

Governance and Financial Review
of the Island Corridor Foundation
for the
Association of Vancouver Island
and Coastal Communities

September 2, 2016

aKd Resource



Table of Contents

The Assignment	3
Methodology	3
Context	4
Island Corridor Foundation Structure	5
Governance Review	7
Financial Review	14
Summary and Conclusions	16
Recommendations	18
Attachment 1: AVICC Resolution	20
Attachment 2: Stewart McDannold Stuart Legal Opinion	21

The Assignment

At the 2016 convention of the Association of Vancouver Island and Coastal Communities (AVICC) a resolution (Attachment 1) was passed calling for a financial and governance review of the Island Corridor Foundation (ICF). To fulfill the objectives of the resolution the AVICC Executive contracted with Kelly Daniels to conduct the review with direction to:

- Clarify and confirm the issues, concerns and frustrations prompting the review;
- Review current bylaws and system structure to ensure the owners of the corridor are properly represented and their interests are protected;
- Conduct a high level review of ICF budget and 2015 financial statements; and
- Determine if the ICF's performance and accomplishments to date have been reasonable and if it is meeting the owners' expectations.

The First Nation members of ICF were not party to the resolution although it was intended to contact at least the ICF First Nation Board representatives for their perspectives.

The review was specifically not intended to mediate differences between the parties nor to evaluate or make recommendations as to the viability of providing rail service on Vancouver Island.

This report reflects the findings, analysis and recommendations to meet the deliverables as identified by the Executive.

Methodology

The following activities were undertaken:

- All elected officials from the 5 member Regional Districts (RD) were contacted through their Chief Administrative Officers (CAO) and offered an opportunity to be interviewed. Each Regional District was given the choice to set up a process suitable for them resulting in a range of approaches including: a single joint meeting with all Directors from the Regional District; telephone interviews; individual face-to-face meetings at Regional District offices; and written submissions. Approximately 40 people were heard during this process;
- The CEO and Chair of the ICF were interviewed;
- Meetings with senior Provincial officials;
- A document review of:
 - minutes from the last ICF Annual General Meeting;
 - notes for the previous 12 months of Board Meetings;
 - the ICF's bylaws;

- the ICF 2016 budget and 2015 Audited Financial Statements;
- the Schlenker v. Torgrimson Court of Appeal ruling;
- a subsequent legal opinion obtained from Stewart McDannold Stuart (SMS) for this review (Attachment 2) as to how this decision would relate to participation of local government politicians on the ICF Board regarding the new Regulation and whether the fiduciary duty of directors of the ICF precludes them from discussing ICF matters with their respective Regional District Boards; and
- a review of ICF website material including context, organization structure, objects and intent as well as progress toward goals.

ICF would have preferred a process of responding to specific issues and complaints but the review was designed for an independent, high-level evaluation of its governance and finances, not potentially an on-going question and answer exchange between ICF and Regional District members. We did review with them some of the general themes that were emerging from our interviews.

In a two hour meeting, to explain the process and obtain information to provide context and a clear understanding of ICF's governance and finances, the Chair and CEO expressed the opinion that many of our questions were administrative in nature and that it was inappropriate for Regional Districts to be involved in ICF's day to day affairs. Further attempts resulted in only partial information being provided.

While the First Nations members were not party to the original resolution the intention was to contact at least the ICF First Nation Board representatives for their input. This approach, however, was not supported by the ICF. They did not provide contact information for them, and we were told it was not necessary to come to the ICF Board meeting in July as planned. This is unfortunate since the First Nation perspective could have provided a fuller picture.

Context

When Rail America lost its largest freight customer in 2001 it announced that it intended to sell its assets and leave the island by the fall of 2003. In response a private organization calling itself the Vancouver Island Rail Corporation (VIRC), with Tanner Elton as its spokesperson, was formed to maintain rail on Vancouver Island and to operate the system. They initially worked with First Nation communities for support, particularly the Cowichan Tribes, and then approached AVICC with a proposal for a public-private partnership among the 5 Regional Districts and fourteen First Nations along the line.

The AVICC held a number of meetings to discuss the proposal from VIRC to enter into a public-private partnership to take ownership and operate the rail line. VIRC proposed the establishment of a Vancouver Island Corridor Foundation (a federally incorporated charitable foundation) made up of the affected regional governments and First Nations who would own and control the corridor. The Foundation would seek charitable status from Canada Customs and Revenue Agency and establish a Corridor Authority, a wholly owned subsidiary of the foundation, which would put into operation the objectives of the Foundation.

In 2003 AVICC passed a motion authorizing hiring a consulting firm to assess the proposal and make recommendations on:

- Whether a non-profit Foundation would be the most appropriate means to participate in this venture;
- The financial, business and other risks municipal governments and First Nations might face through participating in a private/public partnership of this nature; and,
- The financial requirements and exposure of member local governments within the following 6 years and in the long term.

The CAOs of the five Regional Districts were tasked with hiring the consultant and reporting to their respective Boards. Meyers Norris Penny (MNP) was retained to conduct the evaluation and in August of 2003 the CAOs forwarded the MNP report to their Boards with a covering report prepared by all five CAOs.

The result was that all five Boards approved the formation of a Foundation to own and manage the railway corridor. The Boards each appointed a representative to work on creating the foundation, including preparing “final documents, appraisals and environmental studies, and the business plan”. Those efforts essentially became the current bylaws and structure of the ICF.

Island Corridor Foundation Structure

The ICF is the governing body made up from the five Regional Districts and fourteen First Nations who are along the corridor. As identified in its bylaws, the Foundation is governed by a Board of Directors made up of a representative nominated by each Regional District, five First Nation representatives who represent the eight First Nation groups supporting nominees to the Board, and two members at large. The Board is responsible for the administration of ‘the affairs of the Corporation in all things and [to] do all such other acts and things and make or cause to be made for the Corporation, in its name, any kind of contract which the Corporation may lawfully enter into and, save as hereinafter provided, generally, may exercise all such powers and do all such other things as the Corporation is, by its articles or otherwise, authorized to exercise and do.’

There is a Members Committee that is comprised of designated representatives from each Regional District and First Nation. The role of the Members Committee is rather vague in the ICF Bylaws (ie) “each member shall appoint a designated representative to exercise its rights, including voting rights, at any meeting of members.” To date Members generally attend the Annual General Meeting, and preside over the appointment of the Board of Directors, the appointment of the Auditors, and the election of the Chair and Vice-Chair of the Board of Directors.

From an administrative perspective, the Chief Executive Officer is the sole staff person reporting to the Board of Directors. Currently this position is contracted to Granneke Management and Consulting Services, which provides services such as land management, maintenance of assets in good condition, trail development, and presentation of an annual budget. The Corporate Secretary role is performed by the only direct ICF employee while the Finance Officer and First Nation Liaison Officer are paid an honorarium directly by ICF

We understand that there were initially a number of operating committees to assist in meeting the mandate of the ICF but they were disbanded some time ago. More recently we are aware of two committees the ICF has established to provide advice and direction to the Board and to improve communication with the members; a Local Government Liaison Committee (LGLC) and a First Nations Liaison Committee (FNLC). We were not able to review terms of reference for these Committees.

A schematic representation of the structure, largely taken from the ICF website, follows:



The Foundation’s by-laws provide a method for members to make changes to the bylaws by putting forward resolutions (section 2.6) at either a special meeting or the Annual General Meeting. The Board of Directors may, by resolution, make, amend or repeal any bylaws that regulate the activities or affairs of the Corporation. This process is outlined in section 14.1 of the Bylaws.

While the land within the corridor is legally owned by ICF, regional districts see themselves, along with First Nations, as owners of the corridor, partly because they are members of the Foundation, partly because of the efforts Regional Districts and First Nations made to save the corridor originally. As owners they feel they are entitled to more in-depth information than is provided on the ICF web-site.

Governance Review

The governance structure of the ICF was originally established to accomplish three primary objectives:

- to limit the owners' financial exposure and liability both in running a rail line and in owning and maintaining a land corridor of this size;
- to limit political interference in a complex structure involving regional governments and First Nations; and
- to take advantage of charitable status, a requirement for the initial transfer of the corridor.

No one interviewed expressed dissatisfaction with the structure of the organization per se. Suggestions were made for working more effectively within the existing structure with minor changes to the bylaws.

One suggestion related to the qualifications of ICF Board Directors. Currently the Regional District Directors on the ICF Board are nominated by recommendation of their Regional Boards. They are often chosen because of their interest in the business of the Foundation and not necessarily because of any particular skill set they will bring to the Board. It was suggested that individual Board appointments could be made from the general public based on expertise required by the ICF Board. This would be similar to the process often used by Regional Districts for appointments to Airport Commissions.

The general feeling was that, while such a process may be valuable once the rail is operating, the current process for nominating political representatives from the Regional Boards should remain. However, the member-at-large representatives on the Board should be chosen for particular skills that strategically bring added value to the Board table, for example financial, legal, business planning, rail operations, or fund-raising expertise.

Recommendation #1: That the ICF Board appoint members-at-large from the public based on a strategic evaluation of skill sets that will provide added value to the Board.

Recommendation #2: That in the future Regional District Boards consider nominating Board Members to the ICF Board from the community based on specific skill set requirements.

Four categories of issues were raised during the review:

- 1) Communication and transparency
- 2) Loss of trust on behalf of politicians and the public
- 3) Lack of effort by Regional District Board members to become informed
- 4) Lack of basic corporate planning and performance monitoring tools

1) Communication and Transparency Issues

The most common theme we found in our interviews with politicians was frustration over the lack of communication between the ICF and Regional District members, who regard themselves as co-owners of the corridor. Regional District Board members feel uninformed of the current status of ICF progress on meeting corridor goals and frustrated when their Board representatives are not able to talk to them due in large part to interpretations of the Schlenker decision (see below). This was particularly true of the newer RD Board members in their first term of office who lack history with the organization. Without up-to-date information they are unable to answer questions from their electorate causing embarrassment and over time, a weakening of support for the objectives of the Foundation. It also resulted in a considerable amount of misinformation since, in a vacuum of information, people will fill in the gaps.

A lack of transparency regarding the business case for rail on Vancouver Island has resulted in the lack of trust and support from even some of the most staunch supporters of rail.

The lack of communication has been exacerbated by a lack of understanding of the complexity of the environment in which the Foundation works, involving not only different requirements of Regional District and First Nation members, legal and funding requirements of two senior governments, operating partners, and several regulatory authorities (see below).

The Foundation is statutorily a separate and independent entity for valid reasons. Although it is an independent body and has no legal requirement to be transparent or overly communicative about its affairs, we see no practical reason for them to operate in such a closed manner. It is hurting their credibility and reducing support from politicians and the public.

Simple changes to the bylaws such as permitting the public to attend the Annual General Meeting and regular meetings would help reduce mistrust and would increase transparency. All non-confidential agenda items should be open to the public.

Recommendation #3: That the ICF Board amend section 4.1 of its bylaw to allow the public to attend the Annual General Meeting.

Recommendation #4: That the ICF Board amend its bylaw to designate a portion of each regular meeting as open to the public.

The ICF board has most recently implemented a number of initiatives to address this issue by distributing notes from their Board meetings, initiating a Community Liaison Committee and increasing the number of times the CEO attends Regional District Board meetings. The Frequently Asked Questions (FAQ) section of the ICF web-site is also valuable and should be expanded and updated on a regular basis.

Recommendation #5: That ICF schedule one regular, annual, presentation to the five Regional District Boards focusing on past year accomplishments and objectives for the coming year.

Recommendation #6: That AVICC schedule a regular session at their annual convention for ICF to hold a workshop that provides a business plan update and progress report, allows for a Q and A session to the Board of Directors and senior staff and incorporates interactive small group sessions where the ICF Board can receive input on specific topics/issues.

Recommendation #7: That ICF structure its Board agendas and minutes to allow for public, non-confidential portions of the minutes to be posted on their website and that section 7.7(c) of the ICF bylaws be amended to allow for such distribution.

Recommendation #8: That the FAQ section of the website be expanded and updated on a regular basis.

We found that Regional District directors expect to hear about the dealings of the ICF from their representatives on the ICF Board. They are perplexed and frustrated to find that their representatives not only refuse to discuss these matters but also leave the Regional Board table when items pertaining to the ICF are raised. This appears to stem not from direction of the ICF Executive but largely from interpretation of the 2013 Schlenker V. Torgrimson BC Court of Appeal decision, which broadened the interpretation of a pecuniary interest subject to the conflict of interest provisions of the Community Charter. For many, this has been interpreted to mean that Regional District Directors cannot discuss any affairs of the society.

The Schlenker V. Torgrimson decision was referred to in the CEO's report at the 2015 Annual General Meeting indicating that it had "virtually eliminated directors from reporting about the ICF to their respective regional boards or councils due to the conflict of interest ruling. The Provincial Government enacted a Conflict of Interest Exceptions Regulation in 2016 to address some of the resulting problems faced by local government politicians in similar circumstances, but it is clear that

relief is afforded only to those who are appointed, rather than nominated, as are the ICF Regional District representatives.

Two questions remain: 1) does the new Provincial regulation solve this problem for the ICF Board of Directors; and 2) to what extent can Regional District Board representatives report to their Regional District Boards on the activities of the ICF.

To address these questions a legal opinion was sought from Stewart McDannold Stuart (SMS) (Attachment 2). In essence this opinion states that:

- The Conflict of Interest Exceptions Regulation does provide relief for Regional District representatives on the ICF Board. A key factor in this opinion was the requirement for Regional Districts to appoint their members directly to the corporation or society. SMS concluded that while the bylaws of the ICF state that Regional Districts nominate a candidate, in essence the candidates are deemed to be appointed. The wording of the ICF Bylaw states that once the nominees have been selected, "the members (through their designated representatives **shall meet and shall elect** the nominees to the Board" [my emphasis]. In effect, the bylaws of the ICF mandate the election by the Members of the person nominated by the Regional District Board. SMS further suggests that "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."

Recommendation #9: That Regional District use the wording "that (appointee) be confirmed and ratified as the (specific) Regional District's nominee to be appointed to the ICF Board."

- On the second question of ICF Board members having limited to no ability to speak to their respective Regional District Boards on ICF matters, SMS found 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 interest of their members may need to maintain good communication with those who have an interest in the organization." SMS is also very clear, however, that this communication must be tempered with the fiduciary duty Board members have to the corporation.

While a member of a society board should be cautious when representing the society so as not to put the business interests of the organization in jeopardy, it is clear that the ICF Board members are acting with an over abundance of caution by not speaking on more general ICF issues. By structuring the ICF Board agenda as recommended above, and providing directors with clear policy or a code of conduct, the Board members will more clearly understand what they can reveal publicly and what must remain confidential.

Recommendation #10: That ICF provide Board members with clear policy guidelines (Code of Conduct), based on the attached legal opinion, indicating the range of matters about which they can communicate to their Regional District Boards.

By adopting the principles of an open and accountable governing body the ICF will take a major step toward resolving many complaints.

2) Loss of Trust

A recurring theme in the interviews with RD Board members was the lack of trust in, and credibility of, the Chief Executive Officer (CEO) and by association the ICF Board. Much of this dissatisfaction was generated in the last couple of years when expectations were raised by overly optimistic predictions and public promises of funding expectations, contracts or agreements which then did not materialize. While not all of these instances were within the control of the ICF (for example federal funding has not been provided as expected due to the Snaw-na-as First Nation's lawsuit regarding the corridor lands within their territory) there is a general perception of over-promising and under-delivering, particularly on the part of the CEO. The CEO and ICF Board members have identified this as an issue and they have curtailed making similar pronouncements or projections but the damage to the trust and credibility of the Board, and particularly the CEO, lingers.

While ICF has acted to improve communication issues with members, it is apparent that the CEO continues to be a lightning rod for Regional District politicians' discontent. Whether it is his salary, the perceived lack of performance in achieving a train service on Vancouver Island, the fact he was found to have been in violation of the federal lobbying code of conduct, or the perception of his controlling and non-transparent approach to management, in their minds, he is a major source of the discontent and loss of credibility with the ICF.

While some of these perceptions may be grounded in reality they are nonetheless by association damaging to ICF. This is particularly true for many of those interviewed who saw the recent contract extension of the CEO to be an example of the level and quality of oversight by the Board of Directors.

However, it must also be said that there have been some significant gains in the development of the corridor. To appreciate this fully one has to understand the complexities of dealing with at least eight federal and provincial regulatory bodies, a private rail operator, disaffected rail companies who don't want to discuss rail on Vancouver Island anymore, two senior levels of government and many local and First Nation governments. There are also, we understand, approximately 1000 agreements that exist to keep the line active as well as ongoing corridor land use requests, and issues with adjacent landowners.

Lack of understanding about the complex environment and the resulting lack of trust could be relieved in part, if ICF Board members were more active in informing their Regional District Board members about the complexities facing the Foundation in its day to day operation as they work toward the long term objective of running a train on the corridor. Having ICF Board members more front and centre in communicating with the Regional District Boards would increase trust while removing some of the negative focus on the CEO.

Recommendation #11: That a regular agenda item for an ICF update be placed on Regional District Board agendas along with the ICF Board Meeting Notes when available.

While there may often be nothing to report it would be a regular reminder and an opportunity for questions from the RD Board members.

3) Lack of effort by Regional District members to become informed

While there is a responsibility and political imperative on the part of ICF to communicate better to the Regional District Board members and the public, Regional Board members also have a responsibility to get and keep themselves informed by taking advantage of information that is provided. Regional District Board members could be more conscientious about reading the Board Meeting Notes distributed to them, attending the twice yearly meetings of the newly created Community Liaison Committee, reviewing the ICF website on a regular basis, and attending and asking questions at sessions offered at the AVICC Conference.

4) Lack of basic corporate planning and performance monitoring tools

Local politicians lack confidence and trust partly because of a perceived absence of transparency on the part of the ICF regarding the viability of rail. Responsible for the use of public funds and answerable to their constituents, they are reluctant to authorize expenditures for something about which they feel inadequately informed, and for which there is neither a supportable business case nor a public business plan.

The FAQ section of the ICF website makes reference to a business plan, prepared in 2014 and recently updated, that suggests the rail operation and ICF will have “financial success”. This business plan is not available on the ICF website, has not been provided in response to requests by members, and was not made available for this review. Such a plan could be developed without disclosing sensitive financial or proprietary information relating to the current operator, Southern Railway of Vancouver Island (SRVI) or of the ICF. If it does what the website suggests, it would be a strong document to support grant funding and to address the concerns of many who believe rail operations on Vancouver Island are not financially viable. A public business plan to address just these issues was recommended in the 2003 MNP report.

There has been a suggestion that because of the over-riding mandate of the ICF as a land manager of the corridor it is not appropriate or required for the ICF to show a business case for rail but that it is the responsibility of the rail operator. However, the politicians and the public look to ICF to justify the expenditure of funds on trying to secure rail on the corridor. For the ICF not to make public a business plan that confirms and supports their commitment to pursuing rail on the corridor is not acceptable nor in the best interests of the citizens of Vancouver Island.

The Province's 2010 E&N Corridor Study indicated that "the future success of the E&N rail line is dependent on a number of factors, including:

- Increased population growth and transit-oriented development near the E&N corridor.
- Increased industrial and commercial development along the E&N rail corridor that would benefit from rail.
- Improved economic conditions, particularly in forestry, mining and tourism.
- Transit service improvements and connections in communities near the E&N rail line."

It behooves ICF to address these issues in a business planning manner that is clear and transparent and lets the corridor members, and the public, know that there is an action plan that is viable. The business plan would also help each level of government understand and ascertain what is required from them to make rail on Vancouver Island viable.

The Foundation's bylaws state that implementing strategic planning is one of the responsibilities of the CEO. We are not aware that such a document currently exists. A longer term vision for the corridor and ICF in the form of a strategic plan would give Regional District Boards, First Nations and the public clarity for the future and confidence in the direction of ICF. An expanded role for the member representatives would be a positive step to including the Regional Districts and First Nations in the long range planning of the corridor. Consideration should be given to amending the role of the Member Representatives to work with the CEO to direct the strategic planning process and **recommend** a plan to the Board of Directors for approval.

It is hoped that in making a **recommendation** of a strategic plan to the ICF Board, the arms-length relationship, which is critical to maintaining charitable status, would not be jeopardized. Regardless, a legal opinion will likely be required to explore an expanded role for the Member Representatives.

Recommendation #12: That ICF, with input from all stakeholders, develop a long term strategic plan to be reviewed annually and updated every three years and made public on the ICF website.

Recommendation #13: That ICF seek a legal opinion about expanding the role of the Member Representatives to direct the process of developing a strategic plan for recommendation to the ICF Board.

Making public a credible business plan will greatly assist in creating the needed public and political support to invest in rail on Vancouver Island. If a credible positive plan is not possible then informed decisions cannot be made on the future of the corridor.

Recommendation #14: That ICF make public a comprehensive business plan that addresses the strategic priorities of the ICF and the key components required to achieving a viable rail service on Vancouver Island.

Recommendation #15: That a review and update of the business plan be conducted annually and reported to the members at the Annual General Meeting.

The performance of the CEO was a consistent topic of comment during the interview portion of the review. To ensure best practices are followed in the oversight of the Foundation by the Board of Directors an annual review of the CEO should be conducted and based on achieving measureable benchmarks in the strategic focus areas and business plan objectives set annually by the Board. Knowing that there is a regular process of evaluation based on tangible and measureable performance expectations would also help to improve the reputation of the CEO and the Board.

Recommendation #16: That the CEO's annual performance review include an evaluation of progress toward measureable benchmarks in the strategic focus areas and business plan objectives set annually by the Board of Directors of the ICF.

Financial Review

A high level review of the finances of the Foundation was conducted by both the consultant and qualified outside sources. While the budget appears to be reasonable and appropriate for an organization of its size and complexity, there are concerns regarding the audited financial statements that need to be dealt with by the ICF Board and administration. It should be noted that an audit of the books was not undertaken but the comments below represent concerns that arose in a review of the 2015 financial statement. We were not able to confirm whether these concerns were being addressed through any strategy or financial plan. [Highlights are the author's.]

Specifically:

- Current assets of \$434,741 are insufficient to cover current liabilities of \$1,324,681, making liquidity a concern. A significant portion of the current liability is a debt to CIBC, which has the right to demand payment within one year. The **debt is secured by a first charge over all property owned by ICF**, registered assignment of rents and a \$1.1 million registered first charge over the Nanaimo Train Station property. The charge over all property limits ICF from obtaining other financing if needed;
- There is a current loan to SRVI of \$175,000 secured by a promissory note and a **second charge over all ICF's assets**. The new Long Term Operating Agreement, under negotiation, is expected to have a **general security agreement over all the present and after-acquired property, including accounts receivable**.
- The continued viable operations of ICF are dependent upon the continued support of the Canadian Pacific Railway which provides the primary source of revenue of \$329,940, although this is at odds with the 2016 budget which suggests the amount comes from a Telus lease. We assume this is a flow-through payment from CP due to a lease with Telus, but have not been able to confirm that.
- In addition to the credit and liquidity risks identified above, ICF debt has floating rates for interest resulting in interest rate risk.

Recommendation #17: That the ICF Board ensure the business plan includes a strategy to address the financial issues noted in the 2015 Notes to the Financial Statements.

As identified in section 8.2(e) of the ICF bylaws, and confirmed by the CEO, the Board of Directors receives at every Board meeting “an accounting of all transactions and a statement of the financial position of the Corporation” from the Treasurer of the Corporation. It is our understanding that the responsibilities of the Treasurer, as identified in the bylaws, is being undertaken by the position of Financial Officer as noted in the organization structure above.

Local governments are billed directly by SRVI for maintenance on the rail crossings within their jurisdictions. While the posted budget shows a minor amount of money committed to the maintenance of the Alberni Sub Station, a larger amount for crossings along the line does not appear in the budget.

We assume the contract with SRVI provides for SRVI to be the sole entity to provide maintenance to the crossings. If this is true ICF needs to be transparent in managing this work to ensure local governments can have confidence that the work performed

is billed out at a rate that is competitive in the market place and that the ICF books show the true cost of maintaining the rail line. The alternative would be to require municipalities to maintain the crossings themselves.

Recommendation #18: That all financial transactions for line and crossing maintenance be shown in the annual budget as revenue and expense amounts and billing be managed by the ICF.

Summary and Conclusions

The governance structure was initially designed to ensure a balance of representation and power among First Nations and Regional Districts, as well as to allow for charitable status so that a tax receipt could be provided to CP and Rail America to compensate them for the transfer of land. The structure is therefore important and generally appears to be doing the job originally intended.

However, the ICF Board and Administration have taken an unnecessarily restrictive attitude towards the independent nature of the Foundation that, while legal, is not supportable or necessary to the extent they have implemented and in fact has been very damaging to their reputation with many Regional Districts. It has resulted in a loss of trust and political support for their efforts. The Board and management must adopt a much more open and transparent relationship with their members.

A significant majority of Regional District Board members interviewed expressed a high degree of disillusionment with the CEO and his management style as well as his ability to achieve rail on Vancouver Island. Early poor communication and unfulfilled promises have resulted in a significant loss of trust and confidence in the CEO that also reflects badly on the ICF Board. The damage to their reputation will be a significant hurdle to overcome in their efforts to gain back political support at the local level. The CEO's contract was extended in the spring of 2016 by the ICF Board for a further two years. Recent efforts to improve communication with, and awareness of, members have been positive and should continue. Further steps as identified in the recommendations need also to be implemented.

A legal opinion obtained as part of this review confirms that the new Provincial Regulation on Conflict of Interest Exceptions provides relief for Board Members of the ICF Board. Furthermore, that Board members can, and should, provide a stronger level of communication about the activities of the Foundation. It is recommended that a code of conduct be adopted to provide clear direction to Board members on this matter.

It is recognized that ICF in their regular dealings must walk a fine line to ensure their charitable status is monitored and liability risk is kept to a minimum. The need for transparency and accountability must be weighed against this risk and maximized whenever and wherever possible.

To reiterate, the structure is basically a sound one and with minor adjustments will guide the Board well. It is the day to day performance and attitude of the organization that has resulted in a loss of trust, confidence and credibility.

It is crucial, if ICF is ever to repair broad RD Board member support, that they make public a strategic plan for the corridor and a business plan for rail operations on Vancouver Island.

Recommendations:

To the Association of Vancouver Island and Coastal Communities:

Recommendation #6: That AVICC schedule a regular session at their annual convention for the ICF to conduct a workshop that provides a business plan update and progress report, allows for a Q and A session to the Board of Directors and senior staff and incorporates interactive small group sessions where the ICF Board can receive input on specific topics/issues.

To the Island Corridor Foundation:

Recommendation #1: That the ICF Board appoint members-at-large from the public based on a strategic evaluation of skill sets that will provide added value to the Board.

Recommendation #3: That the ICF Board amend section 4.1 of its bylaw to allow public attendance at the Annual General Meeting.

Recommendation #4: That the ICF Board amend its bylaw to designate a portion of each regular meeting as open to the public.

Recommendation #5: That ICF schedule one regular, annual, presentation to the five Regional District Boards focusing on the past years accomplishments and objectives for the coming year.

Recommendation #7: That ICF structure its Board agendas and minutes to allow for public, non-confidential portions of the minutes to be posted on their website and that section 7.7(c) of the ICF bylaws be amended to allow for such distribution.

Recommendation #8: That the FAQ section of the website be expanded and updated on a regular basis.

Recommendation #9: That Regional Districts use the wording “that (appointee) be confirmed and ratified as the (specific) Regional District’s nominee to be appointed to the ICF Board.”

Recommendation #10: That ICF provide Board members with clear policy guidelines (Code of Conduct), based on the attached legal opinion, indicating the range of matters about which they can communicate to their Regional District Boards.

Recommendation #12: That ICF, with input from all stakeholders, develop a long term strategic plan to be reviewed annually and updated every three years and made public on the ICF website.

Recommendation #13: That ICF seek a legal opinion about expanding the role of the Member Representatives to direct the process of developing a strategic plan for recommendation to the ICF Board.

Recommendation #14: That ICF make public a comprehensive business plan that addresses the strategic priorities of the ICF and the key components required to achieving a viable rail service on Vancouver Island.

Recommendation #15: That a review and update of the business plan be conducted annually and reported to the members at the Annual General Meeting.

Recommendation #16: That the CEO's annual performance review include an evaluation of progress toward measureable benchmarks in the strategic focus areas and business plan objectives set annually by the Board of Directors of the ICF.

Recommendation #17: That the ICF Board ensure the business plan includes a strategy to address the financial issues noted in the 2015 Notes to the Financial Statements.

Recommendation #18: That all financial transactions for line and crossing maintenance be shown in the annual budget as revenue and expense amounts and billing be managed by the ICF.

To Regional District Boards:

Recommendation #2: That in the future Regional District Boards consider nominating Board Members to the ICF Board from the community based on specific skill set requirements.

Recommendation #11: That a regular agenda item for an ICF Update, be placed on Regional District Board agendas along with the ICF Board Meeting Notes when available.

R18 Island Corridor Foundation City of Langford

Whereas the Island Corridor Foundation (ICF) was established in 2003 to oversee the management and operations of the Esquimalt and Nanaimo (E&N) rail line which has a direct impact on many municipalities on Vancouver Island but these same municipalities have no direct representation on the ICF board;

And whereas although the rail service has not been operating for the past several years, and the services provided to municipalities along the corridor by the management of ICF have not met the standard expected, the costs to local governments to support the ICF continue to be significant;

Therefore be it resolved that AVICC work with impacted local governments and the ICF board to conduct a financial and governance review of the Island Corridor Foundation.

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:

A handwritten signature in black ink, appearing to read 'Colin Stewart', with a stylized flourish at the end.

Colin Stewart *

CS/dw

*Law Corporation