

Provincial Legislation Attempting to Protect New Housing Development from Legal Challenge Found to be Unconstitutional

Kitsilano Coalition for Children & Family Safety Society v. British Columbia (Attorney General), 2024 BCCA 423

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Last month, the BC Court of Appeal released its decision in *Kitsilano Coalition for Children & Family Safety Society v. British Columbia (Attorney General)*, 2024 BCCA 423, examining and interpreting new provincial legislation. The legislation had been enacted to support the completion of a housing development, but was challenged as unconstitutional.

Background

This case arises in the context of the ongoing housing crisis, in which both the cost of housing and the prevalence of homelessness are high across the province, and particularly so in Vancouver. The Arbutus Housing Development was announced by the City of Vancouver in 2021 to be developed on Arbutus Street in the Kitsilano neighbourhood, and to comprise of 140 studio apartments, with half open to low-income residents and the remainder tied to support services. The City entered into a memorandum of understanding (MOU) with the Province and other agencies in order to receive funding for the development and services for its eventual operations.

As of 2021, the lands slated for development were not zoned to permit the Arbutus Housing Development, so the City began the process of rezoning. Rezoning triggered the public hearing process mandated by provincial legislation, as set out in the *Vancouver Charter*.

Prior to the public hearing sessions, the City provided public access to information concerning the Arbutus Housing Development, but it did not release the MOU. Some attendees at the public sessions complained of inconsistent information being provided about the MOU and, furthermore, raised concerns that some individuals' opportunity to be heard was being cut off during sessions. Those attendees included members of the Kitsilano Coalition for Children & Family Safety Society (the "**Society**").

In July 2022, despite concerns about the public hearing process, Vancouver City Council gave approval in principle to the rezoning application, though it did not yet formally adopt the rezoning amendment. In October of 2022, the Society responded by filing a petition with the BC Supreme Court seeking judicial review of Council's approval in principle. Among other things, the Society alleged that the public hearing process had been procedurally unfair and in breach of the City's procedural bylaw.

Municipal Enabling and Validating Act

In this case, the Province (through the Minister of Housing) was concerned that litigation-related delays would affect the completion of the Arbutus Housing Development in a timely manner and

consequently exercised its legislative powers to attempt to make the rezoning bylaw valid despite the fact Council had not yet adopted it.

Bill 26: Municipal Enabling and Validating Act (No. 5) SBC 2023 c 3 (“MEVA 5”) was tabled in the Legislature in April 2023. It was subsequently enacted and came into force on May 11, 2023. *MEVA 5* provides that the public hearing for the rezoning application “is conclusively deemed to have been validly held” and the zoning amendment bylaw “is conclusively deemed to have been validly adopted by the Vancouver council.” The Society responded by filing a new petition to the court, claiming that *MEVA 5* is unconstitutional.

Initially, *MEVA 5* was upheld by the BC Supreme Court, with the Court following an earlier case in *Barbour v. The University of British Columbia*, 2010 BCCA 63. The Society then appealed that decision to the BC Court of Appeal.

Judicial Independence

In a decision released on December 23, 2024, Madam Justice Newbury, writing for a unanimous Court of Appeal, based her reasons for judgment on the important constitutional principle of judicial independence. Reviewing a recent decision of the Manitoba Court of Appeal, she observed that:

[N]either Parliament nor a legislature has the power to enact legislation that intrudes on judicial independence and/or the judicial role. [...] [A] superior court must be “free, and reasonably seen to be free, to perform its adjudicative role without interference, including interference from the executive and legislative branches of government” [...] that legislation must not “interfere, or be reasonably seen to interfere, with the courts’ adjudicative role, or with the essential conditions of judicial independence.”

[at para 62; underlining by the Court of Appeal]

Madam Justice Newbury went on to interpret *MEVA 5*, finding that it does not merely alter the law that the court would apply to adjudicate the Society’s claims. Instead, *MEVA 5* fundamentally interferes with judicial independence by directing the specific outcome of a court proceeding:

No particular legislative provision, including a bylaw, has been amended or come into force retroactively. [*MEVA 5*] simply makes a kind of direction that *notwithstanding* what the *law* might be, a particular state of affairs is to be ‘deemed’ to exist — that the public hearing has been “validly held” and the proposed amending bylaw has been “validly adopted”. The effect of *MEVA 5* deeming a particular state of affairs to be true is to direct the outcome of a specific court proceeding. That direction is obviously intended for the Supreme Court.

[at para 68; italics in original]

Not surprisingly, the Court of Appeal held *MEVA 5* to be unconstitutional and of no force or effect.

Takeaway

Provincial intervention is at times sought by local governments, and at other times contested by them. While the Provincial Legislature has the power to grant, alter, and remove legal rights, only the courts may adjudicate those rights. This case makes clear that housing solutions, no matter how urgently needed, cannot be pushed through at the cost of undermining the role of the judiciary.

Canada has a globally enviable – if imperfect – three-branch system in which power is split between the executive, legislative, and judicial branches of government. Judicial independence ensures that, when necessary, government missteps or overreach can be corrected through recourse to the courts. This is a fundamental role of the courts in Canada’s constitutional democracy. In that regard, this decision has been widely praised as a victory for the “rule of law”.

End of case brief.