

**SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY**

S 218115

File No. _____
Vancouver Registry

SEP 14 2021



IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE JUDICIAL REVIEW PROCEDURE ACT
R.S.B.C. 1996, c. 241

BETWEEN:

BC/Yukon Association of Drug War Survivors

Petitioner

AND:

City of Surrey and Kim Marosevich, Manager of Bylaw Enforcement & Licensing Services

Respondents

PETITION TO THE COURT

ON NOTICE TO:

Deputy Attorney General
Ministry of the Attorney General
PO BOX 9290 Stn Prov Govt
Victoria BC V8W 9J7

Manager, Bylaw Enforcement & Licensing Services
The City of Surrey
14245-56th Avenue
Surrey, B.C. V3X 3A2

This proceeding has been brought for the relief set out in Part 1 below, by the person named as petitioner in the style of proceedings above.

If you intend to respond to this petition, you or your lawyer must

(a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

(b) serve on the petitioner

- (i) 2 copies of the filed response to petition, and
- (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner(s),

(a) if you were served with the petition anywhere in Canada, within 21 days after that service,

(b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the petition anywhere else, within 49 days after that service, or

(d) if the time for response has been set by order of the court, within that time.

(1) The address of the registry is: 800 Smithe Street, Vancouver British Columbia V6Z 2E1

(2) The ADDRESS FOR SERVICE of the Petitioner is:

c/o Pivot Legal Society
121 Heatley Avenue
Vancouver, BC V6A 3E9

(3) The name and office address of the Petitioner's lawyer is:

Sarah Runyon and Caitlin Shane
Pivot Legal Society
121 Heatley Avenue
Vancouver, BC V6A 3E9

Part 1: ORDERS SOUGHT

The Petitioner makes application for:

1. An order of certiorari quashing the decision of City Council to refuse the business license;
2. An order of mandamus, directing the City to issue the business license;
3. In the alternative, and pursuant to s. 5 of the *Judicial Review Procedure Act*, an order remitting the matter to City Council for a further hearing with directions;
5. Costs; and
6. Such further and other relief as this Honourable Court may deem just.

Part 2: FACTUAL BASIS

A. The BC/Yukon Association of Drug War Survivors (“BCYADWS”)

1. The petitioner is a registered non-profit society established under the *Societies Act*, SBC 2015 c. 18. Founded in 2009 and funded by the Overdose Emergency Response Centre of the Ministry of Mental Health and Addictions, BCYADWS comprises a province-wide network of drug users and former drug users. Its primary mandate includes implementing educational programs and training events that foster harm reduction and promote a better public understanding of the systemic issues facing people who use illegal drugs. BCYADWS also offers advocacy and education on a provincial scale, aims to influence public policy, and contributes to critical academic research.
2. BCYADWS routinely collaborates with prominent researchers from a variety of institutions, including Simon Fraser University, the University of British Columbia, the BC Centre on Substance Use, and the Canadian Institute for Substance Use Research.
3. BCYADWS has a variety of member groups comprised of and led by people who use drugs in various jurisdictions throughout the province, including the Surrey-Newton Union of Drug Users (“SNUDU”).

B. The Surrey-Newton Union of Drug Users (“SNUDU”)

4. SNUDU was formed in 2019 and aims to improve the lives of people who use drugs in Surrey-Newton through user-to-user support, education, and advocacy. As a member group of BCYADWS, SNUDU operates under BCYADWS’s leadership and organizational mandate.
5. In August 2020, BCYADWS entered into a tenancy agreement on behalf of SNUDU at unit 101-13245 72nd Avenue in Surrey-Newton (the “Premise”). BCYADWS applied for and received a business license to operate a community service there, comprising an office and meeting space for SNUDU members.

C. Chronology of SNUDU’s Acquisition of the Business License

6. In August 2020, BCYADWS applied on behalf of SNUDU to the Surrey Bylaw and Licensing Department for a business license at the Premise. On August 13, 2020 BCYADWS received an email from Sandra Palmiere, the Supervisor for Business Licensing with the City of Surrey, inquiring about the type of business that would be operating at the Premise. BCYADWS replied that the Premise would be operated as a community service (pursuant to the relevant zoning by-laws). No further information about SNUDU’s operations were requested or required from the City of Surrey.
7. On August 19, 2020 BCYADWS received a subsequent email from Sandra Palmiere confirming that the application had been reviewed and processed.
8. On August 20, 2020, Sandra Palmiere advised that the Premise would normally require an inspection as part of the business license process but in light of COVID-19 restrictions, the City of Surrey paused these inspections. SNUDU received express permission to commence operations and received its business license number (176989).

9. Between late October and early November 2020, SNUDU commenced regular office hours at the Premise between noon and 4:30 p.m. Monday to Friday. By February 2021, client demand for use of the Premise increased and hours were extended from 9:00 a.m. to 8:00 p.m. 7 days per week.
10. The Premise's primary purpose was to provide a meeting space for SNUDU to carry out functions such as public education, support group meetings, and rights training. For example, weekly meetings were held at the Premise to discuss volunteer opportunities in the community, strategies for drug policy reform, and developments in opioid agonist treatment. The Premise was well-used by SNUDU's members because it offered access to sanitation facilities such as a shower and toilet; snacks and refreshments; harm reduction supplies; first aid equipment; technology; and comfortable furniture (all of which are notoriously difficult for low-income people to access in the Surrey-Newton area). Without the Premise, many of SNUDU's structurally vulnerable members would not otherwise have access to these resources.
11. The geographic location of the Premise was also deemed ideal because it is located in a resource-scarce community with a high population of low-income people who use drugs. Surrey has BC's highest rates of death from drug overdose.
12. Given's SNUDU's mandate and the population it serves, people who access the Premise do, out of necessity, consume illicit substances. However, drug use is not the reason for the Premise's existence.
13. On March 12, 2021, a bylaw officer attended at the Premise and served SNUDU with a notice stating the City of Surrey could not issue a business license to BCYADWS because the business operation included facilitating the consumption of illicit drugs. SNUDU was also told to cease its operations by March 15, 2021 and seek approval from the provincial health authorities to operate an overdose prevention site.
14. BCYADWS was not operating an overdose prevention site. The petitioner made efforts to contact the City of Surrey and the Manager of Bylaw Services to explain their mandate and operation, however, the Petitioner's calls were never returned.

15. On March 15, 2021, Dr. Fernando MejiaMulet, Medical Health Officer of Fraser Health Authority, issued a letter to the Manager of Bylaw Services advising that the Premise was not an overdose prevention site. Dr. MejiaMulet further advised in the letter that Fraser Health Authority supports the efforts of BCYADWS and expressed concern about the City's efforts to halt its operations. Dr. MejiaMulet expressly acknowledged that Fraser Health Authority is aware of the resource scarcity in the Surrey-Newton area and that it had applied for a delegation to the City of Surrey to discuss implementing additional health services.

D. The Reconsideration Hearing

16. On May 10, 2021 the Surrey City Council held a Business License Reconsideration Hearing at the request of BCYADWS.

17. Counsel for BCYADWS urged City Council to treat the hearing as one regarding a license *cancellation*, not a license *refusal*. Surrey's *Business License Bylaw, 1999*, No. 13680 allows, in the event of a license cancellation (but not a license refusal), for a license-holder to continue to operate the business until the reconsideration hearing takes place. Counsel noted that the City licensing department: issued a business license number after the relevant fees were satisfied by BCYADWS; and expressly stated that operations could commence while city inspections were paused. The site operated for roughly 7 months under its business license number.

18. Counsel for BCYADWS specifically requested that the written reasons "show that the license was canceled, and not refused, on March 12th." City Council did not address this issue in its reasons nor was this issue deliberated after counsels' submissions. Significantly, counsel for BCYADWS was asked by Councillor Pettigrew to review her argument as to why the hearing should be one focused on the reasonableness of the license cancellation as opposed to refusal. Counsel's argument was articulated for a second time. The merits and consequences of the distinction were not considered or reflected in Council's decision.

19. In her subsequent submissions, counsel for BCYADWS carefully and extensively catalogued each reason provided by Bylaw Enforcement & Licensing Services for cancelling the license and explained in turn why BCYADWS deemed those reasons “unreasonable” by referring to relevant case law and legislation. A concerted focus was placed on the claims of Bylaw officers who allegedly observed violations of COVID-19 protocols, criminal activity, or litter around the Premise and the fact that none of these incidents could be causally linked to the Premise or SNUDU’s presence.
20. More importantly, counsel argued that there are existing and appropriate legal channels to: (a) investigate the alleged occurrences and their cause; and (b) to address and remedy those occurrences if in fact a causal link was established. As counsel clarified, none of those channels were pursued, no causal relationship was established, and the City therefore lacked a legal basis to abruptly cancel SNUDU’s license.
21. In her concluding submissions, counsel for BCYADWS argued that “cancelling BC Yukon’s license amounts to discrimination and a violation of the *Canadian Charter of Rights and Freedoms*.” Further, it was argued that the decision to cancel “may well violate human rights legislation protecting against discrimination - the *Human Rights Code*.”
22. City Council voted to uphold the decision of the Manager of Bylaw Services to refuse the business license to BCYADWS.
23. The requested written reasons that followed consisted only of the following:
- Council resolves:
 - To uphold the decision of the Manager, By-law Enforcement Services to refuse the issuance of a business license to the BC Yukon Association of Drug War Survivors;
 - The suitability of [the Premise] for its intended use by the BC Yukon Association of Drug War Survivors; and
 - The public interest in having safely operated sites and suitable locations having regard to the interests of both drug users and other member of the public.
24. City Council did not offer any explanation to BCYADWS as to why it refused the issuance of a business license. Consequently, there is no ability for BCYADWS to

understand why their application was refused or for this Court to assess the reasonableness of City Council's decision.

Part 3: LEGAL BASIS

25. The petitioner raises three primary issues on this judicial review:

- a) The City of Surrey failed to give reasons as required by s. 60 of the *Community Charter*, [SBC 2003] chap. 26;
- b) In the alternative, the reasons of Surrey City Council are factually and legally deficient and therefore inadequate;
- c) The City's ultimate decision to refuse the issuance of a business license to BCYADWS is unreasonable based on the evidence, submissions, and implications of the decision for the petitioner and the people the petitioner serves.

A. *The City of Surrey failed to give reasons as required by s. 60 of the Community Charter, [SBC 2003] chap. 26.*

26. The Petitioner requested written reasons at the reconsideration hearing. Pursuant to s. 60 of the *Community Charter*, the City was statutorily bound to provide written reasons for the refusal to issue a business license to the Petitioner:

Business license authority

60 (1) An application for a business license may be refused in any specific case, but

- (a) the application must not be unreasonably refused, and
- (b) on request, the person or body making the decision must give written reasons for the refusal. [emphasis added]

27. The Council's resolution does not provide any reasons explaining the conclusions they present as a decision.

B. *In the alternative, the reasons of Surrey City Council are factually and legally deficient and therefore inadequate.*

28. Recently, in *R v G.F.* 2021 SCC 20, the Supreme Court clarified that reasons must be both “factually and legally sufficient.” Factual sufficiency is concerned with what the decision-maker decided and why. Legal sufficiency requires that the aggrieved party be able to meaningfully exercise their right of appeal: “lawyers must be able to discern the viability of an appeal and appellate courts must be able to determine whether an error has occurred.” The Supreme Court emphasized that legal sufficiency is highly context specific and must be assessed in light of the live issues at trial.
29. The petitioner will advance that the Council’s reasons are factually deficient because they fail to respond to the case’s live issues, having regard to the evidence as a whole and the submissions of counsel.
30. The petitioner will advance that the reasons are legally deficient because City Council was specifically called upon to settle several controversial points of law, including whether the hearing was properly a reconsideration of a license refusal or cancellation and whether the license refusal infringed the *Charter* and human rights law. The “reasons” for the City’s decision amount to a mere conclusory statement without explanation. A statement of conclusion with nothing or little more than nothing, including a conclusion that continuing a permit is not in the public interest, will not suffice: *Johal v Surrey (City)* 2011 BCSC 710; *Johal v. Canada Revenue Agency*, 2009 FCA 276; *Canada (Citizenship and Immigration) v. Wang*, 2009 FC 1290; *Zeliony v. Red River College*, 2007 MBQB 308, 222 Man.R. (2d) 156 (Man. Q.B.); *Ahlefeld v. Border Conservation* (1983), 28 Sask.R. 213 (Q.B.).
- C. *The City’s ultimate decision to refuse the issuance of a business license to BCYADWS is unreasonable based on the evidence, submissions, and implications of the decision for the petitioner and the people the petitioner serves.*
31. The requirement to provide reasons is both an aspect of procedural fairness and an attribute of the reasonableness of the decision.

32. In *Canada (Minister of Citizenship and Immigration) v. Vavilov* (“*Vavilov*”) 2019 SCC 65 the Supreme Court introduced a new contextual factor to the reasonableness analysis: the impact of an impugned decision on those affected by it, and particularly, those with existing vulnerabilities.
33. At the hearing, counsel for BCYADWS emphasized that the City’s decision “impacts people’s fundamental *Charter* protected rights. Their life, liberty and security interests, their protection against discrimination, their freedom of association.” Counsel further emphasized the impact the City’s decision would have on residents’ ability to access critical harm reduction services – especially considering Surrey is plagued by the highest rates of fatal overdose in the province and a scarcity of resources.
34. The majority in *Vavilov* held that where the impact of a decision on an individual’s rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the Legislature’s intention. This includes decisions with consequences that threaten an individual’s life, liberty, dignity or livelihood.
35. The petitioner will advance that City Council has an obligation to take all of its citizens’ perspectives seriously. City Council is entrusted with an extraordinary degree of power over the lives of ordinary people, including the most structurally vulnerable among us. The corollary to that power is a responsibility on the part of City Council to ensure that its reasons demonstrate a consideration of the consequences of a decision and that those consequences are justified in light of the facts and law, which undoubtedly include Constitutional guarantees and the *Charter* values they reflect.

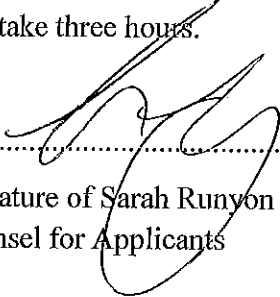
Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Ann Livingston made May 5, 2021;

2. The pleadings, affidavits and other material filed herein;
3. Transcript and Reasons of the Reconsideration Hearing held May 10, 2021;
4. Written Argument and authorities of the Petitioner [to be forwarded];
5. Such other materials as counsel may advise and this Court deems just.

The applicants estimate that the application will take three hours.

Date: September 7, 2021



 Signature of Sarah Runyon and Caitlin Shane,
 Counsel for Applicants

Address for Service:
 Pivot Legal Society
 121 Heatley Avenue
 Vancouver, BC V6A 3E9

To be completed by the court only:

Order made

in the terms requested in paragraphs of
 Part 1 of this notice of application

with the following variations and additional terms:

.....

.....

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Date:

Signature of Judge Master