Islands Trust

News Release

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COURT OF APPEAL RELEASES DECISION IN SCHLENKER CASE

VICTORIA — The British Columbia Court of Appeal released its decision today in a case that sought to have two former trustees on Salt Spring Island disqualified from office for conflict of interest.

While the decision indicates that the two former trustees voted in a manner contrary to a section of the *Community Charter*, they remain eligible for elected office and will not have to repay funds allocated to the Salt Spring Island Water Council Society or the Salt Spring Island Climate Action Council Society.

The case began in October 2011, when a group of Salt Spring Island electors petitioned the court, seeking to have then-trustees Christine Torgrimson and George Ehring, and then-Electoral Area Director Garth Hendren of the Capital Regional District (CRD) disqualified from holding elected office. Their petition arose because the three elected officials volunteered as members of community groups working on water conservation and climate change issues, but had not declared conflicts of interest before voting to allocate funds to the two community groups.

In his decision about the case last January, the Honourable Mr. Justice Brian D. MacKenzie of the BC Supreme Court declared that "there is no basis for disqualification" of Ehring and Torgrimson from elected office. An earlier court decision had cleared former Director Hendren of all claims; that decision was not appealed.

Eight of the fifteen original petitioners appealed the court's decision regarding the former trustees, claiming the Supreme Court judge had made several errors in law. They asked the Court of Appeal to disqualify the former trustees from holding elected office until the next general election or for three years. They also sought a ruling that the former trustees should personally repay funds allocated to the non-profit societies. The appellants were Norbert Fred Schlenker, Ted Bartrim, Alison Mary Cunningham, Harold Derek Hill, Malcolm George Legg, Dietrich Luth, Victoria Linda Mihalyi and Mark Lyster Toole.

The appeal case was argued in court on November 26, 2012 and the Court of Appeal released its decision today. The ruling focuses on the period in 2011 after the community groups decided to convert themselves to societies under the Society Act, to become eligible for funding from the Capital Regional District. Because the former trustees became directors of the newly-formed societies, the Court of Appeal ruled their responsibilities as society directors conflicted with their duties as elected officials. As noted in the decision "whether the respondents derived any personal gain or not, the public did not have the undivided loyalty of their elected officials" and the trustees therefore "voted on questions contrary to s. 101 of the *Community Charter"*.

The Court of Appeal did not disqualify the trustees from seeking office and ruled "there is no basis for an order of repayment".

. . . /2

The Islands Trust Council is a federation of local government bodies representing 25,000 people living within the Islands Trust Area. The Islands Trust is responsible for preserving and protecting the unique environment and amenities of the Islands Trust Area through planning and regulating land use, development management, education, cooperation with other agencies, and land conservation. The area covers the islands and waters between the British Columbia mainland and southern Vancouver Island. It includes 13 major and more than 450 smaller islands covering 5200 square kilometres.

Note: Reasons for judgment attached.

- 30 -

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Schlenker v. Torgrimson,*
2013 BCCA 9

Date: 20130111
Docket: CA039685

Between:

Norbert Fred Schlenker, Ted Bartrim,
Alison Mary Cunningham, Harold Derek Hill,
Malcolm George Legg, Dietrich Luth,
Victoria Linda Mihalyi and Mark Lyster Toole

Appellants
(Petitioners)

And

Christine Torgrimson and George Ehring

Respondents
(Respondents)

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of British Columbia, January 13, 2012
(*Schlenker v. Torgrimson*, 2012 BCSC 41, Victoria Docket 11-4036)

Counsel for the Appellants:	L. J. Alexander and A. L. Faulkner-Killam
Counsel for the Respondents:	F. V. Marzari
Place and Date of Hearing:	Victoria, British Columbia November 26, 2012
Place and Date of Judgment:	Vancouver, British Columbia January 11, 2013

Written Reasons by:
The Honourable Mr. Justice Donald

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Hinkson

Reasons for Judgment of the Honourable Mr. Justice Donald:

[1] Elected officials must avoid conflicts of interest. The question on appeal is whether the respondents were in a conflict when they voted to award two service contracts to societies of which they were directors. In the words of s. 101(1) of the *Community Charter*, S.B.C. 2003, c. 26, did they have “a direct or indirect pecuniary interest in the matter[s]”?

[2] The chambers judge found they did not have such an interest because they derived no personal financial benefit from the contracts.

[3] With respect, I disagree with the judge’s opinion. His view of the matter comes from too narrow a construction of the enactment. In my judgment, the pecuniary interest of the respondents lies in the fulfillment of their fiduciary obligation to their societies. When they voted for the expenditure of public money on the two contracts, which master were they serving, the public or the societies? In these circumstances, a reasonable, fair-minded member of the public might well wonder who got the better bargain.

[4] The respondents brought preliminary motions to quash the appeal for mootness and lack of standing of the appellants to maintain the appeal. I would not accede to either motion.

[5] The penalty for conflict is disqualification until the next election. While disqualification from office is in this case no longer a practical remedy because of the passage of time, the issues on appeal affect the public interest generally and should be decided. On the standing motion, fewer than ten electors, the minimum number required to support a petition alleging a conflict of interest, participated in the appeal. The petition, however, was brought by the requisite number of electors. There is no rule requiring the same number to bring a valid appeal.

[6] I would allow the appeal and declare that the respondents violated the *Community Charter*.

Factual Background

[7] In November 2008, the respondents were elected as trustees for the Salt Spring Island Local Trust Area. They, and a resident from another Gulf Island, comprised the Local Trust Committee (LTC) for Salt Spring Island. An LTC is a statutory corporation within the scheme of the *Islands Trust Act*, R.S.B.C. 1996, c. 239, having local government responsibility for land use planning and regulation for the particular island in question.

[8] The respondents were active in environmental issues: the respondent Torgrimson with the Water Council, and the respondent Ehring with the Climate Action Council. Both unincorporated bodies received funds from the LTC for various activities associated with their environmental causes. No issue is taken with the LTC resolutions authorizing those expenditures.

[9] On 20 April 2011, the respondents, along with three others, incorporated the Salt Spring Island Water Council Society. On 4 July 2011, the respondents, with three others, incorporated the Salt Spring Island Climate Action Council Society. The respondents were directors of the Societies at the material time.

[10] The appellants are Salt Spring Island electors who brought a petition contesting the behaviour of the respondents in respect of two resolutions of the LTC authorizing payments to the Societies for services related to their fields of interest. The chambers judge summarized the events in this way (2012 BCSC 41):

> [16] The incident that was the catalyst for the petition against Ms. Torgrimson and Mr. Ehring occurred on September 1, 2011. The LTC held a meeting at which Ms. Torgrimson and Mr. Ehring were present along with the third trustee, Ms. Malcolmson.
>
> [17] At the time of the vote on September 1, 2011, both respondent trustees were directors of the newly incorporated Water Council Society.
>
> [18] On September 1, 2011, Ms. Torgrimson moved and voted in favour of a resolution to “dedicate” $4,000 to fund a project by which the Water Council Society would organize and run a workshop to raise awareness of water issues on Salt Spring Island. Mr. Ehring was present and voted in favour of the resolution as did the third trustee.

> [19] During the discussion and eventual vote on the matter, neither Ms. Torgrimson nor Mr. Ehring disclosed that they were now directors of the newly incorporated societies.
>
> * * *
>
> [23] There was another meeting of the LTC on October 6, 2011. Again Ms. Torgrimson and Mr. Ehring were present with the third trustee. At this time Ms. Torgrimson made a motion to dedicate $4,000 to the Climate Action Society for the purpose of providing a progress report on greenhouse gases. Again, there was no mention that both respondents are directors of the Climate Action Society. As on September 1, 2011, the motion was not on the agenda. Given the similar conduct of the respondents on October 6, 2011, whatever decision I make with respect to what occurred September 1, 2011, would be the same decision for the October 6, 2011, transaction.

[11] At the hearing of the petition, no contract for services in relation to either expenditure had been executed. However, counsel agreed:

> That the Court of Appeal panel be advised at the hearing of the appeal that the Court below accepted that the resolutions in question would lead to the contracts being let, and the money actually expended, which is in fact what happened.

[12] The appellants filed a motion to adduce new evidence relating to the contracts. This was in response to the respondents' argument that there was no evidence before the chambers judge that any money changed hands. The evidence is new in the sense that it arose after the hearing. It supports the appellants' contention that the transactions were for service contracts and were paid for. Given the agreed statement above, I see no need to consider other details of the new evidence.

[13] The hearing of the petition occurred on the eve of the election in November 2011 at the expiry of the respondents' terms of office. As will be seen, the conflict legislation provides disqualification from office until the next election as its primary remedy. The respondents did not run again in November 2011 and say they have no intention of standing for office in the future.

Decision Under Appeal

[14] The chambers judge dismissed the petition on the ground that the evidence did not disclose a "personal pecuniary interest". He found that the respondents'

duties as directors of the Societies failed to satisfy this test. After reviewing case law, he ruled as follows:

> [39] In this case, the petitioners invite the court to draw the inference that these trustees have an indirect pecuniary interest based upon the fact of their being directors *simpliciter*.
>
> [40] I am not satisfied this is an appropriate inference to be drawn given the court's comments in *Fairbrass BCCA* [*Fairbrass v. Hansma*, 2010 BCCA 319, 5 B.C.L.R. (5th) 349]. Granted, directors are the operating minds of a society. However, the society exists as a separate legal person from the individuals who in this case work for no remuneration to guide it.
>
> [41] In my opinion, *Fairbrass BCCA* supports the respondents' position: the fact that they are directors of societies that received the funds, in the absence of sufficient evidence to establish a personal pecuniary interest between themselves and the societies, does not permit the inference to be drawn that they have an indirect pecuniary interest in the dedication of funds to the societies.
>
> [42] Again, as I decided in the Hendren judgment [*Schlenker v. Hendren* (18 November 2011), Victoria 11-4036 (S.C.)], the law in British Columbia cannot be read in the spirit of the Ontario legislation. The Ontario statute raised by counsel for the petitioners, the *Municipal Conflict of Interest Act*, R.S.O. 1990, Chapter M.50, ss. 2(a)(iii), 4(k), and 5, sets a low threshold for indirect pecuniary interest. It includes within the category of indirect pecuniary interest situations where an individual is a member of a body that in turn has a pecuniary interest in the matter (s. 2(a)(iii)).
>
> [43] I am satisfied that in British Columbia, disqualification on the grounds of indirect pecuniary interest requires evidence sufficient that there can be "a readily recognizable pecuniary incentive to vote other than for planning reasons." (See *Re McCaghren and Lindsay* (1983), 144 D.L.R. (3d) 503 at 510 (Alta. C.A.).) In our circumstances, reason to vote without conflict would not be "for planning" but for public education on water issues.
>
> [44] Moreover, even though the society depends to a certain extent on grants it receives from the LTC, as well as other sources, to advance its goals and objectives and to assist in the viability of the society, I do not conclude that Ms. Torgrimson and Mr. Ehring had an indirect pecuniary interest in the issue that was before the LTC on September 1, 2011. The petitioners need not show an actual pecuniary interest being affected, yet there still must be evidence of the potential "to affect the member's financial interest." (See [*Mondoux v. Tuchenhagen*, 2010 ONSC 6536, 79 M.P.L.R. (4th) 1], para. 46; and *Tolnai v. Downey* (2003), 40 M.P.L.R. (3d) 243 (Ont. Sup. Ct.) at para. 25.) Therefore, the fact that the respondents are directors is not sufficient to establish an indirect pecuniary interest.
>
> [45] I am fully cognizant of the classic statement made by the court in *Re Moll and Fisher et al*. (1979), 96 D.L.R. (3d) 506 at 509, 23 O.R. (2d) 609 (H.C.), that "no man can serve two masters," and that the conflict of interest rules and enactments recognize that even if elected officials are well-meaning, their judgment may be impaired "when their personal financial

interests are affected." Yet I underline that it is personal economic self-interest that must be in conflict with the official's public duty. While the vote on September 1, 2011, would provide the Water Council Society with funds to set up a workshop in order to pursue its objectives and educate the community with respect to water issues, the evidence does not establish that the grants had the potential to affect the personal financial interests of Ms. Torgrimson or Mr. Ehring. Indeed, there is possibly less pecuniary connection between a non-profit society and its directors as private individuals than there was between the mayor and his sons in *Fairbrass*.

[46] Given the totality of the evidence, I am not able to conclude that the petitioners have established that Ms. Torgrimson and Mr. Ehring had an indirect personal pecuniary interest when they voted for the dedication of money to the Water Council Society on September 1, 2011.

[47] As a result, where the petition seeks a declaration that Ms. Torgrimson and Mr. Ehring have violated s. 101 and s. 107 of the *Community Charter* because of a failure to disclose a direct or indirect pecuniary interest, the petition is dismissed.

Relevant Enactments

[15] The relevant sections of the legislation are as follows:

Community Charter, S.B.C. 2003, c. 26 –

100 (1) ...

(2) If a council member attending a meeting considers that he or she is not entitled to participate in the discussion of a matter, or to vote on a question in respect of a matter, because the member has

(a) a direct or indirect pecuniary interest in the matter, ...

the member must declare this and state in general terms the reason why the member considers this to be the case.

(3) After making a declaration under subsection (2), the council member must not do anything referred to in section 101 (2) [*restrictions on participation*].

* * *

101 (1) This section applies if a council member has a direct or indirect pecuniary interest in a matter, whether or not the member has made a declaration under section 100.

(2) The council member must not

(a) remain or attend at any part of a meeting referred to in section 100 (1) during which the matter is under consideration,

(b) participate in any discussion of the matter at such a meeting,

(c) vote on a question in respect of the matter at such a meeting, or

(d) attempt in any way, whether before, during or after such a meeting, to influence the voting on any question in respect of the matter.

(3) A person who contravenes this section is disqualified from holding an office described in, and for the period established by, section 110 (2), unless the contravention was done inadvertently or because of an error in judgment made in good faith.

* * *

111 (1) If it appears that a person is disqualified under section 110 and is continuing to act in office,

(a) 10 or more electors of the municipality, ...

may apply to the Supreme Court for an order under this section.

* * *

(4) An application under this section may only be made within 45 days after the alleged basis of the disqualification comes to the attention of

(a) any of the electors bringing the application, in the case of an application under subsection (1) (a), ...

(6) On the hearing of the application, the court may declare

...

(b) that the person is disqualified from holding office, ...

* * *

191 (1) A council member who votes for a bylaw or resolution authorizing the expenditure, investment or other use of money contrary to this Act or the *Local Government Act* is personally liable to the municipality for the amount.

* * *

(4) Money owed to a municipality under this section may be recovered for the municipality by

...

(b) an elector or taxpayer of the municipality, ...

<u>*Society Act*</u>, R.S.B.C. 1996, c. 433 –

24 (1) The members of a society may, in accordance with the bylaws, nominate, elect or appoint directors.

(2) Subject to this Act and the constitution and bylaws of the society, the directors

(a) must manage, or supervise the management of, the affairs of the society, and

(b) may exercise all of the powers of the society.

* * *

25 (1) A director of a society must

(a) act honestly and in good faith and in the best interests of the society, and

(b) exercise the care, diligence and skill of a reasonably prudent person,

in exercising the powers and performing the functions as a director.

(2) The requirements of this section are in addition to, and not in derogation of, an enactment or rule of law or equity relating to the duties or liabilities of directors of a society.

* * *

27 A director of a society who is, directly or indirectly, interested in a proposed contract or transaction with the society must disclose fully and promptly the nature and extent of the interest to each of the other directors.

28 (1) ....

(2) Unless the bylaws otherwise provide, a director referred to in section 27 must not be counted in the quorum at a meeting of the directors at which the proposed contract or transaction is approved.

<u>*Business Corporations Act*</u>, S.B.C. 2002, c. 57 –

1 (1) In this Act:

* * *

"company" means

(a) a corporation, recognized as a company under this Act or a former *Companies Act*, that has not, since the corporation's most recent recognition or restoration as a company, ceased to be a company

* * *

"corporation" means a company, a body corporate, a body politic and corporate, an incorporated association or a society, however and wherever incorporated, but does not include a municipality or a corporation sole;

* * *

136 (1) The directors of a company must, subject to this Act, the regulations and the memorandum and articles of the company, manage or supervise the management of the business and affairs of the company.

* * *

> 142 (1) A director or officer of a company, when exercising the powers and performing the functions of a director or officer of the company, as the case may be, must
>
> (a) act honestly and in good faith with a view to the best interests of the company, ...

Canada Business Corporations Act, R.S.C. 1985, c. C-44 –

> 102. (1) Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation.
>
> * * *
>
> 122. (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall
>
> (a) act honestly and in good faith with a view to the best interests of the corporation; ...

Issues

[16] I will discuss the following issues:

1. Standing: Can less than ten electors bring a valid appeal from dismissal of a conflict of interest petition under the *Community Charter*?
2. Mootness: Is the case moot and if it is should it nevertheless be decided?
3. Statutory interpretation of the phrase "a direct or indirect pecuniary interest in the matter": Is it limited to personal financial gain of the councillor or does it extend to a non-profit society of which the councillor is a director?

Discussion

Standing

[17] The petition in this case was brought by 15 electors, more than the minimum number (10) prescribed by s. 111(1)(a) of the *Community Charter*. The respondents contest the validity of the appeal on the basis that the eight appellants lacked standing as they form a group less than the requisite number.

[18] This argument has no support in the legislation. The respondents argue for a restriction on the right to appeal yet there is nothing in the *Community Charter* or

related enactments which extends the minimum requirement in s. 111(1)(a) to an appeal.

[19] The jurisdiction of the Court is set out in the *Court of Appeal Act*, R.S.B.C. 1996, c. 77:

> 6 (1) An appeal lies to the court
>
> (a) from an order of the Supreme Court or an order of a judge of that court, and
>
> (b) in any matter where jurisdiction is given to it under an enactment of British Columbia or Canada.
>
> (2) If another enactment of British Columbia or Canada provides that there is no appeal, or a limited right of appeal, from an order referred to in subsection (1), that enactment prevails.

[20] Each petitioner must join with at least nine others to launch a valid petition. Once they have done so, each becomes a party to the proceeding. Their status as a party remains throughout the proceeding and enables them to invoke the jurisdiction of this Court whether or not the original petitioning group remains intact. It would, in my opinion, take very specific language in the relevant legislation to restrict access to this Court in the manner suggested by the respondents.

[21] I would not give effect to the preliminary objection based on standing.

<u>Mootness</u>

[22] The respondents' other preliminary objection is that there is no practical purpose to be served by deciding the appeal. Since the respondents did not run in the 2011 election, the primary remedy for voting while in a conflict of interest, namely, disqualification from office until the next election, has no application; all that is left is a declaratory remedy, a purely academic exercise which this Court should not engage in. The respondents submit that the problem will probably come up again and can and should be decided on a live issue rather than on a moot case.

[23] The appellants respond in several ways. First, they say that there is a practical remedy available in that this Court could order the respondents to repay the money for the contracts under s. 191 of the *Community Charter*. Second, the Court

could order the respondents disqualified from holding office for a period running from the date of the Court's judgment to the next election. Third, the prayer for relief in the petition expressly sought a declaration as a remedy and nothing that has transpired since has affected the soundness of that remedy. Fourth, even if s. 191 is not available and it is seen that there is no practical sanction against the respondents, there is nevertheless a strong public interest in settling the law on the substantive issue in the case.

[24] I do not find it necessary to deal with the appellants' first two points. In my opinion, the third and fourth points meet the mootness objection.

[25] The events giving rise to the dispute occurred within a short time of the November 2011 election. The respondents' terms of office were about to expire when they voted to approve the expenditures in question. The *Community Charter* prescribes a 45-day limit to bring a conflict challenge by way of petition. Since the procedures must be taken in such a compressed timeframe and the terms of office can be shorter than the time it takes for a case to make its way through to an appeal, it will often be difficult to apply the disqualification sanction if it is not ordered at first instance. Timing was one of the factors that influenced this Court in *Fairbrass v. Hansma*, 2010 BCCA 319, to proceed with the appeal despite the lapse of the disqualification period:

> [9] Section 110(2) referred to in s. 101(3) sets the period of disqualification as commencing at the time of the contravention of s. 101 and ending on the date of the next general local election.
>
> [10] The potential period of disqualification in this case has long since lapsed, there having been a general local election in November 2008. Nonetheless, the petitioners brought the petition promptly. It raises a serious issue which was considered by the Supreme Court of British Columbia. Were we to refuse to hear the appeal as moot, it would be a rare case that could be advanced through the court process, given the election cycle in municipal governance. The issue in this case is serious, the allegations are of consequence, in particular to the respondent, and the issue has the potential to arise again in another guise. Upon these considerations we determined this appeal should be resolved on its merits.

[26] The first two orders sought in the amended petition are expressed in this way:

> 1. A declaration that Trustee Christine Torgrimson, Trustee George Ehring ... have failed to disclose a direct, or indirect, pecuniary conflict of interest contrary to section 101 <u>and section 107</u> of the *Community Charter, SBC 2003, c 26*;
>
> 2. A declaration that Trustee Christine Torgrimson, Trustee George Ehring ... have attended a meeting, participated in discussions, attempted to influence voting, and voted on a question contrary to section 101 <u>and section 107</u> of the *Community Charter*.

[27] No objection could have been taken to the petition had it claimed only a declaration as relief. Rule 20-4 of the *Supreme Court Civil Rules* provides:

> (1) A proceeding is not open to objection on the ground that only a declaratory order is sought, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

[28] This appears to be a case of first impression. None of the authorities cited to us deals squarely with the position of a councillor voting on a money resolution authorizing payment to a non-profit society of which the councillor is a director.

[29] Finally, and regardless of whether the case is moot, a resolution of the issue will have practical utility. As counsel for the appellants explained, elected officials often seek legal guidance on whether they are in a conflict of interest. If they act on such advice, they have available to them a good faith defence under s. 101(3) of the *Community Charter*:

> (3) A person who contravenes this section is disqualified from holding an office described in, and for the period established by, section 110 (2), unless the contravention was done inadvertently or because of an error in judgment made in good faith.

[30] So the respondents are concerned that unless the decision under appeal is reviewed, it will remain the basis of legal advice to councillors throughout the province and because of the good-faith defence, no one will be motivated to challenge their conduct. The argument is that if the decision is wrong and left uncorrected, it will have a deleterious long-term effect.

[31] I agree with this argument. I am not satisfied the case is moot, but even if it is, it falls within the class of cases that should be decided in the public interest.

Construction of the Phrase "a direct or indirect pecuniary interest in the matter"

[32] As mentioned, my principal difference of opinion with the judge is in what I consider to be his too narrow construction of the phrase "a direct or indirect pecuniary interest".

[33] 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. The result of applying that narrow interpretation to the facts was to defeat the purpose and object of the conflict of interest legislation.

[34] 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.

Liberal vs. Strict Interpretation

[35] My starting point in the interpretive process is to recall the directive in the *Interpretation Act*, R.S.B.C. 1996, c. 238:

> 8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[36] I then move to the classic statement of the "modern principle" enunciated by Elmer Driedger in the second edition of *Construction of Statutes* and adopted by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27:

> [21] Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
>> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[37] The context of the questioned phrase can be seen from its placement in Part 4 of the *Community Charter* entitled "Public Participation and Council Accountability" and Division 6 of that Part, entitled "Conflict of Interest". The phrase appears in that part of the *Community Charter* addressing the problem of divided loyalties, particularly in money matters.

[38] The purpose of such legislation was eloquently described by Robins J. (later J.A.) speaking for the Ontario Divisional Court in *Re Moll and Fisher* (1979), 96 D.L.R. (3d) 506 at 509:

> This enactment, like all conflict-of-interest rules, is 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 when their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose. And the Act, by its broad proscription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interest may be in conflict with their public duty. The public's confidence in its elected representatives demands no less.
>
> Legislation of this nature must, it is clear, be construed broadly and in a manner consistent with its purpose.
>
> [Emphasis added.]

[39] In *The Queen v. Wheeler*, [1979] 2 S.C.R. 650, the Court referred to the New Brunswick equivalent of s. 8 of our *Interpretation Act*, quoted earlier, in adopting at 659 a broad approach to the interpretation of the conflict provision involved in that case.

[40] In *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, Sopinka J. commented generally on conflict of interest legislation for local government at 1196-97:

> 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 from the facts of this case, for example, 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. <u>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</u>. See *Re Blustein and Borough of North York*, [1967] 1 O.R. 604 (H.C.); *Re Moll and Fisher* (1979), 23 O.R. (2d) 609 (Div. Ct.); *Committee for Justice and Liberty v. National Energy Board*, [[1978] 1 S.C.R. 369]; and *Valente v. The Queen*, [1985] 2 S.C.R. 673.
>
> 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. See *Blustein* and *Moll*, *supra*.
>
> [Emphasis added.]

[41] I think a reasonably well-informed elector on Salt Spring Island would conclude that the respondents' interest as directors would influence their decision to authorize and pay for contracts with their Societies. The respondents themselves initiated the resolutions that directly benefitted their Societies, and then voted in favour of those resolutions, without disclosing that they were directors of the very Societies that were obtaining the benefit.

[42] If, in the present case, the chambers judge approached the interpretation narrowly because of the penalties for engaging in a conflict, he erred in my opinion. In *Tuchenhagen v. Mondoux*, 2011 ONSC 5398, 107 O.R. (3d) 675, the Divisional Court held:

> [26] The *MCIA* [*Municipal Conflict of Interest Act*] s. 10 does provide for the penalties to be imposed if a member of council is found to have breached the legislation. The seat of the member is to be declared vacant, he or she may be disqualified from being a member for a period of time not exceeding seven years and, where the contravention has resulted in financial gain, ordered to pay restitution. As such, the *MCIA* is penal in nature. This does not mean that it should be interpreted narrowly, in favour of the member, in case of ambiguity. "Even with penal statutes, the real intention of the legislature must be sought, and the meaning compatible with its goals applied" (see: *R. v. Hasselwander*, [1993] 2 S.C.R. 398 at para. 30 as referred to in *Ruffolo v. Jackson*, [2010] O.J. No. 2840 (C.A.) at para. 9).
>
> [Emphasis added.]

Directors' Duties

[43] In most cases of conflict of interest, the conflict examined is between the personal interests of the individual and his or her duty to the corporate entity. At bar, the question is whether the respondents took on conflicting responsibilities as local councillors and Society directors such that they could not participate in decisions awarding contracts to the Societies.

[44] There is little difference in the duties of a director of a business corporation and a society.

[45] Directors of societies have a fiduciary duty of loyalty to "act honestly and in good faith and in the best interests of the society": s. 25(1)(a) of the *Society Act*. This fiduciary duty is the same duty that directors owe to corporations under the *Business Corporations Act* at s. 142(1)(a), which provides that directors of a company (defined as a corporation recognized as a company under that Act), when exercising the powers and performing the functions of a director of the company must act honestly and in good faith with a view to the best interests of the company, as well as the federal *Canada Business Corporations Act* under s. 122(1)(a), which provides that every director of a corporation in exercising their powers and discharging their duties shall act honestly and in good faith with a view to the best interests of the corporation. Therefore, case law relating to the fiduciary duty of directors of corporations is analogous to the fiduciary duty of directors of societies.

[46] As the Supreme Court of Canada noted in *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461, the duty of loyalty imposes several duties on directors:

> [35] The statutory fiduciary duty requires directors and officers to act honestly and in good faith *vis-à-vis* the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly and loyally: see K. P. McGuinness, *The Law and Practice of Canadian Business Corporations* (1999), at p. 715.

[47] In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, Chief Justice McLachlin, for the Court, wrote of the fiduciary principle in general as follows:

> [43] The duty is one of utmost loyalty to the beneficiary. As Finn states, the fiduciary principle's function "is not to mediate between interests. It is to secure the paramountcy of *one side's* interests . . . . The beneficiary's interests are to be protected. This is achieved through a regime designed to secure loyal service of those interests" (P. D. Finn, "The Fiduciary Principle", in T. G. Youdan, ed., *Equity, Fiduciaries and Trusts* (1989), 1, at p. 27 (underlining added [by McLachlin C.J.]); see also [*Hodgkinson v. Simms*, [1994] 3 S.C.R. 377], at p. 468, *per* Sopinka J. and McLachlin J. (as she then was), dissenting).
>
> [Emphasis in text.]

[48] The case of *Wheeler* involved a mayor and a business corporation but the following remarks at 659-60 I think are apposite:

> A director, and particularly one who is also a president, owes a continuous, day-to-day duty to the legal entity, the company, as well as to the shareholders, to prosecute the company's affairs in an efficient, profitable, and entirely lawful manner. Applying the broad principle enunciated by Duff C.J. in [*J.B. Arthur Angrignon v. J. Arsène Bonnier*, [1935] S.C.R. 38], such an officer is most certainly "interested" in his company entering into profitable contracts. In a service company or in the construction business, that may well be his only real interest in conducting the affairs of the company.
>
> * * *
>
> It should not, however, be assumed that the Legislature has thereby expressed an intention to reduce the meaning and application of the expression "indirect interest". It is unrealistic to believe that as a general

> principle of human conduct a director or officer of a contracting company does not have at least an indirect interest in the company's contracts. On the facts before this Court, the provision has an even clearer impact. A director or officer of a construction company or of a service company must, in ordinary parlance and understanding, have an interest, albeit indirect, in the welfare of the company as it relates to or results from 'contracts'.
>
> [Emphasis added.]

Pecuniary Interest

[49] In several ways in the course of these reasons, I have endeavoured to make the point that so long as the "matter" involves the expenditure of public funds and the respondents have "an interest" in the matter which a well-informed elector would conclude conflicts with their duty as councillors, it makes no difference that they put no money into their own pockets.

[50] As directors of the Societies, the respondents were under a fiduciary duty to put the Society's interests first. Directors of societies, by virtue of their position, have an indirect interest in any contract a society is awarded. When the respondents moved and voted in favour of resolutions that benefitted their Societies through the granting of contracts, arguably contracts the Societies might not have been awarded had the councillors not also been directors, their duties as directors to put the Society's interests first were in direct conflict with their duties as councillors to put the public's interests first. These circumstances encompass the mischief the legislation was aimed at, namely, a conflict of interest in deciding money resolutions. The public is disadvantaged by the conflict, whether the respondents derived any personal gain or not, because the public did not have the undivided loyalty of their elected officials.

Case Law

[51] This Court has twice considered pecuniary interest conflict. In *Fairbrass*, the Mayor of Spallumcheen voted on a bylaw to amend the Official Community Plan allegedly to the potential benefit of his two sons. In *King v. Nanaimo (City)*, 2001 BCCA 610, 94 B.C.L.R. (3d) 51, a city councillor voted in favour of matters

benefitting his largest campaign contributor. This Court upheld the dismissal of the petition in *Fairbrass* and reversed the finding of pecuniary conflict in *King*.

[52] The decisions have a common rationale. The proof requirement establishing a link between the matter voted on and a pecuniary interest of the councillor was lacking in each case.

[53] In *King*, Mr. Justice Esson, for the Court, wrote:

> [12] That conclusion, in my respectful view, is wrong in law. What was prohibited by s. 201(5) 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.
>
> [13] 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 s. 201(5) is wrong in law and must be set aside.
>
> [Emphasis added.]

[54] Madam Justice Saunders gave the judgment of the Court in *Fairbrass* and wrote:

> [21] I see no error in the approach of the judge to the petition before him. In the circumstances disclosed to him in the evidence, the case fell to be resolved by considering whether there could be enhancement of the respondent's financial position directly, or through the fact his sons owned adjacent property. The judge recognized the sons had a direct pecuniary interest because the proposal would make it easier for them to sub-divide their property. There were, then, only two questions: did the respondent have a direct interest, and did the sons' direct interest create such potential for

> enhancement of the respondent's financial circumstances as to be a pecuniary interest that was indirect.
>
> [22] The proposition that the person asserting a fact has the burden of proving it, is fundamental. Here the petitioners alleged a pecuniary interest, either direct or indirect. Yet they adduced no evidence to the effect that the bylaw, were it to pass, would make the respondent's four acre but still un-subdividable property more valuable. Whether the change in set-back requirements would have this effect is speculation. So too, as the judge said, is the possibility of the respondent acquiring land, thereby to sub-divide the property. Even more speculative is the possibility of accretion making the four acre parcel more valuable now.
>
> [Emphasis added.]

[55] In the present case, however, proof of a pecuniary conflict does not depend on a remote and tenuous connection as in *King* or on speculation like *Fairbrass*, but on the solid footing of a fiduciary duty as discussed.

[56] 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.

[57] When, at para. 41 of his reasons, the chambers judge requires some personal pecuniary benefit to flow to the respondents from their societies before declaring a conflict, he in my opinion erred in principle and in law by misconstruing the effect of *Fairbrass*.

Remedies

[58] As mentioned, the declaratory order should be made because of the public importance of the issue. But the appellants also ask for an order pursuant to s. 191(1) of the *Community Charter* requiring the respondents to repay the money expended on the contracts.

[59] In my opinion, s. 191(1) has no application to this case. As I read the provision, it addresses itself to the subject matter of the expenditure rather than to the qualification of the councillor voting on the expenditure. The phrase “contrary to this Act or the *Local Government Act*” refers to the “expenditure, investment or other use of money”, not to the council member who casts the vote. The focus is on the impropriety of the expenditure.

[60] Thus, s. 191(1) is placed in a separate part of the *Community Charter* under “Part 6 – Financial Management, Division 5 – Restrictions on Use of Municipal Funds”, apart from those provisions dealing with improper voting by council members who are disqualified by reason of conflict of interest.

[61] It is not alleged in this case that the projects covered by the contracts let by the LTC were in themselves improper subjects for expenditure. The attack was directed at the respondents’ conflict of interest. There is, therefore, no basis for an order of repayment under s. 191(1).

<u>Conclusion</u>

[62] For these reasons, I would allow the appeal and declare that the respondents voted on questions contrary to s. 101 of the *Community Charter*.

“The Honourable Mr. Justice Donald”

I agree:

“The Honourable Madam Justice Newbury”

I agree:

“The Honourable Mr. Justice Hinkson”