

CANADA / JUDGMENT

Nicholson v. Coquitlam (City)

2022 BCSC 1433

COURT

Supreme Court of British Columbia

DECIDED

18 August 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 1433 Nicholson v. Coquitlam (City)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nicholson v. Coquitlam (City),

2022 BCSC 1433

Date: 20220818

Docket: S221660

Registry: Vancouver

Between:

Neal John Nicholson and Wayne Taylor

Petitioners

And

The City of Coquitlam, Richard Stewart, Brent Asmundson, Steve Kim, Trish Mandewo, Dennis Marsden, Craig Hodge, Teri Towner, And Chris Wilson

Respondents

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:

S. Anderson

M. Harden

Counsel for the Respondents:

P.A. Hildebrand

K. Dakus

Counsel for the Attorney General of British Columbia:

M. Witten

Place and Date of Hearing:

Vancouver, B.C.

June 21, 2022

Written Submissions Received:

Vancouver, B.C.

July 27, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 18, 2022

INTRODUCTION

- [1] The petitioners, Neal Nicholson and Wayne Taylor, are residents of Coquitlam, BC.
- [2] In March 2022, the petitioners filed this action against the defendant, City of Coquitlam (the "City"), and the individual defendants, all of whom are currently councillors of the City. The petitioners sought various relief against the defendants, all directed toward obtaining court orders to compel the City to hold a by-election for a council position that became vacant in September 2021.
- [3] Unfortunately, this matter did not come on for hearing until late June 2022. At the conclusion of counsel's oral submissions, I declined to order that the City hold a by-election and dismissed the relief sought in that respect. That left the remaining relief sought by the petitioners to quash the City's decision not to hold a by-election and declarations relating to the propriety of the City's decision in that respect. At that time, I reserved my decision as to this further relief.
- [4] For reasons set out below, I have since concluded that it is not appropriate to proceed to consider the remaining relief sought by the petitioners.

BACKGROUND FACTS

[5] In September 2021, a member of the City's council resigned after her election to Parliament. That fact was recorded by the City at its next council meeting held in early October 2021.

[6] The Local Government Act, R.S.B.C. 2015, c. 1 [LGA], addresses by-elections in the event of a vacancy arising from a resignation, as follows:

54 (1) Subject to this section, an election must be held to fill a vacancy in an elected local government office that occurs in any of the following circumstances:

.

- (d) the person holding the office resigns from office;
- (2) A local government may decide that a by-election is not to be held if the vacancy occurs after June 1 in the year of a general local election that will fill the office.
- (3) In addition to the authority under subsection (2), a council may decide that a by-election is not to be held if all the following circumstances apply:
 - (a) the vacancy occurs after January 1 in the year of a general local election that will fill the office;
 - (b) the vacancy is not in an office elected on the basis of a neighbourhood constituency;
 - (c) the number of remaining council members is at least one greater than the quorum for the council, as set under section 129 (1) [quorum for conducting business] of the Community Charter.
- (4) As soon as practicable after a vacancy occurs for which an election under this section is to be held, the local government must
 - (a) appoint a chief election officer for the election, and
 - (b) notify the minister of the election.

(4.1) As soon as practicable after the appointment under subsection (4) (a), the chief election officer must notify the BC chief electoral officer of the election.

(5) The chief election officer must set a general voting day for the election, which must be on a Saturday no later than 80 days after the date the chief election officer was appointed.

[7] The next BC general election for all local governments, including the City, will occur on October 15, 2022.

[8] Since the council member's resignation occurred prior to June 1, 2022, s. 54(2) of the LGA did not allow the City to decide against holding a by-election. In addition, none of the prerequisites set out in s. 54(3) were satisfied to similarly allow the City to not hold a by-election.

- [9] Accordingly, s. 54 of the LGA required the City to hold a by-election after October 2021 "as soon as practicable" (LGA, s. 54(4)) and also, take steps to organize that by-election by appointing a chief electoral officer and setting a voting date (LGA, s. 54(4.1) and (5)). Beginning in October 2021, the petitioners began contacting the City to request that a by-election be held.
- [10] The City did not agree that a by-election either should or could be held. The City argued that both pandemic and weather related issues made it such that the holding of a by-election was neither possible nor appropriate. They cited various events in late 2021: the rise of the Omicron COVID-19 variant; government mask mandates; government health-related restrictions on gatherings; unprecedented flooding from massive rainfall which resulted in a province-wide state of emergency and supply chain issues; and, finally, a cold snap in December 2021. All of these issues were said by the City to have affected the availability of staff to manage non-routine matters, such as organizing and holding a by-election.
- [11] Finally, the City raised the issue of the cost of holding a by-election (\$200,000), particularly in advance of the costs anticipated to hold the general election later in October 2022 (\$450,000). The City made the related point that the timing would be such that there was little utility in electing another council member when, after observing the relevant timelines, there would be limited opportunity for that person to participate on council in the short period of time before the general election.
- [12] In October 2021, the City contacted the Provincial Government seeking an exemption from the holding of a by-election. Such authority is found under s. 167 of the LGA if "special circumstances" exist. After exchanges on the issue, on February 1, 2022, the Provincial Government advised the City that it cannot exercise its power under s. 167 of the LGA because there was no election underway; however, it added that because s. 54(4) mandates a municipal council must hold a by-election "as soon as practicable" after a vacancy occurs under s. 54(1), "the decision to determine what is practicable rests wholly with Council".
- [13] On February 22, 2022, the petitioners' counsel gave notice to the City of this impending proceeding. On March 3, 2022, this petition was filed. The petitioners sought the following substantive relief in their petition:
1. An order pursuant to s. 2 of the Judicial Review Procedure Act, R.S.B.C. 1996, c-241 [JRPA], in the nature of certiorari quashing the decision of the Respondents to not conduct a by-election to fill the vacancy created by the resignation of elected Councillor Bonita Zarrillo that was tendered in September 2021;
 2. A declaration that the Respondents have breached s. 54 of the [LGA], by failing to appoint a chief election officer to conduct a by-election and to notify the Minister of Municipal Affairs of the by-election as required by s. 54 of the [LGA];
 3. A declaration that the Respondents have failed and refused to perform their statutory obligation to conduct a by-election in accordance with the requirements of s. 54 of the

[LGA];

4. An order pursuant to Section 2 of the [JRPA], in the nature of mandamus directing the Respondents to immediately appoint a chief election officer for a by-election and to notify the Minister of Municipal Affairs of the by-election, pursuant to s. 54(4) of the [LGA];
5. An order pursuant to Section 2 of the [JRPA] directing the chief electoral officer appointed by the Respondents to notify as soon as practicable the BC chief electoral officer of the by-election, pursuant to s. 54(4.1) of the [LGA];
6. An order pursuant to Section 2 of the [JRPA] directing the chief electoral officer appointed by the Respondents to set a general voting day on a Saturday no later than 80 days after their appointment, pursuant to s. 54(5) of the [LGA];

POST-FILING EVENTS

[14] In mid-March 2022, the City again attempted to have the Provincial Government change its mind about not acting under s. 167 of the LGA.

[15] On March 28, 2022, the City passed a resolution to oppose this proceeding, which was unanimously adopted by its council members. The resolution cited the numerous reasons why the Council decided not to hold a by-election, leading to the conclusion that:

G. As a result of the foregoing, it has been and remains both contrary to the public interest and impracticable to hold a by-election to fill the vacancy created by the resignation of Councillor Zarrillo, prior to the scheduled general election.

[16] On March 29, 2022, the City filed its response to this action. The City's defence to the action included:

- a) that the petitioners did not have standing, including public interest standing;
- b) that it had been and continued to be "impracticable" to hold a by-election, which was a reasonable decision in all of the circumstances; and
- c) in any event, the Court should decline to exercise its discretion to order that a by-election be held.

[17] On March 31, 2022, in light of the City's position that the petitioners had no standing to bring this action, the petitioners provided notice to the Provincial Government of their petition "so that the interests of British Columbians can be represented with respect to elections in [BC]".

[18] By April/May 2022, the Provincial Government advised both sides that it would not be wading into the dispute. The Provincial Government told the City (again) that it would not invoke s. 167 of the LGA. The Provincial Government also told the petitioners that it would not seek to intervene in the litigation, a position that its counsel confirmed at this hearing.

JUNE 21, 2022 HEARING

- [19] On June 21, 2022, the matter came for hearing and I heard substantial submissions from counsel. I would add at this time that the petitioners do not contend that the City or its counsel delayed the hearing of the matter in any way. It is simply how the litigation unfolded.
- [20] At the end of the hearing, I advised counsel that, even if the City was required to hold a by-election under s. 54 of the LGA, I would decline to exercise my discretion to compel the City to do so.
- [21] In large part, my decision was driven by sheer practicality. By the time of the hearing, the general election was less than four months away.
- [22] The complex issues raised at the hearing--including the significant and highly contested issue as to whether the petitioners had public interest standing--were not amenable to an immediate decision from the bench, requiring me to reserve my judgment. Any delay, even a short one, in potentially arriving at a decision that did direct a by-election, was such that it would result in the swearing in of a new council member under a by-election at the same time if not after the general election.
- [23] Even if a decision from the bench could have been made immediately, the orders requested by the petitioners would have resulted in barely sufficient time to hold the by-election, even assuming the minimum numbers of days required after the appointment of the electoral officer in early July 2022. The most realistic timeline would have resulted in a new council member being confirmed as elected in mid-September 2022, and then only sworn in by the next council meeting on September 19, 2022 or possibly even October 3, 2022, both dates only weeks before the general election, respectively.
- [24] All of these circumstances would also have required the City to hold a by-election essentially at the same time as holding the general election, while spending \$200,000 of taxpayer funds for what would have been (possibly) very limited participation by that new council member until the general election.
- [25] Accordingly, at the end of day on June 21, 2022, I dismissed the relief sought in the petition at paras. 4-6 that were directed toward compelling the City to hold a by-election. I indicated to the parties that, even if the petitioners had standing and even if the City had acted unreasonably in not holding a by-election, I would have declined to exercise my discretion to order that a by-election be held.
- [26] Therefore, what remained under reserve was the relief sought by the petitioners at paras. 1-3 of the petition, i.e., to quash the City's decision and declare that the City had failed to abide by s. 54 of the LGA in not holding a by-election.

DECLARATORY RELIEF

- [27] On June 29, 2022, reasons were issued in *Interfor Corporation v. Mackenzie Sawmill Ltd.*, 2022 BCCA 228 [Interfor]. One of the issues addressed by the court was when it is appropriate for this Court to exercise its discretion to grant declaratory relief.
- [28] The decision in *Interfor* brought into sharp focus an issue that had not been specifically addressed at the end of the hearing and after my decision that day, namely, should this Court even proceed to consider the remaining relief when the ultimate relief sought had been dismissed.
- [29] On July 12, 2022, I invited counsel to provide the Court with written submissions on the appropriateness of the Court considering the certiorari and declaratory relief that remained arising from my decision on June 21, 2022. Those submissions were received.

Interfor Decision

- [30] The dispute in *Interfor* concerned enforcement of a chip supply agreement from a sawmill that had been affected by many fires in the past. Among the issues before this Court were those raised by the defendants, as to whether the contract had been frustrated by some or all of the fires and whether those fires were a proper basis upon which to invoke a force majeure clause under the contract.
- [31] At a summary trial, Justice Gomery made findings of fact and law in favour of the plaintiff, dismissed the relief sought by the defendants, and granted declarations on those issues in favour of the plaintiff: *Interfor Corporation v. Mackenzie Sawmill Ltd.*, 2020 BCSC 1572. The defendants appealed, contending that Gomery J. had erred in his decision. However, before turning to that issue, the Court considered the suitability of granting declaratory relief.
- [32] The majority of the court in *Interfor* set out the test for granting declaratory relief:
- [25] Declaratory relief is a discretionary remedy that "may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought": *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 at para. 60. In addition, a declaration must have practical utility, in that it will settle a "live controversy" between the parties or clarify the rights of the parties, at least to some extent: *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para. 11; *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 at paras. 308-314, 331, leave to appeal ref'd [2020] S.C.C.A. No. 252. An interpretation of a contract and its application to a specific set of facts may be a proper case for declaratory relief, but a declaration of facts detached from the legal rights of the parties is not: see *1472292 Ontario Inc. (Rosen Express) v. Northbridge General Insurance Company*, 2019 ONCA 753 at paras. 30-31.

[Emphasis added.]

- [33] The majority concluded that, while Gomery J.'s declarations were premature and unnecessary, they resulted in a narrowing of the issues and, as such, they had some "practical utility" in resolving some issues that did not need to be later addressed at the trial (paras. 30-32).
- [34] In dissent in *Interfor*, Willcock J.A. disagreed that there was any "practical utility" in the declaration on the frustration issue and would have set aside that aspect of the relief granted. In doing so, Willcock J.A. emphasized the contours of declaratory relief, consistent with the majority view:
- [94] Declaratory relief that has no practical effect should not be granted. Such relief is to be granted sparingly, and is directed to real and not hypothetical disputes: see, in addition to the authorities my colleague has cited, *Solosky v. The Queen*, [1980] 1 S.C.R. 821, and *Heller v. Greater Vancouver Regional District* (1992), 94 D.L.R. (4th) 718, (B.C.C.A.), leave to appeal to ref'd [1993] 2 S.C.R. viii.
- [95] Declarations of uncertain effect, such as those made in this case, may be particularly problematic where they are made on an application in an action that will continue to trial. In my opinion, the fact that the second declaratory order is of uncertain effect is reflected in the parties' inability to describe the practical effect of the order or the issues it has resolved, in response to our request for additional submissions. That difficulty may be problematic at trial.

Position of the Parties

- [35] The petitioners say that it is appropriate for the Court to decide the remaining issues of certiorari and the declaratory relief.
- [36] The petitioners say that a determination of the issues is not a hypothetical exercise in that there continues to be practical utility in granting the remedies sought to settle the "live controversy" as to whether the City acted unlawfully in failing to and refusing to conduct the by-election under s. 54 of the LGA. They say that, where there is a right to a by-election, they have a right to a remedy, even if those remedies may only serve limited practical utility. Finally, the petitioners say that the declaratory relief they seek would "clarify the respective rights of the parties".
- [37] The City says that it is not appropriate to proceed as no basis exists for issuing declaratory relief. The City says that: there is no longer a real dispute; the petitioners no longer have a genuine interest in pursuing declaratory relief; and, the remaining relief sought will no longer have any practical utility, in terms of settling a live controversy.

Discussion

- [38] There is little doubt as to the Court's jurisdiction to exercise its discretion to grant the remaining relief sought, including declaratory relief, where appropriate.

[39] The BC Supreme Court Civil Rules provide in R. 20-4(1):

- (1) A proceeding is not open to objection on the ground that only a declaratory order is sought, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

[40] In addition, the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 [JRPA] provides this Court with that jurisdiction. The Court has the discretion to grant relief in the nature of certiorari and grant declarations as to the exercise or refusal to exercise statutory powers and may grant consequential relief in that event, including setting aside a decision of a statutory body: JRPA, ss. 2, 7 and 8.

[41] Lazar Sarna states in *The Law of Declaratory Judgments*, 4th ed (Toronto: Carswell, 2016) [Sarna] at p. 1, that a declaratory judgment is a judicial statement confirming or denying a legal right. At p. 2, the author further discusses the rationale for granting such relief and the intended utility in obtaining that relief even as simply a "pure" judicial declaration without consequential remedies:

The inherent function of the court is to declare, in the sense of confirm, the rights of the parties seeking judicial intervention. The premise underlying the declaratory recourse is that judicial recognition of certain rights should not be withheld from the parties for reasons relating strictly to the procedural obstacles characteristic of other judicial remedies. It is assumed that a pure judicial declaration provides sufficient protection to the parties for the due exercise of their rights in the face of possible interference and destruction, for the effect of judicial recognition is to publicize the existence of rights, and subsequent action for enforcement will depend on large measure on the content of the declaration. The innovation effected by the introduction of the declaratory recourse is that a litigant is no longer obliged to wait until he has suffered actual damage to his person or patrimony before seeking redress through judicial process; access to the courts gains immediacy. A plaintiff who has sufficient interest may, if the issue posed is justiciable and not hypothetical, obtain a declaration clarifying and confirming the validity of various rights under statute, administrative orders, contract, collective agreements, and deeds.

[Emphasis added.]

[42] The petitioners assert that, where there is a right, there is a remedy, citing the old Latin maxim, *ubi jus, ibi remedium*, and a case involving a denial of voting, *Ashby v. White* (1703), 92 E.R. 126 (K.B.), Holt C.J. dissenting at 136; *rev'd* [1703] 1 Bro. Parl. Cas. 62 (H.L.).

[43] The City refers to a more modern authority in 1472292 Ontario Inc. (*Rosen Express*) v. Northbridge General Insurance Company, 2019 ONCA 753 [Northbridge], a decision referred to in *Interfor* at para. 25. This case involved a dispute between a trucking firm and its insurer concerning a theft of cargo. Although no claim had been advanced against the trucking firm by its customer, the trucking firm sought and obtained declarations from the court below concerning the coverage issues.

- [44] On appeal, the court in Northbridge found that no declarations ought to have been granted, based on the four-part test from *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 (cited in *Interfor* at para. 25). The Court stated in part:
- [22] While the court has the jurisdiction and authority to make a declaration of right, it is only to be used when the declaration will have an effect on an existing dispute between the parties. It is not to be given as an opinion on a hypothetical set of facts, or as an academic exercise to settle what may happen in the future. ...
- [23] The leading decision from the Supreme Court on this issue is *Solosky v. The Queen*, [1980] 1 S.C.R. 821. Mr. Solosky, a federal prisoner, sought a declaration that it would be illegal for penitentiary officials to open and read his mail to and from his lawyer. Dickson J. stated that the principles that guide the court in exercising its jurisdiction to grant a declaration have been stated many times. There are two factors to consider. The first is the reality of the dispute: Dickson J. explained at p. 832 that "[i]t is clear that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise". In *Solosky*, the dispute was not hypothetical because there was an order in place requiring that Mr. Solosky's mail be opened and read; that order had been and was continuing to be applied and therefore would apply to future mail.
- [24] If the dispute is established as a real dispute, then the second factor is "whether the declaration is capable of having any practical effect in resolving the issues in the case": at p. 833. In *Solosky*, the court concluded that the appellant was not entitled to the declaration sought for other reasons, but that otherwise, the court could have exercised its jurisdiction to grant it because the two criteria stated above were met.
- [Emphasis added.]
- [45] I am persuaded by the above authorities that it is no longer appropriate to even proceed to consider the declarations and other relief sought by the petitioners.
- [46] It is now impracticable to hold a by-election given the statutorily imposed timelines that I alluded to above at para. 23. To use the language in *Interfor*, the dispute may still be "real and not theoretical", but the declarations sought would have no "practical utility" in resolving the issues in the case. It would be akin to saying "I was right and you were wrong". Apropos this point are the comments of Justice Davies in *British Columbia (Securities Commission) v Pasquill*, 2021 BCSC 1047 at paras. 127-130 where he declined to consider declaratory relief that past conduct was wrongful. This is true regardless whether this action is brought by the petitioners in their personal capacity or "in the public interest", as they also allege.
- [47] Further--though I do not suggest this is determinative--the facts that infused the City's decision against holding a by-election are so unique that there is likely little precedential value to any decision I might have made.

- [48] In refusing to grant the declarations sought, I am not deterred by Ashby. The maxim cited in that case, *ubi jus, ibi remedium*, does not absolve the petitioners from having to show that they meet the requirements for declaratory relief.
- [49] In the event that I am wrong on the last point, I note Ashby was decided on a rather narrow point and does not bear the weight the petitioners place upon it. The right to vote denied in that case was incidental to a franchise vested in an incorporated borough. Holt C.J. noted that although the franchise was held by the corporation, it was enjoyed as a "personal right" by members of the incorporated borough, of which Ashby was one: Ashby at 134-135. This led Holt C.J. to characterize that personal right as a "property right", which in turn allowed him to conclude that Ashby was entitled to damages, though he had suffered no injury: Ashby at 137-138. The petitioners' interest in having a by-election held by the City in the within case is obviously not proprietary.
- [50] I find support for my reading of Ashby in *Watkins v. Home Office*, [2006] UKHL 17, where Lords Bingham and Rodger at paras. 13-14 and 48-57 respectively read down Ashby on the same basis after a detailed consideration of its facts and historical context. This latest English authority may put into question previous jurisprudence of BC courts suggesting a greater scope for the rule in Ashby (see, for example, *Allen v. College of Dental Surgeons of British Columbia*, 2007 BCCA 75).
- [51] I decline to consider granting the requested order in the nature of certiorari for the same reasons that I decline to grant the declarations requested.

COSTS

- [52] I have concluded that it is not appropriate for the Court to exercise its discretion to consider and possibly grant the remaining relief sought. The remainder of the relief sought in the petition (paras. 1-3) is dismissed.
- [53] In that event, the parties agree that no costs should be awarded arising from this action and that is so ordered.

"Fitzpatrick J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/14/2022BCSC1433.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/nicholson-v-coquitlam-city-2022>

Prepared on 27 October 2026 · Esheria