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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**APPEARANCES:**
JOY SUL, applicant,	Norman Boudreau and John Isfeld for the applicant
- and -	Bernice Bowley for the Rural Municipality of St. Andrews
THE RURAL MUNICIPALITY OF ST. ANDREWS, MANITOBA AS REPRESENTED BY THE COUNCIL OF THE RURAL MUNICIPALITY OF ST. ANDREW'S MANITOBA AND JOHN PREUN, respondents.	Judgment delivered: July 5, 2021

TOEWS J.

Background

[1] This is an application for a declaration along with certiorari to quash Bylaw No. 4319 ("Bylaw 4319"). Bylaw 4319 was passed on September 24, 2019 by the respondent municipal council (the "Council"). The applicant states that it does not meet the requirements of ***The Municipal Act***, C.C.S.M. c. M225 (the "***Act***"). Furthermore, the

applicant seeks to have two resolutions, 653-2019 ("Resolution 653") and 656-2019 ("Resolution 656"), passed pursuant to 4319 declared invalid as well.

[2] Bylaw 4319 was an amendment to section 8.1 of the Procedures Bylaw which provided that the Council would appoint a member to the position of chair and deputy chair of all council and committee of the whole meetings. The previous provision stated that all meetings of the Council shall be chaired by the mayor, or in the absence of the mayor, by the deputy-mayor.

[3] On December 11, 2019, Ernie Epp, the chief administrative officer of the municipality at the time, e-mailed council members to notify them of a special meeting on December 16, 2019. They were advised that the purpose of the special meeting was, in part, to appoint the chair and deputy chair, and to appoint the municipality's spokesperson.

[4] At the December 16, 2019 meeting the Council passed Resolution 653 which named the respondent councillor, John Preun as the chair of municipal council meetings and another councillor as the deputy chair. Bylaw 656 was passed by the Council at the same meeting, appointing Mr. Preun as spokesperson for the municipality. Following the December 16, 2019 meeting, the applicant remained entitled to debate, vote, sit on other committees and retained her signing authority for municipal cheques.

Interim Motions

[5] Following the filing of affidavits, application briefs and the completion of cross-examinations on the affidavits, the respondents brought a motion seeking leave to file the affidavit of D.J. Sigmundson, the current CAO of the municipality (the "Sigmundson

Affidavit"), to demonstrate that the impugned Bylaw and Resolution 653 had been replaced by Bylaw 4338-2020 ("Bylaw 4338") and Resolution 429-2020 ("Resolution 429") respectively. Furthermore, the Sigmundson affidavit advises that the Council has been following an informal policy to address the issue of who is the municipality's spokesperson, thereby negating the effect of Resolution 656.

[6] It is the respondents' position that the issues raised by the applicant in her application have been rendered moot by the replacement and negation, as the case may be, of Bylaw 4319 and Resolutions 653 and 656.

[7] For her part, in addition to opposing the introduction of the Sigmundson affidavit into evidence, the applicant seeks to expunge various portions of affidavits filed in the application. The applicant seeks the expungement of the impugned paragraphs of the affidavits on the basis of Rules 4.07(2), 25.11(1) and 39.01(5) of the Court of Queen's Bench Rules which provides that:

> 4.07(2) An affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise.
>
> 25.11(1) The court may on motion strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
> (a) may prejudice or delay the fair trial of the action;
> (b) is scandalous, frivolous or vexatious;
> (c) as an abuse of the process of the court; or
> (d) does not disclose a reasonable cause of action or defence.
>
> 39.01(5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit.

[8] I held that the Sigmundson affidavit should be admitted as it sets out the current status of the impugned Bylaw and resolutions. However, I also held that the application

is not moot since the underlying dispute removing the applicant as the chair of council meetings and as the spokesperson for the municipality, continues to be a live issue with the passing of Bylaw 4338 and Resolution 429 and the adoption of a policy of appointing a spokesperson on an informal basis.

[9] In respect of the applicant's motion to expunge, my review of the material leads me to the conclusion that the statements made in the course of or in respect of this dispute should not be excluded on the basis of being characterized as scandalous, frivolous or vexatious.

[10] Furthermore, while some of the statements may be based on information and belief rather than the personal knowledge of the deponents, to the extent that I may be required to consider that information and belief, I will consider the evidentiary weight of those statements in coming to my decision. In my opinion, the principle of proportionality justifies that approach rather than a time-consuming exercise by counsel and myself in a dissection of the impugned affidavits on a sentence by sentence or paragraph by paragraph basis.

Position of the Applicant

(i) The Review of Bylaw 4319 and Resolutions 653 and 656 by the Court

[11] The applicant argues that the Council's decisions to pass Bylaw 4319 as well as Resolutions 653 and 656 are subject to review on the standard of "reasonableness" set out by the Supreme Court of Canada in ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65, 441 D.L.R. (4th) 1 (QL). She cites para. 109 of that decision where the court held:

> **109** … a proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. As a result, there is no need to maintain a category of "truly" jurisdictional questions that are subject to correctness review. Although a decision maker's interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation. Reasonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it.

(ii) Bylaw 4319 is invalid

[12] The applicant states that Bylaw 4319 is invalid as it does not comply with the ***Act***. She relies on s. 149(3) of the ***Act***, arguing that s. 83(2) of the ***Act*** must be read in conjunction with s. 149(3) of the ***Act***. It is s. 83(2) of the ***Act*** which the respondents rely upon as providing the statutory authority to enact Bylaw 4319.

[13] The applicant argues that a reading of the ***Act*** as a whole suggests that the power to appoint a member of the Council other than the head or deputy head of council to preside over council meetings only takes effect where the head or deputy head are unable to act.

[14] These two provisions provide:

> **Duties of the head of council**
>
> 83(2) In addition to performing the duties of a member of a council, the head of council has a duty
>
> (a) to preside when in attendance at a council meeting, except where the procedures by-law or this or any other Act otherwise provides;
>
> (b) to provide leadership and direction to the council; and
>
> (c) to perform any other duty or function assigned to a head of council by the council or by this or any other Act.
>
> . . . . .

Content of procedures by-law

149(3)

The council must in its procedures by-law provide for

(a) regular meetings of the council, and the day, time and place of the meetings;

(b) the type and amount of notice to be given of regular meetings of the council;

(c) the procedure to be followed and the type and amount of notice to be given to change the day, time or place of a regular meeting of the council;

(d) rules respecting the conduct of council meetings;

(e) rules respecting public participation at council meetings;

(f) a procedure for the appointment of a member to act as head of council if the head and deputy head are unable to act or the offices are vacant;

(g) the type and amount of notice to be given of a special meeting of the council; and

(h) the time within which a special meeting of the council requested under clause 151(1)(b) must be called by the head of council and must take place.

[15] Furthermore, the applicant argues that since Bylaw 4319 contains no provision for the appointment of a member to act as the head of council if the head and deputy head are unable to act or the offices are vacant, nor the time within which a special meeting of the council requested under s. 151(1)(b) must take place, it is invalid.

(iii) The Council acted in excess of Jurisdiction in passing Resolutions 653 and 656.

[16] The applicant states that the Council considered only s. 83(2) of the ***Act*** in passing the resolutions and was not alive to statutory context and purpose as discussed in ***Vavilov*** at para. 120. In addition to the Council's failure to consider the proper statutory relationship between ss. 83(2) and 149(3) of the ***Act***, the applicant argues that it was the intention of the legislature to allow the residents of each municipality and not the Council, to decide who the head of council should be, and thus, who receives and should exercise the powers and responsibilities of the head of council. It is the position of the

applicant that the resolutions to replace the head of council as the chair of council meetings and as the spokesperson for the municipality are undemocratic.

[17] In respect of the appointment of a spokesperson for the municipality pursuant to Resolution 656, the applicant relies on the decisions of ***R. v. Sharma***, [1993] 1 S.C.R. 650, [1993] S.C.J. No. 18 (S.C.C.) and ***Shell Canada Products Ltd. v. Vancouver (City)***, [1994] 1 S.C.R. 231, [1994] S.C.J. No. 15 (S.C.C.) in arguing that the resolution is invalid as there is no express or implied power to appoint a spokesperson other than the head of council. The applicant submits that as is the case with Resolution 653, Resolution 656 is invalid as it is undemocratic and contrary to the purpose and objects of the ***Act***.

[18] The applicant argues in the alternative that if Resolutions 653 and 656 were permissible under the ***Act***, they are not compatible with the purpose and objects of the ***Act***. The applicant cites s. 3 of the ***Act*** which provides:

> **Municipal purposes**
> 3 The purposes of a municipality are
> (a) to provide good government;
> (b) to provide services, facilities or other things that, in the opinion of the council of the municipality, are necessary or desirable for all or a part of the municipality; and
> (c) to develop and maintain safe and viable communities.

[19] Relying on the material submitted by the parties, the applicant states that many of the councillors consistently displayed disrespectful behaviour towards the applicant in her role as head of council and took various steps to circumscribe her organizational responsibilities as the head of council and on committees of council. Accordingly, the

applicant submits that the resolution was not passed for any municipal purpose but rather for the purpose of stripping the elected head of council of her position as chair.

[20] In the further alternative, the applicant submits that even if Bylaw 4319 is found to be valid, Resolution 653 is invalid as it does not comply with the requirements set out in s. 8.1 of the Bylaw in that it was not passed "By the first regular Council meeting …". (See R.M. Procedures By-law 4319, Exhibit M to the Affidavit of the applicant, sworn January 19, 2020, s. 8.1)

[21] Furthermore, the applicant states that the moving and seconding of the resolution did not comply with the requirements of Bylaw 4319. (See the Affidavit of the applicant at para. 51)

(iv) The respondents breached the duty of fairness and the rules of natural justice

[22] The applicant further submits that the Council breached the duty of fairness and failed to observe the rules of natural justice in respect of its dealings with the applicant in passing the two resolutions. The applicant relies on the decision of ***Mission Institution v. Khela***, 2014 SCC 24, [2014] 1 S.C.R. 502, as authority for the proposition that breaches of procedural fairness are reviewed on a standard of correctness. Furthermore, since there is nothing in the statute to suggest that the duty of fairness does not apply, the general rule that the duty of fairness is not displaced applies. (See ***Canada (Attorney General) v. Mavi***, 2011 SCC 30, [2011] 2 S.C.R. 504)

[23] The applicant states that the decisions made by council in this matter are a purported exercise of "administrative authority" granted by the ***Act*** and has broad impacts on the administration of the municipality. Accordingly, the applicant argues that

on the basis of ***Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall***, 2018 SCC 26, [2018] 1 S.C.R. 750 (QL), the impugned decisions constitute a state action and are of a sufficiently public character to require procedural fairness. (See para. 43 of the applicant's brief)

[24] On the basis of the criteria identified and discussed by the court in ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817 (S.C.C.) (QL), the applicant submits that the Council owed a high degree of procedural fairness in making the decisions "… as they directly affected the rights and obligations of the Applicant, [since the decisions] effectively deprived the Applicant of her position as head of council". (See para. 47 of the applicant's brief)

[25] The applicant relies on the decision of ***Knight v. Indian Head School Division No. 19***, [1990] 1 S.C.R. 653, 83 Sask.R. 81 (S.C.C.) (QL), in emphasizing that "A high standard of justice is required when the right to continue in one's profession or employment is at stake" (at para. 35). The applicant argues that while the ***Knight*** decision dealt with an individual's employment, she states that this should apply to elected positions as well since "… the Applicant's status as Mayor of the R.M. is far greater than that of a mere employee." (See para. 49 of the applicant's brief)

[26] The applicant argues that even if the position of an elected official is not analogous to that of an employee, she states that the decisions of the Council affected her interests as the head of council. She states that she ran for election as mayor "… with the understanding that it involved certain duties, responsibilities and a certain authority" and

in the process of taking these from the applicant, the Council owed her a high degree of procedural fairness. (See para. 51 of the applicant's brief)

[27] The applicant further advances the position that a high degree of procedural fairness is owed to her as a result of the "legitimate expectations" she had owing to the fact that prior to her election as mayor, there had never been a vote by council in respect of the position of chair of council meetings or spokesperson for the municipality. She submits that "because of this continuing history of the head of council holding these positions", a broad duty of fairness should be owed to her in respect of the decisions made by council in respect of these positions. (See para. 53 of the applicant's brief)

[28] Furthermore, she states in her affidavit that one of the councillors advised her at the December 10, 2019 council meeting that "…no one is removing anyone from the chair" when asked about the purpose of the change to the procedures by-law and that the change "… is simply a procedural matter and changing some wording". She states that as a result of this representation from one of the councillors she was entitled to greater procedural protections regarding the decision to remove her from the position of chair of council meetings. (See para. 41 of the affidavit of the applicant sworn January 19, 2020)

[29] The applicant states that high level of procedural fairness is also owed to her as "… there is no appeal procedure for the Council's implementation of resolutions". In addition, the failure to give notice in advance that the proposed resolutions would be put forward plus the failure by council to provide reasons for its decision are fatal to the council's actions in view of the " … great significance to the applicant" and the fact they

affected her "position, rights and obligations, and were contrary to her legitimate expectations". (See applicant's brief at paras. 60 and 67)

[30] The applicant also submits that procedural fairness here requires that decisions be made free from a reasonable apprehension of bias and that given the relationship between the applicant and the Council, there is a reasonable apprehension of bias. (See applicant's brief at paras. 71 - 79)

[31] Finally, the applicant argues that the Council's Procedural Bylaw in respect of moving, seconding and debating Resolution 653 was not followed and therefore the resolution "was a breach of her reasonable expectation and was unfair." (See applicant's brief at paras. 69 - 70)

The Position of the Respondents

(i) The Outline of the Dispute between the Parties

[32] The respondents take the position that Bylaw 4319 and the two impugned resolutions, 653 and 656, purportedly passed pursuant to that Bylaw, were the culmination of the applicant's actions which the respondents characterize as being perceived as " … dysfunctional, and not in the interests of the people" of the municipality. (See respondents' brief para. 3)

[33] The respondents point out that the ***Act*** establishes a "weak mayor" structure wherein the mayor or head of council does not have any additional powers beyond those of a councillor, with each council member and the mayor having one vote. (See respondents' brief para. 7)

[34] The respondents state that there are additional duties, although no additional rights, given to the head of council which are set out at s. 83(2) of the ***Act***.

[35] Without going into the details of their dispute here (which the respondents characterize as "governance issues"), the brief of the respondents sets out the matters of contention between the applicant and the respondents which led to the passing of the impugned Bylaw and the two resolutions. The dispute between the parties arose shortly after the applicant's election as mayor and central to that dispute was a wastewater project in respect of which various council members took very different positions, with the applicant initially taking one position on the matter, but then eventually voting with the other councillors to unanimously approve the wastewater project.

[36] However, it appears her formal commitment to the project reflected in the unanimous vote of council did not prevent her from presenting a contrary political view or at least concerns about the decision of the Council publicly from time to time. The respondents state that the conduct of the mayor was discussed with her by various council members, and these discussions included allegations by other council members that she was not properly fulfilling her role as chair at public council meetings. (See respondents brief at paras. 12 – 42 inclusive)

[37] The respondents outline the steps taken by the council in the course of passing the impugned Bylaw and the two resolutions in December, 2019 and point out that notwithstanding their passing, that the applicant remained entitled to debate, vote and sit on other committees of council, as well as retaining her signing authority for municipal cheques. (See respondents' brief at paras. 43 - 51 inclusive)

(ii) The Standard of Review

[38] The respondents agree with the applicant that the applicable standard of review to challenge a municipal Bylaw or resolution is reasonableness while issues relating to procedural fairness and natural justice are reviewed on the standard of correctness.

[39] The respondents submit that the impugned decisions are statutory and not adjudicative in nature and accordingly a high degree of deference must be given to the Council. They state that a bylaw should not be set aside unless it is one that no reasonable body could have taken, citing ***Catalyst Paper Corp. v. North Cowichan (District)***, 2012 SCC 2, [2012] 1 S.C.R. 5 (QL), which holds that "… courts must respect the responsibility of elected representatives to serve people who elected them and to whom they are ultimately accountable." (at para. 19)

[40] Furthermore, the respondents point out that on the basis of s. 384 of the ***Act***, the court must be mindful that in the context of considering the reasonableness standard of review, the Legislature imported a higher statutory deference to the decisions of council. Section 384 (a) provides:

> 384 No by-law, resolution or proceeding of a council and no resolution or proceeding of a council committee may be challenged on the ground that
> (a) the by-law is unreasonable or not in the public interest;

[41] In reviewing an impugned bylaw, the respondents submit that a reviewing court's function is to determine whether it was "reasonable" that the municipality believed its action did not exceed its statutory authority, not whether the reviewing court believes that the statutory authority was exceeded. The latter would involve an application of the "correctness" standard and would therefore constitute an error. They rely on the decision

of ***1120732 B.C. Ltd. v. Whistler (Resort Municipality)***, 2020 BCCA 101, 445 D.L.R. (4th) 448 (QL), at paras. 38 - 42 in support of this proposition.

(iii) The validity of Bylaw 4319

[42] In response to the applicant's position that Bylaw 4319 is invalid because it does contain a provision for a member to act as head of council if the head or deputy head of council are not available and because it does not provide a time within a special meeting must take place, the respondents state that clause 9 of Bylaw 4319 provides for the time in which a special meeting of council requested under s. 151(1)(b) must take place. Furthermore, the respondents state the incorporation of Geoffrey H. Stanford, *Bourinot's Rules of Order*, 4th ed (Toronto, Ont.: McClelland & Stewart, 1995) by Bylaw 4319 deals with the choosing of a chair in the absence of the head or deputy head of council.

[43] In respect of the applicant's argument that Bylaw 4319 is invalid because it ignores the requirements of s. 149(3)(f) of the ***Act***, the respondents state that the applicant erroneously conflates the title of "head" and "chair" of council in suggesting that s. 149(3)(f) of the ***Act*** demonstrates the Legislature's intention that the head of council is to be the chair of council as well. The respondents argue that the head of council's duty to be the chair at council meetings is one that can be altered by virtue of a bylaw as noted by s. 83(2)(a) of the ***Act***.

(iv) Resolutions 653 and 656 are *intra vires*

[44] The respondents submit that s. 83(2) of the ***Act*** permits the enactment of Bylaw 4319 and that pursuant to that Bylaw, Resolution 653 was passed. The fact that the Council had not passed a resolution to appoint a chair and a deputy chair was discussed and rectified at the special meeting when Resolution 653 was passed in December 2019.

[45] In respect of who moved and seconded the same motion to pass Resolution 653, the respondents state there was extensive discussion as to who moved and who seconded the motion at the meeting and that it is reasonable to conclude that Councillor Preun moved the motion and Councillor Pohl seconded it. In this regard, the respondents submit that even if there was a failure to observe its own procedure, absent, clear evidence of bad faith or fraudulent intent, and absent express statutory requirements, the procedure adopted by a council in passing bylaws and resolutions is wholly a matter of domestic concern and internal regulation.

[46] In respect of Resolution 656 and the appointment of a spokesperson other than the head of the Council, the respondents state that the ***Act*** is silent on the appointment of a spokesperson. However, applying a broad purposive interpretation in respect of the municipality's powers granted by the ***Act***, the respondents submit it is a necessary incident of the Council's duty to determine the governance structure that best meets its needs, which includes appointing or removing a spokesperson or chair of council. It is not for the court to interfere in this type of internal decision given that members are democratically elected and politically accountable to the electorate.

(v) The Process and Rationale for adopting Bylaw 4319 and Resolutions 653 and 656

[47] The respondents submit that absent express statutory provisions, the procedure adopted by a council in passing bylaws and resolutions is wholly a matter of domestic concern and internal regulation. The respondents further submit that it is well settled law that the courts will not give effect to objections based upon the failure of a council to observe its procedure, unless there is clear evidence of bad faith or fraudulent intent.

In this respect the respondents rely on ***Village of Merritton v. County of Lincoln*** 1917 CarswellOntario 150, 39 D.L.R. 328 (Ont. C.A.).

[48] The respondents submit that the evidence here does not establish that there was bad faith or fraudulent intent on the part of the Council. On the contrary, the respondents state that the evidence here demonstrates that the bylaws and the resolutions were passed to address the failure of the applicant to address the difficulties in conducting municipal business and meetings.

[49] Good governance, the respondents submit, is a proper purpose for removal of the head of council as the chair of council meetings or acting as the spokesperson for the municipality. Again, citing the Supreme Court of Canada decision of ***Catalyst Paper Corp.***, at paras. 19 - 21, the respondents state that the case law suggests that the review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation.

[50] The respondents state that the actions were taken by the respondents in order to address concerns relating to the governance of council meetings and that the power to pass those bylaws and the consequential resolutions are either expressly provided to the Council by the ***Act*** or they are a necessary incident of the Council's duty to determine the governance structure that best meets its needs.

(vi) The decisions of the Council are not undemocratic

[51] The response of the respondents to the applicant's submission that the impugned decisions are undemocratic is that they are democratic in nature in that they were voted on by all duly elected members of the Council. Furthermore, the respondents submit that the decisions were made within the jurisdiction of the Council for permissible purposes.

Even if the interpretation is not correct, the respondents submit that the interpretation of the ***Act*** relied upon in making these decisions are reasonable and therefore the Council's decision should be upheld.

(vii) The decisions of the Council comply with procedural fairness and natural justice

[52] The respondents agree that the review by the court in respect of allegations of breach of natural justice and procedural fairness is on the correctness standard. However, the respondents submit that the consideration of the correctness standard must be carried out in the context of all of the circumstances and the factors set out by the Supreme Court of Canada in ***Baker*** which the court reaffirmed in ***Vavilov*** at para. 77 where the court held:

> **77** … Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker*, at para. 21. In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: *Baker*, at paras. 23-27; see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650, at para. 5. Cases in which written reasons tend to be required include those in which the decision-making process gives the parties participatory rights, an adverse decision would have a significant impact on an individual or there is a right of appeal: *Baker*, at para. 43; D. J. M. Brown and the Hon. J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* loose-leaf), vol. 3, at p. 12-54.

[53] On the basis of the application of the factors set out in ***Baker***, the respondents state that the level of procedural fairness owed to the applicant is low and was not breached. The respondents state that the applicant's position is not akin to that of an

employee who would be owed a higher degree of procedural fairness, that the applicant has a minimal "interest" in the position resulting in a low degree of procedural fairness owed to her, that she had no "legitimate expectation" in respect of the position, and that she failed to take advantage of the statutory right to have the Council reconsider or review its decision in respect of the impugned resolutions as set out in Bylaw 4319. In the result, the respondents argue that these factors establish that the level of procedural fairness that may be owed to the applicant has been met.

[54] Furthermore, the respondents state that the applicant received appropriate notice, that there is no duty to provide reasons for its decisions and if there was any non-conformity with the appropriate procedures required to pass the impugned resolutions, the non-conformity was minor and not unfairly prejudicial to the applicant.

[55] In respect of the issue of notice specifically, the respondents argue that not only did the applicant have notice that the vote to appoint a chair, a deputy chair and a spokesperson would take place at the December 16, 2019 special meeting of the Council, but had her legal counsel present at that meeting as well as many of her supporters who came out presumably in response to an email she sent out asking them to come out and protest. In respect of the issue of reasons, the respondents state that the reasons for passing the impugned bylaw and the two resolutions were clear to everyone, including the applicant.

[56] In respect of the allegation that the Council was biased in its decision making, the respondent states that the applicant has failed to meet the high standard required to establish that the respondents acted other than in the public interest. They state that

there was no evidence that the Council was operating under a reasonable apprehension of bias or based its decision on anything other than relevant evidence. Similarly, they state that there is no evidence that it exercised its legislative powers to serve private interests at the expense of the public interest.

Analysis and Decision

(i) Is the appointment of a chair of Council meetings other than the head of council statutorily authorized by the *Act*?

[57] It appears to me that on its face the statutory language of s. 83(2) (a) of the ***Act*** authorizes the appointment of a chair of council meetings other than the head of council or the mayor. It states:

> 83(2)(a) In addition to performing the duties of a member of a council, the head of council has a duty
> (a) to preside when in attendance at a council meeting, *except where the procedures by-law or this or any other Act otherwise provides;*

[58] Accordingly, on the basis of the wording of that section, where the municipality's procedures bylaw or a statutory provision allows the Council to appoint someone other than the head of council as the chair of council meetings, the head of council does not have the duty to preside at a council meeting where the Council makes an alternate appointment or a statute designates someone other than the head of council as the chair.

[59] The applicant argues that s. 149(3) of the ***Act*** provides a statutory bar to the appointment of a chair of council meetings other than the head of council. She argues that its language demonstrates that it is the intention of the legislature that the head of council should also be the chair of council meetings.

[60] In response, the respondents state that s. 149(3)(f) of the ***Act*** does not pertain to the "chair" but rather to the "head" of council. The head of council may also be the chair, but if the procedures bylaw sets out the authority to appoint someone else as the chair, s. 149(3)(f) does not create a statutory prohibition preventing the exercise of that authority or to passing a resolution to appoint someone else as chair pursuant to the procedures bylaw.

[61] In this case, the procedures bylaw purports to provide the authority to the Council to appoint a chair other than the head of council to preside at council meetings, stating at s. 8.1 that the Council would have to appoint a member of council to the position of chair or deputy chair of all council meetings. The previous bylaw provided that all meetings of council shall be chaired by the mayor or in the absence of the mayor, by the deputy mayor.

[62] In interpreting the legislative authority to pass Bylaw 4319, it is instructive to consider the comments of the Ontario Court of Appeal in ***Toronto Livery Assn. v. Toronto (City)***, 2009 ONCA 535, 2009 CarswellOnt 3714 (QL), at para. 44:

> **44** To begin, the examination of the legality of the Challenged Provisions must proceed in light of the generous, deferential standard that applies to appellate review of the exercise of municipal powers: see *Equity Waste*, at p. 339, citing *Howard and Toronto (City) (Re)* (1928, 61 O.L.R. 563 (C.A.) and *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, *per* McLaughlin J., in dissent, at para. 24; *Cash Converters Canada Inc. v. Oshawa (City)* (2007), 86 O.R. (3d) 401 (C.A.), at para. 20; *Toronto Taxi Alliance Inc. v. Toronto (City)* (2005), 77 O.R. (3d) 721 (C.A.), at para. 46. This deferential approach requires a reviewing court "[to] respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens of those municipal councils": *Shell Canada*, at para. 19. Further, this approach to the interpretation of municipal powers presumes that municipal by-laws are validly enacted absent a clear demonstration that the by-law in question exceeds the municipality's powers: see *Ontario Restaurant Hotel & Motel Assn. v. Toronto (City)*, [2005] O.J. No. 4268 (C.A.), at para. 3, leave to appeal refused, [2006] S.C.C.A. No. 45.

[63] In ***Gendre v. Fort MacLeod (Town)***, 2015 ABQB 623, 2015 CarswellAlta 1888 (QL), the court considered the authority of a municipal council to remove a mayor's authority "… to chair Council meetings, sign bylaws and call special meetings." In that case, "Council also removed the Mayor from boards and committees and restricted him from attending meetings representing the Town or Council and acting as its official spokesman. … [taking] these actions, which it described as sanctions, by passing a number of resolutions and a new procedural bylaw." (See ***Gendre*** at para. 1)

[64] In discussing the authority to pass the resolution and bylaws and the standard of review applicable to the court's consideration of the validity of the impugned decisions, the court considered legislative provisions very similar to those found in Manitoba's legislation. The statutory equivalent of s. 83(2) of the ***Act*** found in the Alberta legislation is set out at para. 33 of the ***Gendre*** decision which states:

> **33** Council's authority to appoint someone other than a mayor to fulfill the role of presiding officer at council meetings and to modify a mayor's appointment to committees and boards can be found in the *MGA* as follows:
>
> > s 154(1)(a): a mayor must, when in attendance, preside at council meetings unless a bylaw provides that another councillor or person is to preside;
> > s154(2): a mayor is a member of all council committees and bodies to which council has the right to appointment members unless council provides otherwise.

[65] In respect of the standard of review applicable to the consideration of the validity of the impugned bylaw and resolutions the court in ***Gendre*** also held:

> **21** A municipal council obtains its powers from the legislature as set out in the *MGA*. It must use its statutory powers in good faith. It must act "reasonably, fairly and in a non-discriminatory way": *Columbia Estate Co v Burnaby (District)* (1974), 49 DLR (3d) 123 (BCSC) at para 27. A council that uses its powers for an improper purpose acts in bad faith. A council that acts in bad faith acts outside its jurisdiction: *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5 at para 28.

> **22** Whether Council acted outside its jurisdiction, that is, outside its statutory authority or in bad faith, is a legal question. The standard of review to be applied to determine those questions, therefore, is correctness: *New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9, [2008] 1 SCR 190 at para 59; *Edmonton Flying Club v Edmonton (City)*, 2013 ABQB 421, 567 AR 101 at para 85; *Nor-Chris Holdings Inc v Sturgeon (County)*, 2013 ABQB 184, 559 AR 159 at para 72.
>
> **23** If Council acted within its jurisdiction, the standard of review is reasonableness: *Catalyst Paper* at para 19; *Simonelli v Rocky View (Municipal District No 44)*, 2004 ABQB 45, 350 AR 286 at para 62.
>
> **24** In considering the meaning of "reasonableness" in the context of review of actions of a municipality, consideration must be given to s 539 of the *MGA*. This section provides that a bylaw or resolution may not be challenged on the ground that it is unreasonable. The Court in *Nor-Chris* observed that, by enacting this section, the Legislature intended that a higher standard than unreasonableness *per se* was required, and preserved patent unreasonableness as the standard for review.
>
> **25** The Supreme Court of Canada stated in *Catalyst Paper* (at paras 19-24) that as bylaws are legislative, as opposed to adjudicative, in nature, deference is to be given to municipal councils. A bylaw should not be set aside unless it is one that no reasonable body could have taken. The Supreme Court of Canada cautioned that "… courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable": *Catalyst Paper* at para 19.

[66] In my opinion, the impugned bylaw in the case at bar relates to the appointment of a chair at council meetings which is not only specifically contemplated by s. 83(2) of the ***Act***, it addresses a legitimate domestic and internal administrative concern of council in respect of the conduct of council meetings. Section 149(3) of the ***Act*** or any other provision, on my review of the ***Act***, does not prohibit this type of bylaw or an appointment of a chair other than the head of council pursuant to resolution under the authority of that bylaw. Not only is there no clear demonstration here that Bylaw 4319 exceeds the enabling legislation, the enabling legislation specifically contemplates the power of a municipality to pass such a bylaw.

[67] Having found that the impugned bylaw does not exceed its statutory authority by authorizing the appointment of a chair at council meetings other than the head of council or mayor, it follows that the impugned resolution appointing a chair of council meetings other than the head of council or mayor has an appropriate statutory and regulatory basis on which to ground that appointment.

[68] Furthermore, while the power to appoint a spokesperson to speak on behalf of the municipality is not specifically spelled out in the legislation, in my opinion the decision to appoint the head of council to serve as spokesperson by prior councils is similarly not specifically addressed by the legislation. Whether it is the head of council or some other member of the Council or employee of the municipality who is appointed as spokesperson by the Council, this is a power that may be exercised by the Council as being necessarily incidental to its powers to determine its own governance structure that best suits its needs as a result of its obligation to provide good governance.

[69] However, that finding does not end the matter. The next step to consider is whether the bylaw and resolutions were passed in such a manner that deprived the applicant of procedural fairness or otherwise offended the rules of natural justice. That analysis, as stated earlier in these reasons, is conducted on a correctness rather than a reasonableness standard of review.

(ii) Were Bylaw 4319 and Resolutions 653 and 656 passed in a manner that offended procedural fairness, breached the rules of natural justice or otherwise passed in bad faith?

[70] In my opinion, the first point that should be made in this context is that there is a substantive difference between a decision made by a tribunal that makes quasi-judicial decisions and the legislative task performed by a municipal council in passing bylaws and

resolutions. Political factors and the general wellbeing of the municipality are proper considerations that the Council can take into consideration when considering a bylaw or a resolution. The court in ***Catalyst Paper Corp.*** considers this important distinction between the legislative function of a municipal council and a tribunal making quasi-judicial decisions. It held at paras. 19 - 21 inclusive:

> **19** The case law suggests that review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. Rather, they involve an array of social, economic, political and other non-legal considerations. "Municipal governments are democratic institutions", *per* LeBel J. for the majority in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919, at para. 33. In this context, reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.
>
> **20** The decided cases support the view of the trial judge that, historically, courts have refused to overturn municipal bylaws unless they were found to be "aberrant", "overwhelming", or if "no reasonable body" could have adopted them (para. 80, *per* Voith J.). See *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.); *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.); *Lehndorff United Properties (Canada) Ltd. v. Edmonton (City)* (1993), 146 A.R. 37 (Q.B.), aff'd (1994), 157 A.R. 169 (C.A.).
>
> **21** This deferential approach to judicial review of municipal bylaws has been in place for over a century. As Lord Russell C.J. stated in *Kruse v. Johnson*:
>
> > . . . courts of justice ought to be slow to condemn as invalid any by-law, so made under such conditions, on the ground of supposed unreasonableness. Notwithstanding what Cockburn C.J. said in *Bailey v. Williamson* [(1873), L.R. 8 Q.B. 118, at p. 124], an analogous case, I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires." But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient,

> or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. [Emphasis added; pp. 99-100.]

> These are the general indicators of unreasonableness in the context of municipal bylaws. It must be remembered, though, that what is unreasonable will depend on the applicable legislative framework. For instance, Lord Russell C.J.'s reference to inequality in operation as between different classes is inapt in the context of many modern municipal statutes, which contain provisions that expressly allow for such inequality. Subsection 197(3) of the *Community Charter*, S.B.C. 2003, c. 26, which allows municipalities to set different tax rates for different property classes, is such a provision.

[71] Furthermore, as stated in Rogers, *The Law of Canadian Municipal Corporations* (Toronto: Thomson Canada Limited, 2019) at §48.22:

> The procedure adopted by a council in passing by-laws or transacting any other business within its jurisdiction, in the absence of express statutory requirements, is a matter wholly of domestic concern and internal regulation. The courts will accordingly not give effect to objections based upon the failure of a council to observe its established procedure, unless there is clear evidence of bad faith or fraudulent intent.

(See also ***Merritton v. Lincoln*** (1917), 1917 CarswellOnt 150)

[72] It is on account of that line of reasoning that I do not accept the arguments by the applicant that the procedural fairness and duty owed to her are similar if not even higher than that afforded an employee. If procedural fairness is owed to the applicant in the context of the passing of the impugned bylaw and resolutions, it is at a much lower standard and in my opinion that standard has been met.

[73] The substantive distinction between the duty owed to a public official holding a public office and the higher duty owed to an employee by an employer is discussed in ***Goulet v. Buena Vista (Village)***, 2012 SKQB 503, 408 Sask.R. 267 (QL) where the court held as follows at paras. 14 – 19:

> **14** The question, then, is whether the office at issue falls on the "office" or "employment" side of this line. That question has been repeatedly considered in

cases dealing with the application of a duty of fairness to office holders who have been dismissed. In the seminal decision in *Knight v. Indian Head School Division No. 19* [1990] 1 S.C.R. 653, [1990] S.C.J. No. 26 (QL), for example, the court found that the appellant director of education was an office holder, and as such, was owed a duty of fairness. It did so on the basis that although there were contractual elements to the relationship between the appellant and the school division, the office of director of education had a strong "statutory flavour".

15 As noted by Bastarache J. in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the application of this test is not always a simple matter:

> 92 In practice, a clear distinction between office holders and contractual employees has been difficult to maintain:
> Although the law makes such a sharp distinction between office and service in theory, in practice it may be difficult to tell which is which. For tax purposes "office" has long been defined as a "subsisting, permanent substantive position which has an existence independent of the person who fills it", but for the purposes of natural justice the test may not be the same. Nor need an office necessarily be statutory, although nearly all public offices of importance in administrative law are statutory. A statutory public authority may have many employees who are in law merely its servants, and others of higher grades who are office-holders.
> (Wade and Forsyth, at pp. 532-33)
> ...
>
> 94 There is no reason to think that the distinction has been easier to apply in Canada. In *Knight*, as has been noted, the majority judgment relied on whether the public employee's position had a "strong 'statutory flavour'" (p. 672), but as Brown and Evans observe, "there is no simple test for determining whether there is a sufficiently strong 'statutory flavour' to a job for it to be classified as an 'office'" (p. 7-19). This has led to uncertainty as to whether procedural fairness attaches to particular positions. For instance, there are conflicting decisions on whether the position of a "middle manager" in a municipality is sufficiently important to attract a duty of fairness (compare *Gismondi*, at para. 53, and *Hughes v. Moncton (City)* (1990), 111 N.B.R. (2d) 184 (Q.B.), aff'd (1991), 118 N.B.R. (2d) 306 (C.A.)). Similarly, physicians working in the public health system may or may not be entitled to a duty of fairness (compare *Seshia and Rosen v. Saskatoon District Health Board*, [2000] 4 W.W.R. 606, 2000 SKQB 40).

16 In this case, however, it is my opinion that the application of the test is a simple matter. The mayor is a member of Council. The Village does not employ Council or its members. Rather, as provided by s. 79 of the Act, the Village is governed by Council, which exercises the power and carries out the duties of the Village. The duties of the mayor are the policy, legislative and governance functions described in ss. 92 and 93 of the Act. There is no doubt but that there is, as a result of those provisions, a strong statutory flavour to the office of mayor. In the words of Viscount Simon, a mayor's authority is "original, not delegated, and is exercised at his own discretion by virtue of his office".

> **17** It is readily apparent that the office of mayor lacks the key indicia of an employment relationship. In *Jans v. Ducks Unlimited Canada*, 2006 SKQB 396, 283 Sask. R. 212, Gerein J. summarized the common law test as to the existence of an employment relationship as follows (at para. 23):
>
> > 23 ... At one time the test was said to be that of control. See *Mersey Docks & Harbour Board v. Coggins & Griffiths (Liverpool) Ltd. and MacFarlane* (1947), A.C. 1 (H.L). Yet in that same year the House of Lords put forward a fourfold test in *Montreal v. Montreal Locomotive Works Ltd. et al.,* [1947] 1 D.L.R. 161 at p. 169.
> >
> > The great difference of opinion on this question in the Courts below illustrates the difficulty which is inherent in deciding questions like this. In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have often been applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive.
> >
> > That approach has become the norm.
>
> **18** The Village may "own the tools" used by the applicant in her office as mayor. However, that concept has little relevance in this context. The concepts of profit and risk of loss are not relevant. The issue, if any, would relate to whether the Village controls the mayor in carrying out her duties.
>
> **19** The Village does not have that authority. Indeed, the concept of control is fundamentally inconsistent with the duties of a mayor. A mayor is, like every member of council, the democratically elected representative of the public. Her duties are, as noted above, the policy, legislative and governance functions described in ss. 92 and 93 of the Act. She is, in carrying out those duties, accountable to her constituents. She is no more an "employee" in carrying out these functions than a member of the legislative assembly or a minister of the Crown is an employee of the province when exercising comparable functions. The relationship between a mayor or member of council under the Act and the municipality is radically different than that between an employer and employee.

[74] Even assuming for the purposes of this argument that one of the councillors may have minimized the impact of the amendment to the procedural bylaw by stating that the change "… is simply a procedural matter and changing some wording", to the extent that notice is required in these kinds of circumstances and in respect of a bylaw and

resolutions that are, as is the case here, a matter of domestic concern and internal regulation, any obligation to provide notice has been met. My review of the evidence in this case clearly indicates that the applicant knew that the Council was planning on passing the impugned bylaw and resolutions and that she took steps to have her legal counsel and supporters present at the meeting for that debate.

[75] Furthermore, my review of the evidence leads me to the conclusion that the onus upon the applicant to establish bad faith, bias or procedural unfairness has not been met. The evidence available to me by way of affidavit clearly indicates that there was a difficult political issue that needed to be resolved and that the majority of councillors were of the opinion that the mayor was not only undermining the unanimous vote the Council had made in respect of a political decision over an important wastewater project, but that she was failing to properly control the proceedings in the course of public meetings related to that issue and other matters incidental or consequential to that matter.

[76] The following comments from the ***Gendre*** case where a similar bylaw and resolution were under consideration are applicable here at paras. 40 - 43:

> **40** Before addressing whether Council acted in bad faith, it needs to be clarified that Council need not (as argued by the Mayor) establish that the Mayor's conduct was illegal, outside the bounds of the *MGA*, or so egregious that it warranted punishment, in order for the resolutions and bylaw to be valid. Referring to its actions as sanctions does not, as the Mayor submits, reveal that Council's intent was to punish him for his conduct.
>
> **41** Council was engaged in a legislative, not an adjudicative, function. It was not punishing the Mayor for his conduct. The issue here is not whether the Mayor's actions were deserving of punishment; it is whether Council acted in bad faith, that is, for the ulterior purpose of silencing him, as opposed to the legitimate purpose of good governance.
>
> **42** A municipal council is presumed to have acted in good faith: *Edmonton Flying Club* at para 1. The onus to establish bad faith is on the party alleging it, here the Mayor.

> **43** The standard to establish bad faith is high. The burden of proof is heavy; it requires evidence that clearly demonstrates that the municipality acted other than in the public interest: *Edmonton Flying Club* at paras 92-93. The true purpose of Council's actions must be determined: *Columbia Estate* at para 27.

[77] In my opinion the evidence does not establish actions in bad faith on the part of the councillors who voted in favour of the bylaw and the resolutions, but rather they were motivated by concerns over the proper governance of council and the broader general public interest of the municipality. In doing so they acted reasonably and fairly.

[78] In respect of the argument that the actions of the Council are a breach of natural justice or procedural fairness on account of the failure of the Council to provide reasons for its decision, in my opinion this argument again is an attempt to equate this legislative function of the Council with the decision of an administrative tribunal carrying out a quasi-judicial function. While quasi-judicial tribunals often do provide formal reasons and are sometimes legislatively required to do so, in the absence of a statutory requirement to provide reasons, I see no statutory, regulatory or other basis for requiring the Council here to provide reasons for its decision in respect of these impugned decisions. As the affidavit evidence indicates, the reasons why the majority of council members voted in the manner they did is set out in the debates of the Council and referenced in the affidavits filed on behalf of the parties. Ultimately it is the voter and not the court who should determine whether those reasons are sufficient to satisfy the political duty that each councillor has to the electorate of the municipality.

[79] I accept the arguments of the respondents set out in their brief that there are no failures to comply with any mandatory requirements to pass certain timelines or rules in

its procedures bylaw in order to conduct council business. The respondents' response to the applicant's concerns are set out at paras. 61 to 65 of their brief.

[80] In respect of any failure to follow the procedure established by the Council, I am satisfied that if there were any such failures in passing the bylaw or transacting any other business, these are in respect of matters within its jurisdiction, and in the absence of statutory requirements to the contrary, this is a matter wholly of domestic concern and internal regulation.

[81] As the applicant has not established by clear evidence any bad faith or fraudulent intent, I will not give effect to objections based upon the failure of a council to observe its established procedure even if I were to find such a failure. In my opinion, assuming there is such a failure, any such failure in the circumstances of this case are, as set out at paras. 66 through 69 of the respondents' brief, irrelevant to the application, trivial in nature nor has any prejudice been suffered by the applicant on account of any alleged failure.

Conclusion

[82] In conclusion, it is my opinion that Bylaw 4319 and Resolutions 653 and 656 are intra vires the power given to the Council pursuant to the provisions of the ***Act***, and that there is no basis for concluding that this bylaw and the resolutions were passed for an improper purpose or in a manner that breached procedural fairness or any other rules of natural justice.

[83] As set out in the Sigmundson Affidavit, Bylaw 4319 and Resolution 653 have been replaced by Bylaw 4338 and Resolution 429 respectively. It appears to me that both

Bylaw 4338 and Resolution 429 rely on the same statutory and regulatory basis as their predecessors and in my opinion on that basis are valid.

[84] Furthermore, the Sigmundson affidavit advises that the Council has been following an informal policy to address the issue of who is the municipality's spokesperson, thereby negating the effect of Resolution 656. I agree with the respondents that such an informal policy is a decision in respect of a matter of domestic concern and internal regulation within the jurisdiction of the Council to adopt and carry out. There is in my opinion no legal requirement to adopt a formal resolution to appoint a municipal spokesperson. However, the fact that Resolution 656 is still technically in force is a matter that the Council may wish to address, with a view to avoiding a possible conflict between Resolution 656 and the subsequent informal policy it has now adopted.

[85] I make no comment on whether there are any breaches of procedural fairness or natural justice in the passing of Bylaw 4338 or Resolution 429, nor do I wish it to appear that I am making any such suggestion. That matter was not directly before me and so it would be inappropriate for any such inference to be made on the basis of this general observation.

[86] As the respondents have been successful in their defence of this application, they shall have their costs on the basis of the applicable tariff. Costs may be spoken to if there is no agreement.

_____ J.