IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dupont v. Port Coquitlam (City),*
2021 BCSC 728

Date: 20210421
Docket: S206043
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241;
In the Matter of the *Community Charter*, S.B.C. 2003, c. 26; and
In the Matter of the *Local Government Act*, R.S.B.C. 2015, c.1

Between:

Laura Dupont

Petitioner

And

The Corporation of the City of Port Coquitlam

Respondent

Before: The Honourable Justice Marzari

Reasons for Judgment

Counsel for the Petitioner via videoconference:	S. Anderson
Counsel for the Respondent via videoconference:	M. Cruickshank M.R. Voell
Place and Date of Trial/Hearing:	Vancouver, B.C. January 15, 2021
Place and Date of Judgment:	Vancouver, B.C. April 21, 2021

INTRODUCTION

[1] The petitioner, Councillor Dupont, brings this petition for judicial review to quash a May 26, 2020 resolution (the "Resolution") of Council of the City of Port Coquitlam that declared she had disclosed confidential information in breach of the *Community Charter,* S.B.C. 2003, c. 26 and her duties as a Council member, formally censured her for this breach, imposed restrictions on her access to confidential materials, and removed her from certain committees and roles.

[2] Additionally, Councillor Dupont seeks injunctive relief staying the effect of the Resolution, and restraining the City from passing any further censuring or sanctioning resolutions against her. She also seeks declaratory relief that the censure and sanction aspects of the Resolution are *ultra vires* the City pursuant to the *Community Charter* and *Local Government Act*, R.S.B.C. 2015, c. 1, and declarations that the information she disclosed:

a) was not confidential information, or did not constitute unlawful disclosure of confidential information within the meaning of s. 117 of the *Community Charter*; or

b) was not information that may be considered in closed Council meetings pursuant to s. 90 of the *Community Charter*.

[3] Councillor Dupont also seeks an order quashing the censure and sanctions as "excessive and disproportionate" and directing the City to "expunge and remove the Resolution, and all references to the Resolution, the censure, and the Sanctions from the City's records."

[4] Finally, Councillor Dupont pleads a number of alternative remedies that I will not address as they were not pursued before me at the hearing of this petition.

[5] Councillor Dupont's application for interlocutory injunctive relief to stay the effect of the Resolution pending hearing of this petition came before this court in July 2020. Justice Branch denied that interlocutory relief in *Dupont v. The Corporation of*

the City of Port Coquitlam, 2020 BCSC 1127, on a number of grounds, including that the petition and the evidence in support of the petition (which I note is the same evidence that is now before me) did not establish a strong *prima facie* case that the City's decision was unreasonable. In making this finding, Branch J. noted at para. 40 that, "[t]his assessment will obviously not bind the hands of the court hearing the petition, as the parties may file additional material, will make additional arguments with additional time, and will be applying a different test."

[6] At the hearing of the petition before me, Councillor Dupont, in both written and oral submissions, all but abandoned the substantive grounds argued before Branch J. as pled in the petition, and raised, for the first time, a series of procedural fairness grounds for setting aside the Resolution on the basis of failure to provide adequate reasons, denial of a fair hearing before the decision-maker, and bias or closed mind. The City objected to these new grounds being raised in the absence of amended pleadings or notice.

[7] The issues before me in this petition are therefore:

a) the substantive grounds as pled in the petition relating to the jurisdiction and reasonableness of the City's Resolution;

b) whether Councillor Dupont should be permitted to raise procedural fairness grounds not pled in her petition; and

c) if Councillor Dupont is permitted to raise procedural fairness grounds, whether the Resolution was passed in a procedurally unfair manner.

[8] I should also note that Councillor Dupont raised three preliminary objections at the hearing of this petition, which I will address briefly now.

[9] The first was an objection to the standing of the City to respond to the petition on its merits in this judicial review proceeding. I am satisfied that the City ought to be granted that standing pursuant to *Ontario (Energy Board) v. Ontario Power Generation Inc*., 2015 SCC 44. This is not a case where a third-party has been

affected who is capable of responding to the petition, and the court requires the assistance of the City's submission on the merits of the petition.

[10] The second was an objection that the City did not properly submit the record before Council for this hearing. This is something that should have been raised with the City well before the hearing before me. Ideally, all judicial review petitions should include a separate affidavit attaching in one place, properly tabbed, the full record of all materials that were before the decision maker in relation to the decision sought to be reviewed. In this case, I am satisfied that the record was effectively provided through the affidavit of Councillor Dupont filed and attached to the petition, as supplemented by the affidavit of Mr. Joseph, the City's Corporate Officer.

[11] While the affidavit materials of both the petitioner and the City go beyond the record before Council when it considered the Resolution, I am satisfied that the additional evidence provides necessary background to understand not only the context of the Resolution itself, but also its implications for the petitioner in relation to the censure and sanctions and the other remedies sought.

[12] Finally, Councillor Dupont objects to para. 5 of the second affidavit of Ms. Dixon, the City's Chief Administrative Officer, sworn on July 28, 2020, as providing inadmissible opinion regarding her "sense" of Council's concerns regarding the breach of confidential information. The City has agreed not to rely on that paragraph and I have disregarded its contents.

[13] The factual context of the Resolution and this petition is largely uncontentious. I turn to that now.

THE RESOLUTION AND ITS FACTUAL CONTEXT

[14] The Resolution was passed at a time when the City was engaged in discussions that were closed to the public pursuant to s. 90 of the *Community Charter,* for the purposes of evaluating the potential development of a City-owned piece of land located at 2251 McAllister Avenue (the "Site"). Councillor Dupont was concerned about the preservation of trees on the Site, and in particular a specific

mature Deodar cedar tree (the "Tree"). She shared information regarding the potential impact of the Site's preliminary development proposal on the Tree with community members also involved with and concerned about the preservation of trees in the City. I note that Councillor Dupont ran for Council, and presumably was elected, in part based on her concern for environmental protection.

[15] Justice Branch succinctly summarized the evidence regarding the broader context of this petition in his interlocutory reasons, none of which are challenged by either party, as follows:

> [3] On November 15, 2014, the petitioner was elected as a Councillor at large by the citizens of the respondent City of Port Coquitlam (the "City"). On October 20, 2018, the petitioner was re-elected for a 4-year term.
>
> [4] Following the 2018 election, the City made the petitioner the designate for matters relating to the City's Parks, Environment and Climate Change. These designations are discretionary and do not give the designated member any additional decision-making authority in relation to the subject area.
>
> [5] The petitioner was also appointed as the City's representative to the Coquitlam River Watershed Roundtable and the Tri-Cities Healthier Communities Partnership, and was the alternate appointment to the Fraser Valley Regional Library Board and the Tri-Cities Homelessness and Housing Task Group.
>
> [6] The alleged breaches of confidentiality that resulted in the petitioner's removal from these positions flow from work the City has been doing to evaluate the potential development of certain City-owned lands. Since 2018, Council has been considering matters related to the sale and future development of property located at 2251 McAllister Avenue (the "Site"). In May 2018, the City retained a consultant, Jeff Brown (the "Consultant"), to act as the Land & Development Facilitator for the City, and to advise Council in relation to the development of the Site.
>
> [7] Council has only ever considered matters related to the sale and development of the Site at *in camera* meetings. In the last year, Council discussed the development of the Site at *in camera* meetings held on July 23, 2019, October 8, 2019 and December 17, 2019. On each occasion, prior to going *in camera*, City Council adopted a Resolution to close the meeting pursuant to s. 90 of the *Community Charter*. The petitioner was present at the public and *in camera* portions of these meetings and voted in favour of the Resolutions to have the issues related to the Site considered *in camera*.
>
> [8] The Consultant attended the City's *in camera* meetings from time to time to provide advice and recommendations to Council regarding development of the Site. The Consultant has never given advice regarding the Site at a Council meeting that has been open to the public.

[9] The only information released by the City to the public regarding development on the Site was contained in a press release issued by the City on October 24, 2019, which release was authorized by a Council Resolution dated October 8, 2019.

[10] On February 10, 2020, the petitioner met with the Consultant. The Consultant says that the petitioner invited a third individual to the meeting who was not attending in any official capacity for the City. At the meeting, there was discussion about steps that could be taken to preserve trees as part of the development of the Site. One tree in particular was the focus of the discussion (thereby elevating its import to a level entitling it to its own defined term—the "Tree"). The petitioner and the third party advocated for retention of the Tree.

[11] On April 2, 2020, the petitioner forwarded to certain members of the public a copy of an email sent by the Consultant to Council. This email included the following detail:

> Since we are trying to push this project forward quickly, we need to know if council would rather have the [Tree] or an additional 11 residential parking stalls for the project.

[12] The recipients to whom the petitioner forwarded the email were local tree protection advocates, including the individual who was at the February 10, 2020 meeting. The petitioner sought to encourage these individuals to reach out to their contacts on Council to encourage retention of the Tree.

[13] On April 5, 2020, the City's Chief Administrative Officer (the "CAO") forwarded a copy of an April 4, 2020 email from the Consultant to the Mayor and Councillors, which information was stated to be in respect of a "late closed item on the agenda." This email included such details and recommendations as the following:

> [The] developer, Quarry Rock, has informed us that they feel that the loss of parking stalls will have a major impact on the marketability of the residential units. In addition, their landscape architect also seems to be against the retention of the [Tree] due to the impact on the pedestrian mews. I understand that staff is also recommending against a reduction in parking stalls on the project, which would mean the removal of the [Tree].
>
> If the residential units are less valuable there will be less money available to contribute to offsite improvements on McAllister…
>
> It is unfortunate, however this is the first project in what will hopefully be many in the downtown. It is important that this project is able to deliver an excellent pedestrian mews experience and vibrant restaurant options, while contributing financially to the improvement of McAllister and not placing a parking burden on the limited commercial spaces. For these reasons I would suggest that the project should be designed without the [Tree].

[14] The petitioner again forwarded the email to tree protection advocates outside Council and City staff.

> [15] The CAO deposed that the issue regarding the Tree is actually quite a financially significant one. Her affidavit states as follows:
>
> > The matter Council had planned to consider during the in camera portion of its meeting on April 7, 2020 was not simply about whether to remove or retain the Tree on the Site. The question was really whether Council was prepared to approve an alternate design concept for development of the Site which would have a number of impacts, including visual blockage to retail storefronts – which could impact the commercial viability of the development, as well as the potential to exacerbate CPTED (Crime Prevention Through Environment Design) issues. More importantly, there would be a financial implication in that the alternate design concept would result in a loss of an additional 11 parking spaces and the developer had advised it would not be willing to pay cash in lieu (approximately $440,000) for those stalls….
>
> [16] Council became concerned that the petitioner may have disclosed confidential information related to the development of the Site to members of the public. At an *in camera* meeting on April 7, 2020, Council resolved to undertake an investigation relating to the potential breaches of confidentiality.
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> [Emphasis added.]

[16] The City notes that Councillor Dupont opposed the motion to proceed to an investigation to determine the source of the potential breach, at that point denying she was the source. The investigation process and findings were also summarized by Branch J.:

> [17] The City retained Earl Phillips, Q.C. (the "Investigator") to conduct the investigation. The petitioner was invited to participate in the investigation but declined to do so.
>
> [18] The Investigator provided a report on May 4, 2020 (the "Report"). The Investigator concluded the petitioner had breached confidentiality on each of February 10, April 2, and April 5, 2020. Specifically, the Investigator concluded as follows:
>
> > Councillor Dupont breached her duty of confidentiality in discussing the Development and the Tree with Bobick at the meeting she arranged with Brown on February 10, 2020. It was a breach of confidence generally, and a breach of s.117(1)(b) of the Community Charter.
> >
> > Councillor Dupont breached her duty of confidentiality in forwarding the April 2 email to Bobick and Furness. It was a breach of confidence generally, as it was a communication from Brown as an advisor to the City on land issues and was inherently confidential. It was also a breach of s.117(1)(a) of the Community Charter. The April 2 email is a "record" that was sent to Council and Council alone, and given the relationship between Council and Brown is properly considered a "record held in confidence by the [City]." The April 2 email did not

> need to be labelled as “confidential” or “closed” to be confidential, the nature of the information and the context of the April 2 email make it confidential.
>
> Councillor Dupont breached her duty of confidentiality in forwarding the April 5 email to Bobick and Furness. It was a breach of confidence generally and a breach of s.117(1)(a) of the Community Charter. The April 5 email was forwarded to Bobick and Furness also contained communication from Councillor Dupont to her fellow Council members about the closed matter.

[Emphasis added.]

[17] Upon receipt of the investigator’s report, Council for the City initiated the process to consider a motion of censure and related sanctions against Councillor Dupont for the breaches of confidentiality found in the investigation. Justice Branch summarized that evidence as follows:

> [19] On May 12, 2020, at an *in camera* meeting, Council resolved to consider a motion of censure and related sanctions given the breaches of confidentiality. On May 26, 2020, Council held a special meeting and went *in camera* to consider the Resolution and Sanctions. After hearing from the petitioner and her legal counsel, Council adopted the Resolution. The Sanctions were put in place for a period of 12 months.
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> [20] Since the Resolution was adopted, the Mayor has removed the petitioner from the four boards and committees and has appointed other members of Council in the petitioner’s place.
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> …
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> [23] City Council has removed the petitioner’s City designation for Parks, Environment and Climate Change.
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> [24] The petitioner has now also been removed from the City’s Acting Mayor rotation for the month of August 2020. The councillor designated as Acting Mayor only fulfills the role if the Mayor is unavailable or unable to fulfill his duties.
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> [25] Finally, Council has put in place alternate procedures for the petitioner’s access to confidential materials. On June 1, 2020, the petitioner received an email outlining the restrictions and limitations as follows:
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> > a) closed meeting agendas will be available in paper form for the petitioner to be picked up from the City’s Corporate Manager or the City’s Assistant Corporate Officer;
> >
> > b) closed meeting agendas will include a special watermark on all closed items to prevent copying of materials;
> >
> > c) there is an expectation that the petitioner will return the closed meeting paper agenda the day after the meeting while COVID-19 measures are in place or, after COVID-19 measures are lifted, to the Corporate Manager or the ACO immediately following the meeting.

> [26] Since the Resolution was adopted, there has been certain public and media criticism of both the petitioner and other members of Council as a result of these matters.

THE REASONABLENESS OF THE RESOLUTION

[18] Councillor Dupont concedes that the standard of review applicable to the Resolution is reasonableness, in accordance with the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*]. However, she argues that Council's interpretation of her duties of confidentiality pursuant to s. 117 of the *Community Charter*, and Council's authority to impose censure and sanctions at all, are jurisdictional questions to which the correctness standard of review applies.

[19] I cannot accept this latter submission. The Supreme Court of Canada in *Vavilov* established that such distinctions are no longer useful, and that the reasonableness standard applies equally to administrative decision makers interpreting their enabling legislation: *Vavilov* at paras. 16–17, 65–66; *G.S.R. Capital Group Inc. v. The City of White Rock*, 2020 BCSC 489 at para. 68. This observation has been applied in the context of municipal governments post-*Vavilov* by our Court of Appeal in *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101 at paras. 34–35.

[20] The Council is therefore entitled to deference with respect to its interpretation of s. 90 and s. 117 of the *Community Charter*, including how those sections relate to information that may be considered in closed Council meetings pursuant to s. 90 of the *Community Charter*. Council is also entitled to deference as to whether a particular disclosure constitutes a breach of the duty of confidentiality pursuant to s. 117 of the *Community Charter*. Finally, Council is entitled to deference with respect to determining that it has the authority to pass resolutions of censure and sanction.

[21] In the recent articulation of the fundamental tenets of judicial review in *Vavilov*, the majority of the Supreme Court set forth a number of principles to guide courts when conducting reasonableness review, including:

a) In conducting reasonableness review, the court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified: at para. 15;

b) Reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process: at para. 86;

c) The reviewing court must review a decision in light of the history and context of the proceedings in which it was rendered: at para. 94; and

d) Absent exceptional circumstances, a reviewing court will not interfere with the factual findings of an administrative decision maker. The reviewing court must refrain from reweighing and reassessing the evidence considered by the decision maker: at para. 125.

The Authority of Council to Censure or Sanction its Members

[22] With respect to the authority of an elected council to censure and sanction one of its members, I find that the City Council's decision was not only reasonable, but was also correct in concluding that it had that authority.

[23] Sections 4 and 114 of the *Community Charter* provide municipalities and their councils broad authority to control their processes. Generally speaking, councillors are not subject to the ordinary reviews and disciplinary processes of traditional employment; their performance is left to be evaluated by the electors every four years at the ballot box. Problematic behaviours may nevertheless arise during the course of a councillor's term, and motions of censure have long been used by all levels of government to express disapproval of a member's conduct. In the local

government context, the courts have affirmed that councils and boards are entitled to use this procedure to respond to the conduct of their members. This was first expressed in relation to a regional district in *Barnett v. Cariboo Regional District*, 2009 BCSC 471, where Justice McKinnon stated as follows:

> [21] I take no issue with the submission that the CRD's Board is entitled to govern its own internal procedure by regulating the conduct of its members which includes Directors such as the petitioner. The powers conferred on the Board by the *Local Government Act are* broad to begin with, and additionally, must be interpreted with a broad and purposive approach which permits the Board to exercise power that is necessarily or fairly implied by statute...
>
> ….
>
> [28] Thus, I do not accept that the Regional District "has no jurisdiction" to govern the (mis)conduct of Directors. The weight of the statutory and judicial authority suggests that a Regional Board has the ability to determine its own internal procedures, which surely must include the ability to control misconduct by a Director.

[24] More recently, in *Skakun v. Prince George (City)*, 2011 BCSC 1796, this Court affirmed the authority of local government councils and boards to adopt motions of censure, notably in the specific context of a breach of confidentiality. Although no censure had yet been imposed, the court was asked to consider the challenge to the council's authority in this regard. Justice Crawford found that this authority exists, stating:

> [41] So we have a situation where Mr. Skakun's conduct is not specifically denounced in the statute. Plainly there has been a breach of s. 117 and there has been a conviction under s. 30(4), although I note that is subject to appeal, but in both instances, Mr. Skakun conceded he had divulged a confidential report.
>
> [42] There is no disagreement then that there is no specific legislation, but can I imply it? I believe I can. That is to be found when one looks at the elements that constitute the duties of the councillor, and it would be expected that council would not sit idly by when a council member has acted contrary to their own statutory obligations….
>
> [43] By my reading of the *Community Charter*, it is reasonable to imply council have an obligation to regulate a councillor's misconduct when there is a substantial falling away from the expected standard.

[25] Councillor Dupont seeks to distinguish these cases on the basis that neither upheld a motion of censure that had already been made: in *Barnett* the resolution

was set aside on the basis of a breach of procedural fairness because Mr. Barnett had not been permitted an opportunity to be heard by the Regional District Board on the issue, and in *Skakun,* council had not yet imposed the anticipated censure and sanction.

[26] I do not consider that these cases can be distinguished on the above or other bases. Even if *Barnett* were to be considered *obiter* on this point, this Court has determined that local government boards and councils have, and ought to have, the authority to censure their members for unlawful or unprofessional behaviour, including breach of confidentiality requirements under the *Community Charter*. In light of these cases, it was certainly reasonable for the City Council to conclude that they had this authority.

[27] In addition, I agree with the City that the authority of local government councils and boards to remove discretionary appointments is inherent in their authority to make such appointments, for example pursuant to ss. 114, 116 and 130 of the *Community Charter*.

[28] The authority to set the procedures for access to confidential materials arises from Council's express authority to govern its own internal procedures.

[29] I find that the City Council reasonably (and correctly) determined that it had the authority to adopt the Resolution of censure and to impose the sanctions it did on the petitioner.

[30] I will therefore go on to consider Councillor Dupont's arguments with respect to whether the censure motion and sanctions themselves were reasonable. These arguments take two forms: the first is regarding the reasonableness of Council's conclusion that Councillor Dupont breached confidentiality; the second relates to Council's obligations under *Vavilov* to provide transparent and intelligible reasons that set out the justification for the decision.

[31] The first argument was set out in Councillor Dupont's petition and is reflected in the relief sought. The latter argument was advanced for the first time at the

hearing of this petition, and has elements of both substantive review for reasonableness, and procedural fairness grounds relating to the requirement to provide reasons.

The Reasons for Council's Decision

[32] Because the adequacy of Council's reasoning process is engaged as part of the reasonableness review under *Vavilov*, I will address this first as part of the substantive review of the Council's decision. As Councillor Dupont notes, a review for reasonableness pursuant to *Vavilov* requires the reviewing court to pay attention to the reasons as articulated by the decision-maker, and consider whether the reasons adequately justify the outcome through a "coherent and rational chain of analysis … that is justified in relation to the facts and law that constrain the decision maker": *Vavilov* at para. 85.

[33] Councillor Dupont accepts that Council's reasons for the Resolution are contained directly within the Resolution, as was indicated by the Mayor in his May 27, 2020 correspondence to the petitioner. The relevant portions of the Resolution read as follows:

> Whereas Council accepts the finding of an independent investigator that Councillor Dupont breached s. 117 of the *Community Charter* by disclosing confidential information contrary to the requirements of that section;
>
> Whereas Council considers Councillor Dupont's unlawful disclosure of confidential information to be conduct unbecoming a member of City Council;
>
> …
>
> Whereas Councillor Dupont was given the opportunity to personally, or via their legal counsel, make submissions to the rest of Council regarding their conduct in this matter;
>
> Whereas Council has considered the submissions made by Councillor Dupont and/or their legal counsel;
>
> Whereas Council has unanimously agreed upon the appropriate action;
>
> Whereas Council has provided written reasons so that Councillor Dupont understands the basis for the decision to address her conduct.
>
> Be it Resolved as Follows:
>
> 1. That Council accepts the findings of the independent investigator that Councillor Dupont disclosed confidential information in breach of s. 117 of the *Community Charter*;

2. That Council considers Councillor Dupont's breach of confidentiality to be conduct unbecoming a member of City Council;
3. That Council shall address what it believes to be conduct unbecoming a member of City Council by way of:

   (a) a motion of censure on Councillor Dupont;

   (b) removal of Councillor Dupont as the City's representative on any external boards or committees

   (c) removal of Councillor Dupont's City appointed designation;

   (d) removal of Councillor Dupont from Acting Mayor rotation;

   (e) alternate procedures for Councillor Dupont's access to confidential material; and

   (f) public notification of sanctions.
4. That the sanctions imposed on Councillor Dupont in sections 3(b), (c), (d), and (e) above remain in effect for a period of 12 months; and
5. That the above Resolution be released into open.

[34] Councillor Dupont argues that the reasons provided by Council are inadequate to establish the reasonableness of its decision. She argues that the reasons do not disclose that Council had "any particular expertise in making decisions concerning allegations about a municipal council member's conduct" and that Council "delegated the investigative task to an external investigator and appears to have summarily adopted the findings in the investigator's report without conducting its own critical analysis." She also argues that the reasons "merely consist of eight summary, conclusory statements contained in the preamble of the Resolution" and "does not satisfy the requirement that the reasons actually justify the outcome by rational and coherent chain of analysis."

[35] Councillor Dupont also argues that the Resolution does not "logically explain" how the email exchange she engaged in could be considered a breach of her confidentiality or any obligations pursuant to the *Community Charter*, and therefore how her actions could be considered conduct unbecoming of a City Councillor.

[36] Finally, Councillor Dupont argues that the Resolution does not "engage with arguments" she made before Council.

[37] Overall, she argues that even in the context of a council decision made by an elected body, the Resolution does not "meet the higher standard which requires justification, demonstrated expertise, responsiveness and contemporaneity."

[38] The City submits that the Supreme Court of Canada in *Vavilov* noted that there is a category of decisions where no duty to provide reasons exists, including decisions of local government councils and other elected bodies, where the individual decision makers may in fact have different reasons, and it is not possible to produce a unitary set of reasons:

> [136] Where the duty of procedural fairness or the legislative scheme mandates that reasons be given to the affected party but none have been given, this failure will generally require the decision to be set aside and the matter remitted to the decision maker: see, e.g*., Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 35. Also, where reasons are provided but they fail to provide a transparent and intelligible justification as explained above, the decision will be unreasonable. In many cases, however, neither the duty of procedural fairness nor the statutory scheme will require that formal reasons be given at all: *Baker*, at para. 43.
>
> [137] Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst*; *Green*; *Trinity Western University*.

[39] In reviewing such decisions, the resolution itself becomes the starting point for review, and the court is required to look at the record and context to determine whether or not the reasons are reasonably intelligible, transparent and justified: *Vavilov* at para. 137.

[40] In this case, I find that the combination of the Resolution, and the detailed investigative report and the reasoning it adopts, provides a robust set of reasons that exceed what would ordinarily be expected or required of a municipal council, even for this more adjudicative type of decision.

[41] Far from being a terse recitation of conclusory statements as argued by Councillor Dupont, I find that the Resolution, together with the investigatory report

that Council adopts, provides a transparent, intelligible, and coherent path to Council's determination that Councillor Dupont breached her duties of confidentiality pursuant to s. 117 of the *Community Charter*.

[42] I disagree that *Vavilov* requires a City Council, within the body of its resolution or decisions, to describe its expertise. Expertise is presumed pursuant to *Vavilov*, and is the foundation for the reasonableness standard of review of administrative decision making. In any event, City Council can be presumed to have expertise with respect to its own processes and standards for behaviour. With respect to the legal interpretation of the *Community Charter*, Council is entitled to consider the investigative report and the expertise of the investigator in reaching its conclusion: see *Bui v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 168 at paras. 18, 36. I find that it has the inherent expertise to determine what is conduct unbecoming of one of its members.

[43] I disagree that Council delegated its decision making to the investigator. Council held a hearing in which it heard from Councillor Dupont and her counsel, and then proceeded to engage in deliberations and to vote as to whether or not to endorse the conclusions in that report. The fact that Council did not resolve to modify the draft Resolution or the acceptance of the findings of the independent investigator is not inconsistent with an independent consideration of whether to adopt those findings.

[44] I agree with Councillor Dupont that the Resolution does not reference the content of the arguments she and her counsel made before Council or go on to explain its rejection of them. However, where reasons have to be voted on and approved by an elected body, it may not always be possible for elected bodies to articulate an engagement with the arguments presented. In my view, Council's adopted resolution that it considered the Councillor's submissions, and implicitly was not swayed by them, is sufficient in this context.

[45] The preamble also includes a statement that "Council has provided written reasons so that Councillor Dupont understands the basis for the decision to address

her conduct." This statement is confusing in that it appears to be referencing the very preamble were it is stated, there being no other "written reasons." Nevertheless, I do not find that this statement detracts from the sufficiency of the reasons provided by Council in this case.

[46] I will therefore move on to consider Councillor Dupont's more substantive arguments with respect to whether or not Council's conclusions that she breached confidentiality were reasonable.

Breach of Confidentiality

[47] In oral and written submission before me, Councillor Dupont focused primarily on her procedural fairness arguments, rather than the substantive arguments pled in the petition and argued before Branch J. on the stay application. The question of the interpretation of s. 117 of the *Community Charter*, and whether the information shared by Councillor Dupont with members of the community could properly be considered confidential pursuant to that section was addressed by Branch J. as follows at para. 40:

> a) While there could be some legitimate debate about whether any confidential information was disclosed by the petitioner at the first February 10, 2020 meeting, I am confident based on the record before me that the information in the two later emails was confidential. The last email stated expressly that it was in relation to a "closed item on the agenda".
>
> b) The petitioner should have been aware that topics related to the Site development were confidential given that all meetings regarding the Site had been *in camera*, and only limited information had been provided to the public.
>
> c) The disclosures were not simple limited debates about a single Tree. Rather, the potential effect of the decision on parking spaces meant that it could be upwards of a $400,000 issue for the City. Disclosure of this sensitive information could reasonably be seen as undermining the City's bargaining position in its negotiations with the developer given that "knowledge is power". This is one more reason why it should remain confidential, as the same types of concerns underlie the "without prejudice" settlement communications privilege (e.g. *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at paras. 16 to18).
>
> d) The petitioner's argument that the mechanism for council to make things confidential is to pass the necessary motion under s. 92 of the *Community Charter* for a closed meeting, fails to acknowledge that there will almost always be documents prepared and circulated in advance of the meeting about a particular issue of concern. If all preparatory documents were open

> for public review, the purpose of having *in camera* meetings would largely be defeated. Furthermore, there are two statutory provisions that signal that confidentiality extends beyond the content of meetings designated as closed. First, I note that s. 91(2) of the *Community Charter* states:
>
> > If all or part of a meeting is closed to the public, the council may allow a person other than municipal officers and employees to attend,
> >
> > (a) in the case of a meeting that must be closed under section 90 (2), if the council considers this necessary and the person
> >
> > > (i) already has knowledge of the confidential information, or
> > >
> > > (ii) is a lawyer attending to provide legal advice in relation to the matter, and
> >
> > (b) in other cases, if the council considers this necessary.
>
> The language of s. 91(2)(a)(i) suggests an awareness that there will be "confidential information" that may be obtained before the closed meeting itself.
>
> Further guidance is found in the language of s. 117(1) which states:
>
> > 117 (1) A council member or former council member must, unless specifically authorized otherwise by council,
> >
> > > (a) keep in confidence any record held in confidence by the municipality, until the record is released to the public as lawfully authorized or required, and
> > >
> > > (b) keep in confidence information considered in any part of a council meeting or council committee meeting that was lawfully closed to the public, until the council or committee discusses the information at a meeting that is open to the public or releases the information to the public.
>
> The fact that clause (a) exists separate and apart from the clause (b) specifically relating to meetings, is a further indication that records can be "in confidence" even if existing apart from any role in a closed meeting.
>
> e) The petitioner's submission that communications need to be labelled as "confidential" in order to be confidential is weak. Again, similar concerns arise in the case of "without prejudice" communications, and courts have recognized that communication can be "without prejudice" even without using these precise words on the face of the document (*Sable* at paras. 14 and15).

[48] Although these observations were made in the context of the interlocutory application, I find that they are fully supported by the evidence and arguments before me in this petition and I endorse them.

[49] To these observations I would add that, although s. 117(1)(a) refers to *records* held in confidence (but not necessarily considered in a closed meeting), the

sharing of *information* that discloses the content of such records, even without disclosure of the record itself, may reasonably considered to be a breach of that provision.

[50] Here, although Councillor Dupont did not disclose the preliminary site plans or other records that had been discussed in closed session of council, she disclosed the content of those plans.

[51] The interpretation of s. 117 advocated by Councillor Dupont is narrow and would not achieve the objectives of s. 117. I accept the submissions of the City that local governments will often have large volumes of documents that are "held in confidence" within the meaning of s. 117, which have never been considered by a board or council at an *in camera* meeting, including employment records, procurement records, legal opinions, settlement records, and draft reports and agreements. Those documents may nevertheless fall under the statutory requirement that councillors maintain the confidentiality of that information.

[52] In all of the circumstances, I find that Council's conclusion that Councillor Dupont breached her duties of confidentiality to the City and s. 117 of the *Community Charter* in particular, was reasonable.

The Censure and Sanctions

[53] Councillor Dupont also challenges the reasonableness of the censure and sanctions even if Council's determination of the breach is upheld.

[54] The evidence before Council that was potentially relevant to its decision to impose the censure and sanctions includes: that Councillor Dupont denied sharing the confidential information when asked if she had done so before the investigation started; Councillor Dupont's attempts to deflect blame for this breach onto the City's consultant by suggesting that the City should begin its investigation into breaches of confidentiality with him; and finally, her failure to take full responsibility for these breaches.

[55] In light of the full record before Council in this regard, I find that Council's decision to censure Councillor Dupont, impose limitations on Councillor Dupont's access to confidential records, and to remove Councillor Dupont from various discretionary roles and committees was also reasonable.

PROCEDURAL FAIRNESS GROUNDS

[56] In addition to her arguments regarding the adequacy of the City's reasons addressed above, Councillor Dupont advances for the first time at this hearing the argument that the Resolution should be set aside on the basis that: (a) Council denied her the right to be heard on the merits of the Resolution, and (b) Council did not have an open mind when they considered the Resolution.

[57] As noted above, the City opposes the introduction of these procedural fairness grounds for judicial review on the basis that they were not pled in the petition, and the City was only alerted to Councillor Dupont's intention to raise them at the hearing a few days in advance when they received Councillor Dupont's written submissions.

[58] The City relies upon *Polson v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCSC 700 at paras. 56–66, in which Justice Skolrood found that natural justice arguments need to be pled with specificity pursuant to the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241, and our *Rules of Court*.

[59] Counsellor Dupont notes that at para. 27 of her petition, she pleads that she received a letter dated May 13, 2020 from the Mayor on behalf of Council advising her that she would have the opportunity to make submissions at the May 26, 2020 Council meeting. The letter stated that she would have "an opportunity to address Council regarding the contents of the draft form of Resolution", which she states she "understood precluded her from addressing the merits of the allegations." She says this is the foundation for her procedural fairness argument with respect to her right to be heard, and so is adequately pled. That letter is also the basis of her argument that Council approached the Resolution with a closed mind.

[60] Councillor Dupont's argument on this point advances a somewhat strained reading of the letter May 13, 2020 letter, which offers Councillor Dupont the opportunity to address Council regarding *contents* of the "draft form of Resolution". I also note that Councillor Dupont's stated understanding of this letter is somewhat belied by her actual submissions before Council which make no reference to the form of the Resolution. I also accept the evidence of the Corporate Officer of the City that Councillor Dupont's legal counsel at the time made submissions at the hearing on the merits of the Resolution to the effect that Councillor Dupont should not be censured by Council.

[61] Finally, there is no record of any objection being raised by Councillor Dupont, or her experienced counsel, with respect to the scope of her permitted submissions or about predetermination of the matter by Council at the Council hearing.

[62] In any event, I have reviewed Councillor Dupont's pleadings, and I find that they do not sufficiently raise these procedural fairness issues. Although they reference the May 13, 2020 letter from the Mayor as part of the factual basis of the petition, they do not plead any breach of procedural fairness or natural justice at all, including that Councillor Dupont did not have the opportunity to be heard, or that Council had predetermined the matter.

[63] Councillor Dupont's petition is detailed, reciting the events leading up to the Resolution, and containing argument and case law with respect to the remedy sought. None of the argument or case law in the petition is directed towards procedural fairness deficiencies in the process including closed mind or lack of opportunity to be heard. The remedies sought are also consistent with substantive review for reasonableness and jurisdiction rather than procedural review. For example, of the many alternative remedies sought, none are to remit the matter back for a fair hearing, which is the most common remedy for a breach of procedural fairness.

[64] The issue of bias or closed mind in particular ought to be raised at first instance, and must be pled with specificity to allow an opportunity for response, even

where other general allegations of breach of procedural fairness are pled: see *Alberta (Information & Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 22–26; *Polson* at paras. 57–60; *Guest v. North Vancouver (District)*, 2012 BCSC 1626 at para. 56.

[65] I find that Councillor Dupont did not plead these breaches of procedural fairness in her petition, and did not give the respondent the opportunity to file materials in reply to these allegations. I dismiss Councillor Dupont's request to quash the Resolution on these late raised grounds.

CONCLUSION

[66] In conclusion, the foundation for the procedural fairness issues raised by Councillor Dupont is weak on the record before me. These issues were not raised in a timely manner at the hearing before Council, and, most significantly, these grounds are not adequately pled in the petition materials. These issues are not properly before the Court.

[67] The City of Port Coquitlam Council's decision to censure and sanction Councillor Dupont was within its jurisdiction and its authority to control its own processes. Council's decision in this regard is reviewed on a reasonableness standard, both with respect to the interpretation of the duty of confidentiality provisions in the *Community Charter*, and their application to Councillor Dupont's actions. Applying this standard, I have found that the Resolution was intelligible and coherent and that it was reasonable in the circumstances before Council.

[68] The petition is dismissed.

[69] Both parties sought costs in the event of their success on this application. The City was the successful party and is generally entitled to its costs. If the parties wish to speak to the issue of costs, they may make arrangements through the registry within 30 days of receipt of these reasons to appear before me.

"Marzari J."