

CANADA / JUDGMENT

He v. Vancouver (City)

2019 BCSC 2246

COURT

Supreme Court of British Columbia

DECIDED

24 December 2019

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2019 BCSC 2246 He v. Vancouver (City)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

He v. Vancouver (City),

2019 BCSC 2246

Date: 20191224

Docket: S196832

Registry: Vancouver

Between:

Yi Ju He

Petitioner

And

The City of Vancouver

The Vacancy Tax Review Officer

and The Vacancy Tax Review Panel

Respondents

Before: The Honourable Madam Justice Fitzpatrick

On judicial review from: A determination of the City of Vancouver Tax Review Officer dated June 25, 2018 and the decision of the Vacancy Tax Review Panel dated April 24, 2019

Reasons for Judgment

Counsel for Petitioner:

J. A. Nitikman

T. Shum

Counsel for the Respondents:

I.K. Dixon

Place and Date of Hearing:

Vancouver, B.C.

December 5, 2019

Place and Date of Judgment:

Vancouver, B.C.

December 24, 2019

INTRODUCTION

- [1] In this petition proceeding, the petitioner, Yi Ju He, seeks to challenge the imposition of a vacancy tax on her property by the respondent the City of Vancouver (the "City") for the year 2017.
- [2] As I will describe in more detail below, the history of this matter begins with Ms. He's unsuccessful attempt to claim an exemption from the vacancy tax from the City. Ms. He's later complaint to a vacancy tax review officer (the "VTRO") was denied. Her request for a review of the VTRO's dismissal of the complaint to the vacancy tax review panel (the "Review Panel") was also denied.
- [3] Ms. He brought this judicial review proceeding seeking to quash the decisions of both the VTRO and the Review Panel.
- [4] The City acknowledges that the VTRO and Review Panel's decision did not meet the requirements of procedural fairness. Issues include the sufficiency of the VTRO's reasons for her decision and the VTRO and Review Panel's consideration of evidence of which Ms. He was not aware. Accordingly, the City agrees that this Court should quash the VTRO and the Review Panel's decisions and remit the matter back to the VTRO for further determination.
- [5] The remaining issue between the parties arises from Ms. He's position that the VTRO is required to convene an oral hearing and allow any property owner, including Ms. He, to present oral argument in support of a complaint. The City disputes that an oral hearing is required. In the alternative, Ms. He argues that, in her circumstances, this Court should direct the VTRO to exercise her discretion to hold such an oral hearing.

- [6] In light of the more focussed issue to be determined at this time, I will briefly review the relevant facts, as contained in the Agreed Statement of Facts and Documents dated October 15, 2019 signed by both parties.

STATUTORY REGIME

- [7] The City imposes the vacancy tax pursuant to the following statutory regime.

The Vacancy Tax

- [8] In November 2016, the City enacted the Vacancy Tax By-law, No. 11674 (the "By-law"). The By-law is the legal basis for the imposition of the vacancy tax and outlines how that tax will be administered. The first year in which the vacancy tax was effective was 2017.
- [9] The By-law has been amended on a number of occasions. In these reasons, all references are to the provisions of the By-law as they were in force at the relevant time.
- [10] Subject to various exemptions, the By-law imposes a tax (the "Vacancy Tax") on every Class 1 residential property within the City. Section 3 of the By-law allows a property owner to claim an exemption from the Vacancy Tax if the property owner meets certain criteria.
- [11] Pursuant to the By-law, all property owners in the City are required to make a property status declaration for their property by February 2 of the following year, which would include any claim to an exemption. Failure to submit a property status declaration results in the Property being subject to the Vacancy Tax.

Challenges to the Vacancy Tax

- [12] Section 6 of the By-law, entitled "Complaints and Review Process", allows for a process by which property owners may challenge the imposition of the Vacancy Tax.
- [13] Pursuant to s. 6 of the By-law, the first stage of that process is the filing by the property owner of a complaint to a VTRO. A VTRO is a person appointed by the City Council to administer complaints made in accordance with the vacancy tax review provisions of the By-law. The VTRO reviews the submission of the affected taxpayer and determines whether there is a ground for the complaint as set out in s. 6.2, namely:
- a) an error or omission on the part of the City resulted in the imposition of the vacancy tax; or
 - b) an error or omission on the part of the registered owner in completing the property status declaration resulted in the imposition of the vacancy tax.
- [14] Upon receiving a notice of complaint, the VTRO may require, under s. 6.5 of the By-law, that the registered owner provide any further information or evidence relevant to the complaint.

The Review Panel

- [15] Pursuant to s. 6.10 of the By-law, a registered owner who has received a determination by the VTRO may request a review of that determination by the Review Panel. Pursuant to s. 6.11 of the By-law, that owner must submit a review request within 21 days of the deemed receipt of the VTRO's determination. Section 6.12 of the By-law sets out the requirements for any review request, including that it must set out the grounds for the request and provide any further supplementary information and evidence previously provided to the VTRO to substantiate the reasons for the complaint.
- [16] The City has contracted with Alternate Dispute Resolution British Columbia to provide adjudicators who sit on the Review Panel. The adjudicators are independent of the City. The members of the Review Panel sit as an independent body but they have no administrative staff assigned to them.
- [17] Upon reaching a decision, the Review Panel records their reasons into the City's computer system and the system produces a letter outlining that decision to the appellant. City staff forward the communications to the property owner who sought the review.

BACKGROUND FACTS

- [18] Ms. He purchased the property at 4749 Belmont Avenue, Vancouver, BC in October 2015 (the "Property"). At the time, a house was located on the Property.
- [19] Throughout 2016 and 2017, Ms. He undertook various steps toward redeveloping the Property. Essentially, this involved efforts to remove the existing house on the Property and construct a new residence on it.
- [20] Ms. He entered into contracts for architectural and landscape design services. In addition, she investigated issues concerning the removal of the existing house, which contained some asbestos materials that had to be carefully managed during the demolition process.
- [21] From January-April 2017, Ms. He or contractors acting on her behalf submitted applications to the City for various permits in respect of the redevelopment of the Property, including an application for a building permit.
- [22] In the first half of 2017, Ms. He entered into agreements with nearly all of the contractors necessary to build the new structure, including those relating to interior and electrical design and mechanical engineering.
- [23] In the latter half of 2017, site work began on the Property. By late 2017, archaeological work on the Property had begun.
- [24] By the summer of 2018, some permits had been issued by the City. In February and April 2019 respectively, the City had issued permits for the demolition of the existing house and construction of the new house on the Property.

The Claim for Exemption

- [25] Ms. He did not file an "Empty Homes Tax Property Status Declaration" with the City, by which she could claim an exemption from the Vacancy Tax for 2017, by the February 2, 2018 deadline.
- [26] However, on February 5, 2018, the City sent Ms. He a "Bylaw Warning Notice". In the notice, the City noted that she had failed to submit the required Property Status Declaration. The notice advised that, since 2017 was the first year for the imposition of the Vacancy Tax, an additional one-month period was allowed within which to file it. The Notice stated that "[i]f you complete and file your declaration by March 5, 2018, you will not be subject to the penalty".
- [27] Later in February 2018, pursuant to s. 4.5 of the By-law, Ms. He or others on her behalf filed online a Property Status Declaration with the City for 2017 (the "2017 Status Form"). Ms. He claimed an exemption from the Vacancy Tax for 2017 under s. 3.2(a) of the By-law (the "Redevelopment Exemption"):

3.2 A vacancy tax is not payable under this by-law for a parcel of residential property if the residential property was unoccupied for more than six months during the vacancy reference period in order to do one or more of the following:

- (a) redevelop or safely carry out major renovations to the property:
 - i. for which permits have been issued by the City, and
 - ii. which, in the opinion of the Chief Building Official, are being carried out diligently and without unnecessary delay, ..

- [28] On March 6, 2018, the City denied Ms. He's claim for the Redevelopment Exemption and issued a Vacancy Tax Notice imposing a tax of \$249,313.67 on the Property.

The Complaint

- [29] Sometime after March 6, 2018, pursuant to s. 6.3 of the By-law, Ms. He or others on her behalf submitted a complaint to the VTRO regarding the imposition of the tax under the Vacancy Tax Notice. A property owner files any complaint with the City by an online filing system. This system allows the property owner to provide details of the property in question, reasons for the complaint, answers to various questions in a questionnaire and also, upload relevant documents.
- [30] Pursuant to the By-law, the City appointed a VTRO to address and determine Ms. He's complaint.

- [31] Part of the difficulty that arose, as acknowledged by the City's counsel, is that the VTRO requested additional information from other City employees. The VTRO did not share this further information with Ms. He and she was not given an opportunity to respond. Nevertheless, such information did factor into the decision by the VTRO.
- [32] At no time did Ms. He request the opportunity to attend at and make submissions to the VTRO at an oral hearing to consider her complaint. Having said that, the City acknowledges that the online system that allows the communication of a complaint to the City does not necessarily identify that as an option.
- [33] On June 25, 2018, the VTRO issued a determination (the "Determination") to Ms. He denying her complaint. The Determination provided:

The reasons for our conclusion are as follows:

- Inappropriate Evidence

Based on the evidence provided, the City determines that the reason the property was unoccupied for more than 180 days was not because it was undergoing redevelopment or major renovation with permits issued by the City.

The Review

- [34] On or about July 3, 2018, pursuant to ss. 6.10 and 6.11 of the By-law, Ms. He or others on her behalf submitted online a request to the Review Panel to review the Determination.
- [35] Further difficulties with the process arose when, prior to making its decision, the Review Panel sought and received advice from other City officials concerning the permits that Ms. He had applied for and been issued in respect of the Property and any reasons for any delay in issuing those permits.
- [36] The Review Panel did not advise Ms. He of the input from other City officials on the permitting process, despite the Review Panel later considering these communications as part of its review of the Determination arising from Ms. He's complaint. The Review Panel did not afford Ms. He any opportunity to respond.
- [37] As with the process before the VTRO, Ms. He did not request an oral hearing before the Review Panel prior to considering and deciding the review.
- [38] On April 24, 2019, the City informed Ms. He that the Review Panel had rejected Ms. He's request for a review and confirmed the decision of the VTRO. On June 11, 2019, the Review Panel provided Ms. He's counsel with clarification that it did not consider that the evidence presented by her brought her within the requirements of a Redevelopment Exemption under s. 3.2(a) of the By-law.

DISCUSSION

[39] Ms. He first argues that the relevant legislation requires that the VTRO convene an oral hearing at which a property owner may advance oral and/or written submissions in support of his or her complaint. In the alternative, Ms. He argues that in any case, in particular her case, the VTRO should be required to convene such hearing.

Is an Oral Hearing Required?

[40] Ms. He argues that the Vancouver Charter, S.B.C. 1953, c. 55 (the "Charter") and the By-law must be interpreted as requiring the VTRO to convene an oral hearing.

[41] The ability of the City to impose the Vacancy Tax arose from the Province's enactment of the Miscellaneous Statutes (Housing Priority Initiatives) Amendment Act, 2016, S.B.C. c. 27. By that legislation, the Charter was amended by the addition of Part XXX - Vacancy Tax and, specifically:

Required vacancy tax by-law provisions

617. A vacancy tax by-law must do the following:

(a) provide for a process for the administration and collection of a vacancy tax;

...

(i) provide for a process to hear and determine complaints respecting the imposition of a vacancy tax, including providing for a review process for determinations of complaints

[Emphasis Added.]

[42] The By-law deals with the process by which complaints are brought before the VTRO:

6.7 Subject to the provisions of this by-law, the vacancy tax review officer must, within a reasonable time, consider the notice of complaint and any supplementary information and evidence, make a determination on the complaint, advise the registered owner in writing of the determination and, if the complaint is successful, rescind the vacancy tax notice.

[Emphasis Added.]

[43] The By-law also deals with the process by which review applications are brought before the Review Panel:

6.14 Subject to the provisions of this by-law, the vacancy tax review panel must, within a reasonable time, consider the review request based on the materials provided pursuant to Section 6.12 and, without a hearing, make a determination on the review, advise the registered owner in writing of its determination and, if the review request is successful, rescind the vacancy tax notice.

[Emphasis Added.]

[44] The issue then turns on whether the mandate under the Charter (that there be a process to "hear and determine" complaints) requires the VTRO acting pursuant to s. 6.7 of the By-law to convene an oral hearing. Ms. He first relies on various dictionary definitions of "hear" or "hearing":

[45] In Black's Law Dictionary, 11th ed. (Westlaw, 2019):

Hearing (13c). 1. A judicial session, usu. open to the public, held for the purposes of deciding issues of fact or of law, sometime with witnesses testifying 2. Administrative law. Any setting in which an affected person presents arguments to a decision-maker 5. English law. ORAL ARGUMENT.

[Emphasis Added.]

[46] In the Canadian Oxford Dictionary, 2nd ed. (Canada: Oxford University Press, 2004) at 698:

Hear verb 3 transitive listen judicially to and judge (a case, plaintiff, etc.)

[47] Ms. He cites two Ontario Provincial Court decisions where dictionary definitions were used to interpret the word "hear".

[48] In *R. v. Jeffrey*, [1976] O.J. No. 1655 (Prov. Ct.), Judge Delisle was interpreting a Criminal Code provision that required a judge to "hear and consider" allegations contained in an information. He was considering whether the judge could simply rely on the statements in the information, rather than hearing direct statements by the informant to the judge. He decided against that proposition:

5 They note that that paragraph commands a justice who receives an information to then "hear and consider, ex parte, the allegations of the informant". . The prosecutor argues that it is not necessary for the informant to actually say anything for the Justice of the Peace to hear him but that rather the word "hear" can be broadly interpreted to include the mere reading of the "allegation" appearing in the information. It appears to me that there are two difficulties with the Crown's position. First, it appears to fly in the face of the normal rule of statutory interpretation that penal statutes ought to be strictly construed, and if I am to give effect to this rule of statutory interpretation I cannot interpret "hear" to mean "see" or "read".

[Emphasis Added.]

[49] Similarly, in *Re Z. (E.W.)*, [1975] O.J. No. 1612 (Prov. Ct.), the court was addressing the matter in another entirely different context, namely which person a judge could "hear on behalf of the child" in a child welfare hearing before the court. Judge Fisher stated:

6 Leaving aside the words "on behalf of the child", I would take the view that the judge has the discretion ("may") to decide whether any person should be heard by the court and that "and hear" is meant in the sense of a hearing entitling that person to have all the rights of a party at a hearing.

7 The Oxford Dictionary defines "to hear" *inter alia*, as "to listen judiciously in a court of law", "to try (a ... case)", and defines "hearing" as "the listening to evidence and pleadings in a court of law". Clearly "to hear" can mean a hearing in a judicial sense.

[50] Finally, Ms. He cites two American cases in support of her argument.

[51] In *Marsh v. Kentucky Farmers Bank* (1986), 714 S.W.2d 502 (Kty. CA), the court concluded that summary judgement decided based on the record was not a "hearing". The court stated:

A hearing as generally defined [citing a case and Black's Law Dictionary],

... involves an opposite party, a defendant, and necessarily implies notice thereof to him; it contemplates listening to facts and evidence for the sake of adjudication.

[Emphasis in Original].

[52] In *Kolter v. Commission on Professional Competence of Los Angeles Unified School Dist.*, 170 Cal.App.4th 1346, the court addressed the right of a terminated employee to challenge her dismissal. At 1351, the court considered the specific legislation at issue and stated:

The *Bollinger* court first noted that in section 54957 the Legislature used the verb "hear" in connection with "complaints or charges," but the verb "consider" in connection with "dismissal of a public employee." ... The Court of Appeal concluded the word choice was significant because the dictionary defines "to consider" as "to 'deliberate upon,' [while] [t]o 'hear' is to 'listen to in an official ... capacity[.]' [Citation.] A 'hearing' is '[a] proceeding of relative formality ..., generally public, with definite issues of fact or of law to be tried, in which witnesses are heard and evidence presented.'

[Citations omitted in Original and Above.]

[53] As the above dictionary definitions and the application of various definitions in these cases demonstrate, the determination as to whether a "hearing" or a right to be "heard" arises generally depends on two things: firstly, a review of the legislation at issue; and secondly, the context in which that legislation is to be interpreted, both internally in relation to the entire act and externally in relation to the statutory objectives at play.

[54] In Canada, the general approach to statutory interpretation has been consistently stated, arising from the Court's adoption of *E. Driedger in Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87 in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at 41:

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.

[55] The importance of context is apparent from the further definition found in *The Dictionary of Canadian Law*, 3rd ed. (Scarborough: Thomson Carswell, 2004) that provides at 571:

HEARING. n. 1. "[N]ormally an oral hearing. But a statutory board, acting in an administrative capacity, may [hear applications] on written evidence and arguments," 2. The right to be heard by the decision-maker with a full opportunity to lay before him all the pertinent facts supporting his side of the issue. 3. Generic label to describe trials, appeals, and interlocutory proceedings. 4. Need not be an auditory event. Evidence can be in written form.

- [56] The context of administrative law, such as here, is specifically addressed in the above dictionary definition (and also Black's Law Dictionary) which recognizes that an oral hearing is not necessarily required in terms of having an opportunity for a "hearing" to advance one's position before a tribunal.
- [57] In support of its position, the City cites various Canadian authorities that have interpreted administrative law legislation in the workers' compensation area.
- [58] In *Campbell v. Workers' Compensation Board*, 2012 SKCA 56, the court was interpreting the meaning of the legislation where the Board had the jurisdiction to "examine, hear and determine" certain matters. At para. 76, the court stated that "the term 'hearing' does not, in law, necessarily connote an oral or viva voce hearing"
- [59] I acknowledge Ms. He's arguments that the statement in *Campbell* is distinguishable because the Saskatchewan legislation specifically empowered the Board to exercise its discretion in fashioning its own procedures. However, the court's statement as to the initial issue - namely, the legal meaning of "hearing" - is consistent with the various dictionary definitions that I have already cited that emphasize that context is important and that a "hearing" does not necessarily mean an oral one.
- [60] The City also refers to various British Columbia authorities on the point, which similarly considered our workers' compensation legislation which also endows the Workers' Compensation Board with jurisdiction to "inquire into, hear and determine" certain matters.
- [61] In *Prevost v. British Columbia (Worker's Compensation Board)*, [1988] B.C.J. No. 1159 (S.C.), Justice Southin, as she then was, concluded that:

the statute does not require the commissioners to hear oral submissions on an appeal. The concept of natural justice or procedural fairness does not itself require oral hearings in every instance.

- [62] In *Watford v. British Columbia (Workers' Compensation Board)*, [1999] B.C.J. No. 128 (S.C.), Justice Skipp also rejected the argument that an interpretation of the word "hear" meant an oral hearing. Justice Skipp summarizes the submissions of the petitioner as follows:

45 Counsel for the petitioner submits that Section 96(1) of the Workers' Compensation Act requires the Workers' Compensation Board to enquire into, hear and determine all matters and questions of fact in law, and he submits that the word "hear" connotes a formal hearing where oral presentation of evidence and argument is given. Here there was no oral hearing involved in any of the internal appeals herein.

- [63] As with the Saskatchewan legislation considered in Campbell, the rejection of the argument in Watford as to the meaning of the word "hear" was not negated by the further finding that the legislation (Workers' Compensation Act, s. 85(1)) expressly provided that the Board could establish its own procedures.
- [64] Denial of an oral hearing was not a denial of procedural fairness in either Prevost or Watford. In Van Unen v. British Columbia (Workers' Compensation Board), [1999] B.C.J. No. 1822 (S.C.), Justice Bauman, as he then was, cited both Prevost and Watford with approval and reached the same conclusion in finding that the concept of natural justice or procedural fairness does not require an oral hearing in every instance: see paras. 54-64.
- [65] Finally, Ms. He argues that the differences between s. 6.7 (complaint to the VTRO) and s. 6.14 (review of the VTRO determination) of the By-law can only be interpreted as meaning that s. 6.7 requires an oral hearing. Again, the VTRO must "consider" and "make a determination" while the Review Panel must "consider without a hearing".
- [66] In drawing this distinction, Ms. He relies on the maxim of statutory interpretation *expressio unius est exclusio alterius*, namely, to express one thing is to exclude the other. In Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham: Butterworths, 2002) at 186-187 ("Construction of Statutes"), Ruth Sullivan describes the maxim as follows:

An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.

- [67] Ms. He then argues that, if the legislature meant to exclude oral hearings by the VTRO, s. 6.7 of the By-law would have stated that, just as stated in s. 6.14.
- [68] Further comments, however, found in the Construction of Statutes at 192-193 provide a useful summary of the caution that must be applied in relation to this maxim:

The failure to expressly refer to a matter is sometimes the result of careless drafting or inadvertence rather than choice. As Newcombe J. wrote in *Turgeon v. Dominion Bank*:

The maxim, *expressio unius est exclusio alterius*, enunciates a principle which has its application in the construction of statutes and written instruments, and no doubt it has its uses when it aids to discover the intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context. One has to realize that a general rule of interpretation is not always in the mind of a draughtsman; that accidents occur; that there may be inadvertence; that sometimes unnecessary expressions are introduced, *ex abundanti cautela*, by way of least resistance, to satisfy an insistent interest, without any thought of limiting the general provision; and so the axiom is held not to be of universal application.

These observations are insightful and they have been taken to heart by both courts and commentators. In Canada, the following passage from *Côté* is frequently relied on:

A contrario, especially in the form *expressio unius est exclusio alterius*, is widely used. But of all the interpretive arguments it is among those which must be used with the utmost caution. The courts have often described it an unreliable tool, and it is frequently rejected.

While it is true that implied exclusion arguments are often rightly rejected, it does not follow that the reasoning underlying such arguments is somehow less reliable than the reasoning underlying other forms of textual analysis. In fact, the reasoning underlying this form of reasoning is grounded in the presumptions of knowledge, competence, consistent expression and no tautology discussed above. Like all arguments based on these presumptions, its weight depends on a range of contextual factors and the weight of competing considerations. Even if an implied exclusion argument is not rebutted, it may be outweighed by other indicators of legislative intent.

- [69] I conclude that the maxim must be rejected here. I also conclude that the failure of the legislature to expressly exclude oral hearings in s. 6.7 of the By-law does not inevitably lead to the conclusion that one is required.
- [70] The policies and legislative intentions that animate the respective complaint and review parts of the process under s. 6 of the By-law need not be compatible in their requirements. It is clear enough that the legislature intended that the review process would not include an oral hearing. This is consistent with having a review based on the record only, similar to appeals from this Court.
- [71] However, the failure to specify the type of "hearing" to be conducted by the VTRO at the complaint stage can reasonably be interpreted as the legislature expressing its intention to leave the matter to be decided within the discretion of the VTRO. This approach is, in my view, consistent with the intention behind the By-law in affording the VTRO discretion to not only consider the initial complaint filed by the property owner, but also to require any supplementary information and evidence under ss. 4.7-4.9 of the By-law as is necessary to arrive at the determination.
- [72] As occurred in this case, there may be further evidence garnered by the VTRO from other City officials. If there is a dispute about certain matters as between the City official and the property owner, the VTRO must then decide how to resolve those issues.
- [73] In this manner, s. 6.7 of the By-law can be interpreted as giving the VTRO the flexibility to decide how to proceed to a determination. The omission of any limiting words in that procedural decision making, such as is found in s. 6.14, does not necessarily require the VTRO to proceed in that fashion; rather, the VTRO may proceed in any manner he or she deems advisable.

[74] In summary, I agree with the City that the concept of a "hearing" in a legal dispute is a flexible one and depends on the words of the provision and the context in which it is considered. The reference to the property owner having her complaint "hear[d] and determine[d]" by the VTRO does not require an oral hearing in every case.

Should an Oral Hearing be Ordered?

[75] In the alternative, Ms. He argues that, even if the VTRO is not required to convene an oral hearing under the By-law, he or she should do so in every instance in which a complaint is advanced before the VTRO, including in her case.

[76] I have accepted that the portions of the By-law governing the authority of the VTRO contain no provision or requirement for oral hearings. I agree with the City that the structure of the By-law demonstrates that, at least in the first instance, the VTRO's determination is intended to be based on written submissions.

[77] Both the City and Ms. He accept that a duty of procedural fairness applies in respect of the complaint and review process under the By-law.

[78] An oral hearing is not always necessary to ensure a fair hearing and consideration of the issues involved: see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para 33. Whether the VTRO should hold an oral hearing is a question of procedural fairness. In *Baker* at para. 21, Justice L'Heureux-Dube states:

The concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case

[79] The level of procedural fairness required by a particular tribunal in a particular set of circumstances is governed by a number of considerations as set out in *Baker*. I accept the City's summary of the *Baker* factors discussed at paras. 23-27 of that decision:

- a) the nature of the decision being made and the process followed in making it;
- b) the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates";
- c) the importance of the decision to the individual or 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;
- d) the legitimate expectations of the person challenging the decision; and
- e) 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.

- [80] Under the first factor, the question is whether the decision is court-like and adjudicative or more discretionary and policy-based. The nature of the decision in this case is adjudicative and the process used is closer to a judicial process than an inquisitorial process - the VTRO must consider submissions and evidence. As a result, the first factor gives rise to a higher duty of fairness.
- [81] With respect to the second factor, the By-law provides for an internal appeal mechanism. Ms. He may request a review of the VTRO decision by the Review Panel (an independent body) under s. 6.10. This factor weighs in favour of a lower duty. It also could be argued that the nature of the statutory scheme is inquisitorial, given the complaint process by which the property owner puts submissions and evidence before the VTRO.
- [82] With respect to the third factor, there is an argument that the decision has a significant impact on Ms. He. The financial consequences are significant; however, those consequences are driven simply by the value of the Property. Clearly, Ms. He has or has access to substantial financial resources, given the value of the Property even in its undeveloped state. This argument can be equally applied to other property owners facing a similar vacancy tax assessment. The relative amount of the assessment in comparison to the actual property owner's personal circumstances - in terms of his or her wish to or ability to pay that assessment - can vary widely. This factor then, can not be applied broadly to any complaint from a vacancy tax assessment, as Ms. He argues. In my view, this factor is neutral.
- [83] With respect to the fourth factor, Ms. He does not have a legitimate expectation in these circumstances. Ms. He never requested or was promised an oral hearing by a person with appropriate authority. From the materials, it seems that oral hearings are not a typical practice of VTROs. Section 6.7 of the By-law mandates that the VTRO must consider the notice of complaint, supplementary information and evidence and make a determination of the complaint. As stated above, there is no requirement in the By-law to hold an oral hearing. This factor indicates a lower duty of procedural fairness.
- [84] The fifth factor is a reminder that courts cannot impose their own ideas about fairness. The VTRO has discretion in determining whether to hold an oral hearing. As set out in the By-law, the VTRO will decide whether to request additional information from the owner.
- [85] As stated in the above quote from Baker, the issue before the VTRO can also widely vary from case to case and will dictate the proper procedure in terms of what procedure is appropriate. Section 3 of the By-law provides for a number of exemptions, some relatively straightforward. For example, if support for the exemption requires further documentation that was not available at the time of the filing of the status declaration, but is easily later provided by the homeowner, the VTRO may quickly come to the conclusion that the exemption is justified and no further procedures, such as an oral hearing, is required at all.
- [86] This factor weighs in favour of a lower duty of fairness.

- [87] In my view, the strength of the duty of fairness is not particularly high in these circumstances and does not demand an oral hearing.
- [88] It may be worth noting that an oral hearing will be necessary when credibility is in issue: see *Khan v. University of Ottawa*, [1997] O.J. No. 2650 (CA). When a decision turns on credibility, a decision-maker should not make an adverse finding of credibility without affording the affected person an oral hearing. However, absent issues of credibility, the duty of fairness will not ordinarily demand an oral hearing: see *Sidhu v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2010 BCSC at para. 85, citing *Khan* at para. 21. If issues of credibility arise in this case, then an oral hearing may be necessary.
- [89] All of the above supports that a VTRO's decision as to what is required procedurally to decide the issue will be specific to the circumstances at play in each case. Consideration will include, but not be limited to, the nature of the exemption claimed, the nature of the evidence, whether there are disputes concerning the evidence as between the City and the property owner, whether there are disputes concerning the interpretation of the exemption claimed and any other relevant matter.
- [90] I accept Ms. He's arguments that many circumstances here point to a more complicated issue to be determined. The first and second factors require a consideration of the new and largely untested requirements in s. 3.2(a) of the By-law by which Ms. He claimed the Redevelopment Exemption. Factual issues have been raised as to not only when permits were issued for the Property, but when they should have been issued. Both the City and Ms. He blame the other for the course of the permitting applications and the issuance of permits. Whether that history is a relevant consideration under the By-law remains to be determined. Clearly, the magnitude of the Vacancy Tax has raised the stakes here. Both parties have a large stake in the determination; Ms. He's is largely financial; the City no doubt has an eye on that aspect and any precedential value of an interpretation of the Redevelopment Exemption.
- [91] Ms. He argues that I should pre-empt the new VTRO's consideration of what procedure to adopt in addressing her claim to the Redevelopment Exemption. Given that the matter is to be remitted back to a new VTRO, as agreed, this aspect of the VTRO's determination is, as yet, unknown.
- [92] In that event, I agree with the City that it is not appropriate for this Court to rule on whether procedural fairness requires an oral hearing in this particular case. That analysis, at least in the first instance, as to whether an oral hearing is required is for the VTRO to decide. I am simply not in a position to assess the Baker factors in a vacuum and without that decision in hand. It may be that the VTRO mandates a procedure that is completely acceptable to both parties, obviating any judicial review at all on that issue. That decision could include or not include an oral hearing.

[93] In sum, the matter as to what procedure should be undertaken to ensure a full and fair hearing is a determination for the VTRO. In the absence of that decision, this Court will not undertake any premature analysis of procedural fairness in relation to Ms. He's case and decide what procedures should be allowed. That issue is necessarily within the exclusive purview and discretion of the VTRO, at least in the first instance.

CONCLUSION

[94] I grant the following orders:

- a) the decision of the Vacancy Tax Review Panel dated April 24, 2019 in respect of the application of the Vacancy Tax to the Petitioner's property at 4749 Belmont Avenue, Vancouver, BC (the "Property") for 2017 is hereby quashed;
- b) the determination of the Vacancy Tax Review Officer ("VTRO") dated June 25, 2018 in respect of the application of the Vacancy Tax to the Property for 2017 is hereby quashed;
- c) the issue of whether the Property is subject to the Vacancy Tax for 2017 is hereby remitted back to a new VTRO for determination;
- d) the VTRO shall determine the process by which the new determination will be undertaken, after receiving submissions on such point from Ms. He and the City; and
- e) there shall be no costs to either party.

"Fitzpatrick J."

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Prepared on 27 October 2026 · Esheria