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BARRISTERS & SOLICITORS

GOVERNANCE: COMMON ISSUES

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I. INTRODUCTION

Despite the decades long history of the governance rules relating to open meetings, conflict of interest, and public participation in meetings, the evolution of the issues facing local governments means that they must continue to grapple with those rules. In this paper, we address some common governance issues on which we are currently called upon to advise.

II. THE OPEN MEETING RULE

It is a fundamental characteristic of local governance in British Columbia that business must take place in open meetings, at which the public may attend. The open meeting rule is codified in section 89 of the *Community Charter*, which very simply provides:

> 89 (1) A meeting of a council must be open to the public, except as provided in this Division.
>
> (2) A council must not vote on the reading or adoption of a bylaw when its meeting is closed to the public.

As anticipated in section 89, there are a number of exceptions to the general rule that meetings must be open to the public. Section 90 of the *Community Charter* splits these exceptions into two categories. First, there are meetings that may be closed to the public. Second, there are meetings that must be closed to the public.

Meetings that may be closed to the public are ones at which the following subject-matter is considered:

- Personal information about an identifiable individual who holds or is being considered for a position as an officer, employee or agent of the municipality or another position appointed by the municipality;
- Personal information about an identifiable individual who is being considered for a municipal award or honour, or who has offered to provide a gift to the municipality on condition of anonymity;
- Labour relations or other employee relations;
- The security of the property of the municipality;
- The acquisition, disposition or expropriation of land or improvements, if the council considers that disclosure could reasonably be expected to harm the interests of the municipality;

- Law enforcement, if the council considers that disclosure could reasonably be expected to harm the conduct of an investigation under or enforcement of an enactment;

- Litigation or potential litigation affecting the municipality;

- An administrative tribunal hearing or potential administrative tribunal hearing affecting the municipality, other than a hearing to be conducted by the council or a delegate of council;

- The receipt of advice that is subject to solicitor-client privilege, 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*;

- Negotiations and related discussions respecting the proposed provision of a municipal service that are at their preliminary stages and that, in the view of the council, could reasonably be expected to harm the interests of the municipality if they were held in public;

- Discussions with municipal officers and employees respecting municipal objectives, measures and progress reports for the purposes of preparing an annual report under section 98 *[annual municipal report]*;

- A matter that, under another enactment, is such that the public may be excluded from the meeting;

- The consideration of whether a council meeting should be closed under a provision of this subsection or subsection (2);

- The consideration of whether the authority under section 91 *[other persons attending closed meetings]* should be exercised in relation to a council meeting.

Meetings that must be closed to the public relate to the following:

- A request under the *Freedom of Information and Protection of Privacy Act*, if the council is designated as head of the local public body for the purposes of that Act in relation to the matter;

- The consideration of information received and held in confidence relating to negotiations between the municipality and a provincial government or the federal government or both, or between a provincial government or the federal government or both and a third party;

- A matter that is being investigated under the *Ombudsperson Act* of which the municipality has been notified under section 14 *[Ombudsperson to notify authority]* of that Act;

- A matter that, under another enactment, is such that the public must be excluded from the meeting.

The consequences of closing a meeting improperly are serious, and were considered by the Supreme Court of Canada in *London (City) v. RSJ Holdings,* [2007] 2 SCR 588. There, the Council considered 32 bylaws in a closed meeting. Later, during an open meeting, Council gave first, second, and third reading to these bylaws without a debate, citing solicitor-client advice as the reason the earlier portion of the meeting was closed. The Supreme Court of Canada admonished the Council as follows:

> In light of the particular statutory provision that occupies us — the open meeting requirement — I would add the following comment on the principle of deference. The dissent of McLachlin J. (as she then was) in *Shell Canada* is often cited as a broad statement of the deference that courts owe to municipal governments. In large part, this deference is founded upon the democratic character of municipal decisions. Indeed, McLachlin J. recognized that deference to municipal decisions "adheres to the fundamental axiom that courts must accord proper respect to the democratic responsibilities of elected municipal officials and the rights of those who elect them" (p. 245). Municipal law was changed to require that municipal governments hold meetings that are open to the public, in order to imbue municipal governments with a robust democratic legitimacy. 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. <u>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</u>.
>
> (Our emphasis)

It is not within the scope of this paper to provide a detailed discussion of each of the grounds for closure cited above. Rather, it deals with some more specific and current issues facing local governments in relation to closed and open meetings, identifying thorny issues and areas in which legislative amendment may be desirable.

A. Informal "Shirtsleeves" Meetings

At what point does an informal gathering (sometimes called a "shirtsleeves meeting") become a "meeting", thereby attracting the statutory rules in the *Community Charter*? The nature of the modern municipality is such that its elected officials are expected to participate in gatherings that either may or may not fall short of a meeting, such as training, planning, briefings.

Whether one of these gatherings becomes a meeting is a contextual exercise that looks at: (1) the nature of the group; (2) the nature of the discussion; and (3) the nature of the gathering. Generally, a gathering becomes a meeting where the council or board advances its business toward a decision.[1]

In relation to the first factor – the nature of the group – the presence of a quorum of council or board members at a gathering is a strong indication that the gathering is actually a meeting. A gathering constituted by less than a quorum is less likely to be a meeting, as business cannot be advanced.

On the second factor – the nature of the discussion – any real progress in the decision-making process is another strong indication that a council or board has crossed the line into meeting territory. This factor, however, is more about the character of the discussion itself than the fact of a decision being reached. Detailed discussion of specific business that is within the jurisdiction of the council or board will indicate that the gathering is a meeting.

Third, and finally, where and how a gathering takes place is also relevant. For example, a gathering that takes place in the council chambers and is presided over by the mayor is more likely to be a meeting. If rules of order set out in a procedure bylaw are followed and minutes are taken, similarly, a gathering is likely to be a meeting.

There are multiple court decisions in which informal gatherings were considered to be meetings, including *Southam Inc. et al. v. Ottawa (City),* 5 OR (3d) 726 (1991) and *Yellowknife Property Owner Assn v. Yellowknife (City),* [1998] NWJT No. 74.

In *Southam,* the City of Ottawa council held a "retreat" at a resort, where the majority of council and some staff attended. There was a structured agenda with topics that were regularly within the scope of council's usual business. When the nature of the retreat was challenged by a newspaper, the City argued that this gathering was simply an informal gathering. The Court rejected this argument and found that there was a lack of information to prove the gathering was informal and that City business had been advanced. As such, the Court deemed it to be a meeting subject to the open meeting rule.

In *Yellowknife,* the Court found that staff briefings to council constituted meetings that should have been subject to the open meeting rule. In that case, staff were providing regular briefings on matters that were within council's jurisdiction. These briefings did not simply constitute updates to council on staff actions. Rather, they included some decision-making processes and discussions that the Court thought the public should have seen. The Court provided a succinct precis of its findings as follows:

> In summary, the briefing meetings were structured meetings chaired by the Mayor which served many purposes including providing [staff] the opportunity

[1] The BC Ombudsperson has prepared a helpful guide for local governments that contains a detailed discussion of these factors. See Special Report No. 34, September 2012.

> to update council with information on civic affairs, but also provided the opportunity for [council members] to discuss… or debate… civic matters and give administration appropriate directions. Additionally, of course, the briefing sessions provided council with the opportunity to discuss confidential items without being required by s. 22(2) (supra) to pass a resolution permitting an in-camera meeting."

While it is clear that, as modern municipalities have taken on more and more administrative burden, there must be some informal gatherings at which staff members update council on matters outside of the context of a meeting, great care must be taken to ensure that these updates do not cross the line and violate the open meeting rule.

B. "Government-to-Government" Meetings with First Nations

As British Columbia has worked to implement the objectives of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) through the *Declaration on the Rights of Indigenous Peoples Act* (the Declaration Act), local governments have been engaged with indigenous governing bodies at an unprecedented level. One issue that arises frequently, as local governments continue to work with indigenous governing bodies more deeply, is whether discussions between a local government council or board and an indigenous governing body must take place in an open meeting.

Indigenous governing bodies frequently, due in part to the nature of their prior relationships that involve negotiation with the Federal and Provincial Crown, make requests that local governments engage in "government-to-government" meetings. Such meetings, while they can include staff, are often explicitly supposed to include, for example, the entirety of a First Nation's Chief and Council, as well as a local government's elected body. Under the current legislative framework, there is no statutory basis on which the public can be excluded from such meetings if, as discussed above, they relate to municipal business.

The BC Supreme Court recently considered a situation involving a local government and a First Nation conducting business in a closed meeting in *Kits Point Residents Association v. Vancouver (City),* 2023 BCSC 1706. In that case, the Association was challenging the decision of the City of Vancouver to execute a servicing agreement in relation to the Seṅákw development on Squamish Nation reserve lands located on the southern shores of False Creek. The Association argued that the decision to enter into the agreement was unlawful because it was made in a closed meeting.

The case turned on an interpretation of section 165.2(1)(k) of the *Vancouver Charter*, which reads:

> **165.2** (1) A part of a Council meeting may be closed to the public if the subject matter being considered relates to or is one or more of the following:
>
> …
>
> (k) negotiations and related discussions respecting the proposed provision of an activity, work or facility that are at their preliminary stages and that, in the view of the Council, could reasonably be expected to harm the interests of the city if they were held in public;

The Court interpreted this provision (which is not found in the *Community Charter*) in light of the purposes of the UNDRIP, as is now required by section 8.1 of the *Interpretation Act.* In light of those purposes, the Court adopted the interpretation set out by the City, and found that it was reasonable for the City to deal with the servicing agreement in a closed meeting.

The *Kits Point* decision raises interesting issues for local governments because – while it shows that the principles in UNDRIP can go some distance in authorizing indigenous governing bodies and local governments to make certain decisions in closed meetings – it brings into focus the fact that the existing bases for closure as set out in section 90 do not clearly authorize closed government-to-government meetings. Whether and how the legislation could be amended to address issues like this remains to be seen. While there are policy reasons for allowing certain types of meetings between local governments and indigenous governing bodies to take place behind closed doors, these must be balanced with the principles of openness and accountability that ground the open meeting rule.

C. Codes of Conduct and Censure Hearings

One other nascent issue facing local governments is how to run "censure hearings" under codes of conduct. With a push from the Province to encourage local governments to adopt regulatory bylaws and policies dealing with elected official conduct (see s. 113.1 of the *Community Charter*), many local governments are enacting regimes crafted to ensure procedural fairness for elected officials who are subject to a complaint. Often, such regimes involve the hiring of a third party investigator, whose role is to determine whether a breach of the code has taken place and to recommend possible sanctions or corrective actions.

There is no one-size-fits-all solution for creating such a process and, indeed, such a process is not directly contemplated by the legislative scheme. While some circumstances in which a report is received can clearly be closed pursuant to the *Community Charter* – for example, for the purpose of receiving legal advice on an investigation report – others are less clear. Investigation reports are often sensitive in nature. For example, they may contain the personal information of employees or members of the public, and may deal with difficult subject-matter.

There may be good reasons that a local government will want to ensure that it, at least at first instance, receives the report in a closed meeting.

We need not speculate about the breadth of situations in which a local government may close a meeting to receive an investigation report prepared under a code of conduct. However, we simply note that the lack of legislative contemplation of any particular system for the regulation of elected official conduct means that section 90 of the *Community Charter* does not address the issue. As such, local governments must take care that there is an existing basis in section 90 that they may rely on to close such a meeting.

III. CONFLICT OF INTEREST

Under Division 6 of Part 4, the *Community Charter* provides that a council member is prohibited from participating in council meetings and voting upon matters where that council member has a pecuniary interest in the matter or another interest that constitutes a conflict of interest.[2] It requires that where a conflict of interest arises, the member must declare that they have a conflict of interest and state in general terms why they consider that the conflict of interest exists. This is a statutory codification of the common law legal principle that where a council member has a personal interest in a matter that is so related to the exercise of their public duties that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty, that council member should be prohibited from participating in the matter.[3]

The prohibition on participating in matters where there is a conflict of interest acknowledges that council members are engaged members of their communities in addition to being elected officials. They will inevitably be interested in matters considered by council in a manner that could negatively impact their ability to fulfill their responsibilities as council members – in particular, the duty to consider the well-being and interests of the municipality and its community. Elected officials are anything but infallible, and the concern that a council member may have their judgment clouded by personal interests that are engaged by a matter that is under consideration by council is a fair one.

However, sussing out conflicts of interest can be challenging, and court decisions regarding conflicts of interest will often turn on the specific contextual factors of a given case. Section 100(2) identifies two types of conflict of interest: (1) where the council member has a direct or indirect pecuniary interest in the matter; or (2) the council member has another interest in the matter that constitutes a conflict of interest. However, it is noteworthy that this penalty only applies in relation to pecuniary conflicts – it does not apply to other interests that constitute a conflict of interest. As such, this paper will focus on pecuniary conflicts of interest.

[2] These provisions are made applicable to board members of Regional Districts by s. 205(1(a) of the *Local Government Act.* For simplicity, we will continue to refer to "council members" during this section, but our discussion is equally applicable in the Regional District context.

[3] *Allan v. Froese,* 2021 BCSC 28, para 37, citing *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City),* 1990 CanLII 31 (SCC).

Getting conflicts of interest right is important, because the consequences under the *Community Charter* can be severe where a conflict exists and a council member fails to recuse themselves from discussing or voting on the matter. Under section 101(3), a council member who remains in attendance, participates in discussion, votes on, or attempts to influence voting on any part of a meeting relating to a matter where a conflict exists is disqualified from holding office.[4]

A. Pecuniary Conflicts of Interest

A pecuniary interest is a financial or monetary interest. Therefore, whether the council member's financial interest is direct or indirect, participating in the matter will be prohibited. If, for example, a council member operates a landscaping business and council is considering whether to contract with their business to maintain municipal property, that council member has a direct pecuniary interest. Another example would be a circumstance in which it is the council member's spouse that operates the landscaping business. In that situation, the council member has an indirect pecuniary interest. In either case, it is obvious that they should recuse themselves from deliberating or voting on the matter.

For a pecuniary interest to be made out as a conflict of interest in court, the alleged conflict cannot be based on a suspicion, even a reasonable one – there must be facts to support it. In *Fairbrass v. Hansma,* 2010 BCCA 319, 39 electors from Spallumcheen argued that the Mayor's participation in a vote on a proposed amendment to the Township's Official Community Plan should be grounds for disqualification from office. The proposed amendment would have set out a policy to rezone parcels owned by the Mayor's children such that they could be subdivided and sold off for a profit.[5] The petitioners argued that this constituted an indirect pecuniary interest sufficient to constitute a conflict of interest, and that therefore the Mayor should not have voted on the amendment.

The chambers judge rejected this position, and the court of appeal upheld his decision, noting that without evidence of a "financial relationship, or of the intertwining of the financial affairs of the father on the one hand and the sons on the other," an indirect pecuniary interest cannot be established.

Fairbrass can be contrasted against another case from Alberta, *Casson v. Reed,* 1975 CanLII 939 (ABCA), where a council member voted in favour of constructing a recreational complex near his property. The lower court found that the construction of the complex would have a significant impact on the sale and value of parcels within its vicinity, including those belonging to the council member. This was not in and of itself sufficient to find a pecuniary interest, but the Alberta Court of Appeal noted that leading up to and after voting on the recreational complex, the council member was actively engaged in subdividing his property and selling the resulting lots at a substantial profit. As a result, the Court of Appeal held that he should be

[4] Note that disqualification may be avoided where the contravention was done inadvertently or because of an error in judgment made in good faith.

[5] Notably, the Official Community Plan amendment did not actually rezone the properties at issue – it simply established a policy to rezone properties of that kind.

disqualified from office – in other words, there was a sufficient "financial relationship" between the matter voted upon and the council member's personal financial interest in that matter.

B. Exceptions

The *Community Charter* does set out five circumstances where the prohibition against participating in a meeting if there is a conflict does not apply. These are set out under section 104(1):

- The pecuniary interest of the council member is a pecuniary interest in common with the electors of the municipality generally;
- 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;
- The matter relates to remuneration, expenses or benefits payable to one or more council members in relation to their duties as council members;
- 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;
- The pecuniary interest is of a nature prescribed by regulation.

Each of these will be discussed below.

1. The Community of Interest Exception

Under section 104(1)(a), a pecuniary interest of a council member that is shared in common with electors of the municipality generally is not subject to the conflict of interest provisions. In other words, if a council member may have a pecuniary interest in a matter that is before council, if that pecuniary interest is shared with a sufficiently broad percentage of the electors within the municipality, the council member may nevertheless participate in deliberating and voting upon the matter.

There are two reasons for this exception. The first is practical – if council members were obliged to excuse themselves from all matters that engage a pecuniary interest, some issues simply could not be dealt with. The annual property tax bylaw is the most frequently cited justification for this exemption on this basis. The second justification is that council members may represent a subsection of electors within a municipality, and if they share a pecuniary interest in common with those electors, their voice should be heard on the matter, even if the council member has a pecuniary interest in the matter and the matter does not engage with the interests of every elector within the municipality.

This second justification is more contentious, because it raises the issue of what percentage of the electorate needs to share in the "community of interest" in order for the exception to apply. This issue was recently dealt with by the BC Court of Appeal in *Redmond v. Wiebe,* 2022 BCCA 244. In that case, the respondent was a Vancouver council member who owned a restaurant and was an investor in a pub. The respondent participated in and voted on a motion related to the expansion of patio seating for restaurants and bars during the COVID-19 pandemic (the "Temporary Patio Program"). The petitioners sought to disqualify the respondent on the basis that he failed to disclose his conflict of interest and contravened the restrictions against participation.[6]

The Temporary Patio Program was approved by council, and the respondent's businesses was among the first of those awarded a temporary patio permit. The Court of Appeal noted that there were 453,190 electors in Vancouver, 69,230 business licences, and 3,127 restaurant and liquor licences at the relevant times, and that within three months of adopting the Temporary Patio Program, the City had received 452 applications for a temporary patio permit.

Both parties agreed that the council member had a conflict of interest, but the council member argued that he was exempt from the application of the prohibition against participating against in a matter where there is a conflict on the basis of the community of interest exception. The Court of Appeal stated that an interest held in common with some other electors is sufficient to engage the exception – the question was whether a) the interest was of the same *kind* as that shared with other electors, and b) whether there was a "significant segment" of electors with whom the interest was shared.

In the lower court, the judge identified the 3,127 holders of restaurant and liquor licences as the appropriate comparator group. The Court of Appeal disagreed, stating that this finding conflated the fact that any of those licensees *could* participate in the Temporary Patio Program, with the conclusion that all such licensees *did in fact* share the same interest as the council member.

Sharing a community of interest in regard to the Temporary Patio Program required more than being a member of a group that might benefit from it – instead, the Court found that the analysis should identify those electors who "were ready and considered themselves able to take advantage of the [Temporary Patio Program] during its initial limited availability… The only evidence of the size of that group is the number of such licensees who applied to take advantage of the program." As a result, the comparator group was the 452 electors who actually applied to the Temporary Patio Program,[7] a much smaller number than was considered

[6] Note that the applicable legislation here was the *Vancouver Charter,* but that the applicable sections of that legislation are the equivalent to section 101 of the *Community Charter.*

[7] The Court of Appeal also noted that the Temporary Patio Program was only open to those licensees who met certain requirements, such as exit pathway requirements, accessibility requirements, and free access to entrances and exits. This gestures towards a potential issue in the Court's reasoning – arguably, the correct comparator group would be all licensees who could qualify for the Temporary Patio Program, since it would be impossible for the council member to predict how many licensees would actually apply once it was established. I suspect that the

in the lower court. As a result, the Court of Appeal concluded that the council member had failed to prove that he shared his pecuniary interest with a sufficiently significant segment of the electors to bring himself within the community of interest exception.

In other words, the Court in *Redmond* found that the council member's interest in the Temporary Patio Program was of a different kind from that held by other restaurant and liquor licence holders – it was only sufficiently similar to be compared against other applicants to the program, and, against the backdrop of the Vancouver electorate, that was insufficient to satisfy the community of interest exception.

A similar finding was reached in *Casson,* which is discussed above. The community of interest exception was also raised in that case, with the council member arguing that his interest in the recreational complex was shared with all other property owners who would have access to the facility. The Alberta Court of Appeal accepted that he had a community of interest with other electors regarding the recreational complex, but found that his efforts to subdivide and sell lots at a profit in anticipation of its construction rendered his interest to be of a different kind.

2. The Local Service Tax Exemption

This exception is essentially a re-statement of the community of interest exception, but deals with the specific circumstance where the matter in question is the adoption of a local service tax. The fact that it exists separate and apart from the community of interest exception means that there is no consideration of whether a sufficiently significant segment of the "electors generally" share an interest in the local service tax that is before council. Instead, the exception applies even if the number of electors who share an interest in the local service tax is extremely small.

3. The Remuneration Exception

This exception speaks for itself – council members are permitted to deliberate and vote on matters relating to their remuneration, expenses, and benefits as council members. Obviously, all members of council would hold a pecuniary interest in that matter, but without setting up an independent tribunal to determine the matter of remuneration, they are also the only legislators capable of dealing with the matter. Presumably, this indicates that the legislature is comfortable with council members being held responsible by their electorate on this question in particular.

Court of Appeal relied on the actual number of applicants as a matter of expediency, since it would be inconvenient and time-consuming to actually assess each of the 3,127 licensees and determine which of those could have applied to the program.

4. The Remoteness Exception

This exception stands for the principle that despite the existence of a pecuniary interest in a matter that is before council, some interests are so remote or insignificant that they will not impair the council member's ability to carry out their public duties. Here, it is useful to recall the common law principle that underpins section 100: it is only intended to apply where a council member has a personal interest in a matter that is so related to the exercise of their public duties that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty.

A common example of a pecuniary interest that the courts have repeatedly struck down as too remote to constitute a conflict of interest is that of campaign contributions. In *King v. Nanaimo (City),* 2001 BCCA 610, *Highlands Preservation Society v. Highlands (District),* 2005 BCSC 1735, and *Allan v. Froese,* 2021 BCSC 28, the courts have found that a campaign contribution in and of itself is insufficient to establish a pecuniary interest – there must be "something more," such as evidence of an agreement between the council member and the donor to take a position on a specific issue in exchange for the donation.[8]

That said, courts have found surprisingly small amounts of money to be "significant" for the purposes of this section. The key is to examine the evidence of a connection between the purported pecuniary interest and the matter that is before council.

5. Prescribed by Regulation

At the moment, only one matter has been prescribed under the Conflict of Interest Exceptions Regulation for the purposes of this exception. Section 2 of the Regulation provides that if a conflict of interest arises as a result of the council member being on the board of a society or a corporation incorporated by a public authority that is providing a service to the municipality, the pecuniary interest is exempt from the conflict of interest restrictions set out under section 100.

IV. THE RIGHT OF THE PUBLIC TO PARTICIPATE

A. The *Community Charter* and the *Local Government Act*

As an overarching comment, it must be noted that neither the *Community Charter* nor the *Local Government Act* contain provisions that afford the public the general right to participate in a council or board meeting.

[8] This is of course subject to council members complying with all applicable campaign financing disclosure requirements.

While, as discussed above in detail, section 89 of the *Community Charter* requires that council and board meetings be open to the public, it does not afford the public a right to participate in the meeting. Rather, it only affords the public the right to attend the meeting and observe the proceedings.

The foregoing is confirmed by the fact that there are provisions in the *Community Charter* and the *Local Government Act* that expressly provide the public with a right to be heard by a council or board in specific circumstances (e.g., at a public hearing in relation to a proposed land use bylaw). If these statutes were intended to afford the public with a general right to participate in a meeting, these provisions would be superfluous. Statutory interpretation principles require that interpretations that would render provisions superfluous be avoided.

B. Procedural Fairness Requirements

In *Canada (Attorney* General*) v. Mavi*, 2011 SCC 30, the Supreme Court of Canada made the following general comments about the doctrine of procedural fairness:

> **38** The doctrine of procedural fairness has been a fundamental component of Canadian administrative law since *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, where Chief Justice Laskin for the majority adopted the proposition that "in the administrative or executive field there is a general duty of fairness" (p. 324). Six years later this principle was affirmed by a unanimous Court, *per* Le Dain J.: "... there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual": *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653. The question in every case is "what the duty of procedural fairness may reasonably require of an authority in the way of specific procedural rights in a particular legislative and administrative context" (*Cardinal*, at p. 654). See also *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 669; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 20; and *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 18. More recently, in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, Bastarache and LeBel JJ. adopted the proposition that "[t]he observance of fair procedures is central to the notion of the 'just' exercise of power" (para. 90) (citing D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at p. 7-3).
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> (Underlining added)

As can be seen, the Supreme Court of Canada recognized and confirmed that a duty of fairness does not arise in the context of legislative decision-making (see also, *Canada (Attorney General) v. Inuit Tapirisat of Canada* [1980] 2 SCR 735).

As for what constitutes legislative decision-making, in *Inuit Tapirisat*, the Supreme Court of Canada referred to a legislative decision as one involving "political, economic and social" concerns (at para. 27) in contrast to decisions that only engage a subject matter of "individual concern" or "a right unique to the petitioner or appellant". The distinction between administrative and legislative functions depends not on fine distinctions between individual exercises of the function, but instead on what the Court in *Inuit Tapirisat* called the "political science pathology" of the function. In determining whether a function is legislative, the key issue is whether the function as a whole is an adjudication of the rights or interests of an individual or instead a discretionary implementation of the decision-maker's policy choices.

Given that much of the business conducted by a council or board at a meeting is legislative in nature, procedural fairness principles are not engaged in relation to that business. As a result, those principles do not impose a general requirement that the public be afforded an opportunity to participate in council or board meetings.

C. Freedom of Expression

Supreme Court of Canada decisions regarding freedom of expression establish that there is no general obligation for governments to provide particular platforms for expression.

In *Haig v. Canada*, the Supreme Court of Canada first rejected the argument that the *Canadian Charter of Rights and Freedoms* generally requires governments to provide particular platforms for freedom of expression. In *Haig*, the Court held that:

> In my view, though a referendum is undoubtedly a platform for expression, s. 2(b) of the *Charter* does not impose upon a government, whether provincial or federal, any positive obligation to consult its citizens through the particular mechanism of a referendum. Nor does it confer upon all citizens the right to express their opinions in a referendum. A government is under no constitutional obligation to extend this platform of expression to anyone, let alone to everyone. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law.
>
> The following caveat is, however, in order here. While s. 2(b) of the *Charter* does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the *Constitution*. The traditional rules of *Charter* scrutiny continue to apply.

The Court's reasoning in *Haig* applies equally to the general right of the public to be heard by a council or board at a meeting. There is no requirement under section 2(b) of the *Canadian Charter of Rights and Freedoms* that the Province provide such a right under the *Community Charter* or the *Local Government Act*. Moreover, there is no requirement for a council or board, at first instance, to provide in its procedure bylaw a general right of the public to be heard at a meeting. However, if a council or board does so, the provisions granting the right must be consistent with the *Constitution*.

D. Procedure Bylaws

Many local governments have adopted procedure bylaws or policies that provide opportunities to appear before the council or board as a delegation. Others have included in their procedure bylaws or policies a limited period during which members of the public in attendance at a meeting of the council or board may make a statement on a matter that is on the meeting agenda. Others, in rare cases, have included in their procedure bylaws and policies a limited period during which members of the public in attendance at a meeting of the council or board may make a statement on any matter of importance to them.

Where a council or board has included public participation rights in their procedure bylaw or policies, procedural fairness requires that the council or board follow the procedure set out in the applicable bylaw or policy. In addition, the provisions granting the right must be consistent with the *Canadian Charter of Rights and Freedoms*.

The foregoing being said, where a council or board has included public participation rights in their procedure bylaw or policies, the *Canadian Charter of Rights and Freedoms* does not preclude the council or board from modifying or even eliminating those rights. In *Baier v. Alberta*, the Supreme Court of Canada considered whether removing access to a platform for expression created by the government constituted a violation of section 2(b) of the *Canadian Charter of Rights and Freedoms*. The appellants argued that since they had access to the platform prior to the government's action that changed the platform and excluded them from it, the government's action in taking away the platform for expression was a violation of section 2(b). The Court rejected that argument, stating as follows:

> The fact that the appellants had access to this statutory platform prior to the LAEA Amendments cannot convert their claim into a negative one. There is no meaningful distinction in this case between a hypothetical situation where the government for the first time provides for elected school boards with provisions to disqualify school employees from running and serving as trustees, and the present situation where pre-existing legislation has been amended to that end. To hold otherwise would mean that once a government had created a statutory platform, it could never change or repeal it without infringing s. 2(b) and justifying such changes under s. 1.

The Court's reasoning in *Baier* applies equally to circumstances where rights of the public to be heard by a council or board at a meeting under a procedure bylaw or policy is reduced or removed by amendment. As there is no general right under section 2(b) of the *Canadian Charter of Rights and Freedoms* to be heard by a council or board at a meeting, it cannot be an infringement of section 2(b) to reduce through the enactment of an amendment to the procedure bylaw or policy the rights of the public to be heard.

E. Issues for Public Hearings

1. Required Public Hearings

Where a public hearing is required under Part 14 of the *Local Government Act*, the *audi alteram partem* principle requires that, after a public hearing has been held, the council or board not hear from parties interested in the subject-matter of the hearing unless other interested parties have an equivalent opportunity to be heard. This often leads to a further public hearing, as councils and boards often wish to receive further information post-public hearing.

For the above reason, most procedure bylaws that permit delegations or public input prohibit representations on matters that have been the subject of a public hearing and that are still before the council or board for consideration. There is no reason to limit representations on such a bylaw that might be made prior to the decision on the scheduling of a public hearing, because such representations can be included in the material that is eventually made available to the public for inspection prior to the hearing, thereby complying with the *audi alteram partem* principle. However, for representations made after a public hearing, any public input policy should contain an express prohibition on representations regarding bylaws that have been the subject of a public hearing and that the council or board has not yet either adopted or rejected. Likewise, because questions put to council or board members can easily be shaped or phrased as to constitute a representation on the merits of such a bylaw, any public questions policy should preclude questions regarding such bylaws. The public is, of course, entitled at any time to put such questions to staff at any time.

2. Prohibited Public Hearings

The newly enacted prohibition of public hearings under Bill 44 raises novel issues with respect to public input that have not yet been the subject of litigation. Prior to Bill 44, local governments had the option of proceeding without a hearing for a zoning bylaw if it was consistent with the relevant official community plan. In those circumstances, the bylaw could be handled just like any other bylaw that wasn't subject to a public hearing requirement. For such bylaws, application of the public input and questions policy in a fair and reasonable manner would likely satisfy any procedural fairness concerns. All persons interested in the bylaw would, in the ordinary course of events, have equal opportunities to review upcoming council or board agendas and attend meetings if they wish to have an opportunity to make representations or ask questions, just as they may do with respect to any other type of bylaw.

Under Bill 44, allowing any such representations or questions might raise a new issue: whether the council or board, by entertaining representations and questions, is circumventing the Province's prohibition on public hearings on certain types of bylaws. An applicant for a bylaw amendment for residential development that is consistent with the applicable official community plan but is rejected by a council or board may plausibly argue that, by permitting representations or questions under public input or questions policies, the council or board circumvented the statutory prohibition on hearing from the public on the bylaw.

Alternatively, it may be that opponents of a bylaw that has been adopted would argue that the council or board breached the public hearing prohibition by permitting representations or questions from a supporter of the bylaw. In dealing with such an allegation, a court would likely have regard to the purpose of the prohibition, which appears to relate both to the timing of consideration of such bylaws as well as the introduction of argument and advocacy into the bylaw consideration proceedings that is inconsistent with the official community plan and may interfere with the implementation of the plan. In such circumstances, a court could reasonably order the council or board to reconsider its decision on the bylaw without regard to representations that have been made pursuant to the public input or questions policies and without allowing any further input or questions. Such legal proceedings would create uncertainty as to the status of a bylaw, and would of course expose the local government to legal costs and costs in staff time required to defend the board's decision.

Any public input or questions policy should contain an express prohibition on representations or questions regarding bylaws in respect of which a public hearing is prohibited.

F. Conclusion

Simply put, the public's general right to be heard by its local government is through the ballot box at a general election or a by-election.

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