

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Grand Forks (City) v. Butler*,
2016 BCSC 349

Date: 20160229
Docket: S154940
Registry: Vancouver

Between:

The Corporation of the City of Grand Forks

Petitioner

And

Julia Christine Butler

Respondent

Before: The Honourable Mr. Justice Greuell

Reasons for Judgment

Counsel for the Petitioner:

S.S. Manhas

Counsel for the Respondent:

J. Dubas

Place and Date of Hearing:

Vancouver, B.C.
February 1, 2016

Place and Date of Judgment:

Vancouver, B.C.
February 29, 2016

[1] The petitioner City of Grand Forks (the "City") seeks to disqualify the respondent, Ms. Butler, from holding office pursuant to ss. 101(1)(2)(3), 108.1 and 111(6) of the *Community Charter*, S.B.C. 2003, c. 26 (the "*Charter*").

The Community Charter

[2] The relevant provisions of the *Charter* read:

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 office as described in section 101.8 [*disqualification for contravening conflict rules*] unless the contravention was done inadvertently or because of an error in judgment made in good faith

...

108 (1) A council member or former council member must not use information or a record that

(a) was obtained in performance of the member's office, and

(b) is not available to the general public,

for the purpose of gaining or furthering a direct or indirect pecuniary interest of the council member or former council member.

...

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

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

(b) the municipal,

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

...

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

- (a) any of the electors bringing the application, in the case of an application under subsection (1) (a), or
- (b) any member of council other than the person alleged to be disqualified, in the case of an application under subsection (1) (b).

The Legal Framework

[3] The legal framework for determining whether a municipal elected official should be removed from office under the *Charter* was addressed by Mr. Justice Rogers in *Fairbrass v. Hansma*, 2009 BCSC 878, at paras. 16 - 21 (Appeal dismissed):

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

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

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

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

[20] Assuming that the official is guilty of a conflict on all counts so far, the court must then look to s. 104 to determine if he may be excused. ...

[4] Mr. Justice Rogers, proceeded to discuss the circumstances extant in the case before him saying:

... In the present case, two circumstances contemplated by s. 104 might afford relief here. They are that the pecuniary interest is in common with the electors of the municipality generally, or that the pecuniary interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the member in relation to the matter.

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

[5] The legal rationale underlying the provisions in the *Charter* was explained by the Court of Appeal in *Schlenker v. Torgrimson*, [2013] B.C.J. No 29 (C.A.), at para. 38:

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

This enactment, like all conflict-of-interest rules, is based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well-meaning men and women may be impaired when their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose. And the Act, by its broad proscription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interest may be in conflict with their public duty. The public's confidence in its elected representatives demands no less.

Legislation of this nature must, it is clear, be construed broadly and in a manner consistent with its purpose.

[Emphasis added.]

[6] What is determined to be a "direct or indirect pecuniary interest in the matter" is necessarily depend on the facts of each case. However, the authorities indicate "a trend towards a broader interpretation as electors and Legislatures insist upon higher standards of objectivity for elected representatives in order to promote disinterested consideration of the questions that counsellors are called upon to decide": *Godfrey v. Bird*, [2005] B.C.J. No. 1122.

Background

[7] The petitioner is a municipal corporation under the *Local Government Act*, R.S.B.C. 1996, c. 323 and the *Charter*.

[8] Ms. Butler is a single mother of two children. To support her family she has worked at odd jobs in the community and since mid-2011 had offered these and

various gardening services to customers under the name of "Eden Yard Care" ("Eden"). Ms. Butler estimated that in 2014, 60 percent of her income was derived from Lawn mowing, 20% derived from weeding and the balance from other activities. She earned approximately \$8,100 per annum and had about ten regular customers.

[9] Since at least 2003, the petitioner's Council had been considering the implementation of the Water Meter Program (the "Program") within the petitioner's territorial jurisdiction whereby water meters would be installed on all residential properties and the owners of those properties would be charged for water on the basis of usage for their respective properties. One of the primary reasons for the consideration of the implementation of the Program by the petitioner's Council was to promote the conservation of the City's water resources and for the long term protection of the aquifer that provides water to the City.

[10] The issue of the installation of residential water meters has been controversial one for a number of years and was one of the issues before the electorate in the last municipal election in November, 2014.

[11] Ms. Butler ran as a candidate for the petitioner's Council and was elected. It was well known in the community she was opposed to the installation of water meters.

[12] On January 27, 2014, prior to being elected as a member of the petitioner's Council, Ms. Butler appeared before Council and spoke against the Program. In her presentation, she advised the Council she operated a business in the City and that she had concerns regarding the Program in respect to the operation of her business and was concerned that the rates for water usage could be changed by Council at any time. Ms. Butler expressed the view that the Program would have a negative impact of the financial viability of her business.

[13] Since being elected as a Council member, Ms. Butler has attended meetings of Council and participated in discussions and decision-making relating to the

Program and to the rates to be imposed by the City on residential property owners for water usage.

[14] Ms. Butler requested to be and was subsequently appointed to the City's Water Rates Review Select Committee. The Committee is charged with reporting to Council with recommendations as to the rates to be imposed by the City on residential owners for water usage.

[15] On or about February 16, 2015, City Council received a letter from a local citizen's group, the Cityzens' Oversight and Participation Project, raising concerns Ms. Butler may have a conflict of interest in relation to the Program and, in particular, to the rates to be imposed by the City on residential property owners for water usage.

[16] The letter raised the concerns because of the statements made by Ms. Butler at the January 27, 2014, Council meeting.

[17] At an in-camera meeting on February 23, 2015, City Council and Ms. Butler, received verbal legal advice from the City's solicitor advising that Ms. Butler had a pecuniary conflict of interest in relation to the Program and the rates to be imposed under the Program as a result of the concerns she had earlier expressed about the potential negative impact of the Program and her business.

[18] The petitioner's solicitor advised Ms. Butler that she should abstain from participating in relation to the Program and the rates to be imposed.

[19] At an in-camera meeting on April 7, 2015, the Council received a written legal opinion from the City's solicitor again advising that Ms. Butler had a pecuniary conflict of interest in relation to the Program and the rates to be imposed for water usage. The opinion was premised on the potential impact the Program would have on her business. The petitioner's solicitor again advised Council that Ms. Butler should abstain from participating in Council discussions and in any voting in relation to the Program and the rates to be imposed on residential property owners. While Ms. Butler was not in attendance at the meeting when Council received the opinion,

the opinion was made available to Ms. Butler on April 5, 2015. Council subsequently authorized her to provide the opinion to her lawyer so he could provide legal advice to her.

[20] Ms. Butler attended at an April 20, 2015 regular meeting of Council. She participated in the discussion on whether to implement the Program. She voted against the implementation of the Program on first, second, and third reading of the Bylaw. Ms. Butler did not declare she had a conflict of interest in relation to the Program or the Bylaw.

[21] Ms. Butler sought her own legal advice. She received oral advice from her legal counsel on April 29, 2015, that she was "acting in good faith throughout". She subsequently provided Council with a copy of her counsel's written opinion dated May 5, 2015.

[22] The written opinion she received was premised on her activities of moving lawns, weeding gardens trimming hedges and garden cleanup through Eden, that the volume of the business was small; that the volume of business was small; that she did not water lawns; that the water required to maintain lawns and gardens was supplied by her customer; and that prior to the election she had publically expressed concerns about the lack of certainty with water rates in the City moved ahead with the Program. The opinion concluded the conflict of interest provisions of the Community Charter would not apply to her because "you do not have, through your business, a pecuniary interest that is different in kind". Her counsel was of the view her interest was common with the rest of the community in general.

[23] Ms. Butler attended a May 4, 2015 regular meeting of Council, and participated in the discussion of and voted on adoption of the Bylaw. Ms. Butler voted against adopting the Bylaw. Again, Ms. Butler did not declare a conflict of interest in relation to the Program or the Bylaw.

[24] On May 25, 2015, by resolution adopted by a two-thirds majority vote, the Council authorized the bringing of this petition to seek a declaration that Ms. Butler is disqualified from holding office under the *Charter* for conflict of interest.

[25] Ms. Butler responded to the application by filing two affidavits. In the first she deposed that in March 2015, she had dissolved Eden and had been hired by Arch Angle Contracting as a “general labourer and for contract sourcing and office work”. She deposed she did this because she was given verbal advice by the petitioner’s staff and its lawyer at an in-camera meeting on February 23, 2015, advising her she had a pecuniary conflict of interest in relation to the water meter Program and the rates to be imposed. She deposed she was advised as a result of the conflict she should refrain from participating in discussion on the topic and in voting. She further deposed that she was advised that if she worked for a company on a salary “a conflict would be less likely”. She deposed she “was working for Angle Contracting long before the two votes at issue” were taken. She attached a copy of what she described as a “payment confirmation” describing she had worked 40 hours between March 11 and March 30 for Angle as an “employee”. She also deposed she is not doing garden work, but only office work for Arch Angle. She had produced a payroll slip evidencing she was on Arch Angle’s payroll commencing March 11, 2015 when she worked 40 hours between that date and March 30.

[26] Several Council members have sworn affidavits that Ms. Butler has “taken employment with another business providing services within the boundaries of the City similar to those provided by [Eden]”.

[27] Arch Angle Contracting is a business operated by Mr. Darrell Boettcher. Mr. Boettcher, who resides in Kelowna, applied for a Business Licence on May 19, 2015 (after the events described above). The application describes the “Type of Business as ‘Handyman - odd jobs, retaining walls, decks fences et and yard work’” and that the enterprise has two employees.

[28] Ms. Butler’s description of what she is now doing is:

With respect to my employment, my company was shut down as of March of 2015 and since that time I have been working with Arch Angle Contracting exclusively. As well Arch Angel is servicing only the following yard maintenance contacts as of the spring of 2015 and currently: I put in the garden for Natasha Soroka who lives within city limits but operates off a well and not off the reservoir. Here is the watering I referred to preciously costs \$25.00; I still work for the Gables Housing Society through Arch Angle, but again I have no control over their watering which they do through an automated system. There are a couple of other clients for whom Arch Angle has me rake leaves and trim hedges. Also there was comment about me telling two council members that I had picked up additional work as a result of the dispute and that I had told them this. This is not a fair depiction of what had been said. When this dispute arose because it is a small town people found out about my situation. I was offered employment by a property management company, to work as a lifeguard in another location outside the city where I would not be in conflict, and I was offered the job at Arch Angle Contracting which I took. This having been said, Arch Angle has picked up additional work since this dispute arose but this has involved shovelling snow in the winter, and looking after a house when one of my neighbours who is a snow bird is away. I have also mowed on behalf of Arch Angle two lawns within city limits but with no watering and one outside city limits. It should be noted I work for Arch Angle 50 hours a month making \$10.25/hour and they receive the small amounts of money from these jobs currently being done. It should be noted that much of what I'm down for Arch is now office work and as Arch Angle has fewer customers than I had when I was doing yard work with my own company. ...

[29] The City in response says Ms. Butler did not advise her lawyer she had made presentations to Council advising the Program would negatively affect her business. Had she made such disclosure, the petitioner says the advice she would have received would have been the same as the legal advice given to the City.

Discussion

[30] In my view Ms. Butler quite clearly had a direct conflict of interest when she participated in discussion about the Program before she divested herself of doing business as Eden in early March, 2015. The conflict arose from the statement she made to Council in 2014 that she had concerns about the effect that the Program would have on her business. The natural meaning of her comments would lead one to conclude she opposed the Program because her business would be negatively affected should the Program be introduced.

[31] The issue is whether she remained in a conflict of interest position once she became an employee of Arch Angle. The facts satisfy me that Ms. Butler shut down Eden as a result of the warning given to her by the City's counsel that she was in a conflict of interest position as a result of her business. She took steps to change what she is doing by taking employment with Arch Angle. On the evidence before me the City has not established Arch Angle is doing similar work to that previously performed by Eden. There is simply no evidence to contradict Ms. Butler's description of the functions she is now performing.

[32] I am of the view that Ms. Butler's change in status from operating her own business to taking a position of employment with Arch Angel does not place her in conflict with the Program. The work she describes she is doing does not directly or indirectly place her in a position of conflict wherein she will have more or less income or hours of employment as a consequence of the implementation of the Program. In my view her interest is now no more than that of an ordinary member of the community, although she remains one who is politically interested in the Program.

[33] Accordingly, I conclude the City has not established that at the time Ms. Butler voted on the first, second and third readings or on adoption of the Bylaw that she had a conflict of interest.

[34] Even if I am wrong in drawing this conclusion I would find the City has not brought this application within the time specified in the Charter and even if it has that, in any event Ms. Butler has acted in good faith at the time she voted against the adoption of the Bylaw on May 4, 2015. I reach this conclusion for several reasons.

[35] First, as set out above, s. 111(4) of the *Charter* requires an application "may only be made within 45 days after the alleged basis of the disqualification comes to the attention of ... any member of council other than the person alleged to be disqualified...". The original complaint Ms. Butler was in a conflict position was made to Council by letter on February 16, 2015. Council received legal advice on February 23, 2015, advising Ms. Butler had a pecuniary conflict of interest in the Program and

should disqualify herself from discussing and voting on issues concerning the Program. Ms. Butler voted on first, second and third reading of the Bylaw on April 20, 2015. She maintained she was not in a position of conflict. She had changed her business relationship by that time. The petition was filed June 16, 2015, well outside the 45 day time limitation period. Had the City intended to take action against Ms. Butler it should have done so after the April meeting. I do not accept the City's position that the 45 day time limitation runs from May 4, 2015, the date Council voted to adopt the Program.

[36] The legislature has purposefully set a short time limitation period for bringing applications of this nature. In addition the time runs, not from the time of voting or from when the issue is first brought before council for discussion but from when "the alleged bias of the disqualification comes to the attention of any member of council...". The obvious intention of the legislature is that conflict of interest matters will be dealt and resolved promptly and in such a manner that elected local government officials can carry out their political and legislative duties under the trust imposed on them in an expeditious manner.

[37] Further, I am satisfied Ms. Butler acted in good faith throughout. While she initially did not believe she was in a position of conflict of interest I find she was influenced by statements made to her that she may be able to remove herself from such conflict by shutting Eden down and taking employment with an employer. She did so. She subsequently received a legal opinion from a lawyer she retained, who was experienced in municipal law, to advise her that her business under Eden did not place her in position of a conflict position. The opinion was provided to her before she voted on passage of the Program. As stated, I find she was not in a conflict of interest position as of May 4, 2015.

[38] Based on these conclusions I dismiss the petition to have Ms. Butler disqualified from holding office on the City's Council.

[39] Ms. Butler will recover her costs of this application.

"Greyell J."