COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ironclad Developments Inc. v. West Kelowna (City),* 2025 BCCA 191

Date: 20250611
Docket: CA49967

Between:

Ironclad Developments Inc. and Ironclad Developments Elliot Inc.

Appellants
(Petitioners)

And

The City of West Kelowna, Elliot Road Limited Partnership and WestUrban Developments Ltd.

Respondents
(Respondents)

Before: The Honourable Mr. Justice Abrioux
The Honourable Mr. Justice Grauer
The Honourable Justice Gomery

On appeal from: An order of the Supreme Court of British Columbia, dated June 3, 2024 (*Ironclad Developments Inc. v. West Kelowna (City)*, 2024 BCSC 1285, Kelowna Docket S131035).

Counsel for the Appellants:	J. Martens J. Sokal
Counsel for the Respondent, City of West Kelowna:	S. Manhas N. Falzon
Counsel for the Respondents, Elliot Road Limited Partnership and WestUrban Developments Ltd.:	M. Fancourt-Smith K. Coady
Place and Date of Hearing:	Kelowna, British Columbia May 28, 2025
Place and Date of Judgment:	Vancouver, British Columbia June 11, 2025

Written Reasons by:
The Honourable Justice Gomery

Concurred in by:
The Honourable Mr. Justice Abrioux
The Honourable Mr. Justice Grauer

Summary:

The appellant challenges the order made on a petition for judicial review affirming the decision of the City of West Kelowna to impose a latecomer charge on the appellant. The appellant submits that the decision was procedurally unfair and substantively unreasonable. The chambers judge concluded that the decision was unfair, but no duty of fairness was owed because the decision was legislative in nature.

Held: Appeal allowed. The decision was not legislative in nature, and the City owed the appellant a duty of procedural fairness. Because the appellant was not given an opportunity to provide input and feedback in the process of determining the amount of the latecomer charge to be imposed, the decision was procedurally unfair and should be quashed.

Reasons for Judgment of the Honourable Justice Gomery:

Overview

[1] The appellants ("Ironclad") were engaged in the development of a real estate project in West Kelowna. Two related respondents ("WestUrban") were developing a neighbouring project. Both had to satisfy requirements imposed by the third respondent, the City of West Kelowna.

[2] In 2018, the City required WestUrban to construct road and site servicing infrastructure. Some of this work would benefit Ironclad's project. The City advised Ironclad that it would be required to contribute to the cost by paying a "latecomer charge". The City derives its authority to impose these requirements from ss. 507 and 508 of the *Local Government Act,* R.S.B.C. 2015, c. 1. Ironclad was to pay 54% of the actual construction costs incurred by WestUrban. The City would pay 20%, leaving WestUrban to bear 26% of the actual cost.

[3] A dispute emerged as to whether the costs attributed to the work by WestUrban were reasonable. Initially, it estimated that the total cost would be approximately $670,000, and Ironclad's share would be approximately $362,000. Later it advised the City that it had incurred actual costs totalling approximately $1.926 million, an amount it subsequently revised downwards to approximately $1.583 million. The City retained a firm of quantity surveyors ("SSA") to review the

costs. SSA opined that the reasonable costs were $1.311 million. The City provided SSA's report to WestUrban. On receipt of WestUrban's comments, SSA revised its opinion of the reasonable costs upwards to $1,388,260.

[4] The City provided SSA's revised report to Ironclad and required it to pay 54% or $749,666.40 (the "Charge") as a condition of obtaining an occupancy permit. Ironclad's project had just been completed. Ironclad was not given an opportunity to review and critique the report. It had tenants who were ready to move in. It did not accept SSA's opinion and made the payment under protest.

[5] Ironclad petitioned the Supreme Court for an order setting aside the City's decision to require it to pay the Charge on two grounds. First, it maintained that the procedure adopted by the City in imposing the Charge was unfair because it should have been given an opportunity to address and critique WestUrban's costs and SSA's report before the Charge was imposed. Second, it maintained that the City's decision to impose the Charge was substantively unreasonable. The City and WestUrban opposed the petition.

[6] The chambers judge dismissed Ironclad's petition. She considered that, while the procedure leading to the imposition of the Charge was unfair to Ironclad, the City did not owe it a duty to act fairly because she viewed the decision to impose the Charge as legislative in nature. She rejected Ironclad's argument that the Charge was substantively unreasonable, in large part because she held that the evidence upon which Ironclad relied—a consultant's report (the "McElhanney report") that it had obtained since the Charge was levied—was inadmissible as part of the record on this application for judicial review.

[7] Ironclad appeals. The arguments are essentially the same as they were in the court below.

[8] For the reasons that follow, I would allow the appeal. The City's imposition of the Charge was not a legislative decision, and it should have afforded Ironclad a reasonable opportunity to address SSA's opinion before imposing the Charge. The

decision should be set aside and the City directed to reconsider the amount of the Charge.

Issues

[9] I would frame the issues on appeal as follows:

1. Was the City required to act fairly in imposing the Charge?

2. If so, did the City act fairly?

3. If not, what is the appropriate remedy?

[10] While other issues were argued, they need not be addressed because my conclusions on these issues are dispositive of the appeal.

Standard of review

[11] The general rule is that, on an appeal from the decision of a court of first instance hearing an application for judicial review, the appellate court steps into the shoes of the reviewing judge and conducts its own review of the decision under review, having regard to but not deferring to the reviewing judge's reasons: *Northern Regional Health Authority v. Horrocks,* 2021 SCC 42 at para. 10. There is an exception, however, where the judge of first instance was called upon to make findings of fact in assessing the fairness of the procedure adopted by the original decision-maker: *Onni Wyndansea Holdings Ltd. v. Ucluelet (District),* 2023 BCCA 342 at para. 58. Such findings are reviewed with deference and this Court will only overturn them on the basis of an overriding and palpable error: *Henthorne v. British Columbia Ferry Services Inc.,* 2011 BCCA 476 at para. 77.

Analysis

1. Was the City required to act fairly in imposing the Charge?

[12] My analysis of the City's obligation to act fairly proceeds in three stages. First, I address the legal distinction between legislative and other decisions of government authorities, because it is settled law that no duty of fairness is owed in respect of

legislative decisions. Next, I consider the legal character of the decision made by the City in this case and address whether it was, as the chambers judge concluded, inherently legislative. Finally, having concluded that it was not and that a duty of fairness is not therefore excluded by virtue of the character of the decision, I go on to assess whether a duty of fairness was owed and, if so, what it required of the City.

A. The distinction between legislative and other government decisions

[13] In Canadian administrative law there is a general rule that government authorities must act fairly subject to an exception for decisions "of a legislative nature". The chambers judge quoted from *Canada (Attorney General) v. Mavi,* 2011 SCC 30 [*Mavi*], where Binnie J. gave judgment for the Court, describing the rule and noting the exception as follows:

> [38] The doctrine of procedural fairness has been a fundamental component of Canadian administrative law since *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, 1978 CanLII 24 (SCC), [1979] 1 S.C.R. 311, where Chief Justice Laskin for the majority adopted the proposition that "in the administrative or executive field there is a general duty of fairness" (p. 324). Six years later this principle was affirmed by a unanimous Court, *per* Le Dain J.: ". . . there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual": *Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643, at p. 653. The question in every case is "what the duty of procedural fairness may reasonably require of an authority in the way of specific procedural rights in a particular legislative and administrative context" (*Cardinal*, at p. 654). … More recently, in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, Bastarache and LeBel JJ. adopted the proposition that "[t]he observance of fair procedures is central to the notion of the 'just' exercise of power" (para. 90) (citing D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at p. 7-3).
>
> [39] Accordingly, while the content of procedural fairness varies with circumstances and the legislative and administrative context, it is certainly not to be presumed that Parliament intended that administrative officials be free to deal unfairly with people subject to their decisions. …
>
> [Emphasis added.]

[14] What makes a decision legislative is not always clear. It is not necessarily the identity of the decision-maker, or the ambit or form of the decision, although these features may sometimes bear on the classification.

[15] Some propositions are settled by the authorities. The first is that the form in which the decision is taken is usually of little or no moment. Decisions made by a municipal council are not legislative in nature simply because they were made by enacting a bylaw. In *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512 [*Wiswell*], a city enacted a zoning bylaw opposed by a local ratepayers' association. The enactment of the zoning bylaw was not a legislative decision. Speaking for the majority in the Supreme Court of Canada, Hall J. adopted the dissenting reasons of Freedman C.J.M. in the Court of Appeal where he stated that "the realities and the substance of the case" were that "this was a specific decision made upon a specific application concerned with a specific parcel of land". In enacting the bylaw, the City "was essentially dealing with a dispute between Dr. Ginsberg, who wanted the zoning requirements to be altered for his benefit, and those other residents of the district who wanted the zoning restrictions to continue as they were": at 520. The zoning bylaw was set aside because the ratepayers had not received fair notice that it was proposed.

[16] *Wiswell* also establishes that the identify of the decision-maker is not necessarily decisive. Bodies such as municipal councils and school boards are "vested with a range of functions", sometimes acting in a legislative capacity, and other times acting administratively: *TransAlta Generation Partnership v. Alberta (Minister of Municipal Affairs),* 2022 ABCA 381 at para. 93 [*TransAlta*]; *Potter v. Halifax Regional School Board,* 2002 NSCA 88, at para. 38 [*Potter*]; *Queen Elizabeth Annex (QEA) Parents' Society v. Vancouver School District No. 39,* 2025 BCCA 160 at paras. 55–62.

[17] Finally, as the chambers judge held at para. 58 of her reasons, a decision may be legislative even though it affects only a small number of persons: *Evraz Inc. NA Canada v. Alberta,* 2012 ABQB 173 at para. 121.

[18] To get beyond propositions as to what does not necessarily matter (form of the decision, identity of the decision-maker, number of persons affected), it is helpful to consider the purposes served by the imposition of an obligation of procedural

fairness on administrative decision-makers and the reasons for carving out an exception for legislative decisions.

[19] As noted in *Mavi*, recognition of a general obligation of procedural fairness in respect of administrative action began with *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 S.C.R. 311. A leading case is *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 [*Baker*]. *Baker* holds that what fairness requires—that is, the content of the duty of fairness—"is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected": para. 22. The content invariably includes affording to the affected individual an opportunity to be heard in some way by the decision-maker. Justice L'Heureux-Dubé spoke for the Court in *Baker* and explained:

> [28] …The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[20] The development of a doctrine of administrative fairness extends from proceedings before quasi-judicial tribunals to much less formal settings the core notion that persons affected by a decision should have the opportunity to make their case to the decision-maker . However, it is easy to see that the extension cannot extend indefinitely into every exercise of state authority. It cannot extend to the enactment of legislation by Parliament or a provincial Legislature. Legislation is general, not individual. It is the culmination of a political process. In the case of legislation by a sovereign legislature, assessing the fairness of the process lies outside the court's constitutional competence.

[21] But the concept of a legislative decision extends beyond the pure case of the enactment of legislation by a sovereign legislature. It extends, for example, to: the establishment of a property tax rate by a municipality (*Catalyst Paper Corporation. v. North Cowichan (District),* 2009 BCSC 1420 at para. 56, affirmed 2010 BCCA 199 at para. 14(d); affirmed 2012 SCC 2); the imposition of a telephone rate structure by the federal Cabinet under legislation permitting it to alter the rates fixed by the

statutory regulator in the public interest (*Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735); and to the issuance of an order-in-council by the provincial Cabinet under statutory authority suspending a union's right to strike for 90 days (*Health Sciences Association of British Columbia v. British Columbia (Attorney General)* (1986), 6 B.C.L.R. (2d) 17 (S.C.)).

[22] Judges and scholars have generalized from the concept and the cases that have extended it to discern the characteristic features of a legislative decision. In a passage cited with approval by the Alberta Court of Appeal in *TransAlta* at para. 90, Donald Brown and John Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters) (loose-leaf, updated release 2, June 2023) propose that the characteristic features of legislative decisions are their generality and that they are based on broad considerations of public policy. They state:

> While no precise definition of "legislative" power emerges from the caselaw, two characteristics seem important for the purpose of defining the extent of the duty of fairness. The first is the element of generality, that is, that the power is of general application and when exercised will not be directed at a particular person. The second *indicium* of a legislative power is that its exercise is based essentially on broad considerations of public policy, rather than on facts pertaining to individuals or their conduct. Decisions of a legislative nature, it is said, create norms or policy, whereas those of an administrative nature merely apply such norms to particular situations.
>
> [Footnotes omitted.]

[23] The proposition that legislative decisions are general in nature, and administrative decisions are not, is articulated in *Knight v. Indian Head School Division No. 19,* [1990] 1 S.C.R. 653 at para. 26 and *Potter* at paras. 35–39. Both *Potter* at para. 39 and *C.W. Casino World Ltd. v. British Columbia (Gaming Commission)* (1997), 89 B.C.A.C. 241 at para. 26 find support for the proposition in former editions of a leading English text, *de Smith's Judicial Review of Administrative Action*.

[24] The most recent edition of *de Smith* offers a different attempt to identify, in general terms, the demarcation between legislative and administrative decisions: *de Smith's Judicial Review* (London: Sweet & Maxwell, 2007), at para. 7-027. The authors, Lord Woolf, Jeffrey Jowell and Andrew Le Sueur, identify the availability of

avenues of political participation and accountability, and the diversity and diffuse nature of affected interests as characteristic of legislative decisions. They state:

> There are two reasons why “legislative” decisions have been held exempt from the duty to provide a fair hearing: first, where the decision is taken by a minister or other elected official who is accountable to Parliament or a local authority, the courts will be chary of adding an additional forum of participation where one is already in place as part of the process of political accountability. The second reason is a practical one: bodies may be exempt from the duty to provide a hearing where the potential of adversely protected interests is too diverse or too numerous to permit each individual to participate.

[25] I think that both Brown and Evans’ exegesis of the concept of a legislative decision and *de Smith*’s recent analysis offer helpful insight. In my view, while there is no bright-line test, the following features cumulatively point towards a determination that a decision by an authority other than a sovereign legislator is legislative, and not subject to a requirement that it be made fairly:

1. The decision is general in nature;

2. The decision is based on broad considerations of public policy;

3. Mechanisms of political accountability exist in respect of the decision; and

4. Adversely affected interests are numerous, diverse, or diffuse.

None of these considerations, taken individually, is necessarily determinative.

B. The legal character of the City’s decision to impose the Charge

[26] The City imposed the Charge in the exercise of statutory authority, and ss. 507 and 508 of the *LGA* are therefore the starting point of analysis. They provide as follows:

> **Requirements for excess or extended services**
>
> 507 (1) For the purposes of this section and section 508, "excess or extended services" means
>
> (a) a portion of a highway system that will provide access to land other than the land being subdivided or developed, and

(b) a portion of a water, sewage or drainage system that will serve land other than the land being subdivided or developed.

(2) A local government may require that the owner of land that is to be subdivided or developed provide excess or extended services.

(3) If a local government makes a requirement under subsection (2), the cost of providing the excess or extended services must be paid for

(a) by the municipality or regional district, or

(b) if the local government considers its costs to provide all or part of these services to be excessive, by the owner of the land being subdivided or developed.

Latecomer charges and cost recovery for excess or extended services

508 (1) If the owner is required under section 507 (3) (b) to pay all or part of the costs of excess or extended services, the municipality or regional district must

(a) determine the proportion of the cost of providing the highway or water, sewage or drainage facilities that it considers constitutes the excess or extended services;

(b) determine which part of the excess or extended services that it considers will benefit each of the parcels of land that will be served by the excess or extended services; and

(c) impose, as a condition of an owner connecting to or using the excess or extended services, a charge related to the benefit determined under paragraph (b).

(2) If the owner pays all or part of the costs of excess or extended services, the municipality or regional district must pay the owner

(a) all the latecomer charges collected under subsection (1) (c), if the owner pays all the costs, or

(b) a corresponding proportion of all latecomer charges collected, if the owner pays a portion of the costs.

(3) If the municipality or regional district pays all or part of the costs of excess or extended services, it may recover costs

(a) by a latecomer charge under subsection (1) (c),

(b) by a tax imposed in accordance with Division 5 *[Local Service Taxes]* of Part 7 of the *Community Charter*, other than section 211 (1) of that Act, or

(c) by fee imposed in accordance with section 397 *[imposition of fees and charges]* of this Act or section 194 *[municipal fees]* of the *Community Charter*.

(4) A latecomer charge must include interest calculated annually at a rate established by bylaw, payable for the period beginning when the excess or extended services were completed, up to the date that the connection is made or the use begins.

> (5) Subject to subsection (6), latecomer charges must be collected during the period beginning when the excess or extended services are completed, up to
>
> (a) a date to be agreed on by the owner and the local government, or
>
> (b) if there is no agreement, a date determined under the *Arbitration Act*.
>
> (6) No latecomer charges are payable as follows:
>
> (a) if there is a phased development agreement that is directly related to the construction and installation of the excess or extended services, beyond 15 years from the date the services are completed or the end of the phased development agreement, whichever is later;
>
> (b) in any other case, beyond 15 years from the date the services are completed.
>
> (7) If an owner, in accordance with a bylaw under section 506 *[works and services requirements]*, provides a highway or water, sewage or drainage facilities that serve land other than the land being subdivided or developed, this section applies.

[27] Section 507(2) is the provision that authorized the City to require WestUrban to provide excess or extended services for the benefit of Ironclad's property. Pursuant to s. 507(3), the cost of those excess or extended services had to be paid either by the City (by sub-s. (3)(a)) or by WestUrban (by sub-s. (3)(b)).

[28] Section 508(1)(c) authorized the City to impose the Charge on Ironclad as a latecomer. The Charge had to be "a charge related to the benefit determined under paragraph (b)" which required the City to determine the extent to which Ironclad had benefitted from the servicing of its property by the excess or extended services. Section 508(2)(a) required the City to pay to WestUrban all of the latecomer charges collected from Ironclad under s. 508(1)(c).

[29] The City had an alternative to charging Ironclad and using the money collected from Ironclad to reimburse WestUrban. It could choose to pay the cost of excess or extended services itself and recover the costs by imposing a tax under s. 508(3)(b) or a fee under s. 508(3)(c). The possibility that the City might impose a tax or fee is important to the chambers judge's analysis. At para. 62 of her reasons,

she describes the latecomer charging regime as "typical of other mandatory fee or tax regimes" and one that is:

> … at its core is driven by discretionary policy considerations. It is not a function that is focused on unique features, attributes, or rights of individuals.

[30] The chambers judge further reasons that:

> [65] … in deciding whether and how to implement a latecomer charging regime, the City must consider numerous policy oriented questions which have much broader implications than the charges ultimately assessed as against the directly interested parties. In this scenario, the City was responsible for 20% of the latecomer charges. That percentage allocation and the math of the latecomer charges has a potential impact on all property tax paying residents of the City.
>
> [66] In this regard, I accept that if there was a duty of procedural fairness which applies to the establishment of input costs beyond a latecomer charge on the ground that the cost determination aspect of the legislative decision is of a technical or administrative nature, then the distinction between legislative acts and administrative ones would be significantly undermined.

[31] The City and WestUrban submit that the judge was correct to view ss. 507 and 508 as establishing a single, indivisible, charging regime of a legislative nature because it is "driven by discretionary policy considerations rather than the unique features, attributes or rights of an individual". Focusing in particular on s. 508(3), the City contends that the imposition of a tax or a fee under s. 508(3)(b) or (c) would be legislative, and so too must be the imposition of a latecomer charge under ss. 508(1)(c) and 508(3)(a). It says that the scheme is "legislative from start to finish".

[32] I do not accept the judge's reasoning and the respondents' argument. It is important to have regard to the decision that was made, and not to other decisions that might have been made under the statute.

[33] In 2013, the City Council adopted an "Excess or Extended Services (Latecomer Agreements) Policy (the "Policy") to address the exercise of its statutory powers pursuant to s. 939 of the former *Local Government Act*, R.S.B.C. 1996 c. 323. Section 939 became ss. 507 and 508 of the present *LGA*. The Policy provides for the establishment of "Latecomer Agreements" between the City (then

described as a District) and landowners such as WestUrban whom the City requires to provide excess or extended services. In a Latecomer Agreement, the City is to undertake to the landowner to impose latecomer charges and to forward to the landowner the charges collected every six months. It states:

> The land owner shall pay all the costs of the excess or extended services required, and may apply to the District to enter into a Latecomer Agreement in accordance with this policy.
>
> Under the Latecomer Agreement, the District will impose latecomer charges on parcels that obtain physical access to, connect to, front on or directly benefit from the extension or excess service.
>
> The District will collect all Latecomer Charges and will forward them to the land owner every six months after the date of execution of the Latecomer Agreement.

[34] By bylaw, the City has formally delegated the authority to approve Latecomer Agreements to an approving officer.

[35] The Policy states that its objectives are:

> 1.) To protect [the City's] municipal taxpayers from having to front-end or guarantee the cost of local government infrastructure that is not identified in the District's Development Cost Charge Bylaw or other infrastructure financing arrangement.
>
> 2.) To require land owners who initiate developments that are out of sequence with the District's infrastructure servicing plans to pay the full cost of infrastructure that is needed to facilitate the developments.
>
> 3.) To provide land owners with the means to recuperate infrastructure costs that benefit other lands.

[36] In short, the City has chosen, as a matter of general policy, to recover extended and excess service costs through latecomer charges under s. 508(1)(a) and 508(3)(a) and not by the imposition of taxes or fees pursuant to ss. 508(3)(b) or (c).

[37] The Policy addresses the costs that may be included in a Latecomer Agreement. They are to be "based on the actual cost of the infrastructure required to serve the owner's land in accordance with the standards prescribed in the City's Subdivision and Development Bylaw" and must be subject to review, at the City's request, by a professional engineer. The Policy includes a template Latecomer

Agreement and a latecomer application form. It sets out in considerable detail the process from pre-application, application for a Latecomer Agreement, approval in principle, and implementation through to collection and administration.

[38] The City's decision to impose the Charge on Ironclad was concurrent with its acceptance of the revised SSA report and entry into a Latecomer Agreement with WestUrban.

[39] The City's decision to adopt the Policy in 2013 had a legislative character. It was general in nature and engaged broad considerations of public policy. It was made by the elected City Council as a body with direct political accountability to residents. Potentially adversely affected interests were numerous, diverse, and diffuse in the sense of contingent.

[40] On the other hand, the City's decision to impose the Charge lacked a legislative character. The markers of a legislative decision are not present. This decision was not general in nature but imposed liability on a single latecomer, Ironclad, to pay 54% of the expenses claimed by a single owner, WestUrban. It was not a decision based on broad considerations of public policy, but on a factual assessment as to the reasonableness of the costs claimed by WestUrban. It was a decision made by an approving officer employed by the City, rather than a politically accountable body such as the elected City Council. The interests primarily affected were not numerous, diverse or diffuse.

[41] I conclude that the decision to impose a Charge had an administrative, not a legislative character.

C. Was the City obliged to make the decision fairly?

[42] The decision was one that obviously affected Ironclad's rights and interests by imposing upon it an obligation to pay the Charge and, as a practical matter, preventing it from obtaining an occupancy permit until it paid the Charge. The general principle applicable to administrative decisions governs, and the City was required to make the decision fairly.

[43] The City submits that the general principle is excluded by the legislative scheme constituted by ss. 507 and 508, referring in particular to s. 508(5). Section 508(5) addresses the period during which latecomer charges will be collected and makes the end-date arbitrable, if the City and the owner cannot agree. The City's argument is that the conferral of a specific procedural right on the owner, but not on the latecomer, "demonstrates a clear legislative intention that the duty of fairness not apply in relation to latecomer charges".

[44] This is not cogent. It simply does not follow from the conferral of a specific procedural right for the owner's benefit that latecomers are to be denied a fair process that is, as stated in *Mavi*, central to the notion of the just exercise of power.

[45] The City advances other submissions based upon the presence or absence of public participation rights in relation to decisions of various kinds that may be made by a municipality exercising powers under the *LGA.* Again, none of these arguments overrides the application of the general principle to the decision in issue in this case.

2. Did the City act fairly?

[46] I agree with the chambers judge that the City did not act fairly in imposing the Charge. The essential facts are not in dispute.

[47] On June 26, 2018, WestUrban provided the City with an estimate, prepared by its engineering consultant ("Arrow") that the cost of constructing excess or extended services would be $669,691.39. This cost estimate was subsequently revised in discussions between WestUrban and the City.

[48] On October 12, 2018, WestUrban submitted to the City a latecomer application form in relation to the excess or extended services.

[49] The Policy includes, in a schedule headed "Latecomer Agreement Process":

> 3. Approval in Principle
>
> 3.1 The District notifies the owners of all benefitting parcels of a Latecomer Application, and provides an opportunity for feedback prior to the Agreement being finalized.

[50] On November 22, 2018, the approving officer wrote to Ironclad advising that the City had imposed an excess or extended services requirement on WestUrban and, if Ironclad developed its property within 15 years, it would be obliged to pay a latecomer charge. Ironclad would have to pay 54% of the cost. At 54%, its share was estimated to be $397,796.69 but would in the end be based on the actual cost of constructing the excess or extended services. The letter included a letter provided by Arrow confirming the estimate and a draft latecomer agreement contemplated between the City and WestUrban.

[51] In correspondence with the City, Ironclad did not dispute its proportionate share of the cost but raised concerns about the amount to be based on expenses actually incurred.

[52] On December 13, 2018, the City advised WestUrban that it approved in principle the draft latecomer agreement.

[53] On April 9, 2020, WestUrban submitted to the City a spreadsheet indicating that its actual invoiced costs were $1,925,702.44. This was almost three times the 2018 estimate.

[54] On May 5, 2020, the approving officer wrote WestUrban and Arrow to obtain further information. He requested an explanation and additional information and advised:

> Once the City has received the requested information, the City will review and determine if further information is required. Please note that the City will require the Engineer of Record to certify the costs in accordance with the City's latecomer policy. As well the City may, in accordance with its Latecomer Policy, require that WestUrban provide an independent review of the costs through a quantity surveyor or other qualified professional.

[55] On the same day, the approving officer advised Ironclad of the $1.925 million amount and said that it was undertaking appropriate due diligence to review the costs of construction submitted by WestUrban and Arrow. The email concluded:

> The City is in the process of undertaking appropriate due diligence in reviewing the actual costs of constructing Gossett Road submitted by WestUrban to determine the total costs on which the latecomer payments are to be based, and what amount is to be allocated to Ironclad as the actual latecomer payment.
>
> The City will advise Ironclad once the City has completed its due diligence.
>
> Please let us know if you have any concerns regarding the proposed correspondence.

[56] On May 6, 2020, Ironclad replied, indicating that it did not agree to "the alleged increased costs" and requesting cost reports and estimates certified by WestUrban's engineer, along with all supporting information. The approving officer promptly replied. He said that, under the *LGA,* responsibility for the determination of latecomer payments fell on the City, acting reasonably, not on Ironclad or WestUrban. He advised:

> The City will require the Engineer of Record to certify the costs in accordance with the City's Latecomer Policy. As well, the City may, in accordance with the Latecomer Policy, require that WestUrban provide an independent review of the costs through a quantity surveyor or other qualified professional.
>
> Should the City require assistance from Ironclad, the City will not hesitate to request it.

[57] On June 19, 2020, Arrow replied to the City's inquiries and provided a breakdown of costs claimed, now in the amount of $1,583,789.44 rather than $1,925,702.44. The approving officer did not forward this correspondence to Ironclad.

[58] On July 24, 2020, Ironclad's lawyer wrote the City's lawyer requesting the right to make submissions concerning the claim for a latecomer charge based on construction costs of $1,925,702.44.

[59] On or about the same date, the City retained SSA to undertake an independent review of the costs claimed by WestUrban. On September 9, it received

a report from SSA advising that, in its opinion, the reasonable costs were $1,311,000. This report was not provided to Ironclad.

[60] The City forwarded SSA's report to WestUrban which commented upon it. SSA was persuaded that its report was in error. On November 9, 2020, it issued a revised report stating its opinion that the reasonable costs were $1,388,260. That same day, the approving officer accepted the revised report as a reasonable and appropriate basis for the determination of the latecomer charge payable by Ironclad.

[61] The City advised Ironclad of its decision on November 12, 2020, by email from its lawyer to Ironclad's lawyer. The email stated:

> Further to our telephone conversation, please find attached the report prepared by SSA Quantity Surveyors Ltd., determining the costs associated with the Gossett Road Extension project at $1,388,260.00, exclusive of GST. With your client's share of the costs having been determined by the City to be 54%, the latecomer charge payable by your client to obtain the first occupancy permit for its development will be $749,660.40.
>
> As discussed, the City is of the view that the costs as determined by SSA are reasonable and appropriate. The costs determined by SSA are approximately $200,000.00 less than the costs certified by Arrow Engineering Ltd. on behalf of WestUrban. The City has told WestUrban that its claim to any greater amount will likely be rejected unless it can be shown that SSA has made an error.
>
> Please do not hesitate to contact the writer should you have any questions regarding the City's position.

[62] On November 13, 2020, the City and WestUrban entered into a latecomer agreement in the form contemplated by the Policy. It contemplated latecomer charges of $749,660.40 to be collected by the City (from Ironclad) and remitted to WestUrban.

[63] Also on November 13, 2020, Ironclad's lawyer wrote protesting the City's decision and the prospect that it would be required to pay $749,660.40 immediately to obtain an occupancy permit anticipated to be issued within weeks. On November 18, the City's lawyer replied that the City had made its decision, and that payment would be required in advance of issuance of an occupancy permit. Ironclad then made the payment under protest.

[64] Addressing all of this, the chambers judge made the following findings:

> [74] The City engaged Ironclad in the Latecomer Charge assessment process in 2018. Various correspondence was exchanged which created, I conclude, a reasonable expectation of consultation with Ironclad and input in the process. …
>
> [75] Ironclad was aware of the preparation of the SSA cost estimate. However, the decision to accept the conclusions in the SSA cost estimate was made by the approving officer before a copy of said report was even provided to Ironclad.

[65] These findings are amply supported by the evidence.

[66] In the circumstances, fairness required that Ironclad be afforded an opportunity to be informed of the costs claimed by WestUrban and SSA's analysis before the City made a decision that imposed on Ironclad an obligation to pay almost $750,000. The Policy stated that it would have an opportunity to provide feedback. Ironclad had repeatedly requested supporting documentation and an opportunity to make submissions. It appears that the approving officer was willing to talk to WestUrban, for whose benefit the charge would be imposed, but not to Ironclad, who would have to pay it. The unfairness of this process is obvious.

3. What is the appropriate remedy?

[67] The City having failed to fulfill its legal obligation to make the decision fairly, the appropriate remedy is that the decision should be quashed and the City directed to redetermine the amount of the Charge payable by Ironclad following consideration of submissions from Ironclad. In this Court, the City objected to any reliance on the McElhanney report, primarily because it was not part of the record before the judge, who refused to admit it. That, of course, is no bar to its consideration by the City on a redetermination, and Ironclad may rely upon it. It is not necessary to require that information be provided to Ironclad beyond what it has already obtained through the litigation process.

[68] In its petition and its notice of appeal, Ironclad sought an order that the $749,660.40 paid by it under protest be repaid. It now accepts that such an order is not available on this application for judicial review.

Disposition

[69] For these reasons, I would allow the appeal, set aside the order of the chambers judge, quash the decision, and direct the City to redetermine the amount of the Charge following consideration of submissions by Ironclad, which may incorporate the McElhanney report.

[70] While costs are not always ordered in the trial court on applications for judicial review, in this case the City sought and obtained an order for costs payable by Ironclad. As the successful party, Ironclad is entitled to its costs in this Court and, in the circumstances, it should also recover costs as against the City in the Supreme Court.

"The Honourable Justice Gomery"

I AGREE:

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Grauer"