STEWART McDANNOLD STUART
Barristers & Solicitors

PH: 250.380.7744 | 2nd Floor, 837 Burdett Ave.
FX: 250.380.3008 | Victoria, BC V8W 1B3
logolaw@sms.bc.ca | www.sms.bc.ca

Email Transmission

PRIVILEGED AND CONFIDENTIAL

August 12, 2016 File No.: 682 004

Email: kapow2@shaw.ca

aKd Resource
Mr. Kelly Daniels
5124 Brenton Page Road
Ladysmith, BC V9G 1L6

Dear Mr. Daniels

RE: Island Corridor Foundation and Conflict of Interest Issues

We have been asked to provide our opinion on matters relating to the Island Corridor Foundation and in particular, the role of elected officials who serve as appointees to the Board of Directors of the Island Corridor Foundation.

The particular questions we have addressed in this opinion are the following:

1. Would the Conflict of Interest Exceptions Regulation, BC Reg. 91/2016 (the "Regulation") recently enacted by the Province provide any relief to members of the Board of Directors of the Island Corridor Foundation who are elected officials serving on the boards of regional districts?; and

2. Does the fiduciary duty that directors of the Island Corridor Foundation owe to the Island Corridor Foundation or the *Schlenker* decision preclude such persons from discussing ICF matters with their respective regional district boards?

1. Would the Conflict of Interest Exceptions Regulation, BC Reg. 91/2016 (the "Regulation") recently enacted by the Province provide any relief to members of the Board of Directors of the Island Corridor Foundation who are elected officials serving on the boards of regional districts?

The Province has recently enacted the Regulation in order to alleviate some of the concerns created by the decision of the BC Court of Appeal in *Schlenker v. Torgrimson* 2013 BCCA 9. The Regulation provides relief for elected officials who also sit as directors on the boards of societies and corporations in the following fairly limited circumstances:

1. In the case of societies (including extra-provincial societies), the relief extends to situations where a matter that falls within the definition of "specified interest" comes before the board of a local government and one (1) or more of the elected officials also

sit on the board of the society because of an appointment to the society board by the local government.

2. In the case of corporations, the matter must also be a "specified interest" as defined in the Regulation, the corporation must be one that was incorporated by a public authority and not only must the elected official have been appointed by the local government to the board of the corporation, but the corporation must also be providing a service to the local government.

As you can see from this, it is not every situation where a director sits on the board of a society or corporation that is the subject of a vote at a regional district board meeting that will be covered by the Regulation. Moreover, even for situations where the elected official has been appointed to the board of the society or corporation, it is not every vote on every matter that will be protected. The vote must involve a "specified interest" defined as follows:

(a) an expenditure of public funds to or on behalf of an entity;
(b) an advantage, benefit, grant or other form of assistance to or on behalf of an entity;
(c) an acquisition or disposition of an interest or right in real or personal property that results in an advantage, benefit or disadvantage to or on behalf of an entity;
(d) an agreement respecting a matter described in paragraphs (a), (b) or (c).

Is the ICF a Society or a Corporation?

In my opinion the ICF is likely a corporation.

"Society" is defined in the Regulation as having the same meaning as in the B.C. *Society Act.* The definition of "society" also includes an extra-provincial society.

In the *Society Act*, an extra-provincial society is defined as being "formed outside British Columbia". The Island Corridor Foundation ("ICF") was not technically formed "outside" British Columbia, but formed in British Columbia under federal legislation, the *Canada Not-For-Profit Corporations Act*. While the ICF resembles a society created under the *Society Act,* it likely does not meet the definition of "society" in the Regulation. In my opinion it is more likely that the ICF should be considered as a "corporation" for the purposes of the Regulation.

Therefore, the Regulation will only apply to the directors who are on the Board of the ICF if:

(a) the members are "appointed" by the regional board as that term might be interpreted under the Regulation;
(b) the ICF provides a service to the regional district that has appointed an elected official to the ICF board of directors; and
(c) where the matter falls within the definition of "specified interest" under the Regulation.

Does the ICF Provide a Service to a Regional District?

Typically the ICF would not, in its role as the operator of a rail line, provide a service to a regional district.

Under the *Local Government Act* "service" in relation to a regional district is defined in part as:

> "(a) an activity, work or facility undertaken or provided by or on behalf of the regional district …"

However, one of the purposes of the Island Corridor Foundation is stated to be creating trails, parks, gardens, greenways and other public areas for use of members of the public along the length of the Island corridor railway line on the southern part of Vancouver Island. If the ICF provides land for trails to a regional district for use and benefit to be managed through the regional district's regional trail service, this would, in my opinion, likely be considered a service to a regional district in this context.

Given that, even if the Island Corridor Foundation does not qualify as an "extra-provincial society" as defined in the *Society Act* of British Columbia, in our opinion it would constitute a corporation to which the Regulation could apply in circumstances where it makes lands available to regional districts for public trail purposes.

Are ICF Directors appointed to the Board of the ICF by a regional district?

On the issue of the manner in which ICF directors are elected to the Board, there is some ambiguity about whether the phrase "appointed to" would actually cover the situation of the Island Corridor Foundation.

In the case of the ICF, Bylaw 5.1 provides that the "the board shall be comprised of an equal number of directors from Regional Governments (the "Regional Government Directors")…"

However, the process for the ICF is that Bylaw 5.2(a) provides that "The Regional Government Members shall each nominate one (1) director for election to the board. Such persons need not be elected public officials". There is no requirement in the bylaws that the person so nominated be an elected official. Under bylaw 5.2(d) once the nominees have been selected, "the members (through their designated representatives **shall** meet and **shall elect** the nominees to the board" (my emphasis). This process reflects the wording of the *Canada Not-for-profit Business Corporations Act* which provides for election of directors by the members and no provisions to reject the nominees. The ICF bylaws appear to leave the member representatives with no alternative but to "elect" the "nominees" to the Board but puts the authority for the selection of the actual director to represent each member squarely in the control of the nominating member itself. Accordingly a regional district putting forward the name of a nominee can be assured that such nominee is going to be that regional district's appointee to the Board of the ICF.

The term "appoint" is not defined in the Regulation but there is case authority from the Federal Court in which it was given a broad reading to include a 'designation' and not just a formal

Ministerial appointment: *Houle v. Canada (Minister of Employment and Immigration*, [1997] 2 F.C. 493.

At paragraph 22 of the decision, the court stated the following:

> "22 I attach no particular significance to the use of the word "designate" in subs. 61(1) of the *Immigration Act*, 1976 and to the use of the words 'appointed' and 'appointment' in ss. 22 and 23 of the *Interpretation Act*. The effect of what was done by the Governor in Council on December 19, 1969 was that the plaintiff became a vice-chairman of the immigration appeal board, a public officer in the public service of Canada. Whether he was appointed, constituted, designated, named or called to that office would nevertheless, in my opinion, subject him to the limitations imposed by reason of s. 22 and 23 of the *Interpretation Act*."

There is a reasonable argument that a regional board which puts forward the name of an elected official as its nominee is, for its purposes and within the meaning of the Regulation, "appointing" that person to be its representative on the ICF board, given the bylaws of the ICF which mandate the election by the members of the person nominated. To paraphrase the court in *Houle,* the effect of what is being done is that the director so nominated becomes that regional district's appointment to the board of the ICF.

Given the nature of the Regulation (providing relief from disqualification), in my opinion it is not unreasonable to give the word "appoint" a broader rather than narrower interpretation.

Any doubt about a regional board's intent could be clarified by the board of the nominating regional district confirming and ratifying its elected official as its appointment to the Board of the ICF, remembering that the intent of the Regulation is to empower elected officials to represent their boards and councils while sitting as the designated appointee on the boards of other entities—a reflection of the fact that there truly is no reasonable basis for holding such persons to be in positions of pecuniary conflict of interest. Then, if there were ever to be a challenge, the Board would have a resolution confirming that its nominee is to be the Board "appointed" ICF director within the intent of section 2 of the Regulation.

The best approach to eliminate any uncertainty would be for the bylaws of the Island Corridor Foundation to be amended to provide for a process of direct appointment by the regional district and First Nation members, but that may be problematic given the wording of the *Canada Not-for-profit Corporations Act* under which the ICF is incorporated, which does not appear to provide that flexibility.

2. Must local government appointees refrain from communicating any confidences of the ICF Board of Directors to their respective regional districts?

As a general principle, directors of a corporation, including a corporation such as ICF incorporated under the *Canada Not For Profit Corporations Act*, owe fiduciary duties to the corporation of which they are appointed directors. This point was reiterated in the case of *Society Act* directors by the Court of Appeal in *Schlenker.* While the Schlenker decision does

not apply directly to the ICF which is not incorporated under the *Society Act,* the same principles would apply to ICF directors who also owe a fiduciary duty to the ICF as a separate corporate entity from their regional districts.

In the case of a not for profit society incorporated under the *Canada Not-for-profit Corporations Act,* the common law would impose fiduciary duties on such person. These common law duties would include a duty to preserve the confidences of the Board of directors.

However, that duty is not an absolute one. In some circumstances, the members of a not for profit corporation such as the ICF will have a legitimate interest in being kept aware of matters that materially affect the interests of the members. In some circumstances where there is no apparent prejudice to the ICF, it may not be considered a breach of fiduciary duty on the part of directors to make information available.

In *Wang v. British Columbia Medical Association* 2014 BCCA 162, a member of the Board of Directors of the BCMA who was involved in a fractious dispute with other members of the board, sued the BCMA directors that she felt had wrongly disclosed to BCMA members information about her battle with the board directors.

In its analysis of the validity of such a claim (before dismissing it), the B.C. Supreme Court had spent time considering the nature of the relationship between not for profit organizations and their members. In reviewing an earlier case involving communications about a member of the English bar, *Kearns v General Council of the Bar* [2003] 1 W.L.R. 1357 (Eng. C.A.) and stated:

> "…It matters not at all whether Mr. Stobbs and the Bar Council are properly to be regarded as owing a duty to the Bar to rule on questions of professional conduct such as arose here, or as sharing with the Bar a common interest in maintaining professional standards. What matters it that the relationship between them is an established one which plainly requires the flow of free and frank communications in both directions on all questions relevant to the discharge of the Bar Council's functions." (emphasis in original)

The B.C. Supreme Court also stated the following:

> "…Here, the board of directors of a private society was communicating through its spokesperson to its members in connection with the conduct of one of the directors and its effect on the board's function. …in the context of a whole history of communications dealing with the increasing tension between Dr. Wang and the rest of the board. Dr. Wang had not hesitated to communicate to her perceived constituents on these issues." (emphasis in original)

This was a case where the Code of Conduct designated the President of the BCMA as being free to communicate with the general membership as the official spokesperson – rather than a one-off communication between a director and the members, however the Court does not posit that Dr. Wang, herself a member of the board, had communicated with some members of the society following directors' meetings. And noted that she too was protected by the

qualified privilege that attached to her statements against actions in defamation from other members of the board:

> "A board should be able to communicate to the members of the Association it governs about matters that were interfering with its ability to function, without the threat of civil liability for defamation. That is why the defence exists. It provides equal protection to Dr. Wang with respect to the many potentially defamatory comments she published concerning board members and others." (my emphasis)

Schlenker v Torgrimson addressed a regional board vote; it did not address mere communication of information that remained governed by the common law fiduciary obligations of ICF directors. It is clear from the *Wang* decision that there are circumstances in which it is perfectly proper for a board of directors to communicate with its membership, and that organizations established to represent the interests of their members may need to maintain good communications with those who have an interest in the organization.

Therefore a blanket statement by ICF prohibiting all communication between ICF directors reporting back to the individual members (who have themselves each nominated an individual for appointment to the Board) has no real foundation in law, even under the *Schlenker v Torgrimson* decision.

That said, the fact that there may be limited circumstances in which disclosure of a Board confidence may not be a breach of fiduciary duty does not mean that this duty is to be taken lightly. I would advise against individual directors making unilateral disclosures which compromise the legitimate legal interests of the ICF without the direction of the ICF Board. Individual directors doing so could place themselves at legal risk for breach of a fiduciary obligation.

In the case of the BCMA, it had adopted a Code of Conduct for Board directors which allowed for individual directors to communicate with the members. Given the representative nature of the ICF, and the legitimate interests of the regional and First Nations members in the governance and operations of the ICF, it may make sense for the ICF to have a similar Code of Conduct, similarly allowing for communication of information between the directors representing the members and the boards or band councils of those members. This reflects a common sense position that a "wall of silence" is not necessary or desirable to insulate the governing body of an organization from its members.

In extreme circumstances, if members of the ICF believe that the interests of the members are not being adequately protected by the Board of Directors, there are remedies available under the *Canada Not-for-profit Corporations Act* to apply to the court for relief against this situation.

Section 253 of the *Canada Not-for-Profit Corporations Act provides:*

Application to court re oppression

> 253 (1) On the application of a complainant, a court may make an order if it is

> satisfied that, in respect of a corporation or any of its affiliates, any of the following is oppressive or unfairly prejudicial to or unfairly disregards the interests of any shareholder, creditor, director, officer or **member**, or causes such a result:
>
> (a) any act or omission of the corporation or any of its affiliates;
>
> (b) the conduct of the activities or affairs of the corporation or any of its affiliates; or
>
> (c) the exercise of the powers of the directors or officers of the corporation or any of its affiliates.

Obviously, it would be preferable to have a system of appropriate communication between the directors and the members so that circumstances never gave rise to the need for an expensive and divisive court action just to protect the legitimate expectations and interests of the parties that formed the corporation in the first place. A Code of Conduct for ICF Board members which recognized the need to balance their duties to the ICF as an organization with the legitimate interests of the ICF member which they are nominated to represent could assist in improving communications and provide for the kinds of open and frank flow of information that would benefit all parties.

Yours truly,

STEWART McDANNOLD STUART

Per:

Colin Stewart *

CS/dw

*Law Corporation