



PROCEDURAL FAIRNESS IN COUNCIL DECISION MAKING

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FIRST NATION DECISIONS CAN BE CHALLENGED IN COURT

- Government can only make decisions that they are allowed to make under law.
- Government decisions can be challenged in Court.
- First Nations are governments and their decisions can be challenged in court (*Federal Courts Act / case law*).



WHICH DECISIONS CAN BE CHALLENGED IN COURT? (AND WHO CAN CHALLENGE THEM?)

- Short answer: most of them.
- If you have the legal authority to make a decision (which you should if you are making the decision in the first place!), it can be challenged in court.
- Under Land Code, your legal authority is defined by the *Framework Agreement / First Nation Land Management Act* AND specific laws that you make (e.g Trespass Law / Banishment Law / Drug Enforcement Law / Dangerous Animal Control Law / etc.)
- Basically, anyone who is affected by a decision of the First Nation can challenge the decision in court under “Procedural Fairness” grounds (NOTE: they have to challenge within 30 days of the decision being made).



HOW CAN FOLKS CHALLENGE DECISIONS?

- Two ways:
 1. A “Procedural” challenge (reviewing the way a decision was made); or
 2. A “Reasonableness” challenge (reviewing the substance of the decision).

If either of these challenges are successful, the First Nation’s decision will be “quashed” by the Court (it will be held null and void).



REVIEW TYPE #1

PROCEDURAL FAIRNESS REVIEW

- A case called Baker tells us the Court needs to consider 5 things (which are the “indicia” of procedural fairness):
 1. The nature of the decision and the process followed in making it (does one match the other?);
 2. The intention of the legislation generally and decision maker’s compliance with that legislative intent;
 3. The importance of the decision to the individual or individuals affected (the more important a decision is for an individual, the more care the decision maker has to use);
 4. The legitimate expectations of the affected person; and
 5. The choice of procedure made by the decision maker (i.e. you can safeguard your decision by making them very procedurally fair– by, for example, providing a right to appeal in your laws).



WHAT ARE SOME THINGS WE CAN DO TO SAFEGUARD OUR DECISIONS FROM PROCEDURAL REVIEW?

- 1) Give the affected person notice that the decision is going to be made. ✓
- 2) Ensure that there is no bias associated with the decision. This is a “reasonable person” test– would a reasonable person perceive bias? ✓
- 3) Make sure the affected person gets written reasons for the decision. ✓

WHAT ARE SOME THINGS WE CAN DO TO SAFEGUARD OUR DECISIONS FROM PROCEDURAL REVIEW?

- 4) If the decision will have a significant impact (e.g. Banishing a member) there will be a higher bar for procedural fairness (the more significant the decision, the higher the bar), and you will have to consider:
- Giving the affected person the right to make written submissions before Council; ✓
 - Perhaps an oral “hearing” would be more appropriate? ✓
 - Always ensure the body who hear the person’s reasons (or receive the person’s written reasons) are the ones who make the decision in the end (obviously); and ✓
 - Perhaps a right to apply for reconsideration / appeal is appropriate if reasonable grounds exist? ✓
- 5) Getting advice from a lawyer is always a good idea when you’re making these big decisions... before you make them! The bar that the Court will measure “Procedural Fairness” against is “correctness” - that is, you have to have followed the “correct” procedure- NO ROOM FOR ERROR- so, error on the side of caution! ✓



REVIEW TYPE 2: SUBSTANTIVE REVIEW

- In a judicial review, the substantive review is where the court looks at the content of the decision (i.e. what the decision was based on, and what it was).
- The things the court will be looking at
 - i. the facts;
 - ii. the statutory authority;
 - iii. the law (is there precedent?); and
 - iv. and how well articulated and transparent the reasons are.
- The standard of review at the substantive review stage is almost always reasonableness (*Minister of Citizenship v Vavilov*, 2019 SCC 65).

Review type 2: Substantive Review cont.

- A “reasonable” decision is not a perfect decision, but rather is a decision which is defensible/acceptable AND which displays an acceptable chain of reasoning in making the decision.
- There are several things that need to be included in a “reasonable” decision :
 - 1) **The decision is based on an internally coherent and rational chain of analysis**
 - In other words, the decision needs to make sense!
 - 2) **The decision is justified in relation to the facts AND the legislation that constrains the decision-maker**
 - Reference the facts and how those facts interact with the legislative framework that you’re trying to uphold.
 - The decision needs to be consistent with previous decisions on similar issues.
 - 3) **The decision is base on the record / facts before the decision maker** (again... it needs to make sense...)

WHAT ARE SOME THINGS WE CAN DO TO SAFE-GUARD OUR DECISION FROM A “REASONABLENESS” REVIEW?

- 1) Make sure you’re acting with the scope of your legislative authority (this is something we consider when drafting the law on the front end. Does the legislation allow you to do what you want to do? Can you follow the legislative requirements? (e.g. if your law allows a right to appeal, do you have a Dispute Adjudication Law or appeal body?)
- 2) Ensure the decision is in writing, and explains the entire decision-making process (again, err on the side of caution– write a long decision that sets everything out) .

Your reasons will include:

- Consideration of the facts;
- Consideration of the evidence before Council when the decision was being made;
- Consideration of legislative authority (i.e. provision and intent your Land Code Law);
- Consideration past similar decisions. Say why it’s the same or different;
- Where the decision has significant impact on an individual(s), let the individual plead their case (and include that in the evidence);
- Ensure rational chain of analysis leading to an outcome which “adds up”; and
- Provide a mechanism for appeal.



DO THE WORK ON THE FRONT END!

- Very difficult (more like impossible) to “fix” procedural fairness post-facto.
- Build a procedurally fair law regime that other laws can “plug into”. That way, you can be reasonably certain that when you do enforce your law, your decisions won’t get quashed by a court on procedural fairness grounds!

