ELECTED OFFICIALS: GAME MISCONDUCT

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I. INTRODUCTION

In the last year or two, there have been a number of interesting court decisions involving the behaviour of elected officials and their dealings with local government. This paper will explore these cases in some detail and attempt to provide local government with general legal direction and some practical tips if ever faced with these scenarios.

II. CENSURE MOTIONS

On occasion, local governments through their Council or Board, consider adopting censure motions against one of their elected officials for perceived or real misconduct during the course of their duties. Two of the most common examples are where elected officials either mistreat local government staff or breach confidences discussed during closed meetings.

There is no specific statutory provision dealing with a local government's right to censure one of its own elected officials. However, recent judicial commentary concludes that a local government's general powers to control its own process and functions allows it the jurisdiction to consider punitive censure motions against one of its own elected officials.

In *Barnett v. Cariboo Regional District*, 2009 B.C.S.C. 471, the court stated:

> Thus, I do not accept that the Regional District "has no jurisdiction" to govern the (mis)conduct of Directors. The weight of the statutory and judicial authority suggests that a Regional Board has the ability to determine its own internal procedures, which surely must include the ability to control misconduct by a Director.

Thus it would appear that a local government has the jurisdiction to censure its own elected officials but, as discussed further below, this must be done in accordance with the rules of procedural fairness.

In *Barnett v. Cariboo Regional District*, the B.C. Supreme Court struck down a Board resolution restricting a Director from contacting and communicating with staff. Regional District staff had been complaining with respect to the abusive nature of this Director's communications. In an effort to deal with this, the Board met in closed session to deal with certain confidential matters. Once these confidential items were concluded, the Board meeting remained closed and copies of a report regarding this Director's behaviour were circulated for review. This was the first that this Director had heard of the report and he was not given the opportunity to see the report in advance of it being provided during this closed session of the Board. Despite this, the Board adopted the following resolution at its meeting:

> …that Director Duncan Barnett not have contact or communication with staff, on a person to person basis, except through e-mail or written correspondence delivered to the front desk, addressed to the Chief Administrative Officer or designate. Further, that this directive be brought forward for review by the Board in a period of one year.

The primary issue before the Court in this case was whether or not the Director had been provided appropriate procedural fairness in advance of the Board adopting the above-noted resolution. After significant discussion, the Court stated as follows:

> The fundamental problem with this approach to disciplining the petitioner is that he was never given any specifics of the complaints that might permit a reasoned and structured response. He was never given any opportunity to consult counsel or even any reasonable opportunity to study and respond to the vague allegations that upset the sensibilities of CRD staff and others. In that light, it is difficult to see how the petitioner's right to be heard was respected in any sense.
>
> The CRD defends its refusal to be specific on the basis that it wants to protect its staff from (presumably) harassment from Mr. Barnett. While this might be a laudable goal in terms of employee/employer relations, it should not have trumped the petitioner's right to a fair hearing.

On the basis of the conclusion that the Board had not treated Director Barnett with appropriate procedural fairness, the Board's censure resolution was declared invalid. To add to this, the Court directed that the Regional District pay what are known as "special costs" to Director Barnett for its pre-litigation behaviour. The Court had concluded that there was a clear bias against Mr. Barnett and a complete disregard for any fair process. A special costs award in essence means that the litigant is entitled to get back their dollar for dollar costs paid to their lawyer for the handling of the matter.

This case serves to verify that censure motions are within the jurisdiction of a local government to enact but only after the elected official is provided with procedural fairness in advance of adopting a censure motion. However, as a result of the *Barnett* case, local governments would be well served to seek guidance from their solicitors in advance of considering any type of censure motion as it relates to an elected official.

III. ELECTION FRAUD

Section 152(3)(b) of the *Local Government Act* reads as follow:

> 152 …
>
> (3) A person must not, by abduction, duress or fraudulent means, do any of the following:
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> …
>
> (b) compel, persuade or otherwise cause a person to vote or refrain from voting;

This provision became the subject of much legal debate in the case of *Todd v. Coleridge*, 2009 B.C.S.C. 688, where the B.C. Supreme Court considered the validity of the election of a City of White Rock Councillor for his alleged untruths during the 2008 local government election.

By way of background, Mr. Todd was a unsuccessful candidate for Council in the City of White Rock election. Mr. Coleridge was a successful candidate for Council. During the election campaign, Mr. Coleridge's wife sent an email linking Mr. Todd with a pro-development slate of candidates for Council using an assumed name. Later, Mr. Coleridge purported to respond to his wife's email and an email chain ensued in which Mr. Todd was criticized. Mr. Coleridge's email was written as if he was responding to one of his supporters. When asked by the media if he knew who sent the original email, Mr. Coleridge lied saying he had no idea and when pressed sketched a picture of a shadowy character nobody had ever met. The media ultimately discovered that the email had originated from Mr. Coleridge's home but Mr. Coleridge claimed he was a victim of identity theft.

In dealing with these factual circumstances and how they were to be interpreted pursuant to s. 152(3)(b) of the *Local Government Act*, the Court concluded:

> Mr. Coleridge agrees that he described himself to the electorate in his campaign materials as a person someone could come to for straight answers. During the election, he was endorsed by the White Rock Citizens for Positive Renewal, which has one of its goals to "Restore Public Trust." Mr. Coleridge testified that he did not think the fact that he lied to and deceived the public about his participation in the Slate Email would have impacted his endorsement by the Citizens for Positive Renewal or impacted his campaign if the matter had come to the surface before the election…
>
> …

> Mr. Coleridge argues that the question is whether he persuaded or caused anyone to vote for or to refrain from voting for someone else by alleging the matters set out in the Slate Email, by using an assumed name, and later by repeatedly denying it.
>
> However, that is not the question in my view. The question in my view is whether Mr. Coleridge persuaded or caused anyone to vote for him by stating that in his campaign material that he was someone the electorate could come to for a straight answer, i.e., that he was someone you could trust. Mr. Coleridge ran on his reputation that he was a candidate who could be counted on to tell the public the truth.
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> …
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> Mr. Coleridge displayed a willingness to continue to lie and deceive the public despite being presented with a number of occasions when he could have told the truth. In my opinion, if a candidate puts his character in issue and runs on his integrity and honesty, then his character, including his integrity and honesty, is a material fact.

The Court concluded that the election of Mr. Coleridge was invalid and that his office was to be declared vacant. Thus, a by-election for the vacant Councillor's seat was ordered. To add to the situation, Mr. Coleridge was ordered to pay $20,000.00 to the City of White Rock to assist towards the expenses of running the by-election.

This case indicates clearly that if an elected official places his or her integrity into the record as a material fact, and is later shown to have lied, they may find their election to public office declared invalid.

IV. CRIMINAL CONDUCT

It often surprises members of the public (and some local government administrators) to be informed that elected officials who have been convicted of criminal offences, or who are charged with criminal offences during the term of their office, are not disqualified from their elected positions. There are no simple statutory provisions which require an elected official to step down from office on the basis of being charged or convicted of a criminal offence.

Such a situation recently came to pass in the Lower Mainland where Port Coquitlam's Mayor was charged and convicted with several criminal offences. This Mayor refused to resign from his mayoral position despite significant public protest asking him to do so. Ultimately, he was voted out of office in the 2008 elections.

It would seem that one available method to remove an elected official convicted of a criminal charge would be to rely on the provisions of s. 110(1)(b) of the *Community Charter* wherein the elected official who is absent for 60 consecutive days or 4 consecutive regularly scheduled meetings, without excuse, will be disqualified from office. This section reads:

> 110 (1) A person elected or appointed to office on a council is disqualified from holding that office if any of the following applies:
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> …
>
> (b) the person is absent from council meetings for a period of 60 consecutive days or 4 consecutive regularly scheduled council meetings, whichever is the longer time period, unless the absence is because of illness or injury or is with the leave of the council;

Obviously, if an elected official where to be sentenced to jail time in excess of this period of time they would be disqualified from office. However, other than that circumstance coming to pass, criminal charges or convictions do not result in automatic disqualification from office.

V. CLOSED MEETING CONFIDENCES

A not infrequent occurrence for local governments is the leaking of sensitive information from closed meetings of a Council or a Board. It is important to remind our elected officials of the provisions of s. 117 of the *Community Charter* which reads:

> 117 (1) A council member or former council member must, unless specifically authorized otherwise by council,
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> (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.
>
> (2) If the municipality suffers loss or damage because a person contravenes subsection (1) and the contravention was not inadvertent, the municipality may recover damages from the person for the loss or damage.

In addition, s. 30.4 of the *Freedom of Information and Protection of Privacy Act* provides as follows:

> **30.4** 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.

Although several local governments to the writer's knowledge have had significant concerns with respect to these provisions being breached by elected officials, there are very few circumstances where a breach can be proven.

Interestingly, there is currently a charge making its way through B.C. Provincial Court involving a City of Prince George Councillor who is facing a fine of up to $2,000.00 for disclosing an in-camera document containing sensitive personal information contrary to s. 30.4 of the *Freedom of Information and Protection of Privacy Act*'s protection of personal privacy provision cited above.

The Councillor allegedly leaked a document which ended up on the CBC's website for a brief period of time. This report summarized a lawyer's findings with respect to a personal relationship between a senior member of the RCMP detachment in Prince George and a civilian City manager working at the detachment. This report, which was properly placed before the City of Prince George Council pursuant to s. 90 of the *Community Charter*, was not authorized to be released to the public given its sensitive content.

This prosecution is a reminder to elected officials, and local government staff, of the seriousness of their responsibilities and the corporate responsibilities of a local government under both FOIPPA and the *Community Charter* with respect to the collection of personal information and its dissemination.

As can be seen from these charges, the consequences of privacy breaches can be serious with individuals facing quasi-criminal charges with a maximum fine of up to $2,000.00 while the local government may be prosecuted to a maximum of $500,000.00.

It is very important to note that the charges against this Councillor have not been proven in Court and at this time are allegations only.

VI. CONFLICT OF INTEREST

Elected officials faced with a conflict of interest scenario may be faced with two types of disqualification: disqualification from voting on the particular matter and/or disqualification from office. The tests for conflict of interest arise from the common law, as do many of the legal consequences. The *Community Charter* also contains important provisions prohibiting elected officials affected by a conflict from participating in discussion and voting.

The Supreme Court of Canada in *Edmonton (City) v. Hawrelak*, [1976] 1 S.C.R. 387, described the elected official's duty as follows: "No one entrusted with duties of a fiduciary nature may enter into any transaction in which his personal interest is or may be in conflict with the interest of his principal."

The common law recognizes two types of conflict of interest: non-pecuniary private or personal interest and pecuniary interest.

Non-pecuniary conflicts arise in situations of close personal relationships. The Court will examine whether there is a reasonable apprehension that the elected official is biased. In short, would a reasonable person find it likely that the elected official would favour one position or party over another? For example, in *Starr et al. v. City of Calgary* (1965), 52 D.L.R. (2d) 726 (Alta. S.C.), two city council members who also sat on the board of directors for the Calgary Stampede were disqualified from voting on any matter before council that affected the Stampede.

What constitutes a "pecuniary interest"? Based on the cases on this subject, it appears one of the most frequently alleged situations of pecuniary conflict of interest arises when a matter before council involves a developer or another party from whom an elected official has accepted campaign donations. Cases like *King v. Nanaimo (City)* (2001), 94 B.C.L.R. (3d) 51 (C.A.), however, suggest that there must be a fairly strong correlation between the matter of the vote and the elected official's personal interest, and sufficient evidence showing the campaign contribution affected the elected official's vote.

Sections 100 and 101 of the *Community Charter* have codified common law prohibitions against situations of pecuniary conflict of interest. Directness of the pecuniary interest in question is not a relevant consideration. The *Community Charter* states that an elected official must not participate in discussions of any matter or vote on a question regarding any matter because the member has either a direct or indirect pecuniary interest. In fact, elected officials with such a conflict must make a declaration to this extent (section 100(2)), after which time four requirements of section 101(2) of the *Community Charter* must be met:

- The member must leave the meeting while the matter is under consideration;
- The member must not participate in discussion at all;
- The member must not vote on a question in respect of the matter; and
- The member must not attempt in any way to influence voting on the matter.

Contravention of one of these four requirements under section 101(2) of the *Community Charter* disqualifies that elected official from continuing to hold office unless the contravention was inadvertent or the result of a good-faith error in judgment (section 101(3) of the *Community Charter*). A court would render the vote of an elected official invalid if made in contravention of these provisions.

The restrictions on participation in debate and on voting are exempted in the following situations contained in section 104(1) of the *Community Charter*:

(a) The pecuniary interest of the council member is a pecuniary interest in common with the 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 the remuneration or expenses payable to one or more council members in relation to their duties as council member;

(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; or

(e) The pecuniary interest is of a nature prescribed by resolution.

If an elected official, by their own participation has either disqualified themselves from office or refused to step down on a matter where a conflict is clear, s. 111 of the *Community Charter* allows ten or more electors, or the local government itself, to apply to the B.C. Supreme Court for an order under the section. There are certain procedural and timing restrictions to do so. Generally speaking, the Court will review the circumstances under which the elected official has participated in matters which may disqualify that elected official and make a declaration as to whether or not that elected official's office should declared vacant.

Such a situation was recent considered in *Fairbrass v. Hansma,* 2009 B.C.S.C. 878, where the Mayor of Spallumcheen was petitioned by 39 electors claiming that he should be disqualified from office for a pecuniary interest in some properties owned by his sons for which he had voted on an OCP amendment which would have allowed for subdivision and upzoning of certain properties.

In an interesting judgment, the Court concluded that the Mayor did not have an indirect pecuniary interest and was thus not disqualified from office.

> In essence, the petitioners argue that the court must assume that because he is their father, this mayor must be taken to desire financial advancement for his sons, and further that because of that father and son relationship, improvement of the sons' affairs will necessarily equate to an improvement of the mayor's estate.
>
> In my view, the law has not yet come so far as to permit such inferences to be drawn, at least not without there being some evidence to support them. None of the authorities upon which the petitioners rely go that far - they all contain at least some evidence showing a link between the pecuniary interests of the official and

> the pecuniary interest of the party whose affairs were affected by the matter under discussion.

The Court made it clear that it was making this conclusion on the basis of a lack of evidence presented to the Court. In addition, the Court made it clear that the Mayor may have been saved from disqualification in any event given that he had sought legal advice early in the process and had a "good-faith" position given that he had relied on that legal advice in continuing to vote on the OCP amendments.

This case highlights the importance of obtaining independent legal advice for elected officials where there are allegations of conflict of interest. Local governments may wish to discuss policies to assist elected officials to access independent legal counsel in this regard. Allowing access to independent legal counsel for its elected officials may save local governments significant legal costs, and perhaps avoid costly by-elections, in the event that electors, such as in the *Fairbrass* case, bring petitions to disqualify elected officials.

VII. A WORD OF CAUTION

In most of the above-cited examples, elected officials have placed themselves in positions by their own conduct, or lack of conduct, that led to their disqualification or censure. As such, when elected officials do misbehave in this regard, the above-noted examples show that there are, in most cases, statutory provisions or procedural mechanisms in place to deal with that misconduct.

However, it is important to note that most allegations made against elected officials by members of the public or others carry little, if any, substance. For example, in *Costello v. Hornby Island Local Trust Committee*, 2009 B.C.S.C. 1334, serious allegations were made against two elected officials. These were completely rebuffed by the Court in clear factual findings. In this regard, the Court stated as follows:

> I agree with the defendants that the claims brought by Ms. Costello are very serious stigmatizing accusations against the HILTC, the Islands Trust, the Islands Trust Council, Ms. Griggs and Mr. Law without any legitimate foundation. The evidence fails to establish Ms. Costello's claims for negligence, abuse of public office, breach of trust, mental distress and punitive damages.
>
> There is no evidence the defendants engaged in deliberate, unlawful conduct and targeted malice against Ms. Costello or her property. To the contrary, the defendants attempted to facilitate a compromise, weighing the interests of all parties in conjunction with the community interest to preserve and protect community values, resources, and rural character. The local trustees did their best to serve their community for minimal compensation but, as Mr. Law commented, in the highly charged emotional environment

> they could not please everyone; in fact, at the end of the day, they could not please anyone. However, the end result is that Ms. Costello's building is in compliance with the Bylaw and Mr. Grayson is closer to establishing his winery.

In this regard, all local governments should ensure that they have indemnification bylaws in place to assist elected officials when they are sued personally. Early and ongoing legal advice in these scenarios is very important.

VIII. CONCLUSION

Local governments would be well served to consider the following in effort to be prepared for dealing with elected officials misconduct whether real or alleged.

1. In dealing with elected officials who are abusive to their colleagues or local government staff, an appropriate procedural response to such behaviour should be laid out well in advance of it being considered by Council or a Regional Board for censure purposes. For example, local government staff can, in consultation with their corporate solicitors, draft a policy (e.g., similar to a business licence suspension or cancellation hearing) that gives the elected official the opportunity for notice, a response and a hearing before his or her colleagues before being censured. Drafting a written policy of this nature before such an incident arises would be prudent.

2. Local government Chief Electoral Officers would be well advised to remind candidates for local government office of the Court's reasons in *Todd* v *Coleridge* and to remind all candidates for local government office that violations of election rules may result in their office being challenged and potentially declared vacant.

3. Local government officials should remind elected officials of the provisions of s. 117 of the *Community Charter* and s. 30.4 of FOIPPA and stress to elected officials the seriousness of the potential civil and quasi-criminal consequences for a breach of these provisions.

4. Local government officials should provide routine educational opportunities to their elected officials to understand the conflict of interest provisions in the *Community Charter*. There still appears to be a significant misunderstanding by some elected officials as to the operation of these provisions and the consequences for being in breach of these provisions.

5. Local governments should seek routine legal advice from their corporate solicitors as to whether elected officials are in conflict of interest as it may have serious implication on the local government, both by way of the adoption of important bylaws or resolutions, and the possibility of an office being declared vacated. In addition, local governments should provide elected officials with a reasonable opportunity to seek their own independent legal advice to assist them in understanding whether they are in fact in a

conflict of interest. It is important both for the elected official, and the local government, to ensure that the elected official has independent legal advice.

6. In the vast majority of cases, allegations of misconduct made against elected officials are without foundation. As such, a local government should be prepared to assist its elected officials in whatever way possible through its indemnification bylaw or an indemnification resolution to assist them with obtaining adequate legal advice.