IMLA

# Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

MAR APR 2021
VOL.62
NO.02



**OFFICERS**
President
**Tyrone E. Cooper**
City Attorney
Beaumont, Texas

President Elect
**Barbara Adams**
General Counsel
Illinois Local Government Lawyers Association

Immediate Past President
**Patrick Baker**
City Attorney
Charlotte, North Carolina

Treasurer
**Rose Humway-Warmuth**
City Solicitor
Wheeling, West Virginia

General Counsel and Executive Director
**Charles W. Thompson, Jr.**
IMLA Rockville, Maryland

**BOARD OF DIRECTORS**
**Christopher Balch**
City Attorney
Brookhaven, Georgia

**Shauna Billingsley**
City Attorney
Franklin, Tennessee

**Lori Grigg Bluhm**
City Attorney
Troy, Michigan

**Alan Bojorquez**
Borjorquez Law Firm PLLC
Austin, Texas

**Beth Anne Childs**
City Attorney
Owassa, Oklahoma

**Jeffrey Dana**
City Solicitor
Providence, Rhode Island

**Arthur Gutekunst**
Sr. Assistant Corporation Counsel
White Plains, New York

**Douglas Haney**
Corporation Counsel
Carmel, Indiana

**Nina R. Hickson**
City Attorney
Atlanta, Georgia

**Joy Hulton**
Regional Solicitor
York Region, Ontario, Canada

**Wynetta Massey**
City Attorney
Colorado Springs, Colorado

**Marcel S. Pratt**
City Solicitor
Philadelphia, Pennsylvania

**Gregory Priamos**
County Counsel
Riverside County, California

**Kelly Jean Long Pridgen**
General Counsel
Association County Commissioners of Georgia
Atlanta, Georgia

**Tracy Reeve**
City Attorney
Portland, Oregon

**Jennie Granahan Tarr**
Chief Assistant County Attorney
Hillsborough County, Florida

**Nancy Thompson**
City Counselor
Columbia, Missouri

**Randall Van Vleck**
General Counsel
New Mexico Municipal League
Santa Fe, New Mexico

**Byron Werry**
City Solicitor
Regina, Saskatchewan

**Susana Alcala Wood**
City Attorney
Sacramento, California

# CONTENTS

MARCH / APRIL 2021

**ROBOCALL ME MAYBE-FEDERAL RESTRICTIONS ON MUNICIPAL AUTOMATED MESSAGING**
*By: David S. Johnson, Assistant City Attorney, City of Arlington, Texas*
While emergency alerts and COVID updates may generally be communicated without the recipient's prior consent, most municipal robocalls and texts, even where well-intentioned, require advance authorization.
**PAGE 6**

**THE MUNICIPALITY AS SHAREHOLDER: SECURITIES LITIGATION IN THE AGE OF FISCAL AND SOCIAL RESPONSIBILITY**
*By: Joshua Grabar, Principal, Grabar Law Office, Philadelphia, Pennsylvania*
Municipalities increasingly take action as shareholders, seeking recourse for corporate fraud and mismanagement and exerting pressure for social and environmental reforms.
**PAGE 12**

## DEPARTMENTS

PAGE12, 6, ILLUSTRATIONS BY TRUJILLODESIGN

**18 AFFIRMATIVE LITIGATION**
**Public Sector Entities and Affirmative Litigation**
*By: Edward Truant, Founder, Slingshot Capital, Inc., Toronto, Ontario and Grant Farrar, Founder, Arran Capital, Inc. Evanston, Illinois*
An additional mechanism to fund municipalities seeking recourse on behalf of their constituents.

**22 PRACTICE TIPS**
**Mandatory Employee Vaccinations: Complexities Abound**
*By: Karen Day White, Executive Counsel, Louisiana Municipal Association, Baton Rouge, Louisiana*
Covid vaccines are increasingly available. Easy answers are not.

**24 SUPREME COURT**
**Legislators Rein in Qualified Immunity: High Court Review Ahead?**
*By: Lisa Soronen, Executive Director, SLLC Washington D.C.*
Legislatures seek to limit QI.

**28 AMICUS**
**About Face? Reviewing a Prior Administration's Pending Cases**
*By: Amanda Karras, IMLA Deputy General Counsel and Director of Legal Advocacy*
A tradition of Solicitor General fidelity to prior pleadings.

**32 PREEMPTION**
**Pandemic Proof? Cannabis Retailers Thrive in Ontario**
*By: Monica Ciriello, Ontario 2015, Hamilton, Ontario*
A province overrides local regulatory efforts. Uncontrolled proliferation follows.

**34 DIVERSITY**
**Diversity, Equity, and Inclusion, Oh Yes!**
*By: Deanna Shahnami, IMLA Associate Counsel*
The law department as an investment portfolio.

**36 INSIDE CANADA**
**Examining Racism, Bias, and Procedural Fairness**
*By: Monica Ciriello, Ontario 2015, Hamilton, Ontario*
Recent cases of interest.

**38 LISTSERV**
**Virtual Realities: Avoiding Mishaps While the Camera is On**
*By: Brad Cunningham, Municipal Attorney, Lexington, South Carolina*
Do's and dont's in a Zoom world.

## STAFF

EXECUTIVE EDITOR
Charles W. Thompson, Jr.

EDITOR
Erich R. Eiselt

EDITORIAL STAFF
Deanna Shahnami

ART DIRECTION AND PRODUCTION
Trujillo Design

MARKETING
Caroline Storer

Views appearing in Municipal Lawyer are those of the author. Publication of articles in this magazine does not reflect a direct or implied endorsement of an author's views. © Copyright 2021 by the International Municipal Lawyers Association (IMLA). All rights reserved. IMLA is a non-profit professional association of municipal lawyers from across the United States and Canada. It offers its members continuing legal education courses, research services, litigation assistance on amicus briefs and an information-sharing network in the field of municipal law. Municipal Lawyer is IMLA's membership magazine. It is published bi-monthly. Views expressed by authors and contributors are not necessarily the views of IMLA. For membership information contact: IMLA, 51 Monroe Street, Suite 404, Rockville, Maryland 20850, phone: (202) 466-5424, or e-mail: info@imla.org. Contributions of articles are welcome. Municipal Lawyer reserves the right to refuse or edit manuscripts submitted for publication.

# INSIDE CANADA

BY: MONICA CIRIELLO
*Ontario 2015*

## Evaluating Racism, Bias, and Procedural Fairness

**Ontario Considers Role of Anti-Black Bias in Sentencing**
*R. v. Morris, 2018 ONSC 5186 https://canlii.ca/t/hv19g*
The 2018 decision saw Justice Nakatsuru rely on pre-sentencing reports on anti-black racism and the social history of the defendant, Kevin Morris (Morris) to account for his criminal offence sentencing. By considering anti-black racism, Justice Nakatsuru sentenced Morris to one year in jail. This was a substantial shift from the Crown's request of from four years to four and six months of jail time. The Crown appealed the decision, arguing that the sentence was too lenient and that anti-black racism should not have been considered in the sentencing because there was no link between systemic racism and Morris' crime. The timely question before the Ontario Court of Appeal is whether judges can consider the effects of anti-black racism in sentencing.

**Case Facts:**
*R v. Morris*, 2018 ONSC 5186

Morris was arrested by police in the City of Scarborough who were responding to a call for a nearby home invasion. Morris was not involved in the invasion, but ran from the police. When apprehended, he was found to be carrying a loaded pistol. A jury found him guilty of numerous offences, including possession of an unauthorized firearm, possession of a prohibited firearm with ammunition, and carrying a concealed weapon.

On sentencing, the Crown presented the traditional principles of sentencing under Part XXIII of the *Criminal Code*, RSC 1985, c. C-46 (*Criminal Code*). The Defence, aware of Justice Nakatsuru's earlier decision of *R v. Jackson,* 2018 ONSC 2527 requested that consideration be given to anti-black racism and the inequities in a justice system which disproportionately jails black offenders. In *Jackson,* Justice Nakatsuru had held that sentencing was an individual process and gave consideration to the social context of the black defendant, relying on 718.2(e) of the *Criminal Code*. Section 718.2(e) states:

**Other sentencing principles**
**718.2** A court that imposes a sentence shall also take into consideration the following principles:

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Section 718.2(e) allows for consideration of sanctions other than imprisonment, especially for Aboriginal people. In *R v. Gladue,* [1999] 1 SCR 688 the Court interpreted section 718.2(e) to establish a sentencing structure that allowed for systemic factors of Aboriginal people to be considered in sentencing. The Supreme Court of Canada in *R v. Ipeelee,* 2012 SCC 13 further held that "the failure to apply the *Gladue* principles in any case would also result in a sentence that is not fit and is not consistent with the fundamental principle of proportionality." In *Jackson*, Justice Nakatsuru had utilized the *Gladue* factors, and considered disproportionate jail sentencing of black offenders, links to colonialism, slavery and systemic racism. He took the same approach in *Morris* when admitting two reports: one general report of systemic racism and a second report of Morris' specific social history, adding a lens as to why Morris was carrying a loaded gun and the road that led him to that point. The Crown has appealed this decision and arguing that the reports should not have been admitted.

On February 11, 2021 the appeal started before the Ontario Court of Appeal.

**No Bias Where Judge was Formerly City Solicitor**
*Smuk v Regina (City),* 2021 SKQB 37
https://canlii.ca/t/jd63f

The Appellant appealed a decision by the City of Regina (City) to refuse access to records pursuant to s. 46 of the *Local Authority Freedom of Information and Protection of Privacy Act,* SS 1990-91, c L-27.1 (*Act*). The appeal was before Justice Robertson, a former solicitor at the City. The Appellant expressed concern about Justice Robertson's independence, triggering a review of the rules and principles governing conflict to determine whether he should be permitted to preside.

**HELD:** No conflict.

**DISCUSSION:** Judicial independence is of upmost importance to preserve public confidence in the justice system. A judge must step aside when the applicant has demonstrated bias or a reasonable apprehension of

bias, *Ayers v. Miller*, 2019 SKCA 2. The threshold is high: "a real likelihood or probability of bias must be demonstrated; a mere suspicion is not enough" *Aalbers v. Aalbers,* 2013 SKCA 64. To ensure no reasonable apprehension of bias, Justice Robertson reviewed the Canadian judicial council federal judges guide, *Ethical Principles for Judges, [Ethical Principles]* viewing the matter from the perspective of a reasonable, fair minded and informed person: "the test is whether an informed person, viewing the matter realistically and practically would think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly." *Committee for Justice and Liberty* [1978] 1 SCR 369. *Ethical Principles,* E. 12 states that "a judge should disclose on the record anything which might support a plausible argument in favour of disqualification." Justice Robertson complied with E.12 and disclosed that he was a former solicitor at the City, something that might support a reasonable apprehension of bias. *Ethical Principles*, E.19 contemplates how judges may deal with matters in cases involving former clients, or in Justice Robertson's situation, government departments. E.19(A) assesses whether the judge had direct involvement in the file while at the previous place of employment. The Province of Saskatchewan requires a 2-year cooling-off period; Justice Robertson confirmed that the appeal before him arose more than 10 years after he left employment with the City, therefore he had no knowledge or exposure to the matter in his previous capacity. This timeline also satisfied the required cooling off period. *Ethical Principles* provides that even if a judge is not required to step aside, the judge still maintains discretion to recuse. Justice Robertson found no reason to step aside, and no reasonable apprehension of bias as a former solicitor at the City.

**Relatively Low Level of Procedural Fairness Suffices**

*Scott v. Toronto (City),* 2021 ONSC 858 https://canlii.ca/t/jd2p7

The Applicant purchased a home in the City of Toronto (City) that had an unauthorized front yard parking pad, resulting in a Bylaw order. The Applicant then unsuccessfully applied for a licence for a front yard parking pad, a process regulated under the *Toronto Municipal Code,* Chapter 918, *Parking on Residential Front Yards and Boulevards,* which authorizes the City to issue or refuse a licence. The Applicant appealed the City's decision to the Community Council, which has delegated authority under City Council to deal with front yard parking appeals pursuant to sections 20(1) and 24(1) of the *City of Toronto Act, 2006,* S.O. 2006, c. 11. Sched A. Relying on a report presented by City staff, the Community Council denied the Applicant's request for two reasons: first, the parking pad is on the same side as street permit parking, and second, the parking pad is too close to a protected tree. The Applicant sought judicial review.

**HELD:** Application dismissed.

**DISCUSSION:** It is established case law that judicial review is limited to the information before the original decision maker with minimal exceptions, *Bernard v. Canada Revenue Agency,* 2015 FCA 263. The Court found a relevant exception in this case and proceeded to review affidavits by both parties to determine what fell within the exception pursuant to Rule 68 of the *Rules of Civil Procedure,* RRO 1990, Reg. 194 The Applicant argued that there was procedural unfairness, particularly that the City staff report did not contemplate the Applicant's argument that the front yard parking pad on his property was grandfathered, as the previous homeowner had received preliminary approval from the City. The Court noted that the City report had no obligation to summarize all arguments raised by the Applicant. Further, the Court outlined the extensive process of obtaining a front yard parking pad licence and found that the previous homeowners were only in the early stages. The Court held that since no licence was issued and no licensing fees were paid, the application of the original homeowners was rightly deemed abandoned by the City.

In addressing the Applicant's procedural unfairness argument, the Court evaluated the five factors set out *in Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817. These included (1) the nature of the decision being made, and the process followed (the decision was discretionary, taking into account the public interest, and the process did not resemble judicial decision-making; (2) the nature of the statutory scheme and the terms of the applicable statute (the decision was final, with no further appeals); (3) the importance of the decision to the individuals affected (this was a decision of relatively low importance, compared, for example, to threats to life, liberty, or fundamental dignity); (4) the legitimate expectations of the persons challenging the decision (The applicants had not established that they had a legitimate expectation of higher participatory rights); and (5) the choices of procedure made by the agency and its institutional constraints (deference was owed to the City's processes designed to balance fairness, public participation, and efficiency, and there were significant constraints on the time of elected councillors--at the June 2017 meeting, there had been 142 agenda items).

On this basis, the Applicant was entitled to a relatively low level of procedural fairness, being entitled to receiving notice, a copy of the City staff report, and an opportunity to be heard by the Community Council, all of which had been provided. The Community Council's failure to provide written reasons for its decision was not a breach of its duty of procedural fairness, as written reasons for decisions are not mandatory for all administrative proceedings. ML