

YOUNG ANDERSON

BARRISTERS & SOLICITORS

JANUARY 11, 2013

CLIENT BULLETIN

DIRECTORS OF NON-PROFIT SOCIETIES IN A CONFLICT OF INTEREST

The Court of Appeal delivered reasons today in *Schlenker v. Torgrimson*, 2013 BCCA 9, declaring that two elected officials were in a conflict of interest contrary to the *Community Charter* when they voted to grant funds to non-profit societies of which they were directors.

The B.C. Supreme Court had originally found that no pecuniary or non-pecuniary conflict of interest existed in this situation, as the elected officials had received no personal or financial benefit from the funds provided to the non-profits societies, and because the purposes of the non-profit societies were related to the objectives of the local government. Nevertheless, the Court of Appeal found that the elected officials' role as directors of the societies, in and of itself, gave rise to a fiduciary duty to the societies, and that in matters relating to funding, the directors' financial interests were allied with the societies' interest as a matter of law. As a result, the Court found that the nature of the conflict was a pecuniary one.

The Court of Appeal refused the relief sought by the petitioners for disqualification from office or the repayment of the funds, on the basis that the disqualification issue was moot (the petition was brought just before the last local general election, and the local trustees did not run in that general election), and on the basis that the repayment rule in section 191 of the *Community Charter* did not apply to conflict of interest issues. The Court, however, exercised its discretion to make a declaratory order on the conflict issue to clarify the law that, as local elected officials, directors of non-profit societies are in a conflict of interest when they vote or participate in matters related to the society, and that that conflict is pecuniary when the local government matter relates to money or financial benefits.

Generally, the presence of a conflict where local elected officials participate or vote on matters that relate to societies of which they are directors is not new. The additional law established by this case is that the conflict will be considered pecuniary in nature, and therefore a disqualifying conflict of interest, for directors of non-profit societies even when there is no financial benefit anticipated or provided to the director; an indirect pecuniary interest will be inferred as a matter of law.

Francesca Marzari