YOUNG ANDERSON
BARRISTERS & SOLICITORS

SEPTEMBER 19, 2013

UBCM WORKSHOP

Conflict of Interest in BC and Beyond

***Francesca Marzari*, Young Anderson**

2012 and the early part of 2013 saw significant developments in the area of conflict of interest. In B.C., we started the year with two decisions: *Baziuk v. Shelley*, and *Schlenker v. Torgrimson*.

Baziuk v. Shelley concerned a councillor who was found to be disqualified to hold office because he was still considered to be an employee of the city as a member of its volunteer fire department (See our May 2012 Newsletter at http://www.younganderson.ca/images/uploads/May_2012_Newsletter_Vol23_1.pdf for a fuller discussion).

Schlenker v. Torgrimson, which considered conflict of interest in the context of elected officials sitting directors of non-profit societies, was originally decided in January of 2012 by the BC Supreme Court. That court found that two Islands Trust trustees that had voted to provide funding to two non-profit societies on the Island involved in water conservation and climate change issues pursuant to the Salt Spring Island OCP, of which they were board members, were not in a common law or pecuniary conflict of interest because they received no remuneration from the societies, and because the reasonably objective observer would consider that the societies were established to further the work of the local government and not to benefit the trustees personally.

An appeal of that decision was heard on November 26 2012, the same day that the Ontario lower court gave reasons on *Magder v. Ford,* finding that Mayor Ford was disqualified from office, having voted on a motion that related to the use of his office to fundraise for his private football charity. A discussion of that case can be found in our client bulletin released January 25, 2013 at http://www.younganderson.ca/images/uploads/lawyers/Client_Bulletin-2013-January_25-bb-Ford_Appeal.pdf.

Somewhat ironically, the B.C. Court of Appeal overturned the *Schlenker* decision in January 2013, finding the two trustees to be in a pecuniary conflict of interest, just two weeks before the Ontario Divisional Court (Ontario's court of appeal) overturned Mayor Ford's disqualification.

At first glance, it might appear that the law in Ontario and the law in British Columbia are now diametrically opposed with respect to the involvement of local government elected officials in private societies. However, a closer look at the decisions belies that appearance.

The *Ford* case

In the case of Mayor Ford, the Ontario Divisional Court's decision continues to support a finding that Mayor Ford was in a conflict when he used City letterhead to raise funds for his private football charity. However, it was not this conflict of interest that founded the disqualification application. Rather, this conflict was the basis only for a recommendation by the City's integrity commissioner that Mayor Ford repay the $3,150.00 he raised for the charity back to the original donors. The integrity commissioner did not recommend disqualification in that case. Indeed, it would appear that the two types of penalties authorized by the *City of Toronto Act* were limited to a reprimand, or a suspension from council without pay for up to 90 days.

The basis for disqualification in the Ford case was actually Mayor Ford's participation in a vote on council in support of a resolution that he not have to repay the funds raised. The appellate court in Ontario agreed that Mayor Ford had a personal and financial interest in that issue when he voted, that was distinct from any interest he may have had in the football charity. However, the appellate court also found that Toronto's City Council had no authority to require Mayor Ford to repay those funds, and therefore the vote which Mr. Ford participated in was a nullity. On that basis, Mayor Ford's participation in the vote could not be the basis for disqualification.

This *Ford* case raises a more general concern with respect to the usefulness of conflict of interest provisions. The most egregious cases of conflict of interest may well be those cases where a local government official votes to enrich themselves, where they have no authority to do so. The Ontario appellate decision would seem to say that, as long as there was no legal authority for the City to actually follow through on such an enrichment, the attempt itself could not be penalized or subject to the requirements of the *Act*. The complainant has promised to seek leave to appeal this case to the Supreme Court of Canada.

The *Schlenker* case

In *Schlenker* there was also no disqualification ordered, but in that case it was because the trustees were no longer in office. Indeed they had announced that they would not be seeking re-election in the 2011 municipal election before the conflict allegations were even made. The petitioners in the *Schlenker* decision also sought "reimbursement" of funds paid to the non-profit societies, and this relief was denied, in part, because the trustees had not received any of those funds.

So in fact, the Ford and *Schlenker* decisions are similar in that neither decision resulted in a disqualification from office, but both decisions supported findings of conflict of interest. However, there is also a very significant distinction between the cases that is of great concern to many local governments across British Columbia: a distinction that rests in the types of non-profit societies the elected officials in each province had been involved with.

Non-Profit Societies as a Local Government Tool

In the *Ford* decision, the non-profit society was a private football foundation. While worthy cause, there was no suggestion that the society was linked to the purposes or objectives of the City of Toronto.

In the *Schlenker* decision, the two societies at issue, the Salt Spring Island Water Council and the Salt Spring Island Climate Action Council, were formed in an effort to coordinate the activities of the Islands Trust representatives, the Regional District representative for Salt Spring Island, water improvement district directors (on the Water Council Society) and other community stakeholders, in respect of local government issues regarding water conservation, and the climate change targets in the Official Community Plan. One or both of the trustees sat as board members on these societies, together with the Regional District director who chaired the Water Council Society. In so doing, the elected officials were using the non-profit societies to coordinate between local governments and other levels of government in furtherance of local government goals.

The Court of Appeal's decision in *Schlenker* therefore has had significant ramifications across British Columbia for local governments that participate in societies created, in many cases, specifically for the purposes of coordinating between governments and forwarding the goals of the local government. It also affects local governments that have appointed elected officials to the boards of local societies seeking to establish accountability for the projects financed or supported by the local government, such as fire prevention societies, or the Canada Winter Games society.

There is nothing new about the requirement that elected officials cannot participate in council decisions that pertain to matters in which they have a personal or pecuniary interest. However, prior to the *Schlenker* decision, it was generally believed that a director, who is not paid for their position or remunerated in relation to their participation in a board or society, would not have a pecuniary conflict in relation to monies paid to that society if those monies would not or could not flow to them. Furthermore, in *Save St Ann's Academy Coalition v. Victoria*, our Court of Appeal found that the appointment of two City of Victoria councillors to the provincial Capital Commission, a crown corporation, did not lead to a disqualifying conflict of interest preventing those councillors from voting on council resolutions in matters pertaining to the Commission's property. This was because the Commission's statutory foundation actually *required* the appointment of representative from the City on the board.

The implication of the *Schlenker* decision is that elected officials sitting on societies or boards that are not established by statute, or that are established by statute but which do not *require* the appointment of an elected official to their board, cannot participate in discussions, either at the council table or with staff or outside entities, in relation to any pecuniary or financial matters relating to that society or board. As most elected officials are appointed to these types of societies for the specific purpose of ensuring accountability for local government contributions, amongst other things, this prohibition on their participation renders their appointment to these boards essentially useless to the local government.

Next Steps

Since the *Schlenker* decision, there has been a substantial response from local governments across British Columbia that consider participation of their elected officials on non-profit societies, both in their community and inter-jurisdictionally, to be essential to their work as local governments. As noted by the BC Supreme Court judge in the *Schlenker* decision, elected officials are generally elected to office on the basis of their contributions to their community, and often as a result of their involvement in non-profit societies.

It should be noted that the *Schlenker* decision does not prevent or prohibit in any way local government officials from continuing to participate on non-profit societies that are of interest to them, and should have no significant impact on their participation in private non-profit societies (i.e., those non-profit societies where the local government officials are not appointed by their local government). With respect to those societies, it is clear that local government officials have and continue to have a personal conflict of interest with respect to matters relating to societies they are directors of when it comes to council voting and participation. In other words, elected officials can continue to wear both hats, but must declare a conflict and remove themselves from council discussions around matters dealing with the non-governmental societies in which they are directly involved.

With respect to societies directly related to the purposes and objectives of the local government, whose boards are largely made up of elected officials specifically for the purposes of coordinating their governmental work, the *Schlenker* decision puts the constitution of the societies and the usefulness of these societies directly into question. For now, local governments may wish to appoint non-elected officials to those boards to represent the interests of the local government. They might also consider models of cooperation other than non-profit societies, such as committees, commissions, or service agreements.

Ultimately, however, the use of non-profit societies in order to coordinate the work of local governments between each other, and the appointment of local government officials to these societies, may well require a legislative or regulatory remedy. One solution that we have suggested is the introduction of a regulation pursuant to s. 282(2)(e) of the *Community Charter*, which would expressly exempt elected officials from the conflict of interest provisions in the *Charter* where they are expressly appointed by their local government to sit on the board of a non-profit society. Given that the *Schlenker* decision also implicates participation in corporations, local governments may also wish to seek an exemption for elected officials who are appointed by their local governments to sit on boards of municipal wholly owned corporations. Other legislative or regulatory options are also available, and we understand that the Ministry is in the process of reviewing the issue, together with the UBCM.

YOUNG ANDERSON
BARRISTERS & SOLICITORS

UBCM Conflict of Interest Worksheet

Francesca Marzari and Alyssa Bradley

Sally Citizen is a director of the Business Improvement Association in the Town of Pecunia.

The BIA is a registered non-profit society, organizes numerous activities, and regularly appears before Council of the Town to make recommendations and comment on local initiatives. The BIA has always received grants from the Town and the Town has generally had an elected official sitting on the BIA board. Every year the BIA organizes an Art Walk and Studio Tour, which Sally is particularly involved in as a local artist and gallery owner.

Sally ran as a Councillor for the Town in the last election and was elected on a platform of promoting the Town as a community with a strong connection to the arts. She continues to sit on the BIA as a director as well, and generally acts as a liaison between the Council and the BIA.

Now that Sally is a Councillor she wants to support the BIA, and the Art Walk and Studio Tour in particular, as part of her mandate.

1. Can Sally vote at Council to support the grant to the BIA for the Art Walk?

2. What if she was voting on a general operating grant to the BIA and not the Art Walk?

3. What if she refrained from voting but appeared before Council as a representative of the BIA?

4. What if she was a member of the BIA, but not a director?

5. What if the BIA was not an incorporated society, but just an informal advisory group?

6. What if Sally also opened her own art studio and gallery as part of the Art Walk?

7. What if the BIA was not seeking any funding, but was seeking a permit to close a street to vehicular traffic as part of the Art Walk?