a small number of examples of notations that may be registered on property titles, they are illustrative of why they should not be ignored.

Jacob Lewin

Legislating Within Limits: Recent Case Law on Provincial Authority

On November 25, 2024, the Ontario government enacted Bill 212, titled the Reducing Gridlock, Saving You Time Act, 2024 *(the "Act"). The legislation amended the* Highway Traffic Act *to require municipalities to seek provincial approval before installing bike lanes that would displace existing motor vehicle lanes. More controversially, the Act also mandated the removal of specific, high-profile bike lanes on Bloor Street, University Avenue, and Yonge Street in downtown Toronto.*

The Act prompted swift opposition from cycling advocacy groups and the City of Toronto. Cycling advocates challenged the law on the grounds that it posed serious safety risks, and would lead to an increase in accidents involving bicycles, now forced to share the road with cars. More specifically, they argued that the Act infringed the right to "life, liberty, and security of the person" under section 7 of the *Charter of Rights and Freedoms* (the "*Charter*"). The City, who had made the decision to install the bike lanes in the first place, argued that the Bill undermined local democratic governance, imposed costly infrastructure changes, and lacked evidentiary support for its central claim – that it would reduce traffic congestion.

On July 30, 2025, the Ontario Superior Court of Justice released reasons in *Cycle Toronto et al. v. Attorney General of Ontario et al.*, 2025 ONSC 4397. The key legal issue was whether the safety risks created by removing the bike lanes could be justified in light of the government's stated objective of reducing gridlock. The *Charter* challenge hinged on whether the government's actions were arbitrary: did the law actually advance its stated purpose, or was it disconnected from the evidence?

The Ontario Superior Court sided with the applicants. It found that the government failed to show that removing the bike lanes would meaningfully reduce congestion. Meanwhile, the Court determined that there was compelling evidence to suggest that removing the lanes would increase the risk of harm to cyclists:

> [18] The government has the right to make decisions about roads and traffic infrastructure, but where the government takes action that puts people at risk, and does so arbitrarily, its actions may be restrained by the *Charter*. Where the government acts rationally, in that its actions will further its desired objective, [the *Charter*] may not be breached. But where, as here, the increased risk of harm results from action that will not further the government's objective of reducing congestion, the government action is arbitrary and breaches s. 7 of the *Charter*.

In other words, government decisions, even those clearly within provincial jurisdiction, must still be rationally connected to their stated objectives when they risk infringing *Charter* rights.

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While the Court explicitly stated that it was not recognizing a *positive right to bike lanes*, the practical effect of the ruling is to limit the government's ability to use legislation to mandate the removal of such infrastructure – at least where the removal cannot be justified by evidence consistent with the government's policy objectives. As such, some critics contend that the decision indirectly constitutionalizes cycling infrastructure, by tying its removal to *Charter* compliance in the context where public safety is impacted.

Arguably, however, the case does not restrain the Province's <u>*authority*</u> in any meaningful sense. The ruling does not prevent a provincial legislature from enacting policies that favour certain transportation modes or constituencies. Rather, it emphasizes that when a government action infringes on section 7 rights, that action must not be arbitrary, i.e. it must bear a rational connection to its stated legislative objective.

In this case, the *Act* was framed around the objective of "reducing gridlock". The Court found that the removal of bike lanes would not further that objective, and indeed posed a safety risk to cyclists. Had the Province articulated a different or broader objective – such as promoting driver convenience or prioritizing vehicular traffic – this may have shifted the analysis, and the same law

might have been upheld. The issue, then, is less about the *content* of the policy, and more about its coherence with the evidence and rationale presented in support of the legislation.

A similar dynamic played out in the recent case of *Kitsilano Coalition for Children & Family Safety Society v. British Columbia (Attorney General)*, 2024 BCCA 423. In that case, the BCCA acknowledged that the Province had the constitutional authority to create statutory exceptions of public hearing requirements for rezoning. However, the Court struck down the legislation on the basis that its stated objective was to effectively dismiss an ongoing judicial review brought by an advocacy group in relating to a controversial development. The Court suggested that had the legislation been drafted in a different form, it might have survived constitutional scrutiny.

These cases are suggestive of a judicial attentiveness not only to whether authority exists, but to the manner and rationale of its exercise.

These cases are suggestive of a judicial attentiveness not only to whether authority exists, but to the manner and rationale of its exercise – an approach that could influence the trajectory of future *Charter* claims and judicial reviews. For provincial governments, this may be a source of understandable frustration, looking like form over substance: the law permits them to legislate in areas within their jurisdiction, but courts are willing to apply purpose-based scrutiny that can invalidate legislation even where jurisdiction is not in question.

Jack Wells

A Lesson in Justification - *667895 B.C. Ltd. v. Delta (City)*, 2025 BCCA 279

The recent British Columbia Court of Appeal's decision 667895 B.C. Ltd. v. Delta (City), 2025 BCCA 279, highlights the risk of judicial review if an enactment requires written reasons for a decision and Council or the statutory decision-maker fails to provide sufficient written reasons. Even if the Court might have otherwise found the outcome was reasonable, a lack of written reasons to explain and justify the decision is a basis to quash the decision.

This case arose from the City of Delta requiring the appellant owner to dedicate land as highway ("90 Street"). Despite requiring its dedication, Delta never constructed 90 Street, and instead, a few years later, took steps to remove the dedication and sell the land. That process was the subject of a separate legal challenge brought by the same owner.

The appellant owner applied to the Registrar of Land Titles under Part 8 of the *Land Title Act* to have the road dedication cancelled and the land returned. The Registrar's authority to cancel the road dedication plan was constricted by Council's decision to pass a resolution declaring that the area was required for the purpose of highway. Without the City's consent, the Registrar could not cancel or alter the boundaries of 90 Street. However, section 132(4) of the *Land Title Act* required Council to give written reasons for the declaration.

The Court said

the written reasons required

by the Land Title Act had to be "responsive",

and were not, because the staff report

did not meaningfully address the concerns

raised by the appellant owner.

Council for the City of Delta had passed the resolution declaring 90 Street was needed for highway use, based on a staff report from the City's Engineering Department. The appellant owner had also submitted a written response to the staff report for Council's consideration. When the appellant owner requested written reasons for the declaration, however, the City cited only the reasons set out in the staff report.

The owner argued that the declaration was unreasonable because it was made not long after the City took steps to close and sell the land, and that the written reasons provided for the declaration (the staff report) did not meet the Supreme Court of Canada's standard for justification, transparency and intelligibility.

The Court of Appeal held that the outcome (declaring the land was necessary for highway purposes) was not unreasonable (despite the previous decision to offer for sale), but the reasons provided in the form of the staff report were not good enough. The Court said the written reasons required by the *Land Title Act* had to be "responsive", and were not, because the staff report did not meaningfully address the concerns raised by the appellant owner. Relying on the staff report as its written reasons did not meaningfully account for central issues and concerns raised by the appellant owner in response to the staff report. As a result, the Court of Appeal quashed Council's resolution and remitted the issue as to whether the area was required for the purpose of highway to Council for reconsideration.

While there are many instances where written reasons are not required of local elected officials or other statutory decision-makers, this case serves as a reminder that if the enactment requires written reasons, then the decision-maker must ensure that those reasons are responsive, intelligible, and justified (as opposed to justifiable) or risk having the decision set aside on judicial review.

Here are some other situations where written reasons are required:

- Building Permits - if requested by an applicant, a building inspector must provide written reasons for the building inspector's refusal to issue a building permit (section 54(1) of the *Community Charter*, section 298(3) of the *Local Government Act*).

- Business Licenses - if requested by an applicant, the person or body making the decision to refuse a business license must give written reasons (section 60(1) of the *Community Charter*).

- If a local government bylaw requires written reasons, which was the case in *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2022 BCSC 2150.

- Bylaw Adoption – if requested by an applicant, a municipality must make available, to the public, a statement respecting council's reasons for adopting a bylaw under section 8(3), (4), (5), (6) of the *Community Charte*r (section 8(9) of the *Community Charter*).

- Code of Conduct – after its first regular meeting, a council must decide whether to establish a code of conduct for council members. If a code of conduct is not established, the council must make available to the public, on request, the reasons for the decision (section 113.1 of the *Community Charter*).

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While courts recognize that it can be difficult for an elected body to produce a single, coherent set of written reasons, this case reinforces that there are circumstances in which such written reasons are required. Beyond that, written reasons must meet the standard of reasonableness, which requires reasons that are transparent and intelligible. To be transparent and intelligible, the written reasons must both explain and justify the decision at issue.

Lynda Stokes & Rubal Kang

Stairway to Litigation?

Court of Appeal's decision in Armstrong v. North Saanich (District)*, 2025 BCCA 277, provides useful commentary on local governments' authority to issue permits under Part 14 of* the Local Government Act *(the "*LGA*").*

In a previous issue of the YA Newsletter, in discussing the BC Supreme Court's decision in *Armstrong v. District of North Saanich*, 2024 BCSC 1844, we asked the important question – "whose stairs are they, anyway?". A related and equally important question arising from that decision, which has now been affirmed on appeal, is "whose development permit is it, anyway"? The Armstrong's neighbours built the controversial stairs on the Armstrong's property, in an area over which the neighbours held an easement (a private law instrument authorizing what would otherwise be a trespass). The stairs were also in a development permit area (a public law designation). Section 489 of the *LGA* prohibits construction in a development permit area "unless … the owner first obtains a development permit". Section 460 says a local government must, by bylaw, define procedures under which "an owner of land" may apply for a development permit. The District accepted a DP application for the stairs from the Armstrong's neighbours, despite the Armstrongs objecting to the stairs, and the application.

The Court of Appeal said the text does not stop a local government from accepting a development permit application from someone other than the registered owner of land.

The Armstrongs' main argument in the lower court was that s. 460 only allows an "owner" to make an application for a DP, and therefore it was unreasonable for the District to accept a DP application from the neighbours. The District meanwhile took the position that, in processing the permit application, it was merely interpreting and following its own development procedures bylaw, which defined "owner" more broadly, to include the holder of a charge (such as an easement). The lower court ultimately decided the District acted reasonably in accepting a DP application from the charge-holding neighbours.

The Armstrongs made the same arguments on appeal, but the Court of Appeal came up with a slightly different, and perhaps more robust, reason for rejecting those arguments. While the lower court accepted a broad definition of "owner" that included the holder of an easement (despite the *LGA* definition), the Court of Appeal looked at some other important words in s. 460. Even if "owner" in that section only includes the registered owner of land, the Court of Appeal said the text does not stop a local government from accepting a development permit application from someone other than the registered owner of land. On that basis, it was reasonable for the District to accept the neighbour's DP application for the stairs.

Local governments typically insist on applications signed by or otherwise authorized by registered

owners, whether for OCP amendments, rezonings, or land use permits. In the context of building permits, the Court of Appeal recently held it was reasonable for a local government to refuse a permit application where one of two registered owners didn't sign. In another case, the Court said a local government couldn't sue a landowner for work done by its tenant, without a development permit, after the landowner apparently refused to sign a development permit and therefore the local government said it couldn't issue the permit. Perhaps the facts of *Armstrong* (servient tenement owner refusing to cooperate in DP application despite easement authorizing stairs) are unique, but the case raises at least a couple of questions of broader importance: when can a local government accept land use and development applications without the consent or cooperation of the registered owner(s) of the subject land? And even if a local government can accept such applications, when is it reasonable to refuse them?

Guy Patterson & Serge Grochenkov

Bill 11 – Sick Notes No Longer Needed for Short-Term Medical Absences

In response to the Canadian Medical Association and Doctors of BC's call for the elimination of short-term sick notes for illness or injury, the Province introduced Bill 11: Employment Standards Amendment Act *on April 15, 2025. Having received royal assent on May 29, 2025, Bill 11 is expected to come into force prior to the 2025 cold and flu season. It serves two purposes: (1) to prevent employers from requesting sick notes for short-term medical leaves and absences due to illness; and (2) to replace outdated processes (such as fax and paper) with digital systems to streamline the referral process, consolidating standard forms, and improving information-sharing between providers.*

Currently, the *Employment Standards Act* and regulations entitle employees in BC to a minimum of five paid sick days and three unpaid sick days per year. The employer can currently request "reasonably sufficient proof" from an employee seeking to use a sick day. "Reasonably sufficient" is fact specific, but often includes a note from a medical professional (physicians, nurse practitioners, registered nurses, and those authorized under the *Health Professions Act*). Bill 11 will prohibit employers from seeking sick notes in relation to absences on a "short term basis" and in "specified circumstances" (terms which will be defined in a forthcoming regulation). While it appears standard "sick notes" will be a thing of the past, the amendment will not prohibit employers from requesting health records relating to long-term absences, medical accommodations, or certification that an injured employee is fit to return to work.

Bill 11 is intended to relieve some of the administrative burden felt by medical professionals, many of whom spend an inordinate amount of time on paperwork submitted to satisfy an employer of the veracity of a short-term illness, freeing time for medical professionals to focus on patient care. The government is currently engaging with stakeholders but intends to have the Bill enacted, along with a corresponding

regulation, prior to the 2025 cold and flu season. In addition to consultation with stakeholders, the government may also look to other provinces that have enacted similar legislation, including: Ontario (*Employment Standards Act*), Nova Scotia (*Labour Standards Code*), and Saskatchewan (*The Saskatchewan Employment Act*).

While the regulations and specific wording of the new legislation are under review, employers should be aware that their existing policies and procedures may need to be changed in the future. In particular, if an employer has a practice of requesting sick notes for short-term medical absences, they will need to review whether that practice will be authorized under the upcoming amendment. We will provide a further update when Bill 11 comes into force.

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Amanda Scott

Regulating Short-Term Rentals: A Novel Constructive Taking Claim to Lookout For

A recent challenge to the Province's Short-Term Rental Accommodations Act by a property owners association invites us to consider constructive taking in an unusual context.

Expropriation (also known as "taking") is the forcible acquisition of private property for public purposes by government. If the Province, a local government, or other permitted public authority wants to take private land, they typically can, provided that owners are compensated for the taking and the expropriating authority has a valid public purpose.

However, a government does not need to formally expropriate private property for a taking to occur. While governments have the authority to regulate land in the public interest, they can be found to regulate someone's property so heavily that it deprives the owner of the use and enjoyment of said property, such that it has been "constructively taken."

In *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36 ("*Annapolis*"), the Supreme Court of Canada clarified the test set out in *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5 ("*CPR*") for determining when government regulations of property amount to constructive taking. A constructive taking occurs when a claimant can prove that:

1) The State has acquired a beneficial interest in the property or an advantage flowing from it; and

2) In regulating the property, the State has removed all reasonable uses of the property from the owner.

Accordingly, a claim for constructive taking may be defeated by showing a single reasonable use of a property remains, regardless of the benefit acquired by the State. The Court held that notional uses of the land, deprived of all economic value, are not reasonable.

Similarly, if a public authority's refusal to upzone vacant land were to eliminate all reasonable uses of that land, no constructive taking would take place unless a benefit or advantage had accrued to the State. An advantage might arise where the use of property was regulated in a manner that permitted its enjoyment as a public resource, like a walking trail. Where the two-part test is satisfied, the property owner is entitled to compensation from the government unless barred by statute.

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In British Columbia, section 458 of the *Local Government Act* immunizes local governments from compensating owners for any loss, damage, or reduction in the value of their land resulting from zoning bylaws, provided the bylaws do not restrict land use to public use. Arguably, this may set a higher standard than the common law test, because the legislation seems to require local government remove all private uses, as opposed to all "reasonable uses." The courts have yet to comment on this potential distinction.

Two Expropriation Claims

In *CPR*, the plaintiff company owned a corridor of land which it had used as a railway line for over a century. As rail operations declined, the plaintiff wanted to redevelop the corridor for residential and commercial purposes. The City of Vancouver then adopted a bylaw which designated the corridor as a "public transportation thoroughfare", effectively prohibiting any residential or commercial uses. The plaintiff argued, among other things, that the City had limited the property's uses and had acquired a de *facto* park, because residents were using the corridor for walking and cycling. This, the plaintiff argued, amounted to a constructive taking.

The Supreme Court of Canada held that neither element of the two-part test was met. The bylaw had not removed all reasonable uses of the corridor, as the company could still use the land for railway operations. Furthermore, Vancouver had not acquired a beneficial interest in the land because the City had not appropriated the corridor for use as a park and had not promoted it as such.

Conversely, in *Lynch v. St. John's (City)*, 2016 NLCA 35 ("*Lynch*") both elements of the test were met. The plaintiff family owned property zoned in a watershed connected to a river that supplied water to the City of St. John's. To maintain the clean water supply, the City prohibited any sort of development on the watershed land as it had to be kept in its natural state. The family argued that their property had been constructively expropriated.

The Court of Appeal of Newfoundland and Labrador agreed. The purpose of the City's

bylaw was to ensure the continuous supply of uncontaminated groundwater to its water facilities, which was an advantage accruing to the City. By prohibiting any development on the land, the City had deprived the family of making any reasonable use.

An important distinction in *CPR* and *Lynch* was each city's intention in zoning. Vancouver had not intended nor promoted the corridor as a park, whereas St. John's express intention was to take away the family's rights to appropriate the groundwater on their land to ensure the continued flow of clean water. The SCC subsequently affirmed in *Annapolis* that while a public authority's intention is not an element of the test for constructive takings, a proven intention to take constructively may support a finding that the landowner has lost all reasonable uses to their land.

Expropriating Short-Term Rentals

In *Westcoast Association for Property Rights v. British Columbia*, 2025 BCSC 296, the Westcoast Association for Property Rights (the "Association") alleged that British Columbia's *Short-Term Rental Accommodations Act* [*STRAA*] amounted to a constructive expropriation of Association members' units.

The *STRAA* was enacted by the legislature in an attempt to tighten regulations for short-term rentals and create more long-term rental stock by limiting the types of housing permitted for short-term accommodation. The Association, a society of short-term rental owners and related service providers, argued, amongst other things, that the effect of the *STRAA* forbids owners from offering short-term rentals in units that were not their principal residences, thereby eliminating the members' rights to use their additional properties for lawful business activities.

The Supreme Court of British Columbia struck the Association's petition for being premature, as no enforcement decisions had been made by the Province against members of the Association. However, the Court did not foreclose the Association's ability to bring subsequent proceedings should a live issue arise.

If the Association comes before the court again, it will have to show that members will be left without any reasonable uses of their units if they cannot provide short-term accommodations and that the Province has acquired a beneficial interest or advantage flowing from that prohibition.

The obvious obstacle to such a claim is that the *STRAA* does not forbid long-term rentals. The Association will need to prove that such a use is not actually reasonable for their properties. Furthermore, success on one branch of the test may pose a problem on the other. If the Association can prove that the *STRAA* has removed all reasonable uses of members' properties, including that long-term renting is not reasonable, it is not obvious what benefit would be flowing to the Province, as there would be no increase in long-term housing supply.

Should a constructive taking be found by the court, and the Province ordered to compensate owners of short-term accommodation, it seems likely the Province would appeal, given the adverse financial impact of a compensation award.

Ramon Dabiryan

Procedural Fairness and Municipal Codes of Conduct

Codes of conduct and, indeed, censure processes generally, received relatively little comment from BC Courts until Barnett v. Cariboo Regional District*, 2009 BCSC 471 was released. In that case, the Court set aside a decision of the CRD to censure an area director for allegedly inappropriate conduct toward CRD staff. The Court found that Director Barnett had not been provided with adequate notice of the case against him, which rendered the process unfair.*

More than 15 years later, courts are animated by the same concerns expressed in *Barnett* regarding notice, an opportunity to be heard, and fairness. In *Herar v. Mission (City)*, 2025 BCSC 1533, the BC Supreme Court found that council for the City violated the petitioner's procedural fairness rights in its handling of a code of conduct complaint submitted against a City councillor.

In this case, the complaint arose following two incidents. First, it was alleged that the councillor had improperly taken pictures with children at a local youth centre, with council's anti-racism proclamation displayed. In particular, it was alleged that he should have received Council's authorization before doing this, and should have ensured that parental consent was obtained before taking the photographs. Second, the councillor and his wife attended a training session held by the City's IT department, during which the petitioner's password information was shared with his wife. His wife was not formally approved to attend the session, and staff were not aware that she would be attending prior to her arrival at the session.

Before the complaint was submitted, council considered a motion regarding the appointment of an investigator to investigate complaints made under the Code of Conduct. The existence of a "pending complaint" was mentioned during the meeting, but no details were shared regarding the complainant or subject matter of the complaint. Both the Mayor and the councillor participated in the council meeting and voted on the appointment of a complaint investigator, and council decided to appoint an investigator.

The petitioner successfully argued on judicial review that council had violated his right to procedural fairness in its handling of the complaint against him.

Following the meeting, the Mayor filed a formal complaint against the councillor in relation to one or both of the above-described incidents.

The investigator performed a series of interviews with the Mayor, the councillor, and several other witnesses who may have been involved in the incidents that gave rise to the complaint. After interviews were complete, the investigator mediated a discussion between the Mayor and the councillor for the purpose of resolving the complaint. The Mayor and the councillor signed a joint resolution in relation to the complaint, with the Mayor signing on behalf of council – not as the complainant.

Council considered the joint resolution later that month. A staff report was submitted to present the joint resolution. The staff report

provided that if the joint resolution was rejected by council, an investigation report would be completed by the investigator and submitted for consideration by council, at which point council could decide whether to proceed with a hearing for a motion for censure of the petitioner. If council did decide to reject the joint resolution, the staff report stated that the petitioner would receive at least two weeks' notice to prepare for council's consideration of the investigation report and would be afforded legal counsel for that meeting.

Both the Mayor and the councillor took part in council's consideration, debate, and vote on the joint resolution. Somewhat inexplicably, the Court found, the joint resolution was unanimously rejected by council, despite the fact that both the Mayor and the councillor had signed it previously.

The informal resolution having been rejected by council, the investigator completed her investigation report. A redacted version of the report, with notice that a special council meeting was scheduled two days later for consideration of the investigation report. The petitioner attended the special council meeting, and requested an adjournment as his legal counsel was unable to attend on such short notice. council denied his request for adjournment and accepted the investigation report's findings. Another council meeting to discuss censure and sanction against the petitioner was scheduled at that time.

The councillor attended this meeting, and requested an adjournment as his legal counsel was not available. The adjournment was granted.

At the rescheduled meeting, the petitioner did not attend, but his legal counsel did. During the meeting, the petitioner's lawyer requested a further adjournment so that he could have access to witnesses and disclosure of documents in relation to the investigation. Council denied his request, and voted to censure and sanction the petitioner.

As noted above, the petitioner successfully argued on judicial review that council had violated his right to procedural fairness in its handling of the complaint against him. In particular, the Court noted that:

- the complainant (the Mayor) took part in council's handling of the complaint, both as a complainant and as a member of council, including council's vote to appoint a complaint investigator;
- the complaint itself did not meet the formal requirements imposed by the municipality's code of conduct;
- The Mayor signed the joint resolution on behalf of council, rather than as the complainant;
- The Mayor took part in council's consideration of the joint resolution;
- The petitioner was denied access to basic information regarding the complaint, including the identity of the complainant, the particulars of the complaint, and information gathered in the course of investigating the complaint; and
- council considered and accepted the investigation report's findings despite the petitioner's request for an adjournment to permit his legal counsel to attend the council meeting.

Several lessons can be drawn from this case. First, municipalities should take steps to ensure that complainants are not involved in any decisions made by council in relation to their complaint, even at preliminary stages. Second, municipalities should ensure that if they have adopted procedures and standards for the submission and processing of complaints, they adhere to those standards and procedures. If a complaint fails to satisfy the standards, or if

council decides to depart from its procedures, those decisions should at the very least be justified. Finally, it is essential that complaint respondents be given ample notice of the complaint that is being made against them, and given access to all material evidence that was collected in the course of investigating the complaint.

A core component to the procedural fairness rights enjoyed by complaint respondents is the right to know the case against them, and insufficient disclosure of information collected in the course of the investigation is a surefire way to breach that right.

Nick Falzon & Nate Ruston

Look For Your Lawyers

Nick Falzon will be guest lecturing a session entitled "Municipal Law 101" at the 2025 LGMA Foundations Program on September 25, 2025.

Sukhbir Manhas will be presenting a session entitled "Legal Update" at the Local Government Management Association Corporate Officers Forum being held in Penticton on October 1-3, 2025.

Carolyn MacEachern will be presenting a session entitled "Workplace Bullying & Harassment Investigations - Lessons Learned" at the Western Cities HR Conference being held October 7-10, 2025 in Nanaimo.

Reece Harding will be guest lecturing a session entitled "Administrative Law" at the PADM 203 Municipal Law in BC course at Capilano University on October 28, 2025.

Alyssa Bradley & Timothy Luk will be presenting the PIBC Vancouver Island North Chapter "Planning Legal Session with Young Anderson" being held on October 30th in Nanaimo.

Carolyn MacEachern & Amanda Scott will be presenting a session entitled "Caselaw Update" at the CLE Human Rights Conference being held in Vancouver November 6-7, 2025.

Young, Anderson will be presenting its Annual Local Government Law Seminar on November 21, 2025 at the Fairmont Hotel Vancouver, 900 Georgia Street, Vancouver.

We are pleased to welcome **Peter Mate** and **Rubal Kang** as our articled students for 2025-2026. Peter and Rubal have been great additions to our team and we look forward to their progress during their articling term.

We wish our 2025 summer student, **Ramon Dabiryan**, all the best as he returns to Allard Hall to complete the final year of his juris doctor degree. We will all be happy to have **Ramon** back as an articled student in 2026-2027.

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If you are keen to receive client bulletins and updates to the firm blog by e-mail, go to **www.younganderson.ca** and click on the "**STAY CONNECTED**" button at the top of the webpage.