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COUNCIL, COUNCILLORS, MAYORS AND OFFICERS: THEIR RESPECTIVE ROLES

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By Sukhbir Manhas

COUNCIL, COUNCILLORS, MAYORS AND OFFICERS: THEIR RESPECTIVE ROLES

I. INTRODUCTION

The respective roles of council, councillors, mayors and officers in municipal government have often been difficult to discern. All too often, as a result of this difficulty, the failure to properly differentiate between these respective roles has led to embarrassment and potential liability for municipal governments.

Consider circumstances in which a municipality is either under the threat of legal proceedings or is being sued and a sole member of council deems it appropriate to meet with the other party to discuss the matter. The member of council, on his or her own, does not have the authority to settle the dispute, does not represent the view of the municipality, should not hold himself or herself out as having that role in the municipality, and has left the area of policy making for the municipality (the area reserved for council) and has strayed into the area of the administration of the municipality (the area best suited for the expertise of the municipality's officers and employees). However, far too often in the course of litigation the courts hear evidence as to the activities of a sole member of council that purport to reflect the position of the municipality as a whole.

In this paper, we discuss the roles of council, councillors, mayors, and officers through a review of their respective powers, rights and responsibilities under the governing legislation. With respect to the latter issue, the *Community Charter* provides valuable assistance to municipal governments through the inclusion of provisions setting out express responsibilities for each of these groups. While this paper focuses on municipal government, many of the principles discussed in this paper are equally applicable to regional government.

II. COUNCIL

A. Municipal Powers

The powers of municipal governments derive from authority delegated by the Province to municipal governments by statute. The Province has delegated the majority of those powers to municipal governments through the *Community Charter* and the *Local Government Act*. However, there are numerous other statutes that confer powers on municipal governments (e.g., the *Fire Services Act* and the *Transportation Act*).

In addition to the express powers conferred on municipal governments under the above-mentioned statutes, Section 8(1) of the *Community Charter* provides that a municipality has the capacity, rights, powers and privileges of a "natural person" of full capacity.

Our Supreme Court has recently interpreted these "natural person" powers broadly. In *Kitimat (District) v. Alcan, Inc.*, the Court held that the limits placed upon a municipal government's powers by Section 8(10) of the *Community Charter* (which provides that the powers are subject to any specific conditions and restrictions established by or under the *Community Charter* or another Act and must be exercised in accordance with the *Community Charter* unless expressly otherwise provided) do not restrict a municipality's powers to only those expressly set out in the *Community Charter*. Rather, the Court held that the effect of Section 8(10) is that a municipality cannot exercise its "natural person" powers if the exercise of such powers would be inconsistent with the *Community Charter*.

B. The Exercise of Municipal Powers by Council

The powers of a municipal government are generally to be exercised by the council.

Various provisions under the *Community Charter* establish that the council is the directing mind of the municipality. Section 114(3) of the *Community Charter* provides that, except as provided by or under the *Community Charter* or another Act, the powers, duties and functions of a municipality are to be exercised and performed by its council. Section 114(3) then goes on to provide that the council in exercising or performing its powers, duties and functions is acting as the "governing mind of the municipality". Moreover, Section 122 of the *Community Charter* provides that a council may only validly exercise its authority by resolution or bylaw at a duly constituted council meeting.

There is a long line of legal authorities considering provisions similar to those cited above, including our Supreme Court's decisions in *Amalgamated Recreation Engineers Network Associates Ltd. v. Town of Sidney et al.* and in *Beggs v. District of Summerland*, holding that the indoor management rule (i.e., that a corporation is bound by the acts of an individual who holds himself or herself out as having the authority to bind the corporation even where the individual lacked any such authority) does not apply to municipal governments and that, in the absence of a bylaw or resolution from the municipal council authorizing a contract, the municipality is not bound by the terms of the contract. While this line of authorities has not been considered in the context of the "natural person" powers conferred on municipal governments under the *Community Charter*, it is unlikely that the granting of such powers would alter the court's view of the import of the provisions cited above. To the contrary, it is likely that the courts would conclude that the "natural person" powers of a municipal government must be exercised in accordance with the *Community Charter* by either a resolution or bylaw passed by the municipal council at a duly constituted council meeting.

Earlier in this paper, we mentioned that the powers, duties and functions of a municipality are to be exercised and performed by its council "except as provided by or under the *Community Charter* or another Act".

Division 6 of Part 5 of the *Community Charter* provides a mechanism by which the council of a municipality may delegate the exercise of the powers, duties and functions of a municipality to a councillor or committee of council, to an officer or employee of the municipality, or to another

body established by the council (other than a corporation). However, the council may not delegate:

1. the making of a bylaw;

2. a power or duty exercisable only by bylaw;

3. a power or duty established by the *Community Charter* or another Act that the council give its approval or consent to, recommendations on, or acceptance of an action, decision or other matter;

4. a power or duty established by an enactment that the council hear an appeal or reconsider an action, decision or other matter;

5. a power or duty to terminate the appointment of an officer; or

6. the power to impose a remedial action requirement.

Some specific delegations are subject to additional limitations under the *Community Charter*. For example, the power to appoint or suspend an officer may only be delegated to the municipality's chief administrative officer and the power to conduct a council hearing may only be delegated to one or more councillors.

In addition, many delegations under the *Community Charter* attract a right to have the delegate's decision reconsidered by the council.

C. The Responsibilities of Council

The primary responsibility of the council of a municipal government is to exercise the powers afforded to it under the *Community Charter* and other applicable statutes in a manner that represents the best interests of the municipal government and its residents. In this regard, the council adopts policies to give effect to the desires of residents as to the shape of their community and provides direction to the officers and employees of the municipal government as to the implementation and administration of those policies.

The *Community Charter*, for the most part, simply confers the necessary powers on municipal governments to achieve their primary responsibility and leaves to the council the decisions as to how to achieve the goal of representing the best interests of the municipal government and its residents. As a result, there are few duties expressly imposed on municipal governments. Those duties include the following:

1. Section 124 of the *Community Charter* – Council must enact a bylaw establishing the general procedures to be followed by council and council committees in conducting their business, including with respect to the taking of minutes of meetings, the posting of public notices, and the schedule of meetings;

2. Section 127 of the *Community Charter* – Council must make available to the public a schedule of regular council meetings and give the appropriate notice of both regular and special council meetings;

3. Section 146 of the *Community Charter* – Council must establish the officer positions of corporate officer and financial officer;

4. Section 165 and 166 of the *Community Charter* – Council must enact a bylaw adopting annually a financial plan and, prior to doing so, must undertake a process of public consultation in respect of the financial plan;

5. Section 169 of the *Community Charter* – Council must appoint an auditor for the municipality;

6. Section 197 of the *Community Charter* – Council must enact an annual tax rates bylaw; and,

7. Section 879 of the *Local Government Act* – Council must provide opportunities to consult in respect of the adoption or amendment of an official community plan.

A review of the duties imposed on the council of a municipal government discloses that the purpose underlying those duties is to ensure the fundament operations of the municipal government and to ensure a sufficient level of public accountability in respect of the exercise of municipal government powers by council.

III. COUNCILLORS

A. The Rights of Councillors

Individual councillors have no powers under the *Community Charter*. It is only when they sit in a group as council at a duly constituted meeting that the significant powers afforded to municipal governments are exercisable by them. The foregoing being said, individual councillors are afforded significant rights under the *Community Charter* over and above the rights of the general public. Those rights include the following:

1. Sections 123 and 125 of the *Community Charter* – An individual councillor has the right to participate in, and vote on any question considered at, a council meeting;

2. Section 126 of the *Community Charter* – An individual councillor, along with another councillor, may request the calling of a special meeting or, in certain circumstances, may call a special meeting;

3. Section 130 of the *Community Charter* – An individual councillor is eligible to act in the place of the mayor when the mayor is absent; and,

4. Sections 141 and 142 of the *Community Charter* – An individual councillor is eligible to sit on a standard or select committee.

The rights afforded to individual councillors are directed at providing councillors with the ability to fully participate in the governance of the municipal government. By availing himself or herself of the rights to participate, the individual councillor is afforded the opportunity to ensure that the council acts in the best interests of the municipality and its residents.

B. The Responsibilities of Councillors

Section 115 of the *Community Charter* provides that each individual councillor has the following responsibilities:

1. to consider the well-being and interest of the municipality and its community;

2. to contribute to the development and evaluation of the policies and programs of the municipality respecting its services and other activities;

3. to participate in council meetings, committee meetings and meetings of other bodies to which the member is appointed;

4. to carry out other duties assigned by council; and,

5. to carry out other duties assigned by or under the *Community Charter* or any other Act.

The Province has, in Section 115 of the *Community Charter*, legislatively enshrined the primary responsibility of the council of a municipal government discussed above as being the primary responsibility of each individual councillor. In this context, the Province has directed the responsibility of individual councillors towards the development and evaluation of the policies of the municipality. Notably, Section 115 does not reference the implementation or administration of these policies as being part of the responsibilities of individual councillors.

Turning then to duties assigned to individual councillors under the *Community Charter*, there are few such duties. Those duties include the following:

1. Sections 100 and 101 of the *Community Charter* – An individual councillor must declare a conflict of interest where he or she has a direct of indirect pecuniary interest in a matter to be considered by council or has another interest in the matter that constitutes a conflict of interest and thereafter must absent himself or herself from the meeting during which the matter in which he or she has declared a conflict of interest is being discussed, and must not participate in any discussion of, vote on any question or attempt to influence the voting on any question in respect of the matter;

2. Section 106 of the *Community Charter* – An individual councillor must file a disclosure statement in respect of any gift or gifts he or she lawfully receives under Section 105(2) from a single source having a value in excess of $250 in any year;

3. Section 117 of the *Community Charter* – An individual councillor must keep in confidence any record held in confidence by the municipality until the record is released to the public as lawfully authorized or required and information considered at a closed council or committee meeting until the information is released to the public by the council or committee and, if he or she breaches the confidence, must compensate the municipality for any damage or loss it suffers as a result; and,

4. Section 123 of the *Community Charter* – An individual councillor in attendance at the time of a vote at a meeting must vote.

In addition to the positive duties imposed on individual councillors such as the foregoing, the *Community Charter* also imposes negative duties or prohibitions on councillors. For example, an individual councillor is prohibited from using for the purpose of gain information or a record that was obtained by him or her in the performance of his or her office and is not available to the general public.

The duties of individual councillors discussed above are all directed at furthering the goals underlying the responsibilities of councillors established under Section 115 of the *Community Charter*. Specifically, each of those duties is directed towards the goals of councillors contributing to the development and evaluation of policies and programs of the municipality and ensuring that they are acting in the best interest of the municipality and its residents.

IV. MAYORS

A. The Rights and Powers of Mayors

In addition to having all of the rights afforded to individual councillors (including the rights to make motions and vote in respect of any question considered at a council meeting), mayors are afforded a number of rights and even powers under the *Community Charter* and other applicable statutes that are not available to individual councillors. These rights and powers include:

1. Section 126 of the *Community Charter* – The mayor may, on his or her own initiative, call a special council meeting;

2. Section 131 of the *Community Charter* – The mayor may, on his or her own initiative, within 30 days, require that the council reconsider and vote again on a matter that was the subject of a vote;

3. Section 132 of the *Community Charter* – The mayor presides at all council meetings and, in doing so must preserve order and decide points of order that may arise;

4. Section 133 of the *Community Charter* – The mayor may expel a person from a meeting if the mayor believes that the person is acting improperly;

5. Section 141 of the *Community Charter* – The mayor may establish standing committees if the mayor believes them to be necessary;

6. Section 151 of the *Community Charter* – The mayor may suspend a municipal officer or employee if the mayor believes a suspension to be necessary;

7. Section 12 of the *Emergency Program Act* – The mayor may declare a state of emergency at any time he or she believes that an emergency exists or is imminent in the municipality; and

8. Section 67 of the *Criminal Code* – The mayor shall, upon being satisfied that a riot is in progress, read the *Riot Act*.

The additional rights and powers afforded to mayors are directed at furthering the mayor's role as the head and chief executive officer of the municipality.

B. The Responsibilities of Mayors

In addition to the responsibilities that mayors have as members of council, mayors are subject to the responsibilities placed on them by Section 116 of the *Community Charter*. Section 116 provides that mayors have the following additional responsibilities:

1. to provide leadership to the council, including by recommending bylaws, resolutions and other measures that, in the mayor's opinion, may assist the peace, order and good government of the municipality;

2. to communicate information to the council;

3. to preside at council meetings when in attendance;

4. to provide, on behalf of the council, general direction to municipal officers respecting implementation of municipal policies, programs and other directions of the council;

5. to establish standing committees;

6. to suspend municipal officers and employees;

7. to reflect the will of council and to carry out other duties on behalf of the council; and

8. to carry out other duties assigned by or under the *Community Charter* or any other Act.

The foregoing list of responsibilities directly informs and delineates the mayor's role as the head and chief executive officer of the municipality. It is worthy to note that the responsibilities of the

mayor go to the general stewardship of the municipality and, as with individual councillors, do not go to the day-to-day administration of municipal policies and programs. Section 116(d) of the *Community Charter* makes it clear that the mayor's role with respect to the implementation of municipal policies and programs is to provide, on behalf of the council, general direction to municipal officers. Essentially, to fulfill this responsibility, the mayor has the role of liaising between the council and municipal officers as to the implementation of municipal policies, programs and other council direction. Notably, as with the responsibilities of councillors, the responsibilities of mayors do not speak to the administration of the municipality.

V. OFFICERS

A. Bylaws Conferring Powers, Duties and Functions on Municipal Officers

Section 146 of the *Community Charter* authorizes the council to establish, by bylaw, officer positions for its municipal government. The bylaw must establish the positions of corporate officer and financial officer, with at least the powers, duties and functions assigned by the *Community Charter* to those positions. The bylaw may establish other officer positions, with the powers, duties, and functions assigned by the bylaw to those positions.

In addition to the powers, duties and functions conferred on municipal officials under the municipality's officers and employees bylaw, some powers, duties and functions of council may be delegated, by bylaw, to municipal officers under Division 6 of Part 5 of the *Community Charter*.

B. The Powers, Duties and Functions of the Chief Administrative Officer

As identified above, the position of chief administrative officer is not a mandatory officer position for a municipality under the *Community Charter*. However, once the council of a municipality decides to create such a position, the *Community Charter* directs that the powers, duties and functions of the chief administrative officer position include:

1. the overall management of the operations of the municipality;

2. ensuring that the policies, programs and other directions of the council are implemented; and,

3. advising and informing the council on the operation and affairs of the municipality.

The foregoing list of powers, duties and functions is clearly directed at overseeing the administration of the day-to-day operations of the municipality. Interestingly, items 2 and 3 overlap with the mayor's responsibilities of communicating information to council and providing, on behalf of council, general direction to municipal officers respecting the implementation of municipal policies, programs and other directions of council. By including items 2 and 3 within the list of mandatory powers, duties and functions of the chief administrative officer of a municipal government, and by making the creation of such a position

optional, the Province has expressed an intention that, where a chief administrative officer position is created, the responsibilities of the mayor are to be reduced in accordance with the powers, duties and functions of the chief administrative officer.

C. The Powers, Duties and Functions of the Corporate Officer and the Financial Officer

Both the position of corporate officer and the position of financial officer are mandatory municipal officer positions under the *Community Charter*.

Section 148 of the *Community Charter* mandates that the powers, duties and functions of the corporate officer must include the following:

1. ensuring that accurate minutes of the meetings of the council and council committees are prepared and that the minutes, bylaws and other records of the business of the council and council committees are maintained and kept safe;

2. ensuring that access is provided to records of the council and council committees, as required by law or authorized by the council;

3. administering oaths and taking affirmations, affidavits and declarations required to be taken under the *Community Charter* or any other Act relating to municipalities;

4. certifying copies of bylaws and other documents, as required or requested;

5. accepting, on behalf of the council or municipality, notices and documents that are required or permitted to be given to, served on, filed with or otherwise provided to the council or municipality; and,

6. keeping the corporate seal, if any, and having it affixed to documents as required.

Section 149 of the *Community Charter* mandates that the powers, duties and functions of the financial officer must include the following:

1. receiving all money paid to the municipality;

2. ensuring the keeping of all funds and securities of the municipality;

3. investing municipal funds, until required, in authorized investments;

4. expending municipal money in the manner authorized by the council;

5. ensuring that accurate records and full accounts of the financial affairs of the municipality are prepared, maintained and kept safe; and,

6. exercising control and supervision over all other financial affairs of the municipality.

Both of the foregoing lists of powers, duties and functions are clearly directed at the day-to-day administration of the municipal government's business.

VI. CONCLUSION

The foregoing review of the statutory provisions relating to the relative roles of council, councillors, mayors and officers shows that the Province intended that there be a clear delineation between the role of elected officials on the one hand and the role of municipal officers on the other hand. Under the applicable statutory provisions, the role of policy making is left to the elected officials and the role of the implementation and administration of those policies, along with the other day-to-day administration of the municipality, is left to municipal officers. This delineation in the respective roles of elected officials and municipal officers reflects the public accountability at the ballot box of elected officials in making policy and the expertise of municipal officers in fulfilling their duties.

YOUNG ANDERSON
BARRISTERS & SOLICITORS

SAUCE FOR THE GANDER:
CONFLICT OF INTEREST FOR ELECTED OFFICIALS AND EMPLOYEES

DECEMBER 3, 2010

Stephanie James and Joanna Track

SAUCE FOR THE GANDER: CONFLICT OF INTEREST FOR ELECTED OFFICIALS AND EMPLOYEES

I. INTRODUCTION

Most local government elected officials and employees are aware that the *Community Charter* contains a comprehensive set of rules with respect to the management of officials' conflicts of interest. While these provisions undoubtedly serve to improve public confidence in the administration of local government, the phrase "conflict of interest" often bears an undeserved stigma. Officials sometimes seem reluctant to address conflicts, perhaps due to confusion about the statutory regime and the consequences of failing to comply with it.

In this paper, we provide a general overview of the conflict of interest provisions of the *Community Charter* applicable to municipal councillors and regional district board members. We review elected officials' disclosure requirements and the resulting list of activities that are prohibited if an official has a conflict of interest, including participation in local government meetings and votes, inside and outside influence, and the use of confidential information.

Of course, elected officials are not the only local government actors who may find themselves in situations involving conflicting loyalties. In the second portion of this paper we highlight the duties of employees that generally mirror those provisions of the *Community Charter* applicable to similar misconduct by elected officials. Evidently, what is sauce for the goose is sauce for the gander.

Last, we discuss some specific conflict of interest rules found in the *Society Act*, the *Business Corporations Act* and the *Criminal Code*, which apply to both local government elected officials and employees.

II. CONFLICT OF INTEREST AND THE LOCAL GOVERNMENT ELECTED OFFICIAL

A. Introduction to Conflict of Interest: The Legislative Framework

The rules in Division 6 of Part 4 of the *Community Charter* provide a procedure for elected officials to declare both pecuniary and non-pecuniary conflicts to the council or the board, leave the meeting, and refrain from attempting to influence the voting on the question. There is a disqualification penalty for officials who fail to declare a pecuniary interest in a matter. In the case of a non-pecuniary conflict, the statute provides no individual consequences for the member but the decision of the council or the board may be vulnerable, particularly where the member casts a deciding vote. Division 6 of Part 4 of the *Charter* also applies to regional districts (see section 787.1(1) of the *Local Government Act*).

Rather unfortunately, the conflict of interest provisions of the *Charter* are often viewed by elected officials as punitive provisions designed to stigmatize those who find themselves in

conflict of interest situations. This perception has led some elected officials to avoid making a conflict of interest declaration when one is clearly required, in order to avoid the stigma associated with making a declaration. In fact, the conflict of interest provisions are procedural rules designed to acknowledge that elected officials who have been actively engaged in their communities in a range of capacities will inevitably encounter conflict of interest situations, through which they require clear statutory procedures to navigate.

B. Disclosure of Conflict of Interest

Subsection 100(2) of the *Community Charter* generally prohibits an official from participating in matters in which he or she has either a pecuniary or "another" conflict of interest:

> 100(2) If a council member attending a meeting considers that he or she is not entitled to participate in the discussion of a matter, or to vote on a question in respect of a matter, because the member has
>
> (a) a direct or indirect pecuniary interest in the matter, or
>
> (b) another interest in the matter that constitutes a conflict of interest,
>
> the member must declare this and state in general terms the reason why the member considers this to be the case.

The *Charter* does not actually define conflict of interest situations, merely requiring that officials who find themselves in such situations conduct themselves in a prescribed way. Subsection 100(2) applies to both direct and indirect pecuniary interests and to non-pecuniary interests.

Pecuniary Conflict of Interest

A pecuniary interest is a financial interest. A direct pecuniary interest would include, for example, the interest of an official in a business licence application for a business of which she is the owner. An indirect pecuniary interest would include, for example, the interest of an official in a business licence application for a business of which her financially dependent son is the owner.

In determining whether a pecuniary interest exists, the court will construe sections 100 to 102 of the *Charter* "in a manner which is consistent with the apparent intent of the Legislature to hold councillors to a high level [of] objectivity free of pecuniary interest" (*Godfrey v. Bird*, 2005 BCSC 626).

Non-Pecuniary Conflict of Interest

Non-pecuniary interests exist at common law where a member of the public with knowledge of the relevant facts would conclude that the personal interest of an official is capable of influencing his or her vote one way or another. The general language in subsection 100(2)(b) has been broadly interpreted by courts to uphold the key principle of natural justice that no person should be a judge in his or her own case. The common law test for a disqualifying non-pecuniary conflict of interest is found in the Supreme Court of Canada's decision in *Old St. Boniface v. Winnipeg* (1990), 75 D.L.R. (4th) 385. Discussing the impact of an elected official's personal interest, the Court held:

> It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both by common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest.

It is important to note that the above test is not whether the interest "would" influence the official. Rather, the test is whether a reasonable person would think that the interest "might" influence the official. The test turns on the appearance of bias, not whether there is evidence of actual bias. If an informed, reasonable person could view that official's personal interest as capable of affecting his or her judgment, then the personal interest test is met and there is an apprehension of bias sufficient to constitute "another" conflict of interest. It is irrelevant that an official feels he or she can be open-minded and fair.

When looking at whether a reasonable person would conclude that the interest might influence the elected official, a Court is likely to consider how substantial the outside interest is, how unique it is to the official (i.e. does the rest of the community hold the same interest) and how directly connected it is to the subject matter before the council or board for consideration. These three variables were articulated by the B.C. Supreme Court in *Watson v. Burnaby* (1994), 22 M.P.L.R. (2d) 136, where the Court found a councillor who was also a Mason did not have a disqualifying conflict of interest when a historical society requested City approval to construct a replica Masonic lodge on City-owned lands. The Court noted that the councillor was not a member of the historical society, the building was more connected to City history than to Masonic history, and that the building would be beneficial to all residents of the City regardless of their religious or other affiliations.

C. Restrictions on Participation

The *Community Charter* requires an elected official attending at a meeting who considers that he or she is not entitled to participate in the discussion of a matter, or to vote on a question in respect of a matter due to a conflict, to declare the conflict and to state "in general terms" the reason that he or she considers a conflict exists. The minutes of the meeting must record the statement, including the reason, as well as the time of the member's departure from and return to the meeting. The member must then leave the meeting and must not do anything referred to in subsection 101(2):

> 101(2) The council member must not:
>
> (a) remain or attend at any part of a meeting referred to in section 100(1) during which the matter is under consideration;
>
> (b) participate in any discussion of the matter at such a meeting;
>
> (c) vote on a question in respect of the matter at such a meeting; or
>
> (d) attempt in any way, whether before, during or after such a meeting, to influence the voting on any question in respect of the matter.

Thus, the member must leave the meeting and must not participate in any way or attempt to influence the voting on the matter. These rules prevent the member from remaining in the meeting room during the discussion of the matter in any capacity, although he or she may remain in the building. The mayor or chair or other person presiding at the meeting has a duty to ensure that the member is not present during the discussion of the matter in question.

It is significant to note that the restrictions on participation apply regardless or whether or not the official has made the required declaration under section 100(2).

Section 101(3) provides that a person who contravenes the restrictions contained in subsection (2) and participates in council or board business with respect to a matter in which he or she has a pecuniary conflict of interest is subject to disqualification from office. An official who participates in council or board business in which he or she has a non-pecuniary conflict of interest ("another" interest) is not subject to disqualification but his or her vote may be discounted and therefore any decision on the matter could be rendered void.

An elected official who declares a conflict of interest and subsequently receives legal advice to the effect that he or she does not in fact have a conflict of interest may withdraw a declaration made under subsection 100(2) and resume participation. This provision permits an official to participate when the matter comes up again at a subsequent meeting, and seems designed to encourage officials to err on the side of caution in their initial assessments of whether they have a conflict of interest, as the declaration is ultimately revocable.

D. Restrictions on Inside and Outside Influence

The *Charter* prohibits attempts by elected officials to influence decisions, recommendations, or other actions by an officer or employee or a delegate of the council or board, on a matter in which he or she has a direct or indirect pecuniary interest. Section 102 reads:

> 102(1) A council member must not use his or her office to attempt to influence in any way a decision, recommendation or other action to be made or taken
>
> (a) at a meeting referred to in section 100(1) *[disclosure of conflict]*,
>
> (b) by an officer or an employee of the municipality, or
>
> (c) by a delegate under section 154 *[delegation of council authority]*,
>
> if the member has a direct or indirect pecuniary interest in the matter to which the decision, recommendation or other action relates.

Elected officials are also prohibited from using their office to influence decisions made by persons outside the local government organization. Section 103 provides that a member must not use his or her office to attempt to influence in any way a decision, recommendation or action to be made or taken by any other person or body, if the member has a direct or indirect pecuniary interest in the matter to which the decision, recommendation or other action relates. The typical example of using one's office inappropriately in such matters is lobbying an external decision-maker in a letter written on the local government's letterhead, or sending one's local government business card with a letter written on personal letterhead. The scope of the prohibition is very broad and includes making representations to any governmental or non-governmental decision-maker in a matter in which one has a financial interest.

Both sections 102 and 103 go on to provide that a person who contravenes that section is disqualified from holding office, unless the contravention was done inadvertently or because of an error in judgment made in good faith.

E. Exceptions To Conflict Restrictions

According to section 104 of the *Charter*, the conflict of interest rules found in sections 100 to 103 do not apply if certain circumstances apply, meaning that the obligation to disclose a conflict, the restrictions on participation, and the prohibitions on inside and outside influence do not apply in prescribed circumstances:

> 104(1) Sections 100 to 103 do not apply if one or more of the following circumstances applies:
>
> (a) the pecuniary interest of the council member is a pecuniary interest in common with electors of the municipality generally;
>
> (b) in the case of a matter that relates to a local service, the pecuniary interest of the council member is in common with other persons who are or would be liable for the local service tax;
>
> (c) the matter relates to remuneration, expenses or benefits payable to one or more council members in relation to their duties as council members;
>
> (d) the pecuniary interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the member in relation to the matter;
>
> (e) the pecuniary interest is of a nature prescribed by regulation.

As per subsection (a), the conflict of interest rules do not apply in the case of a pecuniary interest that an elected official has in common with electors of the local government generally, and an equivalent exception may be applied in relation to common law conflicts. This exception is often called the "community of interest" exception, and is described as a "matter of practical necessity as well as communal democracy" (*Guimond v. Sornberger*, [1980] A.J. No. 650). The standard example of this exception is the adoption of the annual property tax bylaw under section 197 of the *Charter*, a matter in which every official who owns real property within the local government has a direct pecuniary interest.

Although the courts have not defined precisely what will constitute a sufficient community of interest so as to excuse a pecuniary conflict, the decision in *Godfrey v. Bird*, 2005 BCSC 626 does provide some helpful parameters for consideration. The case concerned a council member (Mr. Bird) who worked as a real estate agent and had numerous business associations with a developer. One of the council matters in which Mr. Bird participated was a zoning amendment

application affecting 48 properties, including one that Mr. Bird planned to sell to the developer. The municipality had received a legal opinion that, in general, if there are fewer than 100 parcels in an affected area, council members who had an interest in that area should not assume that there is a sufficient community of interest such that subsection 104(1)(a) would apply to them. Mr. Bird participated in the discussion of and voting on the application and, in proceedings commenced by a group of electors to declare his Council seat vacant, attempted to rely on the "community of interest" exception. The Court concluded:

> Similarly, I can not reach the conclusion that Mr. Bird was correct in concluding that he could participate because he had an interest which was "in common with the electors of the municipality generally". Sections 100 through 103 of the Act do not apply if there is a finding that a councillor has a pecuniary interest and if the Court can also conclude that the pecuniary interest is "in common with the electors of the municipality generally". I find that, if Mr. Bird did have direct or indirect pecuniary interest, then that pecuniary interest was not "in common with the electors of the municipality generally". Mr. Bird knew throughout that it was the opinion of the solicitors for the District that, in order for a councillor to have a pecuniary interest in common with the electors of the District generally, it would be necessary for the pecuniary interest to relate to in excess of 100 properties. To the knowledge of Mr. Bird, the Ardmore Property was one of less than 50 properties within the District that were being considered by the Committee and Council. Without assuming that less than 100 properties in any municipality will mark the boundary between an interest "in common with the electors of the municipality generally" and an interest which is not "in common", I am satisfied that the solicitors for the District were correct in concluding that 100 properties would be the appropriate "boundary" for this District.

The Court's qualification on the application of a "100 properties" guideline for the community of interest exception is likely an acknowledgment that the guideline may vary with the population of the community. North Saanich, the community in question in *Godfrey*, had a population of approximately 11,000.

As per subsection (d), the conflict of interest rules do not apply in respect of a pecuniary interest if it is so remote or insignificant that it cannot reasonably be regarded as likely to influence the official on the matter in question. The "insignificance" exception is also based on the common law and may be difficult to apply, as the courts have found that surprisingly small amounts of money are not insignificant in the context of municipal conflict of interest law.

Subsection 104(2) goes on to provide that, if an official has a legal right to make representations to the council or board in his or her private capacity and is prohibited by the conflict of interest rules from exercising that right, the member may appoint another person to make representations on that member's behalf.

F. Disclosure of Gifts

Related to the restrictions on participating in certain matters where an elected official has a pecuniary conflict of interest, section 105 of the *Charter* provides a general prohibition on accepting a fee, gift or personal benefit that is connected with a member's performance of his or her official duties. Subject to certain exceptions, the receipt of such fees, gifts, or benefits results in disqualification from office, unless the contravention was done inadvertently or because of an error in judgment made in good faith. According to subsection 105(2), the prohibition on accepting gifts does not apply to:

(a) a gift or personal benefit that is received as an incident of the protocol or social obligations that normally accompany the responsibilities of office;

(b) compensation authorized by law; or

(c) a lawful contribution made to a member who is a candidate for election to a local government.

However, according to section 106, if an official receives a gift or personal benefit of a type permitted by subsection 105(2) that exceeds $250 in value, or the total of such gifts and benefits received from one source in any 12 month period exceeds $250, the official must file with the corporate officer a disclosure statement indicating the nature of the gift or benefit, its source, when it was received, and the circumstances under which it was given and accepted. A failure to properly disclose such gifts and benefits results in disqualification from office, unless the contravention was done inadvertently or because of an error in judgment made in good faith.

G. Disclosure of Contracts

Under section 107 of the *Charter* current and former elected officials have a duty to report to the local government any contracts with the local government in which they have a direct or indirect pecuniary interest. The local government then has a duty to report the existence of such a contract as soon as reasonably practicable at a council or board meeting that is open to the public.

If an official fails to report the existence of a contract, he or she is disqualified from holding office, unless the contravention was done inadvertently or because of an error in judgment made in good faith. However, even if an officer does fail to report, the local government is still

responsible for reporting the contract under subsection 107(1). Thus the local government is responsible for knowing, when it enters into the contract, what persons have a direct or indirect pecuniary interest in the contract.

H. Restrictions on Use of Insider Information

Current and former elected officials, regardless of how much time has elapsed since the end of their terms of office, are prohibited from using information that was obtained in the performance of their official duties and that is not available to the general public, to gain or further a direct or indirect pecuniary interest.

The consequence for officials presently in office is disqualification, unless the contravention was done inadvertently or because of an error in judgment made in good faith.

Another consequence, which applies to both current and former officials, is found in section 109 of the *Charter*. Section 109 provides for a Supreme Court order that an official who has contravened Division 6 of Part 4 of the *Community Charter* and who has realized financial gain in relation to that contravention must pay to the local government all or part of that financial gain. Either the corporation or an elector may apply for such an order. If an elector makes the application and is successful, the local government must pay the elector's costs in the Rules of Court scale of costs, although the Court may order another party, including the current of former official, to reimburse the local government.

III. CONFLICT OF INTEREST AND THE LOCAL GOVERNMENT EMPLOYEE

We are often asked by local government employees whether the *Community Charter* conflict of interest provisions apply to their conduct. The short answer is no, they do not. While employees are not covered by Part 4, Divisions 6 and 7 of the *Community Charter*, they do have similar codes of conduct regulating their relationships with their local government employers. These codes originate in employees' implied duty of loyalty to their employers and their express duties under their employment contracts and applicable workplace and other professional regulatory statutes.

A. Implied Duty of Loyalty

Courts consistently find that employees (both unionized and non-unionized) owe their employers a comprehensive and broadly defined duty of loyalty. As vestiges of feudal master-servant law, this duty has been characterized in many different ways, including the duty of fidelity or the duty to act in good faith. This duty has been described as:

> [...] the implied duty of fidelity provides the courts with a convenient 'catch-all' instrument for protecting the employer's trading and business interests against what is considered, in the circumstances of each case, to be improper and unduly damaging

> conduct on the part of the employee. The law in the area can be uncertain and fluid, as the courts seek to strike a balance of proportionality between protecting the interests of the employer, the employee and the general public. (England, G., *Employment Law in Canada*, 4th Ed., Vol. 2, s.11.122)

In short, the duty is to advance the employer's business interests. By extension, an employee cannot advance his or her personal interest to the detriment of the employer's interest. An employee's discharge of this duty is called into question when his or her ability to further the employer's objectives and goals is jeopardized by the existence of a personal relationship or other employment or volunteer activities, by the acceptance of some improper benefit, or by the misuse of the employer's resources, including its confidential information.

Inappropriate Relationships

A review of the municipal conflict of interest cases suggests that elected officials' participation in council or board matters is often challenged on the basis that the official has a conflict of interest because of his or her family or personal relationships. These conflicts can be both pecuniary and non-pecuniary. In the employment context, many conflict of interest policies address these relationships as well. Again, the overriding concern is that employees ought not to be in a position where they might—or a reasonable person thinks they might—advance the interests of a family member or friend rather than those of the employer. Like elected officials, employees are also under disclosure obligations and must promptly and fully inform their supervisors of any conflict situations in which they may find themselves.

For example, in *Toronto* (2002), 107 L.A.C. (4th) (Davie) the City terminated a clerk in its community welfare department for breaches of the City's conflict of interest policy. The City alleged that the clerk, who processed welfare applications, breached that policy by helping her son secure welfare benefits and then by accepting rent from him while he was in receipt of those benefits. The evidence suggested that she misrepresented financial information on her mortgage application, her son's car loan application, and various other financial transactions. The employee said that she had repeatedly disclosed to her supervisors that her son was receiving welfare. The labour arbitrator noted that the employee's alleged partial disclosure, even if it really occurred, still failed to satisfy her duty to fully and frankly disclose all relevant information about a conflict of interest or perceived conflict to her supervisors, which in this case required disclosure of the fact that her son was living with her and paying her rent:

> The grievor's response that her supervisors "didn't ask" about these matters does not absolve the grievor's conduct. The fact that a Supervisor did not ask a particular question does not excuse or explain the grievor's failure to be full and frank in her disclosure of the conflict of interest. The requirement to disclose a conflict lies with the employee who has all the facts. In declaring a conflict

> of interest an employee cannot be selective about disclosing all the facts, and cannot pick and choose to disclose only that information which the employee thinks is necessary. (para. 72)

A clandestine three year office romance between a manager and someone he supervised led to the manager's employment being terminated with cause in *Carroll v. Emco Corp.*, 2006 BCSC 861, aff'd 2007 BCCA 186. During their romance, Mr. Caroll conducted his girlfriend's performance reviews, awarded her pay increases, imposed discipline on her, and promoted her within the branch. He also repeatedly denied the affair when asked about it by his superiors. The trial judge and the Court of Appeal agreed that his conduct in failing to appropriately address the conflict of interest that arose when he engaged in a personal relationship with a subordinate violated his common law duty of fidelity to the employer.

Conflicting Jobs or Volunteer Activities

Many employees' conflict of interest predicaments arise because of second jobs or volunteer activities, the pursuit of which is at odds with their duty to advance their employers' interests. These cases are often difficult to resolve because courts and arbitrators tend to take a narrow view of an employer's right to discipline or impose other employment sanctions in respect of an employee's off-duty conduct.

In *Ontario* (2006), 153 L.A.C. (4th) 385 (Petryshen), a senior Ministry of Health employee was terminated because of his active involvement in a community foundation he established to voice his concerns about ageism in the delivery of health care services. He persisted with his prominent involvement in the foundation despite repeated demands from the Deputy Minister that he cease such volunteer work because of the Deputy Minister's concerns that it gave rise to a perceived conflict of interest. The employee argued strenuously that the Deputy Minister's demands infringed his rights under the *Charter of Rights and Freedoms*. The arbitrator ultimately concluded that the Ministry's conflict of interest code did violate the employee's *Charter* rights but the policy was a reasonable limit on those rights in the circumstances. The arbitrator was careful to describe the concern as one of a perceived conflict of interest, using language similar to that used by courts when considering allegations of conflict of interest for elected officials:

> Although there is no indication that Mr. Globerman's views on how the health care system treats the elderly has an impact on how he performs his duties as a senior financial consultant, a reasonable perception is that the recommendations he makes to senior management in the Ministry might be influenced by his private advocacy role with the Foundation. [...]
>
> The identification of Mr. Globerman as a public servant with the Ministry creates a reasonable prospect that people would believe that the Foundation has an advantage over other charities

> because he has access to information and individuals which others outside of Government do not. Whatever his reason for identifying himself as a public servant with the Ministry, a reasonable perception is that the Foundation, his private interest, benefits from such a connection. (paras. 63-64)

Presumably the fact that the employee also lied to the Deputy Minister by stating that he had withdrawn from the foundation when in fact he had not, did little to help his cause. The arbitrator upheld the Ministry's decision to terminate Mr. Globerman.

In *New Westminster* (1991), 18 LAC (4th) 396, the City denied one of its firefighters a promotion based on his ownership of a fire protection supply firm, which the City's hiring panel considered to be in conflict with the duties of the Chief responsible for the department's fire prevention division. Interestingly, the City was fully aware of the side business as the employee had been operating it for several years while working as a firefighter in the City's fire suppression division, but had not developed any express conflict of interest policy during that time. Further, the employee offered to divest himself of all his interests in the company if he was awarded the position. The arbitrator found that no express conflict of interest rule or policy was necessary, and that the employee's late-in-the-day offer to sell his interest in the company would not be enough to resolve the continuing perceived conflict of interest.

In a more recent labour arbitration decision, two public works foremen were terminated when the City learned that they instructed labourers under their supervision to perform work, while on duty, for a client of the foremen's private business (*City of Regina* (2008), 176 L.A.C. (4th) 359 (Stevenson)). The arbitration panel found their conduct constituted time theft and the misappropriation of City resources and materials, all of which were contraventions of the City's code of conduct. However, the arbitration panel found that the City failed to establish evidence of a "widespread problem associated with improper conduct or abuse of the trust relationship". The Panel also concluded that the City had not taken sufficient steps to notify its employees, including the two foremen, of its emphasis on public accountability. The panel reinstated the two employees and substituted six-month suspensions.

In *Rupert v. Greater Victoria School District No. 61*, 2001 BCSC 700, aff'd 2003 BCCA, the court considered whether Mr. Rupert gave the School District just cause to terminate his employment by operating a private company and passing it off as affiliated with or sanctioned by the School District. Mr. Rupert was responsible for all aspects of the School District's international student program. While the Court characterized several things Mr. Roper did in the course of his employment as "clear examples of bad judgment", it was his operation of a private holiday program for participants in the School District's international student program that the Court found gave the School District cause to terminate his employment. He used School District letterhead and documents to help sell these holidays, giving the impression they were School District programs. He also misled his colleagues into thinking the holiday program was part of the School District's international student program so that he could rent facilities

from the School District at reduced rental rates. His acts of misappropriating School District supplies and misleading its students, all the while misrepresenting the nature of the holiday program to his colleagues, constituted serious breaches of his duty of fidelity to his employer. Mr. Rupert's wrongful dismissal claim was dismissed, and the School District's counterclaim for $45,000 in damages, being the amount of profit Mr. Rupert made from his holiday business, was allowed.

Gifts

In *New Brunswick (Department of Public Safety)* (2008), 172 L.A.C. (4th) 266 (McEvoy), a commercial vehicle inspector and part-time investigative coroner who accepted cash payments from the funeral homes with whom he interacted in the course of his job was disciplined for breaching his duty of loyalty and fidelity. In upholding a relatively minor suspension, the arbitrator noted that the total amount received ($120, paid $20 at a time) was minimal and that the employee did not solicit the payments. The employee testified that these occasional payments did not result in him treating the funeral home any differently that he normally would in the execution of his coroner duties. He also stated that the situation was quite unlike the more explicit—and expensive—bribes he was offered, but refused, in the course of his other duties as a commercial vehicle inspector and apparently this was a wide-spread practice amongst the coroners' service. He noted that he had not been charged with any criminal offences arising from the misconduct whereas some of his coworkers had. In light of all of these factors, the arbitrator concluded that the employee's misconduct was not so egregious as to give the employer just cause to terminate his employment.

In the non-union setting, a manager in General Motors' paint shop with 25 years of service was dismissed with cause for accepting a private loan from a client during a time of personal financial distress (*Connolly v. General Motors of Canada*, [1993] O.J. No. 2811 (Ont. Ct. GD)). The trial court dismissed his wrongful dismissal action, finding that his acceptance of the loan violated the plant's extensive conflict of interest policy, which contained an express prohibition on accepting loans from clients or customers. The court noted the following:

1. the fact that the employee did not realize his actions were problematic was, at best, a mitigating factor—the conduct should be viewed objectively;

2. the fact that the customer supplying the loan did not receive any benefit, and the employer did not suffer any quantifiable loss, was irrelevant; and

3. the existence or non-existence of any actual conflict of interest is irrelevant—a possible conflict, or even an appearance of conflict, is equally problematic.

Inside Influence

Employees who exercise discretion in the conduct of their job duties ought not to be involved with processing or adjudicating matters in which they have a direct pecuniary or non-pecuniary interest. For example, a municipal parking control officer was found to have acted improperly in "disposing" of three parking tickets issued to him by his own municipality (*Ottawa* (1993), 34 L.A.C. (4th) 177 (Fraser)). The arbitration panel noted:

> We find that the position of parking control officer, and clearly that of a senior officer who may do prosecutions, involves a position of trust. The removal of tickets by the grievor for his own benefit unquestionably constitutes a breach of that trust and, as a consequence, he would no longer be suitable as someone trusted to issue tickets. He is also quite unsuitable to perform any prosecuting function, which is part of a quasi-criminal process requiring not only trust but also an impartial use of the discretion that is normally found in such functions. [...] (para. 13)

In a similar vein, the property assessor who decreased his own property's assessment and that of his step-mother's property, decreased his girlfriend's property assessment, and tampered with his ex-wife's property assessment by changing the age of the home, eliminating an exemption code and increasing the assessed value, was found to have acted contrary to his implied duty of loyalty and the employer's code of conduct (*Municipal Property Assessment Corp.* (2008), 170 L.A.C. (4th) 259 (Tacon)). The employee argued that he was just adjusting the property values to preserve "data integrity". The arbitrator found that even if there was a legitimate error in the properties' assessments, it was inappropriate and contrary to the conflict of interest policy or code for him to make those adjustments:

> [...] the conflict of interest provisions preclude an individual implementing such reassessments even if accurate. The information is to be passed on to an appropriate assessor or manager. To do otherwise is to create a perceived conflict of interest: to an objective viewer, the involvement of an employee in changing data for properties in which he/she has an interest or in which a relative has an interest undermines MPAC's reputation for impartiality, a core value of the corporation. (para. 68)

Accessing/Disclosing Confidential Information

As discussed above, the *Community Charter* prohibits elected officials from misusing confidential information they receive in the course of their duties as elected officials (ss. 108, 117). Employees are under a similar duty, and violating the duty to maintain an employer's confidences is often characterized by courts and labour arbitrators as a serious act of

dishonesty that can frustrate the employment relationship, thus giving rise to just cause for discipline and termination.

A municipal employee working in the police detachment learned the hard way that a workplace policy prohibiting unauthorized access to information on the Canadian Police Information Centre (CPIC) database was not to be taken lightly. Contrary to the policy, the employee in *Cape Breton (Regional Municipality)* (2001), 105 L.A.C. (4th) 169 used a police officer's name to run a search on her new boyfriend to see if he had a criminal record. Although the arbitrator overturned the municipality's decision to terminate her employment, a one year suspension was substituted in its place.

An executive assistant working for the ministry responsible for administering a spousal and child support payment enforcement program similarly crossed the line when she ruined a provincial political candidate's campaign by leaking confidential information revealing that he owed substantial support payments. An arbitration panel upheld her dismissal in *Alberta (Department of Justice)* (2006), 154 L.A.C. (4th) 183 (Sims).

A municipal employee in *West Grey Police Services Board* (2005), 146 L.A.C. (4th) 111 (Kirkwood) was terminated for disclosing confidential schematics and other proprietary information she received from one proponent to another in the process of managing a competitive procurement process. She also purposefully slanted her report to the board making the final procurement decision, all apparently with the goal of persuading the board to select the proponent she thought most capable of doing the job. Finding "the legitimacy and the desirability of the goal does not legitimize or make any means acceptable" (para. 127), the arbitrator found that the employee's conduct breached her duty of loyalty to the board and warranted very serious discipline. The arbitrator reinstated the employee but substituted an unpaid suspension from the date of termination to the date of reinstatement, which was over two years.

B. Express Duties

In addition to the implied duties of fidelity, loyalty and good faith, employee conduct is also regulated by various express duties.

Contractual Provisions

Many local government employees have written employment contracts setting out the terms and conditions of the employment relationship. Some contracts contain express language acknowledging the employee's duty to the local government, including provisions restricting the employee's ability to pursue additional employment. Contracts for senior employees often include a restriction on the use of confidential information obtained in the course of employment.

Workplace Statutes

Many employment-related statutes apply not only to local governments in their corporate capacity but also to individual agents of local governments, including their officers and employees. For example, individuals can be found personally liable for breaches of the codes of conduct contained in the *Human Rights Code*, the *Employment Standards Act*, the *Labour Relations Code*, the *Workers Compensation Act* and various other general application statutes that regulate workers and workplaces. A violation of one of these statutes may constitute a conflict of interest under an employer's policies or otherwise constitute a breach of implied or express contractual duties, thereby resulting in adverse employment consequences in addition to any statutory liability.

Self-Regulating Professions

Local government employees who are members of a self-regulating profession also may have express duties under provincial legislation and codes of conduct adopted by their professional organizations. Accountants, architects, building officials, engineers and geoscientists, forest professionals, land surveyors, lawyers, notaries, and police officers and are examples of employees regulated by provincial statutes and codes of conduct adopted by their professional organizations. Planners, while not regulated by a provincial statute, are also subject to a code of conduct as a condition of membership in their professional organization.

For example:

1. The Association of Professional Engineers and Geoscientists of British Columbia's Code of Ethics requires its members to: "act as faithful agents of their clients or employers, maintain confidentiality and avoid a conflict of interest but, where such conflict arises, fully disclose the circumstances without delay to the employer or client."

2. The Planning Institute of British Columbia's bylaws include a Code of Professional Conduct that requires members to: "ensure full disclosure to a client or employer of a possible conflict of interest arising from the Member's private or professional activities."

3. The Building Officials' Association of British Columbia's bylaws include Rules of Professional Conduct that require members to: "discharge all duties owed to the Member's employer, the Province, other members of the profession and the public, honestly, impartially, competently and without interference or undue delay."

To the extent that professional designation or membership in a particular organization is a requirement of a person's job, failure to maintain that designation or membership may amount to cause to discipline or dismiss that employee.

Statutory Decision-Makers

As a result of their independent statutory status, some local government employees have a duty to uphold certain principles or interests that may, on occasion, be at odds with their employers' actual or perceived interests. For example, the office of a subdivision approving officer is a designation independent of a local government and the person holding that office must exercise independent decision-making when performing his or her duties under the *Land Title Act* regardless of that person's affiliation with or employment by a local government. Election officers under the *Local Government Act* and information heads under the *Freedom of Information and Protection of Privacy Act* are similar examples of statutorily required offices often held by individuals otherwise employed by a local government.

While these employees must identify to whom they owe a duty in any given situation, in reality they often perform their dual roles with little friction. This highlights the fact that the wearing of more than one hat, so to speak, does not always result in a conflict of interest and that a case-by-case analysis is necessary to determine when those individuals cannot or should not be involved with a particular decision.

C. Consequences of Breaches of the Duty of Loyalty

As the above cases and labour arbitration decisions highlight, an employee whose conduct is at odds with his or her duty to the employer faces negative employment consequences. Like the elected official who might be disqualified from holding office for violating the *Community Charter*'s code of conduct, an employee who engages in activity that is found to be an impermissible conflict of interest might be terminated on a with cause basis. Particularly in the union setting, lesser discipline (such as a warnings, or a suspension) may be issued, depending on the severity of the offence and the other criteria employers and labour arbitrators normally consider when addressing employment misconduct.

Unlike some of the other remedies described below, existence of an actual benefit to the employee or loss to the employer is not a prerequisite to the legitimate imposition of discipline or to an employer's finding of just cause for termination.

While rarely exercised, an employer whose employee's misconduct results in either a loss of profit to the employer or financial gain to the employee also has contractual and equitable remedies. A court may grant an injunction to prohibit the employee (or, more likely, the former employee) from engaging in certain conduct, such as misusing confidential information, to advance a personal project. A court may also require the employee or former employee to repay any damages (such as lost profit) to the employer or issue an order of disgorgement that requires the employee or former employee to account for any profit or benefit. The latter remedy was successfully obtained by the School District in *Rupert v. Greater Victoria School District No. 61*, a court case discussed above.

An employee or officer who engages in improper conduct in the discharge of express statutory duties may face penalties under the applicable statutory regime. Similarly, an employee whose conduct violates the code of conduct for a professional organization to whom he or she belongs faces sanction under that organization's governing bylaws.

D. Workplace Conflict of Interest Policies

The breadth of an employee's duty to his or her employer can result in a wide variety of "rules" inherent in the employment relationship. We encourage employers to reduce these rules to writing in the form a comprehensive but flexible conflict of interest policy. These policies assist employees in identifying when they may have an ethical dilemma or conflicting loyalty that needs to be disclosed and addressed.

Typical conflict of interest policies are remarkably similar to the conflict of interest provisions applicable to elected officials under the *Community Charter*. They often address matters such as:

- Inappropriate business dealings with family or friends;
- Conflicting second businesses and volunteer activities;
- Acceptance of gifts, donations or favours in the course of employment; and
- Misuse of the local government's resources, including records and information.

Well-drafted policies have a clear declaration and reporting mechanism to facilitate early disclosure of potentially problematic situations. They also clearly warn employees that breaches may lead to discipline up to and including dismissal. As with all policies, local governments must take positive steps to bring a conflict of interest policy to employees' attention, and will be well served to invest appropriate time and resources into periodic training for those tasked with administering or enforcing the policy.

Many conflict of interest policies are paired with whistleblower protection policies to ensure that an employee who, in good faith, reports a co-worker's possible conflict of interest is protected from negative workplace consequences.

Regardless of which type of conflict of interest policy a local government adopts, conducting an appropriate investigation of any alleged breach prior to imposing discipline is imperative.

IV. CONFLICT OF INTEREST RULES APPLICABLE TO LOCAL GOVERNMENT ELECTED OFFICIALS AND EMPLOYEES

A. Status as a Director of a Company or Society

Many local governments are involved in the ownership and management of corporations and societies. When a local government elected official or employee serves as a director of such an entity, questions about possible conflicts of interest can arise. In this section, we discuss the relevant statutory and common law duties of directors of companies and societies, and review the case law considering whether an elected official's dual role gives rise to impermissible conflicts of interests.

Directors of companies and societies are usually the individuals with control of and decision-making power with respect to the entity's affairs. It is therefore not surprising that the statutes regulating those entities contain rules aimed at avoiding certain conflicts of interest.

First, there is a stand-alone duty for company directors to "act honestly and in good faith with a view to the best interests of the company" and the *Society Act* imposes the same duty on society directors.

Sections 27 to 29 of the *Society Act* require a director of a society who has an interest (direct or indirect, pecuniary or non-pecuniary) in a proposed contract or transaction with the society to "disclose fully and promptly the nature and extent of the interest to each of the other directors" (s.27). If that director profits from such a contract or transaction, he or she may be liable to the society for that profit unless certain "savings" provisions apply, such as if the director made full and frank disclosure in accordance with s.27, the remaining directors approved the contract or transaction, and the affected director abstained from voting on its approval. If directors fail to observe this required process for disclosing matters in which they are personally interested and not participating in the approval of those matters, the members of the society or "an interested person" can apply to the Court for relief, including an order setting aside the impugned contract or transaction.

Directors and officers of companies have similar duties to refrain from acting in conflict with the company's best interest. Part 5, Division 3 of the *Business Corporations Act* contains a comprehensive conflict of interest code that requires disclosure of "material" interests in contracts and transactions that are "material" to the company. It also contains a disgorgement mechanism similar to that applicable to society directors.

Conflicts can arise when a local government elected official or employee also sits as a director of a company or society. One the one hand, the official or employee owes his or her local government a duty of fidelity and loyalty and is tasked with advancing the local government's best interest. What is in the local government's best interest may be adverse to what is in the company's or the society's best interest. In those situations, even the possibility of a conflict, or the perceived conflict, may be sufficient to require an elected official to declare a conflict of

interest under the *Community Charter* and for both an elected official and an employee to abstain from participation in the local government's management of matters involving the company or society.

Case law considering when an elected official has a conflict of interest with respect to matters involving a company or society tends to distinguish between the following types of situations:

1. where a statute requires the local government to appoint the official to the board of a corporation or society related to the local government or that the local government controls (e.g. *Save St. Anne's Coalition v. Victoria* (1991), 5 M.P.L.R. (2d) 331 (B.C.C.A.)); and

2. where an official sits as a director of a corporation or society unrelated to or not controlled by the local government (e.g. *Starr v. City of Calgary* (1985), 52 D.L.R. (2d) 726 (A.B.Q.B.).

In *Save St. Anne's Academy*, the Provincial Capital Commission, a body established by Provincial statute, owned a historic property that it proposed to redevelop. City Council adopted the necessary rezoning but concerned citizens attempted to strike down the zoning bylaw on the basis that the two councillors who were also members of the Commission had a conflict of interest with respect to the matter. The Court of Appeal disagreed:

> The structure of City Council in Victoria and the structure of the Provincial Capital Commission, and their interrelationship, require that there be two members of the Victoria Council involved in the decisions of the Provincial Capital Commission and it cannot be inherent in the structural inter-relationship that those two members must always disqualify themselves from any consideration, in their capacity as councillors, of the same issues as those raised in the deliberations of the Provincial Capital Commission. The structure would not have been set up that way if that result were contemplated.

In *Starr*, the City leased land to a company known as Calgary Exhibition and Stampede Limited. Provisions of the company's bylaws required it to appoint to its board of directors four councillors chosen by the City. The City and the company proposed to enter into a new lease, and it was alleged that the four councillors were disqualified from voting on the matter at council meetings. The Court agreed that the councillors were disqualified not only under the applicable municipal statute, but also at common law because their connection to the corporation raised an apprehension of bias:

> If the [councillors] are not prohibited from voting, the citizens of Calgary may feel that alderman who have a bias in favour of the Stampede Company due to their interests as directors of the

> Stampede Company, have coloured their views against the City. Even a suspicion that this would take place will not be permitted.

However, we find the most common situation to be analogous to neither of the above cases: the elected official who sits as a director of a corporation or society wholly owned and controlled by the local government as the sole shareholder or member. In that case, there is no obligation for the local government to appoint one of its elected officials to the board (unlike *Save St. Anne's*) but the company or society is not an unrelated entity—indeed, it is usually just the alter-ego of the local government (unlike *Starr*). In these situations, it would appear to be a highly technical and artificial result if elected officials were prevented from participating and voting in their elected capacity on matters involving the company or society.

B. Criminal Conflict of Interest

Elected officials should be aware that certain breaches of the conflict of interest rules may actually amount to criminal misconduct and have repercussions under the Canadian *Criminal Code* that far exceed disqualification from office.

Section 122 addresses breaches of trust by public officers. It provides that every officer who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Section 123 sets out the offence of municipal corruption. Section 123(1) makes it an offence to give, offer or agree to give a municipal official, or anyone for the benefit of a municipal official, a loan, reward, advantage or benefit of any kind as consideration for the official: (a) abstaining from voting at a meeting of the municipal council or a committee of the council, (b) voting in favour of or against a motion or resolution, (c) aiding in procuring or preventing the adoption of a motion or resolution, or (d) performing or failing to perform an official act. Section 123(1) also makes it an offence for a municipal official to demand, accept or offer to accept from any person such a loan, reward, advantage or benefit given as consideration for any of the acts described in (a) through (d). It is an offence to influence or attempt to influence a municipal official to do anything mentioned in (a) through (d) by suppressing the truth (in the case of a person who is under a duty to disclose the truth), by threats or deceit, or by any unlawful means.

In the case of *R. v. Gyles,* [2003] O.J. No. 3188, the accused was charged with the criminal offences of breach of trust and municipal corruption under sections 122 and 123 of the *Criminal Code*. It was alleged that the accused, who was a municipal councillor, demanded or accepted a bribe in exchange for the exercise of his influence in obtaining rezoning for particular properties. The first complainant sought to have a piece of property rezoned for use as a funeral home, and arranged a meeting with the councillor with a view to obtaining his support for the project and advice on how to obtain the rezoning. During subsequent meetings, the complainant alleged that the councillor offered to fix things for him in return for $50,000. The second complainant alleged that he also met with the councillor with respect to a rezoning

application, and the councillor indicated he would help get the rezoning but that his fee would be $25,000.

In finding the councillor guilty of breach of trust, the Court stated that the essential elements of the charge of breach of trust that must be proved by the Crown are:

(a) the accused is an official;

(b) the impugned act was committed in connection with the duties of his office; and

(c) the act constitutes a breach of trust.

Here, it was clear that the accused was an official, as he was elected a Mississauga City Councillor, and there was no doubt that the impugned acts of demanding or accepting a sum of money were committed in the general context of the duties of his office. The Court found that, in order to constitute a breach of trust, it must be shown that the councillor acted contrary to the duty imposed on him by statute, regulation, his contract of employment or directive in connection with his office and that the act gave him a personal benefit directly or indirectly. There need not be real prejudice or loss to the public or the local government, nor does the crime of breach of trust necessarily involve the idea of corruption. The advantage must flow from the very status and office of the official. The Crown is not required to prove that any official actions were altered as a result of the benefit.

Section 122 is sufficiently broad to ensnare the municipal official who, though performing the duties of his office or his official acts in a perfectly appropriate manner, does so in express return for considerations, benefits or rewards, accepted by the municipal official and offered by a person seeking the performance of that duty or official act.

In also finding the accused guilty of municipal corruption, a rarely prosecuted offence, the Court stated that the essential elements that must be proved by the Crown are:

(a) the accused is a municipal official;

(b) the accused demanded or accepted a benefit as consideration; and

(c) the accused accepted this consideration for voting or for procuring the adoption of a municipal motion.

Here, the councillor both demanded and accepted money from each of the complainants, and the Court was left to consider whether he demanded or accepted these benefits as consideration for voting in favour of a rezoning application in the case of the first complainant, and as consideration for aiding in procuring the adoption of a motion in the case of the second complainant. Like section 122, section 123 does not require proof of an overtly corrupt action by a municipal official. Preferential treatment exercised by a municipal official is sufficient on

its own to constitute an offence under this section. The Court here concluded that the accused's actions, offering to support each of the rezoning applications in exchange for the payment of money, did amount to municipal corruption contrary to section 123 of the *Criminal Code*.

V. CONCLUSION

Given the breadth of elected officials' and employees' duties to their local government, it is perhaps not surprising that the phrase "conflict of interest" carries some confusion. While the individual circumstances of a situation must be carefully considered and case-specific legal advice is often necessary, by proceeding openly and cautiously in possible conflict situations, elected officials and employees are less likely to be caught off guard with allegations of improper conduct. Elected officials and employees are well served to disclose all possible conflicts of interest early and to seek appropriate assistance navigating their various duties.

YOUNG ANDERSON
BARRISTERS & SOLICITORS

JANUARY 11, 2013

CLIENT BULLETIN

DIRECTORS OF NON-PROFIT SOCIETIES IN A CONFLICT OF INTEREST

The Court of Appeal delivered reasons today in *Schlenker v. Torgrimson,* 2013 BCCA 9, declaring that two elected officials were in a conflict of interest contrary to the *Community Charter* when they voted to grant funds to non-profit societies of which they were directors.

The B.C. Supreme Court had originally found that no pecuniary or non-pecuniary conflict of interest existed in this situation, as the elected officials had received no personal or financial benefit from the funds provided to the non-profits societies, and because the purposes of the non-profit societies were related to the objectives of the local government. Nevertheless, the Court of Appeal found that the elected officials' role as directors of the societies, in and of itself, gave rise to a fiduciary duty to the societies, and that in matters relating to funding, the directors' financial interests were allied with the societies' interest as a matter of law. As a result, the Court found that the nature of the conflict was a pecuniary one.

The Court of Appeal refused the relief sought by the petitioners for disqualification from office or the repayment of the funds, on the basis that the disqualification issue was moot (the petition was brought just before the last local general election, and the local trustees did not run in that general election), and on the basis that the repayment rule in section 191 of the *Community Charter* did not apply to conflict of interest issues. The Court, however, exercised its discretion to make a declaratory order on the conflict issue to clarify the law that, as local elected officials, directors of non-profit societies are in a conflict of interest when they vote or participate in matters related to the society, and that that conflict is pecuniary when the local government matter relates to money or financial benefits.

Generally, the presence of a conflict where local elected officials participate or vote on matters that relate to societies of which they are directors is not new. The additional law established by this case is that the conflict will be considered pecuniary in nature, and therefore a disqualifying conflict of interest, for directors of non-profit societies even when there is no financial benefit anticipated or provided to the director; an indirect pecuniary interest will be inferred as a matter of law.

Francesca Marzari

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Schlenker v. Torgrimson,* 2013 BCCA 9

Date: 20130111
Docket: CA039685

Between:

Norbert Fred Schlenker, Ted Bartrim, Alison Mary Cunningham, Harold Derek Hill, Malcolm George Legg, Dietrich Luth, Victoria Linda Mihalyi and Mark Lyster Toole

Appellants (Petitioners)

And

Christine Torgrimson and George Ehring

Respondents (Respondents)

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of British Columbia, January 13, 2012
(*Schlenker v. Torgrimson*, 2012 BCSC 41, Victoria Docket 11-4036)

Counsel for the Appellants: L. J. Alexander and A. L. Faulkner-Killam

Counsel for the Respondents: F. V. Marzari

Place and Date of Hearing: Victoria, British Columbia
November 26, 2012

Place and Date of Judgment: Vancouver, British Columbia
January 11, 2013

Written Reasons by:
The Honourable Mr. Justice Donald

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Hinkson

Reasons for Judgment of the Honourable Mr. Justice Donald:

[1] Elected officials must avoid conflicts of interest. The question on appeal is whether the respondents were in a conflict when they voted to award two service contracts to societies of which they were directors. In the words of s. 101(1) of the *Community Charter*, S.B.C. 2003, c. 26, did they have "a direct or indirect pecuniary interest in the matter[s]"?

[2] The chambers judge found they did not have such an interest because they derived no personal financial benefit from the contracts.

[3] With respect, I disagree with the judge's opinion. His view of the matter comes from too narrow a construction of the enactment. In my judgment, the pecuniary interest of the respondents lies in the fulfillment of their fiduciary obligation to their societies. When they voted for the expenditure of public money on the two contracts, which master were they serving, the public or the societies? In these circumstances, a reasonable, fair-minded member of the public might well wonder who got the better bargain.

[4] The respondents brought preliminary motions to quash the appeal for mootness and lack of standing of the appellants to maintain the appeal. I would not accede to either motion.

[5] The penalty for conflict is disqualification until the next election. While disqualification from office is in this case no longer a practical remedy because of the passage of time, the issues on appeal affect the public interest generally and should be decided. On the standing motion, fewer than ten electors, the minimum number required to support a petition alleging a conflict of interest, participated in the appeal. The petition, however, was brought by the requisite number of electors. There is no rule requiring the same number to bring a valid appeal.

[6] I would allow the appeal and declare that the respondents violated the *Community Charter*.

Factual Background

[7] In November 2008, the respondents were elected as trustees for the Salt Spring Island Local Trust Area. They, and a resident from another Gulf Island, comprised the Local Trust Committee (LTC) for Salt Spring Island. An LTC is a statutory corporation within the scheme of the *Islands Trust Act*, R.S.B.C. 1996, c. 239, having local government responsibility for land use planning and regulation for the particular island in question.

[8] The respondents were active in environmental issues: the respondent Torgrimson with the Water Council, and the respondent Ehring with the Climate Action Council. Both unincorporated bodies received funds from the LTC for various activities associated with their environmental causes. No issue is taken with the LTC resolutions authorizing those expenditures.

[9] On 20 April 2011, the respondents, along with three others, incorporated the Salt Spring Island Water Council Society. On 4 July 2011, the respondents, with three others, incorporated the Salt Spring Island Climate Action Council Society. The respondents were directors of the Societies at the material time.

[10] The appellants are Salt Spring Island electors who brought a petition contesting the behaviour of the respondents in respect of two resolutions of the LTC authorizing payments to the Societies for services related to their fields of interest. The chambers judge summarized the events in this way (2012 BCSC 41):

> [16] The incident that was the catalyst for the petition against Ms. Torgrimson and Mr. Ehring occurred on September 1, 2011. The LTC held a meeting at which Ms. Torgrimson and Mr. Ehring were present along with the third trustee, Ms. Malcolmson.
>
> [17] At the time of the vote on September 1, 2011, both respondent trustees were directors of the newly incorporated Water Council Society.
>
> [18] On September 1, 2011, Ms. Torgrimson moved and voted in favour of a resolution to "dedicate" $4,000 to fund a project by which the Water Council Society would organize and run a workshop to raise awareness of water issues on Salt Spring Island. Mr. Ehring was present and voted in favour of the resolution as did the third trustee.
>
> [19] During the discussion and eventual vote on the matter, neither Ms. Torgrimson nor Mr. Ehring disclosed that they were now directors of the newly incorporated societies.
>
> * * *
>
> [23] There was another meeting of the LTC on October 6, 2011. Again Ms. Torgrimson and Mr. Ehring were present with the third trustee. At this time Ms. Torgrimson made a motion to dedicate $4,000 to the Climate Action Society for the purpose of providing a progress report on greenhouse gases. Again, there was no mention that both respondents are directors of the Climate Action Society. As on September 1, 2011, the motion was not on the agenda. Given the similar conduct of the respondents on October 6, 2011, whatever decision I make with respect to what occurred September 1, 2011, would be the same decision for the October 6, 2011, transaction.

[11] At the hearing of the petition, no contract for services in relation to either expenditure had been executed. However, counsel agreed:

> That the Court of Appeal panel be advised at the hearing of the appeal that the Court below accepted that the resolutions in question would lead to the contracts being let, and the money actually expended, which is in fact what happened.

[12] The appellants filed a motion to adduce new evidence relating to the contracts. This was in response to the respondents' argument that there was no evidence before the chambers judge that any money changed hands. The evidence is new in the sense that it arose after the hearing. It supports the appellants' contention that the transactions were for service contracts and were paid for. Given the agreed statement above, I see no need to consider other details of the new evidence.

[13] The hearing of the petition occurred on the eve of the election in November 2011 at the expiry of the respondents' terms of office. As will be seen, the conflict legislation provides disqualification from office

until the next election as its primary remedy. The respondents did not run again in November 2011 and say they have no intention of standing for office in the future.

Decision Under Appeal

[14] The chambers judge dismissed the petition on the ground that the evidence did not disclose a "personal pecuniary interest". He found that the respondents' duties as directors of the Societies failed to satisfy this test. After reviewing case law, he ruled as follows:

> [39] In this case, the petitioners invite the court to draw the inference that these trustees have an indirect pecuniary interest based upon the fact of their being directors *simpliciter*.
>
> [40] I am not satisfied this is an appropriate inference to be drawn given the court's comments in *Fairbrass BCCA* [*Fairbrass v. Hansma*, 2010 BCCA 319, 5 B.C.L.R. (5th) 349]. Granted, directors are the operating minds of a society. However, the society exists as a separate legal person from the individuals who in this case work for no remuneration to guide it.
>
> [41] In my opinion, *Fairbrass BCCA* supports the respondents' position: the fact that they are directors of societies that received the funds, in the absence of sufficient evidence to establish a personal pecuniary interest between themselves and the societies, does not permit the inference to be drawn that they have an indirect pecuniary interest in the dedication of funds to the societies.
>
> [42] Again, as I decided in the Hendren judgment [*Schlenker v. Hendren* (18 November 2011), Victoria 11-4036 (S.C.)], the law in British Columbia cannot be read in the spirit of the Ontario legislation. The Ontario statute raised by counsel for the petitioners, the *Municipal Conflict of Interest Act*, R.S.O. 1990, Chapter M.50, ss. 2(a)(iii), 4(k), and 5, sets a low threshold for indirect pecuniary interest. It includes within the category of indirect pecuniary interest situations where an individual is a member of a body that in turn has a pecuniary interest in the matter (s. 2(a)(iii)).
>
> [43] I am satisfied that in British Columbia, disqualification on the grounds of indirect pecuniary interest requires evidence sufficient that there can be "a readily recognizable pecuniary incentive to vote other than for planning reasons." (See *Re McCaghren and Lindsay* (1983), 144 D.L.R. (3d) 503 at 510 (Alta. C.A.).) In our circumstances, reason to vote without conflict would not be "for planning" but for public education on water issues.
>
> [44] Moreover, even though the society depends to a certain extent on grants it receives from the LTC, as well as other sources, to advance its goals and objectives and to assist in the viability of the society, I do not conclude that Ms. Torgrimson and Mr. Ehring had an indirect pecuniary interest in the issue that was before the LTC on September 1, 2011. The petitioners need not show an actual pecuniary interest being affected, yet there still must be evidence of the potential "to affect the member's financial interest." (See [*Mondoux v. Tuchenhagen*, 2010 ONSC 6536, 79 M.P.L.R. (4th) 1], para. 46; and *Tolnai v. Downey* (2003), 40 M.P.L.R. (3d) 243 (Ont. Sup. Ct.) at para. 25.) Therefore, the fact that the respondents are directors is not sufficient to establish an indirect pecuniary interest.
>
> [45] I am fully cognizant of the classic statement made by the court in *Re Moll and Fisher et al.* (1979), 96 D.L.R. (3d) 506 at 509, 23 O.R. (2d) 609 (H.C.), that "no man can serve two masters," and that the conflict of interest rules and enactments recognize that even if elected officials are well-meaning, their judgment may be impaired "when their personal financial interests are affected." Yet I underline that it is personal economic self-interest that must be in conflict with the official's public duty. While the vote on September 1, 2011, would provide the Water Council Society with funds to set up a workshop in order to pursue its objectives and educate the community with respect to water issues, the evidence does not establish that the grants had the potential to affect the personal financial interests of Ms. Torgrimson or Mr. Ehring. Indeed, there is possibly less pecuniary connection

between a non-profit society and its directors as private individuals than there was between the mayor and his sons in *Fairbrass*.

[46] Given the totality of the evidence, I am not able to conclude that the petitioners have established that Ms. Torgrimson and Mr. Ehring had an indirect personal pecuniary interest when they voted for the dedication of money to the Water Council Society on September 1, 2011.

[47] As a result, where the petition seeks a declaration that Ms. Torgrimson and Mr. Ehring have violated s. 101 and s. 107 of the *Community Charter* because of a failure to disclose a direct or indirect pecuniary interest, the petition is dismissed.

Relevant Enactments

[15] The relevant sections of the legislation are as follows:

Community Charter, S.B.C. 2003, c. 26 –

100 (1) ...

(2) If a council member attending a meeting considers that he or she is not entitled to participate in the discussion of a matter, or to vote on a question in respect of a matter, because the member has

(a) a direct or indirect pecuniary interest in the matter, ...

the member must declare this and state in general terms the reason why the member considers this to be the case.

(3) After making a declaration under subsection (2), the council member must not do anything referred to in section 101 (2) [*restrictions on participation*].

* * *

101 (1) This section applies if a council member has a direct or indirect pecuniary interest in a matter, whether or not the member has made a declaration under section 100.

(2) The council member must not

(a) remain or attend at any part of a meeting referred to in section 100 (1) during which the matter is under consideration,

(b) participate in any discussion of the matter at such a meeting,

(c) vote on a question in respect of the matter at such a meeting, or

(d) attempt in any way, whether before, during or after such a meeting, to influence the voting on any question in respect of the matter.

(3) A person who contravenes this section is disqualified from holding an office described in, and for the period established by, section 110 (2), unless the contravention was done inadvertently or because of an error in judgment made in good faith.

* * *

111 (1) If it appears that a person is disqualified under section 110 and is continuing to act in office,

(a) 10 or more electors of the municipality, ...

may apply to the Supreme Court for an order under this section.

* * *

(4) An application under this section may only be made within 45 days after the alleged basis of the disqualification comes to the attention of

(a) any of the electors bringing the application, in the case of an application under subsection (1) (a), ...

(6) On the hearing of the application, the court may declare

...

(b) that the person is disqualified from holding office, ...

* * *

191 (1) A council member who votes for a bylaw or resolution authorizing the expenditure, investment or other use of money contrary to this Act or the *Local Government Act* is personally liable to the municipality for the amount.

* * *

(4) Money owed to a municipality under this section may be recovered for the municipality by

...

(b) an elector or taxpayer of the municipality, ...

Society Act, R.S.B.C. 1996, c. 433 –

24 (1) The members of a society may, in accordance with the bylaws, nominate, elect or appoint directors.

(2) Subject to this Act and the constitution and bylaws of the society, the directors

(a) must manage, or supervise the management of, the affairs of the society, and

(b) may exercise all of the powers of the society.

* * *

25 (1) A director of a society must

(a) act honestly and in good faith and in the best interests of the society, and

(b) exercise the care, diligence and skill of a reasonably prudent person,

in exercising the powers and performing the functions as a director.

(2) The requirements of this section are in addition to, and not in derogation of, an enactment or rule of law or equity relating to the duties or liabilities of directors of a society.

* * *

27 A director of a society who is, directly or indirectly, interested in a proposed contract or transaction with the society must disclose fully and promptly the nature and extent of the interest to each of the other directors.

28 (1) ....

(2) Unless the bylaws otherwise provide, a director referred to in section 27 must not be counted in the quorum at a meeting of the directors at which the proposed contract or transaction is approved.

Business Corporations Act, S.B.C. 2002, c. 57 –

1 (1) In this Act:

* * *

"company" means

(a) a corporation, recognized as a company under this Act or a former *Companies Act*, that has not, since the corporation's most recent recognition or restoration as a company, ceased to be a company

* * *

"corporation" means a company, a body corporate, a body politic and corporate, an incorporated association or a society, however and wherever incorporated, but does not include a municipality or a corporation sole;

* * *

136 (1) The directors of a company must, subject to this Act, the regulations and the memorandum and articles of the company, manage or supervise the management of the business and affairs of the company.

* * *

142 (1) A director or officer of a company, when exercising the powers and performing the functions of a director or officer of the company, as the case may be, must

(a) act honestly and in good faith with a view to the best interests of the company, ...

Canada Business Corporations Act, R.S.C. 1985, c. C-44 –

102. (1) Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation.

* * *

122. (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation; ...

Issues

[16] I will discuss the following issues:

1. Standing: Can less than ten electors bring a valid appeal from dismissal of a conflict of interest petition under the *Community Charter*?
2. Mootness: Is the case moot and if it is should it nevertheless be decided?
3. Statutory interpretation of the phrase "a direct or indirect pecuniary interest in the matter": Is it limited to personal financial gain of the councillor or does it extend to a non-profit society of which the councillor is a director?

Discussion

Standing

[17] The petition in this case was brought by 15 electors, more than the minimum number (10) prescribed by s. 111(1)(a) of the *Community Charter*. The respondents contest the validity of the appeal on the basis that the eight appellants lacked standing as they form a group less than the requisite number.

[18] This argument has no support in the legislation. The respondents argue for a restriction on the right to appeal yet there is nothing in the *Community Charter* or related enactments which extends the minimum requirement in s. 111(1)(a) to an appeal.

[19] The jurisdiction of the Court is set out in the *Court of Appeal Act*, R.S.B.C. 1996, c. 77:

> 6 (1) An appeal lies to the court
>
> (a) from an order of the Supreme Court or an order of a judge of that court, and
>
> (b) in any matter where jurisdiction is given to it under an enactment of British Columbia or Canada.
>
> (2) If another enactment of British Columbia or Canada provides that there is no appeal, or a limited right of appeal, from an order referred to in subsection (1), that enactment prevails.

[20] Each petitioner must join with at least nine others to launch a valid petition. Once they have done so, each becomes a party to the proceeding. Their status as a party remains throughout the proceeding and enables them to invoke the jurisdiction of this Court whether or not the original petitioning group remains intact. It would, in my opinion, take very specific language in the relevant legislation to restrict access to this Court in the manner suggested by the respondents.

[21] I would not give effect to the preliminary objection based on standing.

Mootness

[22] The respondents' other preliminary objection is that there is no practical purpose to be served by deciding the appeal. Since the respondents did not run in the 2011 election, the primary remedy for voting while in a conflict of interest, namely, disqualification from office until the next election, has no application; all that is left is a declaratory remedy, a purely academic exercise which this Court should not engage in. The respondents submit that the problem will probably come up again and can and should be decided on a live issue rather than on a moot case.

[23] The appellants respond in several ways. First, they say that there is a practical remedy available in that this Court could order the respondents to repay the money for the contracts under s. 191 of the *Community Charter*. Second, the Court could order the respondents disqualified from holding office for a period running from the date of the Court's judgment to the next election. Third, the prayer for relief in the petition expressly sought a declaration as a remedy and nothing that has transpired since has affected the soundness of that remedy. Fourth, even if s. 191 is not available and it is seen that there is no practical

sanction against the respondents, there is nevertheless a strong public interest in settling the law on the substantive issue in the case.

[24] I do not find it necessary to deal with the appellants' first two points. In my opinion, the third and fourth points meet the mootness objection.

[25] The events giving rise to the dispute occurred within a short time of the November 2011 election. The respondents' terms of office were about to expire when they voted to approve the expenditures in question. The *Community Charter* prescribes a 45-day limit to bring a conflict challenge by way of petition. Since the procedures must be taken in such a compressed timeframe and the terms of office can be shorter than the time it takes for a case to make its way through to an appeal, it will often be difficult to apply the disqualification sanction if it is not ordered at first instance. Timing was one of the factors that influenced this Court in *Fairbrass v. Hansma*, 2010 BCCA 319, to proceed with the appeal despite the lapse of the disqualification period:

> [9] Section 110(2) referred to in s. 101(3) sets the period of disqualification as commencing at the time of the contravention of s. 101 and ending on the date of the next general local election.
>
> [10] The potential period of disqualification in this case has long since lapsed, there having been a general local election in November 2008. Nonetheless, the petitioners brought the petition promptly. It raises a serious issue which was considered by the Supreme Court of British Columbia. Were we to refuse to hear the appeal as moot, it would be a rare case that could be advanced through the court process, given the election cycle in municipal governance. The issue in this case is serious, the allegations are of consequence, in particular to the respondent, and the issue has the potential to arise again in another guise. Upon these considerations we determined this appeal should be resolved on its merits.

[26] The first two orders sought in the amended petition are expressed in this way:

> 1. A declaration that Trustee Christine Torgrimson, Trustee George Ehring ... have failed to disclose a direct, or indirect, pecuniary conflict of interest contrary to section 101 and section 107 of the *Community Charter, SBC 2003, c 26*;
>
> 2. A declaration that Trustee Christine Torgrimson, Trustee George Ehring ... have attended a meeting, participated in discussions, attempted to influence voting, and voted on a question contrary to section 101 and section 107 of the *Community Charter*.

[27] No objection could have been taken to the petition had it claimed only a declaration as relief. Rule 20-4 of the *Supreme Court Civil Rules* provides:

> (1) A proceeding is not open to objection on the ground that only a declaratory order is sought, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

[28] This appears to be a case of first impression. None of the authorities cited to us deals squarely with the position of a councillor voting on a money resolution authorizing payment to a non-profit society of which the councillor is a director.

[29] Finally, and regardless of whether the case is moot, a resolution of the issue will have practical utility. As counsel for the appellants explained, elected officials often seek legal guidance on whether they are in a conflict of interest. If they act on such advice, they have available to them a good faith defence under s. 101(3) of the *Community Charter*:

> (3) A person who contravenes this section is disqualified from holding an office described in, and for the period established by, section 110 (2), unless the contravention was done inadvertently or because of an error in judgment made in good faith.

[30] So the respondents are concerned that unless the decision under appeal is reviewed, it will remain the basis of legal advice to councillors throughout the province and because of the good-faith defence, no one will be motivated to challenge their conduct. The argument is that if the decision is wrong and left uncorrected, it will have a deleterious long-term effect.

[31] I agree with this argument. I am not satisfied the case is moot, but even if it is, it falls within the class of cases that should be decided in the public interest.

Construction of the Phrase "a direct or indirect pecuniary interest in the matter"

[32] As mentioned, my principal difference of opinion with the judge is in what I consider to be his too narrow construction of the phrase "a direct or indirect pecuniary interest".

[33] By limiting the interest to personal financial gain, the chambers judge's interpretation missed an indirect interest, pecuniary in nature, in the fulfillment of the respondents' fiduciary duty as directors. The result of applying that narrow interpretation to the facts was to defeat the purpose and object of the conflict of interest legislation.

[34] The object of the legislation is to prevent elected officials from having divided loyalties in deciding how to spend the public's money. One's own financial advantage can be a powerful motive for putting the public interest second but the same could also be said for the advancement of the cause of the non-profit entity, especially by committed believers in the cause, like the respondents, who as directors were under a legal obligation to put the entity first.

Liberal vs. Strict Interpretation

[35] My starting point in the interpretive process is to recall the directive in the *Interpretation Act*, R.S.B.C. 1996, c. 238:

> 8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[36] I then move to the classic statement of the "modern principle" enunciated by Elmer Driedger in the second edition of *Construction of Statutes* and adopted by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27:

> [21] Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[37] The context of the questioned phrase can be seen from its placement in Part 4 of the *Community Charter* entitled "Public Participation and Council Accountability" and Division 6 of that Part, entitled "Conflict of Interest". The phrase appears in that part of the *Community Charter* addressing the problem of divided loyalties, particularly in money matters.

[38] The purpose of such legislation was eloquently described by Robins J. (later J.A.) speaking for the Ontario Divisional Court in *Re Moll and Fisher* (1979), 96 D.L.R. (3d) 506 at 509:

> This enactment, like all conflict-of-interest rules, is based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well-meaning men and women may be impaired when their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose. And the Act, by its broad proscription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interest may be in conflict with their public duty. The public's confidence in its elected representatives demands no less.
>
> Legislation of this nature must, it is clear, be construed broadly and in a manner consistent with its purpose.
>
> [Emphasis added.]

[39] In *The Queen v. Wheeler*, [1979] 2 S.C.R. 650, the Court referred to the New Brunswick equivalent of s. 8 of our *Interpretation Act*, quoted earlier, in adopting at 659 a broad approach to the interpretation of the conflict provision involved in that case.

[40] In *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, Sopinka J. commented generally on conflict of interest legislation for local government at 1196-97:

> I would distinguish between a case of partiality by reason of pre-judgment on the one hand and by reason of personal interest on the other. It is apparent from the facts of this case, for example, that some degree of pre-judgment is inherent in the role of a councillor. That is not the case in respect of interest. There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest. It is not part of the job description that municipal councillors be personally interested in matters that

> come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest. See *Re Blustein and Borough of North York*, [1967] 1 O.R. 604 (H.C.); *Re Moll and Fisher* (1979), 23 O.R. (2d) 609 (Div. Ct.); *Committee for Justice and Liberty v. National Energy Board*, [[1978] 1 S.C.R. 369]; and *Valente v. The Queen*, [1985] 2 S.C.R. 673.
>
> Statutory provisions in various provincial Municipal Acts tend to parallel the common law but typically provide a definition of the kind of interest which will give rise to a conflict of interest. See *Blustein* and *Moll*, *supra*.
>
> [Emphasis added.]

[41] I think a reasonably well-informed elector on Salt Spring Island would conclude that the respondents' interest as directors would influence their decision to authorize and pay for contracts with their Societies. The respondents themselves initiated the resolutions that directly benefitted their Societies, and then voted in favour of those resolutions, without disclosing that they were directors of the very Societies that were obtaining the benefit.

[42] If, in the present case, the chambers judge approached the interpretation narrowly because of the penalties for engaging in a conflict, he erred in my opinion. In *Tuchenhagen v. Mondoux*, 2011 ONSC 5398, 107 O.R. (3d) 675, the Divisional Court held:

> [26] The *MCIA* [*Municipal Conflict of Interest Act*] s. 10 does provide for the penalties to be imposed if a member of council is found to have breached the legislation. The seat of the member is to be declared vacant, he or she may be disqualified from being a member for a period of time not exceeding seven years and, where the contravention has resulted in financial gain, ordered to pay restitution. As such, the *MCIA* is penal in nature. This does not mean that it should be interpreted narrowly, in favour of the member, in case of ambiguity. "Even with penal statutes, the real intention of the legislature must be sought, and the meaning compatible with its goals applied" (see: *R. v. Hasselwander*, [1993] 2 S.C.R. 398 at para. 30 as referred to in *Ruffolo v. Jackson*, [2010] O.J. No. 2840 (C.A.) at para. 9).
>
> [Emphasis added.]

Directors' Duties

[43] In most cases of conflict of interest, the conflict examined is between the personal interests of the individual and his or her duty to the corporate entity. At bar, the question is whether the respondents took on conflicting responsibilities as local councillors and Society directors such that they could not participate in decisions awarding contracts to the Societies.

[44] There is little difference in the duties of a director of a business corporation and a society.

[45] Directors of societies have a fiduciary duty of loyalty to "act honestly and in good faith and in the best interests of the society": s. 25(1)(a) of the *Society Act*. This fiduciary duty is the same duty that directors owe

to corporations under the *Business Corporations Act* at s. 142(1)(a), which provides that directors of a company (defined as a corporation recognized as a company under that Act), when exercising the powers and performing the functions of a director of the company must act honestly and in good faith with a view to the best interests of the company, as well as the federal *Canada Business Corporations Act* under s. 122(1)(a), which provides that every director of a corporation in exercising their powers and discharging their duties shall act honestly and in good faith with a view to the best interests of the corporation. Therefore, case law relating to the fiduciary duty of directors of corporations is analogous to the fiduciary duty of directors of societies.

[46] As the Supreme Court of Canada noted in *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461, the duty of loyalty imposes several duties on directors:

> [35] The statutory fiduciary duty requires directors and officers to act honestly and in good faith *vis-à-vis* the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly and loyally: see K. P. McGuinness, *The Law and Practice of Canadian Business Corporations* (1999), at p. 715.

[47] In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, Chief Justice McLachlin, for the Court, wrote of the fiduciary principle in general as follows:

> [43] The duty is one of utmost loyalty to the beneficiary. As Finn states, the fiduciary principle's function "is not to mediate between interests. It is to secure the paramountcy of *one side's* interests . . . . The beneficiary's interests are to be protected. This is achieved through a regime designed to secure loyal service of those interests" (P. D. Finn, "The Fiduciary Principle", in T. G. Youdan, ed., *Equity, Fiduciaries and Trusts* (1989), 1, at p. 27 (underlining added [by McLachlin C.J.]); see also [*Hodgkinson v. Simms*, [1994] 3 S.C.R. 377], at p. 468, *per* Sopinka J. and McLachlin J. (as she then was), dissenting).
>
> [Emphasis in text.]

[48] The case of *Wheeler* involved a mayor and a business corporation but the following remarks at 659-60 I think are apposite:

> A director, and particularly one who is also a president, owes a continuous, day-to-day duty to the legal entity, the company, as well as to the shareholders, to prosecute the company's affairs in an efficient, profitable, and entirely lawful manner. Applying the broad principle enunciated by Duff C.J. in [*J.B. Arthur Angrignon v. J. Arsène Bonnier*, [1935] S.C.R. 38], such an officer is most certainly "interested" in his company entering into profitable contracts. In a service company or in the construction business, that may well be his only real interest in conducting the affairs of the company.
>
> * * *
>
> It should not, however, be assumed that the Legislature has thereby expressed an intention to reduce the meaning and application of the expression "indirect interest". It is unrealistic to believe that as a general principle of human conduct a director or officer of a contracting company does not have at least an indirect interest in the company's contracts. On the facts before this Court, the provision has an even clearer impact. A director or officer of a construction company or of a service company must,

> in ordinary parlance and understanding, have an interest, albeit indirect, in the welfare of the company as it relates to or results from 'contracts'.
>
> [Emphasis added.]

Pecuniary Interest

[49] In several ways in the course of these reasons, I have endeavoured to make the point that so long as the "matter" involves the expenditure of public funds and the respondents have "an interest" in the matter which a well-informed elector would conclude conflicts with their duty as councillors, it makes no difference that they put no money into their own pockets.

[50] As directors of the Societies, the respondents were under a fiduciary duty to put the Society's interests first. Directors of societies, by virtue of their position, have an indirect interest in any contract a society is awarded. When the respondents moved and voted in favour of resolutions that benefitted their Societies through the granting of contracts, arguably contracts the Societies might not have been awarded had the councillors not also been directors, their duties as directors to put the Society's interests first were in direct conflict with their duties as councillors to put the public's interests first. These circumstances encompass the mischief the legislation was aimed at, namely, a conflict of interest in deciding money resolutions. The public is disadvantaged by the conflict, whether the respondents derived any personal gain or not, because the public did not have the undivided loyalty of their elected officials.

Case Law

[51] This Court has twice considered pecuniary interest conflict. In *Fairbrass*, the Mayor of Spallumcheen voted on a bylaw to amend the Official Community Plan allegedly to the potential benefit of his two sons. In *King v. Nanaimo (City)*, 2001 BCCA 610, 94 B.C.L.R. (3d) 51, a city councillor voted in favour of matters benefitting his largest campaign contributor. This Court upheld the dismissal of the petition in *Fairbrass* and reversed the finding of pecuniary conflict in *King*.

[52] The decisions have a common rationale. The proof requirement establishing a link between the matter voted on and a pecuniary interest of the councillor was lacking in each case.

[53] In *King*, Mr. Justice Esson, for the Court, wrote:

> [12] That conclusion, in my respectful view, is wrong in law. What was prohibited by s. 201(5) is participation in the discussion or vote on a question in respect of "... a matter in which the member has a direct or indirect pecuniary interest." The "matter" (or matters) in respect of which questions arose before Council were, in this case, the various applications by Northridge Village and its associates. Nothing in the facts established in this proceeding could justify the conclusion that Mr. King had a pecuniary interest, direct or indirect, in any of those matters. The mere fact that Northridge made campaign contributions could not, in and of itself, establish any such interest. There could, of course, be circumstances in which the contribution and the "matter" could be so linked as to justify a conclusion that the contribution created a pecuniary interest in the matter. Indeed, the learned chambers judge took note of an example of such a situation when he said in his reasons:

> There is no evidence of a direct pecuniary interest in the sense that he agreed to vote for these projects in return for their campaign contribution of $1,000.00.
>
> [13] It would not be useful to speculate as to what circumstances could create an indirect pecuniary interest. It is enough to say that the mere fact of the applicant having made a campaign contribution is not enough. In the absence of any factual basis for finding that Mr. King had a pecuniary interest in the matter, the finding based on s. 201(5) is wrong in law and must be set aside.
>
> [Emphasis added.]

[54] Madam Justice Saunders gave the judgment of the Court in *Fairbrass* and wrote:

> [21] I see no error in the approach of the judge to the petition before him. In the circumstances disclosed to him in the evidence, the case fell to be resolved by considering whether there could be enhancement of the respondent's financial position directly, or through the fact his sons owned adjacent property. The judge recognized the sons had a direct pecuniary interest because the proposal would make it easier for them to sub-divide their property. There were, then, only two questions: did the respondent have a direct interest, and did the sons' direct interest create such potential for enhancement of the respondent's financial circumstances as to be a pecuniary interest that was indirect.
>
> [22] The proposition that the person asserting a fact has the burden of proving it, is fundamental. Here the petitioners alleged a pecuniary interest, either direct or indirect. Yet they adduced no evidence to the effect that the bylaw, were it to pass, would make the respondent's four acre but still un-subdividable property more valuable. Whether the change in set-back requirements would have this effect is speculation. So too, as the judge said, is the possibility of the respondent acquiring land, thereby to sub-divide the property. Even more speculative is the possibility of accretion making the four acre parcel more valuable now.
>
> [Emphasis added.]

[55] In the present case, however, proof of a pecuniary conflict does not depend on a remote and tenuous connection as in *King* or on speculation like *Fairbrass*, but on the solid footing of a fiduciary duty as discussed.

[56] It was contended by the petitioners in *Fairbrass* that the filial relationship between the father and the sons was enough to establish an indirect interest. That proposition was rejected at both levels as an unsupported inference. I see no parallel to the case at bar. Parents may or may not be concerned with the business affairs of their children; it all depends on the facts of each case. But there is no doubt about the duty of a director in fostering the business of his or her society; it inheres in the nature of the relationship.

[57] When, at para. 41 of his reasons, the chambers judge requires some personal pecuniary benefit to flow to the respondents from their societies before declaring a conflict, he in my opinion erred in principle and in law by misconstruing the effect of *Fairbrass*.

Remedies

[58] As mentioned, the declaratory order should be made because of the public importance of the issue. But the appellants also ask for an order pursuant to s. 191(1) of the *Community Charter* requiring the respondents to repay the money expended on the contracts.

[59] In my opinion, s. 191(1) has no application to this case. As I read the provision, it addresses itself to the subject matter of the expenditure rather than to the qualification of the councillor voting on the expenditure. The phrase "contrary to this Act or the *Local Government Act*" refers to the "expenditure, investment or other use of money", not to the council member who casts the vote. The focus is on the impropriety of the expenditure.

[60] Thus, s. 191(1) is placed in a separate part of the *Community Charter* under "Part 6 – Financial Management, Division 5 – Restrictions on Use of Municipal Funds", apart from those provisions dealing with improper voting by council members who are disqualified by reason of conflict of interest.

[61] It is not alleged in this case that the projects covered by the contracts let by the LTC were in themselves improper subjects for expenditure. The attack was directed at the respondents' conflict of interest. There is, therefore, no basis for an order of repayment under s. 191(1).

Conclusion

[62] For these reasons, I would allow the appeal and declare that the respondents voted on questions contrary to s. 101 of the *Community Charter*.

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Madam Justice Newbury"

I agree:
"The Honourable Mr. Justice Hinkson"

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Skakun,* 2014 BCCA 223

Date: 20140611
Docket: CA040157

Between:

Regina

Respondent

And

Brian Skakun

Appellant

Before: The Honourable Madam Justice D. Smith
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated July 24, 2012 (*R. v. Skakun*, 2012 BCSC 1103, Prince George Registry No. 30095).

Counsel for the Appellant: J.M. Duncan

Counsel for the Respondent: L.A. Ruzicka

Place and Date of Hearing: Prince George, British Columbia
April 24, 2014

Place and Date of Judgment: Vancouver, British Columbia
June 11, 2014

Written Reasons by:
The Honourable Madam Justice D. Smith

Concurred in by:
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Harris

Summary:

Mr. Skakun, a municipal councillor in the City of Prince George, was convicted under s. 30.4 of the FOIPPA of making an unauthorized disclosure to the CBC of personal information that included a copy of a confidential workplace harassment report he had received during a closed restricted city council meeting. He

was granted leave to appeal from the dismissal of his summary conviction appeal on the legal issue of whether a municipal councillor is an "officer" of a public body under s. 30.4.

Held: Appeal dismissed. The trial judge and summary conviction appeal judge correctly interpreted the term "officer" in s. 30.4 as including elected municipal councillors. Properly construed, the ordinary and grammatical meaning of "officer" in s. 30.4, based on its dictionary definition (both legal and non-legal), when read in the context of the broadly-stated purposes of the legislation (to provide access to information and privacy of personal information in the custody or control of public bodies) and the wide scope of its targeted public bodies and organizations, evinces a legislative intention to include elected municipal councillors within the ambit of the provision.

Reasons for Judgment of the Honourable Madam Justice D. Smith:

Overview

[1] In an open and democratic society, protection of personal information in the control of public bodies is an essential counterbalance to the right of access to information from public bodies. Legislation that ensures these dual objectives has long been recognized as "quasi-constitutional", and is generally interpreted in a manner that advances its broad underlying policy objectives: *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403 at paras. 64-69, La Forest J., dissenting, but not on this point; *Lavigne v. Canada (Office of the Commissioner of Official Languages),* 2002 SCC 53, [2002] 2 S.C.R. 773 at paras. 24-25; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401,* 2013 SCC 62, [2013] 3 S.C.R. 733 at paras. 19, 22. In this province, those objectives are encompassed in the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FOIPPA*].

[2] The central issue in this appeal is whether an elected municipal councillor is captured by the definition of "officer" in s. 30.4 of *FOIPPA.* Section 30.4 provides:

> An employee, officer or director of a public body or an employee or associate of a service provider who has access, whether authorized or unauthorized, to personal information in the custody or control of a public body, must not disclose that information except as authorized under this act.

[3] The circumstances in which this issue arose may be summarized briefly. On May 24, 2011, Mr. Skakun, a municipal councillor with the City of Prince George, was convicted by a Provincial Court judge for breaching s. 30.4 after admitting that he had delivered to the Canadian Broadcasting Corporation a copy of a confidential workplace harassment report which he had received during a closed restricted city council meeting. The trial judge found that the disclosure of the report occurred on August 18, 2008. His appeal from conviction was dismissed by the summary conviction appeal judge. Mr. Skakun then sought leave to appeal to this Court on two issues. He was granted leave to appeal on the single issue of "whether the summary conviction appeal judge erred in law in confirming the trial judge's conclusion that a municipal councillor is an 'officer ... of a public body' under s. 30.4 of the *Freedom of Information and Protection of Privacy Act*." See *R. v. Skakun,* 2013 BCCA 94 at para. 19.

[4] Mr. Skakun submits that the plain and ordinary meaning of the term "officer" in s. 30.4 is not evident when read in its immediate context and that the dictionary meaning of "officer" does not shed light on the legislators' intended meaning. Therefore, he submits, the term is ambiguous and resort must be made to interpretive aids. In this case, those include the technical meaning of the term to its specialized municipal audience. He points to other internal provisions of *FOIPPA* that refer separately to the term "officer" and "elected official"; these terms are also used separately from references to municipal councillors in the *Local Government Act,* R.S.B.C. 1996, c. 323 [*LGA*], and the *Community Charter,* S.B.C. 2003, c. 26. He contends that if the Legislature had intended to include municipal councillors in s. 30.4, it would have done so explicitly. He also relies on a number of secondary principles and presumptions of statutory interpretation to support his position that the term "officer" in s. 30.4 does not include an elected municipal councillor. He maintains that such an interpretation would not give elected municipal councillors freedom to disclose unauthorized personal information to the public with impunity, as they continue to be subject to s. 117 of the *Community Charter,* which also prohibits such disclosure:

> 117(1) A council member or former council member must, unless specifically authorized otherwise by council,
>
> > (a) keep in confidence any record held in confidence by the municipality, until the record is released to the public as lawfully authorized or required, and
> >
> > (b) keep in confidence information considered in any part of a council meeting or council committee meeting that was lawfully closed to the public, until the council or committee discusses the information at a meeting that is open to the public or releases the information to the public.

[5] The respondent Crown submits that the quasi-constitutional status of *FOIPPA* mandates a "broad, liberal, and purposive interpretation" of s. 30.4 (citing *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2011 SCC 53, [2011] 3 S.C.R. 471 at para. 62) in order to advance fundamental Canadian values of access to information and the protection of privacy of personal information in the control of public bodies. The Crown contends that while the term "officer" is not defined in *FOIPPA,* its omission from the list of public bodies exempted from the legislation (judges and members of the legislative assembly) and its dictionary meaning, which includes "[i]n public affairs … a person holding public office under … local government" (*Black's Law Dictionary,* 9th ed.) and "a holder of a public …office; … an appointed or elected functionary" (*Canadian Oxford Dictionary,* 2nd ed.), informs an interpretation that includes both appointed and elected officials, including municipal councillors. The Crown maintains that an application of the broad and purposive approach, and "[t]he first and cardinal principle of statutory interpretation … that one must look to the plain words of the provision" (*R. v. D.A.I.,* 2012 SCC 5, [2012] 1 S.C.R. 149 at para. 26), leads inexorably to an interpretation of "officer" in s. 30.4 that includes elected municipal councillors.

[6] For the reasons that I shall explain below, in my opinion the term "officer" in s. 30.4 of *FOIPPA* is not ambiguous. Based on the plain and ordinary meaning of the term, when read in the context of the

broadly-stated purposes and wide range of targets in the legislation, I am of the view that "officer" in s. 30.4 includes an elected municipal councillor.

The legislative scheme

[7] The relevant provisions of *FOIPPA* are those that were in place in 2008 when the unauthorized disclosure of confidential information occurred in this case. While there have been some minor changes to the legislation since then, it is common ground that at the time of the offence *FOIPPA* applied to records in the custody or control of officials within a public body, which included by definition a municipality.

[8] Section 2(1) of *FOIPPA* sets out the purposes of the legislation: (i) to make public bodies more accountable to the public by providing the public with access to their records; and (ii) to protect personal privacy by preventing the unauthorized collection, use or disclosure of personal information by public bodies that would unreasonably invade the privacy of individual members of the public. See *Legal Services Society v. British Columbia (Information and Privacy Commissioner),* 2003 BCCA 278 at para. 1, 14 B.C.L.R. (4th) 67.

[9] The Supreme Court of Canada has endorsed these objectives in different contexts. Under the federal regime encompassed by the *Access to Information Act,* R.S.C. 1985, c. A-1, and the *Privacy Act,* R.S.C. 1985, c. P-21, the Court observed that while an open and democratic society requires access to information in the hands of public bodies, it must also offer protection for some of that information "in order to prevent the impairment of those very principles and promote good governance": *Canada (Information Commissioner) v. Canada (Minister of National Defence),* 2011 SCC 25, [2011] 2 S.C.R. 306, at para. 15 [*National Defence*]. In *Lavigne,* the Court observed that the federal *Privacy Act* "is a reminder of the extent to which the protection of privacy is necessary to the preservation of a free and democratic society" (para. 25). In the context of Alberta's *Personal Information Protection Act,* S.A. 2003, c. P-6.5, the Court underscored the importance of privacy in a "vibrant democracy" and raised the status of legislation that aims to provide individuals with a measure of control over their personal information to the level of "quasi-constitutional": *Alberta (Information and Privacy Commissioner)* at paras. 19, 22.

[10] *FOIPPA* is structurally complex. It has six distinct parts, each of which deals with a different subject matter: Part 1 – Introductory Provisions; Part 2 – Freedom of Information; Part 3 – Protection of Privacy; Part 4 – Office and Powers of Information and Privacy Commissioner; Part 5 – Reviews and Complaints; and Part 6 – General Provisions. Section 30.4 falls within Part 3 of the Act. The legislation also includes three schedules: Schedule 1 – Definitions; Schedule 2 – Public Bodies; and Schedule 3 – Governing Bodies of Professions or Occupations. Schedules 2 and 3 list respectively, a wide range of public bodies and governing bodies of professions or occupations that are subject to the legislation. Schedule 1 defines a "public body" as including "a local public body" but excludes "the office of a person who is a member or officer of the Legislative Assembly" or "the Court of Appeal, Supreme Court or Provincial Court". A "local public body"

is defined as including "a local government body"; a local government body is defined as including a "municipality". The scope of s. 30.4's application is increased by s. 3(3)(e), which makes s. 30.4 applicable to "officers of the Legislature [and] their employees ... as if the officers and their offices were public bodies".

[11] There is no definition for the term "officer". This omission provides the foundation for the appellant's argument that the term is ambiguous. From that conclusion, the appellant argues for a narrow interpretation of s. 30.4 that restricts the term to appointed officials only.

The first and cardinal principle of statutory interpretation

[12] The preferred "modern approach" to statutory interpretation endorsed by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd (Re),* [1998] 1 S.C.R. 27 at para. 21, adopts the classic statement from Elmer Driedger's *Construction of Statutes* (2d ed. 1983) at page 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[13] This approach, the Court recognized, is not "founded on the wording of the legislation alone" (para. 21) but requires consideration of "the plain meaning of the specific provisions in question" in the context of "the scheme of the [legislation], its object or the intention of the legislature" (para. 23). The Court also relied on the statutory principle codified in what is now s. 8 of the *Interpretation Act,* R.S.B.C. 1996, c. 238:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[14] In *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42, [2002] 2 S.C.R. 559, the Court further observed:

> [27] The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.,* [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52 as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter".

[15] Other presumptions and principles of statutory interpretation are engaged if a legislative provision is found to be ambiguous. This would include the strict construction of penal provisions for which the appellant advocates: *Bell ExpressVu* at para. 28. However, a provision is not ambiguous merely because individuals

may differ on its interpretation. Genuine ambiguity exists only if a provision is reasonably capable of giving rise to two or more plausible meanings, "each equally in accordance with the intentions of the statute" (*CanadianOxy Chemicals Ltd. v. Canada (Attorney General),* [1999] 1 S.C.R. 743 at para. 14) and consistent with the entire legislative scheme.

[16] In *Bell ExpressVu,* the Court explained the meaning of "ambiguity" in this manner:

> [29] What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte,* [*Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108] *supra,* at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, *per* Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para, 14 is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".
>
> [30] ... it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (*Willis* [Professor John Willis], "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1), *supra,* at pp. 4-5).
>
> [Emphasis in original.]

[17] Therefore, the "modern approach" to statutory interpretation seeks "to determine the intention of Parliament by reading the words of the provision, in context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act and the object of the statute" (*National Defence* at para. 27). Stated otherwise, it is to choose an interpretation "that best honours [the Legislature's] intention in enacting the ... regime": *R. v. Fice,* 2005 SCC 32, [2005] 1 S.C.R. 742 at para. 39.

[18] The question then is: What is the ordinary and grammatical meaning of the term "officer" in s. 30.4, when read in its entire context and harmoniously with the *FOIPPA* legislative scheme, that best ensures the attainment of *FOIPPA's* objects and gives effect to the legislative intention of its drafters?

Discussion

[19] In the absence of a statutory definition, the starting point of the interpretative analysis is typically the dictionary definition of the statutory term. See *R. v. A.D.H.,* 2013 SCC 28, [2013] 2 S.C.R. 269 at paras. 43-46; *R. v. Steele*, 2007 SCC 36, [2007] 3 S.C.R. 3 at para. 31. As previously noted, the dictionary meanings of "officer" include both appointed and elected officials of public bodies. The true meaning of the term, however, can only be determined when its dictionary definition is considered in the context of the legislative scheme as a whole.

[20] The appellant relies on the differentiation between the term "officer" in s. 30.4 from other terms for an elected member of a public body in other parts of *FOIPPA,* to argue for an application of the statutory presumption that the same words should carry the same meaning throughout a statute. For this principle, he cites *R. v. Zeolkowski,* [1989] 1 S.C.R. 1378 at 1387, and the corollary principle from *Jabel Image Concepts Inc. et al. v. Minister of National Revenue* (2000), 257 N.R. 193 (F.C.A.) at para. 12, that "[w]hen an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning". He reasons that the Legislature must therefore have intended to limit the meaning of "officer" in s. 30.4 to an unelected official. As an example in support of this submission, he refers to s. 73 in Part 6 – General Provisions. Section 73 deals with the protection of a public body from legal actions and provides that no action lies against a public body, the head of a public body, an elected official of a public body, or any person acting on behalf of or under the direction of the head of a public body.

[21] The complexity of the *FOIPPA* legislative scheme is evident in its compartmentalization of a variety of different subject matters. While s. 73 (Part 6 – General Provisions) and s. 12(3)(b) (Part 2 – Access to Information) refer to "elected officials", s. 76(2)(c) (Part 6 – General Provisions) and s. 22(4)(e) (Part 2 – Access to Information) refer to "officers". Section 30.4, the offence provision in Part 3 for the protection of privacy, refers only to "officer" and includes no other reference to an elected member. The appellant would interpret this as legislative intent to exclude elected municipal councillors from the reach of s. 30.4. I am unable to agree.

[22] The significance of the different terminology in the protection of personal information provisions of *FOIPPA* requires an understanding of the interrelationship between Parts 2 and 3. Part 2 authorizes access to all types of information from public bodies where there has been a formal request by a citizen. A formal request for access to information triggers s. 22(1) in Part 2, which mandates certain exceptions. Those exceptions include instances where the disclosure of personal information "would be an unreasonable invasion of a third party's personal privacy." Part 3, in comparison, provides for the protection of privacy of only personal information that is in the control of public bodies. Section 22 is only applicable to information requests under Part 2. Within Part 3, s. 22 is only applicable where a provision in Part 3 specifically refers to s. 22 or Part 2. See *Canadian Office and Professional Employees' Union, Local 378 v. Coast Mountain Bus Company Ltd.*, 2005 BCCA 604 at paras. 48-49 [*Coast Mountain*]. The duality of *FOIPPA's* objectives and the paramount importance of the privacy provisions of *FOIPPA* were expressly noted by Chief Justice Finch in *Coast Mountain* at para. 17:

> Both Part 2 and Part 3 of the *Act* recognize the specific concerns associated with "personal information" and the fact that when dealing with such information, "privacy is paramount over access": see *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403 at para. 48.

[23] Another notable feature of *FOIPPA* is its use of inclusive definitions. As previously stated (in para. 10 above) a "public body" includes a "local public body", which in turn includes a "local government body",

which includes a "municipality". The appellant has not directed the Court to any provisions in *FOIPPA* that suggest an "elected official" may not also be an "officer". In my review of the legislation there are no apparent provisions that would suggest an "elected official" may not include an "officer" or that such an interpretation would create an inconsistency in the application of the statute. To the contrary, absent a conflict or inconsistency that would be created by such a narrow interpretation of s. 30.4, and in view of the "paramount" objective of protecting privacy under the legislation, I am unable to discern why an "elected official" and an "officer" would be mutually exclusive terms.

[24] A narrow interpretation of s. 30.4 that would limit its application to appointed officials only would be inconsistent with the Legislature's enactment of s. 3(3). Section 3(3) further broadens the scope of the application of s. 30.4 to include officers and offices that are not treated as "public bodies" for the purposes of the rest of the *Act*. An interpretation that would exclude elected municipal councillors from the reach of s. 30.4 leads to a gap in the application of the legislation and in my view to a perverse result that is inconsistent with the underlying objectives of the legislation. It also creates the potential for piecemeal enforcement of its objectives when applied to other public bodies that may not have alternative enforcement legislation to bridge the gap.

[25] The appellant relies on *National Defence* to support his submission that the access to information and protection of privacy provisions of *FOIPPA* must be interpreted seamlessly together (at para. 74), all in the same manner. In *National Defence,* the Supreme Court rejected a function-based approach to the application of the *Access to Information Act* and the *Privacy Act* to federal Ministers. At issue was: (i) the right to access "any record under the control of a government institution" provided for in s. 4(1) of the *Access to Information Act*; and (ii) the exception in s. 3(j) of the *Privacy Act*, which enabled disclosure of personal information regarding "an individual who is or was an officer or employee of a government institution" where the information "relates to the position or functions of the individual" [emphasis added].

[26] The factual underpinnings of the case were unique and unusual. The issue of the interpretation of certain provisions of the federal *Access to Information Act* arose in the context of a request for information from the Prime Minister's Office (the "PMO"), the Minister of National Defence, the Minister of Transport, the RCMP and the Privy Council Office (the "PCO"). The first issue was whether a Minister was a government institution under s. 4(1). The Court concluded that the PMO, Minister of National Defence, and Minister of Transport were not "government institutions". Parliament had chosen to define "government institution", as it applied to departments and ministries, in the form of a list, which did not include the Prime Minister or the Ministers of National Defence or Transport. It also rejected an interpretation of the relevant provisions of the *Access to Information Act* that would have created a dividing line between a Minister's political and non-political functions in order to determine whether the request was for information under the control of a government institution (paras. 37-42).

[27] Also at issue was whether the information requested of the PCO (the Prime Minister's agenda) was "personal information" protected from disclosure by s. 19(1) of the *Access to Information Act*. The Court concluded that while the PCO was a government institution, it would be contrary to Parliament's intention to interpret s. 3(j) of the *Privacy Act* in a manner that rendered the Prime Minister part of a government institution for the purposes of the *Privacy Act* but not the *Access to Information Act*. Writing for the majority, Charron J. identified the need for both federal acts to be read together "as a seamless code", concluding:

> [74] Finally, as this Court explained in *Dagg v. Canada (Minster of Finance),* [1997] 2 S.C.R. 403 (*per* La Forest J. in dissent but not on this point), and reiterated in [*Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66], the *Access to Information Act* and the *Privacy Act* [R.S.C. 1985, c. P-21] are to be read together as a seamless code. The interpretation of Kelen J. and the Commissioner would create discordance between the two statutes. Under the *Access to Information Act,* a Minister or Prime Minister would not be part of a government institution, while under the *Privacy Act,* he would be considered an "officer" of the government institution. I agree with the Federal Court of Appeal. Had Parliament intended the Prime Minster to be treated as an "officer" of the PCO pursuant to the *Privacy Act,* it would have said so expressly. Applying s. 3(j) of the *Privacy Act* to the relevant portions of the Prime Minister's agenda under the control of the RCMP and the PCO, I conclude that they fall outside the scope of the access to information regime.

[28] Charron J. also cautioned against a court relying on the "quasi-constitutional" nature of the legislation to interpret its provisions without resort to the general principles of statutory interpretation, emphasizing that a court should not rewrite the actual words of the legislation "with its own view of how the legislative purpose could be better promoted" (para. 40).

[29] The concern raised in *National Defence* regarding the potential for an inconsistent interpretation of the provisions of the *Access to Information Act* and those in the *Privacy Act* is clearly distinguishable from the circumstances of this case. I agree that the quasi-constitutional nature of the legislation does not obviate the need to apply the principles and presumptions of statutory interpretation in order to determine the true meaning of s. 30.4. However, unlike the *Privacy Act* and *Access to Information Act*, *FOIPPA* is a single piece of legislation that incorporates the dual objectives of access to information and protection of privacy to personal information. It defines the persons and institutions to which the statute applies using broad language, with specific exclusions as necessary (such as the exclusion of MLA's and members of the judiciary from the definition of "public body"). This legislative decision, when considered in conjunction with the importance of the underlying values recognized in *FOIPPA's* stated objectives, attracts a generous interpretation that permits the achievement of the statute's broad public purposes. Common sense would also dictate such an approach. In my view, an interpretation of *FOIPPA* that renders disclosure of personal information in the control of a municipality permissible on the basis of who makes the disclosure would not be a "seamless" interpretation of the dual objectives laid out in *FOIPPA*.

[30] The importation of the meaning of "officer" from other statutes, in a different context, also does not assist in the interpretation of s. 30.4. In this regard, I echo the sentiments of Charron J. in *National Defence*

(at para. 71) that the meaning of "officer" must be ascertained in its proper context and not by resorting to definitions in other statutes, in the absence of any indication that incorporation of those definitions was intended. *FOIPPA* is very different legislation from the *LGA* and *Community Charter.* Both the *LGA* and the *Community Charter* are sector-specific enabling statutes that cloak municipalities (in s. 3 of the *Community Charter*) and regional districts (in s. 1 of the *LGA*), with the legal authority to govern their communities. In contrast, *FOIPPA* is a complete code for the implementation of its dual objectives of access to information and protection of personal information in the control of public bodies. It is not sector specific but targets a wide range of public bodies and organizations. Therefore, to import the meaning of "officer" from narrowly-focussed municipal/district-related legislation into the broad regime of *FOIPPA* would, in my view, unduly restrict its application and result in an inconsistent and piecemeal approach that is contrary to the legislative intent. Again, this would create an absurdity where an elected municipal councillor would not be subject to *FOIPPA* even though the legislation clearly intended municipalities to be subject to its requirements.

[31] The appellant relies on s. 117 of the *Community Charter* to restrict the application of s. 30.4 of *FOIPPA* to appointed officials only, arguing that s. 117 of the *Community Charter,* in combination with s. 5 of the *Offence Act,* R.S.B.C. 1996, c. 338, covers the gap that such an interpretation would create. With respect, this submission merely begs the issue. As was observed in *R. v. Sheets,* [1971] S.C.R. 614 at 621, "[t]he fact that a person may, because of an act or omission, be subject to prosecution under two statutory provisions, is not *per se* a decisive criterion of interpretation of either one."

Disposition

[32] Properly construed, the ordinary and grammatical meaning of "officer" in s. 30.4 of *FOIPPA*, based on its dictionary definition (both legal and non-legal), when read in the context of the legislation's broad stated purposes and wide-ranging scope of application to public bodies and organizations, inexorably leads to the conclusion that the legislative intention was for "officer" in s. 30.4 to include both elected and appointed officials. In the result, I find no error in the decision of the summary conviction appeal judge to uphold the trial judge's interpretation of s. 30.4 of *FOIPPA* and I would dismiss the appeal.

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Mr. Justice Harris"

THE LAW OF OPEN AND CLOSED MEETINGS

November 23, 2007

By Grant Murray and Christina Reed

THE LAW OF OPEN AND CLOSED MEETINGS

Because municipal councils perform their most important functions in meetings, understanding the laws surrounding whether meetings on sensitive topics can be closed to the public is vital to council members and the administrators who support them.

I. STARTING POINTS

Despite centuries of common law surrounding this issue, statutory law governs whether council meetings can be closed to the public in British Columbia, as well as most other provinces. The *Community Charter* contains the most recent modifications to the rules for open and closed meetings.

The rules discussed below apply to municipalities, regional districts, Islands Trust, and the entire range of local government bodies including council committees, municipal commissions, advisory committees and parcel tax review panels (s. 93). They apply to all meetings, whether regular or special. (For simplicity, in this paper, the word "council" includes all decision making bodies subject to these rules.) It is also worth recalling that some recent cases have broadly deemed a council meeting to be any gathering (1) to which all members of council have been invited, and (2) that is a material part of council's decision-making process. Council gatherings where all council members could be seen to be making decisions, or moving towards making decisions, meet this two-part definition. Care should be taken that all such gatherings are held in accordance with the *Charter*'s open meeting provisions.

The starting point of the analysis for open and closed meetings is that a meeting of council should be open to the public, unless certain statutory exceptions can be met (s. 89(1)). This 'default rule' of openness is grounded in the fact that the Canadian democratic society values public accessibility to the decision-making of elected representatives. Council may not vote on the reading of a bylaw or adopt a bylaw when that meeting is closed to the public (s. 89(2)). Any action taken contrary to the statutory rules will likely result in a nullity, so a failure to comply with this rule means that the reading will be invalid.

II. WHAT MEETINGS CAN BE CLOSED TO THE PUBLIC

The *Charter* balances the public need for open meetings with the need for councils to be able to discuss certain sensitive matters in closed meetings, also known as *in camera* meetings. Under the *Charter*, a council may close its meeting to the public if certain subject matters are to be considered. The subject matters themselves are limited, and case law defines the boundaries of what those subject matters encompass.

In understanding closed meetings, it is important to note that there are two general categories that the subject matters fall into – those subjects that **must** be closed to the public and those subjects that **may** be closed to the public.

Council **must** close a meeting by passing a resolution that sets out the basis for closing the meeting to discuss any of the following (s. 90(2)):

- a Freedom of Information and Protection of Privacy Act request directed at the municipality;
- confidential information that relates to negotiations between the municipality and the federal or provincial government or both, or between the federal or provincial government and a third party (i.e. negotiations with a First Nation under a treaty process);
- a matter related to the municipality that is being investigated by the Provincial Ombudsman; and
- a matter that, under a separate enactment, must be discussed in a closed meeting.

Council **may** close a meeting or part of a meeting by passing a resolution that sets out the basis for closing the meeting to discuss any of the following (s. 90(1)):

- personal information about identifiable individuals appointed to or being considered for appointment as an officer, employee or agent of the municipality (or a similar position);
- personal information about individuals being considered for a municipal award or who have offered a gift to the municipality on condition of anonymity;
- labour relations or employee relations;
- security of the property of the municipality;
- acquisition, disposition or expropriation of land or improvements, if council considers that municipal interests could be reasonably harmed by disclosure;
- law enforcement, if disclosure could harm an investigation or enforcement of an enactment;
- litigation or potential litigation impacting the municipality;
- a hearing or potential hearing by an outside administrative tribunal (e.g., Gaming Commission, Motor Carrier Commission, Utilities Commission) affecting the municipality;
- the receipt of legal advice, including communications necessary for that purpose;

- information that is prohibited or information that if it were presented in a document would be prohibited, from disclosure under section 21 of the *Freedom of Information and Protection of Privacy Act*;

- municipal service negotiations and related discussions that are at their preliminary stages and that, in council's view, could reasonably be expected to harm the interests of the municipality if held in public;

- objectives, measures and progress reports discussed with municipal officers and employees for the purposes of preparing the municipality's annual report [despite this report being a cornerstone of the 'open government provisions in the *Charter*];

- a matter that under another enactment is such that the public may be excluded;

- whether or not the meeting should be closed (either under subsection 1 (permitted) or subsection 2 (required)); and

- whether or not council wishes to use the authority under section 91 of the *Charter* to exclude or allow municipal staff or other persons to attend a closed meeting.

III. PROCEDURAL ISSUES

Before holding a closed meeting, council must state in a public meeting the fact that the meeting or a part of it is to be closed to the public and the applicable subject matter (a subsection of s. 90 as listed above) that is the basis for closing the meeting.

A tricky area arises because one of the bases on which a meeting may be closed is to consider whether an upcoming meeting ought to be closed or not. Council can avoid having to go back into open meeting to pass the resolution to deal with that matter in closed meeting, after having so decided, by using a two-part resolution. Some examples of such a two-part resolution are:

> "RESOLVED that the meeting be closed to the public:
>
> (a) for the purpose of considering whether a matter of [labour relations] should be the subject of a closed meeting, and
>
> (b) if Council determines that the matter of [labour relations] should be the subject of a closed meeting, for the purpose of discussing that matter."

or

> "RESOLVED that the meeting be closed to the public:
>
> (a) for the purpose of consideration whether disclosure to the public of information related to [the acquisition, disposition or expropriation of land or improvements] might reasonably be expected to harm the interests of the municipality, and
>
> (b) if the Council determines that such harm must reasonably be expected, for the purpose of dealing with a matter involving [the acquisition, disposition, or expropriation of land or improvements]."

If the council wishes to close all or part of a meeting to the public, the council may allow certain people who are not council members to attend that closed meeting (s. 91). This was not entirely clear from legislation in place before the introduction of the *Charter*. The council may allow certain municipal officers and employees to attend a closed meeting, or exclude certain officers and employees, as council deems appropriate (s. 91(1)). In the case of persons other than officers and employees, their attendance at a closed meeting depends on whether the subject matter to be discussed in that closed meeting falls into the permitted ("may") category of s. 90(1) or the required ("must") category of s. 90(2). If the subject matter falls into the permitted ("may") category, a person other than a municipal employee or officer may be admitted to the closed meeting if the council considers that person's attendance is necessary. If the subject matter falls into the required ("must") category, a person other than a municipal employee or officer may be admitted to the closed meeting, if the council considers that person's attendance to be necessary and if the person already has knowledge of the confidential information or if the person is a lawyer attending to provide legal advice to the council (s. 91(2)).

Section 97 of the *Charter* requires that all minutes of council meetings be available to the public, except for those taken at a meeting or part of a meeting that is closed to the public. The corporate officer is assigned responsibility for ensuring that accurate minutes of the meetings of council and council committees are prepared and that the minutes are maintained and kept safe. If the council excludes its officers from a closed meeting, the minutes of the meeting must be taken by someone in attendance at the meeting. However, the corporate officer is still responsible to ensure that these minutes are accurate. The minutes of a closed meeting must record the names of all persons in attendance: council members, municipal officers, employees, or other persons admitted by the council.

IV. CASE LAW AND THE OPEN MEETINGS RULE

The *Community Charter* does not detail the legal consequences of breaching the open meeting rule. However, a variety of cases provided a good indication of the approach the courts will adopt.

A. *London (City) v. RSJ Holdings Inc.* (2007)

The most important recent decision, *London (City) v. RSJ Holdings Inc.*, comes from the Supreme Court of Canada. This is the first time that Canada's top court has waded into this issue. Although the Supreme Court of Canada's decision on this matter is clearly the most important, it is worthwhile to review the case as it made its way to Ottawa.

In *RSJ Holdings*, the City of London, Ontario, passed an interim control bylaw that created a one-year freeze on all development in a specific corridor. The Council adopted the bylaw after holding two closed meetings and an eight-minute open meeting. At the eight-minute open meeting, the municipal council introduced, gave three readings to, and passed 32 bylaws, including the interim control bylaw, without public debate or discussion.

A company affected by the interim control bylaw applied for an order to quash the bylaw on the grounds that the City violated its statutory obligation, under the Ontario *Municipal Act,* to hold meetings in public. The company had bought some land and applied for permits to construct some student housing. The interim control bylaw had been adopted in response to these applications.
At trial, the Ontario Superior Court of Justice held that the meeting was properly closed to the public because the bylaw being considered created a real potential for litigation. The judge also found that the bylaw was not adopted at the *in camera* meetings, but at the short public meeting. The judge found that this was within the City's powers. The company appealed.

The Court of Appeal overturned that ruling and held that the fact there is a statutory right of appeal for a person affected by the bylaw and that there might be, or even inevitably would be, litigation arising from the bylaw did not make the subject matter under consideration at the closed meeting "potential litigation". In this case, the Court found it was clear that the subject matter that was being considered in the closed meeting was the bylaw, and not any litigation or potential litigation.

The Court of Appeal also considered whether discussions regarding the bylaw fell under the protection of solicitor-client privilege. The Court held that although a solicitor's report may be privileged, reports supplemented by a report from the solicitor did not cloak all of the documents with privilege. Based on this, the Court of Appeal found that the in camera meetings were not properly held. The Court also found that, given the draconian nature of the interim control bylaw, it was necessary that the bylaw be both discussed in public and adopted in public. The City had failed to discuss the bylaw in public, so the Court quashed the bylaw.

London appealed the Court of Appeal's decision to the Supreme Court of Canada. The City argued that the two closed meetings fell within an exception in the Ontario *Municipal Act* that permits closed meetings if they are permitted under another statute. Section 90(1)(m) of the *Community Charter* provides the same exception here in B.C. The City argued that a section of

the Ontario *Planning Act* allowed an interim control bylaw to be passed without prior notice and without holding a public hearing, and this meant that a public meeting was not required.

The Supreme Court of Canada dismissed the City's appeal. The Court unanimously found that the *Planning Act* provisions that permitted the City to waive notice and a public hearing prior to passing an interim control bylaw did not alter the statutory requirement to hold open meetings to adopt and debate bylaws under the *Municipal Act*. The Court concluded that the City's duty to give notice and to hold a public meeting was entirely distinct from its obligation to hold its meetings in public. In short, the discussions on the interim control bylaw still had to be conducted in an open public session. The eight-minute open meeting at which the impugned bylaw was passed did not cure the defect.

The Court provided some important commentary on the significance of the democratic nature of local governments, and stated that courts defer to local governments, in part, because they are democratic:

> The democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law. When a municipal government improperly acts with secrecy, this undermines the democratic legitimacy of its decision, and such decisions, even when *intra vires*, are less worthy of deference.

The Court's remedy was to strike down the bylaw. This is one of the few times this remedy has been exercised for a breach of the open meetings rule.

The question of whether the bylaw should be quashed as a result of the inappropriate procedure was also contested. It was not contested that the City had acted within its jurisdiction in passing the interim control by-law. The City was authorized to pass an interim control bylaw after a land use study was conducted, and a land use study was conducted. The issue was whether the failure to meet a procedural requirement, that did not go to jurisdiction, could also be grounds for quashing the bylaw. The Court accepted that it could be.

The Court emphasized how important it was that RSJ be given an opportunity to observe an open and transparent process, given the fact that it was not entitled to notice of the City's intention to pass the by-law nor any right to make representations at a public hearing. The Court stated that the potentially draconian effects of interim control bylaws accentuated the need for the courts to jealously require that "the meeting in which an interim control by-law is discussed be open to the public as required by ... the Act".

B. *Farber v. Kingston (City)*(2007)

The other recent case of some significance also arose in Ontario. In *Farber v. Kingston (City)* the Court of Appeal again grappled with the issue of open meetings.

In *Farber*, a resident challenged the validity of a bylaw recognizing the City's acceptance of a $1,000,000 donation from a prominent Kingston family. In exchange for the donation, the bylaw renamed the City's primary gathering place from "Market Square" to "Springer Market Square". The resident argued that the bylaw was illegal because it was simply the formalization of discussions and a decision previously made by the Council at two other meetings, which the resident argued were unlawfully held *in camera.* The resident did not challenge the lawfulness of the actual public meeting at which the bylaw was adopted.

Council first considered the matter at an *in camera* council meeting at which it received legal advice about its ability to accept the donation. A month later, Council again considered the matter at an *in camera* Committee of the Whole meeting at which it received further legal advice.

The Ontario *Municipal Act* contains provisions similar to sections 89 to 93 of the *Community Charter* setting out the rules about open or closed meetings. It includes the rule that all meetings are to be open to the public unless one of the enumerated exceptions applies permitting or requiring that the meeting be held *in camera.* The Court of Appeal found that the two impugned meetings were properly held *in camera* pursuant to the exception for matters that are subject to solicitor-client privilege. However, the Court went on to find that the City breached the *Act* by failing to adequately state its reasons for closing the meeting to the public.

The Ontario *Act* requires that council first state "the general nature of the matter to be considered at the closed meeting" before excluding the public. The resolution for both meetings stated that Council was closing the meeting to the public simply to consider "legal matters". The Court of Appeal held that this description was insufficient, finding that the principles of transparency and openness in governance necessitated a description that "maximizes the information available to the public while not undermining the reason for excluding the public". Basically, the Council could have gone *in camera,* but did so improperly.

Section 92 of the *Community Charter* provides a similar, but differently worded requirement. Under its open meeting regime, councils must state "the basis under the applicable subsection of section 90 on which the meeting or part is to be closed". The differences in the Ontario and B.C. statutory provisions arguably suggest that B.C. local governments need only cite the applicable subsection of section 90 and repeat the generic basis listed in that subsection. That said, the

principles of openness and transparency in municipal government transcend drafting differences in provincial statutes, and it is possible that a B.C. court would find that these principles demand a higher standard of public disclosure before local governments conduct business behind closed doors.

The Court characterized this breach of the Act as a procedural irregularity that had no effect on the actual decision by Council to adopt the bylaw, which was done in a properly convened public Council meeting after a public hearing. The bylaw was upheld. The key difference between this case and *RSJ* is that in this case there was an open meeting where the bylaw was discussed and adopted. The bylaw was given a full hearing at a public meeting attended by the public. That was not the case in RSJ, and is a good basis for distinguishing the different results.

C. Some Other Cases that have Dealt with Open Meeting Requirements

1. *Barrick Gold Corporation v. Ontario*

The Councils of two adjacent municipalities met privately in a motel. There was no public notice of the meeting and they discussed a plan for restructuring both municipalities. The scheme involved exchanging some territory and annexing other unorganized territories. After the meeting, each Council adopted a bylaw supporting the other's restructuring proposal and the Ministry of Municipal Affairs ordered the restructuring.

Ratepayers in the annexed areas sought to quash the bylaws on the grounds that they were, among other things, passed in bad faith. The court quashed the bylaws, finding that the holding of the meeting in the motel, contrary to the open meeting rules in the *Municipal Act*, was evidence of bad faith.

2. *Hospital Employees' Union v. Health Authorities (B.C.)*

Union challenges a hospital re-organization plan. One argument was that much of the plan was adopted in closed meetings that should have been open to the public. Meetings could be closed to the public "in the public interest". Meetings were often closed because the presence of the public "can inhibit free and open discussion and debate and can discourage innovative planning". Judge characterized this as "a cynical favouring of the interest of the bureaucracy over that of the public, as well as a stunning disregard for the legislative intent..."

Judge also determined that the health authority confused public presence with public input. Public meetings were essential, but public input was not. However, the Judge refused to declare the meetings illegal, because such declaration could have a significant effect on the legality of many of the financial commitments that the Board had entered into with "innocent" third parties.

3. *Marion Community Homes Corp. v. Kingston*

The corporation was locked out of a Council Committee meeting it sought to attend to request a rebate of garbage collection fees. It operated a 49-unit apartment building for senior citizens, and used a private garbage contractor which it paid $2,000.00 per year. The Township of Kingston passed bylaws imposing taxes for garbage collection and recycling programs, totalling in the corporation's case $7,278.00 per year. Upon becoming aware that it had for several years been paying twice for garbage collection, the corporation requested a partial rebate. Its representative attended a Committee of the Whole meeting on April 9, 1997 and made submissions; he was then advised that the matter would be further considered at another Council meeting on April 15th at 7:00 p.m. Upon attending at the Township building the corporation's representative found the door locked. The committee was meeting inside, and decided to deal with the matter further on April 29th. However, Marion Homes was not advised of this decision, and on April 29th the Council dealt with the matter by directing arrangements be made to actually collect garbage from the corporation's premises, without considering the rebate issue.

The corporation did not begin making use of the Township garbage services, however, and brought an action against the Township's successor, the City of Kingston, alleging various improprieties including breach of the Township's duty of procedural fairness to the corporation in connection with its application for an exemption. The evidence was that the Township knew that the front door to its building often locked automatically from the inside. The court held the Township breached its duty of procedural fairness by failing to ensure public access to its meeting on April 15th, and failing to advise the corporation of its decision to continue to deal with the matter on April 29th. It also failed to keep minutes of its April 8th, 15th and 29th meetings. Damages were awarded to the corporation, representing the cost of private garbage collection between April 15th, 1997 and the date of trial.

In both of these 1999 cases, there were serious consequences for failing to meet the open meeting requirements. The cases discussed below illustrate that the consequences of breaching the open meeting rules need not be serious,

4. *Southam Inc. v. Economic Development Committee of the Regional Municipality of Hamilton Wentworth*

The Economic Development Committee was a standing committee of the regional municipality. The Committee held a scheduled "in camera workshop" in a lounge area of the building where its regular meeting room was located. A local newspaper reporter was denied entry and no meeting minutes of the meeting were kept. The agenda included a review of the committee's terms of reference and directions for the future. The Ontario Supreme Court ruled that the

meeting was covered by the general "open meeting" rule in the regional municipality's procedure bylaw:

> "There is no doubt that members of a committee, meeting informally, can discuss questions within the jurisdiction of the committee privately, but when all members are summoned to a regularly scheduled meeting and their attempt to proceed in camera, they are defeating the intent and purpose of Council's bylaw which governs their procedure."

The court simply declared that the committee had exceeded its jurisdiction in holding the meeting in camera; none of the business that had been conducted at the meeting was affected.

5. *Southam Inc. v. Corporation of the City of Ottawa*

Ottawa City Council held a retreat at the "Calabogie Resort". Every councillor except one and certain City staff attended the first day of meetings. The meetings dealt with the City's capital expenditure plan, an infrastructure management strategy, and other issues.

The mayor and councillors attended the second day of meetings. The meetings dealt with the presence of councillors at official functions, decorum at Council meetings, relations with City staff, the performance of the chief administrative officer, and salaries for Council committee heads. Certain decisions made at the retreat were subsequently the subject of reports to Council committees, and ultimately to Council, for decision. The Ontario Court of Justice ruled that the decision of the Council to hold the retreat "in camera" was contrary to the City's own procedure bylaw and the *Municipal Act*, and exceeded the Council's jurisdiction.

> "Clearly, it is not a question of whether all or any of the ritual trappings of a formal meeting of Council are observed: for example, the prayer to commence the meeting or the seating of councilors at a U-shaped table. Neither should it depend entirely on whether the meeting takes place commencing at 2:30 p.m. on the first and third Wednesday of the month or is in substitution for such a Wednesday meeting. The key would appear to be the councilors are requested to (or do in fact attend without summons) attend a function at which matters which would ordinarily form the basis of Council's business are dealt with in such a way as to move them materially along the way in the overall spectrum of a Council decision. In other words, is the public being deprived of the opportunity to observe a material part of the decision-making process?" [emphasis added]

The court also ruled that the question was not moot, despite the retreat having already occurred by the time the matter came on for hearing, because the City might seek to hold future retreats, and it was in the public interest to resolve the question "given the potential recurrence of the same problem between the media and municipalities."

6. *Yellowknife Property Owners Association v. Yellowknife*

City aldermen and members of the City administration held weekly meetings "in camera" in a boardroom in the basement of the City hall. The meetings were originally briefing sessions initiated by the administrator. The clerk took minutes. One of the aldermen was not comfortable with these meetings. He gave evidence that decisions were taken at the meetings and not later ratified at Council meetings, and that aldermen developed positions at these meetings that were rarely changed afterwards. The administrator conceded that some matters that would otherwise have required a resolution to be considered in camera, were also discussed at these sessions. The Northwest Territories Supreme Court decided that the briefing sessions were meetings that should have been held in public.

V. SUMMARY

Failure to comply with the open meeting rules can have a serious affect on a local government's decisions. The Supreme Court of Canada has indicated that the public nature of municipal decisions is one of the reasons that the courts will defer to them. While not every breach of the rules will have serious consequences, the courts will declare that a failure to meet the rules is illegal.

NOTES

PUBLIC HEARINGS

November 27, 2009

Sukhbir Manhas

PUBLIC HEARINGS

I. INTRODUCTION

We are all very familiar with the requirement of section 890 of the *Local Government Act* that local governments hold a public hearing prior to adopting an official community plan bylaw or a zoning bylaw.

The purpose of that public hearing as stated in the section is to allow the public to make representations to the local government respecting matters contained in the proposed bylaw. To achieve this stated purpose, the Legislature has directed that, at a public hearing, "all persons who believe their interest in property is affected by the proposed bylaw must be afforded a reasonable opportunity to be heard or to present written submissions respecting matters contained in the bylaw that is the subject of the hearing".

The courts have grasped onto the stated purpose of public hearings, and the direction from the Legislature as to how to achieve that purpose, in their consideration of the provisions of the *Local Government Act* found in Part 26: Division 4 – Public Hearings on Bylaws, and in particular in their consideration of whether a local government has satisfied its obligation to hold a public hearing prior to the adoption of an official community plan bylaw or a zoning bylaw.

In doing so, and with the stated purpose in mind, the courts have developed common law requirements to address circumstances where there is a void in the statutorily mandated procedures for public hearings in Part 26: Division 4 of the *Local Government Act*. In addition, the courts have developed common law requirements to supplement the statutorily mandated procedures for public hearings in Part 26: Division 4 of the *Local Government Act*.

In this paper, we will discuss the requirement to hold a public hearing prior to the adoption of an official community plan bylaw or a zoning bylaw, with a view to the requirements of the *Local Government Act* and the common law (as it clarifies and, at times, supplements those requirements).

II. THE REQUIRMENT TO HOLD A PUBLIC HEARING

While the *Local Government Act* requires a local government to hold a public hearing prior to the adoption of an official community plan bylaw or a zoning bylaw, the decision as to whether a proposed bylaw should be advanced to a public hearing is discretionary.

In *Smith v. Surrey*, our Supreme Court considered the discretion of local governments in respect of the consideration of development applications and, in particular, in respect of the holding of a public hearing. In that case, the Court stated:

> ... nothing in the *Municipal Act* requires the respondent to proceed to first and second reading, to proceed to a Public Hearing once first and second reading has been given, to set a date for a Public Hearing once first and second reading has been given, to proceed with a Public Hearing even after the date for it has been set, to conclude a Public Hearing once it has commenced, to re-set a specific date if a Public Hearing is not concluded on the date originally set for it, or to set another date for a Public Hearing if no specific date is set when a Public Hearing which has commenced is adjourned. The "Code of Procedure" set out in the *Municipal Act* only requires a Public Hearing prior to the third reading of a zoning bylaw. Nothing which was done by the respondent failed to comply with the "Code of Procedure" set out under the *Municipal Act* relating to the passing of bylaws.

The discretion as to whether a proposed bylaw should be advanced to a public hearing was recently again considered by our Supreme Court; this time in the context of the doctrine of legitimate expectations. In *Vancouver Island Entertainment Inc. v. Victoria*, Vancouver Island Entertainment had applied to the City to rezone land for a casino. The City passed a resolution directing the application to proceed to public hearing, subject to receiving input from the British Columbia Lottery Corporation before the public hearing. The City's solicitor advised Vancouver Island Entertainment that the receipt of input from the Lottery Corporation was not a condition precedent to the public hearing, but that the input was important for land use considerations in zoning applications. After receiving input from the Lottery Corporation that it did not support another casino in the southern Vancouver Island region, the City passed a resolution rescinding its first resolution directing the application to proceed to public hearing. Vancouver Island Entertainment thereafter sought an order from the Court compelling the City to proceed to public hearing on the basis of the doctrine of legitimate expectations.

The Court held that there are four requirements that must be satisfied in order for the doctrine of legitimate expectations to apply. First, the representation or undertaking must be clear, unambiguous and unqualified. Second, the representation or undertaking must not relate to the exercise of legislative powers. Third, the representation or undertaking must not conflict with a statutory duty. Finally, the representation or undertaking must relate to procedural rather than substantive rights.

The Court held that none of the requirements for the application of the doctrine of legitimate expectations were or could be present and that, as a result, Vancouver Island Entertainment was not entitled to have the proposed bylaw forwarded to public hearing.

As can be seen from these cases, the only obligation on a local government to hold a public hearing is where the local government proposes to consider giving third reading to the proposed official community plan bylaw or the proposed zoning bylaw that is the subject of the public hearing.

III. PROCEEDING TO PUBLIC HEARING

A. Scheduling the Public Hearing

Section 890 (2) of the *Local Government Act* provides that, where a local government has decided to proceed with a public hearing for a proposed official community plan bylaw or rezoning bylaw, the public hearing must be held after first reading and before third reading of the proposed bylaw.

A local government wishing to proceed with a public hearing should pass a resolution referring the proposed bylaw to a public hearing, and directing staff to schedule the public hearing and to give the required notice under section 892 of the *Local Government Act*. It is not necessary for the resolution to set the date, time and place of the public hearing, or to establish the form of notice, as those matters are generally of an administrative nature. Indeed, addressing those issues in the resolution may cause difficulty for the local government; a change in a particular detail addressed in the resolution requiring the local government to amend the resolution before the public hearing may take place.

As for the scheduling of the public hearing, it is important that the public hearing be scheduled sufficiently in the future that members of the public have adequate time to inform themselves as to the issues, and to form a reasoned view as to the effect of the proposed bylaw on their property interest. This is necessary to ensure that the members of the public have been afforded a reasonable opportunity to be heard.

The length of time required for this purpose will depend on the particular circumstances relating to the proposed bylaw to be considered at the public hearing. Proposed bylaws that do not engage technical issues will require less time before the public hearing is held than will proposed bylaws that engage technical issues. In the latter circumstance, it is likely that the public will not be able to assess those technical issues without the assistance of those with expertise in the area, and the public should be afforded the opportunity to seek such assistance.

In *Pitt Polder Preservation Society v. Pitt Meadows (District)*, our Court of Appeal held that the delivery at the beginning of a multi-day public hearing of a number of technical reports requested by Pitt Meadows did not meet the requirements of procedural fairness. The Court observed that the reports were technical in nature and that their contents and conclusions could not readily be assessed without the assistance of those with expertise in the area. For this reason, the Court held that the reports ought to have been made available to the public in advance of the public hearing, and rejected Pitt Meadows argument that the public had an adequate opportunity during the course of the lengthy public hearing to obtain that assistance.

In *Botterill v. Cranbrook (City)*, our Supreme Court elaborated on the right of the public to obtain the assistance of an expert in reviewing technical reports. In that case, the Petitioner argued that members of the public ought to be afforded an equal amount of time to obtain a review of technical reports as the time that was necessary to prepare the reports in the first place. The Court held that all that is necessary is that there be sufficient time to prepare a comment in respect of the reports; it not being necessary to carry out a detailed examination of the reports or to prepare independent reports.

B. Delegating the Public Hearing

A local government may delegate the holding of a public hearing. The delegation may be made by either resolution or bylaw, but may only be made to one or more of the members of the local government's Council or Regional Board.

Where a local government delegates the holding of a public hearing, the delegation is not effective unless the notice of public hearing under section 892 of the *Local Government Act* includes notice that the hearing is to be held by a delegate, and the resolution or bylaw effecting the delegation is available for public inspection along with the proposed bylaw (as required by section 892 (2) (e) of the Act).

If the holding of a public hearing is delegated, the local government must not adopt the proposed bylaw that is the subject of the hearing until the delegate reports, either orally or in writing, the views expressed at the hearing. This report may take the simple form of a representation from the delegate that the public hearing was held, and that the minutes of the public hearing accurately set out the views expressed at the hearing.

C. Giving Notice of the Public Hearing

Section 892 (1) of the *Local Government Act* requires that notice of a public hearing must be given in accordance with that section. Sections 892 (2), (4), and (5) of the *Local Government Act* provide that a public hearing notice must contain the following information:

- The time and date of the public hearing;
- The place of the public hearing;
- In general terms, the purpose of the proposed bylaw;
- The land or lands that are the subject of the proposed bylaw;
- The place where and the times and dates when copies of the proposed bylaw may be inspected; and
- Where the proposed bylaw alters the permitted use or density of any area, either a sketch that identifies the area that is the subject of the proposed bylaw alteration or, if the area can be identified in a manner other than a sketch, identification of the area in that matter.

While ensuring that a public hearing notice complies with requirements 1, 2, 4, 5, and 6 above is generally straightforward, ensuring that a public hearing notice complies with requirement 3 above (i.e., ensuring that a notice, in general terms, sets out the purpose of the proposed bylaw) can prove to be difficult. There is no fixed content in a public hearing notice as to a general statement of the purpose of a proposed bylaw under section 892 (2) (c) of the *Local Government Act*. Each notice must be considered in its particular context. As stated most recently in the cases considering whether public hearing notices set out, in general terms, the purpose of the proposed bylaw, the test is simply whether the notice contains adequate information to allow members of the public to become aware of the purpose of the proposed bylaw in general terms, to decide whether to seek further information, and to decide whether to attend the public hearing. In other words, does the notice provide sufficient information to allow members of the public to fairly consider whether to exercise their right to be heard; a fundamental requirement of procedural fairness.

D. Making The Required Disclosure

1. What Must be Disclosed

Prior to *Pitt Polder*, the common law requirement of pre public hearing disclosure of information relating to a proposed bylaw to be considered at a public hearing was limited to documents in the possession of the local government at the time of the public hearing that either had been or would be considered by the local government in determining whether to adopt the bylaw.

In *Pitt Polder*, our Court of Appeal broadened the scope of that disclosure requirement and quashed official community plan and zoning amendment bylaws because of the manner in which the District had dealt with two categories of documents.

The first category of documents was reports that the District had required the developer to prepare in respect of the development's impact on traffic, the environment, agricultural land, and municipal taxation. The developer made the reports available to the District and to the public for the first time at the commencement of the public hearing that stretched over five days. The Court held that the reports should have been disclosed to the public in advance of the public hearing on the basis that members of the public, in order to be afforded a "reasonable opportunity to be heard" in respect of such reports, had to be afforded an opportunity to have the reports assessed by independent experts prior to the public hearing. The Court made no distinction between brief reports updating earlier impact reports that had been disclosed prior to the public hearing and new reports examining impacts that had not previously been assessed.

The second category of documents included an archaeological assessment provided in relation to the earlier development of adjacent land and correspondence that critiqued that assessment. The assessment had been provided to a predecessor local government several years earlier but was never provided to the District considering the official community plan and zoning amendment bylaws until the developer submitted it to the local government and to the public on the first day of the public hearing. Again, the Court found such disclosure insufficient in view of the scale of development proposed and the nature of the information in the report.

In *Canadian Pacific Railway Co. v. Vancouver (City)*, our Court of Appeal characterized the *Pitt Polder* decision as being regarded as one of the leading decisions in this province dealing with the pre public hearing duty to make disclosure to members of the public who oppose the enactment of a proposed bylaw. The Court in *CPR* also recognized that the decision in *Pitt Polder* is also regarded in the province as "having gone further than any prior decision in imposing a duty on a [local government] to make broad and effective disclosure to members of the public who may wish to oppose the enactment of a bylaw." The Court in *CPR* did not appear question the correctness of the *Pitt Polder* decision.

There have been numerous cases since *Pitt Polder* that have considered the import of that case.

In *Hastings Park Conservancy v. Vancouver (City)*, our Court of Appeal described the duty of disclosure prior to a public hearing as requiring that the public be "given a reasonable amount of information so that reasonably informed representations could be made at the hearing" in respect of the effect of the proposed bylaw.

In *Eaton v. Vancouver (City)*, our Supreme Court reviewed the *Pitt Polder* decision in the context of an allegation by the Petitioner that the City had breached the duty of disclosure by failing to make available to the public information utilized by staff in preparing financial information for the consideration of Council in respect of the proposed development. The Petitioner argued that the disclosure of this information was necessary in order for him to properly review and respond to the financial information provided by staff to the Council. In determining that the City had met its duty of disclosure, the Court held that *Pitt Polder* only imposes a duty on local governments to disclose documents or materials that are provided to and considered by the local government. In that case, it was held not to be necessary to disclose to the public the information relied on by staff in preparing the financial information that was made available to the Council as the information that the Petitioner sought had not been made available to the Council.

In *Eadie v. Vinje Development Properties Ltd. and District of Sicamous*, the Petitioner sought to set aside official community plan and zoning amendment bylaws on a number of grounds, including on the ground that there was an inadequate time frame between the date on which the District had made the proposed bylaws and related information available to the public for inspection (being the dated the District gave the bylaws first and second reading) and the date set for the public hearing; that time frame being 21 days. The Petitioner argued that the time frame was inadequate to allow for him to assess and review environmental and other reports submitted by the developer and, as a result, he was not afforded a reasonable opportunity to be heard at the public hearing. In addition, the Petitioner argued that, in any event, the delivery by the Petitioner of two additional reports to the District on the day of the public hearing precluded him from having a reasonable opportunity to be heard in respect of those reports. The Court held that members of the public were only entitled to disclosure of what was being placed before the Council, and that the District had satisfied its disclosure obligations in all of the circumstances on the basis that "the disclosure process adopted by the District permitted members of the public to have the same documentation that the District had as soon as the Council decided that it would proceed with the amendment process" and as soon as the documentation was made available to

the District. It is important to note that the District did not request the two technical reports that were received by it on the day of the public hearing. Those reports addressed matters within the jurisdiction of other governmental bodies. In this regard, the Court held that it was open to the District to leave consideration of those issues to those other governmental bodies or to later District processes (e.g., the building and development permit processes).

2. When Must Disclosure First Be Made

In *Eadie*, the Petitioner had been requesting information from the District in respect of the proposed development for several months prior to the development application having been made. The District did not provide the information until it had given the official community plan and zoning amendment bylaws first and second reading and had directed that the proposed bylaws be forwarded to public hearing. The Petitioner argued that this was inadequate disclosure. The Court accepted the proposition that the duty to disclose the proposed bylaws and relevant information did not arise until such time as the District had given first and second reading to the bylaws and had directed that they be forwarded to public hearing; the duty of disclosure only arising at such time as the decision had been made that the development application would not be denied, but would proceed through the bylaw consideration process.

3. How May Disclosure Be Made

It is common practice for local governments to prepare disclosure binders in respect of proposed bylaws that are to be considered at a public hearing. These binders are updated as new information is received by the local government in respect of the bylaws, and are made available to members of the public for review both prior to and at the public hearing itself.

In *Eadie*, the Court considered the Petitioner's argument that the District had an obligation to satisfy his request that copies of all relevant documentation be provided to him personally at his residence in Alberta. The Petitioner argued that, where much of the public affected by the proposed official community plan and zoning amendment bylaws resided outside of the District, it was insufficient for the District to solely make the disclosure binders in respect of the proposed bylaws available at the District's offices and the local library. The Court held that the District's process for disclosure was adequate and that the Petitioner had no right to personal delivery of the documents and that to impose such a requirement on a local government would be far too onerous.

While the preparation and maintenance of disclosure binders in respect of proposed bylaws that are to be considered at a public hearing is common practice, our Court of Appeal has held that it is not necessary for a local government to do so in order to meet its disclosure requirements. In *Wilde v. Metchosin (District)*, our Court of Appeal upheld the decision of the lower Court where the lower Court stated:

> In this municipality a Counter Book is made available to the public before a public hearing. It is not specific to any particular bylaw and contains documents that give the reader information

concerning the public hearing process, a paper on public hearing procedures and a paper on post-public hearing procedures. No binder is put together containing all of the information that is available to members of Council. In this case, counsel for the petitioner seeks to have the court impose a burden on the respondent to prepare such a document and have it available for inspection by any elector.

I accept the evidence of the respondent's staff member whose affidavit said the following:

> 7. Prior to the public hearing, it was not uncommon for the residents of Metchosin to attend at the Municipal Hall to obtain copies of Bylaw 444 and other information in the District's files with respect to Bylaw 444. We are a small rural community of approximately 5,000, and our practice is an informal one in which I, and other staff members, assist residents and visitors with obtaining, reviewing and copying the information they seek. I do not recall any complaints or concerns from residents requesting, reviewing or obtaining information on Bylaw 444 prior to the public hearing, with respect to this process.

In my view, when an elector comes to the respondent seeking information concerning a bylaw, the respondent has no obligation to determine the issues that concern that elector and direct him or her to the appropriate documents. Electors have the obligation to make specific requests. For example, in this case an elector might ask for the opportunity to review all correspondence between the developer and the respondent. He or she might seek the opportunity to consider all environmental studies or traffic studies made for the purposes of the development. The list of subjects that concern electors could be quite varied. There is a burden on the person seeking information to outline, even in general terms, the nature of the information he or she seeks.

In this case, after the bylaw received 3rd reading for the second time, the petitioner, with the assistance of her solicitor, obtained information which she says should have been given to her before the hearing. As a result of that request through counsel, the petitioner was given all she asked for at that time, with the exception of some documents where the respondent claimed solicitor-client privilege.

...

> I conclude the process engaged in by the respondent was open and designed to address the concerns of its electors. Members of the public were able to attend and, where requests were made, they were given access to relevant documents. There is no evidence upon which I can conclude that any elector, at any time, was denied access to relevant documents. In particular, there is no evidence the petitioner was denied access to relevant documents that would have allowed her to prepare a reasoned presentation.

E. Conducting the Public Hearing

1. The Role of the Local Government

The role of the members of a local government's Council or Regional Board at a public hearing is to maintain an open mind (i.e., a mind that is amenable to persuasion) and to listen to the representations being made. It is important that the members be attentive.

It is open to the members of a local government's Council or Regional Board at a public hearing to seek clarification from staff, the applicant or any speaker at the public hearing on issues of relevance to the public hearing. However, there is no obligation on the members to debate the issues or state their position in respect of the proposed bylaw at the public hearing.

2. Who May Make Representations

Section 890 (3) of the *Local Government Act* confers the right to speak on "all persons who believe that their interest in property is affected by the proposed bylaw" being considered at the public hearing.

While the section suggests that only persons with an interest in property have a right to speak at a public hearing, it would be very dangerous for a local government to limit speakers at a public hearing to those individuals. There is little doubt that the courts will interpret section 890 (3) of the Act broadly to permit members of the local public that do not have an interest in property to speak as well.

In addition, it is important to note that there is no territorial limitation in respect of the right to speak at a public hearing. The fact that an individual does not reside or own property within the local government's territorial jurisdiction does not remove the right to speak at the public hearing from that individual. There are many circumstances where the property of an individual located in an adjacent municipality or electoral area may be affected by a proposed bylaw. Under section 890 (3) of the Act, the individual has a right to speak at the public hearing. The fundamental question to be asked is, "Does the individual reasonably believe the his/her interest in property is affected by the proposed bylaw?" If the answer is "Yes", then the individual is entitled to speak at the public hearing.

It is permissible for those who are entitled to speak at a public hearing, to do so through a lawyer or other representative (See: *Bay Village Shopping Centre v. Victoria*).

3. The Manner In Which Representations May Be Made

Section 890 (3) of the *Local Government Act* requires that, the public be afforded a reasonable opportunity to be heard or to present written submissions at the public hearing.

The wording of the section affords the choice as to the manner in which the representations are to be made at the public hearing (i.e., orally or in writing) to the individual making them. Thus, local governments should be prepared to accept written submissions at the public hearing itself.

In order to ensure that all persons in attendance at the public hearing have an opportunity to review and respond to the written submissions, the written submissions should either be read into the record by a staff member or should be made available for inspection by members of the public for the duration of the public hearing. Where the written submissions are not read into the record, and are only made available for inspection at the public hearing, the chairperson of the public hearing should periodically announce that all written submissions are available for review if anyone wishes to comment on the content of those submissions. In addition, where the written submissions are not read into the record, and are only made available for inspection at the public hearing, members of the local government's Council or Regional Board should ensure that they review the written submissions before participating in any steps in furtherance of the adoption of the proposed bylaws.

4. The Content of Representations

(a) Irrelevant Representations

Section 890 (3) of the *Local Government Act* provides that representations may be made respecting matters contained in the proposed bylaw that is the subject of the hearing.

The language of the section incorporates the concept of relevance, as it relates to the representations being made, into the conduct of a public hearing. The courts have considered the concept of relevance in numerous areas of the law and have generally considered relevance to be an elastic concept and one that is over-inclusive rather than under-inclusive.

It is not recommended that local governments seek to restrict representations at a public hearing on the basis of relevance unless it is abundantly clear that the representations do not and cannot be seen to go to matters contained in the proposed bylaw. Before restricting representations o the basis of relevance, the chairperson of the public hearing should, without discouraging or suppressing the speaker from continuing his/her representations, first make enquiries of the speaker as to the relevance of the representations.

(b) Repetitive Representations

It is common for there to be a significant amount of repetition at a public hearing. This repetition occurs in the context of a single speaker's representations being repetitive, as well as in the context of a number of speakers making the same or similar representations.

In the former case, it is appropriate for the chairperson of the public hearing to ask that speakers not repeat themselves (as opposed to making the same point of another speaker) and to advise a speaker when he/she is being repetitive. However, the chairperson should be very cautious in doing so; encouraging the speaker to move on to representations that he/she has not already made. Where the speaker insists that he/she is not repeating himself/herself, the speaker should be permitted to continue.

In the latter case, the chairperson should not attempt to limit speakers from repeating the representations of other speakers. The courts have held that the repetition of one speaker's representations by other speakers is a form of advocacy, and can carry significant weight in and of itself.

5. Appropriate Procedural Rules

(a) Speakers Lists

It is open to the chairperson of a public hearing to make appropriate procedural rules for the orderly conduct of the public hearing.

One acceptable procedural rule for such purposes is the establishment of a speakers list. The speakers list should be maintained by a staff member, who should be readily accessible by the public. Members of the public should be permitted to have their name added to the speakers list at any time, regardless of whether they have already spoken or not. However, where a member of the public has already spoken, it is permissible for that person to be required to wait until all members of the public wishing to speak have had a first opportunity to do so.

(b) Time Limits

It is open to a local government to require a speaker to limit his/her representations to a specified time period initially, then to stand aside until all others present have had an opportunity to speak. Such a rule would be justified in order to protect the rights of others to be heard. However, there should not be an overall speaking time limit for any one speaker or for the hearing generally. Such a rule could have the effect, especially in the case of complex bylaws, of denying a speaker of his/her right to a reasonable opportunity to be heard at the public hearing.

6. The Duration of the Public Hearing

Local governments should not attempt to shorten a public hearing by holding it open continuously into the late hours of the night or the early hours of the morning until there is no one left to speak. It is likely that a person who attended the hearing has been denied a reasonable opportunity to be heard if he/she has been unable to speak and must return to his/her job or other commitments as a result of the hearing extending to the late hours of the night or the early hours of the morning. It is recommended that a public hearing be adjourned at a reasonable hour to another day to avoid such an issue. Where a public hearing is adjourned, it is not necessary for the local government to give further notice of the public hearing so long as the date, time and place for the resumption of the public hearing is announced to those present at the time that the hearing is adjourned.

IV. AFTER THE PUBLIC HEARING

A. Receipt of New Information

Our Court of Appeal has, on several occasions, considered the procedural fairness obligations of local governments relating to disclosure following a public hearing. The Court has clearly established that it is not proper for local governments to receive new information from either the proponents or opponents of a proposed bylaw after the public hearing. Where local governments have received new information after the public hearing, the local government must hold a new public hearing.

However, the Court has been mindful of the need for local governments to receive clarification and opinion in respect of issues raised at a public hearing from their staff after the close of the public hearing.

In *McMartin and Gage v. City of Vancouver*, the Court of Appeal considered circumstances where, after a public hearing, the local government received a letter from an officer of a trust company in favour of the proposed bylaw and heard further representations from the local government's Director of Planning and a member of its Engineering Department without giving a further opportunity to members of the public to make representations in respect of those representations. The Court held that, while representations from proponents or opponents of the proposed bylaw should be made at the public hearing, no similar constraint existed in relation to advice from staff or experts retained by the local government following the public hearing. Indeed, the Court stated that "the [local government] may obtain such advice as it sees fit, at least from its staff, or experts whom it may retain, on questions raised at the public hearing; even from those officials who have initiated the rezoning scheme."

In *Bourque v. Richmond*, in quashing the bylaw in question as a result of the local government having received a report from a committee that had heard from the developer after the close of the public hearing, the Court of Appeal specifically noted that "in reaching that conclusion [the Court wishes] to make it clear that [the Court does] not question the right of a municipal council,

following the conclusion of public hearings, to receive advice concerning a by-law, such as the one now under consideration, from its municipal staff or from experts retained by council to advise it."

Finally, in *Jones v. Delta*, the Court of Appeal considered a challenge to the receipt of a staff report after the public hearing on the basis that the report was merely a vehicle for putting forward explicit and express representations from proponents of the proposed bylaw. The staff report in *Jones v. Delta* had physically attached to it a letter of support from a proponent. The Court held that the various public petition representations and letters attached to the staff report raised no new issues that would warrant the reopening of the public hearing and upheld the bylaw.

Most recently, in *Hubbard v. West Vancouver*, the Court of Appeal considered whether it was a breach of the duty of procedural fairness applicable to the conduct of public hearings under the *Local Government Act* for a local government to receive, after the close of a public hearing, a staff report that contained opinions, conclusions, and recommendations in respect of issues raised at the public hearing without giving members of the public an opportunity to make submissions to the local government on those opinions, conclusions, and recommendations. The Court of Appeal determined that procedural fairness requirements for public hearings do not extend to providing the public with an opportunity to review and comment on any staff report prepared after a public hearing, thus triggering a further public hearing. The Court struck a balance in endorsing the longstanding practice of local government's receiving staff reports after a public hearing but with the caution that, if the staff report raises new issues, a new public hearing will be required.

B. Consideration and Amendment of the Proposed Bylaws

Section 894 of the *Local Government Act* provides that, after a public hearing, the local government may, without further notice or hearing, adopt or defeat the proposed bylaw, or alter and then adopt the bylaw (provided that the alteration does not alter the use, increase the density or, without the consent of the owner, decrease the density of any area of the lands that are the subject of the bylaw).

ASSISTANCE

November 28, 2008

Michael Quattrocchi

ASSISTANCE

I. INTRODUCTION

Local governments are subject to various rules and restrictions regarding their ability to provide financial assistance to other persons, with substantial limitations on providing assistance to business. At a basic level, the legislation requires public notice of certain forms of assistance. More significant restrictions on business assistance appear to be aimed at protecting the public from local government decisions that might 'fritter' away public assets. These restrictions also restrict the ability of local governments to assist businesses for some community benefit, such as to encourage businesses to locate in a community or to help ensure the survival of a key community employer. With respect to most typical local government transactions, these rules, if applied strictly, would open up many local government decisions to judicial second-guessing. Fortunately, the Courts have taken a very deferential approach in assessing council and board 'business' decisions, showing respect for decisions not made recklessly and without any intent to provide assistance.

This paper examines assistance and the statutory provisions applicable to municipalities. The rules for regional districts under the *Local Government Act* are substantially the same.

II. ASSISTANCE GENERALLY

A. Natural Person Powers and Assistance

Section 8(1) of the *Community Charter* vests B.C. municipalities with the "capacity, rights, powers and privileges of a natural person of full capacity". One might think these very broad powers would include the ability to 'give away' assets for purely altruistic reasons. A particularly decent natural person might do such a thing. However, while it is difficult to imagine a natural person giving away their own money to a business, a municipality might have a variety of public policy reasons for providing financial or other assistance to business, such as those discussed above. The Legislature has seen fit to restrict 'natural persons' powers, reflecting the fact that natural person municipalities have unnatural powers of taxation.

B. What is Assistance?

Sections 25(1) of the *Charter* defines "assistance" very broadly as a "grant, benefit, advantage or other form of assistance", including an exemption from a fee or tax and including the following forms of assistance, which are listed in section 24(1):

- disposing of land or improvements, or any interest or right in or with respect to them, for less than market value
- lending money

- guaranteeing repayment of borrowing or providing security for borrowing
- assistance under a 'partnering agreement'

Importantly, there are restrictions on providing assistance to a business, there is no prohibition on providing assistance to non-businesses.

C. Notice of Assistance

Pursuant to section 24 of the *Charter*, a council must give notice of its intention to provide the forms of assistance listed in section 24(1), but not of any other forms of assistance. Accordingly, there is no obligation to publish notice of an intention to provide a grant to a non-profit organization, for instance.

Section 24 sets out the required notice content. Section 94 sets out how to provide notice and requires publication in a newspaper for 2 consecutive weeks. The notice may be published after council passes a resolution to provide the assistance, but must be published before the provision of the assistance and before making any contractual commitment to provide assistance (such as a lease or land sale agreement or a loan guarantee agreement) [*Coalition for a Safer Stronger Inner City Kelowna v. Kelowna (City)* (2007), 32 M.P.L.R. (4th) 313 (B.C.S.C.)].

D. Assistance to Business

1. General Prohibition

Section 25 sets out a general prohibition on the provision of assistance to a 'business', except where expressly authorized under statute. The schedule to the *Charter* defines "business" as:

> "(a) carrying on a commercial or industrial activity or undertaking of any kind, and
>
> (b) providing professional, personal or other services for the purpose of gain or profit,
>
> but does not include an activity carried on by the Provincial government, by corporations owned by the Provincial government, by agencies of the Provincial government or by the South Coast British Columbia Transportation Authority or any of its subsidiaries."

Importantly, the Courts have held that the fact that there are commercial components to a non-profit organization's activities, does not on its own mean that the organization or its activities constitute a 'business'. In *Salmon Arm (District) v. Salmon Arm Golf Club* (1994), 23 M.P.L.R. (2d) 214, it was alleged that a municipal tax exemption to a golf club, which was a non-profit society, amounted to a form of assistance to a commercial undertaking contrary to what was then

section 292 of the *Municipal Act*. The Court held that the golf club's activities could include some commercial components without constituting a commercial or business undertaking. The golf club charged green fees to the public, imposed annual dues on its members and operated a restaurant and pro shop. The Court held that these commercial elements were necessary to support ownership of the golf course property and to produce revenue to ensure that the club met its obligations to its members as well as to the District under its lease of District lands.

It is worth noting that at time of the *Salmon Arm Golf Club* decision, the assistance rules addressed assistance to business "undertakings", whereas the definition of business under the *Charter* speaks to a commercial or industrial "activity" in addition to undertakings. This expanded definition is awkward in the context of assistance, in that assistance is normally seen as something provided to someone, as opposed to someone's activities. In any case, it could be argued that assistance to a commercial activity would be assistance, even if the activity is conducted by a non-profit organization.

Also, the definition of business under the *Charter* does not distinguish between incorporated businesses and other forms of business. Certainly, an individual or collection of individuals could be a business depending on the circumstances. An individual who develops land for profit would likely be a business. However, a person who owns property for residential use would not likely be a business.

2. Exceptions

(a) Heritage

Sections 25(2) and (3) specifically permit the provision assistance to a business for various purposes associated with the preservation of heritage property and resources.

(b) Partnering Agreement

A municipality may provide assistance to a business pursuant to a 'partnering agreement', under which the business agrees to provide a service on behalf of the municipality. This kind of agreement is a statutory concept, and need not be in a form of what one would normally consider to be a partnership. The term 'partnering agreement' is specifically defined as "an agreement between a municipality and a person or public authority under which the person or public authority agrees to provide a service on behalf of the municipality, other than a service that is part of the general administration of the municipality". The term "service" is defined as mean "an activity, work or facility undertaken or provided by or on behalf of the municipality".

(c) Tax Exemptions

Tax exemptions may only be provided in accordance with Division 7 of Part 7 (see section 21(a) with respect to partnering agreements and section 193(3) generally). Section 225 specifically provides for tax exemptions for land owned by a person providing a municipal service under a partnering agreement where the land that is used in relation to the partnering service. The

exemption must be authorized by bylaw adopted by 2/3 of all council members and notice of the exemption must be given in accordance with section 227. While the bylaw must set out the term of the exemption, section 225 does not set out any upper limit on the term.

Importantly, a partnering agreement tax exemption does not automatically extend to exempt the property from school, hospital and other taxes. For instance, section 131(5) of the *School Act* provides that tax exemptions under section 225 of the Charter do not extend to school taxes, unless exempted by regulation or order under the *School Act*. This also rule applies to taxes under the *Hospital District Act* (s. 28 of that Act makes sections 130 to 132 of the *School Act* applicable).

III. FORMS OF ASSISTANCE & RELEVANT CONSIDERATIONS

A. Dispositions for Less than Market Value

This very broad category of assistance includes not only the outright sale of land, but also grants of lesser interests in land, including leases, statutory rights of way, easements and restrictive covenants. This is by virtue of the wording of section 24(1)(a) of the *Charter* and the definition of "land" under the *Interpretation Act*.

In the relatively early stages of any discussion concerning a proposed grant of an interest in land, a municipality should consider what the market value of the property is and whether it will be receiving market value consideration in return for the grant. If not, then the municipality will be providing assistance and must publish notice of the proposed assistance. If the grant is to a business, the municipality will not be able to provide the assistance unless the transaction involves a 'partnering agreement'.

B. Assistance in a Commercial Transaction

Aside from dispositions of land, municipalities also enter into various agreements from time to time, including in relation to the construction of municipal works and the provision of municipal services. While it seems doubtful that a municipality would provide assistance under such an arrangement (other than perhaps a form of 'deemed assistance' as discussed further below), legal challenges have been brought in this context and are discussed below. Again, a municipality may need to turn its mind to whether it is doing a 'market value' transaction, although in most cases this will be the case as the arrangements will be the result of some formal procurement process or arms-length negotiation.

C. Considerations In Land Dispositions and Commercial Transaction

1. Due Diligence & Necessity for an Appraisal

With any particular transaction, the question arises as to how far a local government must go in ascertaining whether the deal is for 'market value'. In general the Courts have showed great deference to the decisions a council.

In *Miller v. District of Salmon Arm* (2005), 9 M.P.L.R. (4th) 95, the B.C. Court of Appeal s considered how far a council must go to ensure it receives market value consideration for the sale of land. A developer, who was also the mayor, was seeking a 38-lot subdivision. The developer initially proposed that the District exchange 1,500 square metres of unused road in return for the dedication of 85 square metres of new road as well as credit for a previous dedication by the developer of 1,360 square metres of highway. Council approved the transaction, except that rather than giving credit for the past dedication, it required that the developer pay the transaction costs and an additional $12,000 as market value of the District road. A neighbour considered that the transfer of unused road would remove an access route for future development of his land and increase his development costs. He commenced the legal challenge on various grounds, including that the transfer of the road to the developer was for less than market value. The Court noted that council had used the assessed value of the developer's adjoining land as a yardstick for determining the value of the road. The complainant tendered an appraisal that indicated council had received substantially less than market value. However, the Court did not try to ascertain market value and then determine if the District had sold for less. Rather, the Court looked at council's intention and actions and held:

> "Members of the District Council who dealt with this issue could reasonably be expected to have themselves some general idea of land value relating to lands located in the District...deciding the precise value of a small strip of land like the one transferred, land that was traversed by underground pipes, is not easy and probably no figure would command universal assent. Council chose to adopt as a measure of value assessed valuation which does usually provide some guide to value of land. The members of Council must, in my opinion, be afforded a decent measure of discretion in deciding on such an issue... I would not wish to be taken as saying it would in all circumstances be appropriate for a municipal body to proceed with a land transaction without obtaining specific appraisal information. In the case for instance of a sizeable lot in an urban area, it might be reckless on the part of a council to fail to get detailed appraisal evidence but that is not this case at all. It seems to me that Council was not acting in any improper fashion in the approach they took to valuation of this small piece of land."

Based on this decision, the level of due diligence will depend on the circumstances and a municipality may need not to obtain an appraisal or other valuation each time it proceeds with a transaction. For instance, assessed value comparisons will be sufficient for some land transactions, while appraisals may be required for more complex and important transactions. Also, there are different levels of appraisals, and more comprehensive appraisals will not be required in every case.

2. Transaction as a Whole

The Courts have confirmed that in evaluating whether a council has disposed of land for less than market value, the Court will review the transaction surrounding the disposition in its entirety, and not simply the cash component specifically indicated for the disposition [*Nelson Citizen's Coalition v. Nelson (City)* (1997), 38 M.P.L.R. (2d) 175 (B.C.S.C.)]. In the *Nelson Citizen's Coalition* case, the City had, as part of a complex transaction, agreed to sell 2 parcels of land to a developer for a sale price of $1.00. In finding that the City had not provided illegal assistance, the Court examined the entire transaction, noting that "The whole of the contractual relationship between the parties is relevant".

3. General Deference to Business Deals

As can be seen from the above quotation from the *Miller* case, the Courts have shown deference to council in assessing the value of its own assets. The Courts have also shown a desire not to second-guess complex business arrangements. In *International Paper Industries Ltd. v. Greater Vancouver Regional District* (2006), 18 M.P.L.R. (4th) 211 (B.C.S.C.), International Paper alleged that the GVRD and the Greater Vancouver Sewerage and Drainage District, which is responsible for management and disposal of solid and liquid waste in the GVRD area, were providing illegal assistance to Wastech Services Ltd. The GVSDD had entered into a 20-year agreement whereby Wastech agreed to provide waste management services, including recycling services, at certain facilities on behalf of the GVSDD. Under the agreement, the GVSDD compensated Wastech by paying different rates for different hauling services, and making payments for fixed costs, capital expenses and property taxes and other expenses. In addition, if net revenue exceeded a base level, excess revenue was shared equally by GVSDD and Wastech. If net revenue fell short of that level, the parties would share the shortfall equally. International Paper alleged that by virtue of the agreement, Wastech received unlawful assistance in the form of tax breaks, below market lease payments and subsidized operating expenses and that while certain of Wastech's activities were public services on behalf of the GVRD/GVSDD, operating a large scale commercial recycling operation was not. The Court held that the assistance provisions were inapplicable to the GVSDD because the GVSDD was not governed by the *Local Government Act* and was a separate entity from the GVRD. Nevertheless, the Court went on to consider whether GVSDD was providing assistance. International Paper's allegations focused on the recycling component of the service and the fact that Wastech had operated a private recycling facility on the same premises until 1996, when the arrangement with the GVSDD was put in place. To some extent, the Court sympathized with International Paper noting:

> "It is...understandable that [International Paper] and others would view Wastech as competing at an advantage for the same commercial recyclables as do the private recyclers. The GVSDD does not have to pay taxes on property which it owns and uses for waste purposes...GVSDD will pay certain expenses incurred by Wastech in providing services on behalf of the GVSDD".

However, the Court characterized the business relationship as just one possible way of producing the desired results. The Court noted that "[T]he objective...is to encourage Wastech to operate efficiently, thereby allowing the GVSDD to provide waste management services to the public at a lower cost". The Court held:

> "The GVSDD could have paid Wastech to perform the services by a fixed price contract. Undoubtedly, in determining the fixed price, Wastech would have ensured that its overhead expenses would be covered and included a provision for profit. Instead, the GVSDD has chosen a complicated formula which allows the GVSDD to participate in certain economies that Wastech is able to achieve. This is simply a different mechanism of determining compensation and ensuring that Wastech operates efficiently...The compensation provided to that company is complex, with benefits and obligations flowing both ways. Even if [the LGA assistance provisions] applied to the GVSDD, they are not appropriate to review the contract, weighing the tangible and inchoate benefits, to determine if the GVSDD has made a good deal."

4. Community Benefit

It is not clear as to the extent to which a municipality can consider 'community benefit' as part of what it receives in a given transaction. In the *Nelson Citizen's Coalition* case, the Court appears to have given some weight to the City of Nelson's desire to see its waterfront developed in determining that the City had not provided assistance to the developer. The Court noted:

> "the agreement, fairly considered, appears to be an attempt to allocate as between public and private interests, the costs of an integrated project. Unless there were an obvious aspect of "something for nothing" I see no basis on which this court can "pick the bones" of this agreement for signs of a S. 292 breach...The Court is in no position to ascertain the point at which the City's demands would have been unacceptable and Huber would have abandoned the project, or to weigh that possibility against the interests of the City in the project proceedings. These judgments are all over matters of public interest within Council's mandate and discretion...I think assistance within Section 292 of the Municipal Act implies the conferring of an obvious advantage. Where, as here, a municipality exercises its power to contract under S. 19 to effect purposes that are clearly within the realm of public policy, I do not think S. 292 is an available mechanism to obtain a review of the contract, weighing the tangible and inchoate benefits, to determine if the municipality has made a good deal or not."

It remains unclear as to the extent to which municipalities can consider 'public' or 'community' benefit in valuing its interest in a transaction. Nevertheless, if transaction includes imposes specific restrictions and burdens on the other party aimed benefiting the community, it is likely that these components would be significant factors in assessing the transaction. For instance, if a land sale includes obligations on a developer to develop within a specified time frame and to include specified design and landscaping components, and perhaps includes the registration of the covenant, these obligations would affect the market value of the property as sold to the developer.

D. "Deemed Assistance"

Lending money, guaranteeing repayment of borrowing and providing security for borrowing are deemed to be assistance, even if the local government provides the loan, guarantee or security in exchange for market value consideration. Banks lend money with a view to earning a profit. However, the *Charter* provisions regarding assistance do not speak to lending money for less than a market value return: lending money is assistance. Accordingly, a municipality may only provide a loan, guarantee or security for borrowing to a business pursuant to a 'partnering' agreement.

IV. OTHER ISSUES WITH ASSISTANCE

A. Partnering Agreements

Typically, the need for a partnering agreement only arises where the municipality wishes to provide a loan or a loan guarantee, or where the assistance is in the nature of a tax exemption. These forms of 'deemed' assistance cannot be provided to a business without a partnering agreement.

In most other circumstances where a business is truly providing a service on behalf of the municipality, there is no 'real' assistance in the sense of the municipality giving something of value in exchange for something of lesser value. Under a typical arrangement, the total compensation package to be paid by the municipality is necessary in order to obtain the service – it is simply compensation for the provision of a service. For example, in the *International Paper* case, the legal arrangements were such that they would have qualified as a partnering agreement, however, the Court did not have to visit that issue, in light of its refusal to second guess the value of the GVRD's commercial arrangement. Local governments do not normally wish to pay more for services than they have to.

In addition, the partnering agreements are restricted to services that are provided "on behalf" of the municipality. It is doubtful that a service simply provided to a municipality (such as the construction of a building), could be the subject of a partnering agreement. It is likely that there must be some aspect of the service that is provided to the public on the municipality's behalf. Efforts to characterize a business' normal business activities as some vague municipal service (such as part of some economic development service), so as to enable the provision of assistance through a partnering agreement are questionable.

B. Local Government Subsidiary Corporations

On occasion, a local government may incorporate a subsidiary corporation. Such a corporation is a separate legal entity from the local government. If it is a business undertaking or engages in a business activity, the local government will have to consider the assistance rules when funding the corporation. There are various ways to fund a subsidiary. Funding could be provided in exchange for some service or as assistance under a partnering agreement. It is also likely that funding could be provided by way of a capital investment through the acquisition of shares in the corporation. It is unlikely that such an investment would amount to assistance to the corporation, if the local government receives shares in the corporation in exchange for the investment. However, as loans are deemed to be assistance, a local government may not be able to fund a subsidiary corporation by way of shareholders loan, which is a normally convenient way to capitalize a corporation (except under a partnering agreement).

C. Forced Assistance

In some cases, the law may force a municipality to provide assistance. Under the Federal *Telecommunications Act*, telecommunication companies have effectively been given rights to locate works on public property without any requirement for the provision of any kind of compensation. Under that Act, telecommunications companies can apply to the CRTC if they are unable to obtain rights to use municipal public property on acceptable terms from the municipality. In *CRTC Decision 2001-23*, which involved a dispute regarding access terms between the City of Vancouver and Ledcor Industries Ltd., the CRTC refused to allow the City to impose any kind of market value rent or fees. While the CRTC's reasoning is not entirely clear, it concluded that for various reasons that the imposition of any kind of market based charge was "not necessary or appropriate". The CRTC considered that it would be "extremely difficult to establish a "market-based" rate for the use of municipal property, as there is no "free market" consisting of totally willing buyers and sellers, for municipal consent to occupy and use municipal rights of way". The CRTC was also not satisfied that reference to adjoining land values was appropriate.

V. ILLEGAL ASSISTANCE

A. Who might challenge?

While a person wishing to challenge a decision to provide assistance or an agreement connected with the provision of assistance would have to have 'standing' in order to proceed with the challenge, the most likely source of a challenge would be from a disgruntled ratepayer. A second possible source would be someone who is in competition with the business that receives the allegedly unlawful assistance. This occurred in the *International Paper* case.

B. Repercussions

1. Setting Aside Decision or Agreement

If a Court finds illegal assistance, the decision to provide the assistance would likely be set aside. If the assistance arises under a contract, a Court might set aside the contract. This could leave the local government and other party to the contract in an uncertain legal position if funds have been paid or property has changed hands.

2. Personal Liability

Under section 191 of the Charter, a council member who votes for a bylaw or resolution authorizing the expenditure or other use of money contrary to the Act may be disqualified from office and may also be personally liable to the municipality for the amount.

Section 191 includes a specific exception where a council member has relied on a municipal officer or employee who was guilty of dishonesty, gross negligence or malicious or will full misconduct. This exception is not of great assistance, in that it does not cover a council member who relies on an honest employee who simply turns out to be wrong. In this respect, in *Gook Country Estates Ltd. v. Quesnel (City)* (2006), 26 MPLR (4^{th}) 36 (B.C.S.C.), the Court held, in considering a predecessor to section 191, council members may also be excused if they have acted honestly and reasonably. This reinforces the need for councils to act prudently in evaluating proposed transactions and decisions, to ensure that in the event of a challenge, they can establish that they did act honestly and reasonably, and not recklessly.

THE BASICS OF EXPROPRIATION PROCEDURE

November 27, 2009

Mike Quattrocchi

THE BASICS OF EXPROPRIATION PROCEDURE

How does a local government take land without the consent of the owner of the land? This paper outlines, in very general terms, the process by which a local government may expropriate land. It is intended as a guide only and the *Expropriation Act* and Regulations should be consulted before and during expropriation proceedings.

I. PRE-EXPROPRIATION

A. Power to Expropriate

The initial step in any expropriation is to ascertain that council has the power to expropriate for its intended purpose. While B.C. municipalities have the "powers of a natural person", the power to expropriate land is a 'supernatural' power. The *Expropriation Act* sets out rules governing the procedure to expropriate, however, it does not authorize expropriations. Authority to expropriate must be found in other legislation. Section 31(1) of the *Community Charter* authorizes municipalities to expropriate and provides that, "For the purpose of exercising or performing its powers, duties and functions, a municipality may expropriate real property or works, or an interest in them, in accordance with the *Expropriation Act*". Section 309(1) of the *Local Government Act* confers identical authority upon regional districts. Accordingly, the intended purpose of the expropriation should be carefully considered to ensure that it relates to a local government power, duty or function.

It is worth noting that local governments do have the power to expropriate outside of their boundaries. However, this power is limited such that it may only be exercised for services they provided outside of their boundaries and for "establishing and managing quarries, sand pits or gravel pits to acquire material for [municipal or regional district] works". There is no authority to expropriate outside of boundaries for the purpose of providing a service within boundaries. For instance, if a municipality wished to acquire land for a waterline connecting a water source outside of its boundaries to the water distribution system within its boundaries, the municipality would not be able to expropriate land for the purposes of linking the water source with the system. The municipality might be able to address this problem if it were to establish the connection works as an extra-territorial service, a process that would require the approval of the local government within whose boundaries such works are located.

B. Obtain Land Title Office Search

The next step is to conduct a Land Title Office search in order to confirm the legal description of the subject parcel, the identity of the registered owner of the parcel and the holders of any charges and encumbrances registered against the parcel. In addition to providing information necessary for preparing expropriation documents, the land title search can provide an indication as to how complex the expropriation is likely to be. If title to a property is subject to various

encumbrances, the process of notifying chargeholders may be more complex and there may be more entities to which the local government will have to pay compensation.

C. Determination of Interest to be Expropriated

A local government may expropriate the entire interest (fee simple) in a parcel or may expropriate a lesser interest. For instance, a local government might expropriate a statutory right of way for sewer, water or drainage services. If the local government is expropriating a lesser interest, it will have the document setting out the nature of that interest (for example, the statutory right of way agreement).

A local government may expropriate all or part of a parcel. For instance, it is common for a local government to expropriate property frontage for highway widening purposes.

D. Financing

Section 165 of the *Community Charter* requires that a local government's financial plan set out all proposed expenditures by the local government, except for emergencies. Therefore, before formally commencing an expropriation, it should be confirmed that the financial plan provides for sufficient funds to complete the expropriation. If the plan needs to be amended, this should be coordinated with the initiation of the expropriation so that the amendment is complete before or concurrently with the resolution to expropriate.

If a municipality proposes to borrow funds in order to pay compensation for the expropriation, section 180(2)(a) of the *Charter* provides that elector approval is not required for a loan authorization bylaw for that purpose. The bylaw must, however, receive the approval of the inspector of municipalities. Also, under section 189(3) of the *Charter*, council may, by bylaw, use money from a reserve fund to pay for expropriation compensation to the extent that current revenue is not sufficient. Similar rules apply to regional districts, except that approval of the inspector of municipalities is required to use money from reserve (see section 814(4)(c) of the *Local Government Act*).

E. Pre-Expropriation Resolution & Preparations

Once the local government determines that expropriation may be necessary, the council or board should pass a resolution authorizing certain pre-expropriation procedures (including surveys, document preparation and appraisals). This resolution would not normally authorize the expropriation itself, but would simply authorize the preparation of things necessary or desirable both to enable the expropriation to proceed and to assist in deciding whether to expropriate or push for a negotiated resolution.

1. Site Inspection & Survey and Plan Preparation

If the local government wishes to acquire a part of a property, a survey will be required. In addition, the local government may wish to investigate the environmental condition of the property as well the soil condition of the property for development purposes.

Section 9 of the *Expropriation Act* states that a person authorized by the expropriating authority may, even before service of the expropriation notice, enter onto the land intended to be expropriated during certain times and for certain purposes, including completion of surveys, soil tests and inspections. Section 32 of the *Community Charter* confers a similar authority. These powers may be exercised without the consent of the owner, but subject to the restrictions contained in section 16 of the *Charter* regarding notice and time and manner of entry.

Importantly, pursuant to section 33(2) of the *Charter*, the local government will have to compensate the landowner for any loss or damage caused by its entry and activities on the land.

In relation to regional districts entering property and paying compensation for entry, see sections 311 and 312 of the *Local Government Act*, and note that section 16 of the *Charter* applies to such entry.

2. Preparation of Appraisal Report

It will be necessary to obtain an appraisal of the value of the property or interest to be expropriated in order to determine the amount that will be initially payable to the owner as part of the expropriation process. It is prudent to obtain the appraisal before the commencement of formal expropriation proceedings. This will give the local government some idea as to the compensation that will be payable to the owner for budgeting purpose. The appraisal will also provide useful guidance for negotiating with the owner before commencing expropriation proceedings.

Importantly, the date of valuation in the appraisal must be within 6 months of the date the Expropriation Notice (discussed below) is filed in the land title office. Depending on when the initial appraisal is obtained, it may be necessary to have the appraisal updated once expropriation has begun.

3. Preparation of Expropriation Notice

The actual expropriation is set in motion by the service of an expropriation notice in Form 1 under the *General Regulation* on the "owners", which includes registered chargeholders, as required by section 6 of the *Expropriation Act*.

Section 6(4) of the *Expropriation Act* lists the required contents of the notice, which include the purpose for which the expropriation is required, a legal description of the property and (for an expropriation of a part of a parcel) a plan that, in the opinion of the Registrar of Land Titles, will be sufficient to identify the expropriated land. If the local government is expropriating a lesser interest, such as a statutory right of way, a copy of the interest (i.e. the statutory right of way agreement) must also be attached as a schedule to the expropriation notice.

II. EXPROPRIATING THE INTEREST

A. Negotiation and Section 3 Agreements

Expropriation is a last resort and will typically follow significant efforts on the part of the local government to acquire the property by negotiation. In this respect, the local government should be aware that section 3 of the *Expropriation Act* authorizes the local government and an owner to enter into an agreement to transfer land but to defer the final determination of compensation to a later date, to be determined in accordance with the *Expropriation Act*. Where an owner is agreeable to transferring the property, but the owner and local government cannot agree on price, a Section 3 Agreement can be advantageous, in that avoids the process normally required to complete the expropriation.

B. Initiating Resolutions

The first formal step in any expropriation is for the council or board to authorize the expropriation. An expropriation under section 31 of the *Community Charter* no longer requires a bylaw, so it is typical for a council or board to elect to proceed by the more expedient means of a resolution.

Council must also pass a resolution to authorize a staff member to sign, seal and deliver the expropriation notice. The resolution should authorize placement of the expropriation sign (discussed below) as well.

Typically, the above resolutions are passed at the same meeting.

A council or board may be able to pass these resolutions at a meeting closed to the public, under the authority of section 90(1)(e) of the *Charter* (which applies to regional districts), if "the [council or board] considers that disclosure could reasonably be expected to harm the interests of the municipality". In some many cases, disclosure could be harmful, such as if negotiations are still ongoing. Once the expropriation notice is filed and served on owners, and the fact of the expropriation is public, it is less likely that the council or board will be able to take further expropriation steps in a closed meeting.

C. Filing the Expropriation Notice

The expropriation notice must be filed in the Land Title Office. Prior to the expropriation, Land Title Office documentation requirements should be confirmed, as the requirements are subject to change and may vary between land title offices.

As noted above, if only a portion of a parcel of land is being expropriated, the survey plan must be attached to the expropriation notice. This plan must be labelled as being made pursuant to Section 6 of the *Expropriation Act*. Upon filing in the Land Title Office, the plan accompanying the expropriation notice must be accompanied by the number of linens, mylars and white prints required under section 67(s) of the *Land Title Act*.

Under the *General Regulation* the expropriation notice must include the original signature of an authorized signatory of the expropriating authority or be certified by an authorized official as a

true copy. As well, the local government seal should be imprinted on the notice and copies of the notice.

Once the expropriation notice is filed in the Land Title Office, the Registrar endorses a notation of it on the title to the land and registration of any further instruments dealing with that land is restricted by section 7 of the *Expropriation Act*. This will prevent the owner from transferring the land, subdividing the land or granting interests in the land that affect the area or interest to be expropriate.

It is prudent to file the expropriation notice in the Land Title Office prior to serving it on the owner. If the Land Title Office rejects the notice, the local government can amend it and re-file before serving the notice on the owners.

D. Service of Expropriation Notice and *Expropriation Act*

The expropriation notice must be served on the registered owner of the land to be expropriated, as well as on the registered holders of any charges on title to the land. In addition, a copy of the *Expropriation Act* must be served with the expropriation notice. The notice and Act must be served personally or by registered mail.

In many cases, difficulties serving the expropriation notice can cause delays to completing the expropriation process, as the process cannot proceed to the next stage until the notice is served on each owner and chargeholder. Under the Act, a notice personally delivered will be considered served on the date it is delivered. A notice sent by registered mail will be considered served 14 days after it is sent. It is prudent to serve personally using a process server and to require the server to swear an 'affidavit of service' so there is evidence of service on file. While service by registered mail may be less costly, it will take more time and if the recipient never picks up the notice from the post office, the local government may be faced with having to try to serve personally, adding to further delays. It may also be necessary to engage the services of a "skip trace" service in order to try to locate the person. If an owner or chargeholder cannot be located, it will be necessary to apply to Court for an order for substituted service.

While not required by the *Expropriation Act*, it is also prudent to serve the notice and Act on any tenants of which the local government is aware (regardless of whether the lease is registered in the Land Title Office) so that they are aware of the expropriation and can begin to make arrangements to relocate if their interest is to be expropriated.

The notice must also be served on the "approving authority" (discussed below). Since the approving authority for local government expropriations is the council or board, a further council or board resolution "acknowledging service" after the notice is prepared will suffice.

E. Expropriation Sign

Once the Expropriation Notice is filed in the Land Title Office, a sign containing a copy of the notice or a summary of the notice must be erected on the property. It is prudent to have the

person who posts the notice also swear a statutory declaration in that regard, so that there is a record of the sign having been posted.

F. Inquiry

With some expropriations, after an owner receives an expropriation notice, the owner may apply within 30 days to the Minister requesting an inquiry into whether the expropriation is necessary to achieve the objectives of the local government or whether those objectives would be better achieved by choosing an alternate site or by varying the amount of land to be taken. The necessity of the project for which the expropriated land is to be used is not a permitted subject of an inquiry. Following a request for inquiry, the Minister must appoint an inquiry officer within 7 days, who must set a date for the inquiry that is no later than 21 days after his or her appointment. The inquiry officer must submit a report of his or her recommendations to the approving authority within 30 days of the inquiry.

The possibility of an inquiry is a further potentially significant point of delay to the completion of the expropriation process. The expropriating authority must wait 30 days after serving the expropriation notice to see if an inquiry is requested. If an inquiry is requested, the expropriating authority will have to wait further, until that process is complete.

Importantly, an owner of land is not entitled to request an inquiry if the expropriation is for the construction, extension or alteration of a "linear development". The term "linear development" is defined under section 10(1) of the Act to include a "highway, a railway, a hydro or other electric transmission or distribution line, a pipeline or a sewer, water or drainage line or main".

G. Approval of Expropriation – Resolution

A municipal council or regional board serves two functions in relation to its own expropriation. The council or board is the directing mind of the local government authority that is expropriating land. At the same time, the council or board is the "approving authority" under the *Expropriation Act*. Pursuant to sections 4 and 18 of the Act, an expropriation cannot proceed following the notice stage until and unless the "expropriating authority" has obtained the approval of the "approving authority".

For expropriations where an inquiry is permitted, the approving authority may, at any time after the inquiry report is prepared or, if no inquiry is requested, after the 30 day period for requesting inquiries has expired, decide to approve the expropriation, approve the expropriation with modifications or reject it all together

For linear developments where no inquiry may be requested, the council or board may approve of the expropriation at any time following service of the expropriation notice.

Approval should be given by means of a council or board resolution. A Certificate of Approval of Expropriation must be completed in Form 5 under the *General Regulation*. After the expropriation is approved, the council or board, as approving authority, must notify itself (as the

expropriating authority) and each registered owner and chargeholder whose land or interest is being expropriated of the approval.

H. Advance Payment

Once the approving authority (i.e. council or board) has approved the expropriation and served the Certificate of Approval on owners and chargeholders, the expropriating authority then has 30 days to make a compensation payment (the "advance payment") to the registered owner and chargeholders. Section 20 of the *Expropriation Act* sets out the requirements for the advance payment and requires that the expropriating authority pay its estimate of the compensation payable to the owner or chargeholder, other than for business loss where the business is relocated. Importantly, the expropriating authority does not need to wait the full 30 days and may make the payment as soon as it is able following approval of the expropriation.

The advance payment is accompanied by a Notice of Advance Payment in Form 8 under the *General Regulation.* A copy of each appraisal and all other reports on which the amount of the advance payment is based must be served on the owner or chargeholder when the advance payment is made. As noted above, the appraisal must be dated no more than six months prior to the date on which the expropriation notice is filed in the Land Title Office.

The *General Regulation* stipulates that the appraisal must be prepared by:

(a) a person designated A.A.C.I. by the Appraisal Institute of Canada;

(b) a person designated as a Certified Appraiser R.I. (B.C.) by the Real Estate Institute of British Columbia; or

(c) in respect of partial takings only, a person designated SR/WA by the International Right of Way Association.

Section 20(3) of the *Expropriation Act* lists the required contents of the appraisal report, including the factual data used, the reasoning on which the estimated value was based, the zoning, the highest and best use of the land, any provisions of an official community plan that are relevant and the appraiser's final estimate of the value of the land.

I. Requesting Information for Making an Advance Payment

Pursuant to section 20(8) of the *Expropriation Act*, the local government may require that the owner or chargeholder provide information to assist the local government with estimating compensation payable under the advance payment. If the owner fails to comply with a request, the Court may penalize the owner or chargeholder in costs and interest to which he or she would otherwise be entitled. Accordingly, at some point following delivery of the expropriation notice, the expropriating authority may wish to make such a request, particularly in relation to certain chargeholders, such as mortgage holders and registered leaseholders, in order be certain that the terms of their interests which may differ from that disclosed on title to the property. If the owner or chargeholder does not provide the information, the fact of such a request may reduce interest

amounts that would otherwise be payable if the local government underpays the owner or chargeholder as a result of not having a full picture of that person's interest in the property.

J. Abandoning the Expropriation

Once the advance payment is made, the local government cannot unilaterally abandon the expropriation process. However, prior to that time a local government may abandon the expropriation by filing a Notice of Abandonment in Form 7 in the Land Title Office and serving the Notice on registered owners and chargeholders. Importantly, the local government is still obligated to pay compensation for any damages suffered by an owner or chargeholder as a result of the initiated expropriation, as well as for reasonable legal, appraisal and other costs incurred by the owner.

K. Vesting Notice and Possession

Within 30 days after making the advance payment, the local government must file a "vesting notice" in Form 9 under the *General Regulation* in the Land Title Office and serve a copy on each registered owner and chargeholder. Once the vesting notice is filed in the Land Title Office, title to the land or interest is transferred and the expropriating authority is entitled to possession of the land. Where the local government is acquiring fee simple title, the filing of the vesting notice has the effect of clearing all charges from title to the property except for those contained in a crown grant and charges respecting minerals, coal, petroleum and gases. A local government may, however, permit other charges to remain by identifying those charges as exceptions in the expropriation notice.

Again, there is no need to wait the full 30 days before filing the vesting notice. Accordingly, it is possible to compress the expropriation process after the approving authority approval.

III. POST-EXPROPRIATION

A. Compensation Hearing

An owner or chargeholder has one year from the time of receipt of the advance payment to apply to the B.C. Supreme Court to determine whether any additional compensation is payable. Importantly, in relation to the expropriation process itself, including the serving of the expropriation notice and other documents and the entitlement to an advance payment, the *Expropriation Act* only requires that the local government deal with owners and chargeholders whose interests are registered in the Land Title Office. However, under the Act, all persons having an interest in the land, tenants and occupants of the property and certain others are entitled to compensation, even if their interest is not registered in the land title office. Accordingly, the local government may face claims from persons to whom it has not made any advance payment.

Part 6 of the *Expropriation Act* sets out in some detail the principles by which compensation is determined. While the rules regarding compensation are complex and beyond the scope of this

paper, the basic formula set out in section 31 of the Act is that each owner is entitled to the market value of their land plus reasonable damages for "disturbance". The market value of a property is defined as the amount that would have been paid if the land had been sold, at the date of filing of the vesting notice in the land title office, on the open market by a willing seller to a willing buyer.

Under section 34 of the Act, the disturbance damages to which the owner is entitled include the costs directly caused to the owner by the expropriation and reasonable costs of relocation to another property, including moving, legal and survey costs. Such costs can be extensive. If the owner carried on a business on the land, business losses are also compensable if they are directly attributable to the expropriation.

Section 40 of the *Expropriation Act* states that if only part of the land is expropriated, the owner is entitled to compensation for the reduction in market value of the remainder of the land and any reasonable personal and business losses.

B. Expenses

In addition to paying compensation for the market value of the land taken and disturbance damages, the local government is also liable to pay the reasonable legal and appraisal costs incurred by owners and chargeholders in responding to the expropriation. Legal costs are governed by a tariff, but appraisal costs are not fixed. In some cases, the cost of paying the expropriating authority's own appraisal and legal costs, together with the owner's legal and appraisal costs, can be significant. Before giving notice of expropriation, the expropriating authority should therefore establish a realistic budget for completing the expropriation, including the costs of the compensation hearing.

C. Dealing With Occupants

If, after vesting, an occupant is unwilling to vacate expropriated premises, the local government may apply to Court for an order for possession. Where the local government does not intend to use the property immediately, the local government may wish to approach the occupant during the expropriation process in order to make arrangements for continued occupancy.