*Case Name:*

# Martin v. Vancouver (City)

**Between**
**Terry Martin, Appellant (Petitioner), and**
**The City of Vancouver, Respondent (Respondent)**

[2008] B.C.J. No. 823

2008 BCCA 197

Docket: CA034385

British Columbia Court of Appeal
Vancouver, British Columbia

**M.A. Rowles, R.E. Levine and S.D. Frankel JJ.A.**

Heard: October 30-31, 2007.
Judgment: May 7, 2008.

(86 paras.)

*Administrative law -- Natural justice -- Duty of fairness -- Procedural fairness -- Appeal by ousted member of City's Board of Variance from dismissal of his application for judicial review of City Council's resolution rescinding his appointment dismissed -- Judge correctly concluded that Council breached no principles of procedural fairness and acted in good faith in rescinding appointments of Board members -- Board was not an independent tribunal with security of tenure -- Board carried out a limited role in deciding specific disputes relating to some planning and development matters in context of Council's plenary powers over that process -- Council had explicit power to rescind appointments at any time without reasonable cause.*

*Municipal law -- Resolutions -- Quashing resolutions -- Appeal by ousted member of City's Board of Variance from dismissal of his application for judicial review of City Council's resolution rescinding his appointment dismissed -- Judge correctly concluded that Council breached no principles of procedural fairness and acted in good faith in rescinding appointments of Board members -- Board was not an independent tribunal with security of tenure -- Board carried out a limited role in deciding specific disputes relating to some planning and development matters in context of Council's plenary powers over that process -- Council had explicit power to rescind appointments at any time without reasonable cause.*

Appeal by Martin, an ousted member of the City of Vancouver's Board of Variance, from the dismissal of his application for judicial review of City Council's resolution rescinding his appointment. The chambers judge held that City Council had a broad power to rescind the appointments of members of the Board of Variance. While members were appointed to three-year terms, the power to rescind those appointments "at any time" made their appointments "at pleasure." There was nothing to establish bad faith on the part of City Council, which owed no duty of procedural fairness to Board members.

HELD: Appeal dismissed. The chambers judge correctly concluded that, in the context of the statutory framework within which City Council functioned, the Council breached no principles of procedural fairness and acted in good faith in rescinding the appointments of the members of the Board. The Board was not an independent tribunal with security of tenure. It carried out a limited role in deciding specific disputes relating to some planning and development matters in the context of Council's plenary powers over that process. Council had the explicit power to rescind appointments at any time without reasonable cause.

**Statutes, Regulations and Rules Cited:**

Local Government Act, R.S.B.C. 1996, c. 323, s. 899(9), s. 899(10)

Vancouver Charter, S.B.C. 1953, c. 55, s. 165.2(1)(a), s. 572, s. 572(1), s. 572(2), s. 572(2.1), s. 573(1)

**Counsel:**

D.C. Creighton and J. Rohrick: Counsel for the Appellant.

G.K. Macintosh, Q.C.: Counsel for the Respondent.

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[Editor's note: A corrigendum was released by the Court May 9, 2008; the correction has been made to the text and the corrigendum is appended to this document.]

**Reasons for Judgment**

The judgment of the Court was delivered by

**1** R.E. LEVINE J.A.:-- Terry Martin was the Chair of the City of Vancouver Board of Variance when Vancouver City Council rescinded the appointments of all of the Board members on June 29, 2006. He, and the four other former members of the Board, challenged Council's action by commencing a petition for judicial review, which was dismissed, with costs, by Bauman J. on July 25, 2006. Mr. Martin appealed, under the style of cause, "Terry Martin, on behalf of the Vancouver Board of Variance and Parking Variance Board".

**2** The issue on appeal is whether Council acted within its statutory authority, in good faith, and in accordance with the principles of procedural fairness in rescinding the appointments of all of the members of the Board of Variance without notice, a hearing, or cause.

**3** As the chambers judge's reasons reveal, this is an unusual case that mixes political decision-making with principles of administrative law. In my opinion, the chambers judge was correct in concluding that, in the context of the statutory framework within which Council functions and the nature of the decision in question, Council breached no principles of procedural fairness and acted in good faith in rescinding the appointments of the members of the Board. The chambers judge's reasons for judgment may be found at 2006 BCSC 1260, 59 B.C.L.R. (4th) 10.

***Preliminary Matters***

*Appellants and Style of Cause*

**4** Mr. Martin has no authority or standing to represent the Board of Variance, the Parking Board of Variance, or any of the other former members of the Board of Variance whose appointments were rescinded at the same time as his. He may appeal only on his own behalf. I would order that the style of cause of the proceeding in this Court be amended by deleting the words "on behalf of the Vancouver Board of Variance and Parking Variance Board".

*Fresh Evidence*

**5** The appellant applied to admit fresh evidence on the appeal, consisting of his affidavit sworn April 5, 2007, responding to and providing further information on some of the factual background matters relating to the rescission of the appointments of the Board members. An affidavit of his counsel explained that this evidence was not tendered on the hearing of the petition because of time pressures to have the hearing on short notice, difficulties in obtaining documents from the City, and matters raised in the respondent's factum.

**6** I would not admit the fresh evidence. To the extent that it was discoverable by reasonable diligence before the hearing of the petition, time pressures on counsel do not provide a reasonable explanation for failing to put it before the court. To the extent that it is in response to the matters raised in the respondent's factum, it would not be practically conclusive of any issue before this Court, as will be seen from my reasons.

*Dunsmuir v. New Brunswick*

**7** Following the release by the Supreme Court of Canada of the reasons for judgment in ***Dunsmuir v. New Brunswick***, 2008 SCC 9, both parties made written submissions on the impact of that decision, if any, on this appeal.

**8** ***Dunsmuir*** addressed two issues of possible relevance to this appeal. First, the Court dealt with the test for determining the appropriate standard of review on judicial review of decisions of administrative tribunals, abolishing the "patent unreasonableness" standard of review. Second, the Court considered the application of the analysis set out in ***Knight v. Indian Head School Division No. 19***, [1990] 1 S.C.R. 653, as to whether an administrative decision-maker owes a duty of procedural fairness.

**9** I will deal with each of these issues in the course of my reasons.

***Statutory Framework***

**10** The statutory framework within which Council makes decisions provides the background and context to the discussion of the issues arising on this appeal.

**11** Council is an elected body which exercises delegated powers set out in the ***Vancouver Charter***, S.B.C. 1953, c. 55, as amended.

*Planning and Development*

**12** Council regulates zoning and development in the City of Vancouver by enacting by-laws under Part XXVII ("Planning and Development") of the ***Vancouver Charter***. Acting under ss. 565, 565.1, and 565A(a), Council enacted Zoning and Development Bylaw No. 3575 (the "Zoning By-law"), which sets out which uses of land are allowable in each of 70 districts, and prohibits development without a development permit. In accordance with s. 565A(d), Council delegated discretionary powers relating to zoning to the Director of Development and the Development Permit Board.

*The Board of Variance*

**13** The provisions of the ***Vancouver Charter*** establishing and governing the Board of Variance are also found in Part XXVII, as part of the planning and development powers and procedures of Council.

**14** Section 572 of the ***Vancouver Charter*** provides that Council must establish the Board of Variance and appoint the members of the Board, and that Council has the power to rescind appointments and establish the Board's procedure. The relevant provisions of s. 572 are:

> (1) The Council shall establish by by-law a Board, consisting of 5 members appointed by the Council.
> (1.1) The members of the Board shall elect one of their number as Chair of the Board.

> (2) Subject to subsection (2.1), each member of the Board shall hold office for a term of three years or until the member's successor is appointed, but a person may be reappointed for a further term or terms.
> (2.1) The Council may rescind an appointment to the Board at any time.
> (3) The Council may provide, by by-law or resolution, for the remuneration of members of the Board, in such amounts as the Council thinks fit, and may also provide for the payment of a fee for the hearing of an appeal before the Board.
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> ...
>
> (9) The by-law establishing the Board shall set out the procedure to be followed by the Board, including the manner in which appeals are to be lodged and the method of giving notices required under section 573.

[Emphasis added.]

**15** In rescinding the appointments of the Board, Council acted under s. 572(2.1).

**16** Section 572 of the ***Vancouver Charter*** was amended in 2003 (by s. 20 of the ***Community, Aboriginal and Women's Services Statutes Amendment Act, 2003***, S.B.C. 2003, c. 15) to provide, among other things, that Council has the power to appoint all five members of the Board, and to add s. 572(2.1), giving Council the power to rescind an appointment to the Board at any time.

**17** Before those amendments, s. 572(1) provided that two members of the Board were to be appointed by Council, two were to be appointed by the Lieutenant-Governor in Council, and a Chairman was to be appointed by a majority of the other appointees. Section 572(8) provided: "The Chairman may be removed at any time by the Lieutenant-Governor in Council on the recommendation of the Council". There was no provision for the removal or rescission of the appointments of the other members of the Board.

**18** By way of comparison, it is interesting to note that the ***Local Government Act***, R.S.B.C. 1996, c. 323 ("***LGA***") (previously the ***Municipal Act***), has always provided for the removal of all the members of a board of variance established by a local government. Prior to 2003, ss. 899(1) to (3) of the ***LGA*** provided for the establishment of boards of variance, with members appointed by the council, the minister, and the other appointees. Sections 899(9) and (10) provided:

> (9) A local government may remove its appointee at any time.
> (10) The Lieutenant Governor in Council may
>
> (a) remove the minister's appointee at any time, and
> (b) on the recommendation of a local government, remove the person appointed by the other appointees.

**19** The ***LGA*** was also amended in 2003 by the ***Community, Aboriginal and Women's Services Statutes Amendment Act, 2003***. Amendments to s. 899 gave local governments the power to appoint all the members of the local board of variance. Section 899(10) was repealed, and s. 899(9) was amended to provide: "A local government may rescind an appointment to a board of variance at any time."

**20** To my knowledge, and that of counsel for both parties, this case is without precedent, and there has been no judicial consideration of the power of a municipal council to rescind the appointments of members of

a board of variance "at any time".

*Jurisdiction of the Board of Variance*

**21** The Board is given jurisdiction under s. 573(1) of the ***Vancouver Charter*** to hear certain types of appeals relating to zoning and development matters. As explained in ***Niebuhr et al. v. Vancouver (City) Board of Variance***, 2006 BCSC 1425, at para. 18, 60 B.C.L.R. (4th) 135, aff'd on other grounds, 2007 BCCA 528 (supp. reasons 2007 BCCA 593), leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 3, the Board has the jurisdiction to hear "decision appeals" (under s. 573(1)(a) and (e)), which are appeals from the decisions of the Director of Planning and the Development Permit Board, "variance appeals" (under s. 573(1)(b)), which are appeals for relief from strict enforcement of a zoning by-law, and "other appeals" (non-conformity appeals under ss. 573(1)(c) and (d) and "tree appeals" under s. 573(1)(f)).

**22** The jurisdiction of the Board became a disputed issue between the Board and City staff, and was one of the issues Council considered when it rescinded the appointments of the members of the Board. Challenges to the Board's exercise of its jurisdiction by developers led to two court decisions which restricted the scope of the Board's jurisdiction: see ***No. 249 Cathedral Ventures Ltd. v. Vancouver (City) Board of Variance***, 2005 BCCA 428, 47 B.C.L.R. (4th) 297, and ***Niebuhr***.

***Factual Background***

**23** The Board is composed of five "volunteers from the general public" (quoting from a newspaper advertisement posted by the City seeking applicants for appointment to the Board). Board members are not paid a salary, but receive reimbursement of their expenses. The Board normally meets every second week for one-half day to one day.

**24** The appellant's appointment to the Board began October 1, 2005, and, in accordance with s. 572(2) of the ***Vancouver Charter***, would have expired, subject to reappointment and to rescission, three years from that date, October 1, 2008.

**25** In an *in camera* meeting held June 27 and 29, 2006, Council reviewed a package of written information and received presentations from City staff for the purpose of considering a resolution to rescind the appointments of all of the members of the Board.

**26** A member of the City's legal staff provided an outline of the role of the Board. She described the Board as a "quasi-judicial tribunal established as a mandatory requirement under the *Vancouver Charter*", and outlined the jurisdiction of the Board to hear variance appeals and decision appeals. She made reference to the ***Cathedral Ventures*** decision, noting it was the first judicial consideration of the Board's jurisdiction. (The ***Neibuhr*** decision also considered the Board's jurisdiction. It was decided after Council's decision to rescind the appointments to the Board.)

**27** Included in the material Council received was a memorandum prepared by the Deputy City Manager dated April 18, 2006, in response to a request made by Council on March 21, 2006. The memorandum discussed four matters: a recent appeal dealt with by the Board (a letter from a developer complaining about the Board's decision was attached to the memorandum); the number of appeals "over the past several years" from decisions of the Director of Planning where the Board had overturned the Director's decision; increases in the Board's legal expenses (from $965 in 2004 to $70,757 in 2005) relating primarily to judicial review proceedings, and the request by the Board for an amendment to the ***Vancouver Charter*** to expand its jurisdiction to hear appeals from all decisions made by the Development Permit Board, not just from "relaxations" as provided by s. 573(1)(e) and as decided in ***Cathedral Ventures***.

**28** The material also included a summary of "Board of Variance Issues" to be discussed at the meeting. Among these were "Staff Issues", which were addressed by Michael Zora, the General Manager of Human Resources for the City. In his affidavit filed in these proceedings, Mr. Zora described a disagreement between the City and Mr. Martin concerning the Board's jurisdiction to hire its staff. Mr. Martin took the position that the Board had the authority to hire its staff independently from the City, while the City maintained that it had a legal interest in ensuring that Board staff were qualified as City employees.

**29** Another issue included in the summary was "Budget Over-Expenditure - Legal Counsel, Overtime". A summary of Board expenditures showed overtime expenses for 2005 to be $47,066, and for 2006 to date to be $21,229, compared with a 2006 budget of $5,320. The affidavit of the Manager of Employee Relations for the City, Mr. Naklicki, addressed a disagreement concerning overtime worked by the Board's secretary on weekends after he took time off during the week, and difficulties City staff had in attempting to deal with the Board on this issue.

**30** The chambers judge succinctly summarized Council's concerns about the Board's conduct (at para. 41):

> (i) the Board's assertion that it, to the entire exclusion of the City, employs the staff members assigned to the Board;
> (ii) the Board's management of its budget, in particular its incurrence of substantial legal fees and overtime costs; and
> (iii) the number of complaints which the City has received about various decisions of the Board, especially in latter years.

**31** Council's *in camera* proceeding was held pursuant to s. 165.2(1)(a) of the ***Vancouver Charter***, which permits a part of a Council meeting to be closed to the public if the subject matter being considered relates to "personal information about an identifiable individual who holds or is being considered for a position as an officer, employee or agent of the city or another position appointed by the city". The chambers judge commented (at para. 45): "[T]raditionally appointments to civic agencies are handled *in camera* by City Council". (No objection was apparently taken to the *in camera* procedure in Supreme Court, but in this Court the appellant suggested that because "powers of termination are inimical to an independent Board", Council should have dealt with the rescission of the appointments of the entire Board in public.)

**32** Council voted to rescind the appointments of all five of the members of the Board.

**33** No notice was given to the Board members that Council intended to consider a resolution rescinding their appointments, and Council gave no reasons for the rescissions. As noted by the chambers judge (at para. 39), the City filed in these proceedings the material it considered in its *in camera* meeting, for the purpose of rebutting the allegation that it had acted in bad faith.

***Chambers Judge's Reasons for Judgment***

**34** The three issues presented to the chambers judge were the same as those raised on appeal.

**35** First, the petitioners (the Board members whose appointments had been rescinded) argued that the Board was an independent, quasi-judicial tribunal whose members were entitled to a degree of security of tenure. Thus, they said, Council did not have the authority under s. 572(2.1) of the ***Vancouver Charter*** to rescind their appointments without reasonable cause.

**36** Second, the petitioners argued that they were entitled to be afforded procedural fairness before being terminated, including notice of the intention to rescind their appointments, the opportunity to make submissions and be heard, and reasons for the rescission.

**37** Third, the petitioners argued that Council acted in bad faith or for an improper purpose in rescinding their appointments.

**38** The chambers judge rejected all of these arguments.

**39** The chambers judge interpreted s. 572(2.1) of the ***Vancouver Charter*** as clearly providing that the members of the Board of Variance serve "at pleasure" (at para. 27), citing in support, ***Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch***, [2001] 2 S.C.R. 781. He said that the phrase "at any time" in s. 572(2.1) was "clear, plain language", and must be given effect. He concluded that that the Board members are not entitled to security of tenure, and their appointments may be rescinded without cause (at paras. 28, 32).

**40** The chambers judge rejected the allegation that Council had acted in bad faith, including for an improper purpose, on the basis that "the concerns apparently motivating City Council are not alien or irrelevant considerations in the statutory scheme", and that nothing in the record established "bad faith on the part of Council as that term has been judicially defined" (at paras. 47-50). He dismissed as "rhetoric" the petitioners' submission that Council was acting to reign in an independent-minded Board with the intent of appointing a compliant and intimidated Board (at para. 50).

**41** The chambers judge held, after considering ***Knight***, that Council owed the Board members no duty of procedural fairness, and members of the Board were not entitled to notice and an opportunity to be heard before their appointments were rescinded (at para. 73). This part of his decision focused on the fact that Council had rescinded all appointments to the existing Board: "Institutionally speaking, there has been a clean sweep" (at para. 70). He concluded that Council was motivated by "general policy concerns" and was acting in a "legislative, policy-driven, role", rather than as an adjudicator determining the right of a particular individual to hold public office (at para. 72).

***Issues on Appeal***

**42** The appellant claims the chambers judge erred in finding that s. 572(2.1) permitted Council to terminate appointments to the Board without cause, that Council owed him no duty of procedural fairness, and that Council did not act in bad faith.

**43** At bottom, the appellant's argument is that Council owed the members of the Board of Variance a duty of procedural fairness in the rescission of their appointments, because Board members are entitled to security of tenure to protect their independence from the influence of Council and the staff of the planning and development departments of the City, and in any event, in reliance on the principles of procedural fairness set out in ***Knight***.

**44** The respondent takes the position that the chambers judge was correct: the Board is not entitled to any security of tenure as it is not an independent board; it is not entitled to procedural fairness, for the reasons given by the chambers judge; and Council did not act in bad faith.

***Analysis***

*Standard of Review*

**45** The role of this Court in reviewing the decision of the chambers judge with respect to the standard of review is to determine whether the chambers judge chose and applied the proper standard of review, and if he did not, to determine the proper standard and apply it to the decision under review: see ***Dr. Q. v. College of Physicians and Surgeons of British Columbia***, [2003] 1 S.C.R. 226, at para. 43, 2003 SCC 19.

**46** The abolition of the "patent unreasonableness" standard of review by the Supreme Court of Canada in ***Dunsmuir*** does not change the analysis of the issues arising on this appeal. The issues before the chambers judge were matters of jurisdiction, procedural fairness, and bad faith. On any analysis, the proper standard of review by a reviewing court for such issues is correctness. The chambers judge did not expressly refer to the standard of review, but he properly applied the correctness standard.

*Security of Tenure*

**47** The appellant's position is that the Board is a quasi-judicial tribunal, charged with carrying out court-like functions in making decisions that affect the rights of property owners. He says that, to properly carry out this function, members of the Board are required to be independent of the influence of Council and City staff, with security of tenure to protect them from termination if Council disagrees with their decisions. Thus, he argues, s. 572(2.1) should be read as requiring not only that, before appointments are rescinded, members be given notice and an opportunity to be heard, but as requiring that rescission of an appointment only be made for cause, or for reasons of reorganization or restructuring of the Board.

**48** Whether members of the Board are entitled to independence, including security of tenure, turns on the

interpretation of the provisions of the statute that governs the existence and structure of the Board, the ***Vancouver Charter***, and in particular, s. 572(2.1). That is clear from the statements of McLachlin C.J.C. in ***Ocean Port*** (at paras. 20-22) (quoted by the chambers judge at para. 18 of his reasons):

> This conclusion, in my view, is inescapable. It is well established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as a whole to determine the degree of independence the legislature intended.
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> Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice: *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495, at p. 503; *Law Society of Upper Canada v. French*, [1975] 2 S.C.R. 767, at pp. 783-84. In such circumstances, administrative tribunals may be bound by the requirement of an independent and impartial decision maker, one of the fundamental principles of natural justice: *Matsqui*, [1995] 1 S.C.R. 3 (*per* Lamer C.J. and Sopinka J.); *Régie*, [1996] 3 S.C.R. 919 at para. 39; *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405. Indeed, courts will not lightly assume that legislators intended to enact procedures that run contrary to this principle, although the precise standard of independence required will depend "on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make": *Régie*, at para. 39.
>
> However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. See generally: *Innisfil (Corporation of the Township of) v. Corporation of the Township of Vespra*, [1981] 2 S.C.R. 145; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *Ringrose v. College of Physicians and Surgeons (Alberta)*, [1977] 1 S.C.R. 814; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105. Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question.

[Emphasis added.]

**49** Chief Justice McLachlin explained (at paras. 23-24) the "fundamental distinction between administrative tribunals and courts". Because courts exercise inherent jurisdiction, they "are constitutionally required to possess objective guarantees of both individual and institutional independence". The requirement of judicial independence developed to insulate judges from external influence, "most notably the influence of the executive".

**50** By contrast, administrative tribunals are "created precisely for the purpose of implementing government policy". That may require them to make quasi-judicial decisions. Because of their policy-making function, it is "the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge" its responsibilities. As a "general rule", tribunals do not attract constitutional requirements of judicial independence.

**51** In ***Ocean Port***, the issue was whether the appointees to the Liquor Appeal Board, a tribunal that heard appeals from licensing suspensions and had the power to impose penalties, had sufficient independence in the form of security of tenure. Section 30(2)(a) of the ***Liquor Control and Licensing Act***, R.S.B.C. 1996, c. 267, provided that "[t]he chair and members of the appeal board serve at the pleasure of the Lieutenant-Governor in Council". The Supreme Court of Canada held (at para. 27) that this statutory language was "unequivocal"; "[g]iven the legislature's willingness to countenance 'at pleasure' appointments with full knowledge of the processes and penalties involved ... there is no room to import common law doctrines of independence."

**52** Applying the principles set out in ***Ocean Port***, the chambers judge concluded (at para. 27) that the "power to rescind appointments 'at any time' makes them 'at pleasure' appointments", which meant that Council was not required to articulate any cause for exercising its power to rescind an appointment "at any time" (at para. 32).

**53** I agree with the result of the chambers judge's analysis -- Council had the power to rescind the appointments to the Board of Variance without articulating any cause. However, I would reach that conclusion by a different analysis.

**54** I am not comfortable with the use of the phrase "at pleasure" in describing the appointments by Council to the Board. As noted by the chambers judge (at para. 31), quoting from ***Chadee v. Ross*** (1996), 139 D.L.R. (4th) 589 at 592 (Man. C.A.), where the majority of the Court quoted from ***Halsbury's Laws of England***, 4th ed., vol. 8, at para. 1106, the phrase derives from the common law principle that all public officers and servants of the Crown hold their positions at the pleasure of the Crown, and are subject to dismissal at any time without cause assigned.

**55** In ***Chadee***, the Manitoba Court of Appeal considered whether an Indian Band could exercise inherent powers of the Crown to hire and dismiss employees "at pleasure". The Court unanimously decided that the Band did not have the power to dismiss at pleasure. In concurring reasons, Kroft J.A. noted (at 602) that "in recent years this ancient power has been subject to critical review and expressions of reservation", citing, among other cases, ***Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police***, [1979] 1 S.C.R. 311 at 322-23, where Laskin C.J. said, "the old common law rule, deriving much of its force from Crown law ... has an anachronistic flavour", and ***Knight***, where the Supreme Court held that a school board employee who held his appointment "at pleasure" was nonetheless entitled to some degree of procedural fairness.

**56** The phrase "at pleasure" has a well-understood legal meaning, as used by the chambers judge in this case -- an employee, officer, or other appointee appointed "at pleasure" may be dismissed without cause. Where the term is used in a statute, as in the ***Liquor Control and Licensing Act*** considered in ***Ocean Port***, it is clear the legislature intended that the appointee have no security of tenure. In this case, however, the legislature did not use that phrase, and it is not clear to me that Council, a delegated body, exercises powers of the Crown in appointing and rescinding the appointments of members of the Board.

**57** I prefer to base my conclusion that the members of the Board were not entitled to security of tenure and that Council had the power to rescind their appointments without cause on an analysis of the nature and function of the Board, and the words of s. 572(2.1), in the context of the ***Vancouver Charter***. The question of the Board's degree of independence turns on the legislature's intention as expressed in that statute, interpreted by applying the accepted principle of statutory interpretation. This was stated by Iacobucci J., writing for the Supreme Court of Canada, in ***Bell ExpressVu v. Rex***, [2002] 2 S.C.R. 559, at para. 26, 2002 SCC 42, where he adopted "Elmer Driedger's definitive formulation":

> Today there is only one principle or approach, namely, the words of an Act are to 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 Parliament.

**58** There is no dispute about the description of the Board as a quasi-judicial tribunal. The provisions of the ***Vancouver Charter*** governing the functions of the Board grant it some court-like features: it hears appeals

from persons aggrieved by zoning decisions of the Director of Planning (s. 573(1)(a)); it makes decisions that cannot be appealed (s. 573(6)); its members are not allowed to hold any municipal office (s. 572(4)); its members have a three-year tenure (s. 572(2)); it has the power to grant exemptions and to grant or deny appeals from decisions of the Director of Planning (s. 573(1)(b) and (e)); it must provide notice to persons affected and post public notice (s. 573(3)); and it conducts hearings in open meetings (s. 573(4)). Its procedure is informal, however: evidence is not taken under oath, members may make site visits, and it does not give reasons for its decisions.

**59** Despite these quasi-judicial functions, the Board's jurisdiction and powers are limited. It operates within the overall scheme of the planning and development powers of Council as set out in the ***Vancouver Charter***. It makes no policy; it resolves specific disputes between property owners and staff of the planning and development departments. Its function is to determine whether discretionary decisions of the Director of Planning and the Development Permit Board were made in accordance with the objectives of the by-laws passed by Council. Section 573(2) of the ***Vancouver Charter*** expressly provides that the Board must use its powers only in a manner consistent with Council's purposes:

> (2) The Board shall not allow any appeal solely on the ground that if allowed the land or buildings in question can be put to a more profitable use nor unless the following conditions exist: --
>
> (a) The undue or unnecessary hardship arises from circumstances applying to the applicant's property only; and
> (b) The strict application of the provisions of the by-law would impose an unreasonable restraint or unnecessary hardship on the use of the property inconsistent with the general purpose and intent of the zoning by-law; and
> (c) The allowance of the appeal will not disrupt the official development plan.

[Emphasis added.]

**60** Thus, the scheme of the ***Vancouver Charter*** provides that Council establishes the planning and development framework within which the Board functions. The ***Vancouver Charter*** also provides that Council exercises statutory control over the Board by making and rescinding appointments, providing for remuneration for Board members (s. 572(3)), and determining the Board's procedure (s. 572(9)).

**61** The statutory framework within which the Board functions leads me to conclude that the Board was not intended to operate with more than a minimal degree of independence from Council. The question remains, however, whether the members were entitled to any security of tenure that would require that they be terminated only for reasonable cause.

**62** The appellant argues that s. 572(2.1) is ambiguous, in that it does not expressly say that Council may rescind an appointment "without cause". He says that in the context of s. 572(2), which provides for three-year appointments for Board members, it is wrong to interpret s. 572(2.1) as unequivocally ousting rights to security of tenure. He notes that in ***Ocean Port*** (at para. 21), the Supreme Court of Canada said that where the legislation is silent or ambiguous, "courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice".

**63** The respondent argues, on the other hand, that where the legislature wishes to provide that a position may be terminated only for cause, it does so in clear language, and the absence of that language in s. 572(2.1) raises no ambiguity. For example, s. 163 of the ***Vancouver Charter*** provides that City employees "shall be subject to termination upon one month's notice in writing, but any employee may be dismissed without notice for good cause". Another example is s. 230 of the ***Vancouver Charter***, which provides for the appointment and removal of accountants to audit the City's accounts. Section 230(3) provides: "The auditors'

appointment may be terminated at any time for cause upon a vote of two-thirds of all the members of Council."

**64** The respondent also contrasts s. 572(2.1) with the provisions of s. 152 of the ***Community Charter***, S.B.C. 2003, c. 26, which provides different procedures for the termination of municipal officers, depending on whether termination is for cause:

> (1) Subject to a contract of employment and subject to providing the officer with an opportunity to be heard, the appointment of a municipal officer may be terminated by the council as follows:
>
> (a) in the case of termination for cause, by immediate termination without any period of notice;
> (b) in any other case, by termination on reasonable notice.
>
> (2) A termination under subsection (1)(b) may only be made by the affirmative vote of at least 2/3 of all council members.

**65** The respondent notes that these provisions relate to termination of municipal officers in other municipalities in the province, and argues that they provide an obvious contrast with the unqualified power the legislature granted to Council to rescind Board appointments under s. 572(2.1).

**66** Other British Columbia statutes provide for the rescission of an appointment "at any time", both with and without reference to cause. For example, s. 2(5) of the ***Podiatrists Act***, R.S.B.C. 1996, c. 366, provides: "The Lieutenant Governor in Council may remove a board member [of the board of examiners] at any time for neglect of duty, incompetence, or misconduct", while s. 22(1) of the ***University Act***, R.S.B.C. 1996, c. 468, provides: "The Lieutenant Governor in Council may, at any time, remove from office an appointed member of the board [of governors]."

**67** In these rescission provisions, the legislature has expressly set out when cause must be shown for dismissal from office. The absence of any reference to cause in s. 572(2.1) does not create any ambiguity. I interpret s. 572(2.1) as setting out the legislature's intention that Council's power to rescind appointments to the Board may be exercised without reasonable cause.

**68** Thus, I conclude, based on a consideration of the words of the ***Vancouver Charter***, in particular s. 572(2.1), in the context of the Act as a whole, including the scheme and object as it relates to Council's powers to govern planning and development, that the legislature intended Council to have the power to rescind the appointments of members of the Board without having to have reasonable cause. The Board is not an independent tribunal, with security of tenure. It carries out a limited role in deciding specific disputes relating to some planning and development matters in the context of Council's plenary powers over that process. Council was given the explicit power, in 2003, to rescind appointments "at any time". In the context of the ***Vancouver Charter*** as a whole, I find that Council's power includes rescinding the appointments to the Board without reasonable cause.

*Procedural Fairness*

**69** Although Council had the power to rescind the appointments of the members of the Board without reasonable cause, the question remains whether they were entitled to notice and an opportunity to be heard before Council acted.

**70** The chambers judge engaged in a detailed analysis of the ***Knight*** decision, and concluded that, in the circumstances of this unusual case, where Council effectively dealt with the Board as an institution and not with the individual members, Council was not required to provide the members with notice and an opportunity to be heard.

**71** In ***Knight***, L'Heureux-Dubé J., for the majority of the Supreme Court of Canada, concluded that there is a general duty of procedural fairness, "autonomous of the operation of any statute" (at 668), resting on a public body in an employer-employee relationship. In ***Dunsmuir***, the Supreme Court of Canada determined that the ***Knight*** analysis does not apply where the employment relationship at issue is governed by contract. Justice Bastarache, for the majority, said (at para. 114): "Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law." On my reading of ***Dunsmuir***, the procedural fairness principles articulated in ***Knight*** continue to apply to non-contractual employment relationships and to public appointments from which the holder may be dismissed without cause: see para. 115. Thus, the ***Knight*** analysis continues to be applicable in this case.

**72** Justice L'Heureux-Dubé's conclusion in ***Knight***, as qualified by ***Dunsmuir***, that public employees not protected by contract are entitled to a general duty of procedural fairness is compelling. It goes against the judicial grain to deny even minimal procedural fairness -- notice and the opportunity to be heard -- to a person whose position is rescinded without cause. Justice L'Heureux-Dubé's reasoning (at 674) is persuasive:

> The justification for granting to the holder of an office at pleasure the right to procedural fairness is that, whether or not just cause is necessary to terminate the employment, fairness dictates that the administrative body making the decision be cognizant of all relevant circumstances surrounding the employment and its termination (*Nicholson, supra*, at p. 328, *per* Laskin C.J.) One person capable of providing the administrative body with important insights into the situation is the office holder himself.

**73** Justice L'Heureux-Dubé's comments (at 668) that "the duty to act fairly does not depend on doctrines of employment law, but stems from the fact that the employer is a public body whose powers are derived from statute, powers that must be exercised according to the rules of administrative law", and (at 669) that "the analysis must encompass arguments of public policy", have resonance in this case. She explained further (at 675):

> There is also a wider public policy argument militating in favour of the imposition of a duty to act fairly on administrative bodies making decisions similar to the one impugned in the case at bar. The powers exercised by the appellant Board are delegated statutory powers which, as much as the statutory powers exercised directly by the government, should be put only to legitimate use. As opposed to the employment cases dealing with "pure master and servant" relationships, where no delegated statutory powers are involved, the public has an interest in the proper use of delegated power by administrative bodies.

**74** However, not every decision by a public body to terminate the appointment of the holder of a public office is subject to the duty of procedural fairness. Justice L'Heureux-Dubé set out (at 669) three factors for consideration in determining the existence of a duty to act fairly: the nature of the decision to be made by the administrative body, the relationship existing between that body and the individual, and the effect of that decision on the individual's rights.

**75** In essence, the majority in ***Knight*** found that, where a public body decides to terminate the employment of an individual, there is a general duty to act fairly if the decision is administrative and specific (as opposed to legislative and general) and final (as opposed to preliminary) (at 670), the person dismissed holds an office at pleasure or from which he may be dismissed only for cause (at 676), and the decision has a significant impact on the individual (at 677).

**76** There are important elements of this case that distinguish it from ***Knight***. The members of the Board were not employees or municipal office-holders. They were volunteers, serving part-time, for no remuneration, and without security of tenure. While Council is an administrative public body with statutory powers, it is also an elected, legislative public body which has been given wide powers in the context of planning and development, including a significant degree of control over the composition of the Board.

**77** As the chambers judge emphasized, Council did not rescind the Board members' appointments as individuals. He found (at para. 71), "Council had a concern with the Board as an institution." He characterized the nature of the decision to rescind all of the appointments as "legislative" and "policy-driven" (at para. 72).

**78** I agree with the chambers judge that in all of these circumstances, Council was not required to give notice to the appellant that it was intending to consider a resolution rescinding his appointment and provide him an opportunity to respond. The reasons for Council's decision should not be confused with the process it followed; however, the fact is that Council was concerned with institutional, not personal, matters relating to the Board. The chambers judge described the concerns (at para. 72) as "budgetary, personnel, and reputational concerns with the Board in the community". The nature of Council's decision, as found by the chambers judge, was more general and policy-driven than specific and administrative. The rescission did not deprive the Board members of their livelihoods. Thus, the three ***Knight*** factors do not weigh in favour of imposing a duty in this case.

*Bad Faith*

**79** I am in substantial agreement with the reasons of the chambers judge for rejecting the allegation that Council did not act in good faith in rescinding the appointments to the Board.

**80** As he noted, in the context of municipal law, good faith is established by the absence of bad faith: see ***Knox v. Kindersley (Town)*** (1984), 34 Sask. R. 114 at para. 14 (Q.B.):

> The phrase "good faith" is defined in Rogers, *The Law of Canadian Municipal Corporations*, p. 397, paragraphs 65-43 as follows:
>
> > This simply means the action of their members must not be founded upon fraud, oppression or improper motives ... The presence of good faith is established by the absence of bad faith, but in any case, the onus is upon those alleging it to establish a charge of improper conduct on the part of the council members.

**81** The chambers judge found, correctly, that in the context of the control Council has over the Board's composition and procedure, it was proper for it to consider the matters of staffing, budgets, and how the Board exercises its jurisdiction (at para. 47).

**82** I also agree with the chambers judge's finding (at para. 50):

> The petitioners' essential submission that Council is reining in an independent-minded Board with the intention of appointing a compliant and intimidated Board in the future is, I say respectfully, rhetoric which is not supported by the evidence in the record. The bad faith submission cannot prevail.

***Costs***

**83** The chambers judge ordered that the City was entitled to the costs of the petition (at para. 76). He rejected the petitioners' argument that because the matter was one of public interest there should be no order for costs. Because of the allegation of bad faith, he held that costs should follow the event.

**84** The appellant seeks an order in this Court setting aside the chambers judge's order of costs. That order was a matter of the chambers judge's discretion. As such, this Court may interfere only if he misdirected himself, acted on a wrong principle or on irrelevant considerations, or his decision was so clearly wrong as to amount to an injustice: see ***Ward v. Kostiew*** (1989), 42 B.C.L.R. (2d) 121 at 127 (C.A.). The appellant has cited no ground for interference by this Court.

***Conclusion***

**85** Council acted within the scope of its statutory authority, in good faith, and in accordance with the

principles of procedural fairness in rescinding the appointments of the members of the Board, including the appellant, without reasonable cause, without notice, and without providing the members an opportunity to be heard. The chambers judge made no error in awarding costs in favour of the City.

**86** It follows that I would dismiss the appeal.

R.E. LEVINE J.A.
M.A. ROWLES J.A.:-- I agree.
S.D. FRANKEL J.A.:-- I agree.

* * * * *

Corrigendum
Released: May 9, 2008

The last sentence of paragraph 85 has been changed from "He made no error in awarding costs in favour of the City" to "The chambers judge made no error in awarding costs in favour of the City".

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