ATTACHMENT 2

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WHAT'S THE PROBLEM WITH BIAS?

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I. INTRODUCTION

Elected officials, by the nature of their position, are required to take strong and vocal stances on a myriad of issues. There is however a tipping point where permissibly held positions and impassioned rhetoric can turn into impermissible bias. An elected official, for instance, may well be allowed to express a distaste for certain kinds of development and density, but can that belief land them in hot water if they make public statements to the effect that "it will be a frosty Friday in hell" before they would cast their vote in favour of a particular development?

Local governments are political bodies, headed by elected councils and boards. They are voted in by their constituents on the basis of their policy platforms. Once voted in, however, policy espousal is not an elected official's sole role. What voters and politicians might not consider, at least when casting their votes, is that local government elected officials also act as administrative decision-makers, dealing with everything from Official Community Plan Amendments to appeals from business licence approvals. Most elected officials are keenly aware that they must avoid "conflicts of interest" in their role as administrative decision-makers, especially those conflicts that are financial in nature. If they do not do so, they risk disqualification from office.

These conflicts of interest are regulated by the *Community Charter*, which provides that a council member must not vote, or influence the voting, on any matter in which they have a direct or indirect pecuniary interest. Pecuniary conflicts of interest have been the subject of much litigation, and are at the forefront of the minds of elected officials.

But what about situations that are something less than a pecuniary conflict of interest? What if, even in the absence of the possibility for any financial benefit, the elected official's mind is "closed" on a particular matter? What if an elected official votes on a remedial action requirement in respect of his ex-wife's property?

The *Community Charter* governs some of these matters, calling them "another interest in a matter that constitutes a conflict of interest". But the common law doctrine of procedural fairness also applies to certain decisions of elected officials, requiring them to be free from certain kinds of bias. This paper will focus on the analytically separate but often overlapping concepts of non-pecuniary conflict of interest; the "closed mind"; and reasonable apprehension of bias. It will explore the statutory scheme governing these concepts, and extract some prominent and recurring principles from the cases.

II. THE CONFLICT OF INTEREST SCHEME

The *Community Charter* has little to say about the non-pecuniary conflict of interest. Non-pecuniary conflicts are only mentioned in section 100(2), which is made applicable to council meetings, council committee meetings, and other board 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
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> (a) a direct or indirect pecuniary interest in the matter, or
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> (b) another interest in the matter that constitutes a conflict of interest,
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> the member must declare this and state in general terms the reason why the member considers this to be the case.

A member who believes they have a non-pecuniary conflict of interest must still comply with the rules regarding declarations in section 100 and, as per section 101(2), must not remain at the meeting at which the matter is being discussed; participate in any discussion of the matter; vote on a question in respect of the matter; or attempt to influence the vote in respect of the matter.

However, it is worth noting that section 101(3) of the *Community Charter,* which provides that a member who does any of the above is disqualified, only applies to a council member who has "a direct or indirect pecuniary interest in a matter" under section 100(2)(a). It does not apply to a member who has a non-pecuniary interest under section 100(2)(b). The draconian remedy of disqualification is therefore not applicable in respect of members who have non-pecuniary conflicts. This is not to say that failure to declare a non-pecuniary conflict cannot have serious consequences. Indeed, as a review of the cases shows, the failure of one elected official to declare a conflict of interest can have drastic consequences for the validity of bylaws and decisions.

What is a non-pecuniary conflict of interest? The BC Supreme Court in *Schlenker v. Torgrimson,* 2012 BCSC 41 (overturned on other grounds) acknowledges that while the concept appears simple at first, it becomes exceedingly more complex in practice. The application of non-pecuniary conflicts of interest, as articulated by the Court, may involve two seemingly distinct but interrelated tests:

> It appears that our common law applies two tests to situations in which an official might have public duties conflicting with non-pecuniary personal interests. The first of these tests is the closed mind test. It applies when the official has expressed opinions in advance of a decision to such a degree that he or she might have bias. The closed mind test protects the doctrine of natural justice that translates from the Latin as "Hear the other side".

> The second test resembles the pecuniary interest test. It applies when the official has associations or connections within the community such that the official's own interest might override the public interest when making a decision. This test asks, first, whether the official's interest is particular to the official, or whether it is held in common with other citizens in the electoral area. If the interest is particular to the official, then the court considers, at a second stage, whether:
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> > ... 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. (*Old St. Boniface* at 1196).
>
> This second test -- used for associational conflict -- protects the doctrine of natural justice that translates from the Latin as "No one [should be] a judge in his own cause".

As will become clearer below, this statement of the law shows that judges interpret section 100(2)(b) as overlapping with, and informed by, the common law principles dealing with certain kinds of bias. These standards are often hard to grasp but perhaps, in the words of Supreme Court of the United States Justice Potter Stewart, writing about pornography in *Jacobellis v. Ohio,* you simply "know it when you see it".

III. THE CLOSED MIND STANDARD

In 1990, 13 years prior to the enactment of the *Community Charter,* the Supreme Court of Canada decided two cases dealing with non-pecuniary conflicts of interest – *Save Richmond Farmland Society v. Richmond (Township),* [1990] 3 S.C.R. 1213 and *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City),* [1990] 3 S.C.R. 1170. In *Old St. Boniface,* a residents association challenged a rezoning bylaw that authorized a high-rise development involving the consolidation of certain lands along with purchasing and closing certain streets. In the process leading up to the adoption of the bylaw, Councillor Savoie appeared before the City's Finance Committee to speak on behalf of the developer. The residents argued that Councillor Savoie was biased.

In *Save Richmond Farmland,* the dispute centred on lands known as Terra Nova, and particularly a bylaw passed by Richmond that would convert part of Terra Nova from agricultural to predominantly residential zoning. The public hearings for this bylaw, attended by Alderman Mawby, who was in favour of the rezoning, lasted 57 hours over 12 days. During these public hearings, Alderman Mawby gave an interview in the Richmond news which was entitled "MAWBY WON'T CHANGE MIND".

After the bylaw at issue received first and second reading, a group of Richmond residents filed a petition for judicial review, seeking to prohibit Alderman Mawby from voting on the bylaw. Eventually, after the bylaw had been successfully passed by Richmond, the matter found its way to the Supreme Court of Canada, with the residents arguing that the bylaw should be struck down because it was tainted by Alderman Mawby's vote.

The Court decided both cases on the basis of the following principle:

> In my opinion, the test that is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor is one which requires that the objectors or supporters be heard by members of Council who are capable of being persuaded. The Legislature could not have intended to have a hearing before a body who has already made a decision which is irreversible. The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of Council in respect of all matters that are decided at public meetings at which objectors are entitled to be heard.

It is important to note that the closed mind test covers situations that are not conflicts of interest. For example, a municipal councillor who had a bar fight with an applicant for rezoning the weekend prior to voting on that application might have both a closed mind and a conflict of interest. But a councillor who did not have any personal animus in relation to the applicant, and simply indicated publicly that his mind was not amendable to persuasion, might only have a closed mind and not a conflict of interest.

IV. THE REASONABLE APPREHENSION OF BIAS STANDARD

Despite the relatively lax standard from *Old St. Boniface* and *Save Richmond Farmland,* the law is also clear this standard only applies to elected officials acting in a "legislative capacity". If they are acting in an "adjudicative role", the "reasonable apprehension of bias" test applies. This test is much more common in administrative law generally, and requires decision-makers to be free from bias, both real and apprehended. The question asked by courts dealing with such allegations is as follows – would a reasonable observer fear that the decision-maker could not make a decision free from bias?

The leading case on this standard, *Newfoundland Telephone Company v. Newfoundland (Public Utilities Board of Commissioners),* [1992] 1 S.C.R. 623 also comes from the early 1990s. In *Newfoundland Telephone,* Commissioner Wells, who was a former consumers' advocate and municipal councillor, made several strong statements in the press criticizing the Telephone Company's executive pay policies, including the following:

> "If they want to give Brait [the Company's CEO] and the boys extra fancy pensions, then the shareholders should pay for it, not the rate payers" …
>
> "Who the hell do they think they are? The guys doing the real work, climbing the poles never got any 21 per cent increase".
>
> "…I'm not having anything to do with salary increases and big fat pensions".

Commenting on the salary of one particular executive ($235,000), Councillor Wells said:

> "I can't see what circumstances would justify that kind of money. I don't think the ratepayers of this province should be expected to pay for that kind of salary. The company can bloody well take it out of the shareholders' profits".

The Commission undertook a public hearing after hiring an independent accounting firm to provide analysis of the costs and of the accounts of the Telephone Company between 1981 and 1987. At that hearing, the Telephone Company objected to Commissioner Wells and alleged that he was biased against them. Commissioner Wells did not recuse himself from the decision-making process and, after the public hearing, participated in a split decision as follows: (1) disallowing the "cost of the enhanced pension plan" for senior executives as an expense for rate-making purposes; and (2) directing the Company to refund to its customers sums of $472,000 and $490,300, which were amounts charged as expenses to the Company's operating account to cover the cost of the enhanced pension plan. The Commission made no order regarding the individual salaries of the Company's senior executives.

The Court looked at the statements made before and during the hearing process, ultimately finding that the comments made after the hearing was ordered raised a reasonable apprehension of bias. Interestingly, however, the Court found that the Commission undertook an adjudicative task from the moment the hearing was ordered, and as such the reasonable apprehension of bias standard applied and the closed mind standard was no longer applicable. The Court said the following about Commissioner Wells' statements:

> The statements made by Mr. Wells before the hearing began on December 19 did not indicate that he had a closed mind. For example, his statement: "[s]o I want the company hauled in here -- all them fat cats with their big pensions -- to justify (these expenses) under the public glare... I think the rate payers have a right to be assured that we are not permitting this company to be too extravagant" is not objectionable. That comment is no more than a colourful expression of an opinion that the salaries and pension benefits seemed to be

> unreasonably high. It does not indicate a closed mind. Even Wells' statement that he did not think that the expenses could be justified, did not indicate a closed mind. However, should a commissioner state that, no matter what evidence might be disclosed as a result of the investigation, his or her position would not change, this would indicate a closed mind. Even at the investigatory stage statements manifesting a mind so closed as to make submissions futile would constitute a basis for raising an issue of apprehended bias. However the quoted statement of Mr. Wells was made on November 13, three days after the hearing was ordered. Once the hearing date had been set, the parties were entitled to expect that the conduct of the commissioners would be such that it would not raise a reasonable apprehension of bias. The comment of Mr. Wells did just that.

The Court set aside the decision of the Commission, finding the decision completely void since the Company had not received the fair hearing, free from bias both real and apprehended, it was entitled to.

V. INTERPLAY WITH THE CONFLICT OF INTEREST PROVISIONS

Having reviewed the two standards applicable to allegations of bias, it is worth further exploring whether, and how, those standards inform the interpretation of the conflict of interest provisions in the *Community Charter,* specifically the "non-pecuniary conflict" provision. For the Court in *Old St. Boniface,* the concepts appeared to be analytically separate:

> 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. It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest.

However, the Court goes on to say:

> Statutory provisions in various provincial Municipal Acts tend to parallel the common law but typically provide a definition of the kind of interest which will give rise to a conflict of interest. See *Blustein* and *Moll*, *supra*. In Manitoba, the relevant provisions are found in the *Municipal Council Conflict of Interest Act*, R.S.M. 1987, c. 255, ss. 4, 5 and 8. No reference is made to these sections in this appeal nor is there any suggestion that they have been contravened.

One distinct feature of the *Community Charter* is that it does not contain a definition of "conflict of interest". Indeed, the non-pecuniary conflict of interest has been characterized by the courts as a common law conflict. It is perhaps best to understand non-pecuniary conflict as a distinct species of bias. For example, in *Watson v. Burnaby (City of),* 1994 CanLII 1027 a councillor who was himself a Mason voted in favour of granting funds to build a replica of a Masonic Lodge for an outdoor village museum in the City. The Court found that, as a Mason, Councillor Watson had an interest in the outcome of that vote, but not one that was substantial enough to amount to a non-pecuniary conflict. The particular facts of the case were important in this assessment. Because the project was historical, rather than religious, and was for the benefit of all residents of Burnaby, the Court could not find that the interest held by Councillor Watson was such that it constituted a non-pecuniary conflict.

VI. RECENT APPLICATION TO MUNICIPAL LAW

With the principles from *Save Richmond Farmland, Old St. Boniface,* and *Newfoundland Telephone* in mind, how have courts in British Columbia applied these standards in the context of different decisions of local government decision-makers?

A. Remedial Action Requirements

The BC Court of Appeal considered a remedial action requirement in relation to a property on which there was a derelict motel, restaurant, and residence in *McLaren v. Castlegar (City),* 2011 BCCA 134. Before the City had initiated the remedial action requirement process, it obtained an entry warrant under section 275 of the *Community Charter* to perform an inspection. On the same day that the City entered the property to inspect it, the mayor was interviewed in the *Castlegar News.* The mayor spoke about the derelict buildings as follows:

> "The City of Castlegar has decided to take the necessary steps to demolish the City Centre Motel".
>
> …
>
> "We're just waiting. We'll file a (resolution) and give all notifications."

> "There's all kinds of safety reasons that were there. It's just a pretty dilapidated building that we'd like to see removed. This is an ongoing issue for many years. So we hope to be able to solve it".

The Court found that the reasonable apprehension of bias standard was the correct standard for the decision to issue a remedial action requirement, despite the nature of Council's political functions suggesting that a lenient standard should be applied:

> While the fact that the municipal council was engaged in adjudicative functions in this case cannot be ignored, the nature of a municipal council and the fact that it is an elected body is also of significance. Municipal councillors are responsible to their constituents and are vitally interested in the enforcement of municipal bylaws. They are entitled to press city staff to investigate and report on particular perceived problems. When municipal staff identify a problem, it will only be considered by council if an elected member of the municipal council moves for consideration of a resolution and another seconds the motion. Unlike most adjudicative tribunals, municipal councils are not required to hear whatever disputes come before them; rather, they determine their own agendas. At least some members of council, therefore, will inevitably have made some preliminary estimation as to the merits of a matter before it formally comes before council for resolution.
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> In my view, the standard that was applied in *Old St. Boniface Residents Assn.* and in *Save Richmond Farmland Society* would be too lenient a standard to apply in a case such as the present one. Because members of council were engaging in an adjudicative function, it was not sufficient that they had not irrevocably made up their minds. Rather, they had to be completely open to a fresh evaluation of the evidence and submissions presented to them. In short, they had a duty to be impartial. Keeping in mind, however, that the tribunal was made up of elected politicians who could not be expected to come to the hearing without some knowledge of the situation and without some inkling as to the appropriate disposition, it would be imposing an unrealistically high standard to expect them to come with no preconceptions or inclinations.

With that standard in mind, the Court found that the comments of the mayor did not rise to the level of displaying an "undue predisposition such as to create a reasonable apprehension of bias". These comments, which the Court noted had to be taken in context, did not suggest that the mayor could not be impartial and weigh the evidence before him, or that he would be unwilling to reassess the matter.

The Alberta Court of Appeal considered *McLaren* in *Beaverford v. Thorhild (County No. 7),* 2013 ABCA 6. In that case, Councillor Croswell, who was generally opposed to quarrying in a certain geographic area, sat as a member of a municipal committee which refused a gravel extraction permit to the applicant company. He made Facebook posts that called gravel pits "a waste of

land for private profit" and wrote a letter to his constituents and produced a flier which was distributed, containing similar sentiments. The flier particularly made reference to previous resolutions proposed by Councillor Croswell that sought to prohibit gravel pit operations. The Court determined that the reasonable apprehension of bias standard applied to the hearing of the applicant's permit application, describing it as follows:

> Would a reasonable person, knowledgeable of the facts, and having thought the matter through, conclude that Croswell had a settled opinion against developments such as the applicant's prior to SDAB hearing? Since there is both an attitudinal and behavioural aspect to lack of impartiality, the Court would as part of the analysis consider whether a reasonable person could have confidence that Croswell would approach the matter with an open mind.

With that somewhat confusing standard enunciated, the Court found that the decision of the Subdivision Appeal Board was tainted by a reasonable apprehension of bias. This is markedly different than what the Court did in *McLaren,* where the Court drew a bright line between the closed mind and reasonable apprehension of bias standards. Further, it is perhaps concerning that the Court also drew inferences about Councillor Croswell's mind being closed (or there being a reasonable apprehension of bias) on the basis of his previous legislative proposals in relation to gravel pits more generally. This seems at odds with *Save Richmond Farmland* and *Old St. Boniface*, and shows both the complexity of the legal analysis involved in such matters and the extent to which they turn on their particular facts.

B. Development Variance Permits

Development Variance Permit decisions ("DVPs") are an interesting example of decisions that are perhaps neither truly legislative nor adjudicative. Section 498 of the *Local Government Act* provides that a local government may, by resolution, issue a DVP for land covered by a permit in respect of several matters specified in the statute including, most commonly, zoning bylaws. The statute itself says nothing about a hearing or application, and the only procedural right guaranteed appears to be a notice requirement in respect of affected property owners and tenants (section 499).

However, in practice, local governments receive and adjudicate DVPs based on applications submitted by landowners pursuant to the procedure specified in the relevant bylaw. Local government bylaws of this nature often grant these applicants, along with affected property owners, the right to make written or oral submissions in respect of their application. The elected officials then deliberate based on a staff report, and render a decision.

What standard of conduct do we expect from elected officials in this capacity? While there are no cases specifically dealing with bias allegations in relation to DVP applications, the BC Supreme Court did consider procedural fairness more broadly in *113652 B.C. v. Whistler (Resort Municipality),* 2018 BCSC 1806. There, the applicant owned a small, triangular piece of land near Alta Lake and sought to have the setbacks for the property varied significantly.

The petitioner corporation argued that, as a matter of procedural fairness, it should have been granted an oral hearing at which it could make submission to council. The Court found that the decision on whether to grant a DVP was legislative rather than adjudicative, reasoning as follows:

> In exercising discretion to grant a DVP under s. 498 of the *Local Government Act*, a municipal council is not adjudicating an inter-party dispute, but rather is considering whether the requested variance is in the interests of the community as a whole. A municipal council is not restricted in the factors it may consider on a DVP application provided that the factors are not extraneous to statutory purposes. As explained by Stromberg-Stein J. in *Costello v. Hornby Island Local Trust Committee*, 2009 BCSC 1334 [*Costello*]:
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> > A DVP is discretionary, and permits consideration of extrinsic factors other than mandated in the Bylaw, such as the visual impact of a building, to determine if a variance of the Bylaw is in the interests of the community as a whole….Although the Bylaw did not provide for regulation of the colour or appearance of the building, except for height, a DVP deals with a variance from a bylaw and visual impact associated with height, to ameliorate appearance, is within the mandate of the local trustees to preserve and protect the amenities of the Island, including rural neighbourhoods. It is fundamental to a municipal law regulatory scheme that on a variance application extrinsic factors such as colour and appearance may be addressed.
>
> It is within the role of a municipal council, as the elected representatives of their community, to identify and assess factors relevant to the interests of a community on a variance application. This fact is underscored by the broad nature of the discretion granted to local governments by s. 498, and its non-delegable nature (see *Local Government Act*, s. 498(4)).

One can speculate about whether this reasoning extends as far as allegations of bias, which are also matters of procedural fairness. Does an elected official have to be free from perceived bias, or is it enough if they keep an open mind? There are factors pulling in both directions. Indeed, the public interest nature of the decision to vary a zoning bylaw would militate in favour of characterizing the decision as legislative. However, the fact that the decision is of an individual nature, and deals with the rights of a particular land-owner, would leave it open to a dissatisfied party to argue that the elected officials who voted on such a matter needed to be free from all real or perceived bias.

C. Regional Growth Strategies

Another case dealing with allegations of bias is *3L Developments Inc. v. Comox Valley (Regional District),* 2019 BCSC 1342. This case centred on a Regional Growth Strategy ("RGS"), a type of strategic plan that outlines the implementation of Provincial programs in a regional district, as well as directing the long-term planning in conjunction with official community plans. In respect of a denial of a proposed amendment to an RGS, 3L made an allegation that both the Regional District Board's staff and Board members acted in a way that gave rise to a reasonable apprehension of bias. The factual allegations in relation to bias were numerous, but two are of particular interest. First, 3L alleged that a CVRD staff member told their representatives that it would be a "frosty Friday in hell" before the CVRD board would approve the application. In respect of this argument, the Court was unable to find evidence that the statement had actually been made. It would have been interesting to hear the Court's reasoning on this point if it had been proven, however. It would probably be difficult to prove that a staff member's bias had tainted a decision of a panel of elected officials. Because the staff member was not a decision-maker, 3L would have had to argue that the bias was such that she influenced the final decision a great deal.

3L also argued that Director Scoville had shown disabling bias by writing an email to a constituent containing the following sentence:

> "I appreciate your support to add to my case when I speak to the board tomorrow. I will be more outspoken against the motion than I was on the 17th."

In respect of this allegation, the Court employed similar reasoning to that of the Court of Appeal in *McLaren*:

> [104] Mr. Scoville's email must be viewed in context. He was not opposed to the merits of 3L's development plans. His mind was not made up before the real decision-making stage of the process had been reached, which I view as the CVRD Board vote on October 2. Mr. Scoville voted in favour of a standard amendment twice, once at the COW stage and again at the July 24 CVRD Board meeting. The view he expressed in the email was that the amendment was not a minor one, not that he opposed any amendment by 3L in relation to the Riverwood Land. Mr. Scoville simply favoured a more vigorous, public process than the one 3L was seeking.

While the Court does cite *Save Richmond Farmland* and *Old St. Boniface,* it is notable that there is no discussion of the difference between the closed mind standard and the reasonable apprehension of bias standard. 3L simply characterized its argument as a reasonable apprehension of bias argument, and the Court dismissed it on that basis. Like a DVP, an application to an RGS is such that the eventual decision is probably closer to the legislative end of the spectrum, despite the process involving the individual rights of an applicant being adjudicated. Indeed, again like a DVP, an RGS amendment application is asking the elected officials to relieve the landowner of the need to comply with a rule to which they would have otherwise been subjected. In respect of such decisions, the appropriate standard would be the closed mind test.

D. Codes of Conduct and Censure Motions

In British Columbia, the legislature recently introduced Bill 26, which will require local governments to consider developing a code of conduct for their members, or to review codes of conduct that already exist. However, courts had already affirmed the ability of local government bodies to govern their own processes and, if necessary, discipline elected officials whose conduct fell below the expected standard (for example, in *Skakun v. Prince George (City),* 2011 BCSC 1796 and *Dupont v. Coquitlam (City),* 2021 BCSC 728). It is relatively clear that where elected officials are tasked with determining whether to discipline one of their colleagues for unethical behaviour under a code of conduct, the reasonable apprehension of bias standard should apply. Interestingly, this standard probably applies both to the investigative process undertaken, even if performed by a third-party investigator, and the ultimate decision of the local government.

In *Kissel v. Rocky View (County),* 2020 ABQB 406, the Council passed a resolution disciplining three of its members for breaching its Code of Conduct. The effect of this resolution was to (1) require the councillors to apologize for their behaviour; (2) provide that travel on behalf of the County be subject to approval at a regular council meeting; (3) remove each councillor from all discretionary committee appointments; (4) decrease their gross remuneration by 30%; and (5) forbid them from having any direct contact with the CAO.

The behaviour that led to the complaint included the following allegations: that derogatory comments had been made in open council; that the Code was breached when the councillors shared a County legal opinion with a third party lawyer; that portions of a letter to the editor breached the Code of Conduct by failing to treat the majority of council with "courtesy and respect"; and that Councillor Kissel had called the CAO "infantile", which was disrespectful.

The allegations of bias came in relation to the County's decision to retain a law firm to conduct the investigation that ultimately led to the disciplinary resolution. The councillors argued that the law firm had a professional relationship with the County and reported to the CAO, which meant that it could not be impartial in the investigation. However, it was important that the allegation had been raised during the investigation and received no response. Despite the fact that the Court could not find a reasonable apprehension of bias on the evidence, it nonetheless

held that the investigator's (and by extension Council's) failure to consider whether there was a reasonable apprehension of bias gave rise to an unfair hearing. The Court set aside the resolution partly on this basis.

Kissel emphasizes that when procedural objections are raised at any stage of a hearing, decision-makers should take care to respond to them rather than simply being dismissive. The case is a valuable reminder that process matters, especially in respect of decisions of an adjudicative nature. Where a Court sees that a person's rights were adjudicated in a way that did not have the appearance of fairness, it will be quicker to interfere.

VII. CONCLUSION

As administrative decision-makers who are also politicians, local government elected officials are placed in a unique situation. They are expected to have strong views about the matters that come before them and are elected precisely because they have expressed those strong views publicly. However, as the cases show, there comes a point at which elected officials can cross the line, making corporate decisions "unfair" to members of the public. Courts use different terminology to assess this unfairness, calling it non-pecuniary conflict of interest, reasonable apprehension of bias, or a closed mind. If one thing can be extracted from these cases, it should be that while fairness matters, the pursuit of fairness does not force elected officials into a position of mechanistic neutrality. While elected officials should be aware of the kind of decision they are making, and therefore be aware of the standard that may apply to that decision, they need to balance this awareness with the need for democratic ability. This is well expressed by Madam Justice Southin, writing for the BC Court of Appeal in *Save Richmond Farmland*:

> Today, in my view, the electors have a presumptive right, although not one that the law can enforce, to have campaign promises kept and not dishonoured. That a politician such as Mr. Mawby comes to a public hearing of this kind having strongly advocated a point of view and showing not the slightest sign of resiling from that point of view does not, in my view, disentitle him to vote when the matter comes to the council table for final decision.
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> It is a foolish politician who does not listen carefully to and weigh the strongly held opinions of his constituents; if nothing else it is foolish because it may cost him his seat…

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