



The recent British Columbia Court of Appeal (BCCA) decision on conflict of interest in [Schlenker v. Torgrimson](#) has introduced a number of considerations for staff and elected officials when determining when elected officials may be in a conflict of interest contrary to provisions of the *Community Charter*.

The Local Government Management Association and the Union of BC Municipalities have collaborated with the Ministry of Community, Sport and Cultural Development to review the BCCA decision and identify some key questions and practical steps to assist local government elected officials and staff when applying the implications of the decision to their individual circumstances.

While we cannot provide definitive remedies or certainty of interpretation of the BCCA decision, we are hopeful that these questions and practical steps will guide discussions and assist local government officials in their considerations in circumstances where direct or indirect pecuniary interest may arise. These questions and practical steps are not in any way intended to replace legal advice.

The bulletins from a number of local government legal advisors are also included for reference.

A handwritten signature in black ink that reads "Mayor Mary Sjostrom". The signature is written in a cursive, flowing style.

A handwritten signature in black ink, appearing to be "Corien Speaker". The signature is written in a cursive, flowing style.

Mayor Mary Sjostrom
President
Union of BC Municipalities

Corien Speaker, CGA
President
Local Government Management Association
of BC



BCCA Decision on Conflict of Interest – Some Questions to Consider

Purpose:

Local government elected officials and staff are assessing the implications of the British Columbia Court of Appeal's recent conflict of interest decision in *Schlenker v. Torgrimson* ("BCCA decision").

This bulletin sets out some preliminary considerations on the applicability of the BCCA decision, and some practical tips for local governments and elected officials trying to avoid or minimize risks in the type of conflict of interest situation covered by that decision.

This bulletin does not provide legal advice. Determining how the law might apply to the particular circumstances an elected official faces is ultimately a question for that person and their legal advisor.

Background:

On January 11, 2013, the BCCA decision found that 2 locally-elected Salt Spring Island (SSI) trustees were in conflict of interest. Those trustees had moved and voted on resolutions to "dedicate" monies to two non-profit societies – the SSI Water Council Society and the SSI Climate Action Council Society – for the specific purposes of running a workshop and providing a report to the Local Trust Committee. At the time of those decisions, the locally elected trustees were directors of those societies. The two societies had been incorporated to coordinate multi-party work on these matters of interest to the Local Trust Committee, and were comprised of various organizations, including local governments.

The BCCA decision overturned the lower court and found that the locally-elected trustees had an indirect pecuniary interest in those decisions because of their legal obligations as directors of the societies. Since they had failed to declare that interest and absent themselves from participation/voting, they were in contravention of the *Community Charter* rules which apply to most locally elected officials (CC Part 4, Division 6). As the trustees' term had ended and they did not run again, the court did not apply the consequence of disqualification.

Impact of the Decision

The BCCA decision establishes some important principles of law for elected officials who are directors of societies. Here are some preliminary questions that may be helpful when considering whether those principles are relevant to the specific situation or circumstances facing an elected official.

- **Is there a financial decision or matter before the council/board?**

A fundamental principle of the conflict rules in ss. 100-103 of the *Community Charter* is that an elected official is required to declare a conflict of interest and absent him/herself from participation/voting/influencing if he/she has a direct or indirect pecuniary interest: in a matter under consideration at a meeting of the council/board or meetings of other bodies covered by the rules; or in a decision, recommendation or other action to be taken by an employee or third party. That involves two elements: (1) a direct or indirect pecuniary (financial) interest, the nature of which is defined by the courts based on case law; and (2) that interest being in a matter under consideration – for example, at a meeting or by an employee. In other words, conflict does not arise simply because of a person's status as both an elected official and a director of a society; there has to be a matter in front of the local government which has financial implications for that society.

In the BCCA decision, the locally-elected trustees' financial decisions to "dedicate" monies to the societies for the specific purposes of running a workshop and providing a report were characterized as decisions to pay service contracts. Because directors of societies (like directors of business corporations) have a pecuniary interest in any contract the society is awarded and those directors have a fiduciary duty to put the society's interests first, the BCCA decision found that their duties as directors were in direct conflict with their duties as locally-elected trustees to put the public's interests first.

Not every matter in front of a council/board which relates to a society involves a financial decision covered by the BCCA decision (e.g. declaring a day of recognition in support of the society's cause). However, keep in mind that in some circumstances, non-financial interests may give rise to conflicts of interest at common law.

- **What type of body is involved?**

The BCCA decision focused on certain incorporated bodies -- societies under the *Society Act* and, by analogy, business corporations under the *Business Corporations Act*. These bodies are separate legal entities from the local government. Bodies that are created by local governments as part of the local government – such as committees and commissions – are not separate legal entities.

Not every type of incorporated body is the same -- e.g. corporations such as the Union of BC Municipalities have their own Acts, rather than being fully covered by the *Society Act* or *Business Corporations Act*.

As well, the BCCA decision does not cover bodies on which local governments are required by law to have members (e.g. library board; Municipal Finance Authority; municipal directors on regional district boards; Provincial Capital Commission; BC Transit).

- **What is the elected official's role in the society?**

The BCCA decision focused on elected officials who were also directors of societies – because directors of such incorporated bodies have a fiduciary duty to that body (i.e. to act in the best interests of the society). The position of a member of a society does not have the same inherent fiduciary duty. Whether there is a potential personal benefit for a member of a society would be determined by the particular circumstances, not directly by the BCCA decision.

These are not the only questions to ask; however, if answers to these preliminary questions indicate that the principles in the BCCA decision may apply, an elected official would need to carefully assess the situation and seek legal advice as necessary.

Practical Steps

Until there are further court decisions, it cannot be clearly known how far the principles established by the BCCA decision might apply. That uncertainty and the potential consequence of disqualification mean that caution is important; at the same time, elected officials and their local governments must be able to make the decisions needed to carry on day-to-day business.

Elected officials and their local governments may want to consider what steps could be taken to avoid or minimize the risk in situations that might be considered a conflict of interest under the BCCA decision – whether by clarifying roles or by taking care in designing relationships with non-profit societies. While there can be no guarantees that particular actions will prevent a conflict of interest situation, the following are a few practical steps to consider:

In relation to societies on which elected officials choose to be directors....

- ensure that elected officials understand the rules -- e.g. have orientations and regular legal refreshers for council/board members on conflict of interest generally, the BCCA decision and the rules for disclosing conflicts and absenting themselves from discussions;
- encourage elected officials to carefully consider the risks in retaining directorships in non-profit societies which may be seeking financial support or other decisions from the local government.

In relation to local government's ongoing membership in a society...

- consider separating the council/board's decision on its membership (and membership dues) from any decisions on whether to provide grants or other forms of financial assistance to the society.

In relation to societies to which the local government has traditionally appointed elected officials as directors...

- consider having an elected official be a non-voting “observer” or “liaison” on the society’s board rather than appointing them as a director, and provide clear terms of reference for that observer/liaison role;
- consider alternatives to appointing elected officials – e.g. appoint citizen representatives to the society’s board;
- consider alternatives to board appointments – e.g. set out in an agreement with the society the council/board’s expectations and monitor the society’s performance based on that agreement.

If you/your local government have considered or taken other practical steps, please pass them along to Nancy Taylor, Executive Director, LGMA at ntaylor@lgma.ca so that they could be available for sharing.

Conclusion

At this time, UBCM and LGMA will continue to monitor the BCCA decision’s application, and work with the provincial government to more fully understand its implications for local governments and elected officials.