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Surprise, You're Ostracized! The Necessity of Procedural Fairness in the Discipline of Elected Officials

By Michael Hargraves

How should a council or board respond when one of its members has engaged in inappropriate or undesirable conduct? What sort of process is required? Controversial social media posts by the mayor, public fallout, and the disciplinary steps council attempted to take in response, are at the heart of the BC Supreme Court's recent ruling in *Michetti* v. Pouce Coupe (Village), 2022 BCSC 472 ("*Michetti*").

In February 2021 the mayor of Pouce Coupe posted comments on her Facebook page questioning the honesty of media reports that unvaccinated individuals were driving COVID-19 hospitalizations in British Columbia. Those comments sparked considerable outrage from health care workers, among others, and became national news. While the mayor posted an apology the following day, the damage had already been done. Only two days later, at a special council meeting, council passed resolutions to censure the mayor for her conduct, remove her from all public duties including Village boards and committees, and request that she resign. The mayor commenced a petition in BC Supreme Court to overturn those resolutions; however, it did not proceed to the point of a judge considering the merits. Instead, the Village agreed to a consent order invalidating the resolutions, conceding that the statutory requirements for the special council meeting (including notice to the mayor) had not been met.

Meanwhile, two members of council resigned, and those seats were filled through a by-election in September 2021. Following orientation sessions for the new members, a council meeting was held in early October, and one of the items on the agenda was the matter of appointments of the mayor and council members to various "portfolios" or public duties, including regional district director, and liaison to different community and stakeholder groups. The court noted this was not an unusual agenda item, and that the subject would typically be considered by council following an election. Moreover, the portfolio item was included on the agenda at the direction of the mayor, and it was not linked with the issue of the mayor's social media posts. In fact, the issue of the mayor's COVID-19 comments was later added to the agenda as a separate item. At the time of the October meeting, the mayor held a substantial number of those portfolios.

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During the portfolio review discussion at that October meeting, one of the newly elected council members proposed a resolution to remove the mayor from all portfolios, and to direct that letters be sent to all portfolio partners advising them to communicate through the assigned council representative or Village staff (effectively cutting the mayor out of the communications loop). All of council, except the mayor, voted in favour and the resolution was passed. Council went on to consider each of the 15 or 16 portfolios in turn, and assigned a council member to each, without the mayor being considered for any of them. Later in the same meeting, when the agenda item concerning the mayor's COVID-19 comments came up for discussion, another resolution was passed, directing issuance of a press release to say the mayor's comments were her own personal views and not those of council.

Following the meeting, the mayor commenced another petition in BC Supreme Court. This time around, there was no order by consent, and the case proceeded to a judgment by the court, which held that the resolution barring the mayor from all portfolios, and the subsequent reassignment of portfolios, were invalid because the common law requirements of procedural fairness had not been met. Factors that led the court to that conclusion include the following:

- The matter of portfolio assignments was included on council's agenda in the manner it had typically been done in the past, as new business, without being linked to the mayor's conduct, or to any suggestion that council would consider shutting the mayor out of all portfolios.
- The introduction of the motion to remove the mayor from all portfolios, which occurred at the very outset of council's consideration of the agenda item, was contrary to the mayor's legitimate expectation that portfolio assignments would be handled in the "usual" manner. It was also in violation of the Village's Council Procedure Bylaw, which prohibits council from considering matters outside those listed in its agenda unless added as late item in accordance with the bylaw (which did not occur in this case).
- While the Village's CAO stated at the meeting, in response to an objection from the mayor, that the removal motion pertained to the business item on the agenda, the court did not find that position compelling, and held that the agenda item did not give adequate notice to the mayor. The agenda item suggested the "usual" portfolio review, while at paragraph 50 of the reasons for judgment the Court characterizes council's concern with the mayor as "specific and personal".
- The CAO's response about the relevance of the motion to the agenda item appeared to the court to be a prepared one, contemplated in advance, and that (along with other evidence, including the previous, failed attempt by council to censure and remove the mayor, which was in substantially similar terms) suggested that perhaps both staff and other members of council knew what was coming, even though the mayor did not.

- The Village's council Code of Conduct sets out a procedure for addressing violations by members, which included specific notice of the allegations, a minimum of two weeks to prepare a response before consideration at a council meeting, and an opportunity to be heard. The Code of Conduct was not referred to in relation to the motion removing the mayor, nor was the process in the code of conduct followed. It is worth noting that the code of conduct explicitly states its procedure is intended to "ensure procedural fairness".

On the facts of the case, a reasonable observer might well ask, "Shouldn't the mayor have known what was coming, whether it was specifically drawn to her attention or not? After all, they'd already tried it once, and her conduct was an ongoing matter of controversy at the time of the meeting in question." From the perspective of common sense, there's likely some truth to that. However, in a situation such as this, the law demands more than common sense and assumptions. When it comes to decisions by administrative bodies that affect the rights, privileges and interests of individuals, it is not enough to simply presume the individual in question knows what is at stake. The law requires adequate notice, disclosure of material information, and an opportunity to be heard. There are, occasionally, statutory provisions that modify or limit aspects of procedural fairness, but they are the exception, not the rule. Courts will strive to uphold the underlying principle of procedural fairness, articulated by the Supreme Court of Canada in the seminal 1999 case of *Baker v. Canada (Minister of Citizenship and Immigration)*:

> "…[T]hat the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decision."

Key takeaways from the *Michetti* case include the following:

- When a municipal council or regional board seeks to discipline one of its members through censure, or by limiting or removing the rights, privileges or interests afforded the member as an elected official, procedural fairness is a "must have" component of the process.

- Any such disciplinary process must be sensitive to its specific context, including applicable statutes, bylaws and policies, customary practices, and the facts of the situation, but the courts will consistently look to see that the basic requirements of procedural fairness are met, namely adequate notice, disclosure of material information, and an opportunity to be heard.

Having a thoughtful (and legally reviewed) code of conduct that includes a fair process, and following it when the circumstances arise, is one way to reduce the risk of successful legal challenge.

Are "Emergencies" under the EPA only of a Temporary Nature?

By Andrew Buckley

In the decision of *Rosewall v. Sechelt (District of),* 2022 BCSC 20, Justice Gomery of the BC Supreme Court concluded that the *Emergency Program Act* ("*EPA*") contemplates an emergency as only being "of a temporary nature, as opposed to a usual and enduring state of affairs". On the facts of this case, the judge found the Province liable in nuisance arising from the exercise of its statutory authority under the *EPA.* The judge found that, in the absence of additional information beyond the engineering reports which supported the initial declaration of the State of Local Emergency ("SOLE"), "renewal of the SOLE ceased to be reasonable after three months".

Under the *EPA*, a local authority may declare a SOLE, which expires after 7 days unless extended by the Minister of Public Safety (the "Minister") or Provincial Cabinet. An extension allows for the SOLE to remain in effect for another 7 days, after which time the extension must be renewed. The *Rosewall* decision has potential implications for any local governments with SOLEs that are regularly being extended.

While every emergency and the necessary response to it should be determined on a case-by-case basis, in light of this decision it is anticipated that the Province (and the Minister, as the statutory decision-maker) will be taking a closer look at its approach to renewing SOLEs in order to, in the words of the Court, "consider whether the event or circumstance that inspired the SOLE in the first place continues to qualify as an emergency".

What the decision did not address, and what is left as an unresolved issue, is how the EPA and the Court's interpretation of the EPA addresses emergencies which are, by their very nature, of a long duration and not practically repairable. Possible examples might include: properties buried by large landslides, properties impacted by the deposit of toxic materials and, perhaps ultimately, rising ocean levels that make neighbourhoods uninhabitable. For some of these scenarios it is possible that the circumstances which gave rise to the emergency will not improve, and so the identified hazards will not be temporary.

Background

The plaintiffs in this case each purchased properties around 2008 in a new development in Sechelt, BC known as Seawatch at the Shores ("Seawatch").

Prior to construction or development approval, geotechnical engineers deemed the area of the development safe for the construction of single-family dwellings notwithstanding prior land instability. In approving the development, the District of Sechelt (the "District") required that a covenant be registered against title to each of the lots in Seawatch pursuant to s. 219 of the *Land Title Act*. This covenant put the property owners on notice of the potential for land instability issues by appending the geotechnical reports to the covenant. The covenant also included indemnity and release clauses, requiring the developer and subsequent purchasers to hold the District harmless against losses arising from subsidence connected to the construction of the development or use of the land.

In 2012, sinkholes began daylighting in the Seawatch development. Two additional sinkholes appeared in 2015 and another on December 25, 2018.

State of Local Emergency

Following the December 2018 sinkhole, the District retained an engineering firm to investigate the stability of the Seawatch lands. In a February 6, 2019 report, geotechnical engineers recommended that the District no longer permit occupancy of the properties and buildings within Seawatch due to land subsidence and geological instability which posed a risk of loss of life and damage to property.

The District quickly issued an evacuation order for the residents of Seawatch, including the plaintiffs, effective February 15, 2019 and a temporary fence was constructed around the subdivision. The District declared a SOLE pursuant to ss. 12 and 13 of the *EPA*.

The Province later provided funding to the District towards the construction of a higher, fixed fence in order to better support the evacuation order. The SOLE was continually renewed by the Minister every 7 days after it was initially made on February 15, 2019. The fence remains in place and access to Seawatch continues to be prohibited.

The Civil Action

In July 2019, the plaintiffs began their lawsuit against the District and the Province alleging, among other things, that the continued extensions of the SOLE were unlawful and that the defendants did not have authority to continue to prevent the plaintiffs from accessing their homes.

The plaintiffs discontinued their claims against the District shortly before trial, after the Court of Appeal released its decision in *Rai v. Sechelt (District)*, 2021 BCCA 349. In that decision, the Court of Appeal confirmed that the release contained in the s. 219 covenant registered against title to each lot in Seawatch was effective to release all claims advanced against the District in that litigation.

Therefore, at trial, the primary issue for the Court to determine was whether the Minister's practice of approving the extensions of the SOLE at 7-day intervals since February 15, 2019 was lawful.

The Court Decision

In assessing the validity of the Province's conduct, the Court concluded that the Province's purported exercise of authority to approve the renewals of the SOLE was to be reviewed by the court on the standard of "reasonableness" as opposed to strict "correctness", pursuant to *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65.

In its analysis, the Court confirmed that while "protecting and securing people and property against urgent threats that require collective action is a fundamental responsibility of government" (para. 25), any ambiguity in statutes which interfere with property rights will be construed in favour of preserving the rights of the individual.

The Court holds that it was reasonable for the Minister to initially approve extensions of the SOLE as the circumstances in February 2019 could reasonably be characterized as an emergency as defined in the *EPA.* However, according to the judge, the *EPA* contemplates an emergency as a temporary condition resulting from

the forces of nature. The judge commented that "not every risk to public safety constitutes an emergency justifying the continuation of a SOLE under the *EPA*… the emergency powers under the *EPA* are exceptional and not to be exercised in the ordinary course*"* (para 83).

While the plaintiffs were lawfully evacuated on February 15, 2019, as further investigations into the geotechnical issues were not conducted after the evacuation, the Court held that the renewal of the SOLE ceased to be reasonable after three months. The Court reasoned that "by that time, it was no longer reasonable to approve renewal of the SOLE in the absence of evidence of a reasonable plan to investigate and address the risks to public safety and property in Seawatch" (para 85).

It should be noted that the Action was not brought in negligence and the issue of whether the Province (or District, for that matter) owed a legal duty to abate the subsurface conditions in the subdivision which gave rise to the emergency was not before the Court.

Rather, the plaintiffs brought their action in nuisance. The tort of nuisance is intended to compensate property owners when a defendant has substantially and unreasonably interfered with the use and enjoyment of their property. The focus in nuisance is on the harm suffered by the plaintiff rather than any purported benefits of the defendant's conduct.

As the SOLE renewals were considered unauthorized after three months, the Province was deprived of its defence of statutory authority after that time and thereafter exposed to a claim in nuisance. In unlawfully maintaining the SOLE after the initial three-months and in encouraging and funding the fixed fencing which prohibited access to Seawatch, the Court concluded that the Province unreasonably interfered with the plaintiffs' use and enjoyment of their properties. The Court's finding in this case potentially represents an extension to the tort of nuisance. The Province's actions (regulatory decisions and funding the fencing) were unconnected to the use of the defendant's own land, which is typically a requirement of the tort.

Unfortunately, and although advanced by the Province at trial, the reasons do not include an analysis of s. 18 of the *EPA,* which provides immunity from liability to the Minister and local authorities "for any loss, cost, expense, damage or injury to person or property" resulting from acts or omissions done in good faith under the *EPA*. In theory, this statutory provision could have provided a defence to the plaintiffs' claims.

Ultimately, the plaintiffs were awarded special damages consisting of the costs of rental accommodation, moving costs, furniture replacement costs and storage costs. The plaintiffs were also awarded $40,000 each in general damages. While the Court acknowledged that the plaintiffs would have suffered some disruption in any event as a consequence of the lawful evacuation, the Province's actions "made things much worse for them than they would otherwise have been" (para 119).

Conclusion

The introduction of a possible time-limit on "emergencies" under the *EPA* has important implications for both the Province and local governments across BC. While the reasonable length of any particular emergency ought to be determined in the circumstances, the takeaway point from this decision is that public authorities should not use "the continuing renewal of the SOLE [as] an excuse for inaction" (para 84).

As observed above, the Court did not address what "action" might be required to address emergency conditions and, furthermore, did not address any general or specific statutory duty or common law duty to abate hazardous conditions on lands. Nonetheless, in the circumstance of local governments seeking ongoing renewals of SOLEs under the *EPA*, consideration should be given, at a minimum, to supporting the documentation provided to the Minister (as decision-maker) with updated information as to the nature and continued currency of the hazardous conditions which gave rise to the emergency.

Lastly, the Province has initiated an appeal of the decision which is expected to be heard by the Court of Appeal later this year.

With Great Power Comes Great Responsibility – Tax Sale Powers in British Columbia

By Heidi Boudreau

In *Morgan v Spallumcheen (Township of)* 2022 BCSC 752, the BC Supreme Court delivered its decision on a tax sale gone awry. The reasoning in Spallumcheen cautions local governments to comply with the statutory requirements of the tax sale provisions in the *Local Government Act* and to act expediently to remedy its error, if a tax sale is completed without complying with the statutory requirements.

In *Spallumcheen*, the Township had failed to provide the notice of tax sale to the owner in accordance with the requirements of the *Local Government Act*. The owner was unaware of the tax sale and its options to redeem the tax sale until after the redemption period expired and the transfer to the tax sale purchaser was completed. The Township accepted that it had failed to comply with the notice provisions, but disputed the amount of damages, i.e. the date of valuation of the property. The Township argued that the valuation of the property should be as of the redemption date and the plaintiff owner argued the date of valuation should be either the date that the Township admitted liability, or the date of the trial. The difference between these dates, for the purposes of property valuation was $190,000.00. The Court concluded that the damages were to be determined as of the date of the trial in the amount of $360,000.00.

The Power

Part 16, Division 7, Annual Tax Sale Provisions of the *Local Government Act* gives local governments significant powers to recover unpaid property taxes. The Court in Spallumcheen provided a succinct explanation of these powers at paragraphs 13 and 14, which I have copied below:

> [13] Where property taxes are delinquent, the *LGA* authorizes a local government to sell parcels of land at an annual tax sale. Affected property owners and charge holders have one year from the day the tax sale began to redeem the property. If the property is not redeemed within the redemption period, the property transfers to the party who purchased the property at the tax sale.

> [14] The *LGA* requires that affected owners and charge holders be given written notice that the property has been sold at a tax sale and of the date when the redemption period expires. After the redemption period expires, the aggrieved owner cannot recover the property, but may bring an action for damages against the municipality for failure to give notice of the tax sale.

Pursuant to section 669(3) of the *Local Government Act*, a local government must indemnify an owner if a property is sold to a tax sale purchaser and the property was not liable for taxes, the taxes were paid, or notice was not given. The circumstances of this case fall into the last category. Accordingly, the extraordinary power to recover delinquent taxes by tax sale comes with the great responsibility of indemnifying an owner if done incorrectly.

The Responsibility

In the Court's reasoning, the key consideration in setting damages as of the date of the trial was the owner's inability to mitigate his loss until the owner was paid for his loss. In the facts of this case, the subject property was owner's only asset. The Court distinguished the facts of Spallumcheen from the only other reported case relating to damages and failed tax sales, *Thunderbird Holdings Ltd. v Manitoba*, 2001 MBQB 182 (*Thunderbird Holdings*). In *Thunderbird Holdings*, the plaintiff developer was in the business of buying tax sale properties and could have purchased a replacement property on the date the sale did not go through. Accordingly, the Court reasoned the date of damages was the date that the developer would have become owner if there had not been an error in the tax sale. Although the Court recognizes that the determination of damages is fact specific and that local governments have a right to pursue its defenses in these types of disputes, this must be balanced against the potential delay the pursuit of these defenses will have on the owner, if the obligation is ultimately to indemnify the owner.

Takeaway

The takeaway from this case is that when a local government is exercising its powers under the tax sale provisions of the *Local Government Act*, it must be careful to do so in compliance with all of its statutory requirements. If there is error or default with respect to the statutory requirements, a local government must act expediently and reasonably to make the owner whole again.

Reasonableness Review: A Case Study of Anderson v Strathcona Regional District

By Andrew Buckley

The BC Supreme Court has released reasons in ***Anderson v Strathcona Regional District***, 2021 BCSC 1800 [***Anderson***] which provides an excellent example of the Court applying the reasonableness standard of review, as recently re-articulated by the Supreme Court of Canada in *Vavilov*, to decisions of a local government. In most circumstances, the judicial review of local government decisions post-*Vavilov* are now conducted pursuant to the standard of reasonableness. This means the Court will assess a decision of the local government to determine whether it generally fell within the range of reasonable outcomes, as opposed to determining whether it was purely "correct". Reasonableness is a more deferential standard that affords a decision maker with greater leeway in interpreting its authority.

In the *Anderson* case, one of the members of the Regional District's Board (the "Director") brought a judicial review challenging several decisions of the Board, including:

1. The Board's decisions to refuse to indemnify the Director for her legal fees arising from a BC Supreme Court petition which sought to have the Director disqualified from holding office (the "Indemnification Decisions");

2. The passing of a motion to censure the Director for unauthorized use and disclosure of confidential and privileged Board information (the "Censure Decision"); and

3. The Board's decision to withhold certain reports and materials from the Director in the absence of the Director declaring a conflict of interest (the "Record Withholding Decision").

In all three circumstances, despite arguments by the Director's lawyer, the Court held the decisions were to be reviewed on the reasonableness standard.

The Indemnification Decisions

The Board had adopted a Bylaw which required the Regional District to indemnify an official against a "claim, action or prosecution" brought against the official.

The Director requested that, pursuant to the indemnification bylaw, the Regional District indemnify her legal expenses incurred in defending a BC Supreme Court petition which sought to have the Director disqualified.

The Board determined that the disqualification petition did not fall within the definition of a claim, action or prosecution. Accordingly, the Board refused the Director's request for indemnification.

After reviewing the background and the decision, the Court held the Board was reasonable in interpreting and applying its indemnification bylaw and the *Local Government Act* to deny the Director's request for

indemnification. The judge stated, "In my view, the Board's interpretation of the Indemnification Bylaw and its application of that bylaw to Ms. Anderson's circumstances cannot be said to be unreasonable, unfair or beyond the range of acceptable outcomes".

As with many decisions that are reached by the board or council of a local government, there were no written reasons for the Indemnification Decisions. Nonetheless, following the process outlined in *Vavilov*, the judge in *Anderson* concluded that a review of the materials that were before the Board when it considered whether to accept the Director's request for indemnification provided a "reasonable and satisfactory pathway" to understanding the Board's rationale for the indemnification Decisions.

The Censure Decision

Section 117 of the *Community Charter* requires that municipal council members maintain confidentiality over confidential records and matters discussed in closed meetings. Section 205 of the *Local Government Act* deems this provision to apply equally to members of regional district boards.
Additionally, the Regional District, in this case, had passed a bylaw establishing a code of conduct for its directors, emphasizing the requirement that confidential information not be disclosed.

Contrary to the duty of confidentiality in s. 117 of the *Community Charter*, and the Regional District's code of conduct, the Director shared the Regional District's legal opinions and a consultant's report with her own legal counsel; these were records that were considered in closed meetings. The Director argued that as she had a confidential solicitor-client relationship with her own lawyer, she did not breach any duty of confidentiality.
However, the Court held that the duty of confidentiality owed by local government officials to their board or council requires that the information not be shared with anyone, even the official's own lawyer, without prior approval of the board or council.

As the Director took the confidential information over which the Regional District alone held privilege, and which it had not waived, and shared it with a third party – her lawyer – the Court found that the Censure Decision was reasonable.

The Record Withholding Decision

As a result of the Director's prior unauthorized disclosure of confidential information, the Regional District Board began the practice of limiting the Director's access to certain confidential records.

Specifically, the Regional District began withholding reports on the closed meeting agendas which related to matters in which the Director may be in a conflict of interest with the Regional District. The Director was still provided with copies of all other closed reports and an agenda outline that included the title of all closed reports.

As a result of the Director's prior unauthorized disclosure of confidential information, the potential harm caused by her actions, and the lack of any assurance by the Director that she would change her approach to dealing with confidential information, the Court held that the Record Withholding Decision was fair, reasonable, and did not impede the Director's ability to perform her functions as an elected member of the Board. In reaching this conclusion, the Court followed the recent decision of *Dupont v. Port Coquitlam (City)*, 2021 BCSC 728, in which the Court held that a city council has authority to govern its own internal procedures, including the power to set in place guidelines for restricting a councillor's access to information.

Key Takeaways for Local Governments

Every day local government officials and employees are faced with making difficult decisions. While the courts have been directed to show deference to the decisions of local governments, the decision still must fall within the realm of reasonableness. Accordingly, the greater the decision impacts on an individual or group of individuals, the more the decision-maker should stop and ensure that they consider the bylaw or legislative authority for making that decision and whether the outcome they are inclined to make is a reasonable application of that authority.

The Legislation, it is a Changin': Recent Legislative Changes of Note

By Ryan Bortolin

There have been a number of changes to the Community Charter and Local Government over the last twelve months. The changes are meant to address matters as diverse as modernizing how public notices can be provided, streamlining development approval procedures, requiring codes of conduct, and introducing new consequences for elected officials charged and convicted of indictable offences.
The purpose of this article is not to address all recent changes to local government legislation – only the ones that in my view have the widest impact.

Municipal Affairs Statutes Amendment Act (No. 2), 2021

→ Changes to the Public Notice Provisions

Some of the most significant changes to local government legislation are the changes made to the manner in which public notices may occur. Public notice is prerequisite to numerous local government actions, including public hearings, dispositions of real property, and enacting bylaws that require electoral approval.

Prior to recent changes, the notice requirements contained in section 94 of the Community Charter required local governments to post a notice in their public notice places, and to publish it in a newspaper for two consecutive weeks. The newspaper publication requirement created difficulties for smaller communities, where local newspapers either do not exist, are dying out, or have little readership. It also did not reflect the that in all communities more people increasingly get their news online instead of from printed newspapers.

The prior provisions allowed local governments to fulfill notice requirements through other means when publication by newspaper was impractical, but required this determination on a case-by-case basis While the

authority to make a determination on a case-by-case basis still exists, the Community Charter now allows local governments to pass a bylaw providing for alternative means of publication. If such a bylaw is in force, then publication must be in accordance with the bylaw, rather than the default newspaper requirement. The bylaw must specify at least two means of publication in addition not the public notice posting places. The notice must be published at least 7 days before the date of the matter for which notice is required,

In order for the publication methods to be sufficient, local governments have to consider certain principles contained in the Public Notice Regulation. Those principles state that the means of publication should be reliable, suitable for providing notices, and accessible. The Regulation further specifies the conditions under which these principles can be met. For example the Regulation states that means of publication are reliable if they provide factual information, and the publication takes place at least once a month, or if it is a website is updated at least once a month.

The Province has provided a guidance document to help local governments determine what sort of public notice may be suitable in their communities. That guidance document can be found at https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/local-governments/governance-powers/public_notice_guidance_material_2022.pdf

→ Changes Meant to Streamline Development Applications

The Municipal Affairs Statutes Amendment Act (No. 2) also introduced changes to the manner in which certain processes related to the approval of development can occur. One of the most significant changes is the ability for local governments to delegate consideration of minor development variance permit applications to staff. This authority is contained in section 498.1 of the Local Government Act. Delegation must occur by bylaw, and is limited to applications to vary siting, size and dimensions of buildings and uses in zoning bylaws, off-street parking and loading space requirements, bylaws regulating signs, and screening and landscaping requirements to mask or separate uses or to preserve, restore and enhance the natural environment.

A bylaw delegating the power to issue a DVP must also state the criteria for determining whether the application involves a "minor variance", and guidelines that the staff member must consider when deciding whether to issue the permit. Section 498.1(4) states that if the authority to issue DVPs is delegated to staff, the applicant is entitled to have the Board or Council reconsider the matter.

Another change is to section 464(2) of the Local Government Act, which states when public hearings are required for zoning bylaws. Prior to the Municipal Affairs Statutes Amending Act (No. 2) coming into force, the default rule was the public hearings were required for any amendment to a zoning bylaw, with the local government having the authority to waive the public hearing if the bylaw is consistent with the official community plan in effect for the area. Section 464(2) now states that public hearings are not required in these circumstances. In other words, there is no obligation to actively waive the requirement for a public hearing.

The Hansard extracts related to this amendment indicate that the Province believes removing the requirement to waive a public hearing requirement results in a streamlined process:

"The ultimate outcome that we are intending here is to speed up the development approvals process for local governments, especially to get British Columbians into more homes more quickly. By repealing a local

government's authority to waive the requirement to hold a public hearing on a proposed zoning bylaw when it is consistent with the official community plan, it effectively removes a process step. In other words, a local government would need to opt into a public hearing rather than to have to opt out of having a public hearing."

However, the new section 467(1) of the LGA refers to local governments ***deciding*** not to hold a public hearing. The difference between "waiving" and "deciding not to hold" a public hearing is not clear on its face. It may be that the purpose was to allow councils and boards to decide globally on the circumstances in which it will still require a public hearing, either through a bylaw or policy, in order to streamline the process, rather than decide on a case-by-case basis whether to waive the public hearing requirement.

→ Requirement to Consider a Code of Conduct

The Municipal Affairs Statements Amendment Act (No. 2) 2021 also creates a requirement for local governments to consider whether to establish a code of conduct, or if a code of conduct is already in place, whether that code of conduct should be reviewed. Note that the requirement to consider whether to establish or review a code of conduct is not yet in force. It will be brought into force by the Province at a later date.

When the requirements do come into effect, local governments will have to consider certain prescribed principles and matters and comply with prescribed requirements when deciding whether to establish or review a code of conduct. These will be contained in a regulation that will also come into force at a later date. At this time, the prescribed principles, matters and requirements are not known, but it seems likely that they will incorporate the principles stated in UBCM's Companion Guide for codes of conduct, which can be found here: https://www.ubcm.ca/sites/default/files/2021-08/Comp_Guide_Aug2018_FINAL_updates.pdf

Municipal Affairs Statutes Amendment Act, 2022

→ Electronic Meeting Provisions Clarification

One of the most significant change to local government legislation over the past couple of years is the ability of local governments to have regular electronic council, board and committee meetings. These changes were originally brought into force by Ministerial Order during the COVID-19 pandemic. The changes were regularized in September 2021, when the prior authority for electronic meetings under Ministerial Order M192 expired and amendments to the Community Charter and the Regional District Electronic Meetings Regulation came into force. The 2022 Municipal Affairs Statutes Amendment Act creates further changes, largely to ensure that the ability to have electronic meetings applies to all local government bodies, and to deem any meetings or actions taken at an electronic meeting

When these provisions were first enacted, there was some question regarding whether they applied to certain other bodies. This question has been clarified by the Province enacting section 145.1 and 145.2 of the Community Charter, which clarifies that the following are also permitted to hold meetings electronically:

(a) a municipal commission established to operate services, undertake enforcement, or manage property and licences held by the municipality

(b) a parcel tax roll review panel;

(c) a board of variance established by a local government under Division 15 of Part 14 of the Local Government Act;

(d) an advisory body established by a council;

(e) a body that under this or another Act may exercise the powers of a municipality or council;

(f) a body referred to in section 93

(g) (which overlaps with the bodies in the preceding subsections)

Changes to the Local Government Act in the form of the new sections 226.1 and 226.2 clarify that electronic meetings and electronic participation in meetings can occur for:

(a) local community commissions established by regional districts;

(b) a commission established by a regional board to operate regional district services, operate and enforce in relation to the board's regulatory authority, and manage property;

(c) an intergovernmental advisory committee; and

(d) an advisory planning commission.

At the same time the Province also amended *Municipalities Enabling and Validating Act (No. 4)*. The purpose of the amendments is to deem any meeting conducted electronically that was otherwise validly conducted between September 29, 2021 and June 2, 2022 to have been validly held, and to deem any bylaw, resolution or other action taken during such a meeting to be valid.

→ Consequences of Elected Officials Being Charged and Convicted of Indictable Offences

The other significant change in the 2022 Municipal Statutes Amendment Act that I am going to discuss creates new rules regarding elected officials who are charged with an indictable offence under the Criminal Code or Controlled Drug and Substances Act, or convicted of such an offence. Previously, the only restriction regarding a person who had been sentenced for an indictable offence was their ineligibility to run for office. This is because under section of the Local Government Act, in order to be eligible to vote in a local government election, a person cannot be serving a sentence for an indictable offence, unless they have been released on probation. Since a person who is ineligible to vote in a local government election is also ineligible to run for office under section 81 of the LGA, the result was that such persons could not run for office.

However, there were no rules regarding what happens when a person who is already in office is charged with or convicted of an indictable offence. The Community Charter was recently amended to create clear rules in this regard. The new section 109.2 states that a council member must, as soon as practicable, give written notice to Council if they have been charged with an indictable offence under the Criminal Code of Canada or the Controlled Drug and Substances Act. The council member must then take a leave of absence from the date of the charge to the date they are either acquitted, charged, discharged, or the charge is stayed or

otherwise withdrawn.

If the person is convicted, section 82.1 of the Local Government Act applies. It states that if a person is convicted of an indictable offence they are disqualified from holding office from the date of the conviction until the are sentenced. Once they are sentenced, the rule regarding being ineligible by reason of serving a sentence for an indictable offence still applies.

Vancouver Councillor and Bar Owner Found Not to Have Conflict of Interest Relating to Vote on COVID-19 Measures Affecting Local Restaurants

By Josh Krusell

A July 2021 court decision confirms that the interest or bias that is required to prove an elected official has a conflict of interest is one that relates to the ***distinct*** interest of the elected official in the particular case and is ***not*** merely some financial interest possessed by that elected official that she or he shares with other fellow electors.

Mr. Justice Steeves of the Supreme Court of British Columbia delivered the decision in ***Redmond v Wiebe***, 2021 BCSC 1405 ("***Wiebe***"), whereby an elected councillor of the City of Vancouver was found to have a financial interest in a Vancouver restaurant which created a potential conflict of interest in his voting on COVID-19-related measures related to expanding the use of outdoor patio seating at local restaurants. However, Mr. Justice Steeves found that the councillor's interest was in common with the interests of other electors that own the over 3,000 bars and restaurants in Vancouver, which meant that the councillor was entitled to avail himself of a statutory exemption to the general rules relating to conflicts of interest of elected officials.

Importantly, the decision also clarifies several issues relating to how B.C. courts will assess claims of conflicts of interest against elected officials of local governments. Although the decision was made under the *Vancouver Charter*, which the judge held was a complete code for determining conflicts of interest related to elected officials of Vancouver, Mr. Justice Steves noted that the provisions were largely similar to those in the *Community Charter*. Therefore, there was no reason the Court could not consider cases which had been decided under the *Community Charter* to inform analysis of the *Vancouver Charter* (and, presumably, *vice versa*).

The Judicial Test for Conflicts of Interest and the Shifting Onus of Proof

Mr. Justice Steeves noted that the judicial test for assessing conflicts of interest of elected officials had recently been addressed by the Court in its decision in *Allan v. Froese,* 2021 BCSC 28 ("*Allan*"), which was decided under the *Community Charter*. The *Allan* decision set out the test, as follows:

1. The petitioners must prove, on a balance of probabilities, that the elected official had a "direct or indirect pecuniary interest in the matter under consideration" by council;

2. If step one is proven, the petitioners must then show that the statutory exceptions do not apply, these include showing that:

    a. the pecuniary interest is not an interest held in common with electors of the municipality generally,

    a. the pecuniary interest does not relate to remuneration, expenses or benefits payable to the council member in relation to their duties as a council member; and

    a. a reasonably well-informed person would conclude that the pecuniary interest can reasonably be regarded as likely to influence the member in relation to the matter.

3. If the exceptions in step two are shown not to apply, the onus then shifts to the respondents to demonstrate that the official should, nonetheless, not be disqualified because their contravention was inadvertent or due to a good faith error in judgement.

The petitioners in *Wiebe* argued that the *Allan* decision contained an error in that it placed the onus of proof at both stage one and two of the test on the petitioners challenging the elected official. The petitioners in *Wiebe* argued the onus should be with the petitioners only at the first stage and then shift to the elected official at the subsequent stages.

Mr. Justice Steeves agreed, noting that the Court had, many years before *Allan*, determined that there should be a shifting onus of proof in its decision in *Fairbrass v. Hansma*, 2009 BCSC 878 ("*Fairbrass* SC"), which had been affirmed by the Court of Appeal in *Fairbrass v. Hansma,* 2010 BCCA 319. Mr. Justice Steeves stated that "I conclude that the decision in *Allan* provides a useful two-stage approach regarding the application of the relevant provisions of the *Community Charter*. In my view, this applies equally to the *Vancouver Charter*. Having said that, I prefer the approach in *Fairbrass* SC with respect to the onus of proof".

The approach adopted by Mr. Justice Steeves does not address the fact that Superior Courts in several other provinces with similar conflict of interest provisions have maintained the onus on the petitioner at the first two stages: see, *Calkin v Dauphinee*, 2014 NSSC 452 at para 97; *Kruse v Santer*, 2015 SKQB 376 at para 39; and, *Rocky View (County) v Wright*, 2021 ABQB 422 at para 53

Nonetheless, based upon the analysis in *Wiebe*, which is the most recent judicial commentary on this issue in the province, if the first stage of the test is met by the petitioners, the respondent must then carry the burden to establish one of the statutory exemptions applies. If the official is not able to establish an exception then the court must disqualify the elected official from office for the specified period of time provided under the *Vancouver Charter* or the *Community Charter*, as applicable.

Whether the Councillor's Financial Interest was in Common with Electors of the City Generally

On the facts in ***Wiebe***, Mr. Justice Steeves easily concluded that the elected councillor had a financial interest in a Vancouver pub which would be squarely affected by the outcome of the City's vote on temporary expansion of patio seating at bars and restaurants across Vancouver. His Lordship also found that the councillor had not disclosed this financial interest at the relevant meetings of the committee discussing and voting on the potential expansion of patio seating, but that such interest was otherwise a matter of public record in other financial disclosures.

The councillor raised as a defence the exception at s. 145.6(1)(a) of the *Vancouver Charter* by arguing that his direct or indirect pecuniary interest was one that was "in common with electors of the city generally". He argued that restaurant and bar owners are among the electors, and his financial interest in a particular pub was in common with this group of electors.

Mr. Justice Steeves was faced with a question of whether the legislative phrase "in common with electors of the city generally" meant all electors in Vancouver or a smaller group such as the holders of restaurant and bar licences.

His Lordship answered that question by stating that "the interest or bias that disqualifies a councillor is one that relates to the **distinct interest** of the councillor in the particular case. It is **not merely some interest possessed in common with his fellows or the public generally** or, in this case, all electors in the City of Vancouver" (Emphasis added).

His Lordship also noted that there was no evidence of the Vancouver councillor asserting his distinct business or personal interests during the deliberations over the expansion of patio seating and no evidence of any concerns from other Council members.

Accordingly, Mr. Justice Steeves concluded that the councillor's pecuniary interest was in common with the owners of restaurants and bars in Vancouver, and that all members of this group benefitted from the decision of Council to expand patio seating. The councillor had thus satisfied the burden of proving his pecuniary interest fit the exception to conflict restrictions relating to having a pecuniary interest in common with the electors of Vancouver generally.