

WHAT FAIR IS FAIR? THE DUTY OF FAIRNESS OWED TO RFP PROPONENTS

Posted on June 9, 2015

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If a government institution does not follow a written policy when conducting its RFP procedure, proponents may want to turn to the courts. But what fairness is owed to these proponents and why?

In *Jono Developments Ltd v North End Community Health Association*, the Nova Scotia Court of Appeal addressed the fairness of an RFP process used to sell a property.^[1] The Court held that the RFP process was fair, despite the fact that the RFP process differed from a written procedure.

In June 2015, the Supreme Court of Canada denied leave to hear an appeal of the decision, suggesting that the Court's holdings are now persuasive across Canada.

Overview of the Facts

In 2011, the Halifax Regional Municipality ("**Halifax**") invited proposals for the purchase of a closed school. The evaluation criteria that the RFP set out included

- the intent for use of the property;
- the development experience of the bidder;
- the bidder's financial capability; and
- the amount of the financial offer in relation to market value.

A set of Community Group^[2] respondents submitted proposals for the purchase of the property, as did Jono Developments Ltd. ("**Jono**"), a private developer. Jono was successful.

Around the time Jono won the RFP, the Community Groups became aware of a procedure for the disposal of closed schools that had been passed by Halifax in 2000 (the "**Procedure**"). The Procedure had never been followed, despite the closing of 18 schools since 2000. The Community Groups sought judicial review of Halifax's decision to sell the property to Jono, alleging that failure on the part of Halifax to observe the Procedure constituted a denial of procedural fairness.

In 2012, the reviewing judge quashed Halifax's decision to approve the sale to Jono and awarded costs to the

Community Groups. Jono appealed. At issue at the Court of Appeal was the content of the duty of fairness owed by Halifax to the Community Groups, and whether Halifax breached that duty.

The Court's Reasons

The Court considered the degree of procedural fairness applicable under the circumstances. It referred to five non-exhaustive factors that can affect the content of the duty of fairness from the Supreme Court's 1999 decision in *Baker*:

- The nature of the decision;
- The statutory scheme under which the decision is made;
- The importance of the interest at stake in the decision relative to other interests;
- The legitimate expectations of the parties; and
- The procedural choices available to the decision-maker.^[3]

The Court analyzed each of the above factors, but focused on the legitimate expectations of the parties.

The legitimate expectations doctrine exists to ensure governmental actions are fair, predictable and not arbitrary.^[4] A party does not need to have pre-existing knowledge of a policy to trigger "legitimate expectations".^[5] The fact that the Community Groups were not aware of the Procedure until after the RFP process was not determinative. The Community Groups were still permitted to argue that the Procedure was relevant to the legitimate expectations of proponents.

The Court held that the differences between the RFP and the Procedure did not form the basis for a substantially raised content of the duty of fairness. The Court found that the RFP granted the Community Groups participatory rights that were substantially similar to those contemplated in the Procedure for the following reasons:^[6]

1. though the Procedure had stipulated that Community Groups that expressed interest were to be given 90 days to prepare a proposal, on the facts the group had known about the upcoming RFP at least a year before the RFP was issued, and had ample time to make comprehensive submissions;^[7]
2. while the Procedure provided that Halifax would consider the proposals of Community Groups before those of private developers, it did not imply that Community Groups had any pre-emptive right. The participatory rights that the Community Groups were afforded were substantially similar to those contemplated by the Procedure;^[8]
3. the RFP process was consistent and predictable, as Halifax had used it to sell 16 of 18 closed schools in the past decade, and the Community Groups fully understood the RFP process;^[9] and
4. the Procedure had not provided any specific criteria for evaluating feasibility of a given proposal insofar

as fiscal goals were concerned.^[10]

In sum, the Court found that though the Procedure gave rise to legitimate expectations of the Community Groups, the content of duty of fairness involved broader considerations. Legitimate expectations were just one factor to be considered in the formulation of the duty of fairness. The content of the duty of fairness owed by Halifax was simply to provide the Community Groups:

1. an opportunity to advance a proposal; and
2. to have the proposal considered by Halifax on criteria other than simply the price offered for the property.^[11]

The Court held that this duty was met in the RFP process. In other words, despite not complying with the Procedure, Halifax's conduct still met the duty of fairness that it owed to proponents. The court set aside the reviewing judge's order.

This case raises spectre of the interesting scenario in which a governmental body had two practices in place: the Procedure that had never been used, and a customary process that had been consistently used. The Court's decision, read in one way, suggests that Halifax's customary process was "good enough", even though it was not the official Procedure.

However, this is probably an oversimplification of the Court's reasoning. The Court held that it will determine the content of the duty of fairness by applying the Baker factors to each case. This may be informed by past conduct, information given to proponents and other information.

Although not expressly stated in the Court's reasons, it is possible that the decision in *Jono Developments* may have incorporated a reaction to what could be viewed as an ex post facto "gotcha" technical argument about Procedure compliance, made only after the RFP process was complete. The Procedure was not located until after the RFP was complete and Halifax had been consistent in how it conducted its previous RFP processes. It is interesting to consider if the Court would have upheld the fairness of Halifax's decision if the Procedure been followed in Halifax's previous RFPs. Would the Court have found a different content of the duty of fairness?

Business Considerations

There are transferables from *Jono Developments* beyond the official procedure/customary process division noted above. First, *Jono Developments* confirms that the courts may apply administrative law standards to government RFP processes. Proponents could be faced with judicial review based on the fairness of a process – although in this case the review, after several levels of court, was unsuccessful.

Second, the Court's validation of Halifax's customary process raises questions for proponents. A party

participating in an RFP process may want to look beyond the advertised process to determine if the institution follows other procedures. This will help inform a proponent about the full scope of fairness they may be afforded in a RFP process.

Finally, *Jono Developments* is a reminder to government institutions that they should check their "Policy Closets" to ensure that there are no conflicting policies that contradict RFP processes that they intend to follow. At the very least, such policies may be recognized by the court as contributing to legitimate expectations of proponents and the duty of fairness they are owed.

by Adam D.H. Chisholm and Tayleigh Armstrong

1 *Jono Developments Ltd v North End Community Health Association*, 2014 NSCA 92 [*Jono Developments*].^[ps2id id='1' target="']

2 The Community Group respondents were comprised of The North End Community Health Association, The Richard Preston Centre for Excellence Society, and the Micmac Native Friendship Society (the "**Community Groups**").^[ps2id id='2' target="']

3 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.^[ps2id id='3' target="']

4 *Supra* note 1 at para 71.^[ps2id id='4' target="']

5 *Ibid* at para 69.^[ps2id id='5' target="']

6 *Ibid* at para 96.^[ps2id id='6' target="']

7 *Ibid* at para 97.^[ps2id id='7' target="']

8 *Ibid* at para 98.^[ps2id id='8' target="']

9 *Ibid* at para 110.^[ps2id id='9' target="']

10 *Ibid* at paras 99 – 100.^[ps2id id='10' target="']

11 *Ibid* at para 106.^[ps2id id='11' target="']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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