No. S1914167
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMMUNITY CHARTER*, S.B.C. 2003, C. 26

BETWEEN:

JOHN ALLAN, PENNY LYNNE ALLAN, JANICE LORRAINE BRADDELL, JOHN FULLERTON, JULIE FULLERTON, GRIT HIGH, ALEXANDER GRANT SCHIERMAN, NORA ELIZABETH SCHIERMAN, GARY DAVID SAWATSKY and LINDA ELIZABETH TEMPLE

PETITIONERS

AND:

STANLEY JACK FROESE, BLAIR GARNET WHITMARSH, ROBERT LONG and ANGELA DAWN QUAALE

RESPONDENTS

WRITTEN SUBMISSIONS OF THE PETITIONERS

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INDEX

PART I. INTRODUCTION AND OVERVIEW 1

PART II. FACTS 2

A. The parties 2

B. The campaign contributions 3

i). *The developers* 4

C. The timing of the contributions relative to the development applications before Council 6

i). *The Williams Neighbourhood Plan* 7

ii). *The Beedie Group* 9

iii). *Vesta* 11

iv). *Lanstone* 13

v). *Infinity* 13

vi). *Polygon* 14

vii). *Essence* 14

D. The legal opinion 14

E. The respondents' evidence 15

Part III. ISSUES 15

Part IV. ARGUMENT 16

A. The relevant legislative provisions 16

B. The interpretation of the conflict of interest provisions and the applicable legal test 21

C. The jurisprudence on campaign contributions 24

D. The law applied to the facts of this case 29

i) *Evidence of an agreement or promise to vote is not required.* 29

ii). *The later disclosure of campaign contributions does not absolve the respondents* 30

iii). *Democratic principles support a finding of conflict of interest in this case* 31

iv). *The contraventions were not inadvertent* 32

v. *No error of judgment in good faith* 33

vi). *Remedy* 34

vii). *Conclusion* 35

E. Costs 35

Part V. ORDERS SOUGHT 36

List of Authorities 37

WRITTEN SUBMISSIONS OF THE PETITIONERS

PART I. INTRODUCTION AND OVERVIEW

1. The petitioners seek declarations that the respondents, three sitting members of the Council of the Township of Langley (the "Township") – including the mayor – and a former city councillor, failed to disclose pecuniary conflicts of interest contrary to the *Community Charter*, S.B.C., 2003, c. 26 ("*Community Charter*"). As a result of that failure, the petitioners say that those respondents who are currently sitting members of Council must be disqualified from their positions in office.

2. This case is based on unprecedented (and largely undisputed) facts. In the lead-up to the 2018 municipal election, the respondents received numerous campaign contributions from multiple property developers while those same developers had applications before Council. In some cases, these contributions were received within days of the application coming before Council. Despite having received a legal opinion from the Township's solicitor that a conflict of interest could exist if contributions were accepted while developments were "in-stream", or if the contributions were made shortly after a development application was made, none of the respondents disclosed the contributions and sought legal advice, let alone made a declaration that they were in a conflict of interest. The respondents went on to vote in favour of each of the development applications.

3. To the petitioners' knowledge, this pattern of campaign contributions, with such a close temporal proximity between the contributions and votes on applications, has never come before the courts. It in turn raises an important legal issue with widespread implications for the integrity of, and public confidence in, municipal governance in this province. To date, the jurisprudence on conflicts of interest arising out of campaign contributions has held that a contribution, and a later vote in favour of an application, does not constitute a conflict of interest without "something more". The petitioners say that, in this case, the "something more" is the pattern and temporal proximity of the contributions and voting behaviour, which would lead a reasonably informed person to conclude that the contributions <u>might</u> have influenced the exercise of the respondents' duty as Council members.

4. For their part, the respondents say that there is a much higher legal threshold, and that there must be explicit evidence that the respondents agreed to "deliver a vote" or a *quid pro quo* before a conflict of interest can be made out. The petitioners say that such a high threshold would be virtually impossible to meet from an evidentiary perspective, and is in any event entirely inconsistent with the broad and liberal interpretation to be applied to the conflict of interest provisions in the *Community Charter*. The purpose of the provisions – to maintain public confidence that elected officials do not have divided loyalties – must inform the legal threshold that is to be applied by this Court. Public confidence can be undermined in circumstances short of an explicit "agreement to vote" or *quid pro quo*. It is also not restored by virtue of the fact that disclosure of the contributions is later required under the *Local Elections Campaign Financing Act*, S.B.C. 2014, c. 18. It is the lack of disclosure, and the failure to seek legal advice, at the time of the votes that undermines public confidence.

5. In this case, the circumstances – the timing of the contributions relative to votes, the sheer number of contributions, the repeated pattern of behaviour, the ignoring of legal advice, and the perceived circumvention of legislative restrictions on campaign contributions – are sufficient to give rise to a conflict of interest. If the respondents are correct, and there is no conflict of interest in this case, the democratic principle of transparency will be substantially undermined given that the voting public would have no opportunity to even know about the contributions, and the possibility of divided loyalties, at the time of the votes.

PART II. FACTS

A. The parties

6. The petitioners are ten electors of the Township. They filed this petition pursuant to s. 111 of the *Community Charter* on December 13, 2019, after learning about the issue from a media report on October 31, 2019.[1]

7. The respondent Stanley Jack Froese ("Mayor Froese") has been the mayor of the Township since 2011, and currently holds that office.[2]

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[1] Affidavit #1 of John Allan ("Allan #1"), made December 12, 2019, paras. 3-4, Exhibit A, pp. 2-6. The nine other petitioners have also all filed affidavits stating as such.

[2] Affidavit #1 of Stanley Jack Froese, made February 6, 2020 ("Froese #1"), para. 2

8. The respondent Blair Garnet Whitmarsh ("Councillor Whitmarsh") is currently a Councillor of the Township, and has held that position since 2014.[3]

9. The respondent Robert Long ("Councillor Long") is currently a Councillor of the Township, and has held that position since 1999.[4]

10. The respondent Angela Dawn Quaale ("Former Councillor Quaale") served as Councillor of the Township from 2014 to 2018. While she ran for office in 2018, she was not re-elected.[5]

11. The Township is not a named respondent in this Petition, but was served pursuant to s. 111(5)(b) of the *Community Charter*. It has filed a Response to Petition and affidavit material in support of the respondents.

B. The campaign contributions

12. As noted at the outset, this case does not involve a single contribution from one developer and a subsequent development application by that developer. Rather, it involves numerous contributions by persons connected to a number of developers made while their development applications were before Council in the lead-up to the municipal election held on October 20, 2018.

13. In short, Mayor Froese received at least $12,600,[6] Councillor Whitmarsh received at least $8,900,[7] Councillor Long received at least $8,000,[8] and Former Councillor Quaale received at least $7,700,[9] from persons who were owners, directors, officers, executives and/or employees of the various property development companies.

14. These are significant amounts, particularly in light of the recent amendments to the *Local Elections Campaign Financing Act* that had come into effect.[10] Those amendments capped the

[3] Affidavit #1 of Blair Garnet Whitmarsh, made February 7, 2020 ("Whitmarsh #1"), para. 2
[4] Affidavit #1 of Robert Long, made February 6, 2020 ("Long #1"), para. 2
[5] Affidavit #1 of Angela Dawn Quaale, made February 7, 2020 ("Quaale #1"), paras. 2-3
[6] Representing 26.86% of contributions received (total received was $46,900, see Allan #1, Exhibit B, p. 19)
[7] Representing 25.68% of contributions received (total received was $34,650, see Allan #1, Exhibit, C, p. 42)
[8] Representing 20.29% of contributions received (total received was $39,413.78, see Allan #1, Exhibit D, p. 59)
[9] Representing 23.48% of contributions received (total received was $32,800, See Allan #1, Exhibit E, p. 71)
[10] *Local Elections Campaign Financing Amendment Act, 2017* (Bill 15 – 2017)

maximum amount an individual could contribute to a campaign to $1,200.[11] Further, corporations were prohibited from making campaign contributions.[12]

i) *The developers*

15. In total, at least 19 persons connected with seven property development companies made campaign contributions to the respondents. The following is a summary of the individual contributors and the development companies they are associated with:

1) "The Mitchell Group" (Mitchell Group Investments Inc.)

- Ken Mitchell (Director and Officer)
- Diane Mitchell (Director and Officer)
- Jacilyn O'Shea (Director of Development)
- Ryan O'Shea (Director of Residential development)[13]

2) "The Beedie Group" (The Beedie Group Developments Ltd., BDC (Langley Property) Ltd., 161884 Canada Inc.)

- Ryan Beedie (President, sole Director and Officer)
- Rob Fiorvento (Managing Partner)
- Todd Yuen (President, Industrial)
- Jason Tonin (Vice President, Land Development)[14]

3) "Vesta" (Vesta Properties Ltd.)

- Kent Sillars (sole Director and Officer)
- Dennis Wiemken (Senior Vice President)
- Braedon Sillars (Development Coordinator)
- Julie Sillars (owner)

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[11] *Local Elections Campaign Financing Act*, s. 30.01
[12] *Local Elections Campaign Financing Act*, s. 26, see the definition of "eligible individual"
[13] Allan #1, paras. 9-11, Exhibits F, G
[14] Allan #1, paras. 23-28, Exhibits M, N, O, P

- Marlene Best (Senior Development Manager)[15]

4) "Lanstone" (Lanstone Homes (Murrayville) Ltd.)

- Lanson Foster (Director and sole Officer)
- John Tilstra (Director)[16]

5) "Infinity" (Infinity Properties Ltd.)

- Timothy Bontkes (sole Director and Officer)[17]

6) "Polygon" (Polygon Homes Ltd., Polygon Union Park Homes Ltd.)

- Scott Baldwin (Officer, Senior Vice President, Development)[18]

7) "Essence" (Essence Properties Inc.)

- Kevin Dhaliwal (Director)
- Seeta Dhaliwal (Director)[19]

16. Persons connected to The Mitchell Group contributed a total of $10,200 to Mayor Froese, Councillor Whitmarsh, and Former Councillor Quaale.[20]

17. Persons connected to The Beedie Group contributed a total of $10,800 to all four respondents.[21]

18. Persons connected to Vesta contributed a total of $8,800 to all four respondents.[22]

19. Persons connected to Lanstone contributed a total of $3,200 to Mayor Froese, Councillor Whitmarsh, and Former Councillor Quaale.[23]

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[15] Allan #1, paras. 37-42, Exhibits X, Y, Z, AA, BB
[16] Allan #1, paras. 53-54, Exhibit LL
[17] Allan #1, paras. 63-64, Exhibit OO
[18] Allan #1, paras. 71-72, Exhibits QQ, RR, SS
[19] Allan #1, paras. 77-78, Exhibit UU
[20] Allan #1, paras. 12-15
[21] Allan #1, paras. 29-33
[22] Allan #1, paras. 43-47
[23] Allan #1, paras. 55-58

20. Persons connected to Infinity contributed a total of $2,200 to Mayor Froese, Councillor Whitmarsh, and Former Councillor Quaale.[24]

21. Persons connected to Polygon contributed a total of $1,200 to Mayor Froese.[25]

22. Persons connected to Essence contributed a total of $2,400 to Councillor Long.[26]

C. The timing of the contributions relative to the development applications before Council

23. At the same time that these campaign contributions were made, all of the developers listed above had matters before Council in which they were interested parties. Most of these matters were rezoning applications or development permit applications. The following is a list of the matters before Council at the material time:

1) The Mitchell Group: The Williams Neighbourhood Plan.[27]

2) The Beedie Group: Four development permit applications.[28]

3) Vesta: Five rezoning applications, and two different contracts with the Township.[29]

4) Lanstone: One rezoning/heritage alteration permit application.[30]

5) Infinity: One rezoning/development permit application.[31]

6) Polygon: One rezoning/development permit application.[32]

7) Essence: One rezoning/development permit application.[33]

24. The timing of the contributions in relation to these various application is set out below.

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[24] Allan #1, paras. 65-68
[25] Allan #1, para. 73
[26] Allan #1, para. 79
[27] Allan #1, para. 13
[28] Allan #1, para. 23
[29] Allan #1, paras. 28-29
[30] Allan #1, para. 34
[31] Allan #1, para. 39
[32] Allan #1, para. 44
[33] Allan #1, para. 49

i) *The Williams Neighbourhood Plan*

25. Unlike all the other applications where the connection between the applications before Council and the developers is clear (in that the developers are the proponents), the Williams Neighbourhood Plan merits some additional explanation. In this case, the Mitchell Group was not the proponent; rather, like all neighbourhood plans, the process is initiated by the municipality.[34] However, the Mitchell Group has substantial interests over the area subject to the Williams Neighbourhood Plan. This includes the development of an 80-acre business park and retail complex.[35]

26. The Williams Neighbourhood Plan encompasses 110 hectares in the northeast part of Willoughby, and forms part of the Willoughby Neighbourhood Plan. The Williams Neighbourhood Plan proposed that extensive areas be designated for commercial and industrial development.[36] The Mitchell Group stood to financially gain from that development. The planning process was initiated in September 2015 and went through a number of public consultations before being put to Council.[37]

27. On April 9, 2018, the bylaw amendments that were required to implement the Williams Neighbourhood Plan were put before Council and passed first and second reading. Mayor Froese, Councillor Whitmarsh, and Former Councillor Quaale (the respondents who would end up receiving contributions from the Mitchell Group) were present and voted in favour of the Plan and opposed the referral of the Plan so that Council could receive additional presentations.[38]

28. On April 23, 2018, the Plan went through public hearing before Council. Ken Mitchell was the first speaker. The minutes note the following:

> K. Mitchell, Mitchell Group, Developer of the Williams Business Park and Retail Complex, was in attendance and stated that they want Williams to be a self-contained, walkable community with a neighbourhood retail centre to meet community needs. The Coriolis Consulting Corp. report confirms that four square feet of grocery and 20 square feet of commercial per person are industry standard

[34] Affidavit #1 of Ramin Seifi, made February 7, 2020 ("Seifi #1"), para. 5
[35] Affidavit #1, para. 17, Exhibit I
[36] Allan #1, para. 16
[37] Seifi #1, paras. 5-7
[38] Allan #1, para. 16, Exhibit H, pp. 83, 85-87

> metrics. The proposed Commercial Project will have a neighbourhood retail complex up to 150,000 square feet with a grocery store of 40,000 feet.[39]

29. On May 7, 2018, the Plan was put before Council for third reading. At third reading, Councillor Whitmarsh moved to make an amendment to increase the total area for grocery use to 40,000 square feet. The amendment was seconded by Former Councillor Quaale. Mayor Froese also voted in favour, and 40,000 square feet was ultimately approved.[40]

30. Less than 10 days later, on May 16, 2018, Councillor Whitmarsh received $1,200 from Ken Mitchell, $1,200 from Diane Mitchell, and $600 from Ryan O'Shea.[41]

31. On May 27, Mayor Froese received $1,200 from Ken Mitchell and $1,200 from Diane Mitchell.[42]

32. On June 18, Former Councillor Quaale received $1,200 from Ken Mitchell, $1,200 from Diane Mitchell, and $600 from Ryan O'Shea.[43]

33. On June 22, Mayor Froese received an additional $600 from Jacilyn O'Shea and $600 from Ryan O'Shea.[44]

34. On October 1, 2018, the Plan was before Council for final adoption. At that meeting, Mayor Froese, Councillor Whitmarsh and Former Councillor Quaale voted against an amendment to incorporate more park space. That amendment was defeated 5-4.[45]

35. In summary, Mayor Froese received $3,600, and Councillor Whitmarsh and Former Councillor Quaale each received $3,000 from persons connected to the Mitchell Group, when the Williams Neighbourhood Plan was between third reading and adoption. In Councillor Whitmarsh's case, he received his contributions just 9 days after having moved to amend the Plan to increase the area for grocery use to 40,000 square feet, which matched exactly the proposal that

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[39] Allan #1, para. 18, Exhibit I, pp. 99-100. Interestingly, the next speaker is listed at "P O'Shea". It is unknown whether this speaker is connected with the O'Shea's that work at the Mitchell Group.
[40] Allan #1, para. 19, Exhibit K, p. 114. Technically the motion was to make an amendment to an amendment.
[41] Allan #1, para. 13
[42] Allan #1, para. 12(a)
[43] Allan #1, para. 14
[44] Allan #1, para. 12(b)
[45] Allan #1, para. 20, Exhibit L, p. 144

Mr. Mitchell advocated for at the public hearing in April. The minutes from the October 1, 2018 meeting showed that none of these respondents disclosed a conflict of interest or removed themselves from the meetings.[46]

36. The facts surrounding the Williams Neighbourhood Plan is just one example of the many instances where contributions were received from developers while those developers had matters before Council. The petitioners' case does not rest on this one example alone, and indeed there are other instances where there exists an even closer temporal link between the campaign contributions and the developer's application being considered by Council. Some further examples are discussed for each of the developers below. For each application in question, all of the respondents voted in a manner which benefited the developer.

ii) *The Beedie Group*

37. On June 30, 2018, Mayor Froese received $1,200 from Robert Fiorvento, the Beedie Group's Managing Partner. This was only nine days before a development permit application for a 306.5 m^2 commercial building would be before Council. [47]

38. On July 4, 2018, Mayor Froese received another $1,200 from Jason Tonin, the Beedie Group's Vice President of Land Development.[48]

39. On July 9, 2018, Mayor Froese voted in favour of the development permit application for the 306.5 m^2 commercial building for two restaurants ("Beedie Group's Restaurant Application").[49]

40. One day later, on July 10, 2018, Mayor Froese received $1,200 from Ryan Beedie, the Beedie Group's president.[50]

41. On July 15, 2018, Councillor Whitmarsh received $2,400 from persons connected to the Beedie Group.[51] This was just six days after he voted in favour of the Beedie Group's Restaurant

[46] Allan #1, paras. 21-22
[47] Allan #1, paras. 29(a), 34(a)
[48] Allan #1, para. 29(b)
[49] Allan #1, para. 34(a), Exhibit Q, p. 174, Exhibit R, pp. 187-188
[50] Allan #1, paras. 29(c), 35(a)
[51] Allan #1, para. 30

Application,[52] and just eight days before he voted in favour of a development permit application for an 8,451 m^2 industrial building in the Gloucester Industrial Park ("Beedie Group's Gloucester Application") on July 23, 2018.[53] He also voted in favour of other Beedie Group applications on September 17, 2018 and October 1, 2018.[54]

42. By the time the Beedie Group's Gloucester Application was before Council, Mayor Froese had already received $3,600 in the last several weeks from persons connected to the Beedie Group.[55]

43. On July 25, 2018, Councillor Long received $2,400 from persons connected to the Beedie Group.[56] This was just two days after the Beedie Group's Gloucester Application was approved,[57] 16 days after the development permit for the Beedie Group's Restaurant Application was approved,[58] and about two months before Councillor Long voted in favour of another two of the Beedie Group's developments on September 17, 2018 and October 1, 2018.[59]

44. On September 17, 2018, Council considered another Beedie Group development permit application for a 4,531 m^2 industrial building, that was to be operated by Inno Bakery, also in the Gloucester Industrial Park ("Beedie Group's First Bakery Application").[60] Mayor Froese, Councillor Whitmarsh and Councillor Long voted in favour, and did not disclose the fact that they had received substantial campaign contributions from persons connected to the Beedie Group.[61]

45. On September 25, 2018, Former Councillor Quaale received $1,200 from Todd Yuen of the Beedie Group.[62] This was only five days before Council would consider a development permit application for a 4,651 m^2 industrial building adjacent to the property subject to the Beedie Group's Bakery Application, which was also to be operated by Inno Bakery ("Beedie Group's

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[52] Allan #1, para. 34(a)
[53] Allan #1, para. 34(b), 35(c), Exhibit S, p. 206
[54] Allan #1, paras. 34(c), (d)
[55] Allan #1, paras. 29(b), 35(b)
[56] Allan #1, para. 31
[57] Allan #1, paras. 34(b), 35(d)
[58] Allan #1, para. 34(a)
[59] Allan #1, paras. 34(c), (d)
[60] Allan #1, Exhibit U, p. 241
[61] Allan #1, para. 34(c), Exhibit V, pp. 264-265
[62] Allan #1, para. 32

Second Bakery Application"),[63] and only eight days after the Beedie Group's First Bakery Application had passed.[64]

46. On October 9, 2018, eight days after Mayor Froese voted in favour of the Beedie Group's Second Bakery Application, he received $1,200 from Todd Yuen, the Beedie Group's President, Industrial.[65]

iii) *Vesta*

47. On May 16, 2018, Councillor Whitmarsh received $1,800 from persons connected to Vesta.[66] This was only nine days after Vesta's development of 73 single family lots, 39 rowhouse lots, 18 semi detached lots, and 122 townhouse units ("Vesta's First Latimer Development Application"), was approved.[67] This was also only approximately a month before two significant Vesta projects would be before Council for first reading (June 25, 2018).[68]

48. On June 18, 2018, Former Councillor Quaale received $600 from Marlene Best, Vesta's then Senior Development Manager.[69] This was only seven days before two significant Vesta projects would be before Council for first reading (June 25, 2018), one for 56 townhomes and 186 apartments ("Vesta's Second Latimer Development Application"),[70] and the other for 449 apartments, 3,398 m^2 of commercial space and 10,033 m^2 of office space ("Vesta's Carvolth Development Application").[71] It was also less than a month from when the two Vesta contracts would be considered by Council on July 9, 2018.[72] The contribution was made just over a month subsequent to when the bylaw amendments for Vesta's First Latimer Development Application were adopted (May 7, 2018).[73]

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[63] Allan #1, paras. 34(d), 35(e); Seifi #1, Exhibit B, p. 141. Note that Exhibit W of Allan #1 erroneously duplicates Exhibit V. The Report to Mayor and Council for the Beedie Group's Second Bakery Application can instead be found at Exhibit B of Seifi #1
[64] Allan #1, para. 34(c)
[65] Allan #1, paras. 29(d), 34(d)
[66] Allan #1, para. 44(a)
[67] Allan #1, para. 48(e), see Seifi #1, Exhibit G
[68] Allan #1, paras. 48(b), (c)
[69] Allan #1, para. 46(a)
[70] See Seifi #1, Exhibit D
[71] Allan #1, paras. 48(b), (c). See Seifi #1, Exhibit E
[72] Allan #1, paras. 49-50
[73] Allan #1, para. 48(e)

49. On June 26, 2018, Mayor Froese received $1,000 from Kent Sillars of Vesta. This was only one day after Vesta's Second Latimer Development Application and Vesta's Carvolth Development Application passed first and second reading, and less than a month before both applications passed third reading.[74]

50. This contribution from Mr. Sillars to Mayor Froese was also two weeks before Council considered and approved a Development Cost Charges Front-ending Agreement between the Township and Vesta. At that same meeting on July 9, 2018, Council also passed an amendment to another bylaw to allow for the execution of a Development Works Agreement between the Township and Vesta.[75] Further, this contribution was also received less than a month before a 792 multi-family unit and hotel development of Vesta's was considered before Council on July 23, 2018 ("Vesta's Carvolth High-Rise Development Application").[76] The contribution came less than two months after Vesta's First Latimer Development Application was adopted,[77] and approximately two and half months after a rezoning application for 153 Vesta townhomes passed third reading on April 9, 2018.[78]

51. On September 11, 2018, Councillor Long received $3,200 from persons connected to Vesta.[79] This was only 20 days before third reading of Vesta's Carvolth High-Rise Development Application.[80] This was also less than two months after Vesta's Second Latimer Development Application and Vesta's Carvolth Development Application had passed third reading but were still pending final adoption.[81]

52. On September 18, 2018, Councillor Whitmarsh also received another $500 from Braedon Sillars, Vesta's Development Coordinator.[82] This was less than two weeks before Vesta's Carvolth High-Rise Development Application was brought before Council for third reading.[83]

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[74] Allan #1, paras. 43, 4(b), (c)
[75] Allan #1, paras. 49-50
[76] Allan #1, para. 48(d). See Seifi #1, Exhibit F
[77] Allan #1, para. 48(e)
[78] Allan #1, para. 48(a). See Seifi #1, Exhibit C
[79] Allan #1, para. 45
[80] Allan #1, para. 48(d), 51(d)
[81] Allan #1, para. 48(b), (c)
[82] Allan #1, para. 44(b)
[83] Allan #1, para. 48(d)

53. On September 26, 2018, Former Councillor Quaale also received an additional $1,700 from persons connected to Vesta.[84] This was just five days before Vesta's Carvolth High-Rise Development Application was before Council for third reading.[85]

iv) *Lanstone*

54. On May 16, 2018, Councillor Whitmarsh received $1,000 from Lanson Foster of Lanstone. This was less than a month before Lanstone would have a 54 unit residential development ("Lanstone's Application") before Council for first reading on June 11, 2018.[86]

55. On June 18, 2018, Former Councillor Quaale received $1,000 from Lanson Foster of Lanstone. This was just seven days after Lanstone's Application passed first and second reading and less than a month before it would pass third reading on July 9, 2018.[87]

56. On September 12, 2018, Mayor Froese received $1,200 from John Tilstra of Lanstone. This was approximately two months after Lanstone's Application passed third reading.[88]

v) *Infinity*

57. On May 16, 2018, Councillor Whitmarsh received $500 from Timothy Bontkes of Infinity. This was approximately two months after Infinity's 51 townhouse development ("Infinity's Application") passed third reading on March 5, 2018, and two months before it would be adopted on July 23, 2018.[89]

58. On June 18, 2018, Former Councillor Quaale received $500 from Timothy Bontkes. This contribution was made approximately one month before Infinity's Application was adopted on July 23, 2018.[90]

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[84] Allan #1, para. 46(b)
[85] Allan #1, para. 48(e)
[86] Allan #1, paras. 56, 59. See Seifi #1, Exhibit J
[87] Allan #1, paras. 57, 59
[88] Allan #1, paras. 55, 59
[89] Allan #1, paras. 66, 69. See Seifi #1, Exhibit K
[90] Allan #1, paras. 67, 69

59. On June 27, 2018, Mayor Froese received $1,200 from Timothy Bontkes. This was approximately three and a half months after Infinity's Application passed third reading on March 5, 2018, and less than a month before it was adopted on July 23, 2018.[91]

vi) *Polygon*

60. On June 19, 2018, Mayor Froese received $1,200 from Scott Baldwin of Polygon. This was just six days before Polygon's 589 unit apartment building application came before Council for first reading on June 25, 2018.[92]

vii) *Essence*

61. On October 9, 2018, Councillor Long received $2,400 from persons connected to Essence. This was approximately two and a half months after Essence's application for a 102 townhouse unit and 75 apartment unit development application passed third reading on July 23, 2018, and two months before it would be adopted on December 10, 2018.[93]

D. The legal opinion

62. Importantly, the respondents engaged in this voting behaviour despite having received a legal opinion that doing so could constitute a conflict of interest.

63. In June 2016, the Township sought a legal opinion from Lidstone & Company as to whether campaign contributions from a developer would disqualify a council member from voting on that developer's rezoning application. The opinion was received by Council on June 13, 2016.[94] All the respondents were on Council at the time.

64. In the opinion, Don Lidstone, Q.C. advised that campaign contributions without more did not constitute a conflict of interest. In the opinion's summary, he stated the following:

> ...the campaign contribution by itself does not create a conflict of interest, even if that developer later applies for a rezoning. An exception would be if a developer

[91] Allan #1, paras. 65, 69
[92] Allan #1, paras. 73-75. See Seifi #1, Exhibit L
[93] Allan #1, paras. 79-81. See Seifi #1, Exhibit N
[94] Allan #1, Exhibit WW, p. 627

> gives a Council member a donation when the rezoning application comes before Council.[95]

65. Mr. Lidstone also concluded his opinion by stating:

> There could be a conflict if the Council member was personally or privately connected to the developer, if development was in-stream at the time of the election, or if the developer made a donation after the rezoning application was made. However, we understand that none of these apply in relation to the Brookswood rezoning applications.[96]

E. The respondents' evidence

66. For their part, the respondents do not deny that they received any of the contributions at issue in this proceeding, nor do they deny that they participated in, and voted on the various applications without making any declarations of conflict of interest. Rather, they universally say that: (a) there was never any indication from the contributors that the contributions were made with any intention or expectation of an agreement to vote a particular way; (b) none of their votes were influenced by campaign contributions; and (c) they were always motivated to vote in the best interest of the Township.[97]

67. Much of the respondents' evidence is focused on their recollection or knowledge of who made the impugned contributions, as well as their recollection of the development applications in question. As set out below, the petitioners say that, on the application of the proper legal test, the respondents' subjective recollections or motivations as to how they voted on any particular project are irrelevant.

PART III. ISSUES

68. To determine whether the conflict of interest provisions of the *Community Charter* were contravened, two key questions must be answered:

1) Were the respondents in a direct or indirect pecuniary conflict of interest?

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[95] Allan #1, Ex. WW, p. 627 [emphasis added]
[96] Allan #1, Ex. WW, p. 629 [Emphasis added]
[97] Froese #1, paras. 11-13; Whitmarsh #1, paras. 12-14; Long #1, paras. 10-12; Quaale #1, paras. 10-12

2) If so, was the conflict of interest inadvertent or did it arise from an error in judgment in good faith?

69. If the answer to the first question is yes, and the answer to the second question is no, then the declarations sought by the petitioners should be granted, and respondents who are still holding office should be disqualified.

PART IV. ARGUMENT

A. The relevant legislative provisions

70. The relevant *Community Charter* provisions provide as follows:

> **Division 6 — Conflict of Interest**
>
> **Disclosure of conflict**
>
> **100** (1) This section applies to council members in relation to
>
> (a) council meetings...
>
> (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.
>
> ***

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.

***

Disqualification from office for contravening conflict rules

108.1 A person disqualified from holding office under this Division is disqualified from holding office

(a) on a local government,...

until the next general local election.

Division 7 — Challenge of Council Member Qualification for Office

Disqualifications to which this Division applies

110 This Division applies to the following disqualifications from holding office on a council:

(a) disqualifications under the following provisions of this Act:

(i) Division 6 *[Conflict of Interest]* of this Part;...

***

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, ...

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.

***

Costs of an application

113 (1) In the case of an application under section 111 made by a group of electors, if the court declares that the person challenged is not qualified to hold office, the municipality must promptly pay the electors' costs within the meaning of the Supreme Court Civil Rules.

(2) The court may order that costs to be paid under subsection (1) may be recovered by the municipality from the person who was declared disqualified or any other person as directed by the court in the same manner as a judgment of the Supreme Court.

(3) Except as provided in subsection (1), the costs of an application are in the discretion of the court.

71. The following sections of the *Local Elections Campaign Financing Act* are also relevant:

Each candidate must have a financial agent

17 (1) A candidate must have a financial agent.

(2) A candidate may appoint an individual as financial agent in accordance with this section, but, if no financial agent is appointed, the candidate is his or her own financial agent...

***

Recording requirements for candidates and elector organizations

22 (1) The financial agent for a candidate or elector organization must record and maintain records sufficient to allow compliance with the disclosure requirements under this Act....

(2) Without limiting subsection (1), the financial agent must record the following:

(a) for each campaign contribution received by the candidate or elector organization, the information required under section 29 [campaign contribution information that must be recorded];...

***

Restrictions on making campaign contributions

26 (0.1) An organization or an individual, other than an eligible individual, must not make a campaign contribution....

***

Restrictions in relation to accepting campaign contributions

27(1)...

(1.01) A financial agent or an individual authorized under subsection (1) must not accept

(a) a campaign contribution from an organization or an individual, other than an eligible individual, or

(b) campaign contributions from an eligible individual that exceed an applicable campaign contribution limit.

(2) A financial agent or individual authorized as referred to in subsection (1) must not accept

(a) a campaign contribution for which the information required to be recorded under section 29 [campaign contribution information that must be recorded] has not been provided, or

(b) any other campaign contribution that the individual or organization has reason to believe is made in contravention of this Act or the regulations under this Act.

(3) If an individual authorized as referred to in subsection (1) becomes aware that a campaign contribution may have been made in contravention of this Act or the regulations under this Act, the individual must inform the financial agent as soon as practicable.

(4) An individual or organization that contravenes this section commits an offence.

***

Campaign contribution information that must be recorded

29 (1) Subject to subsection (2) and any applicable regulations, the financial agent for a candidate or elector organization must record the following for each campaign contribution made to the candidate or elector organization:

(a) the value of the campaign contribution;

(b) the date on which the campaign contribution was made;

(c) unless it is an anonymous campaign contribution, the full name, mailing address and, if it is different, residential address of the contributor;

(d) whether the campaign contribution is an anonymous campaign contribution;...

(f) any other information required by regulation.

(2) If section 28 [dealing with prohibited campaign contributions] applies in relation to a campaign contribution, the financial agent must maintain records of the following for each such contribution:

(a) the circumstances in which the contribution was received;

(b) to the extent possible, the information required under subsection (1) (a) to (d) of this section;

(b.1) if the contribution was made by an organization, the name of the organization;

(c) when and how the contribution was dealt with in accordance with section 28;

(d) any other information required by regulation.

(3) A financial agent who contravenes this section commits an offence.

***

Campaign contribution limits for 2017 and 2018

30.01 (1) Subject to any applicable regulations, in relation to the 2018 general local election, for each of 2017 and 2018, the campaign contribution limit is $1 200 for a candidate who is not endorsed by an elector organization in relation to an election campaign of the candidate.

(2) Subject to any applicable regulations, in relation to the 2018 general local election, for each of 2017 and 2018, the campaign contribution limit is $1 200 for any one elector organization and all the candidates endorsed by the elector organization in relation to an election campaign of the elector organization.

***

Time limits for filing disclosure statements — filing on time, late filing on payment of penalty fee, compliance deadline

47 (1) A disclosure statement must be filed

(a) within 90 days after general voting day for the election or assent voting to which it relates, or

(b) if applicable, within the period established under section 90 [late filing extensions in extraordinary circumstances],

in order to avoid a late filing penalty fee.

(2) If a disclosure statement is not filed within the applicable time period under subsection (1), it may be filed within 120 days after general voting day for the

election or assent voting on payment to the BC chief electoral officer of a late filing penalty fee of $500.

(3) For certainty, if separate disclosure statements are required under section 46 (3) [disclosure statement coverage], a late filing penalty fee applies in relation to each disclosure statement.

(4) The compliance deadline for filing a disclosure statement is the later of

(a) the late filing deadline for the disclosure statement, and

(b) if applicable, the last date for filing the disclosure statement as established by a court order for relief under section 68 [court relief powers respecting disclosure requirements].

Schedule

Definitions

"**eligible individual**" means an individual who is

(a) a resident of British Columbia, and

(b) a Canadian citizen or a permanent resident as defined in the Immigration and Refugee Protection Act (Canada);

B. The interpretation of the conflict of interest provisions and the applicable legal test

72. The B.C. Court of Appeal's decision in *Schlenker* is the most recent and leading authority on the interpretation of the *Community Charter* conflict of interest provisions.[98] In that case, the Court of Appeal overturned the chambers judge's decision that the elected officials were not in a direct or indirect pecuniary conflict of interest when they voted to award service contracts to societies of which they were directors. The Court held that the chamber judge's reasoning that the elected officials were not themselves enriched, and therefore there was no pecuniary conflict, applied too narrow an interpretation to the phrase "direct or indirect pecuniary interest". Such a narrow interpretation was said to undermine the purpose of the conflict of interest provisions.[99]

73. After noting the "modern approach" to statutory interpretation, Mr. Justice Donald, speaking for a unanimous Court, held that the conflict of interest provisions in the *Community Charter* must be given a broad and liberal interpretation consistent with its purpose,[100] which is to

[98] *Schlenker v. Torgrimson*, 2013 BCCA 9 [*Schlenker*]
[99] *Schlenker*, para. 33
[100] *Schlenker*, paras. 38-39

prevent elected officials from having divided loyalties. The Court quoted with approval from the following passage in *Re Moll and Fisher*:

> 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.[101]

74. In an earlier decision, the Court of Appeal held that these provisions are "intended to enhance and protect the integrity of local government."[102] This is consistent the reasoning of other appellate courts with respect to the objective of similar conflict of interest provisions. For example, the Alberta Court of Appeal has stated that such a provision "sustains the right of an elector to the even-handed, independent consideration of his elected representatives on questions before Council, unaffected by any influence that could potentially flow from a direct or indirect pecuniary interest".[103]

75. In *Schlenker,* the Court also emphasized that the analysis is an objective one, assessed from the perspective of a reasonable person, citing the Supreme Court of Canada's decision in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City*):

> 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,</u>

[101] *Re Moll and Fisher et al.*, 1979 CanLII 2020 (ON SC)
[102] *Fairbrass v. Hansma*, 2010 BCCA 319, para. 20
[103] *Guimond v. Sornberge*r, 1980 ABCA 216 [*Guimond ABCA*], para. 14

> 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...[104]

76. Given the conflicting fiduciary duty owed by the elected officials to their societies, and their duties as councillors to put the public interest first, the Court concluded that "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."[105] The Court held that it made "no difference that they put no money into their own pockets."[106] Rather, the Court held that "[t]he 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."[107]

77. This contextual, objective inquiry is consistent with the use of the language "indirect". This Court has interpreted the words "indirect" in ss. 100 and 101 to require the courts to "…examine all of the circumstances to determine whether, as a matter of judgment, there is a reasonable probability that [the municipal councilor] was likely to be influenced or biased in casting his votes."[108]

78. Thus, three key points emerge:

1) The conflict of interest provisions are to be interpreted broadly and liberally.

2) The purpose of the provisions is to ensure that the public has confidence that their elected officials do not have divided loyalties, and therefore it does not matter whether there is any personal gain or not.

3) The test is an objective one – whether a reasonably well-informed person would conclude that the interest ***might*** influence the exercise of the public official's duty.

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[104] *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, 1196-1197 [emphasis added in *Schlenker*]
[105] *Schlenker*, para. 41
[106] *Schlenker*, para. 49
[107] *Schlenker*, para. 50
[108] *Godfrey et al. v. Bird and District of North Saanich*, 2005 BCSC 626 [*Godfrey*], para. 124

C. The jurisprudence on campaign contributions

79. The B.C. courts have dealt with a number of campaign contribution cases to date, all of which ultimately ended in a finding that there was no conflict of interest. We explain below how those cases are readily distinguishable in light of the fact that they did not feature the pattern and temporal proximity of contributions that is present in this case.

80. The sole campaign contribution case that has reached the Court of Appeal is *King*.[109] In that case, Mr. King, an elected councillor for the City of Nanaimo, was removed from Council by resolution due to undisclosed campaign contributions. Mr. King had received a total of $1,000 (which, notably, was described by the Court as "substantial contributions by the standards of municipal elections") from the principal of a developer known as Northridge Village in the 1996 municipal election.[110] Between February and May of 1997, Mr. King voted on several motions in favour of Northridge Village.[111] The Court of Appeal overturned the chambers judge decision finding that there was a conflict of interest, holding as follows:

> [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

[109] *King v. Nanaimo (City)*, 2001 BCCA 610 [*King*]
[110] *King*, para. 6
[111] *King*, para. 7

> 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.]

81. In *Schlenker*, Justice Donald cited the above passage with approval,[112] but distinguished the case on the facts, finding that in *King* there was only a "remote and tenuous connection" between the matter at issue and the pecuniary interest.[113]

82. The petitioners do not join issue with the result in *King*. It is acknowledged that campaign contributions, in and of themselves, do not establish a pecuniary interest. However, *King* does not stand for the proposition that there must be evidence of an agreement to vote in favour of developers in return for campaign contributions (that is, a *quid pro quo*). The Court was clear that such a scenario was but "one example" of a situation that would lead to a conflict of interest. The Court in *King* did not define what other circumstances could also lead to a conflict of interest, instead expressly leaving that open for another day.

83. This Court dealt with two cases involving campaign contributions in the period between the Supreme Court and Court of Appeal decisions in *King*: *Guimond*[114] and *Fearnley*.[115] Since the Court of Appeal's decision in *King*, two further cases were decided by this Court: *Highlands*[116] and *Chernen*.[117] Again, the facts of all four of these cases can be easily distinguished.

84. *Guimond* involved a re-zoning application by the developer Polygon of Arbutus Gardens from a rental accommodation complex to private high-density condominium buildings. The petitioner attempted to attack the re-zoning bylaw, and one of the many issues raised was the issue of conflict of interest from campaign contributions. In the 1996 municipal election, Polygon made campaign contributions to Vancouver's mayor, two councilors, and the NPA party.[118] In December of 1997, Polygon submitted its redevelopment application.[119] After a lengthy public hearing process, the impugned rezoning bylaw was approved in October 1998.[120] While acknowledging

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[112] *Schlenker*, para. 53
[113] *Schlenker*, para. 55
[114] *Guimond v. Vancouver (City),* 1999 CanLII 5207 (BCSC) [*Guimond BCSC*]
[115] *Fearnley v. Sharp*, 1999 CanLII 1553 (BCSC) [*Fearnley*]
[116] *Highlands Preservation Society v. Corp. of the District of Highlands*, 2005 BCSC 1743 [*Highlands*]
[117] *Chernen v. Robertson*, 2014 BCSC 1358 [*Chernen*]
[118] *Guimond BCSC*, para. 27
[119] *Guimond BCSC*, para. 30
[120] *Guimond BCSC*, para. 47

the case raised "a difficult decision",[121] the Court ultimately found there was no conflict of interest and distinguished the case from this Court's decision in *King* because the campaign contributions at issue were a small percentage of the total contributions, and because there was full disclosure of the contributions.[122] The Court found that these factors removed the bad faith element found in *King* and made the good faith defence applicable.[123]

85. In *Fearnley*, the elected official received a $2,500 campaign contribution from a union in the 1996 election.[124] The councillor voted in favour of a proposal to explore a compressed work week – a proposal which was brought forward by the City's management but had initially been endorsed by the Union.[125] The vote in question occurred in 1999.[126] The Court acknowledged that the issue was "complex".[127] As in *King*, the Court found that the receipt of campaign contributions in and of itself does not constitute conflict of interest, and that each case must be determined on its own facts:

> [37] In summary, the receipt of a donation to a political campaign that has been fully disclosed does not amount to a conflict of interest in and of itself. It can of course be evidence of such a conflict depending on the context of its receipt and the conduct of the recipient. Each case involving issues such as we have here must be decided on its own facts.

86. In the result, the Court found there was no conflict of interest. Notably, one of the factors the Court considered was that the City's solicitor had provided an opinion on the issue and that there was no conflict.[128]

87. *Highlands* involved a petitioner seeking to set aside rezoning bylaws which passed in February of 2005.[129] The corporation which proposed the rezoning bylaws owned the land in question and planned to develop a golf resort, a hotel, and commercial and residential units. In the 2002 municipal election, the corporation had donated $250 (or approximately 25% of total

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[121] *Guimond BCSC*, para. 108
[122] *Guimond BCSC*, para. 109
[123] *Guimond BCSC*, para. 110
[124] *Fearnley*, para. 26
[125] *Fearnley*, para. 27
[126] *Fearnley*, paras. 27, 31
[127] *Fearnley*, para. 35
[128] *Fearnley*, para. 51
[129] *Highlands*, para. 5

contributions) to each of the four councilors who voted in favour of the development.[130] Applying *King*, the Court dismissed the allegations, finding that campaign contributions without more did not constitute a conflict of interest. The Court also held that arguments pointing to the relative size of the contributions were misguided:

> [55] Counsel for the society placed significant emphasis on the fact that the total campaign contributions from the corporation amounted to more than 25 percent of the total contributions received by the four councillors. In my view, the emphasis on a percentage absent something more is misguided. The question is not whether there is a magical number which campaign contributions cannot exceed, but whether there is any evidence of contributions coupled with a promise, implicit or otherwise, to deliver a vote. If the evidence revealed that a councillor agreed to sell her vote for a campaign contribution of five dollars, the size of the bribe, or the percentage of overall contributions, would be superfluous. In such a case, it is the link to dishonest conduct that is reprehensible.
>
> [56] Similarly, if a councillor happens to receive only one campaign contribution from a single person, it does not automatically follow that the councillor must have agreed to sell his vote in exchange. Absent such an arrangement, the contributor is simply exercising the democratic right to make a campaign contribution to a candidate that she or he chooses to support. There is nothing reprehensible in that so long as the councillor did not agree, implicitly or otherwise, to vote a certain way.

88. The Court ultimately held that there "[t]here should be a further link beyond a campaign contribution to establish an indirect pecuniary interest. I would not infer any appearance of impropriety from the campaign contributions here."[131] To the extent that the respondents in this case rely on these passages in *Highlands* to suggest the only way to prove a conflict of interest is explicit evidence that there was a bribe or an agreement of a councillor to vote a certain way, they read *Highlands* too narrowly. Like *King*, the Court in *Highlands* was only giving an example of a scenario where there would clearly be a conflict of interest, irrespective of how much was contributed to the campaign. That does not foreclose the ability to prove a conflict of interest in other circumstances where the Court could "infer [an] appearance of impropriety". Like *King*, the Court in *Highlands* left unanswered the question of what the "something more" needed to prove a conflict of interest could be.

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[130] *Highlands*, paras. 8-9
[131] *Highlands*, para. 57

89. The last and most recent case from this Court dealing with campaign contributions is *Chernen*. That case did not deal with typical campaign contributions. Rather, the petitioners alleged that Mayor Robertson's campaign in 2011 received assistance from HootSuite, in the form of providing a promotional kit, technical assistance, and marketing assistance, which amounted to campaign contributions.[132] In the summer of 2012, City Council voted on and approved entering into a significant lease and option to purchase agreement with HootSuite.[133] Relying on *King*, Chief Justice Hinkson dismissed the petition as an abuse of process, finding that there was "no evidence that the modest campaign assistance provided to the respondent by HootSuite during the 2011 Vancouver civic election was linked to the lease and option to purchase the Property."[134]

90. The facts of this case can be distinguished from the facts of all the cases described above. Unlike in *Guimond*, the campaign contributions at issue in this case represent a significant percentage of the total contributions received by the respondents.[135] On many occasions, the developers, by having multiple people related to their organizations make contributions, effectively circumvented the restrictions on local election campaign contributions. And unlike the facts in *Fearnley*, the legal opinion in this case reached the conclusion that the specific facts of this case could in fact give rise to a conflict of interest.

91. However, the most important distinguishing feature of this case, which is not to be found in any of the cases discussed above, is the temporal nexus between the contributions and the voting pattern of the respondents on the developers' applications. The cases to date have all involved one-off contributions by a single interested party, and a vote by an elected official in favour of that contributor at a much later date, often measured in years. In the case at bar, there is a repeated pattern of accepting contributions when developers have applications "in-stream", and where votes are held within ***days*** of those contributions. These circumstances, and the temporal nexus in particular, provide the "link" or "something more" that was absent in *King* and all the decisions of this Court to date.

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[132] *Chernen*, paras. 3(9), 6-7
[133] *Chernen*, para. 13
[134] *Chernen*, para. 31
[135] But see *Highlands*, para. 55

D. The law applied to the facts of this case

92. As set out above, the overarching question is whether a reasonably well-informed person would conclude that a direct or indirect pecuniary interest might influence the exercise of the public official's duty. The case law makes clear that the mere fact of campaign contributions, without anything more, does not satisfy this test. The petitioners say that the truly extraordinary circumstances in this case are sufficient for this Court to find that a reasonably well-informed person would infer there is a sufficient link between the interest (the campaign contributions) and the matters (the development applications) such that the interest might have influenced the respondents' votes.

i) *Evidence of an agreement or promise to vote is not required*

93. The petitioners say that it is not necessary to adduce evidence of an agreement or promise to vote to establish a disqualifying indirect pecuniary interest. As explained above, such a high threshold does not flow from the case law and the objective test of the reasonably informed person. Indeed, if such evidence was required, it would be difficult to envision a campaign contribution case ever being successful. It is highly improbable that any petitioner could ever obtain such "smoking gun" evidence, or that a particular campaign donor would expressly propose an "agreement to vote". That burden would be virtually impossible to discharge in a petition proceeding where there is no discovery, which is the form of proceeding required by the legislation.[136]

94. More importantly, such a narrow interpretation of the legislation runs contrary to the guidance provided by our Court of Appeal that these provisions must be given a broad and liberal interpretation consistent with its purpose, which is to ensure that the public can maintain confidence in its elected officials that their loyalties are undivided. Municipal councilors must be independent and even-handed, without any influence or perception of influence that may flow from a direct or indirect pecuniary interest. Public confidence in the independence of councilors may be undermined, as the petitioners say has happened here, in circumstances short of an explicit bribe, agreement to vote, or a *quid pro quo*.

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[136] *Community Charter*, s. 111(5)

95. Accordingly, the denials from the respondents that they were not influenced by the contributions to vote a particular way are irrelevant. The intent or wishes of the developer to influence the respondents are also unnecessary to prove a conflict of interest. The test is an objective one – whether a reasonable person would believe they might have been influenced by the contributions. What the ultimate motivation for them to vote a certain way on an application – whether it was their true belief it was in the public interest or whether they were simply following the recommendations of the Township's staff - is irrelevant. Indeed, even if the respondents had voted against the developers, that does not absolve them from a finding of a conflict of interest. As the Alberta Court of Appeal has held:

> It is irrelevant to inquire whether the councillor cast his vote for the question or against it. He may have voted favourably to his pecuniary interest or he may have "leaned over backward " and voted against it. The latter course may be acceptable morally, but it does not achieve the disinterested consideration of the question on its merits, which the elector is entitled to expect, and to receive, from his representatives, and which the statute commands. The neutrality of the councillors is not to be disturbed one way or the other by the potentials of pecuniary interest.[137]

ii) *The later disclosure of campaign contributions does not absolve the respondents*

96. The later disclosure of the campaign contributions pursuant to the *Local Elections Campaign Financing Act* does not assist the respondents in this case. That is a separate legislative scheme with its own penalties for non-disclosure.[138] It is separate from and does not provide a defence to a contravention of the conflict of interest provisions under the *Community Charter*. The obligations on candidates under the *Local Elections Campaign Financing Act* in no way detract from the obligations of elected officials under the *Community Charter* to avoid conflicts of interest.

97. It is true that the disclosure of campaign finances was a factor considered by the courts in some of the cases discussed above.[139] However, in contrast to those cases, in the circumstances of this case where the votes are largely happening at the same time as the contributions, there is no transparency at the relevant time – at the time of the vote. Campaign contributions do not have to be disclosed under the *Local Elections Campaign Financing Act* for 120 days after the

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[137] *Guimond ABCA*, para. 14
[138] *Local Elections Campaign Financing Act*, ss. 47, 57
[139] *Highlands*, para. 60; *Guimond BCSC*, para. 109; *Fearnley*, para. 51

election.[140] In this case, the respondents did not file their final amended disclosure statements until almost a year after the election.[141] There is certainly no evidence that during any of the council meetings in question, the respondents declared that they had received campaign contributions from individuals connected to the developers or sought legal advice specific to those contributions. The petitioners say this ought to have been the proper course of action followed by the respondents pursuant to s. 100(4) of the *Community Charter*.

98. Accordingly, unless councilors disclose the contributions, and seek legal advice when matters are before council, members of the public will have no way of knowing whether their elected officials have undivided loyalties or not. This gives rise to a serious mischief not present in the cases to date: persons interested in matters before council – such as property developers – will be free to contribute to campaigns (and have their friends and family do so as well), comfortable in the knowledge that their contributions will not be known until a much later date. This directly undermines public confidence in the integrity of municipal governance.

iii) *Democratic principles support a finding of conflict of interest in this case*

99. As noted in the existing jurisprudence, there is a tension between allowing members of the public to exercise their democratic right to support a candidate of their choosing, and the conflict of interest provisions that promote transparency and safeguard the integrity of how public officials carry out their duties.[142]

100. If the Court finds a conflict of interest in this case, that does not limit the rights of an individual to financially support a candidate. It only means that if such an individual exercises that right, the elected official then cannot participate in the voting on matters pertaining to that individual that are already, or will imminently be, before Council. That does not negatively impact democracy or impair the individual's ability to exercise his or her right to support the candidate of their choice. If it did, then that would mean the individual was providing those campaign contributions with the view that the elected official would vote in favour of that individual's

[140] *Local Elections Campaign Financing Act*, s. 47
[141] Allan #1, paras. 5-8
[142] *Guimond BCSC*, para. 108; *Highlands*, para. 56

application. That is exactly the kind of influence that the conflict of interest provisions are meant to prevent.

101. Moreover, in the circumstances of this case, finding a conflict of interest would actually increase transparency and reinforce the intent of the new restrictions found in the local campaign contribution legislation. As already discussed, campaign contributions are only disclosed well after the election, and therefore the only way for electors to know if the contributions were made, and to have a fully transparent vote, is for incumbents to declare a conflict of interest at the time of the application. Further, the legislature has already restricted an individual's right to support candidates by limiting individual contributions to $1,200 and prohibiting corporate contributions. A finding of conflict of interest in this case would strongly dissuade property developers and other interested parties from finding loopholes, such as having a number of officers, directors and/or employees of a company make contributions. On the facts of this case, it is entirely reasonable for a well-informed person to perceive that was exactly what was occurring in this case, which is directly contrary to the intent of the legislation.

iv) *The contraventions were not inadvertent*

102. If the Court agrees with the petitioners that the circumstances of this case present a pecuniary conflict of interest within the meaning of the *Community Charter*, then the onus shifts onto the respondents to demonstrate that the contravention was either inadvertent or an error of judgment exercised in good faith within the meaning of s. 101(3).[143]

103. The petitioners say that the contraventions in this case were clearly not due to inadvertence. Put simply, this was not a one-off "mistake". The sheer volume of contributions and the number of meetings and votes related to the developments demonstrate that the respondents' contraventions were not because of mere inadvertence.

104. Indeed, the respondents would have known exactly who was giving them contributions. The evidence of Councillor Whitmarsh and Former Councillor Quaale is that they directly received

[143] *Godfrey*, para. 93

and recorded the contributions.[144] While Mayor Froese and Councillor Long had financial agents who largely dealt with the contributions, that is irrelevant, as the candidate is in the same position at law as the agent[145] Indeed, given the legislative obligations surrounding the receipt of campaign contributions,[146] and the legal opinion advising that campaign contributions received while applications are in-stream or immediately thereafter could constitute a conflict of interest, the respondents ought to have ensured heightened scrutiny and disclosure of the receipt of campaign contributions, and the immediate receipt of legal advice. This Court should not accept any argument that the respondents did not recall or know who gave them contributions. The respondents knew, or ought to have known: (a) who they received contributions from; (b) that many of these individuals were connected to developers, and (c) that those developers had applications before Council which they voted on within days or at worst weeks of the receipt of these contributions. There is no basis for a finding that their contraventions were inadvertent

v) *No error of judgment in good faith*

105. Certainly, obtaining and following legal advice on a potential conflict of interest can be a basis for the good faith defence under s. 101(3).[147] However, in this case, the fact that the legal advice confirmed that this very set of circumstances could give rise to a conflict of interest entirely negates a good faith defence.

106. A similar circumstance arose in *Godfrey*, which involved a council member and real estate agent who had an indirect pecuniary interest in a matter relating to a property owned by his long-time friend and business partner, from whom he had earned substantial commissions as a real estate agent.[148] The council member participated and voted on a rezoning application regarding a property owned by his friend. The Court found this to be a conflict of interest and disqualified him from holding office. In discussing the good faith defence, the Court pointed to the legal opinions received by the municipality and the councillor:

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[144] Whitmarsh #1, paras. 6-8; Quaale #1, paras. 6-8. Former Councillor Quaale did also have a financial agent though she testifies that her contributions were largely mailed directly to her. Councillor Whitmarsh acted as his own financial agent: see Allan #1, Ex. C, p. 33.
[145] *King*, para. 4
[146] *Local Elections Campaign Financing Act*, ss. 22, 27, 29
[147] *Schlenker*, para. 29
[148] *Godfrey*, para. 121

> [94] However, I cannot conclude that his participation at other meetings of either the Committee or Council was as a result of inadvertence or an error in judgment made in good faith. Because he had legal opinions available to him and because he stated that he referred to these opinions shortly after they were received and on a number of subsequent occasions, it could not be said that he was acting on the bases of those legal opinions when he participated at meetings or that he was somehow misled by the contents of those legal opinions to believe that he was in a position to participate. The issue of whether he had a conflict was raised during several meetings but, nevertheless, Mr. Bird continued to participate at the meetings despite the valid questions raised and without requisitioning legal opinions based on the actual facts in existence.

107. In this case, the respondents had a legal opinion which advised that there could be a conflict of interest if the respondents received campaign contributions from a developer if development applications were in-stream at the time of the contributions. The respondents continued to participate in meetings and voted on application in the face of the Lidstone opinion. What they ought to have done is to make full disclosure and seek legal opinions on the specific facts of each application. If the legal opinions found they were not in a conflict, they could have participated in the meetings pursuant to s. 100(4). Not having availed themselves of this procedure, and not having made disclosure at the time of the meetings, they cannot now rely on the good faith defence. As in *Godfrey*, "[a]nyone reading the legal opinions available to [the elected official] could not have come to the conclusion that he could continue to participate in the discussions...".[149]

vi) <u>*Remedy*</u>

108. The *Community Charter* is clear that a contravention of the conflict of interest rules results in the elected official being disqualified from holding office until the next general election.[150] There is no room to consider whether the conflict was "large" or "small". All conflicts, no matter the degree, are treated equally under the legislation.

109. Further, there is no scope to consider whether any remedy should be political and at the polls. Even if the elected officials were not re-elected, as in the case of Former Councillor Quaale, a declaration of conflict of interest is appropriate and in the public interest in the circumstances.[151]

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[149] *Godfrey*, para. 96
[150] *Community Charter*, s. 108.1
[151] *Schlenker*, paras. 22-31

vii) *Conclusion*

110. The case law establishes that campaign contributions, without "something more", do not constitute an indirect pecuniary interest giving rise to a conflict interest. To date, what constitutes that "something more" has been left open. The petitioners say it does not and cannot mean that there must be evidence of an express agreement or promise to vote. Rather, the inquiry must be guided by an objective assessment of whether a reasonably well-informed observer would conclude that the campaign contribution might influence the duty of the elected official. In this case, there exists a unique constellation of facts, including:

1) the sheer number of contributions from multiple developers;

2) the timing of contributions while those developers had matters before counsel, sometimes within days of a vote on that matter;

3) the fact that there were several individuals making contributions from the same developer, effectively circumventing the restrictions on campaign contributions;

4) the proposing and passing of amendments to coincide with the proposal of a developer (in the case of the Williams Neighbourhood Plan); and

5) the repeated pattern of conduct despite legal advice to the contrary.

111. A reasonably well-informed person would conclude that, given these extraordinary facts, the respondents might have been influenced by these contributions to vote in the best interests of the developers or their own political careers rather than in the best interests of their constituents. Public confidence in the integrity and transparency of municipal governance cannot be maintained if these circumstances are deemed acceptable.

E. Costs

112. This case involves an issue of first impression and is of considerable public importance, where the petitioners derive no personal, proprietary or pecuniary interest in the outcome, and

where the well-funded municipality has opposed the petition. In such circumstances, special costs are appropriate.[152]

PART V. ORDERS SOUGHT

113. The petitioners seek the following orders:

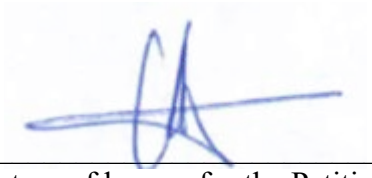
1) A declaration that the respondents failed to disclose a direct or indirect pecuniary conflict of interest contrary to section 100 of the *Community Charter*.

2) A declaration that the respondents attended meetings, participated in discussions, attempted to influence voting, and/or voted in a manner contrary to s. 101(2) of the *Community Charter*.

3) An order pursuant to s. 111 of the *Community Charter* that the respondents, other than Former Councillor Quaale, are disqualified from holding office until the next general local election.

4) Costs, including special costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Dated: 17 Nov 2020

Signature of lawyer for the Petitioners
Mark G. Underhill and
David W. Wu

[152] *Schlenker v. Torgrimson*, 2013 BCCA 395

List of Authorities

Tab	Description
Cases	
1	*Chernen v. Robertson*, 2014 BCSC 1358
2	*Fairbrass v. Hansma*, 2010 BCCA 319
3	*Fearnley v. Sharp*, 1999 CanLII 1553 (BCSC)
4	*Godfrey et al v. Bird and District of North Saanich*, 2005 BCSC 626
5	*Guimond v. Sornberge*r, 1980 ABCA 216
6	*Guimond v. Vancouver (City)*, 1999 CanLII 5207 (BCSC)
7	*Highlands Preservation Society v. Corp. of the District of Highlands*, 2005 BCSC 1743
8	*King v. Nanaimo (City)*, 2001 BCCA 610
9	*Old St. Boniface Residents Assn. Inc. v. Winnipeg (City*), [1990] 3 S.C.R. 1170
10	*Re Moll and Fisher et al.*, 1979 CanLII 2020 (ON SC)
11	*Schlenker v. Torgrimson*, 2013 BCCA 9
12	*Schlenker v. Torgrimson*, 2013 BCCA 395
Statutes	
13	*Community Charter*, S.B.C., 2003, c. 26, ss. 100, 101, 108.1, 110(a)(i), 111, 113
14	*Local Elections Campaign Financing Act*, S.B.C. 2014, c. 18, ss. 4, 17(1)(2), 22, 26, 27, 29, 30.01, 47, 57