

Integrity in Local Government: Key Legal Definitions and Cases

This paper was prepared by Maegen Giltrow and Connor Bildfell for the conference *Integrity in Local Government: Mitigating the Risks of Conflict of Interest, Fraud and Corruption*, to be hosted by the International Centre for Criminal Justice Policy and Criminal Law Reform on February 19, 2016.

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I. Introduction

This paper has been prepared as a resource in aid of the upcoming conference *Integrity in Local Government: Mitigating the Risks of Conflict of Interest, Fraud and Corruption*, to be hosted by the International Centre for Criminal Justice Policy and Criminal Law Reform on February 19, 2016.

Conflict of interest, fraud, and corruption lie on a continuum of conduct that engages important ethical and legal questions. Very importantly, from a practical point of view, understanding and managing these concepts is fundamental to risk management inside local government. It is essential that local government operate under a clear understanding of acceptable and unacceptable conduct up front—*before* problems arise and take hold. It is also important that local government understand where key areas of vulnerability to conflict of interest, fraud, and corruption lie within their organizations.

This paper will set out definitions of legal terms and describe cases and instances that provide examples of the sorts of conduct at issue. This paper was developed in conjunction with the accompanying paper for this conference, authored by Nathalie Baker, entitled “Integrity in Local Government: Legal Challenges to Local Government Decisions and Best Practices for Decision Makers”. That paper explains the mechanisms by which citizens will challenge decisions that to the public eye may appear arbitrary, made in bad faith, or unreasonable. The premise is that good decision-making has to be good all the way through—lack of transparency, over-delegation without proper oversight, and lack of expertise in oversight can not only lead to unreasonable decisions (that may be overturned on judicial review), but also foster conditions in which illegal conduct may take hold. From a risk management perspective, local governments are well advised to take informed steps to protect against this whole range of legal challenges.

Conflict of interest, fraud, and corruption can be notoriously difficult to detect inside an organization. These papers together approach key areas of vulnerability from different angles:

- 1) What are the relevant legal standards?
- 2) What are examples of conduct that has or has not been found to breach these standards?
- 3) What role does judicial review play in oversight of good decision-making and in protection against conflict of interest, fraud, or corruption?

II. Defining “Conflict of Interest”, “Fraud”, and “Corruption”

A. Conflict of Interest

1. Common Law

In *Old St. Boniface Residents Assn Inc v Winnipeg (City)*, Sopinka J, writing for the majority, commented on the meaning of “conflict of interest”, as understood under common law:

I would distinguish between a case of partiality by reason of pre-judgment on the one hand and by reason of personal interest on the other. It is apparent ... that some degree of pre-judgment is inherent in the role of a councillor. That is not the case in respect of interest. There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest. It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest.¹

In *Moll v Fisher*, the Ontario High Court of Justice (Divisional Court) made the following observations with respect to the underlying moral concern addressed by conflict of interest rules:

[All conflict of interest rules are] based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well meaning men and women may be impaired where their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose. And the [*Municipal Conflict of Interest Act, 1972*], by its broad proscription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interests may be in conflict with their public duty. The public’s confidence in its elected representatives demands no less.²

¹ *Old St. Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 SCR 1170 at para 55, Sopinka J [emphasis added] [*Old St. Boniface*].

² *Moll v Fisher* (1979), 23 OR (2d) 609 at para 6.

The common law recognizes two types of conflicts of interest: (1) non-pecuniary private or personal interest and (2) pecuniary interest.

Non-pecuniary conflicts of interest may arise out of proximate personal relationships or membership in a club or society. The common law applies two tests to situations where an official's public duties may be in conflict with non-pecuniary personal interests:

- 1) The first test is the “closed mind test” or “amenable to persuasion test”, which “applies when the official has expressed opinions in advance of a decision to such a degree that he or she might have bias.”³ This protects the *audi alteram partem* doctrine (i.e., listen to the other side).
- 2) The second test resembles the pecuniary interest test and it “applies when the official has associations or connections within the community such that the official's own interest might override the public interest when making a decision.”⁴ This test asks (1) whether the official has a personal interest in the matter beyond the interest he or she shares with all citizens of the municipality and (2) whether that interest is such that a reasonably well-informed person would conclude that the interest might influence the exercise of the official's public duty. This protects the *nemo iudex in sua causa* doctrine (i.e., one should not be a judge in one's own cause).

As summarized in the trial-level decision in *Schlenker*,

a common law conflict of interest (as opposed to common law bias or prejudgment) arises where the interests are particular to the official, where they are not shared by or would not benefit others in the community, and, where—if the interest is particular to the official—a reasonably well-informed person would find that the elected official might be influenced in the exercise of public duty by his or her personal interests.⁵

An example of a non-pecuniary conflict of interest can be found in the Alberta Supreme Court's 1965 decision in *Starr et al v City of Calgary*.⁶ Two City Council members who also sat on the board of directors for the Calgary Stampede, but in which they had no direct or indirect pecuniary interest, were disqualified from voting on any matter that affected the Stampede.⁷

³ *Schlenker v Torgrimson*, 2012 BCSC 41 at para 55 (reversed on appeal, but not on this point).

⁴ *Ibid* at para 56.

⁵ *Ibid* at para 66.

⁶ *Starr et al v City of Calgary* (1965), 52 DLR (2d) 726.

⁷ See Reece Harding, “An Introduction to British Columbia Local Government Law: Basic Principles”, *Young Anderson Barristers & Solicitors* (July 2012) at 10, online:

<www.lgma.ca/assets/Programs~and~Events/MATI~Programs/MATI~Foundations/2012~Presentations/REECE%20HARDING%20-%20Introduction%20to%20BC%20Local%20Government%20Law.pdf>.

Yet, conflicts of interest do not arise solely in the context of councillors or elected representatives. Conflict-of-interest principles apply broadly in the common law related to employment law.

In *British Columbia Systems Corp v BCGEU*, Mr. David Vickers, at that time acting as arbitrator, listed situations that might give rise to a conflict of interest:

In my opinion, a conflict of interest might arise in any one of the following situations:

1. Where the interests of an employer are directly or indirectly affected or likely to be affected in some negative way by the private activities of an employee;
2. Where private activities of employees impair their ability to pursue the interests of their employer;
3. Where private activities of employees compromise the business interests of their employer;
4. Where private activities of employees leave them in a position of gain or potential gain at the expense of their employer;
5. Where employees use knowledge or information imparted to them for the purposes of pursuing their employer's interests to pursue their own private interests.

I do not consider the foregoing examples to be exhaustive. Many situations will turn upon their own facts but in the final analysis, I am satisfied that it makes no difference if the activities are directly or indirectly, i.e., through some third party, impacting upon an employer. Equally, it makes no difference if there is a loss or gain by either an employee or an employer. The conflict arises immediately upon engaging in the activity.⁸

The broader principle of the duties of fidelity and loyalty owed by employees to their employees was discussed in *Toronto (City) v CUPE*:

an employee owes a duty of fidelity and loyalty to their employer which may be breached by conduct involving a conflict of interest. A conflict of interest will be present when an employee takes their own interests or those of others and furthers them to the detriment of their employer or those who have legitimate relationships with their employer.⁹

Similar expressions of principle were made in the context of public servants in *van der Linden v R*:

⁸ *British Columbia Systems Corp v BCGEU*, [1990] BCCA 40 (QL) at paras 43-44.

⁹ *Toronto (City) v CUPE* (1991), 20 LAC (4th) 158 at 168 (Ont Arb Bd), McLaren.

In deciding whether a public servant is in a position of conflict of interest, a Board such as this should look to whether the public servant has placed himself in a situation where his personal interests or activities interfere with his ability to carry out his obligations as a public servant or interfere with the Government's ability to carry on its programmes for the service of the public.¹⁰

2. Statute

As noted in *Old St. Boniface*, “Statutory provisions in various provincial Municipal Acts tend to parallel the common law but typically provide a definition of the kind of interest which will give rise to a conflict of interest.”¹¹

The *Community Charter*¹² constitutes a comprehensive scheme governing all municipalities in British Columbia, apart from the City of Vancouver, which operates under the *Vancouver Charter*.¹³ The conflict of interest standards in the *Community Charter* apply to all municipal and regional district elected officials, including elected officials from the City of Vancouver and the Islands Trust.¹⁴ They do not, however, govern non-elected officials and staff.

The conflict of interest provisions in the *Community Charter* “are intended to enhance and protect the integrity of local government”.¹⁵ “Conflict of interest” remains undefined in the *Community Charter*, despite being the central concept in Division 6. Section 100 requires a council member to declare a conflict of interest if he or she has a direct or indirect pecuniary interest in a matter under consideration. A member must also declare a conflict if he or she has some other, non-pecuniary type of interest that places the person in a conflict position (e.g., bias). This could include any benefit obtained by relations, close friends, or associates of a member who is in conflict. Examples may include a rezoning application by a relative or close personal friend or a business license decision involving a competitor business to one operated by a close friend. The facts of each situation will be unique and will need to be considered when determining if a member is in a non-pecuniary conflict of interest situation.¹⁶

Section 101 sets out the following rules:

¹⁰ *van der Linden v R* (1981), 28 LAC (2d) 352 at 357 (Ont Arb Bd).

¹¹ *Old St. Boniface*, *supra* note 1 at para 56.

¹² *Community Charter*, SBC 2003, c 26 [*Community Charter*].

¹³ *Vancouver Charter*, SBC 1953, c 55. See Government of British Columbia, Ministry of Community, Sport & Cultural Development, “Community Charter – Frequently Asked Questions”, online: <www.cscd.gov.bc.ca/lgd/gov_structure/community_charter/faqs.htm>.

¹⁴ Government of British Columbia, Ministry of Community, Sport & Development, “Ethical Conduct”, online: <http://www.cscd.gov.bc.ca/lgd/gov_structure/community_charter/governance/ethical_conduct.htm> [“Ethical Conduct Guidance”]

¹⁵ *Fairbrass v Hansma*, 2010 BCCA 319 at para 20.

¹⁶ “Ethical Conduct Guidance”, *supra* note 14.

if a council member has a direct or indirect pecuniary interest in a matter, the member must not:

- remain or attend any part of a meeting during which the matter is under consideration;
- participate in any discussion of the matter; or
- vote on the matter or attempt in any way to influence the voting of the matter, whether before, during or after a meeting.

These rules apply at all times, not just when a person makes a declaration of conflict under section 100.

Once a declaration has been made, the member of council must not do any of the things referred to in section 101 (e.g., remain or attend any part of the meeting during which the matter is under consideration, participate in any discussions of the matter, vote on the matter or attempt in any way to influence the voting of the matter whether before, during or after a meeting). These rules are in effect for council members in relation to meetings of councils, boards, committees and any other body created by the municipality or established pursuant to legislation.

A member of council who determines, after declaring a conflict of interest, that he or she is, in fact, not in a conflict position, may withdraw the original declaration and participate in subsequent discussions and vote on the matter being considered. The member must, however, obtain legal advice on the question of conflict before withdrawing the declaration.¹⁷

There are, however, exceptions to the rules outlined above. These exceptions are contained in section 104, and they include:

- the council member's pecuniary interest is an interest in common with the electors of the municipality;
- the council member's pecuniary interest, related to a local service, is in common with other persons who are or would be liable for the local service tax;
- the matter under consideration relates to the remuneration, expenses or benefits payable to local government officials in their capacity as members of council of the municipality;

¹⁷ *Ibid* [emphasis added].

- the pecuniary interest is so remote or insignificant that it cannot reasonably be viewed as likely to influence the member; and
- the council member has a legal right to be heard in respect of a matter or to make representations to council, in which case, the member may appoint a representative to exercise that right.¹⁸

With respect to conflicts of interest, the Government of BC makes the following observations:

Conflicts of interest can be very challenging to identify. Non-pecuniary conflicts that, by definition, do not involve the potential for financial benefit, can be just as damaging to the sense of public trust as conflicts that involve financial gain.

In broad terms, a council member has a non-pecuniary conflict of interest if:

- the member's interest in the matter is immediate and distinct from the public interest;
- it can be reasonably determined that the member's private interest in the matter will influence his or her vote on the matter;
- the member, or one of his or her relations or associates, stands to realize a personal benefit from a favourable decision on the matter; and
- the potential benefit to the member is not financial in nature.

The key consideration for members is whether a reasonable person would conclude that the decision-making could be influenced or affected by the connection, such that a private interest could conflict with a member's public duties. When in doubt it is advised that members err on the side of caution and declare any real or perceived non-pecuniary conflict of interest.

The concept of pecuniary and non-pecuniary conflict of interest is constantly evolving in common law. When faced with uncertainty, municipalities and council members are encouraged to seek legal advice.¹⁹

In addition, for those situated in Vancouver, the City of Vancouver's *Code of Ethics*²⁰ addresses conflicts of interest. The Code applies to all City staff, including political staff, Council officials, and advisory board members. Section 4.2 of the Code stipulates that "[a] conflict exists when an individual is, or could be, influenced, or appear to be influenced, by a

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ City of Vancouver, *Code of Ethics*, Policy Number AE-028-01, online: <vancouver.ca/files/cov/boards-committees-code-of-conduct.pdf>

personal interest, financial (pecuniary) or otherwise, when carrying out their public duty. Personal interest can include direct or indirect pecuniary interest, bias, pre-judgment, close mindedness or undue influence.”²¹

The Code of Ethics sets out examples of how staff might encounter conflicts of interest:

- 4.9.1 ***Obligation to others:*** Staff and advisory body members must not place themselves in a situation where they may be under obligation to someone who has business dealings with the City, and who would benefit from special consideration or treatment.
- 4.9.2 ***Special advantage/disadvantage:*** When staff or advisory body members can gain special advantage because of their position or when the City is disadvantaged as a result of the other interests of Council officials, staff or advisory body members.
- 4.9.3 ***Provision of special consideration/treatment:*** In the performance of their duties, staff and advisory body members may only grant special consideration/treatment as specifically authorized by City Council or the General Manager.
- 4.9.4 ***Representation to City Council, its Committees, Boards or Tribunals:*** Staff and advisory body members must not represent any private interest(s) except on their own behalf;
- 4.9.5 ***Litigation involving the City:*** Staff and advisory body members must not be party to any litigation against or involving the City.
- 4.9.6 ***Use of City-owned equipment:*** Staff must use City owned equipment, material, staff time or property in accordance with City policy, or as specifically authorized by City Council or the General Manager .
- 4.9.7 ***Discounts/Rebates:*** Staff may not take advantage of discounts/rebates on personal purchases from suppliers having an existing business relationship with the City, unless those suppliers offer the same discounts/rebates to the general public or those discounts/rebates are offered to staff of other large employers (public and private) on a no-strings-attached basis to the employer.
- 4.10 Council officials, staff and advisory body members must not expect or request preferential treatment for themselves or their family because of their position. They must also avoid any action that could lead members of the public to believe that they are seeking preferential treatment.
- 4.11 Staff who are considering outside employment, contract work or any business or undertaking that relates in any way to the business of the City or that might conflict or appear to conflict with their duties to the City must notify and seek the approval of their General Manager or the City Manager in writing.

3. Academic Commentary

²¹ *Ibid*, s 4.2.

Canadian academics have commented on the meaning of “conflict of interest” in the local government context. As Basile Chiasson writes, “In the context of Canadian municipal politics, a conflict of interest is the clash of a private interest with a public duty.”²²

B. Fraud

Subsection 380(1) of the *Criminal Code* stipulates that it is an offence to defraud the public or any person, whether ascertained or not, of any property, money or valuable security or any service, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of the *Criminal Code*.²³

- “Deceit” means “an untrue statement made by a person who knows that it is untrue or has reason to believe that it is untrue but makes it, despite that risk, to induce another person to act on it as if it were true to that other person’s detriment.”²⁴
- “Falsehood” means “a deliberate lie.”²⁵
- “Other fraudulent means” “encompasses and broadens the meanings of deceit and falsehood. It includes any other means which are not deceit or falsehood, properly regarded as dishonest according to the standards of reasonable people.”²⁶ “Other fraudulent means” has been interpreted widely in the case law. This category has been used to support convictions in a number of situations where deceit or falsehood cannot be shown. These situations include the use of corporate funds for personal purposes, non-disclosure of important facts, exploiting the weakness of another, unauthorized diversion of funds, and unauthorized arrogation of funds or property.²⁷
- Although the *Criminal Code* provides no definition of “fraud”, the essence of fraud is “dishonest deprivation”.²⁸
- The *actus reus* of fraud is established by proof of: (1) the prohibited act, be it an act of deceit, a falsehood, or some other fraudulent means; and (2) deprivation caused by the prohibited act, which may consist in actual loss or the placing of the complainant’s pecuniary interests at risk.²⁹

²² Basile Chiasson, “Ethics in Local Government: Atlantic Canada Conflicts of Interest Enforcement Mechanisms—Pathways or Roadblocks to a Culture of Ethics” (2009) 59 UNBLJ 231.

²³ *Criminal Code*, RSC 1985, c C-46, s 380(1) [*Criminal Code*].

²⁴ *R v Corey* (2011), 2012 ONCA 725 at para 16.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *R v Théroux*, [1993] 2 SCR 5 at para 15 [*Théroux*]. See also Halsbury’s Laws of Canada, *Criminal Offences and Defences*, “Property Offences: Fraud” at HCR-381 [“Halsbury’s – Fraud”]; *R v Zlatic*, [1993] 2 SCR 29 [*Zlatic*].

²⁸ See “Halsbury’s – Fraud”, *ibid.*; *R v Olan* (1978), 41 CCC (2d) 145 at 150 (SCC), Dickson J (“Courts, for good reason, have been loath to attempt anything in the nature of an exhaustive definition of ‘defraud’ but one may safely say, upon the authorities, that two elements are essential, ‘dishonesty’ and ‘deprivation.’ To succeed, the Crown must establish dishonest deprivation.”)

²⁹ *Zlatic*, *supra* note 27 at para 26; *Théroux*, *supra* note 27 at para 27.

- The *mens rea* of fraud is established by proof of: (1) Subjective knowledge of the prohibited act; and (2) Subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the complainant’s pecuniary interests are put at risk).³⁰ In general, an accused’s belief that the conduct is not wrong, or that no one will be hurt in the end, affords no defence.³¹

The courts have distinguished between “fraud” and “bad faith”. O’Driscoll J of the Ontario Supreme Court (High Court of Justice) made the following distinction in *Rocking Chair Plaza (Bramalea) Ltd v Brampton (City)*:

In my view, “fraud” and “bad faith” are *not* synonymous.

“Fraud” includes “bad faith”, but “bad faith” does not necessarily include “fraud”. Frequently, Judges see litigants who are acting in bad faith, but that does not mean that they are acting fraudulently.

One very pragmatic way to point out the difference between the two is this: people go to jail for fraud, but they do not go to jail for bad faith.³²

In addition to the general fraud offence in section 380 the *Criminal Code*, section 121 creates offences for “frauds on the government”. This section establishes a number of indictable offences with respect to improper activity involving government officials. “Official” in this context means a person who holds an office or is appointed to discharge a public duty.³³ The offences under section 121 are aimed at the avoidance of any appearance of impropriety by prohibiting receipt of benefits.³⁴ To be found guilty of an offence under this section,

the accused must know that he or she is an official; he or she must intentionally demand or accept a loan, reward, advantage or benefit of any kind for himself, herself or another person; and the accused must know that the reward is in consideration for cooperation, assistance or exercise of influence in connection with the transaction of business with or relating to the government.³⁵

Specifically, section 121 makes the following prohibitions relevant to local officials:

³⁰ *Zlatic, supra note 27* at para 26; *Théroux, supra note 27* at para 27.

³¹ *R v Gatley*, 15 BCAC 162.

³² *Rocking Chair Plaza (Bramalea) Ltd v Brampton (City)*, 1988 CarswellOnt 445 at paras 24-26 (WL Can) [emphasis in original].

³³ *Criminal Code*, s 118.

³⁴ Halsbury’s Laws of Canada, *Criminal Offences and Defences*, “Public Corruption Offences” at HCR-169 [“Halsbury’s – Public Corruption Offences”].

³⁵ *R v Cogger*, [1997] 2 SCR 845 at para 24.

- 1) *Bribery of an Official*: It is an indictable offence for a person to give or offer to an official, or for an official to demand or accept, a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with the transaction of business with or any matter of business relating to the government, or a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow, from any person for himself or another person.³⁶ It does not matter whether or not, in fact, the official is able to cooperate, render assistance, exercise influence, or do or omit to do what is proposed.³⁷ Moreover, the offer or gift is illegal if it is made directly or indirectly, or if it is an agreement to give or offer, or if it is made to the official or to any member of his or her family, or to anyone for the benefit of an official.³⁸ The object is to prevent government officials from taking benefits from third parties in exchange for conducting some form of business on that party's behalf with the government. "Corruption" is not a required element of the *actus reus* or the *mens rea*.³⁹ It must be proved the accused was an "official" but it need not be shown that the accused was acting in his official capacity at the time.⁴⁰ The donor's offence is complete upon the "giving" even if nothing is ever done by the recipient or even if what is given is returned by the recipient.⁴¹
- 2) *Giving or Receiving Kick-Backs*: It is an indictable offence for a person who has dealings of any kind with the government to pay a commission or reward to or confer an advantage or benefit of any kind on an employee or official of the government with which he or she deals, or to any member of his or her family, or to any one for the benefit of the employee or official, with respect to such dealings. Similarly, it is an offence for a government official or employee to demand, accept or offer or agree to accept such a commission or reward from a person who has dealings with the government.⁴²
- 3) *Influence Peddling*: It is an indictable offence for a person who has or pretends to have influence with the government or with a minister of the government or an official to demand, accept or offer or agree to accept for himself or another person a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with:
 - the transaction of business with or any matter of business relating to the government,

³⁶ *Criminal Code*, s 121(1)(a).

³⁷ "Halsbury's – Public Corruption Offences", *supra* note 34.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Criminal Code*, ss 121(1)(b)-(c).

- a claim against the Crown or any benefit that the Crown is authorized to bestow, or
- the appointment of any person, including himself, to an office.⁴³

C. Corruption

The *UN Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators* notes that “[t]here is no comprehensive, and universally accepted definition of corruption.”⁴⁴ Similarly, the *UN Convention against Corruption*⁴⁵ leaves “corruption” undefined, but examples of corruption are given throughout the text. The other leading international anti-corruption instrument, the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*,⁴⁶ also leaves “corruption” undefined.

The Canadian International Development Agency and other bodies have defined “corruption” as “the misuse of public office for private gain.”⁴⁷ This encompasses bribery, breach of trust, embezzlement, extortion, fraud, influence peddling, and nepotism. The World Bank distinguishes between two broad categories of corruption:

- 1) “State capture”, which refers to actions by individuals, groups, or organizations to influence policy formation by illegally transferring private benefits to public officials; and
- 2) “Administrative corruption”, which refers to the use of the same type of illegal transfers by the same actors to interfere with the proper implementation of laws, rules, and regulations.⁴⁸

“Corruption” can be further classified into the following categories:

- 1) “Grand corruption”, which refers to corruption involving high-ranking elected or appointed officials; and

⁴³ *Criminal Code*, s 121(1)(d).

⁴⁴ *UN Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators* (Vienna, September 2004) at 23, online: <www.unodc.org/pdf/crime/corruption/Handbook.pdf>.

⁴⁵ *United Nations Convention against Corruption*, GA Res 58/4, UN Doc A/58/422 (2003), online: <www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf>.

⁴⁶ OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (adopted 21 November 1997), online: <www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf>.

⁴⁷ Canadian International Development Agency and the Institute of Public Administration of Canada, “Anti-Corruption” at 1, online: <www.democraticdevelopment.ca/documents/AntiCorruptionLeadershipBrief4.pdf>.

⁴⁸ *Ibid.*

- 2) “Petty corruption”, which refers to corruption involving employees further down the government hierarchy.⁴⁹

Turning to the various legal definitions of corruption, municipal corruption in BC is governed by Part 4 of the *Community Charter* and the *Criminal Code*. In addition, municipal officers are governed by the Code of Ethics adopted by the relevant municipality.⁵⁰

Subsection 123(1) of the *Criminal Code* provides for an offence of “municipal corruption”. It states that

[e]very one is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years who directly or indirectly gives, offers or agrees to give or offer to a municipal official or to anyone for the benefit of a municipal official—or, being a municipal official, directly or indirectly demands, accepts or offers or agrees to accept from any person for themselves or another person—a loan, reward, advantage or benefit of any kind as consideration for the official

(a) to abstain from voting at a meeting of the municipal council or a committee of the council;

(b) to vote in favour of or against a measure, motion or resolution;

(c) to aid in procuring or preventing the adoption of a measure, motion or resolution; or

(d) to perform or fail to perform an official act.

Section 123(3) adds that a “municipal official” means a member of a municipal council or a person who holds an office under a municipal government.

Examples of conduct amounting to “municipal corruption” have included a chief building inspector who accepted bribes in exchange for the non-performance of his duties⁵¹ and a municipal treasurer who accepted money in exchange for providing greater cooperation with a town planner.⁵²

II. Consequences of a Breach

A. Conflict of Interest

⁴⁹ *Ibid.*

⁵⁰ See e.g. City of Vancouver, *Code of Ethics*, Policy Number AE-028-01, online: <vancouver.ca/files/cov/boards-committees-code-of-conduct.pdf>.

⁵¹ *R v Belzberg*, [1962] SCR 254.

⁵² *R v Leblanc*, [1982] 1 SCR 344.

The *Community Charter* and the common law determine the consequences of actions taken in the face of a conflict of interest.

1. Pecuniary Conflict of Interest

Section 101(3) of the *Community Charter* stipulates that a person who acts despite a pecuniary conflict of interest may be disqualified from holding public office unless the contravention was done inadvertently or because of an error in judgment made in good faith. Disqualification will not be a consequence where only a non-pecuniary conflict of interest is concerned. As stated in *Fairbrass v Hansma*, “Unlike the rather more amorphous terms that may be recited in proceedings challenging a discrete action of a council, the ground for disqualification is restricted to a person holding a pecuniary interest in the outcome of the matter under consideration, whether direct or indirect.”⁵³ Section 110 sets out that a person who is disqualified cannot run until the next general local election if the Supreme Court of British Columbia finds that he or she acted in contravention of the conflict of interest rules.

In addition, under section 109, the *Community Charter* provides for the ability of the municipality or an elector to apply to the Supreme Court of British Columbia for an order requiring a member, or former member, to pay to the municipality all or part of the member’s financial gain that was obtained as a result of contravening the rules governing ethical conduct. This provision will only apply in cases involving a pecuniary conflict of interest.

There may be other ramifications outside statutory consequences for acting in the face of a pecuniary conflict of interest. One author summarizes the potential consequences in the following terms:

To sum up briefly, the consequences of a member of council debating and voting on a matter in which the member has a pecuniary conflict of interest are:

- the member can be disqualified from holding office until the next election;
- the member’s vote can be invalidated, which could change the result if the margin was one vote (a tie vote is negative);
- the resolution or bylaw voted on could be invalidated on the basis that the member’s conflict tainted the entire vote; and/or
- the member can be required to give up to the municipality any financial gain realized by the member.⁵⁴

⁵³ *Fairbrass v Hansma*, 2010 BCCA 319 at para 20.

⁵⁴ Lorena Staples, QC, “A Handbook for Municipal Councillors & Mayors: Community Charter and Local Government Act – British Columbia Municipalities” (January 2015) at 27, online: <www.lorenastaples.ca/wp-content/uploads/2015/06/Municipal-Councillors-Handbook-June-2015.pdf>.

2. Non-Pecuniary Conflict of Interest

Where a non-pecuniary conflict of interest arises, the consequences may include invalidation of the individual's vote or the action of Council, such as a by-law, resolution, or contract.

3. Conflicts of Interest in Employment Law

All employees, as a matter of common law, even in the absence of a contract specifying such a duty, have a duty of good faith and loyalty toward their employers.⁵⁵ Being in a conflict of interest can constitute a contravention of this duty.

In the employment law context, the consequences of acting in a conflict of interest may vary depending upon the specific contract of employment. Nonetheless, at common law, courts have repeatedly held that an employer may be justified in terminating an employee for cause and may seek damages if the employee is positioned in a conflict of interest. This applies not only in respect of actual conflicts, but also potential conflicts. An employer need not prove it suffered harm; it need only prove that it could suffer harm from the employee's conduct.⁵⁶

B. Fraud

Fraud *simpliciter* under section 380 is an indictable offence where the subject matter of the offence is a testamentary instrument or its value exceeds \$5,000, and the maximum punishment on conviction is 14 years' imprisonment.⁵⁷ It is a hybrid offence where the subject matter of the offence does not exceed \$5,000, and the maximum punishment where the Crown proceeds by way of indictment is two years' imprisonment.⁵⁸ If the fraud exceeds \$1 million, the offence is prosecuted on indictment, and the person is convicted for more than one count of fraud, the minimum sentence is two years' imprisonment.⁵⁹ In addition, where the fraud exceeds \$1 million, the court must consider the value of the fraud as an aggravating factor.⁶⁰

In imposing a sentence for fraud, subsection 380.1(1) requires the court to consider the following as aggravating circumstances:

(a) the magnitude, complexity, duration or degree of planning of the fraud committed

⁵⁵ *RBC Dominion Securities Inc v Merrill Lynch*, 2008 SCC 54; *Martin v Brown* (1910), 19 Man R 680; *State Vacuum Stores of Canada Ltd v Phillips*, [1954] 3 DLR 621 (BCCA).

⁵⁶ *Empey v Coastal Towing Co*, [1977] 1 WWR 673; *CIBC v Boisvert*, [1986] 2 FC 431.

⁵⁷ *Criminal Code*, s 380(1)(a).

⁵⁸ *Criminal Code*, s 380(1)(b).

⁵⁹ *Criminal Code*, s 380(1.1).

⁶⁰ *Criminal Code*, s 380.1(1.1).

was significant;

(b) the offence adversely affected, or had the potential to adversely affect, the stability of the Canadian economy or financial system or any financial market in Canada or investor confidence in such a financial market;

(c) the offence involved a large number of victims;

(c.1) the offence had a significant impact on the victims given their personal circumstances including their age, health and financial situation;

(d) in committing the offence, the offender took advantage of the high regard in which the offender was held in the community;

(e) the offender did not comply with a licensing requirement, or professional standard, that is normally applicable to the activity or conduct that forms the subject-matter of the offence; and

(f) the offender concealed or destroyed records related to the fraud or to the disbursement of the proceeds of the fraud.

When a court imposes a sentence for fraud, it must not consider as mitigating circumstances the offender's employment, employment skills or status or reputation in the community if those circumstances were relevant to, contributed to, or were used in the commission of the offence.⁶¹

A conviction for frauds on the government under section 121 is an indictable offence, and the convicted individual is liable to imprisonment for a term not exceeding five years.⁶²

C. Corruption

The maximum punishment on conviction for the municipal corruption offences outlined in section 123 of the *Criminal Code* is five years' imprisonment.⁶³

III. Significant Cases and Inquiries Dealing with Conflict of Interest, Fraud, Corruption, or Breach of Fiduciary Duty

A. Conflict of Interest

1. Sherwood Inquiry (2014)

⁶¹ *Criminal Code*, s 380.1(2).

⁶² *Criminal Code*, s 121(3).

⁶³ *Criminal Code*, ss 123(1)-(2).

On June 26, 2014, Government Relations Minister Jim Reiter of Saskatchewan appointed Justice Ron Barclay to conduct an inquiry⁶⁴ in relation to the Rural Municipality of Sherwood #159 after allegations of wrongdoing arose regarding a proposed development. The final report, issued on December 30, 2014, found that Reeve Kevin Eberle was in a serious conflict of interest and had committed violations of the public trust by an elected official.⁶⁵ The inquiry revealed that Mr. Eberle had a direct pecuniary interest in the development at issue, and that Mr. Eberle had attempted to influence the municipality's decisions on the development plan. Mr. Eberle stood to gain almost \$58 million over 13 years as a result of the development.

As a consequence, Mr. Eberle was removed from office, pursuant to section 402 of *The Municipalities Act*.⁶⁶ Also as a result of the inquiry, a number of shortcomings in the conflict of interest provisions of *The Municipalities Act*, *The Cities Act*, and *The Northern Municipalities Act, 2010* were identified. The Government of Saskatchewan, on October 19, 2015, introduced new conflict of interest rules for local elected officials.⁶⁷ The changes require council members to disclose a more detailed declaration of conflicts of interests, including the general nature of such conflicts and details that could “reasonably be seen to materially affect that member’s impartiality in the exercise of his or her office.”⁶⁸ It also includes clearer definitions of what constitutes a conflict of interest, a private interest, and the inappropriate use of office and influence.

2. *Magder v Ford (2013)*

In August 2010, Toronto’s Integrity Commissioner, Janet Leiper, found that Rob Ford—then a city councillor—had violated the City Council’s Code of Conduct. Mr. Ford had used official City letterhead to solicit \$3,150 worth of donations from lobbyists and corporations for his private charitable organization, the Rob Ford Football Foundation. The Code of Conduct prohibited politicians from accepting certain gifts, using political influence for private gains, or using City resources for non-City business. The Integrity Commissioner determined that Mr. Ford had contravened these prohibitions.

⁶⁴ Justice Ron Barclay, “Inquiry Report into the RM of Sherwood #159”, online: <www.saskatchewan.ca/government/municipal-administration/municipal-inquiries>.

⁶⁵ See Government of Saskatchewan, “Government of Saskatchewan Orders Removal of RM of Sherwood Reeve” (5 February 2015), online: <www.saskatchewan.ca/government/news-and-media/2015/february/05/rm-sherwood-reeve-removal>.

⁶⁶ *The Municipalities Act*, SS 2005, c M-36.1.

⁶⁷ See Government of Saskatchewan, “Province Introduces New Conflict of Interest Rules for Municipalities” (19 October 2015), online: <www.saskatchewan.ca/government/news-and-media/2015/october/19/conflict-of-interest-rules>.

⁶⁸ See Government of Saskatchewan, “Conflict of Interest Backgrounder”, online: <www.saskatchewan.ca/~media/news%20release%20backgrounders/2015/oct/new%20conflict%20of%20interest%20rules%20%20backgrounder%20%20oct%2019%202015.pdf>.

On August 25, 2010, City Council agreed with the Integrity Commissioner's determination and imposed a penalty on Mr. Ford, requiring him to pay back the \$3,150 he had improperly acquired. Despite the Integrity Commissioner's insistence on a number of occasions that Mr. Ford abide by the penalty, Mr. Ford refused to return the funds.

Mr. Ford went on to become Mayor of Toronto. The issue of Mr. Ford's conduct came before City Council again on February 7, 2012. It was at this juncture that the Council voted to rescind the earlier decision to make Mr. Ford return the funds. The issue, however, was that Mr. Ford spoke and voted on the issue of whether he should have to pay back the money.

A claim was brought before the Ontario Superior Court⁶⁹ in March 2012 on behalf of Paul Magder, a Toronto resident, arguing that Mr. Ford acted in breach of Ontario's *Municipal Conflict of Interest Act (MCIA)*.⁷⁰ This legislation requires politicians to disclose conflicts of interest and excuse themselves from votes at municipal government councils where such a conflict is present. The trial judge, who released his judgment on November 26, 2012, agreed with the claimant, finding Mr. Ford was in a conflict of interest. This triggered an automatic penalty: Mr. Ford was ordered to vacate his office. The trial judge acknowledged that the automatic penalty of removal from office—which is the only penalty available under the *MCIA*⁷¹—is “a very blunt instrument and [it] has attracted justified criticism and calls for legislative reform.”⁷² Such a penalty is mandatory unless the individual can establish that the contravention was the result of (1) mere inadvertence or (2) a good faith error in judgment, neither of which conditions, in the judge's view, were satisfied in the case.

Mr. Ford sought and was granted a stay, and he appealed the decision to the Ontario Superior Court of Justice (Divisional Court).⁷³ Mr. Ford succeeded on appeal. The Divisional Court found that the original vote of City Council itself was not in order, as Council did not have the jurisdiction to impose a penalty requiring Mr. Ford to pay back the money. Rather, the Divisional Court found that the Code of Conduct only authorized Council to impose two types of sanctions for a breach of the Code: (1) a reprimand or (2) a suspension. A section of the Code of Conduct that allows for “other actions” in response to a breach of the Code was interpreted as providing for non-punitive remedial measures such as apologies, and could not ground the reimbursement order imposed on Mr. Ford by Council. This sanction, in the Divisional Court's view, constituted an attempt by Council to expand its powers beyond those authorized by the Code of Conduct. Since the original order of Council was a nullity, Mr. Ford had no pecuniary interest in the matter when he voted on it, and therefore he was not in a conflict of interest under the *MCIA*.

⁶⁹ *Magder v Ford*, 2012 ONSC 5615.

⁷⁰ *Municipal Conflict of Interest Act*, RSO 1990, c M.50 [*MCIA*].

⁷¹ See *ibid*, s 10(1)(a).

⁷² *Magder v Ford*, 2012 ONSC 5615 at para 46.

⁷³ *Magder v Ford*, 2013 ONSC 263.

As a consequence of the successful appeal, Mr. Ford was able to remain mayor. The Divisional Court nonetheless condemned Mr. Ford for his wilful blindness towards the law, and it affirmed the trial judge's finding that Mr. Ford made an error in judgment that was not in good faith.⁷⁴ Mr. Ford had refused to read the *MCIA*, to consult the councillors' handbook, to attend conflict-of-interest briefings, or to seek legal advice on the law.⁷⁵ According to the trial judge, whose comments on the matter were confirmed by the Divisional Court on appeal, in order to benefit from the protection of the saving provisions for inadvertence or a good faith error in judgment, "There must be some diligence on the respondent's part; that is, some effort to understand and appreciate his obligations. Outright ignorance of the law will not suffice, nor will wilful blindness as to one's obligations."⁷⁶

Importantly, the Divisional Court required that Mr. Ford cover his own costs, which totalled approximately \$116,000. In addressing the costs issue, the Divisional Court cited three reasons why Mr. Ford should pay his own costs.⁷⁷ First, Mr. Ford succeeded on only one of four arguments on appeal. Second, the case involved "novel legal issues with respect to matters of public importance" and helped to clarify the *MCIA*. Third, Mr. Magder brought a reasonable challenge. The appeal was granted on the basis of narrow, technical grounds that were not argued at trial. These factors justified the finding that Mr. Ford should pay his own costs.

Mr. Magder appealed the case to the Supreme Court of Canada, but the Supreme Court denied leave to appeal.⁷⁸

3. *Schlenker v Torgrimson* (2013)

The 2013 case of *Schlenker v Torgrimson*⁷⁹ is a recent and important case in BC on conflicts of interest, and it has provoked considerable discussion (and anxiety) amongst local politicians.⁸⁰ The case concerned the interpretation of "direct or indirect pecuniary interests".

⁷⁴ *Ibid* at paras 89-90.

⁷⁵ *Magder v Ford*, 2012 ONSC 5615 at paras 51, 54.

⁷⁶ *Ibid* at para 53. See also *Magder v Ford*, 2013 ONSC 263 at paras 89-90 ("When an individual seeks to rely on an error of law, good faith requires that he make some inquiry about the meaning and application of the law, rather than rely on his or her own interpretation. Wilful blindness to one's legal obligations cannot be a good faith error in judgment the councillor must prove not only that he had an honest belief that the *MCIA* did not apply; he must also show that his belief was not arbitrary, and that he had taken some reasonable steps to inquire into his legal obligations.")

⁷⁷ *Magder v Ford*, 2013 ONSC 1842 at paras 7-9.

⁷⁸ *Magder v Ford*, [2013] SCCA No 117.

⁷⁹ *Schlenker v Torgrimson*, 2013 BCCA 9 [*Schlenker*].

⁸⁰ See e.g. Bill Cleverley, "Municipal Politicians Seek Clarity on Conflict of Interest after Court Ruling", *Times Colonist* (14 May 2013), online: <www.timescolonist.com/news/local/municipal-politicians-seek-clarity-on-conflict-of-interest-after-court-ruling-1.178262> (noting that, due to the uncertainty caused by the judgment, "so many B.C. municipal councillors were jumping up and leaving the room during this year's budget discussions that several councils had difficulty maintaining a quorum.")

In 2011, two elected trustees of the Salt Spring Island Local Trust Committee voted to approve grants in the amount of \$4,000 each to two non-profit societies—each focused on environmental issues—for which they acted as directors. Neither trustee ever received any payment from either non-profit society. Neither trustee disclosed that they were directors of the respective societies at committee meetings. A group of electors brought an application against the two trustees seeking their disqualification, arguing that they violated the conflict of interest provisions in sections 100 and 101 of the *Community Charter* by voting on a matter in which they had a “direct or indirect pecuniary interest”. In the alternative, the applicants submitted that the trustees were in a conflict of interest at common law, and they asked the court to order that the trustees’ offices be vacated.

The British Columbia Supreme Court⁸¹ dismissed the petition on the ground that there was no direct or indirect pecuniary interest because the two trustees did not derive any personal financial gain from the resolutions at issue, and the mere fact that the trustees were also directors was insufficient to establish an indirect pecuniary interest. The two trustees were merely volunteering their time, and the entities concerned were non-profit societies. The argument that there was a common-law conflict of interest was also dismissed. The trial judge concluded that insufficient evidence to establish a personal interest “peculiar to the councillor” that was distinct from community interests.⁸² Furthermore, even if such an interest could be proven, common-law conflict of interest could not lead to a remedy of disqualification.⁸³

The Court of Appeal⁸⁴ reversed the decision of the BC Supreme Court, finding that the two trustees did in fact have a pecuniary interest in the resolutions. The Court of Appeal reasoned that the trial judge interpreted the meaning of “pecuniary interest” too narrowly:

By limiting the interest to personal financial gain, the chambers judge’s interpretation missed an indirect interest, pecuniary in nature, in the fulfillment of the respondents’ fiduciary duty as directors [of societies]. The result of applying that narrow interpretation to the facts was to defeat the purpose and object of the conflict of interest legislation.⁸⁵

The key finding of the Court of Appeal was that elected officials may be in a pecuniary conflict of interest when they vote to provide funds to societies for which they are directors, even if the money does not benefit the voting official personally. The Court reasoned that “[t]he public is disadvantaged by the conflict, whether the respondents derived any personal gain or not,

⁸¹ *Schlenker v Torgimson*, 2012 BCSC 41.

⁸² *Ibid* at para 73.

⁸³ *Ibid* at para 50.

⁸⁴ *Supra* note 79.

⁸⁵ *Ibid* at para 33.

because the public did not have the undivided loyalty of their elected officials.”⁸⁶

The basis for the pecuniary conflict of interest—which is indirect—in such a scenario is that, as a director, the individual has a fiduciary obligation to the relevant society or corporation, which may come into conflict with the individual’s duties as a councillor. At their core, the *Community Charter* provisions respecting conflicts of interest prevent elected officials from having divided loyalties. In the Court’s view, the trustees were placed in a position of divided loyalty, despite the absence of personal financial gain. Although personal financial gain can be a powerful motive, whether consciously or unconsciously, for placing the public interest behind the interests of a society or corporation, advancement of the society or corporation’s particular cause can also be a powerful motivator, especially since directors are under a fiduciary obligation vis-à-vis the society or corporation. In short, provided the matter involves the expenditure of public funds, and the elected official has “an interest” in the matter that a well-informed elector would view as conflicting with his or her duty as an elected official, there is a pecuniary conflict of interest, regardless of whether the elected official is deriving a personal financial benefit.⁸⁷

The Court of Appeal distinguished the facts in *Schlenker* from those in *Fairbrass* (discussed below):

It was contended by the petitioners in *Fairbrass* that the filial relationship between the father and the sons was enough to establish an indirect interest. That proposition was rejected at both levels as an unsupported inference. I see no parallel to the case at bar. Parents may or may not be concerned with the business affairs of their children; it all depends on the facts of each case. But there is no doubt about the duty of a director in fostering the business of his or her society; it inheres in the nature of the relationship.⁸⁸

The Court of Appeal also clarified that the appropriate remedy for a conflict of interest arising under section 101 of the *Community Charter* is disqualification from office until the next election. On the facts, however, this remedy could not be applied, as the individuals did not run in the election following the bringing of the petition. The Court hence went no further than issuing a declaration that the trustees had violated the *Community Charter*. The Court rejected the suggestion that the repayment rule in section 191 of the *Community Charter*, which states that a council member who votes for a by-law or resolution authorizing the use of funds contrary to the *Community Charter* or the *Local Government Act* is personally liable to the municipality for the amount, could be applied. Section 191 can only be applied where the expenditure is an

⁸⁶ *Ibid* at para 50.

⁸⁷ *Ibid* at para 49.

⁸⁸ *Ibid* at para 56 [emphasis added].

improper subject for expenditure. The focus in section 191 is on improper expenditure, not the qualification of the councillor voting on the expenditure.

In sum, *Schlenker* confirms that there must be more than mere suspicion of, or tenuous connection with, a pecuniary interest influencing the decision. But it is clear that this interest need not be a personal financial interest; it can equally be an interest in another individual or entity's financial interest. A director's duties to a corporation or society is an example of such an interest. The meaning of "pecuniary interest" has been significantly broadened by the *Schlenker* decision. One of the difficulties arising from this decision is that elected officials in small communities—who are often active community members and "wear many hats"—are in danger of being found in a conflict of interest, and may be limited in their ability to take on multiple roles that benefit the community.

4. *Windsor (City) v CUPE, Local 543 (2012)*

*Windsor (City) v CUPE, Local 543*⁸⁹ is an important case on conflicts of interest in the context of a municipal employee having an "outside business". The grievor, a building inspector for the City of Windsor, challenged the application of the City's conflict of interest policy to his outside business activities. The City advised the grievor that providing architectural design services concerning client premises located within the City's boundaries would constitute a conflict.

The arbitrator canvassed the principles related to conflicts of interest in the municipal employee context as follows:

[Conflict of interest] issues affecting municipalities have attracted close scrutiny in recent years.

The Report of the Toronto Computer Leasing Inquiry included the following relevant observations by Commissioner Denise Bellamy:

The driving consideration behind conflict of interest rules is the public good. In this context, a conflict of interest is essentially a conflict between public and private interests...The core concern in a conflict is the presumption that bias and a lack of impartial judgment will lead a decision-maker in public service to prefer his or her own personal interests over the public good.

...

Conflict of interest should be considered in its broadest possible sense. It is about much more than money. Obviously, a conflict of interest exists when a

⁸⁹ *Windsor (City) v CUPE, Local 543 (2012)*, 221 LAC (4th) 208.

decision-maker in public service has a personal financial interest in a decision. But conflicts of interest extend to any interest, loyalty, concern, emotion or other feature of a situation tending to make the individual's judgment less reliable than it would normally be.

A potential conflict of interest exists when a public servant has a private interest that could influence the exercise of his or her public duties or responsibilities. The potential conflict exists even when the public servant has taken no action to reap a tangible private benefit

An apparent conflict of interest exists when someone could reasonably conclude that a conflict of interest exists. In other words, it is a matter of public perception.

Public perceptions of the ethics of public servants are critically important. If the public perceives, even wrongly, that public servants are unethical, democratic institutions will suffer from the erosion of public confidence.

Circumstances can arise where a public servant has been behaving ethically, yet that person's actions look unethical to someone else. The problem, though real, does not lie with the public servant. The appropriate response to such misinterpretation is to improve understanding, through communication and education, of what does and does not constitute unethical behaviour.

On the other hand, public servants should not dismiss the importance of apparent conflicts of interest just because they can arise even where there is no wrongdoing. By disregarding perception, the public servant runs the risk of eroding public confidence, not only in himself or herself but also in government generally.

The Report of the Mississauga Judicial Inquiry by Commissioner J. Douglas Cunningham likewise included the following:

Optics are important. It is essential to consider how a reasonable person would view the actions of the municipal councillor. As Commissioner Jeffrey Oliphant put it so well in his 2010 Report:

Public office holders ultimately owe their position to the public, whose business they are conducting. Ensuring they do not prefer their private interests at the expense of their public duties is a fundamental

objective of ethics standards.

...

This broader approach to conflict of interest has also been recognized as the prevailing standard by previous commissions of inquiry, including those conducted by Commissioners Denise Bellamy and W. D. Parker. As identified in the Parker Commission, there are various manifestations of conflict of interest. A conflict of interest may be real or apparent.

A real conflict of interest has three prerequisites: (1) the existence of a private interest (2) that is known to the public office holder; and (3) that has a nexus with his or her public duties and responsibilities that is sufficient to influence the exercise of those duties and responsibilities.

An apparent conflict of interest arises when a reasonably well-informed person could reasonably conclude, as a result of the surrounding circumstances, that the public official must have known about the connection of his or her involvement with a matter of private interest.

The Cunningham Report contained numerous Recommendations including the following which are apposite to the instant case.

The City should expand its current code of conduct for councillors and its conflict of interest policy for staff to include broader ethical considerations.

Councillors and staff should take steps to avoid as best they can both real and apparent conflicts of interest.

Councillors and staff should not concurrently accept employment by an outside interest that is either incompatible with or in conflict with their official duties.

Elected officials and staff should take all necessary steps to avoid preferential treatment or the appearance of preferential treatment for friends or family.

Labour adjudicators have also considered these issues.

In *Hamilton-Wentworth (Regional Municipality) v. C.U.P.E., Local 167, supra*, Arbitrator Kennedy (as have other arbitrators and adjudicators) quoted from a decision of E.B. Jolliffe, Q.C. for the Public Service Staff Relations Board in the case

of *McKendry v. Canada (Treasury Board)* [(May 31, 1973), Doc. Board File 166-2-674 (Can. P.S.S.R.B.)] (May 31, 1973):

1. Public servants must not seek, for private gain, to make use of information not available to the general public to which they have access by reason of their official duties.
2. A conflict of interest occurs when the public interest in proper administration of a government office and a government official's interest in his private economic affairs clash or appear to clash; and a finding of conflict of interest does not depend on wilful wrongdoing by the official or on the issue of whether the official's judgment has in fact been affected.
3. A government official should not put himself in a position where his judgment could, even unconsciously, be affected by friendship.

Arbitrator Kennedy identified, at page 56, certain factors which he believed required consideration:

- whether or not the employee in question is responsible for a part of a process whereby members of the public are granted or denied licenses, benefits, etc.;
- the extent to which the employee exercises discretion in any part of such process;
- the extent to which he deals with the public, and is seen by them to be instrumental in the process; and
- the extent to which clear guidelines on the nature of conflict of interest have been promulgated, and, if they have not, whether the nature of the employee's position is such that he can be expected to reach his own reasonable conclusions or seek advice on the issue of conflict of interest.

In *Association of Management, Administrative and Professional Crown Employees of Ontario* (Globerman grievance), *supra*, August 2, 2006, the Grievance Settlement Board identified both the purpose of the exercise and the test to be applied in appearance of COI cases:

In determining whether a conflict exists within the meaning of the Conflict of Interest Directive, it is necessary to focus on the job of the public servant and the nature of public servants' outside activities. The Courts have recognized as legitimate the objective of Government to maintain an effective and impartial

public service...a conflict of interest may be actual, perceived or potential. Certainly, a perceived or potential conflict of interest can detrimentally affect the effectiveness and impartiality of the public service. An assessment of whether a conflict exists on any of these levels must be made objectively using the test of a reasonable well-informed person.

In *Threader, supra*, at para 23, the Federal Court articulated the test as follows:

Would an informed person, viewing the matter realistically and practically and having thought the matter through, think it more likely than not that the public servant, whether consciously or unconsciously, will be influenced in the performance of his official duties by considerations having to do with his private interests?

The Bellamy and Cunningham inquiries provide high profile reminders that COI issues are a permanent part of the ethical landscape and that they have direct application to municipal governments. It is trite to say that it is important that public confidence be maintained in the public service and government generally. In my opinion municipal governments should be encouraged to review, not be discouraged from reviewing, the adequacy of their COI policies. Given what appears to be a sharper recognition that public confidence may be seriously impaired by even appearance of COI, any such current review may well involve such a heightened focus. There has never been any doubt that confidence may be destroyed by employees who actually engage in egregious misconduct.

It is however frequently an easier task to state COI principles than it is to apply them, particularly in appearance cases. It is necessary to consider the interests of affected employees with some care. In *van der Linden (Swinton)* it was recognized that:

There is a fine line to be drawn, in deciding whether a conflict of interest exists because of employee business conduct, so as to recognize certain inevitable circumstances. A business client in contact with a Government official may well become impressed with the official's capabilities and wish to engage his or her services. Surely, such an offer does not automatically constitute a conflict of interest.

The test for COI should not be set so low that virtually *any* hypothetical projection of apparent conflict will be sufficient to support a broad employer prohibition of outside activity. The exercise should not be expediently and sanctimoniously *pro forma*. In *Gendron, supra*, the PSLRB at para 140 observed that the Supreme Court of Canada

in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 (S.C.C.) identified, in a freedom of expression case, that “the need to preserve the impartiality and even the appearance of impartiality differs depending on the position occupied by the public servant within the public service”.

A line does have to be drawn by someone however. In the result, it falls ultimately to an adjudicator or a court to decide whether or not a reasonable person apprised of the facts would perceive a conflict. In appearance of COI cases, that line may be drawn without a requirement that one party or the other produce evidence which might purport to disclose what the public might think about a particular fact pattern. While it may be interesting and instructive to consider polling data or to listen to informed opinion, such evidence, whether or not admissible, is not likely to be dispositive. As happened in this case, honest intelligent people may well disagree. De Simone and his supervisor Peach preferred the COI policy of Doyle’s predecessor Link. Doyle has the different view which the City has adopted.

With respect, in my estimation, the employer position concerning COI and the De Simone situation is ultimately compelling. I do not think it wise to ignore the observations made by distinguished judges in public inquiries affecting municipalities. The City had every right, and perhaps the obligation, to review its COI policies and to consider amendments. The fact that a prior policy or practice, such as the Link memorandum, had served adequately in the past should not stand as a barrier to any such review or possible amendment.⁹⁰

The arbitrator emphasized that “the Building Department is one place in the municipal scheme where the City not only may but *should* take every reasonable step to preserve public confidence in public employees.”⁹¹ He also emphasized that no-one had suggested that the City employee had done anything wrong, nor would do anything wrong. Nonetheless, the arbitrator concluded as follows:

The ultimate objective of the grievor’s outside business is to produce drawings to be used by builders which will pass muster with municipal authorities. If those drawings emanate from clients located within the City, it is his work which will require review by his colleagues in the Building Department where he works. His name appears on the drawings “99% of the time”.

It does not require a conspiracy theorist to believe it plausible that the grievor’s colleagues might look upon his work products with favour or, at the very least,

⁹⁰ *Ibid* at paras 39-52.

⁹¹ *Ibid* at para 55 [emphasis added].

consider them as presumptively professionally acceptable without the need for as close an inspection as might be required of others. Plan Examiners are required to exercise their professional discretion in a detached manner with respect to ‘areas of gray’. It would not be unreasonable to suppose that ‘close calls’ might fall more readily in favour of a colleague’s client than to a stranger — whether consciously or unconsciously.⁹²

Accordingly, the arbitrator found the conflict of interest policy to be reasonable, and the grievor was permitted to continue with his outside business only to the extent that it did not involve clients with requirements within the boundaries of the City.

5. *Tuchenhagen v Mondoux (2011)*

The Ontario Divisional Court interpreted the meaning of “pecuniary interest” in the 2011 case of *Tuchenhagen v Mondoux*.⁹³ A councillor of the Thunder Bay City Council became interested in being a potential bidder on the sale of surplus city land. The Councillor sent the following email to staff: “Could you please send me a copy of the advertisement for the Hardistry Street property when it is produced. I may be interested in bidding on this property.”⁹⁴ Nineteen days later, the councillor booked an appointment to view the property. After making this appointment, but before the property visit, the Councillor attended a meeting at which the sale was considered. The Councillor did not disclose his interest in the property when the sale was considered by City Council.

The majority of the Divisional Court reasoned that the councillor’s pecuniary interest crystallised from the moment the councillor saw himself as a potential bidder for the surplus city land, and started to act as one. He thus possessed a pecuniary interest at least from the moment he sent the email to staff. The councillor had entered the role of a prospective purchaser, and as such his loyalties were divided. The Divisional Court noted that the goal of the vendor—here, the municipality and the electors generally—is to maximize sale proceeds, whereas the goal of a potential purchaser—here, the City Councillor—is to do the opposite.⁹⁵ In the result, the individual was disqualified from being a member of City Council for four years.

6. *McCallion Inquiry (2011)*

⁹² *Ibid* at paras 57-58.

⁹³ *Tuchenhagen v Mondoux*, 2011 ONSC 5398 (Div Ct) [*Tuchenhagen*] (the case was appealed to the Ontario Court of Appeal, but the appeal was rejected on the grounds that no appeal was possible, and therefore the Court of Appeal did not consider the case on its merits: see *Tuchenhagen v Mondoux*, 2012 ONCA 567). *Tuchenhagen* was mentioned by the British Columbia Court of Appeal in *Schlenker*, *supra* note 79 at para 42.

⁹⁴ *Tuchenhagen*, *ibid* at para 7.

⁹⁵ *Ibid* at para 46.

In 2007, Peel Region approved an increase to development charges. These charges were made subject to transitional measures that would “grandfather in” projects that had met certain milestones. Mississauga Mayor Hazel McCallion voted on the development charges by-law at three separate meetings and moved an amendment that extended the transition period. Mayor McCallion’s son, Peter, had a 15% ownership interest in World Class Developments, which proposed a development that would benefit from the transitional provisions, and was a real estate agent in the proposed development. Peter stood to make millions if the development was to go through. Mayor McCallion claimed that she only knew Peter was a real estate agent in the proposed development; she claimed she did not know about his ownership interest when she discussed and voted on the matter. She did not declare any conflict of interest.

Justice Douglas Cunningham was appointed to conduct an inquiry into the matter.⁹⁶ Justice Cunningham determined that Mayor McCallion had a “real and apparent” conflict of interest as a result of her son’s pecuniary interest in World Class Developments. The inquiry determined that Mayor McCallion should have refused any involvement with the project in her official capacity once she learned that her son had a pecuniary interest in the matter. Mayor McCallion knew Peter was a real estate agent in the matter, and she should have known about his ownership interest.

Justice Cunningham examined not only the provisions of the *Municipal Conflict of Interest Act (MCIA)*, but also the common law. While the *MCIA* defines “conflict of interest” narrowly as a council member’s pecuniary interest in the matter, the common law provides for a broader definition that includes a substantial interest *other than* a pecuniary one that gives rise to “a real likelihood of bias—a reasonable probability that the interested person is likely to be biased”.⁹⁷ Justice Cunningham found that Mayor McCallion was in breach of only the broader common law definition of conflict of interest, not the narrower interpretation adopted by the *MCIA*. Because Mayor McCallion had not contravened the conflict of interest provisions in the *MCIA*, she was permitted to remain in office.

7. *Fairbrass v Hansma* (2009)

In *Fairbrass v Hansma*,⁹⁸ the Township of Spallumcheen put forward a proposed amendment to the Township’s Official Community Plan. This amendment would have allowed an individual to seek a zoning amendment permitting a smaller minimum parcel size of 2.5 acres.

⁹⁶ The report can be found online: <www.mississaugainquiry.ca/report/pdf/MJI_Report.pdf>. For a concise summary of the inquiry, see Tony Fleming, “The McCallion Inquiry and Municipal Conflicts of Interest”, *Cunningham Swan Lawyers* (21 October 2014), online: <cswan.com/the-mccallion-inquiry-and-municipal-conflicts-of-interest>.

⁹⁷ *L’Abbé v Blind River* (1904), 7 OLR 230 at 233-34 (CA).

⁹⁸ *Fairbrass v Hansma*, 2009 BCSC 878, aff’d 2010 BCCA 319. For a useful summary of this case, see Kathryn Stuart, “Court of Appeal Confirms Mayor Had No Conflict”, *Stewart McDannold Stuart Barristers & Solicitors* (25 May 2011), online: <www.sms.bc.ca/2011/05/court-of-appeal-confirms-mayor-had-no-conflict/>.

The Mayor of the Township owned a property that was only 4 acres, and thus he would not have been able to subdivide his property if the amendment were passed. The Mayor's two sons, however, co-owned an adjacent 10-acre property. Hence, if the amendment were passed, the Mayor's sons would be permitted to subdivide their property, and potentially derive a pecuniary benefit.

The Mayor participated in the vote on the proposed amendment, and he did not declare any conflict, having obtained a legal opinion before the meeting. The proposed amendment was defeated. Nonetheless, the applicants brought a claim for disqualification under section 101 of the *Community Charter*.

The British Columbia Supreme Court, in rejecting the applicants' claim, held that the applicants had not established that the Mayor had a direct pecuniary interest in the outcome. The applicants had put forward two hypothetical scenarios under which the Mayor could derive a direct pecuniary benefit: (1) he could acquire additional land (most likely land from his sons' adjacent parcel) to enable the subdivision of his property and (2) the by-law could be further amended in the future to allow for the subdivision of even smaller parcels. These arguments were rejected as being purely speculative.

As to the alleged indirect pecuniary interest based on his sons' property holdings, it was not clear that there would be any financial advantage derived from the amendment of the by-law. Moreover, the mere fact of the Mayor's relationship with his sons was insufficient to infer a conflict. The sons lacked a financial relationship with their father, and there was no evidence of intertwining finances. Importantly, the Court added:

More generally, I do not understand any of the cases upon which the petitioners rely to say that a direct or indirect pecuniary interest may be inferred out of thin air and in the absence of any evidence showing a link between the pecuniary interests of the official and the matter under discussion by his council. And there lies the flaw in the petitioners' case: they say the court should infer that the mayor has a pecuniary interest in his sons' development of their land, and that the inference may be based upon the familial relationship *simpliciter*.⁹⁹

On appeal, the British Columbia Court of Appeal upheld the lower court's decision.¹⁰⁰

8. *King v Nanaimo (City) (2001)*

⁹⁹ *Fairbrass v Hansma*, 2009 BCSC 878 at para 43.

¹⁰⁰ *Fairbrass v Hansma*, 2010 BCCA 319.

*King v Nanaimo (City)*¹⁰¹ is a leading BC case on the meaning of “direct or indirect pecuniary interest”. A city councillor, Mr. King, voted in favour of matters benefitting his largest campaign contributor, a development company—Northridge—that had contributed \$1,000 to his campaign. Mr. King did not properly disclose that he had received such contributions. The issue was whether Mr. King should be disqualified for having participated in the discussion and voted on the matter in the face of an indirect pecuniary interest.

At trial, the British Columbia Supreme Court¹⁰² found that Mr. King indeed had an indirect pecuniary interest in the matter. The campaign contribution paid to Mr. King was “more or less remotely connected with” the result of the votes he cast in favour of the matters benefitting the campaign contributor.¹⁰³ Accordingly, Mr. King was disqualified from holding office.

Justice Esson, writing for the Court of Appeal, reversed the trial court’s decision. Justice Esson stated the following:

... What was prohibited by [the *Community Charter*] is participation in the discussion or vote on a question in respect of “... a matter in which the member has a direct or indirect pecuniary interest.” The “matter” (or matters) in respect of which questions arose before Council were, in this case, the various applications by Northridge Village and its associates. Nothing in the facts established in this proceeding could justify the conclusion that Mr. King had a pecuniary interest, direct or indirect, in any of those matters. The mere fact that Northridge made campaign contributions could not, in and of itself, establish any such interest. There could, of course, be circumstances in which the contribution and the “matter” could be so linked as to justify a conclusion that the contribution created a pecuniary interest in the matter. Indeed, the learned chambers judge took note of an example of such a situation when he said in his reasons:

There is no evidence of a direct pecuniary interest in the sense that he agreed to vote for these projects in return for their campaign contribution of \$1,000.00.

It would not be useful to speculate as to what circumstances could create an indirect pecuniary interest. It is enough to say that the mere fact of the applicant having made a campaign contribution is not enough. In the absence of any factual basis for finding that Mr. King had a pecuniary interest in the matter, the finding [based on the

¹⁰¹ *King v Nanaimo (City)*, 2001 BCCA 610.

¹⁰² *King v Nanaimo (City)*, 1999 CanLII 6667 (BCSC).

¹⁰³ *Ibid* at para 39.

disqualification provisions in the *Community Charter*] is wrong in law and must be set aside.¹⁰⁴

9. *Toronto (City) and CUPE, Local 79, Re (1996)*

In *Toronto (City) and Cupe, Local 79, Re*,¹⁰⁵ the grievor, who was an inspector in the Public Works Department of the City of Toronto, was dismissed for having attempted to solicit business for his own private gain. The grievor had offered to carry out repairs privately for an individual whose premises had developed a water leak. The issue was whether this constituted a breach of the City's conflict of interest policies and whether dismissal was an appropriate response in the circumstances.

The arbitrator carried out a detailed review of the jurisprudence involving conflicts of interest in the context of municipal employees:

In support of its position, the Employer referred me to a number of previous arbitration decisions. In *Re Corporation of City of Toronto and Canadian Union of Public Employees* (1991), 20 L.A.C. (4th) 158 (McLaren) a City Sewer Inspector inspected a drainage problem at a restaurant as part of his job function. After the inspection had taken place the restaurant owner told the inspector [that] he had received a quotation of \$750 for the repair job whereupon the grievor advised the owner that he knew someone who could help him out at a cheaper price. His friends performed the work at the premises and the grievor was given a five day suspension for "steering information" which was considered to be a conflict with his duty of fidelity to his employer. Arbitrator McLaren addressed the issue of conflict of interest at p. 168 as follows:

The fundamental principle in this area of the law involves the notion that an employee owes a duty of fidelity and loyalty to their employer which may be breached by conduct involving a conflict of interest. A conflict of interest will be present when an employee takes their own interests or those of others and furthers them to the detriment of their employer or those who have legitimate relationships with their employer.

The corporation in this case is a city government. In such an instance employees can be employed in positions of both trust and responsibility. The corporation can demand of these employees that they exercise their judgment and carry out their day-to-day activities in a way which is impartial, fair and

¹⁰⁴ *Ibid* at paras 12-13.

¹⁰⁵ *Toronto (City) and Cupe, Local 79, Re* (1996), 1996 CarswellOnt 6518 (WL Can).

honest in providing advice to property owners. In this case, a drainage inspector must be fair, accurate and free from any shadow of personal interest or gain in providing advice about the options for drainage repair to a property. It has been found as a fact that the grievor steered reformation about the drainage problem at 341 Danforth Ave. to Mr. Traikos. The steering of information as a tipper is sufficient for the employee's duty of fidelity to the corporation to have come into conflict with the employee's actions. It is not necessary that there has been a financial gain. It is enough to have steered information. In that connection, the unreported decision of arbitrator Jolliffe in the *McKendry* case summarizes the conflict of interest for someone involved in the federal public service in the following fashion:

1. Public servants must not seek, for private gain, to make use of information not available to the general public to which they have access by reason of their official duties.
2. A conflict of interest occurs when the public interest in proper administration of a government office and a government official's interest in his private economic affairs clash or appear to clash; and a finding of conflict of interest does not depend on wilful wrongdoing by the official or on the issue of whether the officials' judgment has in fact been affected.
3. A government official should not put himself in a position where his judgment could, even unconsciously, be affected by friendship.

In *Re The Corporation of the City of Toronto and Metropolitan Toronto Civic Employees Union Local 43*, an unreported arbitration decision of Susan L. Stewart dated March 10, 1993 involved the dismissal of six garbage men for "contracting" meaning they picked up and disposed of refuse not ordinarily taken by the Department of Public Works and did so for personal compensation or at least in the expectation of compensation. At pp. 31-32, Arbitrator Stewart addresses the general principles as follows:

...The essential principles expressed in those awards are that an employee owes a duty of fidelity and honesty towards an employer and a breach of that duty is generally considered to be a very serious matter which may, in some circumstances, appropriately compel the conclusion that the employment relationship is no longer viable. Mr. McDermott pointed out that Article 3.05 of Schedule B of this Collective Agreement relating to job evaluations specifically refers to "honesty and integrity" as basic characteristics of all jobs. Even without any specific reference, the duty of an employee to carry

out his functions with honesty and integrity is fundamental to an employment relationship. In determining whether discharge is the appropriate penalty where there has been a breach of this obligation, the relevant factors include the nature of the dishonesty or breach of integrity[,] the notice that the employer has given with respect to the seriousness of the behaviour in issue, the need for general deterrence and the manner in which the employee has responded to the allegations. With respect to this later point, a prompt acknowledgement of wrongdoing upon confrontation has been noted as a significant factor in support of a conclusion that the employment relationship remains a viable one while a continued denial of wrongdoing particularly when that denial continues at the time of the hearing, has generally been considered to be a factor which weighs heavily against the ongoing viability of the employment relationship and hence the appropriateness of reinstatement....

Arbitrator Stewart also looked at the issue of deterrence on pp. 33-34, which reads as follows

... First of all, I accept the City's position that deterrence is an important consideration. The message to all employees that they must not engage in contracting and that a decision to do so will not be tolerated must not be undermined. The fact that these employees are in a position of public [trust] is significant. The failure of the grievors to promptly acknowledge their wrongdoing is a factor that also must weigh against them.

Four of the dismissals in that case were upheld and two grievors received lengthy suspensions.

In Re Van Der Linden and The Crown in Right of Ontario (Ministry of Industry and Tourism) (1981), 28 L.A.C. (2d) 352 (Swinton, chair), the grievor was employed as an Industrial Development Officer in the Small Business Development Branch of the Ministry. He was discharged for conflict of interest. This involved entering into an agreement with a private company, necessitate[ing] some travelling and expenses in furthering that business. The grievor then approached the company with expense claims some of which had also been submitted to the Ministry for reimbursement. The grievor denied any wrongdoing and stated only that the duplicate expenses were in error. The discharge was upheld.

In Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 79 (1992), 31 L.A.C. (4th) 79 (Springate, chair) the grievor was

discharged for theft of welfare cheques of over \$44,000. The course of the fraudulent conduct spanned a two year period. The grievor pleaded guilty to criminal charges. The board upheld the discharge. It found that the grievor worked largely unsupervised and the employer was justified in sending a strong message to employees in like positions with similar opportunities...¹⁰⁶

In the result, the arbitrator found that the City employee was in a conflict of interest and ought not to have engaged in offering his services to the public in a private capacity. The City's decision to dismiss the individual was upheld.

10. Save St. Ann's Academy Coalition v Victoria (City of) (1991)

In *Save St. Ann's Academy Coalition v Victoria (City of)*,¹⁰⁷ the British Columbia Court of Appeal grappled with the question of when a city councillor must disqualify him or herself from participation of a decision of council. This case deals with the common law of conflicts of interest.

A property was acquired by the Provincial Capital Commission, which had to decide what to do with the property. The Commission announced in July 1988 that it favoured a re-zoning of the property for commercial development. When this decision was made, Ms. Baird and Ms. Hansen—two Councillors of the City of Victoria—served as members of the Commission, having been appointed by the City of Victoria as representatives of the City. This was the case because the statute establishing the Commission required that two of the members be appointed by the City as representatives of the City. Thus, at this time, Ms. Baird and Ms. Hansen were both members of the Commission and Councillors of the City of Victoria.

In November 1989, the City voted on and passed by-laws creating new zoning for the property. Both Ms. Baird and Ms. Hansen voted in favour of these by-laws. A petition was brought arguing that the by-laws should be struck because Ms. Baird and Ms. Hansen failed to disqualify themselves from participation in debate and voting on the issue. It was argued that Ms. Baird and Ms. Hansen had an interest, though not a financial or personal one, in the matter. As the Court described,

It was suggested that they had made up their minds about this project before the public hearing in November and that that was sufficient to disqualify them, much as participation by a director of a private development corporation who had no financial stake in the corporation would have been disqualified, it is said, from voting if he was

¹⁰⁶ *Ibid* at paras 14-17.

¹⁰⁷ *Save St. Ann's Academy Coalition v Victoria (City of)*, 1991 CanLII 1331 (BCCA).

a member of Council and Council was considering an arrangement between Council and his development corporation.¹⁰⁸

The Court rejected the suggestion that Ms. Baird and Ms. Hansen acted improperly. The Court reasoned that

[t]he structure of City Council in Victoria and the structure of the Provincial Capital Commission, and their inter-relationship, require that there be two members of the Victoria Council involved in the decisions of the Provincial Capital Commission and it cannot be inherent in the structural inter-relationship that those two members must always disqualify themselves from any consideration, in their capacity as councillors, of the same issues as those raised in the deliberations of the Provincial Capital Commission. The structure would not have been set up that way if that result were contemplated.¹⁰⁹

The Court also found no evidence to suggest that either Councillor was biased or had a closed mind with respect to the zoning issue before Council. As such, the appeal was dismissed.

11. Hamilton-Wentworth (Regional Municipality) v CUPE, Local 167 (1978)

The 1978 case of *Hamilton-Wentworth (Regional Municipality) v CUPE, Local 167*¹¹⁰ concerned a conflict on interest involving a municipal employee. A landscape architect hired by the City of Hamilton was dismissed for having disclosed particulars of projects to a third party with a view to getting the third party the job and for improperly maintaining certain professional connections with third parties. The arbitrator, Ross Kennedy, set out the following:

It is an established principle of the common law governing an employer/employee relationship that “an employee is under a duty to serve his employer with good faith and fidelity and not deliberately do something which may harm his employer’s business.” This has been held to be an implied term of any collective agreement unless it is explicitly excluded. (*R. v Fuller et al, Ex Parte Earles and McKee*, [1968] 2 O.R. 564 (C.A.)).

In the private sphere, the result of this rule is that it is generally an unacceptable conflict of interest for an employee to enter into business in competition with his employer. (*Consumer’s Gas Co.* (1972) 1 L.A.C. (2d) 304 (Brown); *Gray’s Department Stores Limited* (1973) 4 L.A.C. (2d) 111 (Palmer)). To date the issue of conflict of interest in the public service has received very little judicial or arbitral

¹⁰⁸ *Ibid* [pinpoint unavailable].

¹⁰⁹ *Ibid* [pinpoint unavailable].

¹¹⁰ *Hamilton-Wentworth (Regional Municipality) v CUPE, Local 167* (1978), 18 LAC (2d) 46 (Ont Arb).

consideration. However, one case has been cited to this board which deals with the issue at length. It is the decision of Edward B. Jolliffe, Q.C. under the Public Service Staff Relations Act in the case of *McKendry and the Treasury Board* (May 31, 1973 - unreported). In that case, the arbitrator considered the situation of a senior federal public servant who had authority to approve grants of up to \$500,000.00 in the Department of Regional Economic Expansion. During the period when a proposed grant to a company was under consideration he purchased shares in the company, accepted benefits from an officer of the company, and entered into negotiations for the presidency of an associated company. In holding that the employee could have legitimately been discharged for any one of these acts, the adjudicator made the following findings with respect of conflict of interest in the public service:

1. Public servants must not seek, for private gain, to make use of information not available to the general public to which they have access by reason of their official duties.
2. A conflict of interest occurs when the public interest in proper administration of a government office and a government official's interest in his private economic affairs clash or appear to clash; and a finding of conflict of interest does not depend on wilful wrongdoing by the official or on the issue of whether the official's judgment has in fact been affected.
3. A government official should not put himself in a position where his judgment could, even unconsciously, be affected by friendship.

...

...I think that, even in the absence of statutory provisions, the law has recognized the principle that "public servants must not seek, for private gain, to make use of information not available to the general public to which they have access by reason of their official duties."

In my view, it is not a good defence here to show that certain stock was purchased in good faith without any intent to jeopardize the public interest. Nor is it a good defence to establish that judgment remained unimpaired or that there was no actual bias. This is not a matter of yielding to public suspicion or malicious criticism. The essential requirements are that the public servant should serve only one master and should never place himself in a position where he could be even tempted to prefer his own interests or the interests of another over the interests of the public he is employed to serve. Those requirements constitute the rationale of the doctrine that he should avoid a position of *apparent* bias as well as actual bias, and that he should never place himself in a position where — as Dean Manning puts it — "two interests clash, *or appear to clash.*"

Accepting that the application of the principles of conflict of interest set out in the McKendry case may be difficult in this particular instance, this Board must still undertake the task. In so doing, consideration must be given *inter alia*, to the following factors:

- whether or not the employee in question is responsible for a part of a process whereby members of the public are granted or denied licenses, benefits, etc.;
- the extent to which the employee exercises discretion in any part of such process;
- the extent to which he deals with the public, and is seen by them to be instrumental in the process; and
- the extent to which clear guidelines on the nature of conflict of interest have been promulgated [*sic*], and, if they have not, whether the nature of the employee's position is such that he can be expected to reach his own reasonable conclusions or seek advice on the issue of conflict of interest.¹¹¹

On the facts, the arbitrator found that the City employee had acted in a conflict of interest by, *inter alia*: (1) maintaining professional connections with a private firm that was the professional consultant on some of the projects coming before his department for approval, (2) providing the private firm with particulars of a project with a view to getting that firm the job, and (3) maintaining professional association with consultants and developers who brought plans to his department for approval.¹¹² The arbitrator concluded,

There is no evidence that the grievor's judgment was actually affected by any of his outside involvements, and indeed this Board gained the impression that the grievor brought nothing but the highest professional standards to his work for the Region. However, the above acts could not help but give the appearance of a potential conflict of interest, which might well prejudice the public's faith in the integrity of its municipal administration.¹¹³

This constituted adequate grounds for discipline (though the arbitrator exercised his discretion to reduce the penalty to a suspension without pay, rather than dismissal).¹¹⁴

B. Fraud

1. Directeur des poursuites criminelles et pénales du Québec c Michaud (2015)

¹¹¹ *Ibid* at paras 20-22.

¹¹² *Ibid* at paras 25-29.

¹¹³ *Ibid* at para 31.

¹¹⁴ *Ibid* at para 39.

*Directeur des poursuites criminelles et pénales du Québec c Michaud*¹¹⁵ involved two individuals: (1) Robert Poirier, former mayor of Boisbriand, Quebec, and (2) France Michaud, former vice-president of a Quebec engineering firm. On September 15, 2015, Poirier and Michaud were found guilty of several criminal offences in relation to municipal corruption. More specifically, they were charged with 13 counts under the *Criminal Code* of conspiracy to defraud, fraud, municipal corruption, breach of trust by a public officer, conspiracy, providing a secret commission, and bribery. They were found guilty on all counts except one.

These charges arose in the context of a cash-for-contracts scheme for a water-treatment facility. In short, city officials and employees of a particular engineering firm—Roche—agreed to favour certain firms for city contracts, rig bids, fix prices, and illegally increase fees payable to the firms. In exchange, certain engineering firms and their employees provided gifts (e.g., sports tickets, concert tickets, etc.) and monetary donations to city officials, the mayor’s political party, and certain charities. Poirier admitted to having received gifts, but argued that he nonetheless acted in good faith for the benefit of the city and that the gifts did not influence his decisions. The Court of Québec rejected Poirier’s defence.

With respect to the fraud component, the Court of Québec found that the mayor’s intentional avoidance of the official public bid process through the collusion described above constituted “fraudulent means”. In essence, bidders for city contracts who “played fair” were not considered and, consequently, the city and its citizens were deprived of the best possible price on the bids. The Court of Québec reasoned that this satisfies the conditions for criminal fraud.

The key statements with respect to fraud are set out below (note: this is not an official translation, and will contain errors):

Fraud by “other fraudulent means”:

[378] In light of the jurisprudence examined above, the Tribunal is of the view that the fact of having deliberately diverted the bidding process for the award of public contracts, by the collusion between representatives of the firm of *Roche*, represented by France Michaud, *BPR Triax and Groupe Séguin*, the connivance notably of Jean-Guy Gagnon, Robert Poirier and Sylvie St-Jean Berniquez although the law provides for the use of this process, constitutes a dishonest fraudulent act registering as a fraud because it undermines the right of third parties: those who submitted an offer of

¹¹⁵ *Directeur des poursuites criminelles et pénales du Québec c Michaud* 2015 QCCQ 7768 (Court of Québec) [*Michaud*]. The summary of this case is adapted from Mark Morrison & Simon Seida, “Government Fraud and Corruption: Ex-Mayor and Engineer Convicted in Major Municipal Corruption Case in Quebec”, *Blake, Cassels & Graydon LLP* (23 September 2015), online: <www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=2194>.

services that were not considered at its true value; those who were prevented or discouraged from producing a range of services and finally the City and its citizens who were deprived of the best price resulting from the offer of the lowest compliant bidder.

[379] In this case, it is clear that this is not a hypothetical loss, tens of thousands of dollars are at stake if we consider the fact that the companies promoted by the City of Boisbriand over the course of the years in question have invested tens of thousands of dollars in the municipal political party *Solidarity Boisbriand*, in activities and target organizations by the city, in many benefits paid to the mayor, councillors, volunteers of *Solidarity Boisbriand* and to political organizers. In addition, the payment of rebates on a contract can only lead to increases of thousands of dollars of costs of a contract. The same is true of unjustified fee adjustments, payment of fees by the city based on false invoices for the purpose of compensating the non-work performed in order to cover a contract sharing arrangement in disguising it as being work performed.

[380] It is clear that France Michaud and Robert Poirier knowingly participated in the collusive schemes. This is inferred as much by their active involvement as their ways of trying to cover up illegalities committed.

...

[382] The collusion between the engineering firms for the organized sharing of City contracts, the connivance of representatives of Boisbriand to grant them, the illegal financing of political party *Solidarity Boisbriand*, the funding of several activities and organizations of the City, the many advantages granted to the mayor, councillors, municipal officials, volunteers of the *Boisbriand Solidarity* party and political organizers has a direct link, contributed in a major way with the practice of systemic organization of awarding municipal contracts to divert from the process provided by law. This conclusion applies also in respect of all heads of charges.

...

[386] As for Robert Poirier, he is guilty on the first two heads...¹¹⁶

2. *R v Riesberry* (2015)

In *R v Riesberry*,¹¹⁷ Justice Cromwell, writing for a unanimous court, addressed subsection 380(1) of the *Criminal Code*, which deals with fraud. The accused tried to rig two

¹¹⁶ *Ibid* at paras 378-80, 382, 386 [citations omitted].

¹¹⁷ *R v Riesberry*, 2015 SCC 65.

horse races by drugging two horses. In doing so, the accused breached the rules of the Ontario Racing Commission. Bets in excess of \$5,000 had been placed on the two races.

Justice Cromwell described fraud as “dishonest conduct that results in at least a risk of deprivation to the victim”.¹¹⁸ The accused argued that there was no evidence that his fraudulent conduct caused any risk of deprivation or, at least, that any such risk was too remote from his conduct. The accused argued that it had not been established that anyone betting on the race had been induced to bet by, or would not have bet but for, his fraudulent conduct.

Justice Cromwell rejected the accused’s submissions, stating that:

proof of fraud does not always depend on showing that the alleged victim *relied* on the fraudulent conduct or was *induced* by it to act to his or her detriment. What is required in all cases is proof that there is a sufficient causal connection between the fraudulent act and the victim’s risk of deprivation. In some cases, this causal link may be established by showing that the victim of the fraud acted to his or her detriment as a result of relying on or being induced to act by the accused’s fraudulent conduct. But this is not the only way the causal link may be established.¹¹⁹

Justice Cromwell added the following with respect to what constitutes fraud by “other fraudulent means”:

Fraudulent conduct for the purposes of a fraud prosecution is not limited to deception, such as deception by misrepresentations of fact. Rather, fraud requires proof of “deceit, falsehood or other fraudulent means”: s. 380(1). The term “other fraudulent means” encompasses “all other means which can properly be stigmatized as dishonest:” *R. v. Olan*, [1978] 2 S.C.R. 1175, at p. 1180. The House of Lords made the same point in *Scott v. Metropolitan Police Commissioner*, [1975] A.C. 819, a case approved by the Court in *Olan* (p. 1181). Fraud, according to Viscount Dilhorne in *Scott*, may consist of depriving “a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled”: p. 839. And as Lord Diplock said, the fraudulent means “need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit”: *ibid.*, at p. 841.

It follows that where the alleged fraudulent act is not in the nature of deceit or falsehood, such as a misrepresentation of fact, the causal link between the dishonest

¹¹⁸ *Ibid* at para 27.

¹¹⁹ *Ibid* at para 22 [emphasis in original].

conduct and the deprivation may not depend on showing that the victim relied on or was induced to act by the fraudulent act. This is such a case.¹²⁰

Justice Cromwell concluded that the accused's conduct constituted "other fraudulent means" because, in the highly regulated setting in which the accused acted, the conduct could properly be stigmatized as dishonest. The conduct caused a risk of deprivation to the betting public: it created the risk of betting on a horse that, but for the accused's dishonest acts, might have won and led to a payout.

These principles could be applied analogously in the local government context. Acts by elected or appointed officials or staff that are dishonest and create a risk of deprivation to the public create may give rise to criminal liability as against the actor under the *Criminal Code* fraud provisions. Moreover, there is no requirement that the victim relied on the fraudulent conduct or was induced by it.

3. *Toronto (City) v CUPE, Local 79 (2003)*

In *Toronto (City) v CUPE, Local 79*,¹²¹ a social services worker, employed by the City of Toronto, was arrested and later convicted for welfare fraud exceeding \$5,000 committed in a neighbouring municipality. The grievor was then suspended by the City without pay and subsequently discharged. The City acknowledged that the grievor's commission of fraud was off-duty conduct, but the City argued that its interests had been adversely affected by the grievor's conduct and that the grievor could no longer be trusted to perform her work for the City.

As the arbitrator noted,

Although this was "off-duty" conduct, the relationship between the grievor's crime and her work is obvious. She was employed by the City of Toronto to work in the administration of the *Ontario Works* program, the very provincial program she was convicted of defrauding in the Region of Peel. The question I have to consider, in the first instance, is whether her act of fraud, or her conviction for fraud, affected the employer's interests in such a way as to justify her discharge, or whether she should be regarded as no longer capable of performing her work for the employer.¹²²

The arbitrator went on to comment on how the fraud conviction would affect the grievor's credibility and ability to perform her job for the City:

¹²⁰ *Ibid* at paras 23-24 [emphasis in original].

¹²¹ *Toronto (City) v CUPE, Local 79 (2003)*, 120 LAC (4th) 32.

¹²² *Ibid* at para 36.

...I have concluded that the grievor, in view of her fraud, can no longer be relied on to perform her job for the employer in an acceptable way. The case that comes closest to this one in many respects is *Re Workers' Compensation Board, supra*. There, a file clerk employed by the Workers' Compensation Board of British Columbia was discharged for fraudulently obtaining some \$6,000.00 in welfare benefits from the Ministry of Social Services. In holding that the employer was justified in taking disciplinary action against the grievor, the arbitrator stated the following (at page 413):

I accept the proposition of the employer that the evaluation of claims, and the payment of compensation can only work effectively if claimants understand the need to be truthful and honest in the claims process. The ability of the WCB to carry out this function is impaired and its public reputation is damaged, if its own employees have been convicted of engaging in precisely the same type of dishonesty and fraud that undermines the integrity of the claims process at the WCB.

Although I am not persuaded that this reasoning should be applied (as it was in the case just cited) to employees who are not engaged in administering claims, the grievor in the present case was actively and intimately engaged in processing claims by clients and advising them in relation to their entitlements. My concern is that the grievor would have no credibility in cautioning clients to be truthful when she has just been convicted herself of perpetrating a serious welfare fraud over a period of several years. The employer could scarcely have any confidence that she would have the necessary commitment to the program if she were to be reinstated.¹²³

In the result, the arbitrator determined that the grievor was unable to return to her previous post, but was nonetheless permitted to work for the City in some other, more suitable capacity. The result was in part driven by a finding that the grievor had a strong employment record over 10 years with the City.

4. *Metropolitan Toronto (Municipality) v CUPE, Local 79 (1992)*

In *Metropolitan Toronto (Municipality) v CUPE, Local 79*,¹²⁴ the grievor, a welfare worker for the City, was discharged for theft of welfare cheques of over \$44,000. The course of the fraudulent conduct spanned a two-year period. The grievor pleaded guilty to criminal charges, but her sentence was limited to probation because of psychological evidence that her

¹²³ *Ibid* at para 38.

¹²⁴ *Metropolitan Toronto (Municipality) v CUPE, Local 79 (1992)*, 31 LAC (4th) 79.

behaviour was motivated by personal and emotional problems. She was subsequently discharged from her employment for theft and brought a grievance alleging unjust discharge.

In the result, the discharge was found to be justified having regard to the seriousness of grievor's actions and the breach of trust involved. In coming to this conclusion, the arbitrator made important observations on fraud involving municipal employees, when discharge is justified, and other related issues:

Arbitrators have generally upheld the discharge of an employee who has stolen or otherwise fraudulently obtained goods or money from his or her employer. This reflects the general view that such conduct is a fundamental breach of the trust which must exist between an employer and an employee. An often-quoted statement concerning the need for employee honesty is the following excerpt from *Phillips Cables Ltd. and International Union of Electrical, Radio and Machine Workers, Local 510, Re* (1974), 6 L.A.C. (2d) 35 (Ont. Arb.) (Adams) at p 37:

Moreover, in a very general sense, honesty is a touchstone to viable employer-employee relationships. If employees must be constantly watched to insure that they honestly report their comings and goings, or to insure that valuable tools, material and equipment are not stolen, the industrial enterprise will soon be operated on the model of a penal institution. In other words, employee good faith and honesty is one important ingredient to both industrial democracy and the fostering of a more co-operative labour relations climate.

The case law indicates that a discharge for theft is especially likely to be confirmed in situations where employees are not closely supervised and have many opportunities to steal. The rationale for this was discussed as follows in *Re Canada Safeway Ltd. and United Food and Commercial Workers, Loc. 2000* (1987), 29 L.A.C. (3d) 176 (Hope), a case arising out of the retail food industry, at p 187:

The imposition of dismissal for acts of dishonesty in that employment setting responds to two assumptions. The first is that employees can be taken to know that their employment is seriously at risk if they engage in such conduct. Hence, the willingness of an employee to engage in that conduct places the suitability of that employee in extreme doubt. The second factor is the high degree of deterrence that employers in the industry are entitled to extract when offences in breach of the underlying trust relationship are committed. That is, the vulnerability of the employer makes it reasonable to impose relatively exacting standards and to put a heavy price tag on departures from the standards so as to blunt the temptation of other employees who are in a

position to commit similar acts of misconduct.

Although in most cases the discharge of employees who have stolen from or defrauded their employer has been upheld, such has not always been the case. On the basis of a number of different considerations arbitrators have in certain cases substituted a lengthy suspension for a discharge. In some of these cases a consideration was the fact that the employee's misconduct was related to psychological considerations. The Union referred us to a number of these cases, the most relevant of which are summarized below.

In Re Municipality of Metropolitan Toronto and Metropolitan Toronto Civic Employees Union, Local 43 (1988), 4 L.A.C. (4th) 336 (Kennedy) an ambulance attendant with over 20 years service was discharged for using the employer's credit cards over an extended period of time to purchase gasoline for his private vehicle. At the arbitration hearing a psychiatrist testified that at the relevant time the employee had been depressed and that he had no recall of his conduct. On the basis of this evidence the arbitration board directed that the employee be conditionally reinstated.

...

Re City of Moncton and Canadian Union of Public Employees, Local 51 (1990), 10 L.A.C. (4th) 226 (Collier) involved an employee with 23 years service who sold some street signs owned by the City to a scrap dealer for approximately \$180.00. The board of arbitration concluded that the employee's conduct had been driven by a gambling habit which was out of control but which the employee had since overcome. On the basis of the employee's record of employment and the fact that he had overcome his gambling habit, the board directed that he be reinstated.¹²⁵

C. Corruption

1. Charbonneau Commission (2015)

The Charbonneau Commission, known officially as the *Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry*, is a major public inquiry into corruption in public contracting in Quebec.¹²⁶ The Commission was launched on October 19, 2011 by Jean Charest. The Commission is chaired by Justice France Charbonneau. The mandate of the Commission is three-fold:

¹²⁵ *Ibid* at paras 49-52, 55.

¹²⁶ For a short summary of the Charbonneau Commission's activities and findings, see "Charbonneau Commission Finds Corruption Widespread in Quebec's Construction Sector", *CBC News* (24 November 2015), online: <www.cbc.ca/news/canada/montreal/charbonneau-corruption-inquiry-findings-released-1.3331577>.

- 1) Examine the existence of schemes and, where appropriate, paint a portrait of activities involving collusion and corruption in the provision and management of public contracts in the construction industry (including private organizations, government enterprises, and municipalities) and include any links with the financing of political parties.
- 2) Investigate possible infiltration of organized crime in the construction industry.
- 3) Consider possible solutions and make recommendations establishing measures to identify, reduce, and prevent collusion and corruption in awarding and managing public contracts in the construction industry.¹²⁷

In her report,¹²⁸ Justice Charbonneau concluded that corruption and collusion in the awarding of government contracts are far more widespread than originally believed. Influence peddling is a serious issue in Quebec's construction sector, and organized crime had indeed infiltrated the industry. The Commission's final report includes 60 recommendations, including whistleblower protection measures, creation of an independent authority to oversee public contracts, reforms to political donation rules, requirements that construction companies report acts of intimidation or violence, and harsher penalties for companies and individuals who break the law.

Importantly, Justice Charbonneau praised whistleblowers for their courage in coming forward. Justice Charbonneau emphasized that "[w]histleblowing must not be seen as an act of betrayal, but as an act of loyalty to society". Furthermore, without whistleblower protection, the province will struggle to detect collusion or corruption. Justice Charbonneau called upon the province to provide stronger protections for whistleblowers, including shielding their identities and providing financial support where warranted.

D. Breach of Fiduciary Duty in the First Nations Context

Canadian jurisprudence consistently affirms that band councillors owe a fiduciary duty to their bands and band members.¹²⁹ This fiduciary duty arises wherever the band council makes a discretionary decision that stands to affect the interests of the band or its members. One of the contexts in which this fiduciary duty becomes particularly important is the use of band moneys. When making decisions as to how band moneys will be used, band councillors must select

¹²⁷ Gouvernement du Québec, "Mandat" (9 Novembre 2011), online: <www.ceic.gouv.qc.ca/la-commission/mandat.html>.

¹²⁸ France Charbonneau, "Rapport final de la Commission d'enquête sur l'octroi et la gestion des contrats publics dan l'industrie de la construction" (Novembre 2015), online: <s3.documentcloud.org/documents/2599890/charbonneau-report-final-recommendations.pdf>.

¹²⁹ See e.g. *Leonard v Gottfriedson* (1980), 21 BCLR 326; *Louie v Derrickson*, 1993 CanLII 620 (BCSC); *Ermineskin Cree Nation v Minde*, 2010 ABQB 93. See John R Rich & Nathan E Hume, "Band Councils, Band Moneys and Fiduciary Duties" (Paper presented at "Aboriginal People and the Law", 12 April 2011), online: <www.ratcliff.com/sites/default/files/publications/00513728.PDF>.

options that best serve the long-term interests of the band and its members.¹³⁰ One of the difficulties inherent in this concept, as John Rich and Nathan Hume identify, is that band councillors must mediate between the interests of two beneficiaries: (1) the members of the band and (2) the band itself.¹³¹ This can be particularly challenging when certain members of the band express interests that potentially diverge from the interests of the band as a whole. Persons doing their best in difficult circumstances will generally be protected from findings of breach of fiduciary duty. As stated in *Solomon v Alexis Creek Indian Band*, “recovery based upon fiduciary duties is confined to cases where the fiduciary personally takes advantage of a relationship of trust or confidence for her direct or indirect personal advantage. As such, persons doing their best in difficult circumstances are protected from the shame and stigma of disloyalty or dishonesty which is a foundation of breach of fiduciary duty”.¹³²

The British Columbia Supreme Court made an important observation in *Assu v Chickite* regarding the connection between (1) dishonesty or disloyalty and (2) breach of fiduciary duty:

any breaches of fiduciary duty alleged by the plaintiffs will have to be examined carefully to determine whether the impugned activity carries with it the “stench of dishonesty” or disloyalty that characterizes a breach of fiduciary obligation. Nevertheless, as counsel for the plaintiffs point out, the breach of a government’s fiduciary obligation does not necessarily necessitate the finding of dishonesty: *R. v. Guerin...*¹³³

In *Annapolis Valley First Nations Band v Toney*,¹³⁴ the Federal Court expanded upon this idea: “When considering whether a fiduciary has breached his obligations, the central inquiry is not whether the fiduciary has been dishonest or acted in a fraudulent manner, but whether he has acted in the best interests of the beneficiary and without conflict of interest.”¹³⁵ On the other hand, dishonesty and disloyalty appear to be important considerations. As stated in the 2007 case of *Solomon v Alexis Creek Indian Band*, “incompetence or failure to obtain the best result does not constitute breach unless there is also the stench of dishonesty or disloyalty”.¹³⁶

Where the band has established an existing custom or practice, that may give rise to a fiduciary duty on the part of the chief or band councillor to continue that custom or practice when making a discretionary decision affecting the interests of the Band or its members. So, for example, in *Noble v Ecoforestry Soc et al*, the Band’s practice of consulting membership before deciding how to use band assets created a fiduciary to continue this practice when making

¹³⁰ Rich & Hume, *ibid* at 2.

¹³¹ *Ibid* at 5.

¹³² *Solomon v Alexis Creek Indian Band*, 2007 BCSC 459 at para 60.

¹³³ *Assu v Chickite*, [1999] 1 CNLR 14 at para 36 (BCSC).

¹³⁴ *Annapolis Valley First Nations Band v Toney*, 2004 FC 1728.

¹³⁵ *Ibid* at para 29.

¹³⁶ *Solomon v Alexis Creek Indian Band*, 2007 BCSC 459 at para 60.

decisions as to the distribution of funds.¹³⁷

1. Louie v Louie (2015)

In *Louie v Louie*,¹³⁸ members of the Band Council of the Lower Kootenay Indian Band, at an in-camera meeting, voted to pay themselves \$5,000 each as a “retroactive honorarium” for their work as Council members. Prior to this, each member had been receiving honoraria of \$360 per month. This was deemed insufficient by the members, but at the time they lacked the funds to receive a greater amount. When, in September 2009, the Band received \$125,000 from the Regional District as a form of compensation for the District’s use of a road crossing through one of the Band’s reserves, the Council members voted to award themselves the increased honorarium as a one-time payment. The Band had no financial administration or expenditure by-laws pertaining to the Band’s financial management, and there was no evidence that the payments were authorized. There were no minutes from the meeting, no resolutions, and no forms of notice. After becoming aware of the payments, Mr. Louie, a member of the Band, filed a claim seeking a declaration that each of the Councillors acted in breach of their fiduciary duties and an order to return the money to the Band, as well as punitive damages.

The British Columbia Supreme Court¹³⁹ dismissed the claim, finding that there was no breach of fiduciary duty. Rather, Council acted in conformity with the custom and practices of prior Band Councils. Never in the past had there been advance consultation with Band members before payments of honorariums or travel expenses. Moreover, given that the payments were disclosed in the Band’s financial statements, the payments were not being kept a secret. The Council did not act in bad faith, and as such the Band was compelled by the Council’s decision. Moreover, in the Court’s view, it could not be shown that the payments were made to the detriment of the Band. The Court reasoned that it would be impossible for a Council of such a small Band (the Band has approximately 220 members) to apply strict conflict of interest rules.

The British Columbia Court of Appeal overturned the trial decision, finding there to be a breach of fiduciary duty. In so finding, the Court reviewed the two most fundamental and longstanding obligations of fiduciaries: (1) the “no conflict” rule and (2) the “no profit” rule.

The “no conflict” rule requires that fiduciaries not put themselves in a position where there is a conflict, or a significant risk of a conflict, between their personal interests and their fiduciary duty. The Court observed that various courts have adopted differing approaches to the “no conflict” rule. On the one hand, the “prophylactic” approach views the subjective motivations of the fiduciary, the absence of actual harm, and whether the fiduciary profited as

¹³⁷ *Noble v Ecoforestry Soc et al*, 2003 BCSC 430 at paras 34-35, 47-48.

¹³⁸ *Louie v Louie*, 2015 BCCA 247 [*Louie*].

¹³⁹ *Louie v Louie*, 2014 BCSC 133.

irrelevant factors. On the other hand, the “flexible” approach holds that as long as a fiduciary acts in the best interest of the beneficiary, the fiduciary will not necessarily be “on the hook” to return the funds, even if there is a conflict of interest. It is said that this is justified because fiduciaries need not be penalized if they do not cause actual harm to the beneficiary. The Court of Appeal reasoned that even if the “flexible” approach is applied, the Council members acted to the detriment of the Band, and the payments benefitted nobody but the members.

The “no profit” rule requires that fiduciaries account for any benefit acquired by reason or by use of their fiduciary position. Fiduciaries cannot profit from their position. The court acknowledged that by-laws or other rules may create limited exceptions under which fiduciaries—such as band councillors and municipal councillors—can make decisions regarding their own remuneration. An example of this is found in section 83(1) of the *Indian Act*, which allows band councils, subject to the Minister’s approval, to make by-laws for various purposes, including expenditures of moneys of the band to defray expenses and providing for remuneration of officials. However, as no such by-laws had been enacted by the Band, section 2(3) of the *Indian Act* governed the situation. This section stipulates that Council can exercise its powers only with the consent of the majority of electors of the Band and the Councillors of the Band present at a meeting of Council. The Court of Appeal determined that the Council never received consent to exercise an authority to allocate to themselves such funds. Madam Justice Newbury commented: “While I agree that it is unrealistic to expect a band to comply strictly with all the rules and regulations of a sophisticated corporation or council, I see no basis on which this very fundamental statutory provision could be effectively ignored.”¹⁴⁰ As noted above, the Court found that the Council acted to the detriment of the Band. The \$5,000 received by each member was a significant personal benefit to the members and, correspondingly, a significant detriment to the Band. Only advanced consent from the Band could make the Council’s acts lawful. Past custom provided no defence. The Court concluded, “The conclusion seems to me inescapable that this was a breach of fiduciary duty, even in the context of a relatively informal and custom-based governance structure. In my view, such a structure should not deprive members of the Band of the protection of the fiduciary principle.”¹⁴¹

In the result, the Court of Appeal ordered the Council members to repay the \$5,000 to the Band, and Mr. Louie was given leave to pursue a claim for punitive damages at a later date. Commentators on the *Louie* decision have suggested the following:

- 1) Aboriginal governments should consider the appropriateness of passing financial administration and expenditure by-laws pursuant to section 83 of the *Indian Act* or the *First Nations Fiscal Management Act*.

¹⁴⁰ *Ibid* at para 25.

¹⁴¹ *Ibid* at para 29.

- 2) Council members should familiarize themselves with the duties that accompany their role as fiduciary.
- 3) First Nation governments should discuss what good governance means for their communities, and how this can be achieved.
- 4) Aboriginal groups may consider implementing their own financial constitutions, as opposed to being mandated by federal legislation.
- 5) Councils should keep track of how decisions are made (e.g., ensuring minutes of Council meetings are recorded and that copies of all Council resolutions are kept on file).¹⁴²

2. *Annapolis First Nations Band v Toney* (2004)

In *Annapolis First Nations Band v Toney*,¹⁴³ the respondent Chief and two Councillors awarded themselves lucrative five-year employment contracts with the Council as Gaming Commissioners near the end of their two-year term in office. The Federal Court, in finding that the Chief and two Councillors breached their fiduciary duties, concluded,

They [the Chief and two Councillors] were fiduciaries and they had a duty to avoid placing themselves in a position of conflict. While conflict of interest rules must be relaxed in small Bands where relatives of the Chief and Councillors will necessarily be involved in Band business, this does not permit the Chief and Council members to award themselves substantial benefits to the detriment of the Band.”¹⁴⁴

3. *Williams v Squamish First Nation* (2003)

In *Williams v Squamish First Nation*,¹⁴⁵ Band Council for the Squamish First Nation gave funds held for the benefit of a child to the child’s caregiver, rather than investing the funds in an interest-bearing account until the child reached the age of 19. The child, after reaching the age of majority, brought an application alleging that Council had a fiduciary trust responsibility to the applicant while he was a minor that included putting all his moneys into an interest-bearing trust account until he reached the age of majority. The applicant submitted that the Council’s failure to do so constituted a failure to act in his best interests. Consequently, the applicant sought to be put in the position he would have been in had the Council invested his moneys in an interest-bearing trust account while he was a minor.

The Federal Court affirmed that the Council held all power over the distribution of moneys belonging to minor members of the Band and that it owed a fiduciary duty towards the

¹⁴² See Ashley Stacey, “BC Case Sets out Principles for Good First Nations Governance”, *Olthuis Kleer Townshend LLP* (3 July 2015), online: <www.oktlaw.com/blog/bc-case-sets-out-principles-for-good-first-nations-governance>.

¹⁴³ *Annapolis First Nations Band v Toney*, 2004 FC 1728.

¹⁴⁴ *Ibid* at para 31.

¹⁴⁵ *Williams v Squamish First Nation*, 2003 FCT 50.

applicant as a minor to make decisions regarding the expenditure of his distribution moneys in his best interest. However, the Council's failure to place the applicant's funds in an interest-bearing trust account until he reached the age of majority did not constitute a breach of its fiduciary obligations. The Council did act in good faith and in the best interest of the applicant by releasing his distribution moneys to his primary caregiver on his behalf and for his maintenance and upbringing. Council had not used its powers to obtain money at the applicant's expense or to divert funds to a third party to the applicant's detriment. The Court accordingly dismissed the application.

4. *Louie v Derrickson* (1993)

In *Louie v Derrickson*,¹⁴⁶ a Band Chief, during his term, negotiated a new road through the Westbank Indian Band's reserve with the Ministry of Transportation and Highways. In carrying out this negotiation, the Chief ensured that the road infringed land allocated to him, and he arranged for Band Council to pay to him a disproportionate amount of compensation—\$112,500—for this infringement, in violation of Council's own policies. The trial judge found that the Chief had violated his fiduciary duties to the Band and its membership, and ordered the Chief to return the full amount to the Band.

5. *Gilbert v Abbey* (1992)

In *Gilbert v Abbey*,¹⁴⁷ the Chief of the Williams Lake Indian Band had caused the Band to repay her student loan, fund her sons' private school education, and purchase a trailer for her to live in on the reserve. These expenses totalled nearly \$59,000. The Chief had participated in each decision by Council to use the Band's funds to her benefit, despite her clear conflict of interest. The trial judge found that the Chief breached her fiduciary duty to act in the best interests of the members of the Band and ordered her to return the amount improperly used for the Chief's personal interests.

6. *Leonard v Gottfriedson* (1980)

In *Leonard v Gottfriedson*,¹⁴⁸ the defendant was a Band Councillor of the Kamloops Indian Band who executed and arranged for other Council members to execute improper Band Council resolutions purporting to transfer to him interests in reserve land. The Court found that the defendant was not in lawful possession of the land in question, as it was an improper transfer

¹⁴⁶ *Louie v Derrickson*, 1993 CanLII 620 (BCSC). The summary of this case is adapted from Rich & Hume, *supra* note 129 at 3.

¹⁴⁷ *Gilbert v Abbey*, [1992] 4 CNLR 21 (BCSC). The summary of this case is adapted from Rich & Hume, *supra* note 129 at 3.

¹⁴⁸ *Leonard v Gottfriedson* (1980), 21 BCLR 326 [*Leonard*]. The summary of this case is adapted from Rich & Hume, *supra* note 129 at 3.

in breach of the Councillors' fiduciary duties. The Court held that "the chiefs and councillors of a band are in a position of trust relative to the interests of the band generally, the band's assets and the members of the band".¹⁴⁹

Remedies

Where a breach of fiduciary duty is alleged in respect of a band council's decision, there are two remedial avenues: (1) judicial review or (2) an action for breach of fiduciary duty.¹⁵⁰

A judicial review application would constitute a challenge to the council's decision, alleging that the council failed to carry out its duties to the band or its members. The available remedies would be limited to discretionary relief such as an injunction, declaration, or quashing of the decision (*certiorari*).¹⁵¹

An action would allege that one or more council members failed to uphold their fiduciary duty towards the band or its members. The remedies available here are more potent. In addition to injunctions, declarations, or a quashing of the decision, the applicant can obtain damages, which can be important where one or more councillors have used their position for their own personal enrichment.¹⁵² As illustrated above, a chief or member of council may be ordered to return to the band any profit realized by advancing his or her interests over those of the band or its members.

IV. Unlawful Delegation

A municipality, which is a corporate entity, relies on elected or appointed agents to perform its functions.¹⁵³ As a general rule, where a power is conferred on the municipality by the provincial legislature, and no officer or other body is expressly clothed with such power, it is presumptively exercised by the municipal council, which is the governing body of the municipality.¹⁵⁴

The maxim *delegatus non potest delegare* means that an agent to whom a power is delegated cannot further delegate that power. Put differently, power can be exercised only by those responsible in law for its execution.¹⁵⁵ In the municipal law context, the effect of this maxim is that, in the absence of express statutory authority, a municipal council, being the recipient of delegated authority itself, cannot assign to an official or any other agency any

¹⁴⁹ Leonard, *ibid* at para 17.

¹⁵⁰ Rich & Hume, *supra* note 129 at 14.

¹⁵¹ *Ibid* at 15.

¹⁵² *Ibid*.

¹⁵³ See CED 4th (online), *Municipal Corporations*, "General", (IV.1.(e).(i)) at para 391 ["Municipal Corporations"].

¹⁵⁴ *Ibid*; *R v Patterson* (1984), 64 NSR (2d) 36 (CA).

¹⁵⁵ Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed (Carswell), ch VIII.

legislative power vested in it.¹⁵⁶ Powers given to council are to be exercised by council as a single deliberative body, and cannot be delegated to an individual, such as a mayor, alone.¹⁵⁷ So, for example, in *Grande Prairie (City) v Orr*,¹⁵⁸ it was found that a by-law allowing a private business to provide metered parking spaces for customers and impose fines for violations was void, since it amounted to unlawful delegation of the City's authority to manage parking lots.

Delegation by council is, however, permitted in certain cases. Express legislative authority to delegate is one such exception. In addition, if a matter is not purely legislative, but is rather a ministerial matter, it can be delegated to a municipal official for execution.¹⁵⁹ Garrow JA in *Russell v Toronto (City)* put the matter in the following terms: "municipal councils have to do with two very distinct subject matters, one legislative, the other administrative. Their powers with respect to the former cannot be delegated, but not so with the latter, in which they may usually follow ordinary business methods in the absence of express statutory provisions, which of course when made must be observed."¹⁶⁰ Where the rubber hits the road, however, is how we draw the line between what is a valid delegation of an administrative detail, and what is an unlawful delegation of a legislative power.

A municipal council may, and sometimes must out of necessity, delegate to its officials and employees the execution of administrative details.¹⁶¹ The courts have held that the following functions can be properly delegated to officials and employees of the municipality: administrative fact finding, discretionary functions, and ministerial functions.¹⁶² Council may also properly confer certain administrative functions on independent contractors.¹⁶³ Council may also enact by-laws to be administered by subordinates. So, for example, the City of Winnipeg could validly, through by-law, provide for the granting of permits to an electric lighting company for the erection of poles, as the granting of such permits by the city engineer was seen as an executive act not requiring the sanction of a by-law in each case.¹⁶⁴ As a further example, the mere signing of licences may properly be vested in a municipal official through by-law, provided the terms and conditions prescribed by the relevant by-law are respected, such functions being mere administrative functions.¹⁶⁵

The courts draw a distinction between (1) a delegation of the power to make law involving a discretion as to what the law will be and (2) conferring authority as to the law's

¹⁵⁶ "Municipal Corporations", *supra* note 153 at para 392. See *Forst v Toronto (City)* (1923), 54 OLR 256 (CA).

¹⁵⁷ *Winnipeg Beach (Town) By-Law No 92, Re* (1919), 30 Man R 192 (CA).

¹⁵⁸ *Grande Prairie (City) v Orr* (1989), 94 AR 30 (QB).

¹⁵⁹ "Municipal Corporations", *supra* note 153 at para 396.

¹⁶⁰ *Russell v Toronto (City)* (1907), 15 OLR 484 at para 48 (reversed on other grounds).

¹⁶¹ "Municipal Corporations", *supra* note 153 at para 397.

¹⁶² *Kirkpatrick v Maple Ridge (District)*, [1986] 2 SCR 124.

¹⁶³ *JA Provost Inc c St-Jean (Ville)*, [1972] CA 257.

¹⁶⁴ *Winnipeg Electric Railway v Winnipeg (City)* (1912), 4 DLR 116 (Man PC).

¹⁶⁵ *Hamilton Dairies Ltd v Dundas (Town)* (1927), 33 OWN 113 (Ont Div Ct).

execution, to be exercised in pursuance of the law to be applied in the circumstances defined in an ordinance passed by council.¹⁶⁶ Only the latter is permitted. Functions that do not involve the making of policy, such as the issuing of permits upon the fulfilment of conditions outlined in a by-law, are ministerial in nature and can be properly delegated.¹⁶⁷ Courts tend to lean in favour of a broad interpretation of the discretion that can be accorded to a subordinate body or official.¹⁶⁸ Nonetheless, courts insist that council make clear, through by-law, the standards and limits governing the exercise of the discretion.¹⁶⁹

For local elected and appointed officials in BC, the *Community Charter* contains important provisions regarding the delegation of powers. A council may, by by-law, delegate its powers, duties, and functions to a council member or council committee, officers and employees of the municipality, or other bodies established by the council.¹⁷⁰ A council cannot, however, make such a delegation to a corporation.¹⁷¹ Also, a council may only delegate a power or duty to appoint or suspend an officer to its chief administrative officer.¹⁷² Where a municipality in British Columbia has the power to delegate, it may set the terms and conditions of such delegation as it deems appropriate.¹⁷³ The *Community Charter* also outlines certain powers that cannot be delegated. This includes the following:

- (a) the making of a bylaw;
- (b) a power or duty exercisable only by bylaw;
- (c) a power or duty established by this or any other Act that the council give its approval or consent to, recommendations on, or acceptance of an action, decision or other matter;
- (d) a power or duty established by an enactment that the council hear an appeal or reconsider an action, decision or other matter;
- (e) a power or duty to terminate the appointment of an officer;
- (f) the power to impose a remedial action requirement under Division 12 [*Remedial Action Requirements*] of Part 3.¹⁷⁴

In addition to being illegal in the circumstances outlined above, over-reliance on delegation to various levels of staff without informed (and in some cases expert) oversight can lead to vulnerabilities for local government from a risk management perspective. This issue will be addressed in further detail by other conference participants.

¹⁶⁶ “Municipal Corporations”, *supra* note 153 at para 397.

¹⁶⁷ *R v Bridge*, [1953] 1 SCR 8.

¹⁶⁸ See *Joy Oil Co v R*, [1951] SCR 624.

¹⁶⁹ *R v Sandler* 1971, 21 DLR (3d) 286 (ONCA); *Kirkpatrick v Maple Ridge (District)*, [1986] 2 SCR 124.

¹⁷⁰ *Community Charter*, *supra* note 12, s 154(1).

¹⁷¹ *Ibid*, s 154(4).

¹⁷² *Ibid*, s 154(3).

¹⁷³ *Ibid*, s 154(5).

¹⁷⁴ *Ibid*, s 154(2).

V. Application in Small Communities

A. First Nations Context

1. Assu v Chickite (1999)

In *Assu v Chickite*,¹⁷⁵ Chief Ralph Dick and other plaintiffs brought an action against Band Councillors of the Cape Mudge Band, alleging that the Band Councillors breached their fiduciary duties to the band and its members. One of the grounds on which the plaintiffs relied was that Council was biased in hiring Ruth Sauder as interim Band Manager and paying her a salary. The issue raised by the plaintiffs was that Ruth was the common-law spouse of one of the defendant Councillors (though that defendant voluntarily left the room when the resolutions appointing Ruth as interim Band Manager and fixing her salary were voted upon). The plaintiffs argued that, because of this familial tie, the appointment demonstrated not only a perception of bias, but actual bias.

The British Columbia Supreme Court affirmed that members of an elected Band Council are fiduciaries insofar as the band and members of the band are concerned.¹⁷⁶ The Court went on to make important statements about how the fiduciary relationship operates specifically in the context of Band councils in small communities. More precisely, the Court discussed how the legal principles surrounding bias and conflict of interest are to be adapted and applied in small communities:

In my view, the mere existence of familial ties between Ruth Sauder and some of the defendant Councillors does not lead to the conclusion that the Council's decisions of January 10 and 17, 1997 [appointing Ruth as interim Band manager and fixing her salary], were biased. It must be remembered that this is a Band of 204 electors, that many members of the Band are related to each other, and that it would be impossible for Band Councils to operate if courts applied strict rules regarding conflicts of interest.

It is noteworthy that on this Council Ralph Dick who is the Chief is the brother of Elmer Dick, one of the other plaintiffs in this action; Brian Assu is the son of the former Band Manager Don Assu; Elvis Chickite is the common-law spouse of Ruth Sauder, brother of Councillor Barbara McCoy and brother in law of Councillor Nancy Chickite.

¹⁷⁵ *Assu v Chickite*, [1999] 1 CNLR 14 (BCSC).

¹⁷⁶ *Ibid* at para 33.

In *Sparvier v. Cowesses Indian Band No. 73*, [1994] 1 C.N.L.R. 182 (F.C.T.D.), the petitioner sought judicial review of a decision of an election Appeal Tribunal which had nullified the result of a Band Council election. Among other things, the applicant alleged that the Appeal Tribunal was biased on the grounds that one of its members had a business relationship with the applicant that had appeared before it. In discussing the allegation, Rothstein J. noted that the test for bias could not be strictly applied to a small Band of 408 participating electors. As stated by Rothstein J. at pp. 198-199:

... it does not appear to me to be realistic to expect members of the Appeal Tribunal, if they are residents of the reservation, to be completely without social, family or business contacts with a candidate in an election.

...

If a rigorous test for reasonable apprehension of bias were applied, the membership of decision-making bodies such as the Appeal Tribunal, in Bands of small populations, would constantly be challenged on grounds of bias stemming from a connection that a member of the decision-making body had with one or another of the potential candidates. Such a rigorous application of principles relating to the apprehension of bias could potentially lead to situations where the election process would be frustrated under the weight of these assertions. Such procedural frustration could, as stated by counsel for the respondents, be a danger to the process of autonomous elections of Band governments.

In my view the conclusions of Rothstein J. apply with equal force to the Band in the present case, which has even fewer electors than did the Band involved in the *Sparvier* decision. Given its small size, it would be practically impossible for the Band or its Council to operate if Councillors had to withdraw from all matters involving relatives. Nevertheless, the defendant Elvis Chickite did voluntarily leave the room when the resolutions appointing Ruth Sauder as interim Band Manager and fixing of her salary were voted upon. It is also noteworthy that at least of the plaintiffs, Stanley Nelson must have recognized this as he voted in favour of hiring Ruth Sauder at the Council meeting on January 10, 1997.

...

...in *Campbell v. Elliott et al.* Mr. Justice McNair did suggest, without deciding the issue, that a reasonable apprehension of bias existed where a Councillor of the Cowichan Indian Band voted to allot reserve lands to her sister-in-law. However, there is no indication that Mr. Justice McNair was presented with any evidence of the number of electors, or of interwoven family relationships within the Cowichan Band. Therefore, *Campbell* is very different from both the *Sparvier* decision and the instant

case. In the case at bar there is evidence respecting the very small number of Band electors (about 200), and the existence of close familial relationships within the Cape Mudge Band. In *Campbell McNair* J. did not discuss this issue in his decision, nor did he consider, as did Mr. Justice Rothstein in *Sparvier*, the need to apply a flexible test for reasonable apprehension of bias in the context of an Indian Band with a small number of electors, and the existence of interwoven family relationships.

In my view, the Council was within its authority, and did not act inappropriately or breach any duties in appointing Ruth Sauder as interim Band Manager. As a result, to the extent that any of the claims asserted by the plaintiffs rested on alleged wrongdoing in this regard, the claim is dismissed.¹⁷⁷

The statements in *Assu* regarding the relaxed applicable to small bands were picked up by the British Columbia Supreme Court in *Louie v Louie*:

Band Councils have some unique characteristics when it comes to the concept of conflict of interest. Their small size and the fact that many members of the Band and Council are related and beneficiaries themselves mean it would be impossible for a Band Council to operate if courts applied strict rules regarding conflict of interest: *Assu* at para. 53. The line to be drawn therefore between no conflict of interest and a conflict of interest depends on the circumstances.¹⁷⁸

This distinction in standards for smaller bands has also received academic support. In commenting on the *Abbey* and *Assu* cases discussed above, Professor Shin Imai writes:

The Chief and Council have a fiduciary duty to Band members. For example, a court ordered a former Chief of the Williams Lake Band to return payments from the Band for her student loan and tuition for her children. However, conflict of interest rules must be relaxed to take into account the reality of some small Bands. In one case, where the Band had only 204 electors, the court held that it was acceptable to hire the common-law spouse of one of the members of Council as a Band Manager, as long as the member of Council left the room when the decision was made.¹⁷⁹

¹⁷⁷ *Ibid* at paras 53-56, 59-60.

¹⁷⁸ *Louie v Louie*, 2014 BCSC 133 at para 45 (reversed on other grounds).

¹⁷⁹ Shin Imai, *Aboriginal Law Handbook*, 2nd ed (Carswell, 1999) at 135.

B. Declarations under the *Community Charter* Permitting Votes Despite Conflict of Interest

The *Community Charter* contains provisions permitting council to discuss and vote on a matter notwithstanding the fact that one or more members have a conflict of interest with respect to that matter. The BC Government explains this concept as follows:

There will be instances when more than one council member is required to declare a pecuniary or non-pecuniary conflict of interest. The removal of several council members may result in a loss of quorum and the inability to make decisions. In such cases, the municipality may wish to consider applying to the Supreme Court for an order. Using the authority granted in section 129 (quorum for conducting business), the Supreme Court may order that all or specified council members may discuss and vote on the matter, despite the concerns of conflict, and set any conditions it deems appropriate on the participation of council members.¹⁸⁰

The recent case of *Port Clements (Village) (Re)*¹⁸¹ provides a helpful discussion of the operation of this provision:

[27] In the event that the municipality cannot achieve a quorum because of conflicts of interest, s. 129 (4) provides that the municipality may apply to the Supreme Court for relief:

Quorum for conducting business

129 (1) Subject to an order under subsection (3) or (4), the quorum is a majority of the number of members of the council provided for under section 118 [*size of council*].

(2) The acts done by a quorum of council are not invalid by reason only that the council is not at the time composed of the number of council members required under this Act.

(3) If the number of members of a council is reduced to less than a quorum, the minister may either

(a) order that the remaining members of the council constitute a quorum until persons are elected and take office to fill the vacancies, or

¹⁸⁰ “Ethical Conduct Guidance”, *supra* note 14.

¹⁸¹ *Port Clements (Village) (Re)*, 2015 BCSC 1675.

(b) appoint qualified persons to fill the vacancies until persons are elected and take office to fill them.

(4) The municipality may apply to the Supreme Court for an order under subsection (5) if, as a result of section 100 [*disclosure of conflict*], the number of council members who may discuss and vote on a matter falls below

(a) the quorum for the council, or

(b) the number of council members required to adopt the applicable bylaw or resolution.

(5) On an application under subsection (4), the court may

(a) order that all or specified council members may discuss and vote on the matter, despite sections 100 [*disclosure of conflict*] and 101 [*restrictions on participation*], and

(b) make the authority under paragraph (a) subject to any conditions and directions the court considers appropriate.

(6) An application under subsection (4) may be made without notice to any other person.

...

[36] The legislative provisions governing conflicts of interest in the Community Charter underscore the importance that the legislature has assigned to the obligation on elected officials who hold public office to disclose any private interests which could affect the exercise of their public duties. An official who does not disclose a conflict of interest is liable to be disqualified from holding office.

[37] In my view, insofar as s. 129(5) allows elected officials to be involved in a matter despite a declared conflict of interest, it is an exceptional remedy - which the legislature has determined will only be permitted with court approval and subject to judicial oversight.¹⁸²

The Court went on to address the issue of disclosure of information by the municipality. The Court's comments are set out below as a helpful example of the role transparency plays in inviting or avoiding legal challenges by citizens:

¹⁸² *Ibid* at paras 27, 36-37 [emphasis added].

- “I also agree with the Residents that, as a general matter, the Village had a duty to disclose all facts that were “relevant and material” to its application under s. 129(4) of the Community Charter. The obligation on an *ex parte* applicant to make full and frank disclosure of all material facts and the authority of the court to set aside the order where there has been a failure to do so is well established...”¹⁸³
- “I consider that where the court is being asked to make an order under s. 129(5), which order would effectively override the conflict of interest provisions of the Community Charter, the principle of full and frank disclosure is similarly justified.”¹⁸⁴
- “In my view, the Village should ideally have provided more of the factual context for the Rezoning Bylaw 426 in the affidavits in support of the Petition. The Village’s affidavit material could best be described as “lean”. However, I note that s. 129 does not provide any direction as to what information is to be contained in an application under s. 129(4).”¹⁸⁵
- “I am not persuaded on the evidence before me that the Village intentionally omitted or misrepresented relevant facts, as the Residents suggest. Further, I am not persuaded that the disclosure of particulars of the history of the barge project and the consideration of Rezoning Bylaw 419 were material in the sense that they would have affected the outcome...”¹⁸⁶

This case is an example of litigation that likely could have been avoided by greater transparency. Other examples of such cases are given in Nathalie Baker’s paper entitled “Integrity in Local Government: Legal Challenges to Local Government Decisions and Best Practices for Decision Makers”, which accompanies this paper. While the courts will defer to local governments, and will only in rare instances overturn decisions for lack of transparency, the courts have repeatedly observed that litigation can be avoided by greater transparency. There are of course fundamentally important internal and external benefits to increased transparency: by insisting on and erring on the side of increased transparency inside the organization, light is consistently shone internally on the various stages of government decision making. This can only assist in identifying areas inside government that are vulnerable to unethical conduct, conflict of interest, fraud, and corruption. The external corollary is that the public will have an increasingly transparent view of the basis of government decision making, and, even if they don’t agree with it, the integrity of the process will be evident.

¹⁸³ *Ibid* at para 47.

¹⁸⁴ *Ibid* at para 49.

¹⁸⁵ *Ibid* at para 55.

¹⁸⁶ *Ibid* at para 56.