

**COURT FILE NUMBER** QB No 312 of 2017

**COURT OF QUEEN'S BENCH FOR SASKATCHEWAN**

**JUDICIAL CENTRE** PRINCE ALBERT

**APPLICANTS** PRINCE ALBERT RIGHT TO LIFE  
ASSOCIATION AND VALERIE HETTRICK

**RESPONDENT** CITY OF PRINCE ALBERT

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**BRIEF OF LAW  
ON BEHALF OF THE RESPONDENT, CITY OF PRINCE ALBERT**

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File Reference No.: 4884-083

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## I. INTRODUCTION

1. The Applicants, Prince Albert Right to Life Association (“PARLA”) and Valerie Hettrick (collectively, the “Applicant”), brought an originating application seeking an order, by way of judicial review, to void the City of Prince Albert’s deferral of PARLA’s request to use a Courtesy Flag Pole for the purpose of flying an anti-abortion flag depicting a fetus.
2. The Applicant argues that the City of Prince Albert’s deferral was contrary to the principles of natural justice and a violation of their right to freedom of expression guaranteed in section 2(b) of the *Canadian Charter of Rights and Freedoms*.<sup>1</sup> Further, the Applicant seeks an order directing the City to fly PARLA’s flag.
3. The Respondent respectfully submits that the deferral of PARLA’s request to fly its flag was reasonable and did not violate the *Charter*.

## II. FACTS

4. PARLA is a local non-profit organization that focuses its efforts on anti-abortion advocacy.
5. The City of Prince Albert (the “City”) is a municipal corporation under *The Cities Act*.<sup>2</sup> As noted in section 4(2) of the *Act*, the purposes of cities are the following:
  - (a) To provide good government;
  - (b) To provide services, facilities and other things that, in the opinion of council, are necessary and desirable for all or a part of the city;
  - (c) To develop and maintain a safe and viable community;
  - (d) To foster economic, social and environmental well-being;
  - (e) To provide wise stewardship of public assets.

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<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>2</sup> SS 2002, c C-11.1 [*Act*].

6. The City maintains a Courtesy Flag Pole displayed in Memorial Square in front of City Hall. The City has historically made the flag pole available to interested groups or individuals (including on past occasion to the Applicant itself) to apply to fly a particular flag on the flagpole for certain occasions.
7. On 10 May 2010, City Council adopted the *Half-Mast Policy*<sup>3</sup> which outlined policy and procedure respecting the City's use of flagpoles. This policy was eventually replaced by the *Flag Protocol Policy*<sup>4</sup> in 2016, which provided a more comprehensive policy and procedure including a section for the use of the Courtesy Flag Pole.
8. The purpose of the *Flag Protocol Policy* is set out at its outset at section 1.01:

To establish a respectful and consistent process for the raising of half-masting of flags on municipally controlled flagpoles within the City of Prince Albert. This Policy was prepared following established guidelines of the Government of Canada and the Protocol Office of Saskatchewan.

9. PARLA has been permitted to fly its flag on the Courtesy Flag Pole in Memorial Square near annually between 1997 and 2016. PARLA's new flag, since 2007, displays a cartoon fetus named "Umbert the Unborn" along with the phrases "Please Let Me Live" and "Celebrate Life Week" (the "flag"). The City and the Mayor's office have received numerous complaints regarding PARLA's flag from interested groups and citizens.
10. On 3 April 2017, Valerie Hettrick applied to City Hall, on behalf of PARLA, to have the City declare the week of May 8 to 14, 2017 "Celebrate Life Week" starting with a flag raising ceremony at City Hall's Memorial Square. On 6 April 2017, Ms. Hettrick submitted a request to fly PARLA's flag on the Courtesy Flag Pole during Celebrate Life Week.

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<sup>3</sup> City of Prince Albert, Policy No 45, *Half-Mast Policy* (10 May 2016).

<sup>4</sup> City of Prince Albert, revised Policy No 45.1, *Flag Protocol Policy* (25 January 2016) [*Policy*]. This policy was replaced again recently by City of Prince Albert, revised Policy No 45.2, *Flag Protocol Policy* (28 May 2018).

11. On 3 April 2017 the City's Executive Committee (comprised of the elected officials) reviewed and considered correspondence sent to Council from members of the public relating to PARLA's particular anti-abortion flag being raised at City Hall. The correspondence identified the flag itself was publicly controversial and evoked public concerns that it was inflammatory. The correspondence was subsequently referred to the Mayor's office for follow up, for purposes of facilitating respectful communications between PARLA and the City's Director of Community Services charged to administer the City's policy relating to the use of the City's courtesy pole.
12. On 4 April 2017, the Mayor and Ms. Hettrick spoke over the telephone to discuss the publicly raised issues respecting PARLA's particular flag and the imagery displayed on that flag. On 5 April 2017, the Mayor opined to Ms. Hettrick that PARLA's request to fly a flag would be compliant with the policy if they used a flag more broadly associated with their cause.
13. On 6 April 2017, the Mayor executed an official proclamation naming week of May 8 to 14, 2017 as "Celebrate Life Week" in the City of Prince Albert.
14. On 4 May 2017, the Mayor again telephoned Ms. Hettrick and invited PARLA to consider using a new flag for Celebrate Life Week. The Mayor noted that PARLA's flag was not consistent with any nationally or provincially recognized flag. That same day, Ms. Hettrick sent the Mayor a short message service (or text message) by cellular phone questioning whether the Canadian Trans[gender] Flag is a national flag and asking for an elaboration of the term national flag. The Mayor responded by text message, but Ms. Hettrick sent a letter asking for the same information.
15. Neither PARLA nor Ms. Hettrick responded to the Mayor's request regarding the submission of a flag more recognized by their cause.

16. In an official media release dated 5 May 2017, the City of Prince Albert advised that PARLA's request was "on hold" for the purpose of a different flag submission. The release stated that the application was deferred after the Director of Community Services, in consultation with the Mayor's office (in respect of the letters sent to Council), reviewed public concerns with the flag application, identified that the particular flag proposed was not consistent with any nationally or provincially approved flag. The release provided quotes from the Mayor:

All groups have a fair opportunity to have their issues represented and as a democratic institution, the City has an interest in respecting the right for residents to express themselves...When speaking with people it was apparent that it was the picture on the flag that was at issue. We are prepared to grant the request, but we have asked that a new flag be submitted without this particular imagery which does not give them enough time for this year.

17. The Director of Community Services did not deliver a decision respecting PARLA's request to fly a flag on the Courtesy Flag Pole.

18. Relevant portions of the *Policy* include the following:

6.05 Courtesy Flag Pole

- (a) The City of Prince Albert will maintain a courtesy flag pole to allow groups or organizations to fly the flag of:
  - i. A charitable or non-profit organization to help increase public awareness of their programs and activities;
  - ii. An organization that has achieved national or international distinction or made a significant contribution to the community;
  - or
  - iii. An organization that has helped to enhance the City of Prince Albert in a positive manner.
  
- (b) The courtesy flag pole will not be available to any individual, User Group, or organization that promotes views or ideas which are likely to promote hatred or support violence or discrimination for any person on the basis of race, national or ethnic origin, ancestry, colour, citizenship, religion, age, sex, marital status, sexual orientation, gender identity, disability, receipt of public assistance or level of literacy.
  
- (c) Requests to fly flags of commercial, political, or religious organizations require the approval of City Council.

- (d) The City of Prince Albert will maintain a courtesy flag pole as a gesture of respect on the occasion of a visiting dignitary. The flag will be flown for the duration of the visit to Prince Albert and will take precedence over Section 6.05(a) above...

6.07 Flag Raising Booking Procedure

- (a) It is the responsibility of the User Group or organization seeking to fly a flag on the courtesy flag pole at City Hall to:
  - i. Complete the Application to Use City Hall – Memorial Square, available on the City’s website at [www.citypa.ca](http://www.citypa.ca) or by attending the Community Services Department.
  - ii. The Application must be submitted to the Director of Community Services a minimum seven (7) business days prior to the event (exceptions may be made in extenuating circumstances).
  - iii. The User Group or organization’s mandate and activities cannot discriminate against any individual or group as outlined in Section 6.05(b).
  - iii. The User Group will provide the City with the generally recognized flag of the organization a minimum of three (3) business days in advance and will pick up the flag one (1) business day after the final day it is raised.
  - iv. Ensure the courtesy flag meets the standard size of three feet (36 inches) by six feet (72 inches). Any exceptions will be authorized by the Director of Community Services.
  - v. Submit a flag raising request on an annual basis.
- (b) If the request includes an invitation for the Mayor and/or members of Council, a copy of the request will be provided to the Mayor’s Office.
- (c) The following guidelines shall be reviewed for the flying of guest flags:
  - i. Flag raisings shall be in conjunction with a particular circumstance by an organization;
  - ii. Flags of commercial, political, or religious organizations require City Council approval;
  - iii. **Flags of organizations which may be considered controversial, contentious or divisive within the community shall not be flown;**
  - iv. Flags that involve organizations which promote hatred of any person or class of persons, support or promote violence, racism, or intolerance, or otherwise involves illegal activity shall not be flown;
  - v. Flags that involve any undertakings or philosophy which are contrary to the City of Prince Albert’s bylaws or policies shall not be flown; or

vi. Flags that contain any inflammatory, obscene, or libelous statement shall not be flown.

- (e) There is no cost to use the courtesy flag pole. Flags are only raised and lowered during City Hall Day Time Hours at no cost. If the User Group of organization would like a flag raising after regular business hours the applicable security and/or administration fee(s) will be charged to the User Group or organization to have this completed, unless a related event is currently being held on City Hall grounds where these fees have already been paid.
- (f) Flags flown on the courtesy flag pole will be displayed up to a maximum of seven (7) consecutive days. In the event the day of removal is a statutory holiday the flag will be removed on the next City Hall business day.
- (g) An organization that has received approval to fly their flag during the calendar year and submits an additional request to have the flag flown once more during that calendar year will be considered pending there are no other requests received for that same time period.
- (h) If there are conflicts between the dates requested for flags to be flown by two or more organizations on the courtesy flagpole, the organization which first made its request will have precedence.
- (i) If there is a special or local event being sponsored or hosted by the City of Prince Albert, the Director of Community Services may decide to fly a flag in support of the event for a period not exceeding fourteen (14) days. [emphasis added]

### III. ISSUES

19. The Respondent raises the following issues:

- A. The deferral is not a reviewable decision;
- B. The deferral was reasonable;
- C. The City provided an appropriate level of procedural fairness; and
- D. The deferral did not violate the *Charter*.



## IV. ARGUMENT

### A. The deferral is not subject to judicial review

20. The Respondent submits that the deferral is not subject to judicial review as there is no decision for this Honourable Court to review. The Director of Community Services never accepted nor denied PARLA's request to fly their flag during the application process, which was abandoned by PARLA.
21. The Applicant requests a judicial review of a deferral which is more appropriately described as a preliminary stage in the application assessment process or even an adjournment. Not every aspect of an administrative body's process can be reviewed by the courts, and as stated by Justice Hinkson for the British Columbia Court of Appeal, "Where no decision has yet been made and the statutory process is in its preliminary stages, the court should not entertain an application for judicial review."<sup>5</sup>
22. In *Timberwolf*, for example, a provincial commissioner proposed adjustments to a forestry company's stumpage fees based on an audit, and the company was given thirty days to review and respond to the proposal. The company asked for certain disclosure, which was provided, and then the company unsuccessfully sought further disclosure. The company applied for judicial review respecting the commissioner's decision to refuse disclosure, but both the British Columbia Supreme Court<sup>6</sup> and its Court of Appeal found, *inter alia*, that the issue was in an assessment stage and there was no decision.
23. In the instant application, similarly to *Timberwolf*, the City made a proposal to PARLA: that a new flag be submitted for the application process. Ms. Hettrick directed questions to the Mayor, which were answered, but PARLA did not respond to the City's proposal. PARLA's application or request was then left on hold and PARLA proceeded to apply

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<sup>5</sup> *Timberwolf Log Trading Ltd. v British Columbia (Commissioner Appointed Pursuant to s. 142.11 of the Forest Act)*, 2011 BCCA 70 at paras 23, 40, 47, 331 DLR (4th) 405 [*Timberwolf*].

<sup>6</sup> *Timberwolf Log Trading Ltd. British Columbia (Commissioner Appointed Pursuant to s. 142.11 of the Forest Act)*, 2010 BCSC 500, [2010] BCWLD 4772.

for judicial review. The Applicant is effectively requesting that this Honourable Court judicially review the City's interim proposal—made by a telephone call between the Mayor and Ms. Hettrick—that PARLA consider submitting a new flag during the preliminary assessment stage of an application.

24. The British Columbia Supreme Court followed *Timberwolf* in *I.A.B.S.O.I., Local 97 v British Columbia (Labour Relations Board)*.<sup>7</sup> In *IABSOI*, unions sought judicial review in relation to an unfair labour practices application before the Labour Relations Board in British Columbia. The unions requested an order prohibiting the Labour Relations Board from adjudicating their application following a letter sent by the mediator respecting proposals for a solution. There was an allegation of bias, and the unions argued that the mediator acted as a decision-maker when writing the letter. Justice Bernard found that there was no reviewable decision before the court, and that the mediator merely sought to facilitate resolution of the dispute.<sup>8</sup>

25. In *1099065 Ontario Inc. v Canada (Minister of Public Safety & Emergency Preparedness)*,<sup>9</sup> the Federal Court of Appeal refused to accept that an e-mail correspondence between the Canada Border Services Agency and a company proposing a further meeting could be amenable to judicial review.<sup>10</sup> Justice Létourneau warned that reviewing courts should be cautious in authorizing judicial review to parties who seek to circumvent jurisdiction and develop a new form of incidental litigation.<sup>11</sup>

26. The absence of a decision in the present application is buttressed by the lack of any record. The Respondent submits that there is no formal record of the City's impugned deferral of PARLA's request.

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<sup>7</sup> 2011 BCSC 614, 23 Admin LR (5th) 210 [*IABSOI*].

<sup>8</sup> *IABSOI*, *supra* note 7 at paras 31-34.

<sup>9</sup> 2008 FCA 47, 375 NR 368 [*1099065 Ont*].

<sup>10</sup> *1099065 Ont*, *supra* note 9 at para 9.

<sup>11</sup> *1099065, Ont*, *supra* note 9 at para 13; see *Addison & Leyen Ltd. v Canada*, 2007 SCC 33 at para 11, [2007] 2 SCR 793.

27. The “deferral” complained of did not occur in the context of any quasi-judicial process. There was no formal hearing, no formal taking of evidence, no completion of any decision process. The City, in the course of its usual operations in assessing PARLA’s request to fly a proposed flag on the Courtesy Flag Pole, made effort to explore a resolution of issues with PARLA raised publicly to City Council, relevant to Section 6.07(c)(iii) and (vi) of the Policy, identifying public controversy and community concerns that the proposed flag was inflammatory.
28. The Respondent respectfully submits that this is a case where “the court should not entertain an application for judicial review where no decision has yet been made.”<sup>12</sup>
29. Even if the Mayor’s proposal to fly a flag more broadly associated with the cause and the City’s “deferral” is considered a decision, the deferral of PARLA’s request to fly this flag on the Courtesy Flag Pole was not an exercise of a statutory power of decision. Rather, it was a preliminary procedure regarding the management of municipal property and involving discretionary political considerations. As explained by Justice Van Camp in the context of refusing a tender application,

[9] As we examine the decision that was before us and the circumstances we could see that there had been a power of decision exercised. We could see that the powers of the respondent are statutory. We could see that the effect of the decision would be to decide as to the eligibility of the applicant to continue to receive a benefit that it had had. However, the section must be read as a whole. The respondent is a creature of statute but not all that it does is reviewable by this court.... As a creature of statute any decision made by it might be said to be the exercise of a statutory power of decision, as without the statute there would be no power. This would apply to any corporation... The respondent in its management of the premises is entitled, within the statute, to act as any other corporation. Nothing in the statute required it to negotiate with the applicant. Nothing in the statute required it to tender. Nothing in the statute required it to provide the laundry equipment...

[10] ...What is at issue between the parties herein is a matter of contract and it is not a question of a statutory power of decision for review by this court. We can find no specific power or right conferred under *The Ontario*

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<sup>12</sup> *Timberwolf*, *supra* note 5 at para 47.

*Housing Corporation Act*, R.S.O. 1970, c. 317 upon the respondent that in the circumstances herein would afford this court a power of review. [emphasis added]<sup>13</sup>

30. Although the City is a creature of statute that makes public decisions, the deferral in question does not amount to a reviewable exercise of a public power of decision. The Applicant only challenges the singular deferral at issue but has not challenged any protocol, bylaws, or procedures practised by the City of Prince Albert

**B. The deferral was reasonable**

31. Alternatively, if this Honourable Court decides that it has jurisdiction to review the deferral, and that the deferral constitutes a decision, the Respondent respectfully submits that the deferral was reasonable. If a “decision” is deemed to have been made on these facts, it occurred after the Director of Community Services paused to reasonably interpret and apply the *Policy* governing use of the courtesy flagpole, in consultation with the Mayor, as Council’s delegated agent, after Council received correspondence identifying public controversy and concern that the proposed flag was inflammatory. The pause, if it can be considered a deferral, did not result arbitrarily. It sought to address issues relevant to Sections 6.07(c)(iii) and (vi) of the *Policy*.

32. The Divisional Court of the Ontario Superior Court of Justice ruled on a nearly indistinguishable set of facts in *Vietnamese Association of Toronto v Toronto (City)*,<sup>14</sup> where the City’s Chief of Protocol denied a non-profit organization’s request to fly their flag on Toronto City Hall’s courtesy flagpole in Nathan Phillips Square. In *VAT*, the City denied the association’s request to fly their Heritage and Freedom Flag, which was the national flag of the former country of South Vietnam, despite having permitted requests to raise the flag annually for the preceding twenty five years. The Chief of Protocol reached the decision in consultation with the Mayor by interpreting the City’s

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<sup>13</sup> *Midnorthern Appliances Industrial Corp. v Ontario Housing Corp.* (1977), 17 OR (2d) 290 at paras 9-10 (Div Ct) [*Midnorthern*].

<sup>14</sup> (2007), 85 OR (3d) 656 [*VAT*].

courtesy flagpole protocol policy as requiring, *inter alia*, that flags of nations be nationally recognized by the Government of Canada, Department of Foreign Affairs.

33. In *VAT*, the association argued, similarly to the Applicant, that the decision infringed its right to freedom of expression, was procedurally unfair in denying its legitimate expectations, and was unreasonable. The panel court, led by Justice Swinton, dismissed all of these arguments.
34. As noted in *VAT*, the standard of review applied to the issue of a municipality's jurisdiction to make a particular decision is traditionally correctness, however, decisions of municipal councils acting within their jurisdiction are entitled to some deference.<sup>15</sup> In this case, the deferral was an exercise of power delegated by the municipal council upon the Director of Community Services to apply the *Policy*. The deferral involved issues of both fact and interpretation of policy and should therefore be entitled to deference.<sup>16</sup>
35. The Court in *VAT* found the decision to deny the flag request to be a reasonable application of the flag policy since the flag in question was not a recognized nation flag and because it could be perceived as offensive. Justice Swinton noted that the flag policy does not create an entitlement and that the Chief of Protocol can reasonably refuse to permit a group's preferred flag to be flown in order to meet the City's objectives pursuant to the policy.<sup>17</sup>
36. The *Policy* allows for the flying of flags of groups fitting the definitions listed in section 6.05(a), such as a non-profit organization, an organization that has achieved national distinction, or an organization that has helped enhance the City of Prince Albert in a positive manner. Section 6.07(c) explicitly outlines prohibited flags as a part of the *Policy*'s guidelines for review:

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<sup>15</sup> *VAT*, *supra* note 14 at para 26; see *Nanaimo (City) v Rascal Trucking Ltd.*, [2000] 1 SCR 342 at paras 27, 35.

<sup>16</sup> *VAT*, *supra* note 14 at para 26.

<sup>17</sup> *VAT*, *supra* note 14 at para 29.

- iii. Flags of organizations which may be considered controversial, contentious or divisive within the community shall not be flown; ...; or
- vi. Flags that contain any inflammatory, obscene, or libelous statement shall not be flown.

37. The *Policy* does not create nor confer an entitlement upon any person or group to use the courtesy flagpole, but offers an opportunity to certain groups to fly their flag based on the Director of Community Services interpretation of the *Policy* and approval.

38. Although Memorial Square may be a public space, the Applicant has no right to the flagpole itself which is not public property to which the public has historically had access. Even a government body with possessory rights to premises may exclude others from accessing its premises, and is not obliged to provide any reasons<sup>18</sup> or any other procedural fairness.<sup>19</sup> The flagpole's use is, and must be, carefully regulated, as flags flown "can and without questions are perceived, rightly or wrongly, as the expression of the City's perspective and approval."<sup>20</sup>

39. As the party who interprets and implements the *Policy* in processing all requests to fly a flag on the Courtesy Flag Pole, the Director of Community Services is owed deference for drawing on that particular expertise and experience.<sup>21</sup> It is reasonable for a municipality to exercise its own judgment in applying its policy.<sup>22</sup>

40. The Respondent submits that the City's deferral of PARLA's request was a reasonable interpretation and application of the *Policy* in light of the fact that the flag was not a nationally or provincially recognized, it promotes intolerance and hatred, and it is controversial, contentious, and divisive in the community.

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<sup>18</sup> *Covenant Health v Alberta (Information and Privacy Commissioner)*, 2014 ABQB 562 at para 126, 596 AR 234.

<sup>19</sup> *Cordson v Greater Victoria Water District* (1982), 123 DLR (3d) 456 at para 7 (WL) (BC Sup Ct).

<sup>20</sup> *VAT*, *supra* note 14 at para 19.

<sup>21</sup> *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 49, [2008] 1 SCR 190.

<sup>22</sup> See e.g. *Eagle's Nest Youth Ranch Inc. v Corman Park No. 344 (Rural Municipality)*, 2016 SKCA 20, 395 DLR (4th) 24.

### C. The City provided an appropriate level of procedural fairness

41. The Respondent submits that an appropriate level of procedural fairness was observed in coming to the deferral.
42. The authoritative framework for assessing the level of procedural fairness was set out by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship & Immigration)*.<sup>23</sup> Justice L'Heureux-Dubé offered a non-exhaustive list of factors to consider at paragraphs 23-29 which is produced below:

[23] Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In *Knight, supra*, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. See also *Old St. Boniface, supra*, at p. 1191; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (Eng. C.A.) at p. 118; *Syndicat des employés de production du Québec & de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 (S.C.C.) at p. 896, *per Sopinka J.*

[24] A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": *Old St. Boniface, supra*, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 7-66 to 7-67.

[25] A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or

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<sup>23</sup> [1999] 2 SCR 817 [*Baker*].

individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.) at p. 1113:

A high standard of justice is required when the right to continue in one's profession or employment is at stake....A disciplinary suspension can have grave and permanent consequences upon a professional career.

As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council* (1993), [1994] 1 All E.R. 651 (Eng. Q.B.), at p. 667:

In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin*, [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

[26] Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface, supra*, at p. 1204; *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525(S.C.C.) at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship & Immigration)* (1995), 33 Imm. L.R. (2d) 57 (Fed. T.D.); *Mercier-Néron v. Canada (Minister of National Health & Welfare)* (1995), 98 F.T.R. 36 (Fed. T.D.); *Bendahmane v. Canada (Minister of Employment & Immigration)*, [1989] 3 F.C. 16 (Fed. C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness



may require more extensive procedural rights than would otherwise be accorded: D.J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Soc. Pol'y* 282, at p. 297; *Canada (Attorney General) v. Canada (Human Rights Tribunal)* (1994), 76 F.T.R. 1 (Fed. T.D.). Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

[27] Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: *Brown and Evans, supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *I.W.A. Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 (S.C.C.), *per* Gonthier J.

[28] I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

43. Following the first *Baker* factor, the City's deferral of PARLA's request is far removed from the judicial process. The deferral was part of an on-going process involving the City's assessment of whether to accept PARLA's application under the *Policy*. No hearings or meetings were held and no decision was reached. This factor suggests a low degree procedural fairness was required.

44. Following the second *Baker* factor, although the *Policy* does not outline an appeal process for a deferred request to fly a flag on the Courtesy Flag Pole, it is significant that the deferral was not a final or determinative decision. The City had not denied PARLA's request, but rather, the Mayor, as a delegated agent for this purpose, had attempted to find a solution to potential impediments identified, relating to its proposed flag, in applying the *Policy* to accommodate PARLA's request to use the Courtesy Flag Pole. An alternative solution to circumvent the impediments was proposed, but ultimately not responded to by PARLA. Procedural protections are not normally required in earlier stages of a process that precede the adjudicate stage.<sup>24</sup> This factor also suggests a minimal level of procedural fairness.

45. Following the third *Baker* factor, the City's deferral minimally impacted the Applicant. At issue is a symbolic flag raised for less than one week in downtown Prince Albert on a Courtesy Flag Pole. The City's deferral of the request did not engage any individual rights or entitlements. The City in fact approved the request to declare, and did declare "Celebrate Life Week" to highlight PARLA's cause in a manner PARLA proposed to publicly voice it. This factor, in consideration of these facts, points to a low level of procedural fairness.

46. Following the fourth *Baker* factor, the Applicant has no legitimate expectations that a particular procedure would be followed in deferring the assessment of the request. The Appellant specifically relies on the doctrine of legitimate expectations and the fact that PARLA had been permitted to fly its flag in previous years; however, it is trite law that the doctrine of legitimate expectations, at most, gives rise to procedural rights and not substantive rights.<sup>25</sup> Even if the City is under a duty to act fairly in applying the *Policy*, the Appellant cannot rely on legitimate expectations to support a right to have their flag flown.<sup>26</sup>

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<sup>24</sup> *Puar v Association of Professional Engineers & Geoscientists (British Columbia)*, 2009 BCCA 487 at para 22, 313 DLR (4th) 234.

<sup>25</sup> *Baker*, *supra* note 23 at para 26.

<sup>26</sup> *VAT*, *supra* note 14 at paras 25-25.

47. The Respondent further submits that the Appellant cannot rely on the doctrine of legitimate expectations to argue that it was owed procedural rights. As authoritatively cited by Justice LeBel for the Court in *Agraira v. Canada (Public Safety and Emergency Preparedness)*:<sup>27</sup>

The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified. [emphasis original]<sup>28</sup>

48. For example, in *Agraira*, the applicable legislative guidelines listed a clear procedural framework for the handling of relief operations, creating a legitimate expectation that such framework would be followed.<sup>29</sup>

49. The City has never provided clear, unambiguous, nor unqualified representations that would give rise to a reasonable expectation for a different particular procedure in applying the *Policy* and reaching its deferral. This factor suggests a minimal level of procedural fairness was owed.

50. Following the fifth *Baker* factor, the City is owed deference in choosing to defer the request. In deferring the request, the City had to apply its discretion in interpreting the *Policy* and in applying its own procedures. The factor favours a lower level of procedural fairness.

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<sup>27</sup> 2013 SCC 36, [2013] 2 SCR 559 [*Agraira*].

<sup>28</sup> *Agraira*, *supra* note 27 at para 95.

<sup>29</sup> *Agraira*, *supra* note 27 at para 97.

51. Under a contextual consideration of the principles of procedural fairness, the Respondent submits that the City fulfilled any requirements for procedural fairness in the situation at issue.

52. Alternatively, if this Honourable Court finds that the Applicant was not provided with the requisite level of procedural fairness, then the Respondent respectfully submits that the appropriate remedy is to remit the matter back to the City with the decision to be made following the proper or Court-directed process.<sup>30</sup>

**D. The deferral did not violate section 2(b) of the *Charter***

53. The Respondent submits that the deferral did not infringe the right to freedom of expression guaranteed by section 2(b) of the *Charter*. Alternatively, if this Honourable Court finds that the deferral constitutes a *Charter* infringement, the Respondent submits that the deferral is justified under section 1 of the *Charter*.

54. It is well-established that administrative decision-makers must act consistently with *Charter* values when applying their discretion.<sup>31</sup>

55. Courts have traditionally held that the appropriate standard of review for a *Charter* issue on judicial review is correctness.<sup>32</sup> However, the Supreme Court of Canada has moved towards a more deferential standard when reviewing administrative decisions that implicate *Charter* values so that courts do not merely retry administrative decisions that would otherwise be subject to a reasonableness standard.<sup>33</sup> In other words, an administrative decision-maker is generally in the best position for balancing the *Charter* values presented by the specific facts of a case.<sup>34</sup> As stated in *Doré*,

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<sup>30</sup> *P.J.D. Holdings Inc. v Regina (City)*, 2010 SKQB 386 at paras 31, 49, 364 Sask R 63.

<sup>31</sup> *Doré v Québec (Tribunal des professions)*, 2012 SCC 12 at paras 24, 42 [2012] 1 SCR 395 [*Doré*].

<sup>32</sup> *Whatcott v Association of Licensed Practical Nurses (Saskatchewan)*, 2008 SKCA 6 at paras 35-36, 304 Sask R 290 [*Whatcott*]; *Multani v Marguerite-Bourgeoys (Commission scolaire)*, 2006 SCC 6 at paras 20-21, [2006] 1 SCR 256.

<sup>33</sup> *Doré*, *supra* note 31 at para 51.

<sup>34</sup> *Doré*, *supra* note 31 at para 54.

An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values[.]<sup>35</sup>

56. The Respondent submits that the appropriate standard of review for the *Charter* issue is therefore reasonableness.

57. In *VAT*, Justice Swinton found that the city's refusal to fly the association's flag did not even engage section 2(b) of the *Charter*. Under the *Irwin Toy*<sup>36</sup> analysis, even though the flying of a symbolic flag may be a form of expressive activity that falls within the sphere of conduct protected by section 2(b) of the *Charter*, a violation of that protection can only be established if the purpose or effect of the City's deferral was to control PARLA's freedom of expression.<sup>37</sup>

58. The City's purpose in adopting and applying the *Policy* was not to express PARLA's expression, but, as outlined at the beginning of the *Policy*, to establish a respectful and consistent process for raising flags. The *Policy* was prepared following established guidelines from both the Federal and Provincial Governments. Further, section 4 of *The Cities Act* clearly outlines a statutory objective of maintaining a safe and viable community.

59. Alternatively, if this Honourable Court finds that the City's deferral of PARLA's request to fly a flag on the Courtesy Flag Pole infringed section 2(b) of the *Charter*, the Respondent respectfully submits that the infringement was justified. Courts have often found that certain municipal prohibitions of expression are justified in a free and democratic society. For example, noise bylaws,<sup>38</sup> a bylaw prohibiting signs above the roof line of a building,<sup>39</sup> the regulation of lap dancing.<sup>40</sup>

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<sup>35</sup> *Doré*, *supra* note 31 at para 47.

<sup>36</sup> *Irwin Toy Ltd. v Québec (Procureur general)*, [1989] 1 SCR 927 [*Irwin Toy*].

<sup>37</sup> *VAT*, *supra* note 14 at para 14; *Irwin Toy*, *supra* note 36 at paras 40, 47.

<sup>38</sup> *Montréal (Ville) v 2952-1366 Québec inc.*, 2005 SCC 62, [2005] 3 SCR 141.

<sup>39</sup> *Vancouver (City) Jaminer*, 2001 BCCA 240, 198 DLR (4th) 333.

<sup>40</sup> *Ontario Adult Entertainment Bar Association v Metropolitan Toronto (Municipality)* (1997), 151 DLR (4th) 158.

60. The first step under the *Doré* analysis is to examine the statutory objective being promoted. As noted above, the *Policy* seeks to promote a respectful and consistent process for raising flags as a part of the City's objective to promote a safe and viable community. The latter objective has been upheld as valid in the case law, including the objective to protect the public from hateful expression.<sup>41</sup>
61. The second step under the *Doré* analysis is to determine the reasonableness of the decision considering whether the restraint on expression is proportional to the statutory objective and the express is minimally impaired.<sup>42</sup>
62. The City is concerned that displaying PARLA's non-recognized flag may be interpreted as the City's expression and endorsement of a controversial, contentious, and divisive issue. Further, as found by the Alberta Court of Appeal, displaying anti-abortion material in public places is hateful in nature and may be likely to promote hatred against women and their doctors.<sup>43</sup>
63. Although PARLA promotes and broadcasts anti-abortion animus, abortion is a legal medical procedure in Canada. Whereas abortion was at one time prohibited by law, the Supreme Court of Canada found the previous law on procuring of miscarriages to be unconstitutional over thirty years ago in *R v Morgentaler*.<sup>44</sup> Specifically, the former provision criminalizing abortion was found to infringe upon the right to security of the person<sup>45</sup> of pregnant women in a manner not justified in a free and democratic society.<sup>46</sup>
64. The City, in assessing PARLA's request and placing it on hold, was therefore involved in a balancing process revolving around its statutory objectives and between the

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<sup>41</sup> *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 154 at para 64 [2018] 6 WWR 463 [*CCBR v Grande Prairie*].

<sup>42</sup> *CCBR v Grande Prairie*, *supra* note 41 at para 65.

<sup>43</sup> *CCBR v Grande Prairie*, *supra* note 41 at paras 67-71.

<sup>44</sup> [1988] 1 SCR 30 [*Morgentaler*].

<sup>45</sup> *Charter*, s 7.

<sup>46</sup> *Morgentaler*, *supra* note 44 at para 70.

importance of PARLA's right to expression and women's rights to equality and security of the person within a safe and viable community. The Court in *Doré* called for a balancing analysis on judicial review rather than a strict application of the *Oakes*<sup>47</sup> analysis:

On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protection at play.<sup>48</sup>

65. In *Doré*, an authority for freedom of expression claims in the administrative context, a lawyer challenged the constitutionality of a tribunal's decision to sanction him for writing an insulting letter to a judge. The Supreme Court of Canada dismissed the appeal after finding that the disciplinary board's decision to sanction the lawyer was a reasonable balance between the lawyer's expressive rights and the statutory objectives underlying the legal applicable legal regulation.<sup>49</sup>

66. In *Doré*, the Court balanced "the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession."<sup>50</sup> The fact that the disciplinary body had demonstrated that they gave a balanced due regard to the important expressive rights at issue was given deference in the Court's adjudication that the decision was reasonable.

67. A government who chooses to provide a means of expression must do so in a manner consistent with the *Charter*, and it is well-established that section 2(b) of the *Charter* does not guarantee a right to any particular means of expression.<sup>51</sup> The Applicant has no guarantee to use the Courtesy Flag Pole to express themselves, especially if their expression risks infringing on the *Charter*-protected interests of others such as women.

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<sup>47</sup> *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].

<sup>48</sup> *Doré*, *supra* note 31 at para 57.

<sup>49</sup> *Doré*, *supra* note 31 at para 71.

<sup>50</sup> *Doré*, *supra* note 31 at para 66.

<sup>51</sup> *Native Women's Association of Canada v Canada*, [1994] 3 SCR 627 at paras 45, 54, 76 (WL); *VAT*, *supra* note 14 at paras 17, 20.

Similarly to the association in *VAT*, PARLA was permitted to use Memorial Square for its ceremony, and participants may display their flags or express themselves without use of the City's flagpole; "[the] fact that they cannot display their flag in the way they wish does not constitute a denial of freedom of expression."<sup>52</sup>

68. Under the *Doré* analysis, prohibiting expression must be proportionate, meaning that the *Charter* right at issue must be minimally impaired.<sup>53</sup> In this case, the City made multiple efforts with the Applicant regarding a flag more broadly recognized by PARLA's cause. Similarly to *CCBR v Grande Prairie*, the City never took the position that it would refuse to fly a flag depicting anti-abortion sentiment, but only that there were issues with PARLA's particular flag as it related to its interpretation of the *Policy*. In fact, the City accepted the Applicant's request to proclaim the week "Celebrate Life Week" and endeavoured to come to a solution where PARLA could still use the Courtesy Flag Pole in a manner meaningful to the public voicing of their cause.

69. The deferral cannot be construed as a blanket rejection, but merely an isolated assessment of a specific flag.<sup>54</sup> These facts easily distinguish this case from *Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority*,<sup>55</sup> where the decision maker did not acknowledge the association's right to freedom of expression nor the issues involved in balancing a denial of expressive rights with statutory objectives.

70. As noted above, flags flown in front of City Hall have the effect of showing the City's approval of a particular expression. It is respectfully submitted that the City cannot be compelled by *mandamus* to fly PARLA's flag and therefore express a particular opinion.<sup>56</sup>

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<sup>52</sup> *VAT*, *supra* note 14 at para 20.

<sup>53</sup> *CCBR v Grande Prairie*, *supra* note 41 at para 92.

<sup>54</sup> *CCBR v Grand Prairie*, *supra* note 41 at para 92.

<sup>55</sup> 2018 BCCA 344, 2018 CarswellBC 2408.

<sup>56</sup> See e.g. *Sundance (Summer Village) v W.A.W. Holdings Ltd.* (1980), 117 DLR (3d) 351 at para 32 (WL) (Alta CA); *Thunder bay Seaway Non-Profit Apartments v Thunder Bay (City)* (1991), 85 DLR (4th) 229 (Ont Ct J); *Bimini Neighbourhood Pub Ltd. v Vancouver (City)* (1982), 139 DLR (3d) 300 (BC Sup Ct).



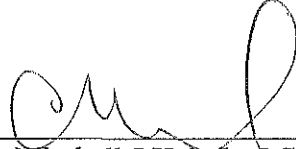
V. CONCLUSION

71. It is therefore respectfully submitted this Honourable Court should dismiss the within application with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Prince Albert, in the Province of Saskatchewan, this 21<sup>st</sup> day of September, 2018.

**NOVUS LAW GROUP**  
**Wilcox Holash McCullagh**

Per:   
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Mitchell J Holash, QC,  
on behalf of the Respondent

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## VI. AUTHORITIES

### Statutes

*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

City of Prince Albert, Policy No 45, *Half-Mast Policy* (10 May 2016).

City of Prince Albert, revised Policy No 45.1, *Flag Protocol Policy* (25 January 2016).

City of Prince Albert, revised Policy No 45.2, *Flag Protocol Policy* (28 May 2018).

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2. *Agraira v. Canada (Public Safety and Emergency Preparedness)* 2013 SCC 36, [2013] 2 SCR 559.
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4. *Bimini Neighbourhood Pub Ltd. v Vancouver (City)* (1982), 139 DLR (3d) 300 (BC Sup Ct).
5. *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 154, [2018] 6 WWR 463.
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9. *Doré v Québec (Tribunal des professions)*, 2012 SCC 12, 42 [2012] 1 SCR 395.
10. *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.
11. *Eagle's Nest Youth Ranch Inc. v Corman Park No. 344 (Rural Municipality)*, 2016 SKCA 20, 395 DLR (4th) 24.
12. *I.A.B.S.O.I., Local 97 v British Columbia (Labour Relations Board)*, 2011 BCSC 614, 23 Admin LR (5th) 210.

13. *Irwin Toy Ltd. v Québec (Procureur general)*, [1989] 1 SCR 927.
14. *Midnorthern Appliances Industrial Corp. v Ontario Housing Corp.* (1977), 17 OR (2d) 290 (Div Ct).
15. *Montréal (Ville) v 2952-1366 Québec inc.*, 2005 SCC 62, [2005] 3 SCR 141.
16. *Multani v Marguerite-Bourgeoys (Commission scolaire)*, 2006 SCC 6, [2006] 1 SCR 256.
17. *Nanaimo (City) v Rascal Trucking Ltd.*, [2000] 1 SCR 342.
18. *Native Women's Association of Canada v Canada*, [1994] 3 SCR 627.
19. *Ontario Adult Entertainment Bar Association v Metropolitan Toronto (Municipality)* (1997), 151 DLR (4th) 158.
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22. *R v Morgentaler*, [1988] 1 SCR 30.
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24. *Sundance (Summer Village) v W.A.W. Holdings Ltd.* (1980), 117 DLR (3d) 351 (Alta CA).
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27. *Timberwolf Log Trading Ltd. v British Columbia (Commissioner Appointed Pursuant to s. 142.11 of the Forest Act)*, 2010 BCSC 500, [2010] BCWLD 4772.
28. *Vancouver (City) Jaminer*, 2001 BCCA 240, 198 DLR (4th) 333.
29. *Vietnamese Association of Toronto v Toronto (City)* (2007), 85 OR (3d) 656.
30. *Whitcott v Association of Licensed Practical Nurses (Saskatchewan)*, 2008 SKCA 6, 304 Sask R 290.