GUIDE FOR MUNICIPAL COUNCIL MEMBERS AND REGIONAL DIRECTORS IN BRITISH COLUMBIA

October 12, 2018

Prepared by:
Colin Stewart and
Marie Watmough

STEWART McDANNOLD STUART
Barristers & Solicitors

PH: 250.380.7744
FX: 250.380.3008
logolaw@sms.bc.ca

2nd Floor, 837 Burdett Ave.
Victoria, BC V8W 1B3
www.sms.bc.ca

1.0 LOCAL GOVERNMENTS AND THE CANADIAN CONSTITUTION

Municipalities and regional districts are created by the Provincial government, but authority for the incorporation of municipalities and other local authorities is given specifically to the Provinces in the *Constitution Act*, 1867 (formerly the *British North America Act*).

Some areas of jurisdiction remain outside of municipal or regional legislative authority: railways, banks, navigation and shipping and aeronautics, to name a few that have significant effect on local government powers.

2.0 THE LEGISLATIVE FRAMEWORK FOR LOCAL GOVERNMENTS IN BRITISH COLUMBIA

Before 1998 the *Local Government Act* of British Columbia was known as the *Municipal Act,* and it was almost a sole source for legislative authority for both municipalities and regional districts. In 2004 the Legislature enacted the *Community Charter,* and removed from the *Local Government Act* a great many of the powers of municipalities, incorporating them into the *Community Charter.* The *Local Government Act* was refocused as the document setting out regional district powers.

Key legislative provisions left behind in the *Local Government Act* include Part 26, Management of Development, Parts 3 and 4, Elections and Other Voting, and miscellaneous provisions like the municipal tax sale provisions and personal immunity from liability for municipal public officers. Even the incorporation of municipalities has been left in the *Local Government Act.*

Other statutes besides the *Community Charter* and the *Local Government Act* also contain powers that may be exercised by municipalities and regional districts. The City of Vancouver for example derives its authority from the *Vancouver Charter.* Other statutes include the *Environmental Management Act.*

3.0 POWERS EXERCISED BY LOCAL GOVERNMENTS

Powers exercised by local government include legislative powers (the power to make laws); corporate executive powers (the power to make decisions for the better administration of the local government as a corporation) and quasi-judicial powers (the power to make decisions that affect a small number of persons in circumstances resembling a hearing).

Bylaws are examples of the exercise of legislative power. Validly enacted, a bylaw is a law as much as a statute of the legislature or a Cabinet regulation. A breach of a bylaw is an offence, like the breach of a provincial statute or regulation.

In 2004 municipalities (but not regional districts) were given “natural person powers” enabling them to enter into a broad range of agreements, just like a real individual (or ‘natural’ person).

Quasi-judicial powers are those that are exercised from time to time to take action that usually involves some potentially negative effect on a property owner or business owner: suspending a business licence, placing a notice against the title to property to warn of a building bylaw problem, ordering clean-up of a messy property (failing which the property will be cleaned up by the local government at the owner’s expense). Administrative law imposes particular process obligations on Councils and Boards making those kinds of decisions.

4.0 JURISDICTION

4.1 Scope of Jurisdiction

As noted above the Constitution places local governments under some jurisdictional constraints. A local government cannot, for example, regulate where people may take off and land aircraft. That falls within the subject matter of aeronautics, and the courts have repeatedly confirmed that this area of jurisdiction is reserved exclusively to the Federal government.

Local governments are given their authority to act within the various statutes and regulations that provide their powers. However, while the Province giveth, the Province also taketh away. An example is the power over zoning. While municipalities and regional districts are given broad powers to determine the use of land under section 903 of the *Local Government Act*, the *Agricultural Commission Act* cuts down that broad authority when it comes to dealing with farm uses. Those are under the control of the Province through the Agricultural Land Commission, leaving municipalities and regional districts with limited authority.

In many circumstances a municipal council or regional board is empowered to act, but is required to do so in a certain way: by advertising (as in the sale of property); giving notice (as in the case of a development variance permit); or holding a public hearing (as in the case of most rezoning bylaws). Failure to follow the rules can have significant consequences, including the undoing of the action.

4.2 Acting Outside the Scope of Jurisdiction

If a local government acts outside its scope of jurisdiction, it is acting unlawfully. A zoning bylaw adopted without publication of a proper notice is invalid. Giving a monetary or other pecuniary benefit to a business enterprise outside the scope of a partnering agreement or under some other express power to do so is unlawful. An expenditure not authorized in the financial plan is illegal. Entering into an agreement of more than 5 years in some cases requires elector approval. There are many limits and procedural requirements.

Most senior local government officials know the limits of what is lawful and unlawful and will work with the elected officials to keep acts within the boundaries. Local governments have much broader authority to act than used to be the case, particularly before *Municipal Act* reform in the late 1990s and the enactment of the *Community Charter* in 2004. But there are still important limits.

There can be serious consequences attached to some illegal acts.

The most obvious consequence is that a resolution or bylaw enacted without lawful authority is likely to be found to be void. As if it never existed at all. This can be embarrassing at the least, and potentially expose the municipality or regional district to damages from a party that has suffered a loss.

There can also be personal ramifications for elected officials. If Council members authorize the spending of municipal funds without authority, for example, they can be held personally liable for that expenditure. (*Community Charter, s. 191).* The only defence referred to in the statute is if the elected official relied upon information provided by a municipal officer who was himself or herself guilty of dishonesty, gross negligence or malicious or willful misconduct – conduct that is rare.

The effect of this section has been tempered however by the recent decision in *Orchiston v. Formosa*, 2014 BCSC 2072, in which the Court held the councillors were protected from personal liability where they relied, in good faith, on advice from the municipal solicitor and administrative staff. This provides elected officials with a defence of good faith under this section.

5.0 ELECTED AND APPOINTED OFFICIALS

5.1 <u>The Policy and Legislative Role of Elected Officials</u>

The electors choose who will govern them at the local level. Most of the powers contained in the *Community Charter* and *Local Government Act* are to be exercised by the elected officials, rather than staff. Some powers may have been delegated; others will remain with the Board.

Elected officials enact bylaws, and provide overall general policy direction and guidance to the appointed officials. This role is critical in determining what policy and political choices are to be made for the organization. The councils and regional boards are also given a non-delegable power to enact bylaws – fulfilling the legislative function of the regional district.

Specific powers and important responsibilities are given to the Mayor under section 116 of the *Community* Charter and to the Board Chair under section 216 of the *Local Government Act* which will be discussed below.

5.2 The Administrative Role of Appointed Officials

The role of appointed staff is to implement the regulations and policies of the elected officials; they are the administrative branch of the local government.

Experienced dedicated administrators, financial officers, corporate officers and other managers and employees can be an invaluable resource for the elected officials. They have knowledge, information, skills and a lot of common sense. In many local governments, significant powers and functions have been delegated to the CAO and other appointed officers and officials. They may enter into routine agreements for the better operation of the municipality or regional district, make routine decisions and in some cases even issue development approvals like development permits. This can free up council or the Board to deal with the more sensitive, complex or policy-driven decisions without the clutter of dealing with the day-to-day administration.

Appointed officials can also warn elected officials of issues and concerns that can help prevent problems such as limits on authority, potential conflicts of interest, previous issues and examples of similar situations.

The CAO, Financial Officer and Corporate Officer have duties and responsibilities prescribed in either the legislation or in the Officers and Employees Bylaw. The CAO is the primary link between the elected officials and the local government staff. A relationship of candour and trust between the CAO and the elected officials, and in particular between the CAO and mayor or board chair can be very helpful in the proper administration of the local government corporation.

5.3 The Mayor and Board Chair

In a municipality, the mayor is the chief executive office. In a regional district, this role is assumed by the chair of the board of a regional district. This function includes providing direction to the corporation at the highest level, and ensuring that the corporation's different components are functioning properly.

The responsibilities of the board chair are set out in sections 216, 239 and 240 of the *Local Government Act*.

Section 116 of the *Community Charter* prescribes the powers, duties and functions of the mayor as follows:

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

(b) to communicate information to council;

(c) to preside at council meetings when in attendance;

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

(e) to establish standing committees;

(f) to suspend municipal officers and employees;

(g) to reflect the will of council and to carry out other duties on behalf of the council;

(h) to carry out duties assigned under the *Community Charter* or any other Act.

In addition to the responsibilities prescribed in section 116, the mayor also has the same responsibilities as council members under section 115.

The board chair's duties are defined in section 216(2) of the *Local Government Act* as follows:

(a) to see that the law is carried out for the improvement and good government of the regional district;

(b) to communicate information to the board

(c) to preside at board meetings when in attendance;

(d) to recommend bylaws, resolutions and measures that, in the chair's opinion, may assist the peace, order and good government of the regional district in relation to the powers conferred on the board by an enactment;

(e) to direct the management of regional district business and affairs

(f) to direct the conduct of officers and employees in accordance with section 239 *[chair to direct and inspect officers and employees]* and 240, *[suspensions of officers and employees.]*

(g) so far as the chair's power extends, to see that negligence, carelessness and violation of duty by an officer or employee is prosecuted and punished.

The chair's authority in relation to the supervision of officers and employees is set out in greater detail in sections 239 and 240 of the *Local Government Act.*

The duties of the mayor and the chair are expressed as being in addition to their duties as members of the board, or of council respectively.

5.4 Members of Council vs. Directors of a Regional Board

The core responsibilities of members of council are set out in section 115 of the *Community Charter*.

(a) to consider the well-being and interests of the municipality and its community;

(b) to contribute to the development and evaluation of the policies and programs of the municipality respecting its services and other activities;

(c) to participate in council meetings, committee meetings and meetings of other bodies to which the member is appointed;

(d) to carry out other duties assigned by the council;

(e) to carry out other duties assigned under this or any other Act.

As can be seen the responsibilities of members of council are described as being related to the policies and programs of the municipality.

There is no statutory equivalent to these powers for board directors. This does not mean that there are not duties applicable to directors, but they are not expressly prescribed by statute and so are derived from the common law.

Note that duties may sometimes come into conflict. In *Schlenker v. Torgrimson*[1], the B.C. Supreme Court held that trustees of the local trust committee of the Islands Trust were in a pecuniary conflict of interest in participating in a matter that involved societies of which they were directors as their duties to both the local government and the societies were distinct.

5.5 Oath of Office

A person elected or appointed to office on a municipal council must make an oath or solemn affirmation of office within 45 days in the case of a person elected to office under section 120 of the *Community Charter*.

Once the elections are complete, in order to assume the position of director on a regional board under section 202 of the *Local Government Act*, all elected or appointed officials (other than an electoral area director who is elected by acclamation) must make an oath or a solemn affirmation within 45 days of the declaration of the results of the election. As an exception, an electoral area director who holds office by acclamation must swear the oath within 50 days rather than 45 (section 202(1)(a)).

The oath or affirmation may be made before a Judge of the Court of Appeal, Supreme Court or Provincial Court, a Justice of the Peace, Commissioner for taking affidavits, Corporate Officer, or Chief Election Officer. A municipal council may prescribe its

[1] *Schlenker v. Tormgrinson,* 2013 BCCA 9

own oath or solemn declaration of office under section 120(2) of the *Community* Charter. The regional board may, by bylaw under section 202(5) of the *Local Government Act*, have established its own wording for the oath, otherwise the Local Government Elections Regulation, BC Reg. 380/93, prescribes the wording of the oath.

An elected official who fails to complete the oath within the required time limit will be disqualified from holding office until the next general local election and their seat declared vacant.

5.6 Length of Term

The term of office by a member of council begins with the first council meeting date that follows the election and ends immediately before the first council meeting following the next general local election (section 119 *Community* Charter). Under section 199 of the *Local Government Act*, the term of office for an electoral director is effective from the later of the first Monday after November 1 and the date the oath is sworn. This year that date is November 5, 2018, and runs until just before the first Monday in November four years from now, or until the successor swears the oath on November 7, 2022, assuming no adjustments to the schedule by the Legislature.

Under section 198 of the *Local Government Act*, municipal directors are appointed to the Regional Board by their respective municipal council and serve at the pleasure of that council. These director appointments become effective when the oath is completed and presented to the Regional Board.

The municipal director appointments end:

- when a new director is appointed,
- when the director ceases to be a member of the municipal council or
- on November 30 of the year of the next local election.

5.7 Alternate Directors

(a) *Alternate Municipal Directors*

Under section 200 of the *Local Government Act*, municipal councils may appoint one or more council members as alternate directors to act in place of the appointed municipal director when required. If, during the term of the appointment, the municipal director position becomes vacant the alternate director acts in the place of the municipal director until a new director is appointed by the municipal council. Where the municipality has more than one director on the regional board, the council may choose to appoint an alternate to act in place of a specific director or have several alternate directors who may act according to a system established by the municipality. However, an alternate may only act on behalf of one director at any time.

Upon the appointment of an alternate director or directors by Council, the corporate officer must report this to the regional district corporate officer in writing.

(b) *Alternate Electoral Area Directors*

Electoral area directors, in contrast, must appoint an alternate director within 60 days of being elected (s. 201(1), *Local Government Act*). In order to be appointed, the alternate must have the same qualifications as someone qualified to run as a candidate in the election. The appointment takes effect when two electors residing within the electoral area approve in writing to the appointment and the director notifies the corporate officer.

If the electoral area director does not appoint an alternate, the regional board must appoint an alternate director for the electoral director (s. 201(3), *Local Government Act*). Again, the appointee must be someone who would be qualified to be nominated as an electoral area director.

Once the alternate directors have been appointed, they must either swear or affirm the oath. This must occur either within 45 days of being appointed, or at the first meeting where they are acting in their capacity as an alternate, whichever is latest. (section 202(1)(e), *Local Government Act.).*

The term of office of an alternate electoral area director runs until a replacement is appointed or only until the next general local election (s. 201(8), *Local Government Act*), whichever is earlier.

5.8 Financial Disclosure and Campaign Financing Disclosure Requirements

(a) *Financial Disclosure Act*

Under the *Financial Disclosure Act*, all candidates are required to have filed a Financial Disclosure Statement with his or her nomination papers.

In addition, this *Act* requires that all elected municipal officials, which includes electoral area directors, file a written disclosure between January 1 and 15 of each year they are in office, (section 2(3), *Financial Disclosure Act)* and by the 15th day of the month following the month they cease to hold office. (section 2(5), *Financial Disclosure Act*)

Failing to file these required disclosures is an offence, which carries a penalty of up to a maximum $10,000.00 fine. Additionally, if a municipal official benefits financially from a failure to provide accurate and complete written disclosure that person could be ordered by the court to pay those monies to the local government.

(b) *Local Elections Campaign Financing Act*

A financial disclosure statement must be filed on behalf of all candidates, successful or not, acclaimed or elected, in relation to their campaign in accordance with section 46 of the *Local Elections Campaign Financing Act* ("LECFA") enacted in 2014. This requirement applies whether or not the candidate received contributions or incurred campaign expenses.

Disclosure requirements also apply to elector organizations that endorsed at least one candidate, any individual or organization that sponsored third party advertising or registered under LECFA as a third party sponsor or that sponsored non-election assent voting advertising.

The written disclosure statements of campaign contributions and expenses must be filed within 90 days of the date of the general voting day. Note this is unlike other deadlines such as the deadline for the oath which is based on a number of days from the date the election is declared.

If the disclosure statement is filed late, after the 90th day but no later that the 120th day, there is a $500.00 late filing penalty fee. The case law has interpreted this section to require payment of the fine as well as the filing of the disclosure to occur by the 120th day limit: *Stow v. British Columbia*, 2010 BCCA 312.

In addition to the initial disclosure report, the LECFA outlines those instances when a supplementary report would be required. These include instances where the information changes or where the initial report was inaccurate or incomplete.

The supplementary report can be initiated by either the candidate or the Chief Electoral Officer and must be completed within 30 days of the candidate becoming aware of the changes or receipt of the written notice from the Chief Electoral Officer that a supplementary report is required. (Section 54, LECFA)

Even though it is the financial agent who files the disclosure on behalf of the candidate, the LECFA states that it is the candidate's responsibility to ensure the filings are completed.

Elected candidates who fail to file the required statements cease to hold office and are disqualified until after the next general local election. The unsuccessful candidates who fail to file these campaign financing statements are also disqualified until after the next general election, effectively for up to eight years.

Prior to the deadline to file campaign disclosure statements, a candidate or their financial agent may make an application to Supreme Court for an extension of time to file. The Court may grant this either with the late penalty or waiving the late penalty. The Court may also grant other relief but it must be satisfied that the candidate exercised due diligence to ensure the disclosure requirements were met.

The BC chief electoral officer must, as soon as practicable, notify the designated local government officer of any notices sent out to candidates or elector organizations or other individuals or organizations required to submit disclosure statements under LECFA, and the local government officer must then prepare a report and present this report in open meeting to Council or the Board as soon as practicable. (section 61, LECFA)

6.0 MEETINGS

6.1 What Constitutes a Meeting?

What constitutes a meeting is a question that has perplexed local governments (and the courts) since the limitations on holding meetings *in camera* were introduced into the legislation.

Why is this important to know? Section 89(1) of the *Community Charter* provides that a meeting of council must be open to the public except as provided in section 90. Section 90 of the *Community Charter* then sets out a finite list of circumstances in which a meeting may be closed to the public. This rule also applies to council committees under section 93 of the *Community Charter*, and the same rules are made applicable to regional districts by s. 226(1) of the *Local Government Act*.

The case law (largely from Ontario) has held that a gathering of elected officials "for the purpose of discussing and acting upon some matter or matters in which they have a common interest" – the definition of a meeting from Black's Law Dictionary – constituted a meeting for the purposes of the Ontario municipal legislation. In another case a 'council retreat' was found to be in fact a meeting[2]. The court held that the key in determining whether the gathering was a 'meeting' was whether the councillors were requested to do so or did in fact attend a gathering at a function at which matters which would ordinarily form the basis of council's business were dealt with in such a way as to move them materially along the way in the overall spectrum of a council decision.

In a contrasting decision, the Ontario Court of Appeal held in a 1985 decision[3] that the requirements that meetings of a Board of Education be open to the public did not preclude informal informational discussions among board members, either alone or with the assistance of their staff. This case allows for some level of informal discussion by some members of an elected body in some circumstances without the gathering reaching the critical mass necessary to constitute a 'meeting'. It should not be relied upon, however, as overriding the other definitions of what might constitute a meeting of members of an elected body.

---

[2] *Southam Inc. v. Ottawa (City)*, (1991) 10 MPLR (2d) 76

[3] *Vanderkloet v. Leeds & Grenville County Board of Education*, (1985) 30 MPLR 230

Any meeting of a 'critical mass' of a board necessary to advance the decision making process may be characterized as a 'meeting' where board members discuss and move forward with discussions of regional district business.

In *Yellowknife (City) Property Owners' Association v. Yellowknife (City)*[4], briefing sessions with staff were held to constitute meetings of the municipal council where the discussions went far beyond simply updating Council but matters which formed the basis for decision making were dealt within in such a way as to move them forward.

The approach that has emerged from the courts can present challenges for elected officials, but an awareness of the rules is important.

7.0 SPECIFIC DUTIES

7.1 Duty to Respect Confidentiality

Section 117 of the *Community Charter* imposes a statutory obligation on Council members to preserve Council confidences. Section 787.1 of the *Local Government Act* makes this section applicable to regional districts. This is an important obligation that is unfortunately sometimes breached by individual elected officials. There is only a limited ability for local government to meet and discuss matters in confidence as set out in section 90 of the *Community Charter*.

In *R. v. Skakun*, 2011 CarswellBC 1352, a municipal councillor admitted to delivering a confidential and privileged workplace harassment report to the CBC. The report had been received by the council member during an in-camera meeting and contained "personal information" as defined in the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The council member was convicted of breaching section 30.4 of FIPPA which prohibits an "officer … of a public body" from disclosing personal information and was fined $750.00.

Note that the elected official in *Skakun* was not charged with breach of section 117(1) of the *Community Charter*. The *Skakun* decision was upheld on appeal by the BC Court of Appeal, 2014 BCCA 223, confirming that under FIPPA an elected official is an "officer" of a local government.

Under section 117(2), if the municipality suffers loss or damage because of a wrongful disclosure of in-camera or other confidential information it may recover the amount of that loss from the council member unless the contravention was inadvertent.

7.2 Duty to Identify and Deal With Conflicts of Interest

[4] (1998) 40 MPLR (2nd) 96

The *Community Charter* requires elected officials to declare and deal with conflicts of interest in accordance with a set of prescribed statutory rules. The onus falls on each elected official to identify when a conflict of interest exists and to take the appropriate measures to deal with it.

(a) *The Basic Rules*

The basic rules relating to conflict of interest are found in sections 100 and 101 of the *Community Charter* (applicable to regional districts by section 787.1 of the *Local Government Act*):

> 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.
>
> 101(2) Once the conflict is declared the elected official must:
>
> - leave the meeting;
>
> and must not:
>
> - participate in any discussion of the matter at such a meeting;
> - vote on a question in respect of the matter at such a meeting; or
> - attempt in any way (before/during/after a meeting) to influence the voting on any question in respect of the matter

The elected official may return to the meeting once the matter that gave rise to the conflict is no longer under discussion.

(b) *Identifying a Conflict*

The key to identifying a conflict of interest is finding the point at which an interest arises. This is not always obvious.

The interest may or may not involve money. If it does, it is a **pecuniary** interest. Pecuniary interests most frequently arise in relation to property, business interests, employment relationships, professional/client relationships, and spousal employment interests.

Non-pecuniary interests may arise in relation to family relationships where there is no pecuniary interest involved (children, siblings, parents) and relationships with other

organizations such as not for profit societies[5], church congregations or community groups.

The interest may be direct or indirect. It may be the elected official's own interest personally, or an interest that arises through a corporation.

The onus is on the elected official to be aware of their interests and to think ahead to matters that may create conflict of interest. There is no blameworthiness in having a conflict – it can arise in many context – but the problems arise when an elected official fails or refuses to acknowledge a conflict that actually exists. There can also be a problem created for an organization through an over-zealous rush to declare a conflict where none actually exists.

7.3 Consequences of Breach of the Act

The consequences of non-disclosure of a conflict of interest are different depending on whether the conflict is pecuniary or not.

If a member votes when he or she has a pecuniary conflict of interest, then the consequence is disqualification from office for the remainder of the term, and the invalidation of the elected official's vote.

In some circumstances where the nature of the decision in which the member participated was 'quasi-judicial' the entire decision may be vulnerable to being invalidated, as the law takes a more serious view of a misstep made in that type of context.

Under section 101 of the *Community Charter*, the elected official will not be disqualified, however, if she or he can persuade a court that the failure to declare the conflict and follow the statutory rules was either inadvertent, or an error of judgment in good faith. For inadvertence, the elected official must be unaware of the facts giving rise to the breach of the act. To be an error of judgment, the elected official must actually be aware of the facts, and make a reasonable error in good faith. Suppression of information, keeping things hidden, not disclosing the full extent of a relationship or a benefit that might accrue from a decision are factors that may prompt a court to decline to find 'good faith'.

7.4 Getting Advice

Advice on whether a conflict of interest actually exists or not can be very important.

---

[5] Note however that a *pecuniary* conflict of interest was found to exist in relation to an elected official who also held a position as a director on the board of a society: *Schlenker v. Torgrimson* 2013 BCCA 9 and voted on resolutions that affected the financial interests of the society. There is now some relief from the consequences of this decision in the Conflict of Interests Exceptions Regulation, B.C. Reg 91/2016

Once the conflict has been declared, a member may return to the meeting and participate provided he or she obtains a legal opinion indicating that there is no conflict. (s. 100(4) *Community Charter*)

7.5 Duties of the Mayor or Chair

Under section 100(6) *Community Charter*, the mayor or Chair must ensure that the member leaves the room and does not participate in respect of the matter at that meeting or a subsequent meeting. (s. 100(6) *Community Charter*)

7.6 Additional Types of Prohibited Conflict-Related Activity under the *Community Charter*

(a) *Restrictions on Use of Inside Influence (section 102)*

A council member or regional director who has a conflict of interest in a matter must not use their office to attempt to influence a decision, recommendation or other action in relation to the matter within the local government organization.

(b) *Restrictions on Use of Outside Influence (section 103)*

A council member or regional director who has a pecuniary conflict of interest must not use his or her office to attempt to influence a decision, recommendation or other action of a third party outside of the organization in relation to the matter.

An elected official who contravenes these sections also risks disqualification until the next election, unless the contravention was inadvertent or an error of judgment in good faith.

7.7 What May Not Be a Conflict of Interest (section 104)

The prohibitions contained in sections 100 to 103 do not apply in certain circumstances:

- where the pecuniary interest of the elected official is a pecuniary interest held in common with other electors of the municipality generally (according to the case law this doesn't mean all other electors of the municipality, but a sizeable class of persons);

- where the interest arises from a local service area, the interest of the elected official is deemed to be the in common with the other electors of the service area;

- where the matter relates to remuneration, expenses or benefits payable to one or more council members in relation to their duties as council members;

- where the interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the member in relation the matter. If the

happening is dependent on the occurrence of a chain of events, then it is 'too remote'. If the amount in question is very small, then it may be found to be 'insignificant'.

- other situations that may be prescribed by a specific regulation, including (but not limited to) the Conflict of Interest Exceptions Regulation B.C. Reg 91/2016.

7.8 Rules Around Gifts (section 105)

There are two rules:

1. Don't accept gifts or other personal benefits unless they are:

   (a) an incident of the protocol or social obligations that normally accompany the responsibilities of office. Holding public office means invitations to attend functions, events, and performances or to receive tokens of appreciation or esteem. These are ok if their purpose is as a matter of courtesy, ceremony or gathering, such as attending a Minister's reception at the UBCM convention. Such gifts and personal benefits are part of the function and are not prohibited. A reasonable person could not conclude that they were intended to influence the decision of an elected official;

   (b) the gifts or other personal benefits are authorized by law. The remuneration bylaw may address some matters, for example, that would not be considered to be a 'gift' or 'personal benefit'; or

   (c) campaign contributions (which are then not 'gifts' but permitted contributions to defray election expenses and must be reported in accordance with the *Local Elections Campaign Financing Act)*.

   All other offered gifts and proposed personal benefits should be declined or turned over to the municipality itself. If you can't decline a gift or personal benefit without causing offence, that might be an indication that the gift or benefit is an incident of protocol or social obligation. If there is doubt, consider turning the gift over to the Municipality. If there is a suggestion that the benefit or gift might create an obligation or an expectation of a favour in the exercise of a public power or function, that is an indication that the gift is not permitted.

2. Even if a gift or benefit is permitted it must be reported to the corporate officer under section 106 of the *Community Charter* if its value exceeds $250 or if the total value of gifts received from one source in one 12-month period exceeds $250.

7.9 Contracts with the Municipality (section 107)

The *Community Charter* does not prohibit a council or board member from having a contract with the municipality, but:

(a) the matter of the contract is a matter in which the elected official would have a pecuniary interest. Therefore, the member must follow the conflict of interest rules;

(b) the existence of the contract must be disclosed by being reported at an open council meeting.

There is a further reporting obligation to advise the corporate officer as soon as reasonably practicable. So, typically the elected official would advise the corporate officer immediately, and then report the matter to council at the following council meeting.

7.10 Restrictions on Use of Insider Information (Section 108)

A council member or former council member (or board director) must not use information or a record that:

(a) was obtained in the performance of the member's office; and

(b) is not available to the general public,

for the purpose of gaining or furthering a direct or indirect pecuniary interest of the council member or former council member.

The consequence for contravention of this provision is disqualification unless the contravention was inadvertent or because of an error of judgment in good faith.

7.11 Requirement to Repay Financial Gain (section 109)

In addition to the disqualification consequences in sections 101 to 108, where a council member or former elected official has contravened Division 6 of Part 4 of the *Community Charter* and has realized a financial gain in relation to that contravention, then the municipality itself or an elector may apply to the B.C. Supreme Court for an order that the council member or former council member pay to the municipality an amount equal to all or part of the person's financial gain as specified by the court.

7.12 Disqualification for Breach of the Act (section 110)

A person elected or appointed to office on a council is disqualified from holding that office if any of the following applies:

(a) the person does not make the required oath or affirmation of office within the time established by section 120 (1.1) *[oath or affirmation of office]*;

(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;

(c) the person is disqualified under Division 6 of Part 4 of the *Local Government Act* which includes any of the following:

- section 101 *[restrictions on participation if in conflict]*;
- section 102 *[restrictions on inside influence]*;
- section 103 *[restrictions on outside influence]*;
- section 105 *[restrictions on accepting gifts]*;
- section 106 *[disclosure of gifts]*;
- section 107 *[disclosure of contracts]*;
- section 108 *[restrictions on use of insider information]*;

(d) the person is disqualified under section 191(3) *[liabilities for use of money contrary to Act]* of the *Community Charter*;

(e) the person is disqualified under section 81(2) *[who may hold elected office]* of the *Local Government Act* or section 38 (2) *[who may hold elected office]* of the *Vancouver Charter*.

8.0 CRIMINAL CODE

There are provisions in the Criminal Code dealing with bribery, corruption and influence trading where public officials are concerned. Penalties for such criminal behaviour can include fines and imprisonment for up to five (5) years. These include the crimes of breach of trust by a public officer (s. 122, *Criminal Code*); and municipal corruption (s. 123, *Criminal Code*).

9.0 PERSONAL IMMUNITY AND INDEMNIFICATION

9.1 Immunity from Personal Liability

Section 738(2) of the *Local Government Act* provides personal immunity for a municipal council member or a regional board director in the performance of his or her duties or the exercise of his or her powers. A limitation on this protection is contained in section 738(3) which provides that section 738(2) does not provide a defence if:

"(a) the municipal public officer has, in relation to the conduct that is the subject matter of the action, been guilty of dishonesty, gross negligence or malicious or willful misconduct, or

(b) the cause of action is libel or slander."

In addition, section 740 of the *Local Government Act* permits a municipal council or regional board to indemnify elected officials in certain circumstances set out in that section. Most local governments will have adopted an indemnification bylaw that sets out the local government's policy in connection with indemnification of legal defence costs, judgment awards or penalties. In addition to circumstances of indemnification covered by the bylaw, councils and boards also have authority to provide indemnification as defined in section 740(1) by way or a resolution in any individual case.

9.2 Defamation and the Defence of Qualified Privilege

Section 738(3) excludes libel and slander actions from the defence against personal liability created by section 738(2). Libel and slander are the more specific terms for a cause of action in defamation that can expose elected officials to controversy, expense and legal liability.

It is not every critical statement made against an elected official, or even an officer or employee of a local government that will be actionable in defamation. In some limited circumstances, statements by elected officials that might be considered defamatory in some other contexts may be protected by the defence of qualified privilege.

In *Lund v. Black Press Group Ltd.*, 2009 BCSC 937 (BCSC), the Court stated:

> "An individual who accepts political office can expect a certain amount of attack and criticism on the ground that the public interest requires that an individual's public conduct should be open to searching criticism and that the holder of a public office should be prepared for critical appraisal of his conduct: *Vander Zalm v. Times Publishers, a Division of F.P. Publications (Western) Ltd.* (1980), 109 DLR (3d) 531 (BCCA) at para. 5."

In *Lund*, the Court found that the comments made did not got beyond "legitimate criticism of a public official". In that case, however, there was no allegation directly regarding corruption, although there were statements made that indirectly imputed the honesty of the area director.

However, at a certain point, if that criticism crosses a threshold, then it may result in the basis for legal action in libel or slander.

An important recent decision on the law of libel and slander as it affects public officials is the BC Supreme Court decision, *Wilson v. Switlo*, 2011 BCSC 1287. In that case, some hereditary chiefs, some of their supporters and a non-practicing lawyer hired by the dissident members of the Haisla Band Council were sued for certain statements that were alleged to be defamatory.

The Court in *Switlo* considered *Lund* and noted at para. 153, as follows:

> "Accordingly, *Lund* is distinguishable in cases where there are allegations of dishonesty or moral fault. Such allegations exceed the limits of legitimate criticism of public officials. This was the case in *Clark* where, as mentioned, allegations that a public official manipulated the decision making process to favour developers in exchange for secret campaign contributions constituted defamation. Similarly, in *Kopeck v. Constantin*, 2003 BCSC 339 (BCSC), statements alleging that a public official was guilty of dishonest conduct did not constitute legitimate criticism. …
>
> Clearly allegations of dishonesty or moral fault are particularly damaging to public officials who rely on public trust to perform their duties effectively."

In *Switlo*, the Court also referred to a leading textbook, *Gatley on Libel and Slander, 11th Edition*, which set out the test in England as follows:

> "**Imputation of unfitness in office.** It is defamatory to impute to a person in any office any corrupt, dishonest or fraudulent conduct or other misconduct or inefficiency in it, or any unfitness or want of ability to discharge its duties, and this is so whether the office be public or private, or whether it be one of profit, honour or trust. …"

In the recent decision *Hunter v. Chandler*, (2010), BCSC 729, a councillor was found to have defamed a member of an inter-municipal committee and was ordered to pay $15,000.00 in damages to a regional district recreation commission. The councillor had alleged that the commissioner was in a conflict of interest and that he should have his professional association "check his ethics". Mr. Hunter was the municipal community representative on its recreation commission and had voted to proceed with a recreation development that council had opposed.

The councillor made the first statement regarding the recreation commission member to the chair of the recreation commission and a second statement to a member of the public who had campaigned in support of the expansion of the community centre.

The court found that the statement made to the chair of the recreation commission was protected on the basis of the defence of qualified privilege. Qualified privilege protects the statements of elected officials in certain circumstances where the court is of the view that the person making the statement has a duty to speak and the recipient of the statement has a duty to receive the statement. Statements made in the court of a board meeting, where the function of directors is obviously governed by the roles and responsibilities that they have under the *Community Charter* and *Local Government Act* are more likely to attract qualified privilege than statements outside of the board room. In this case, the court found that the statement made to the chair of the recreation commission, who also held a public office, was protected by the defence of qualified privilege. However, the court found that the defence of qualified privilege did not apply in the case of the statement made to a member of the public.

In that case, the statement was held to be defamatory. The court awarded damages of $15,000.00 because the statement was made to only a single person. The court did not award any lower damages because the council member had refused to retract his statements when given an opportunity by the commission member.

While individual members of council or a board (or individual officers and employees of the local government corporation) may sue or be sued in defamation, the courts have held that the local government itself has no right of action in defamation. In *Dixon v. Powell River (City)*, (2009) BCSC 406, the municipality had sent a letter to a citizen complainant threatening to sue in defamation. The court found that the municipality had no right to send such a letter and awarded damages against the municipality for having done so, on the basis that a municipal corporation had no basis for an action in defamation given the importance of the value of freedom of expression protected by section 2(b) of the *Charter of Rights and Freedoms*. Actions for defamation should always be approached very carefully, as often the allegation of libel or slander itself is enough to set off a further escalation in the war of words.

10.0 CONCLUSION

Persons elected to local government positions in municipalities and regional districts in British Columbia have the capacity to do a great deal of good for their communities by providing strong, sound, reasoned leadership. The processes and rules contained in the *Community Charter* and *Local Government Act* are designed to enhance the democratic process by reducing corruption rising from conflict of interest, to increase transparency and to provide a mechanism for proper decision-making within an orderly environment. It is important that elected officials keep in mind their own personal responsibilities to avoid allowing the exercise of their powers to become tainted by matters of pecuniary self-interest.

Appendix

Meetings that may or must be closed to the public

90 (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:

(a) 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;

(b) 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;

(c) labour relations or other employee relations;

(d) the security of the property of the municipality;

(e) 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;

(f) 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;

(g) litigation or potential litigation affecting the municipality;

(h) 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;

(i) the receipt of advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

(j) 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*;

(k) 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;

(l) 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]*;

(m) a matter that, under another enactment, is such that the public may be excluded from the meeting;

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

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

(2) A part of a council meeting must be closed to the public if the subject matter being considered relates to one or more of the following:

(a) 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;

(b) 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;

(c) 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;

(d) a matter that, under another enactment, is such that the public must be excluded from the meeting.

(e) a review of a proposed final performance audit report for the purpose of providing comments to the auditor general on the proposed report under section 23 (2) of the *Auditor General for Local Government Act*.

(3) If the only subject matter being considered at a council meeting is one or more matters referred to in subsection (1) or (2), the applicable subsection applies to the entire meeting.