BULL HOUSSER

SERVING TWO MASTERS: ELECTED OFFICIALS ACTING AS DIRECTORS OF SOCIETIES - LOCAL GOVERNMENT NEWSLETTER

January 23, 2013 - In the recent decision in *Schlenker v. Torgrimson*, 2013, BCCA 9, the British Columbia Court of Appeal held that where an elected official serves as a director of a society, such elected official may have conflicting responsibilities as a local government councillor and as a director. Irrespective of whether the elected official receives any personal financial gain in their capacity as the director, the elected official may have a pecuniary conflict of interest if the society receives a monetary benefit from the local government. The basis for the pecuniary conflict of interest is in the fulfillment of the director's fiduciary obligations to the society which are different and may conflict with their obligations as a local councillor.

In *Schlenker* two elected trustees on the Salt Spring Island Local Trust Committee (Ms. Torgrimson and Mr. Ehring) were active in environmental issues: both were directors of non-profit societies called the Water Council Society and the Climate Action Society (the "**Societies**"). Over the course of two Local Trust Committee meetings, both Ms. Torgrimson and Mr. Ehring voted in favour of resolutions authorizing payments by the Local Trust Committee to the Societies. Neither disclosed that they were the directors of the Societies at the meetings. A group of Salt Spring Island electors subsequently brought a petition contesting the behaviour of the trustees and arguing that they violated the conflict of interest provisions in the *Community Charter* by voting on resolutions in relation to which they had a "direct or indirect pecuniary interest".

The British Columbia Supreme Court dismissed the petition on the ground that the trustees did not have a "direct or indirect pecuniary interest" in the resolutions because they did not obtain any personal financial gain from the resolutions; the Societies were non-profit and the directors were volunteering their time.

The Court of Appeal reversed the Supreme Court's decision, finding that Ms. Torgrimson and Mr. Ehring did have pecuniary interest in the resolutions. In the Court of Appeal's view, the object of the *Community Charter* conflict of interest provisions is to prevent elected officials from having divided loyalties in deciding how to spend the public's money. In the Court's opinion, although personal financial advantage can be a powerful motive for putting the public interest second, the same can also be said for the advancement of the cause of a society, especially by directors who are under a legal obligation to put the society first. In other words, so long as a "matter" involves the expenditure of public funds and the elected official has "an interest" in the matter which a well-informed elector would conclude conflicts with their duty as an elected official, it makes no difference whether the official puts the money into their own pockets - they will still have a pecuniary conflict of interest.

The ramifications of the decision in *Schlenker* are significant; irrespective of what would, on a more narrow interpretation, have been understood to be a personal pecuniary interest, elected officials serving as directors of societies, or other distinct legal persons such as corporations, may not be entitled to participate in or vote on matters related to the society or the corporation on the board of which they serve. If undisclosed, a pecuniary conflict of interest may result in disqualification from office. Following the decision in *Schlenker*, elected officials should more than ever exercise caution and consider their respective duties and obligations before participating in or voting, in their capacities as elected officials, on any matter affecting the society or the corporation on the board of which they serve.

Authored by Olga Rivkin and Kathleen Higgins.