Court Decision Creates Uncertainty For Conflict of Interest Provisions

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The B.C. Court of Appeal has released a potentially far reaching decision involving conflict of interest by local government elected officials. In *Schlenker v. Torgrimson* (2013 BCCA 9), the Court held that two Islands Trust trustees were in a conflict of interest under the *Community Charter* when they voted at two Local Trust Committee meetings to "dedicate" money to a non-profit environmental society of which they were directors.

The matter first came before the B.C. Supreme Court on the eve of the 2011 municipal election. As neither of the trustees were running in the election, they were not subject to disqualification if found liable. The Supreme Court held that there was no conflict on the basis that the trustees did not have a pecuniary interest in the matter because the society was an independent legal entity.

The Court of Appeal held that the Supreme Court Judge applied too narrow an interpretation to what is a "direct or indirect pecuniary interest" under the *Community Charter*, and that such an interest was not limited to personal financial gain but also included an indirect pecuniary interest that arose from the trustees' duty as directors of the society. The Court of Appeal held that the Supreme Court's interpretation of the legislation defeated the legislation's object of preventing elected officials from having divided loyalties when spending public money, and that there would be divided loyalties because the trustees also had duties to the society as directors. The Court of Appeal noted that there was little difference in the duties of a director of a company and of a society, and that by virtue of their position as directors of the society, the trustees had an indirect interest in any contract awarded to the society. The Court did not require evidence of any actual pecuniary gain by the trustees, relying instead on the conflict inherent in the legal obligations the trustees had as both trustees and directors. The Court of Appeal did not order the trustees to repay the funds, holding that it was the conflict that was unlawful, not the expenditures.

While it is arguable that the Court of Appeal's decision only applies in the limited situation where an elected official is also a director of another legal entity, some of the language and reasoning in the decision is concerning, seems to create some uncertainty in the law, and may be used as the basis for future legal challenges. First, the decision seems to take into account a test used for finding a common law conflict of interest (i.e., would a reasonably well informed elector think there was a conflict?) to determine whether a conflict of interest exists under the relatively specific test set out in the *Community Charter* that the official have a "direct or indirect pecuniary

interest in a matter". Second, the interpretation given by the Court to what is a direct or indirect pecuniary interest seems to have broadened. After stating that so long as a matter involves the expenditure of public funds for something for which a well-informed elector could conclude creates a conflict, the Court stated that "it makes no difference that [the trustees] put no money into their own pockets". This calls into question the extent to which any pecuniary gain is required for there to be a pecuniary interest under the *Charter*, and what else might be found to create a pecuniary interest. Finally, in noting that the public was "disadvantaged by the conflict, whether the [trustees] derived any personal gain or not, because the public did not have the undivided loyalty of their elected officials", the Court of Appeal seems to be saying that the test for conflict of interest under the *Charter* is based on divided loyalty as well as the "direct or indirect pecuniary interest in a matter" that is specified in the *Charter*.

The Court of Appeal's judgment also suggests that the matters that can lead to a conflict of interest under the *Charter* (as opposed to at common law) may be broader than previously understood, as seen in the following extract:

"The object of the legislation is to prevent elected officials from having divided loyalties in deciding how to spend the public's money. One's own financial advantage can be a powerful motive for putting the public interest second but the same could also be said for the advancement of the cause of the non-profit entity, especially by committed believers in the cause, like the respondents, who as directors were under a legal obligation to put the entity first."

While elected officials should always be mindful of avoiding common law conflicts of interest as well as those that arise under the *Charter*, the decision in *Schlenker* is also concerning to the extent that it implies that the penalties for a conflict under the *Charter* may apply to a conflict of interest that essentially arose under the common law test. It will be interesting to see whether any future legal challenges are directed toward decisions made by elected officials involving matters in which an official has a personal, but not obviously pecuniary, interest such as approving funding that assists or is aligned with a group the official supports, is a member of (even if not as a director), or whose political or other goals are aligned with those of the official.
