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Procedural Fairness in the Issuance of a Ministerial Order to Dismiss a Municipal Councilor under Section 574 of the *Municipal Government Act*

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Case Commented On: *Buryn v Alberta (Minister of Municipal Affairs),* 2017 ABQB 613 (CanLII)

Municipalities in Alberta are creatures of statute and thus subject to both the oversight of the Minister of Municipal Affairs (Minister) and Alberta courts. When the affairs in a municipality go offside, the *Municipal Government Act*, RSA 2000, c M-26 (MGA) provides mechanisms for bringing matters back into line. Municipal affairs in Thorhild County seem to have taken a turn for the worse several years ago, and led to the submission of a petition by electors asking the Minister to inquire into the conduct of the Thorhild municipal council and its chief administrative officer. The MGA provides the Minister with authority to conduct an inquiry into the affairs of a municipality or the conduct of municipal councilors. These powers are exercised on a fairly regular basis, with 33 entries listed on the government website since December 2009. The inspection into the affairs at Thorhild culminated in a Ministerial Order dismissing three members of the Thorhild council. On the eve of the recent municipal election, in *Buryn v Alberta (Minister of Municipal Affairs)* Madam Justice Dawn Pentelechuk quashed the Ministerial Order as unlawful for failing to afford the councilors procedural fairness.

Thorhild County is a municipality located in central Alberta, 45 minutes north of Edmonton. Thorhild has approximately 3,400 people including seven hamlets. There are no incorporated urban centres located within Thorhild's boundaries. The economy of Thorhild is primarily driven by agriculture with secondary contributions from recreation and services to the energy industry. There are 5 elected councilors sitting on the Thorhild municipal council.

In July 2014 the Minister received a petition from electors in Thorhild requesting the Minister to undertake an inquiry into the conduct of the Thorhild municipal council and its chief administrative officer. Section 572 of the MGA provides the Minister with authority to conduct an inquiry into the affairs of a municipality or the conduct of municipal councilors. In response to this petition, the Minister engaged the powers set out in section 571 to order an inspection into the management, administration and operations of the Thorhild municipality.

The inspection produced a report in June 2015 that identified significant governance concerns and suggested 46 recommendations for improved governance and operations. The noted areas of concern in the report are scathing of the governance in Thorhild, and include: open animosity amongst councilors, significant disagreement over the effectiveness of the chief administrative officer and failure of that officer to act in the best interests of the municipality, councilors acting to advance pecuniary interests, failure to comply with the MGA, disproportionate and inequitable

taxation across different hamlets in the municipality, and failure to adhere to procedural fairness in human resources matters.

In September 2015 the Minister issued the first of several Orders pursuant to section 574 of the MGA to implement the recommendations of the inspection report. Ministerial Order 119/15 directed the Thorhild council on a number of governance matters including the removal of the chief administrative officer and reporting to the Minister. In December 2015 the Minister issued two Ministerial Orders against Thorhild. In Ministerial Order 166/15 the Minister directed Thorhild council to initiate legal proceedings to declare a member of council disqualified for bias regarding a pecuniary interest. And in Ministerial Order 171/15 the Minister appointed administrative officers under section 575 of the MGA to oversee the affairs of Thorhild. These Orders were subject to legal challenge on grounds of *ultra vires* and procedural fairness, and it would appear this application was dismissed in May 2017 (*Buryn* at para 13). The written argument filed by Alberta Justice in the previous challenge provides a good overview of the events which led to the current proceedings.

The Ministerial Order subject to the proceedings in *Buryn* is Order 021/16 issued in March 2016 which, pursuant to authority granted to the Minister in section 574(2) of the MGA, dismisses three members of Thorhild council for failing to comply with Ministerial Order 119/15. The three council members applied for judicial review of Ministerial Order 021/16, seeking to have the Order quashed because the Minister failed to afford them procedural fairness in making the Order. Specifically they assert the Minister unlawfully failed to give reasons for their dismissal and did not provide them with an opportunity to be heard prior to their dismissal. The councilors argue they were not informed of which portions of Ministerial Order 119/15 they failed to comply with and how it was they allegedly failed to comply.

Madam Justice Dawn Pentelechuk heard arguments in early October, and on October 12 issued her decision to quash Ministerial Order 021/16. No doubt her decision was expedited to ensure it was issued before the recent municipal elections, as 2 of the applicants were candidates to retain their council position. Justice Pentelechuk ruled the Minister failed to afford the three council members procedural fairness by not providing them with an opportunity to be heard and for not providing reasons for their dismissal.

The essence of the duty on a person exercising statutory power to afford procedural fairness is well summarized by the Supreme Court of Canada in *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643, 1985 CanLII 23 (SCC) at para 14: "This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual." In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC) the Supreme Court confirmed this duty may attach to the exercise of discretionary authority by a Minister.

However not every exercise of statutory authority will attract the duty of procedural fairness. The threshold question from *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653, 1990 CanLII 138 (SCC) is whether the exercise of authority is sufficiently targeted, as opposed to being one of general policy or legislative in nature. In many cases involving a Ministerial

decision this threshold will defeat a claim for procedural fairness. This was likely the result in the earlier challenges here to Ministerial Order 119/15, since that Order could quite comfortably be characterized as a public interest decision with application to the Thorhild electorate in general. Not so in *Buryn* where Ministerial Order 021/16 is specifically targeted at dismissing three members of council, and thus no question the Minister owes a duty of procedural fairness in issuing that Order.

So the question in *Buryn* is what entitlements flow from the duty of procedural fairness? How much process does the Minister owe in this case? The law on this point is that the content of procedural fairness depends on the context. And in its 1999 *Baker* decision, the Supreme Court provided 5 factors to consider in each case for whether procedural fairness would be relatively high or low in content. The 5 factors from Baker are: (1) nature of the decision; (2) nature of the statutory scheme; (3) impact on the person(s) affected by the decision; (4) legitimate expectations (if any); and (5) deference to choice of procedure. On the higher end, procedural fairness will demand trial-like process by the decision-maker. On the lower end, procedural fairness might be satisfied simply with prior notice that a decision adverse to one's interests will be issued. Often it will be instructive to look for precedent from earlier cases involving the same context. But in this case it seems there has been no previous judicial interpretation of sections 571 to 575 of the MGA.

Justice Pentelechuk applies the 5 Baker factors, and in what follows I outline her application along with my commentary.

Nature of the decision. This factor looks at the extent to which the decision-making process resembles that of the adversarial trial model: The closer it resembles the adversarial process, the more likely trial-like process will be required. Justice Pentelechuk looks to a 1984 decision by the Newfoundland Supreme Court considering a Ministerial decision to dismiss a municipal councilor to find that these sort of decisions are quasi-judicial in nature and demand a higher level of process (at paras 34-40). This reasoning is problematic on its face, as Justice Pentelechuk does not analyze the Minister's decision in this case. And I would respectfully submit that one needs to tread carefully around references to 'quasi-judicial' in cases rendered decades ago, as Canadian courts have tried to move away from giving such categorizations the influence they once had – particularly subsequent to *Baker*.

Nature of the statutory scheme. This factor looks to whether the impugned decision is final and not subject to internal review or appeal. The more the decision is final, the more process owed. Justice Pentelechuk observes there is no appeal of a section 574 decision by the Minister, and that this factor militates in favour of higher process (at paras 41-43).

Impact on the person(s) affected by the decision. This factor looks at the significance of the decision on the affected persons. The higher the significance, the more process owed. Justice Pentelechuk observes the impact of the Minister's decision here is significant to these individuals, as it affects their ability to continue in their chosen occupation (at para 44).

Legitimate expectations (if any). This factor looks to see if the decision-maker gave an express and unequivocal promise of certain process. If so, the duty of procedural fairness will require the

decision-maker to live up to that promise. The law in Canada is clear that there can be no legitimate expectation to a substantive outcome. I would respectfully submit that it is here where Justice Pentelechuk goes astray in her reasoning. Justice Pentelechuk goes through the record at some length on this question of legitimate expectations and seems to conclude it would not be reasonable for the three members of council to expect to be dismissed as a result of their conduct (at paras 45-73). While this may be the case, this analysis should not contribute to whether or not the three members of council had a legitimate expectation to reasons or the opportunity to be heard. If anything this analysis suggests they may have formed a reasonable expectation that they would not be dismissed, but nothing on the record suggests any express or unequivocal promise in this regard was made by the Minister and in any event this would be a promise in relation to a substantive outcome for which the doctrine of legitimate expectations does not apply. In short, I believe Justice Pentelechuk misapplies the doctrine of legitimate expectations here.

Deference to choice of procedure. This factor was not well developed by the Supreme Court in *Baker*, but nonetheless it has since evolved into the need to show deference to procedural choices made by decision-makers with expertise in making such choices. In cases such as this one where the decision-maker is a Minister, there will usually be a presumption of such expertise by virtue of office. Justice Pentelechuk does not appear to apply this factor as a presumption, but rather notes the MGA is silent on process under section 574 for the dismissal of councilors.

Justice Pentelechuk does not say so expressly, but her application of the *Baker* factors suggests she determined the overall level of process entitlements in this case to be on the higher end. She concludes the Minister is required to give the three councilors some form of hearing (she doesn't say whether this could simply be a written hearing) to respond to the case against them regarding their dismissal (at paras 83-84). She also concludes the Minister is required to give reasons for the dismissal. The councilors are entitled to know which portions of the previous Orders had not been complied with and why (at paras 77-80). Accordingly, Justice Pentelechuk quashes Ministerial Order 021/16.

I wonder whether Justice Pentelechuk's application of the *Baker* factors is correct in this case, and whether a lower level of process was owed by the Minister here. Given the amount of time that transpired between the initial investigation and the Order to dismiss, and the back and forth which occurred between the councilors and the Minister or her staff during this time, can it really be said that the three councilors did not have a sense of which directives they had failed to comply with, what the Minister expected them to do in order to be in compliance, and why the Minister found they were not in compliance? The materials discussed in Justice Pentelechuk's decision suggest that somehow these individuals were caught by surprise with Ministerial Order 021/16. I find that hard to believe. As such, I think it is arguable that some or all of the process between the councilors and the Minister that occurred after the inspection report was completed in September 2015 would constitute the hearing for the purpose of this dismissal, and that just as in the Supreme Court ruled in its 1999 *Baker* decision concerning the discretionary decision of a Minister, reasons for the dismissal could be found in material which supported Ministerial Order 021/16.

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