

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Conibear v. Dahling*,
2010 BCSC 985

Date: 20100713
Docket: No. S9302
Registry: Campbell River

Between:

**Debra Conibear, Elizabeth Beaupre, Barb Wanless, Sandy Naylor,
Catherine Gordon, Artena Douglas, Alice Thompson, Alex Wright,
David McIntosh, Bill Griswold, Rajinder Sharma,
Sumeet Sharma, Joyce Davies and Lucille Collins**

Petitioners

And

**Mayor Corrine Dahling, Village of Tahsis, Councillor Martin Davis
and Councillor Anne Cameron**

Respondents

Before: The Honourable Madam Justice Allan

Reasons for Judgment

Representing the Petitioners:	D. Conibear
Counsel for the Village of Tahsis:	D. Howieson
Place and Date of Hearing:	Campbell River, B.C. July 5, 2010
Place and Date of Judgment:	Campbell River, B.C. July 13, 2010

Background

[1] In late March 2010, Amber McGrath, the owner of Bounce Hard Productions (“Bounce Hard”) approached the Village of Tahsis (the “Village”) with a proposal that a music festival (the “Festival”) be held in the Village. The Festival is now scheduled to be held on August 13 and 14, 2010 at the old Western Forest Products mill site in Tahsis. Ms. McGrath is the mother of a 14 year old girl named Akeysha. The son of Mayor Corrine Dahling (the “Mayor”) is the father of Akeysha. The relationship between Akeysha’s parents was a short one and, before March 2010, the Mayor had only seen Ms. McGrath twice in the last 13 or 14 years. Akeysha spends part of her time with her father, who lives in Tahsis, and the Mayor sees a lot of her granddaughter when she is in Tahsis.

[2] Tahsis Village Council (the “Council”) is made up of the Mayor and four Councillors elected every three years. Ms. McGrath initially spoke to the Mayor and Harmony Nielsen, the Corporate Officer with the Village, in March 2010. Ms. McGrath was asked to do further research regarding musical acts willing to play and people willing to attend. In April, Ms. McGrath provided a proposal for the Festival and the Mayor considered it to be a good economic development and tourism opportunity for the Village.

[3] On May 3, 2010, the Council considered Bounce Hard’s proposal. The Mayor advised Council of her connection to Ms. McGrath and said she did not consider herself to be in a conflict as she had no personal or business relationship with Ms. McGrath. Ms. Nielsen says that no one took issue with that position until it was raised by Councillors Atkinson and Schooner on May 18.

[4] On May 4, the Council passed a motion to host the Festival (“Pillage at the Village”) by a vote of 3-2.

[5] The Contract, executed by the Village and Bounce Hard on May 15, provides that the Village will host the Festival. After out-of-pocket expenses are paid to third parties, the net profits will be split 65% to the Village and 35% to Bounce Hard. The

Contract had been prepared by the Village's lawyers. Ms. Nielsen deposes that she had received legal advice that because Bounce Hard had approached the Village with the proposal and because each party had obligations and responsibilities under the Contract, there was no issue of the Village providing "assistance" under s. 24 (1) of the *Community Charter*, SBC 2003 26.

[6] Thirty-eight members of the public attended a Council meeting on May 18 to discuss issues relating to the Festival. Some, but not all, of the residents were opposed to Tahsis hosting the Festival. On June 1, 2010, a "Petition Against the 'Pillage the Village' Concert" with 125 signatures was filed with the Corporate Officer. It states: "We were not consulted about this public event. We do not support our tax dollars being spent on this concert. We ask that this concert be cancelled." The authenticity of some of the signatures is questioned by the Respondents.

The Relief Sought

[7] The Petitioners seek the following relief:

- a declaration pursuant to s. 110 of the *Community Charter* that the Mayor is in a conflict of interest and an order nullifying the May 4 vote;
- in the alternative, a declaration pursuant to s. 24 of the *Community Charter* that Councillors Davis and Cameron be declared in breach of their duty of office for failing to do due process and review all facts and figures prior to making a decision, and an order nullifying the May 4 vote;
- in the further alternative, a declaration pursuant to s. 24 of the *Community Charter* that the Mayor and Councillors Davis and Cameron be declared in a conflict of interest for entering into a contract without due notice to the public and an order that the contract is void; and
- in the further alternative, the petitioners seek an injunction preventing the Village from proceeding with any further funding, promotion or planning for the Concert until a budget has been presented to and approved by at least four councillors; the proposed Festival site has been cleaned up and declared safe by an engineer or WorkSafeBC; and a viable security and emergency plan has been presented to and approved by at least four councillors.

[8] The *Community Charter* deals with a council member who is in a conflict of interest:

Division 6 — Conflict of Interest

Disclosure of conflict

100 (1) This section applies to council members in relation to

- (a) council meetings,
- (b) council committee meetings, and
- (c) meetings of any other body referred to in section 93 [*application of open meeting rules to other bodies*].

(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, or
- (b) another interest in the matter that constitutes a conflict of interest,

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*].

(4) As an exception to subsection (3), if a council member has made a declaration under subsection (2) and, after receiving legal advice on the issue, determines that he or she was wrong respecting his or her entitlement to participate in respect of the matter, the member may

- (a) return to the meeting or attend another meeting of the same body,
- (b) withdraw the declaration by stating in general terms the basis on which the member has determined that he or she is entitled to participate, and
- (c) after this, participate and vote in relation to the matter.

(5) For certainty, a council member who makes a statement under subsection (4) remains subject to section 101 [*restrictions on participation if in conflict*].

(6) When a declaration under subsection (2) or a statement under subsection (4) is made,

(a) the person recording the minutes of the meeting must record

- (i) the member's declaration or statement,
- (ii) the reasons given for it, and
- (iii) the time of the member's departure from the meeting room and, if applicable, of the member's return, and

(b) unless a statement is made under subsection (4), the person presiding at that meeting or any following meeting in respect of the matter must ensure that the member is not present at any part of the meeting during which the matter is under consideration.

Restrictions on participation if in conflict

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.

Restrictions on inside influence

102 (1) A council member must not use his or her office to attempt to influence in any way a decision, recommendation or other action to be made or taken

(a) at a meeting referred to in section 100 (1) [*disclosure of conflict*],

(b) by an officer or an employee of the municipality, or

(c) by a delegate under section 154 [*delegation of council authority*],

if the member has a direct or indirect pecuniary interest in the matter to which the decision, recommendation or other action relates.

(2) 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.

Restrictions on outside influence

103 (1) In addition to the restriction under section 102, a council member must not use his or her office to attempt to influence in any way a decision, recommendation or action to be made or taken by any other person or body, if the member has a direct or indirect pecuniary interest in the matter to which the decision, recommendation or other action relates.

(2) 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.

Exceptions from conflict restrictions

104 (1) Sections 100 to 103 do not apply if one or more of the following circumstances applies:

(a) the pecuniary interest of the council member is a pecuniary interest in common with electors of the municipality generally;

...

(d) the pecuniary interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the member in relation to the matter;

....

Circumstances in which a person is disqualified from office on council

110 (1) A person elected or appointed to office on a council is disqualified from holding that office if any of the following applies:

...

(c) the person is disqualified under any of the following:

section 101 [*restrictions on participation if in conflict*];

section 102 [*restrictions on inside influence*];

section 103 [*restrictions on outside influence*];

....

(2) A person disqualified under subsection (1) is disqualified from holding office on a local government until the next general local election.

Application to court for declaration of disqualification

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, or

(b) the municipality,

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

...

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

(a) that the person is qualified to hold office,

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

(c) that the person is disqualified from holding office and that the office is vacant.

[9] The *Community Charter* also deals with partnering agreements.

Partnering agreements

21 If a municipality enters into a partnering agreement for the provision of a service on behalf of the municipality, the council may

(a) provide assistance, other than tax exemptions, to a business in accordance with the agreement,

Publication of intention to provide certain kinds of assistance

24 (1) A council must give notice in accordance with section 94 [*public notice*] of its intention to provide any of the following forms of assistance to a person or organization:

...

(d) assistance under a partnering agreement.

(2) The notice must be published before the assistance is provided and must

(a) identify the intended recipient of the assistance, and

(b) describe the nature, term and extent of the proposed assistance.

[10] I will deal with each of the issues raised in the Petition.

1. Should the Mayor be disqualified because of a conflict of interest?

[11] The Mayor has deposed she has no direct or indirect pecuniary interest in the Festival. The Petitioners submit that the Mayor is in a perceived conflict of interest because of her relationship with her granddaughter. They say her interests in the welfare and well-being of Akeysha (who will benefit from money going to Ms. McGrath) creates a bias in her judgment and that she has not proceeded with due care and attention.

[12] The Petitioners suggest that the Mayor is disqualified from office on Council pursuant to s. 110 of the *Community Charter* because she has contravened s. 101 which is entitled “restrictions on participation if in conflict”. Section 101 outlines the restrictions on participation of a council member where that council member has a pecuniary interest (direct or indirect) in a matter. It provides that the council member must not attend any meetings when the matter is under consideration, and must not vote or attempt to influence voting on a question in respect of that matter. Section 101(3) specifies that a person who contravenes s. 101 is disqualified from holding office under s. 110, unless the contravention was done inadvertently or because of an error in judgment made in good faith. Section 104 provides an exemption from the provisions in ss. 100 to 103 in certain circumstances. Those circumstances include the following: where the pecuniary interest of the member is a pecuniary interest in common with the electors of the municipality generally or where the

pecuniary interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the member in relation to the matter.

[13] Section 110(2) provides that if a council member is disqualified, he or she is disqualified until the next general local election. Section 111 permits an application to Court by 10 or more electors for a declaration of disqualification.

[14] Although s. 100(2) requires a council member to disclose conflicts involving a pecuniary interest or another interest that constitutes a conflict of interest, the restrictions on participation described in s. 101 only apply where the conflict involves a pecuniary interest.

[15] Accordingly, the Mayor can only be disqualified because of a conflict of interest if she held a direct or indirect pecuniary interest in the decision to accept or reject the Bounce Hard's proposal. The Petitioners appear to allege an indirect (rather than direct) pecuniary interest -- i.e. the Mayor's concern for her granddaughter's well-being.

[16] In *Godfrey v. Bird*, 2005 BCSC 626, Mr. Justice Burnyeat concluded that a councillor should be disqualified from office on the basis that he participated in discussion regarding, and voted on, zoning amendment applications in which he held an indirect pecuniary interest. The owner of a piece of property applied to the council for a zoning amendment; the relationship between that owner and the council member in question created a reasonable apprehension of bias on the part of the council member that he might vote for reasons other than in the best interests of the district. Burnyeat J. thoroughly reviewed cases on what constitutes a "direct or indirect pecuniary interest" (paras. 98-120), and concluded as follows:

[121] If electors are to continue to have confidence in the electoral process and the integrity of those who discharge public duties, then councillors such as Mr. Bird must undertake an even-handed and independent consideration of the matters before Council unaffected by a direct or indirect pecuniary interest. Here, I conclude that Mr. Bird had a pecuniary interest, albeit indirect, in the Application which related to a property owned by his good friend, his business partner, his some-time lender, and his principal in a number of purchases and sales of properties on Vancouver Island from which Mr. Bird as an agent for his principal earned substantial commissions and

from which Mr. Schayes from time to time received favourable treatment relating to the commissions paid.

[Emphasis added.]

[17] Mr. Justice Shaw considered the question of what constitutes a “direct or indirect pecuniary interest” in *Watson v. Burnaby (City)* (1994), 22 M.P.L.R. (2d) 136 (B.C.S.C.). (That case dealt with the *Municipal Act* rather than the *Community Charter*). Shaw J. rejected the petitioner’s argument that because the council member in question was a Mason, he held a pecuniary interest in City’s resolution to approve a historical society’s application to construct a replica of a historical Masonic Lodge. Shaw J. held that the council member was not in a conflict of interest, and was therefore not required to abstain from voting on the resolution. He stated at para 56:

The replica building as part of the Burnaby Village Museum will be for the benefit of all residents of Burnaby. There are no personal ends to be gained by Councillor Young over and above the benefits to his fellow citizens in Burnaby.

[18] The Court also noted, at para. 50, that the non-pecuniary interest required to warrant disqualification from voting must be “a substantial interest”. Any interest of remote or little consequence would not suffice.

[19] In *Fairbrass v. Hansma*, 2009 BCSC 878, aff’d 2010 BCCA 319, Mr. Justice Rogers considered whether the mayor of Spallumcheen should be disqualified from office because he participated in meetings and voted on a bylaw in which it was alleged he had a pecuniary interest. The bylaw would have permitted rezoning of certain parcels of land, which would then allow the owners of those parcels to apply to subdivide. The mayor held one such parcel which was too small to subdivide, but his two sons each held parcels which were large enough to subdivide. Despite the bylaw, owners of such parcels would still have to apply to rezone their lands and then apply to subdivide. Rogers J. outlined the steps in his analysis to determine whether the mayor should be disqualified:

[16] The *Community Charter* provides a code for the determination of conflicts of interest that will lead to disqualification from office. That code is set out in sections 101, 104, and 110.

[17] The first task in assessing whether an official must be removed from office is to determine whether the official had a conflict of interest. Section 101 of the *Act* stipulates that a qualifying conflict of interest arises from a direct or indirect pecuniary interest.

[18] Next, the court must be satisfied that despite the conflict, the official offended s. 101 (2) (a)-(d) by remaining or attending at any part of a meeting during which the matter was under consideration; participating in any discussion of the matter at such a meeting; voting on a question in respect of the matter at such a meeting; or attempting in any way before, during or after such a meeting, to influence the voting on any question in respect of the matter.

[19] The next step in the process shifts the onus onto the official. Here, according to s. 101(3), the official must satisfy the court that he contravened the *Act* inadvertently or because of an error in judgment made in good faith.

[20] Assuming that the official is guilty of a conflict on all counts so far, the court must then look to s. 104 to determine if he may be excused. In the present case, two circumstances contemplated by s. 104 might afford relief here. They are that the pecuniary interest is in common with the electors of the municipality generally, or that the pecuniary interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the member in relation to the matter.

[21] If the court concludes that a conflict existed, that the official participated in a prohibited discussion of the issue, and may not be excused under either s. 101(3) or s. 104, then s. 110 of the *Act* requires the court to disqualify the official from office for the specified period of time.

[20] Having concluded that the mayor held no direct pecuniary interest, Rogers J. then considered whether he held an indirect pecuniary interest. He reviewed the case law thoroughly (paras. 29-44), and concluded as follows:

[43] ...I do not understand any of the cases upon which the petitioners rely to say that a direct or indirect pecuniary interest may be inferred out of thin air and in the absence of any evidence showing a link between the pecuniary interests of the official and the matter under discussion by his council. And there lies the flaw in the petitioners' case: they say the court should infer that the mayor has a pecuniary interest in his sons' development of their land, and that the inference may be based upon the familial relationship *simpliciter*. In essence, the petitioners argue that the court must assume that because he is their father, this mayor must be taken to desire financial advancement for his sons, and further that because of that father and son relationship, improvement of the sons' affairs will necessarily equate to an improvement of the mayor's estate.

[44] In my view, the law has not yet come so far as to permit such inferences to be drawn, at least not without there being some evidence to support them. None of the authorities upon which the petitioners rely go that far – they all contain at least some evidence showing a link between the pecuniary interests of the official and the pecuniary interests of the party whose affairs were affected by the matter under discussion. So in *Moll*, for example, the councillor actually deposited the police’s rent cheques to his own account; his interest in the lease was clear. So, too, in *Wynja* the Board members’ own remuneration scheme was tightly linked to the contract on which they voted: they were essentially negotiating their salaries with themselves. But in the present case there is absolutely no evidence at all to link the mayor’s sons’ pecuniary interests to his own.

[Emphasis added.]

[21] In my opinion, the facts in *Fairbrass* are on all fours with the facts in the present case. It is not enough to say that simply because the Mayor’s granddaughter is the daughter of the woman who runs Bounce Hard (an even more distant familial link than was present in *Fairbrass*) that the Mayor held an indirect pecuniary interest in the outcome of the vote on Bounce Hard’s proposal to the Village. One hopes that every grandmother would want the best for her granddaughter, but that relationship alone cannot constitute bias which would disqualify her from voting in favour of a contract that happens to be proposed by the mother of her granddaughter. There are no facts that suggest an indirect financial benefit to the Mayor in voting in favour of the proposal.

[22] In any event, even if the Mayor did hold an indirect pecuniary interest in the matter, her contravention would be properly characterized as an error in judgment made in good faith (per s. 101(3)). The Mayor was forthright with the other council members about her connection to Bounce Hard at the outset of discussions. Clearly, the Mayor disclosed her “connection” to Bounce Hard for council members to discuss in case there was any concern that she may be in a conflict of interest. Her awareness of the possibility of a perception of a conflict, and her disclosure of the relevant facts, indicates that she was acting in good faith -- she believed that she was not in a conflict of interest but wanted to present the information for other council members to consider.

[23] Further, on the facts of this case, ss. 104(a) and (d) would be applicable. Any pecuniary interest of the Mayor is held in common with the electors of Tahsis. The Village will generate revenue if the Festival is profitable. Any potential indirect pecuniary interest the Mayor could have had is so remote that it could not reasonably be perceived to have influenced her judgment.

[24] In conclusion, the Mayor did not hold a direct or indirect pecuniary interest in the Village's Contract with Bounce Hard. She was not in any conflict of interest that would require her disqualification from office.

2. Should the declarations sought under s. 24 of the *Community Charter* be granted?

[25] The Petitioners seek a declaration under s. 24 that the two councillors who voted with the Mayor are in breach of their duty of office for failing to do due process and review all facts and figures prior to making a decision. They also seek a declaration that the two councillors were in a conflict of interest by entering into a contract without due notice to the public, thereby voiding the contract. Section 24 does not deal with conflict of interest issues. In any event, there is not a shred of evidence to suggest that Councillors Davis and Cameron have a conflict of interest.

[26] Section 24 deals solely with the issue of the requirement for notice in certain circumstances. It does not set out any requirement that a council must do due process and review all facts and figures prior to making a decision.

[27] Section 24 requires that if a council intends to provide certain kinds of assistance to a person or organization, it must first give public notice. The content of "public notice" is outlined in s. 94. Basically, notice must be posted in public notice posting places, published in a newspaper with at least weekly distribution in the area affected for two consecutive weeks. Section 24(1) outlines what constitutes "assistance" of which the council must give public notice:

- (a) disposing of land or improvements, or any interest or right in or with respect to them, for less than market value;
- (b) lending money;

- (c) guaranteeing repayment of borrowing or providing security for borrowing;
- (d) assistance under a partnering agreement.

[28] Section 24(2) requires that notice of any of these kinds of assistance must be published prior to its provision, must identify the intended recipient, and describe the nature, term and extent of the proposed assistance.

[29] The Petitioners allege that public notice was required because the Village provided assistance under a partnering agreement.

[30] Counsel for the Village agrees that the Contract is a partnering agreement authorized by s. 21 and concedes that the fact the Village paid an invoice for graphic design services could be considered “assistance.”

[31] Section 24 does not require notice to the public of a council’s intention to enter into a partnering agreement. It requires that notice be given of any assistance provided under a partnering agreement. As I indicate below, I do not agree with counsel that the Contract was a partnering agreement but, in any event, there is no authority in the *Community Charter* to nullify a vote or impose a penalty because public notice was not given.

3. Is the Contract a partnering agreement?

[32] A “partnering agreement” is defined in s. 5 of the Schedule to the *Community Charter* as follows:

“partnering agreement” means an agreement between a municipality and a person or public authority under which the person or public authority agrees to provide a service on behalf of the municipality, other than a service that is part of the general administration of the municipality.

[Emphasis added.]

[33] “Service” is defined in the Schedule as follows:

“service” means, in relation to a municipality, an activity, work or facility undertaken or provided by or on behalf of the municipality.

[34] In my opinion, although putting on a concert qualifies as an “activity”, it cannot be considered “providing a service on behalf of the municipality.” A person does something “on behalf of” another, when he or she does the thing in the interest of, or as a representative of, the other person. Bounce Hard is not acting on behalf of the Village. Bounce Hard is promoting the Festival because it wants to earn profits and the Village also hopes to earn profits and promote Tahsis as a tourism destination. Both parties want the Festival to be a success and it cannot be said that Bounce Hard is providing a service on behalf of Tahsis.

4. The Petitioners’ other concerns

[35] The Petitioners complain that Bounce Hard promoted the Festival event on the website on April 29, before the May 3 Council meeting. I accept the Mayor’s evidence that she was unaware of that fact and not consulted by Bounce Hard beforehand. In any event, that posting is not relevant to any of the legal issues.

[36] The Petitioners also complain that the Village has not published a Festival Budget. Indeed, the Village filled a response to a *Freedom of Information* request on June 28 to that effect because it has not been finalized. That fact has no relevance to the legal issues raised in the Petition.

[37] Similarly, the Court has no jurisdiction to consider the Petitioners’ concerns about security, safety, hygiene, insurance issues, and the like.

Conclusion

[38] There is no basis for the declarations sought by the Petitioners. It follows that there is no longer any question to be tried and the injunctive relief sought is also dismissed.

[39] Pursuant to s. 111(6) I declare that Mayor Dahling, Councillor Davis and Councillor Cameron are qualified to hold office.

[40] The Petition is dismissed with costs.

“M.J. Allan J.”

The Honourable Madam Justice Allan