COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Anderson v. Strathcona (Regional District),* 2024 BCCA 23

Date: 20240124
Docket: CA47620

Between:

Noba Anderson

Appellant
(Petitioner)

And

Strathcona Regional District

Respondent
(Respondent)

Before: The Honourable Madam Justice Fenlon
The Honourable Justice Dickson
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated June 24, 2021 (*Anderson v. Strathcona Regional District*, 2021 BCSC 1800, Campbell River Docket S15097).

Counsel for the Appellant:	P.A. Hildebrand M.R. Voell
Counsel for the Respondent:	J. Goulden, K.C. S.J. McCalla
Place and Date of Hearing:	Vancouver, British Columbia September 8, 2022
Written Submissions Received:	September 28, October 20, 2022
Place and Date of Judgment:	Vancouver, British Columbia January 24, 2024

Written Reasons by:
The Honourable Justice Dickson

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Fitch

Summary:

The appellant appeals a judicial review upholding the board of directors of the respondent's decisions to censure her for disclosing confidential board information to her lawyer and declining to indemnify her for legal costs reasonably incurred in defending a petition to disqualify her from holding office. The appellant argues that the board's decisions were unreasonable. Held: Appeal allowed. The board's decisions were unreasonable. A director does not breach confidence by disclosing confidential board information to a lawyer to obtain legal advice on matters that affect them personally. Therefore, the decision to censure the appellant was unfounded and unreasonable. In addition, the respondent's Indemnification Bylaw obliges the respondent to indemnify the appellant for her reasonable legal costs in successfully defending the disqualification petition.

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Reasons for Judgment of the Honourable Justice Dickson:

Introduction

[1] Does a person breach confidence by disclosing confidential information to a lawyer for the purpose of obtaining personal legal advice? That is the question at the heart of this appeal.

[2] The appellant, Noba Anderson, was an elected member of the board of directors of the respondent, the Strathcona Regional District (the "SRD"). In a series of decisions, the board censured her for disclosing confidential board information to her lawyer. It also refused to pay her legal costs for successfully defending a petition brought to disqualify her from holding office for conflict of interest. On judicial review, the chambers judge upheld the board's decisions on a reasonableness standard. Ms. Anderson appeals, contending the decisions were unreasonable and lacked any basis in fact or in law.

[3] The appeal centers on how principles of solicitor-client privilege and confidentiality apply when a director obtains independent legal advice regarding confidential board matters that affect them personally. According to Ms. Anderson, a director's confidentiality duties under the *Community Charter*, S.B.C. 2003, c. 26 and SRD Code of Conduct Bylaw do not limit their right to obtain such advice, nor does a director compromise confidentiality by its exercise. According to the SRD, a director is duty-bound not to disclose confidential board information to anyone, including their own lawyer, without its authorization and Ms. Anderson breached that duty. The interpretation and application of the SRD Indemnification Bylaw is also a subsidiary issue.

[4] In my view, a director does not breach confidence by disclosing confidential board information to a lawyer to obtain legal advice on matters that affect them personally. Correctly interpreted, the confidentiality provisions of the *Community Charter* and SRD Code of Conduct Bylaw do not limit that fundamental right. Further, the SRD Indemnification Bylaw manifestly obliged the SRD to indemnify Ms. Anderson for her reasonable legal costs in successfully defending the disqualification petition. It follows that the board's decisions to the contrary effect were unreasonable. For these reasons and those that follow, I would allow the appeal, set aside the order below, quash the decisions, and declare that the SRD must indemnify Ms. Anderson for her reasonable legal costs in defending the disqualification petition.

Background

[5] The SRD is a regional district incorporated under the *Local Government Act*, R.S.B.C. 2015, c. 1. Comprised of five municipalities and four electoral areas, it is governed by a Board of Directors of 13 elected members (the "Board"). In November 2008, Ms. Anderson became a member of the Board representing Electoral Area B - Cortes Island. She held that position at all material times.

[6] Among other sections of the *Community Charter*, the conflict of interest provisions and s. 117 apply to regional districts: ss. 205(1)(a) and (d), *Local Government Act*. Section 117 of the *Community Charter* concerns the duty of board members to maintain confidentiality with respect to a regional district's records and information. SRD Bylaw No. 330, Director Code of Conduct Bylaw 2018 also provides for the treatment of confidential information by members of the Board.

[7] When matters considered at a Board meeting relate to certain topics, that part of the meeting may or must be closed to the public: s. 90, *Community Charter*. SRD staff generally prepare a report on the topic in advance of a closed Board meeting (a "Closed Report"). Closed Reports are to be kept confidential unless the Board directs otherwise or disclosure is lawfully required: ss. 26 and 27, SRD Code of Conduct Bylaw.

Precipitating Events

[8] Ms. Anderson's elderly father lived in a cabin on her Cortes Island property. In January 2018, the cabin burned down. Some of Ms. Anderson's friends organized a "Go Fund Me" Internet campaign to raise money to rebuild the cabin. The campaign raised approximately $3,700.

[9] In October 2018, the SRD received complaints that Ms. Anderson had received gifts in her capacity as a Board director. In particular, the complaints alleged that a potential conflict of interest arose in connection with the Go Fund Me campaign.

[10] At a closed meeting on November 7, 2018, the Board considered a Closed Report concerning the complaints and the Go Fund Me campaign. The Board decided to retain a third-party investigator to look into the allegations. Shortly thereafter, it hired Craig Peterson of Creative Solutions Risk Management Consulting to conduct the investigation.

[11] Ms. Anderson sought legal advice in response to the conflict of interest allegations made against her. On November 14, 2018, her counsel wrote to the Board expressing concern about the third-party investigation and asking that it be conducted fairly. In the letter, counsel referred to the Closed Report.

[12] In January 2019, ten Cortes Island residents filed a petition in the Supreme Court of British Columbia seeking to disqualify Ms. Anderson from holding office until the next election for alleged conflict of interest in connection with the Go Fund Me campaign (the "Disqualification Petition"). Among other things, the petitioners alleged that Ms. Anderson "took money from her constituents for personal gain and a number of those same constituents received gifts and grants in return", and that several of the Go Fund Me donators "benefitted either personally or through their own organizations from the SRD grant in aid of which Anderson applied for".

[13] Pursuant to s. 740(2) of the *Local Government Act*, a regional district may provide indemnification for directors by bylaw or case-specific resolution. Pursuant to SRD Bylaw No. 287, Regional District Officials Indemnification Bylaw 2017, the SRD must indemnify its Board members for "any claim, action or prosecution" brought against them in connection with the exercise of their official roles.

[14] On January 14, 2019, Ms. Anderson's lawyer wrote to the Board asking the SRD to indemnify her for her reasonable legal costs in defending the Disqualification Petition. At a closed meeting in January 2019, the Board resolved not to consider Ms. Anderson's request until after Mr. Peterson's investigation was complete and the Disqualification Petition was determined.

[15] In February 2019, SRD staff provided Board members, including Ms. Anderson, with two Closed Reports for an upcoming closed Board meeting. The Closed Reports attached Mr. Peterson's unredacted final investigation report (the "Peterson Report"), together with a privileged and confidential legal opinion from Kathryn Stuart, the lawyer for the SRD (the "February Legal Opinion"). The Peterson Report absolved Ms. Anderson of any wrongdoing.

[16] Ms. Anderson sought legal advice regarding the matters addressed in the Closed Reports, copies of which she provided to her counsel. On March 7, 2019, her counsel wrote to the Board, urging it again to indemnify Ms. Anderson for her legal fees in defending the Disqualification Petition. In the letter, he referred to the contents of the Peterson Report and the February Legal Opinion.

[17] In March 2019, SRD staff provided Board members, including Ms. Anderson, with another Closed Report. That Closed Report included another privileged and confidential legal opinion (the "March Legal Opinion"). Ms. Anderson also provided a copy of the March Legal Opinion to her counsel for the purpose of obtaining legal advice.

[18] Prior to an April 2019 Board meeting, SRD staff stopped providing Ms. Anderson with copies of Closed Reports on matters that related to her and concerning which she and the SRD might have conflicting interests. After the April meeting, counsel for the SRD wrote to Ms. Anderson's counsel stating that: the SRD had not waived solicitor-client privilege over the February or March Legal Opinions; by disclosing the February and March Opinions and the Peterson Report, Ms. Anderson had contravened s. 117 of the *Community Charter* and s. 27 of the SRD Code of Conduct Bylaw; and counsel was required to return and delete those confidential materials. In response, her counsel asserted that Ms. Anderson was entitled to disclose the materials to him based on common interest or, alternatively, waiver of privilege.

[19] On June 10, 2019, Justice Skolrood, then of the Supreme Court, heard the Disqualification Petition. He dismissed the petition in its entirety. In doing so, he declared: there was no basis for the declarations sought by the petitioners; Ms. Anderson did not accept a gift contrary to s. 105 of the *Community Charter*; and, Ms. Anderson was qualified to hold office. Justice Skolrood also awarded lump sum costs to Ms. Anderson.

Indemnification Decisions

[20] Despite having previously resolved not to consider Ms. Anderson's indemnification request until after the Disqualification Petition was determined, on May 8, 2019 the Board decided not to grant Ms. Anderson's request for indemnification of her legal costs. By letter dated May 10, 2019, the SRD informed Ms. Anderson that it had resolved not to indemnify her "in accordance with s. 740(2)(b)(ii) of the *Local Government Act"*.

[21] On June 19, 2019, Ms. Anderson's counsel wrote to the SRD advising of the outcome of the Disqualification Petition and formally seeking indemnification for her legal costs in defending the petition. At a closed meeting on July 24, 2019, the Board considered the letter, but made no further decisions on the indemnification issue. On July 30, 2019, the SRD wrote to Ms. Anderson's counsel stating that the May indemnification decision "still stands".

Censure Decision

[22] On June 25, 2019 the Board notified Ms. Anderson that it would be considering whether to censure her for disclosing confidential information. On September 11, 2019, it resolved to hear a censure motion brought in this regard.

[23] On October 10, 2019, the Board provided Ms. Anderson with a Notice of Censure Motion. The hearing was conducted on October 24, 2019. In response, Ms. Anderson submitted that the confidentiality requirement imposed by s. 117 of the *Community Charter* over materials considered at closed Board meetings is not lost or breached when a Board member seeks independent legal advice related to those materials. She also submitted that Board members are entitled to obtain independent legal advice regarding matters before the Board, and argued the evidence did not show that s. 117 was breached.

[24] After considering the matter, the Board passed a resolution expressing disapproval of Ms. Anderson's disclosure of the February and March Legal Opinions and the Peterson Report "contrary to the Community Charter and the [SRD Code of Conduct Bylaw]" (the "Censure Decision"). Among other things, the Censure Decision directed Ms. Anderson to comply with s. 117 of the *Community Charter* and the SRD Code of Conduct Bylaw, imposed sanctions, and outlined future measures to be taken with respect to her impugned conduct.

[25] On October 30, 2019, the Board provided a copy of the Censure Decision to Ms. Anderson. It did not provide the reasons upon which the decision was based.

Judicial Review Petition

[26] On July 13, 2020, Ms. Anderson filed a petition seeking an order quashing the Censure Decision and a declaration that she is entitled to be indemnified for her legal costs in defending the Disqualification Petition, or, alternatively quashing the Indemnification Decisions.

[27] The chambers judge heard Ms. Anderson's judicial review petition over the course of three days in 2021.

Reasons for Judgment: 2021 BCSC 1800

[28] The judge began by reviewing the background, including the Disqualification Petition, the Indemnification Decisions, and the Censure Decision. After identifying the issues, he asked, first, whether Ms. Anderson had established that the Indemnification Decisions were unreasonable. He concluded she had not.

[29] Specifically, the judge was not persuaded that Ms. Anderson's response to the Disqualification Petition fell within para. 1(a) of the SRD Indemnification Bylaw because, he stated, it was "not 'a claim, action or prosecution' as those terms are generally defined": at paras. 45–49. In addition, in his view, even if the Disqualification was such a proceeding, it was not unreasonable for the Board to refuse to indemnify Ms. Anderson "because the issues in play in [the Disqualification Petition] did not involve her exercise of official powers or duties as a member of the Board": at para. 49. Moreover, he stated, while the Board did not give reasons for the Indemnification Decisions, the materials before it provided "a

reasonable and satisfactory pathway to understand how and why the Board came to [those decisions]": at paras. 54–55.

[30] The judge was satisfied the Board must have concluded that it could respond to Ms. Anderson's indemnification request based on the available materials. In his view, it must also have decided that the result of the Disqualification Petition did not impact Ms. Anderson's entitlement to indemnity:

> [56] The Indemnity Decisions were, in my view, discretionary ones for the Board to make. The fact that the Board at one point indicated that it wished to wait for the outcome of the Disqualification Petition before deciding Ms. Anderson's request, and then reversed that position and rendered a decision shortly before the petition was dismissed does not, in my view, render the Indemnity Decisions unreasonable. The Board had a healthy amount of materials and information before it when it rendered its decision in May 2019 and then confirmed it in July of that year. As I have already mentioned, those materials included comprehensive submissions from Ms. Anderson's counsel. Clearly, the Board must have been satisfied that it had sufficient information before it in May 2019 to make a reasoned and reasonable decision. Equally clear, in my view, is the fact that the Board must have been satisfied that the result of the Disqualification Petition would have no impact upon the question of whether Ms. Anderson was entitled to or should be granted on a case-specific basis, indemnification for her legal costs.
>
> [57] I am not satisfied that Ms. Anderson has shown the Indemnity Decisions to be unreasonable.

[31] Next, the judge asked whether the Censure Decision was unfair or unreasonable. After noting her submission that the question of whether she was entitled to disclose the confidential materials to her lawyer was subject to correctness review, he stated Ms. Anderson also submitted that: she did not breach any privilege or duty of confidentiality by sharing the materials with him as solicitor-client privilege between them maintained their privileged status; alternatively, the Board waived confidentiality and privilege over the materials by giving them to her when she and the SRD were parties with adverse interests; and, therefore, there was no factual or legal foundation for the Censure Decision. Again, the judge disagreed.

[32] The judge rejected Ms. Anderson's submission that whether she was entitled to disclose the confidential information to her lawyer fell within the exception to reasonableness review discussed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, in connection with solicitor-client

privilege. In doing so, he quoted from ss. 26 and 27 of the SRD Code of Conduct Bylaw and s. 117 of the *Community Charter*. Then he said this:

> [68] I am not persuaded that anything in the SRD's Code of Conduct bylaw or s. 117 of the *Charter* improperly affects or limits the solicitor-client relationship and privilege that exists between Ms. Anderson and her counsel. The fact of the matter is the privilege under s. 117 is the SRD's and not that of any one member of the Board. In other words, s. 117 is not focussed on Ms. Anderson and any information of hers that may be protected by solicitor-client privilege. In my opinion, counsel for the SRD is correct when he submits that Ms. Anderson has no right or authority to unilaterally disclose or share confidential SRD information with anyone, even her own legal counsel and that is because she never formed a solicitor-client privilege interest of her own with respect to the SRD's information. In my view, the *Vavilov* exceptions relied upon by counsel for Ms. Anderson do not apply in the instant case because neither the SRD Code of Conduct bylaw nor s. 117 of the *Charter* place any limit on Ms. Anderson's own solicitor-client privilege.
>
> [69] Ms. Anderson could have, and in my respectful opinion should have, requested permission from the Board to share the confidential information in question with her legal counsel, for the purposes of obtaining independent legal advice. If that request had been denied, then she would have had grounds to seek a judicial review of that decision. However, that is not what occurred. Instead, Ms. Anderson took the confidential information over which the SRD, and only the SRD, held privilege and had not waived, and shared it with a third party, her counsel.
>
> [70] I am not convinced that anything the Board did restricted Ms. Anderson's ability to obtain legal advice. The Code of Conduct bylaw and s. 117 of the *Charter* are not in place to protect any privilege of an individual Board member but rather the privilege that the administrative body itself, in this case the SRD, enjoys over its confidential materials that relate to its operation and to which its Board members have access. That access is based upon a trust that no Board member will disclose or share the information with anyone beyond the Board without first getting the Board approval.
>
> [71] Respectfully, I reject [Ms. Anderson's] submission that the Board's decision to censure her for her unilateral decision to disclose confidential SRD materials was unreasonable…

[33] The judge went on to find the procedure adopted by the Board to reach the Censure Decision was not unfair or unreasonable. Nor, he found, was the Censure Decision either unreasonable or unfair: at paras. 71–73. After also finding the Board was justified in limiting Ms. Anderson's ongoing access to confidential information, the judge summarized his conclusions, namely, that Ms. Anderson had not satisfied him "that any of the impugned decisions are unreasonable, unfair or fall outside of the range of reasonable, acceptable outcomes": at para. 79. Accordingly, he dismissed her petition for judicial review.

On Appeal

[34] Ms. Anderson contends the Censure Decision and the Indemnification Decisions were unreasonable. In her submission, she did not breach her duty of confidentiality with respect to the Board materials, or, alternatively, the SRD waived its right to assert confidentiality and privilege as against her, and thus the Censure Decision lacked any factual or legal foundation. In addition, she says, the SRD was obliged to indemnify her for her legal costs in defending the Disqualification Petition. The SRD responds that it was reasonable, or correct, for the Board to conclude that Ms. Anderson breached s. 117 of the *Community Charter* and s. 27 of the SRD Code of Conduct Bylaw and that it was not obliged to grant her indemnification request.

[35] The issues that emerge for determination are:

i. What are the applicable standards of review?

ii. Was the Censure Decision unreasonable?

iii. Were the Indemnification Decisions unreasonable?

Discussion

Statutory Framework

[36] As explained in *Vavilov*, both the common law and statutory law impose constraints on how and what an administrative decision-maker can lawfully decide in a given context: at para. 111. It is therefore necessary to review the material provisions of the *Community Charter*, the *Local Government Act*, the SRD Code of Conduct Bylaw, and the SRD Indemnification Bylaw in the context in question on appeal.

[37] The *Community Charter* provides municipalities and their councils with the legal framework for the powers, duties and functions required to fulfill their purposes, the authority to address their community's needs, and the flexibility necessary to respond to those needs. These powers are to be interpreted broadly, in accordance with the *Community Charter*, the *Local Government Act*, and municipal purposes: ss. 3 and 4, *Community Charter*. The SRD Code of Conduct

Bylaw also establishes “principles and guidelines for the conduct of directors in providing good government to the Regional District”.

[38] Local government councils and boards have the authority to censure and sanction their members for unlawful or unprofessional behaviour. This includes the authority to censure and sanction board members for breaching confidence requirements imposed by s. 117 of the *Community Charter*: *Dupont v. Port Coquitlam (City)*, 2021 BCSC 728 at paras. 23–26.

[39] Section 117 of the *Community Charter* sets out the duty of Board members to respect confidentiality in Board records and information:

> 117 (1) A council member or former council member must, unless specifically authorized otherwise by council,
>
> a) keep in confidence any record held in confidence by the municipality, until the record is released to the public as lawfully authorized or required, and
>
> b) keep in confidence information considered in any part of a council meeting or council committee meeting that was lawfully closed to the public, until the council or committee discusses the information at a meeting that is open to the public or releases the information to the public.

[40] The SRD Code of Conduct Bylaw also addresses the treatment of confidential records and information. Sections 26 and 27 provide, in material part:

> 26. Confidential information includes documents and discussions regarding all matters described under section 90 of the *Community Charter* […] including but not limited to the following:
>
> (a) information discussed or disclosed at a closed meeting of the Board; […]
>
> Duty To Maintain Confidentiality
>
> 27. (1) Directors shall be aware of their responsibilities under the Local Government Act and the Community Charter and shall fulfill the statutory requirements imposed by such legislation.
>
> (2) Directors, staff and advisory body members shall not disclose or release to anyone, either in oral or written form:
>
> (a) confidential information acquired by virtue of their office unless required by law or authorized by the Board to do so.

[41] Certain provisions of the *Local Government Act* and the SRD Indemnification Bylaw also form part of the statutory context for consideration.

[42] Section 740(1) of the *Local Government Act* sets out a three-part definition of "indemnification". Pursuant to s. 740(1), "indemnification" means the payment of amounts required or incurred for specified reasons, including to defend "an action or prosecution brought against a person in connection with the exercise or intended exercise of the person's powers or the performance of the person's duties or functions". Pursuant to s. 740(2), the board of a regional district may provide for the indemnification of its officials by bylaw or case-specific resolution. Section 740(2)(b) provides:

> (2) Indemnification for municipal officials and regional district officials may be provided as follows:
>
> …
>
> (b) a board may do the following:
>
> i. by bylaw, provide for the indemnification of regional district officials in accordance with the bylaw;
>
> ii. by resolution in a specific case, indemnify a regional district official.

[43] Entitled "A Bylaw to Indemnify Regional District Officials Against the Cost of Legal Proceedings", the SRD Indemnification Bylaw was passed by the Board "to provide for the indemnification of [the SRD's] officials in accordance with the provisions of the *Local Government Act*". Section 2 of the SRD Indemnification Bylaw provides:

> 2. The Regional District will indemnify an official against a claim, action or prosecution brought against the official, including reasonable legal costs incurred in relation to the proceeding, provided that the official for whom indemnification is sought complies with the provisions of this bylaw.
>
> [Emphasis added.]

[44] The SRD Indemnification Bylaw defines various terms, but does not use them consistently. In s. 1 of the SRD Indemnification Bylaw, the terms "indemnify", "proceeding" and "reasonable legal costs" are defined as follows:

> 'Indemnify' means to pay the amounts required:
>
> a) to defend against a claim, action or prosecution brought against an official in connection with the exercise or intended exercise of the official's powers or the performance or intended performance of the official's duties or functions;

b) to satisfy a judgement, award or penalty imposed in connection with a claim, action or prosecution referred to in paragraph (a); or

c) in relation to an inquiry under the *Public Inquiry Act* or to another proceeding that involves the administration of the Regional District or the conduct of the Regional District's business;

but does not extend to a fine imposed as a result of a conviction for an offence, other than a strict or absolute liability offence.

'proceeding' means an action, trial, hearing or application before a court, tribunal or other body that has authority to impose civil or criminal penalties, but does not include a proceeding before the Board of Directors.

'reasonable legal costs' means the out of pocket costs, including disbursements, that are incurred by an official or by the Regional District in seeking, retaining or engaging legal counsel with respect to a proceeding covered by this bylaw.

[Emphasis added.]

[45] As noted, s. 2 of the SRD Indemnification Bylaw provides for an official to be indemnified for "a claim, action or prosecution brought against the official, including reasonable legal costs incurred in relation to the proceeding". Section 3 requires an official seeking indemnity to provide a copy of every "notice of civil claim, originating application, letter or other document relating to a claim made against them" for which indemnity may be sought. Section 4 provides that indemnification may be refused where an official has, among other things, "failed to cooperate with the Regional District in its defence of the claim, prosecution, appeal or other proceeding". Section 5 provides the SRD with discretion to appoint counsel to defend "against a claim, prosecution or other proceeding for which an official may seek indemnification", emphasis added.

Governing Principles

Statutory Interpretation

[46] The applicable principles of statutory interpretation are uncontroversial. A statutory provision must be read contextually, in a manner that reflects the grammatical and ordinary meaning of the text, harmoniously with the scheme and object of the Act and the intention of the legislator: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26. In other words, statutory provisions must be interpreted in accordance with their text, context, and purpose: *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252 at para. 41. The objective of the interpretive exercise is to discern the intended meaning of the

legislator and to give effect to that intention: *R. v. Walsh*, 2021 ONCA 43 at paras. 135–136; *Vavilov* at paras. 117, 121.

[47] Pursuant to s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, every enactment must be construed as remedial and given such "fair, large and liberal construction and interpretation as best ensures the attainment of its objects". An "enactment" means an Act or a regulation, or portion thereof, and a "regulation" includes a bylaw enacted in execution of a power conferred under an Act: s. 1, *Interpretation Act*.

[48] The starting point for the exercise is the ordinary meaning of the words, read in their immediate context, often informed, though not dictated, by their dictionary definitions: *Walsh* at para. 60. When the words are precise and unambiguous, their ordinary meaning dominates the process; however, when they can support more than one reasonable meaning, it plays a lesser role. In addition, and in any event, the provisions of an Act must always be read as a harmonious whole: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para. 10.

[49] Questions of statutory interpretation are not treated uniquely on judicial review of administrative decisions. As with other questions of law, they may be evaluated on a reasonableness standard of review: *Vavilov* at para. 115. Moreover, when administrative decision-makers interpret their home statutes, they may not be required to engage in a formalistic interpretive exercise. Nevertheless, the merits of a decision-maker's interpretation must be consistent with the text, context, and purpose of the provision at issue: *Vavilov* at paras. 119–120.

Solicitor-Client Privilege & Confidentiality

[50] Solicitor-client privilege and confidentiality are related, but distinct, concepts. As certain principles related to solicitor-client privilege, confidentiality and their relationship are also part of the relevant context for consideration, they require review.

[51] Solicitor-client privilege is a class privilege. Over time, it has acquired constitutional dimensions as a principle of fundamental justice and part of a client's fundamental right to privacy: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 20. Solicitor-client privilege is essential to the proper functioning of our legal system. For that reason, it is the

privilege the law has protected most zealously and is most reluctant to water down by exceptions: *University of Calgary* at para. 20; *Smith v. Jones*, [1999] 1 S.C.R. 455 at paras. 45–50. As this Court affirmed in *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219, it must remain as close to absolute as possible: at para. 30.

[52] Solicitor-client privilege recognizes that "the justice system depends for its vitality on the full, free and frank communication between those who need legal advice and those who are best able to provide it": *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 26. In *Blank*, quoting R.J. Sharpe (later Sharpe J.A.), Justice Fish observed that the interest underlying solicitor-client privilege is "the interest of all citizens to have full and ready access to legal advice": at para. 28. The Court made similar observations in both sets of reasons delivered in *Smith*.

[53] In *Smith*, a psychiatrist sought a declaration that he was entitled to disclose information conveyed by an accused in a confidential interview arranged on his behalf by defence counsel. Based on that interview, to which solicitor-client privilege applied, the psychiatrist concluded the accused was dangerous and would likely commit serious future offences unless he received sufficient treatment. In dissent on the application of the public safety exception to solicitor-client privilege and doctor-patient confidentiality, Justice Major emphasized everyone is entitled to retain legal counsel to defend and protect their interests, and the protections afforded by law depend on individuals having the assistance of lawyers without fearing their disclosures "might somehow become available to third persons so as to be used against [them]": at paras. 5–6. Speaking for the majority, Justice Cory said this:

> [46] Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent. It cannot be forgotten that the privilege is that of the client, not the lawyer. The privilege is essential if sound legal advice is to be given in every field. It has a deep significance in almost every situation where legal advice is sought whether it be with regard to corporate and commercial transactions, to family relationships, to civil litigation or to criminal charges. Family secrets, company secrets, personal foibles and indiscretions all must on occasion be revealed to the lawyer by the client. Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients. It is an element that is both integral and extremely important to the functioning of the legal system…

[Emphasis added.]

[54] As Justice Cory noted, the solicitor-client privilege belongs to the client, not to the lawyer. As the holder of the privilege, the client alone may waive its protection. The foundation of waiver is knowledge and intention. Where the privilege-holder knows of the privilege and voluntarily evinces an intention to waive it, express waiver is established. Waiver may also be implied by the conduct of the privilege-holder. However, without more, inadvertent disclosure will not lead to an implied waiver: *Lee* at paras. 53, 55–56.

[55] As this Court explained in *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471, waiver will be implied where fairness and consistency so require: at para. 30. Even where implied, a waiver may be of limited application. For example, in *Brown v. Clark Wilson LLP*, 2014 BCCA 185, this Court concluded that suggesting a party acted on counsel's advice based on a specific letter required the disclosure of that letter as a matter of fairness. Nevertheless, this did not mean the door was opened for all communications between the privilege-holder and their counsel to be disclosed: at para. 31.

[56] Confidentiality is "the *sine qua non* of the solicitor-client privilege": *Blank* at para. 32. Accordingly, all privileged communications between a solicitor and client must be confidential. On the other hand, not all confidential communications are privileged, and thus immune from compulsory disclosure. In the absence of an existing class or statutory privilege, confidential communications may or may not be protected by privilege in accordance with the so-called "Wigmore criteria": *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 at para. 20.

[57] Importantly for present purposes, whether confidential information is protected by privilege or not, it may be subject to a duty of confidentiality. Duties of confidentiality may arise in accordance with equitable principles, contractual obligations, and statutory provisions. Where a duty of confidentiality is breached, a range of consequences may follow. For example, where confidential information is communicated in confidence and its unauthorized use is detrimental to the party conveying the information, the elements of a breach of confidence claim are met and compensation or other relief may be ordered. In addition, where a professional duty of confidence is owed and breached, disciplinary measures may be imposed: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2

S.C.R. 574; *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142; *Deloitte & Touche LLP v. Institute of Chartered Accountants of Alberta (Complaints Inquiry Committee)*, 2008 ABCA 162.

Standard of Review

[58] This Court's task on an appeal from judicial review is to determine whether the chambers judge identified the appropriate standard of review and applied that standard appropriately. In undertaking that task, it is unnecessary to identify a specific error made by the judge. Rather, this Court "steps into the shoes" of the judge and focuses on the administrative decision under review: *Cowichan Valley (Regional District) v. Wilson*, 2023 BCCA 25 at para. 69; *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101 at para. 48.

[59] In *Vavilov*, the Court established a presumption that the merits of an administrative decision are to be reviewed on a standard of reasonableness, subject to limited exceptions. One of the exceptions is general questions of law of central importance to the legal system as a whole: *Vavilov* at paras. 10, 17, 58–62. In summary, the *Vavilov* framework seeks to maintain the rule of law while respecting legislative intent to entrust certain decisions to administrative decision-makers. It also seeks to bring simplicity, coherence, and predictability to the law, and to eliminate unwieldy context-based determinations on applicable standards of review: *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at para. 7.

Positions of the Parties

Ms. Anderson

[60] Ms. Anderson acknowledges that the merits of Board decisions are to be reviewed on the presumptive standard of reasonableness. She concedes that this includes the merits of the Censure Decision. However, as she did below, she argues that different issues for determination are subject to different review standards. In particular, she says, issues related to the scope of solicitor-client privilege and her entitlement to obtain independent legal advice, including whether that right is limited by s. 117 of the *Community Charter*, are reviewable on a standard of correctness. In addition, she says, correctness is the appropriate

standard for reviewing issues related to her entitlement to indemnification under the SRD Indemnification Bylaw.

[61] According to Ms. Anderson, the question of whether she had the right to disclose confidential Board materials to her lawyer and whether the *Community Charter* limits that right falls squarely within the exceptions to reasonableness review discussed in *Vavilov*. In support of her submission, she says the social importance of solicitor-client privilege is premised on the fundamental right to obtain legal advice, which is the underlying right the privilege exists to protect. It follows, she says, that the question at the heart of the Censure Decision is of central importance to the legal system as a whole, and that its resolution has implications beyond the decision itself.

[62] Moreover, Ms. Anderson submits, although none of the exceptions discussed in *Vavilov* apply to the Indemnification Decisions, the Board should not be permitted to decide on indemnification without strict judicial oversight because she is a proving creditor and the SRD is the putative debtor. In these circumstances, she says, she and the SRD are directly "financially adverse" and permitting the Board rather than the court to decide violates an important principle of natural justice, namely, *nemo iudex causa sua* (no one should judge a cause in which they have an interest). For that reason, Ms. Anderson submits the Indemnification Decisions should also be reviewed on a correctness standard, at least with respect to the Board's interpretation and application of the SRD Indemnification Bylaw.

The SRD

[63] The SRD responds that the Censure Decision and the Indemnification Decisions are subject to review on the presumptive standard of reasonableness, relying on *Vavilov* and *Whistler*. In its submission, the exception to reasonableness review with respect to solicitor-client privilege does not apply because the issue is not whether s. 117 of the *Community Charter* contains an appropriate limit on Ms. Anderson's solicitor-client privilege. Rather, the confidentiality and privilege interests in question belong to the SRD. However, it emphasizes, the solicitor-client privilege exception discussed in *Vavilov,* referring to *University of Calgary*, relates to whether particular statutory language was sufficient to authorize setting aside solicitor-client privilege, which is not an issue in this case.

[64] The SRD also submits that portions of the Censure Decision should not be parsed out and reviewed for correctness given the deference owed to municipal decision-makers in interpreting their home statutes. In support of this submission, the SRD relies on *Dupont*, where Justice Marzari afforded deference to a local government's interpretation and application of the duty of confidentiality under s. 117 of the *Community Charter*. Moreover, it says, the Indemnification Decisions were discretionary determinations involving the interpretation and application of the SRD's own bylaw and its home statute, namely, the *Local Government Act*, which statute expressly empowers local governments to decide on matters of indemnification.

Analysis

[65] As Ms. Anderson concedes, none of the exceptions to reasonableness review discussed in *Vavilov* apply to the Board's interpretation and application of the SRD Indemnification Bylaw. I see no justification for departing from the presumptive standard in reviewing the Indemnification Decisions. In other words, in my view, the judge correctly identified reasonableness as the appropriate standard of review for those decisions.

[66] As noted, s. 740(1) of the *Local Government Act* defines "indemnification" as the payment of amounts for specified reasons; s. 740(2)(b) provides that boards may indemnify officials; and s. 740(3) limits that power by excluding the payment of certain fines. Ms. Anderson does not challenge the validity of s. 740, which clearly contemplates the "financially adverse" positions she identifies, namely, an official seeking indemnification, on one hand, and, on the other, a council or board responding to their request. To the extent the *nemo iudex causa sua* principle might be engaged (which is questionable), in my view, it is ousted by s. 740. As explained in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, the legislature is free to choose the roles of administrative decision-makers, and, in doing so, to oust principles of natural justice: at para. 22. Given the broad discretionary authority granted to the Board under s. 740, I see no unfairness in deferring to its reasonable decisions made in the exercise of its authority.

[67] However, in my view, whether a director breaches their duty under the *Community Charter* and the SRD Code of Conduct Bylaw by disclosing

confidential Board information to a lawyer to obtain personal legal advice raises a general question of law of central importance to the legal system. For that reason, although I accept that it differs from the solicitor-client privilege exception discussed in *Vavilov*, this question attracts a correctness standard of review. It follows that the judge did not identify the appropriate standard of review in this regard.

[68] The judge concluded that the exception to reasonableness review discussed in *Vavilov* did not apply because neither the *Community Charter* nor the SRD Code of Conduct Bylaw "place any limit on Ms. Anderson's own solicitor-client privilege" and Ms. Anderson "never formed a solicitor-client privilege interest of her own with respect to the SRD's information". However, this misapprehends the nature of the question, which is not whether the material statutory and bylaw provisions limit Ms. Anderson's solicitor-client privilege. On the contrary, Ms. Anderson relies on that privilege to argue that her disclosure did not compromise the SRD's confidentiality and privilege interests and therefore she did not breach her duty of confidentiality. The question is whether the Board's interpretation of the confidentiality requirements under the *Community Charter* and the SRD Code of Conduct Bylaw is legally untenable because it limits a director's right to obtain legal advice on confidential Board matters that affect them personally. In my view, this engages a centrally important and broadly applicable general question of law and therefore attracts correctness review.

[69] As explained in *Vavilov*, "the rule of law requires courts to have the final word with regard to general questions of law that are 'of central importance to the legal system as a whole'": at para. 58. Unlike the questions for determination in *Dupont*, the question in this case is not context or fact specific. Nor is it a "simple question of statutory interpretation" that lacks precedential value outside of issues arising under the material statutory scheme, such as the question in *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 at paras. 60–62. Whether disclosing confidential information to a lawyer to obtain personal legal advice constitutes a failure to "keep [it] in confidence" is a question with far-reaching implications in other contexts and for other statutes that impose duties of confidentiality: *University of Calgary* at paras. 20–21. Given its potential impact on the interest of all citizens in having "full and ready access to legal advice", it is also a question with significant implications for the proper functioning of the justice

system. As such, it requires an answer that is uniform, consistent, and determinate, and therefore is subject to correctness review: *Vavilov* at paras. 60–62.

[70] Finally, the merits of the Censure Decision attract a reasonableness review standard, subject to the general legal principles that apply to solicitor-client privilege, confidentiality, and the relationship between the two.

Reasonableness Review

[71] Reasonableness review upholds the rule of law, while according deference to the decision of an administrative body. It starts from a posture of judicial restraint and differs methodologically from correctness review. When conducting a reasonableness review, the court focuses on the decision that was made, including the justification offered. It does not focus on the conclusion that it would have reached: *Mason* at paras. 57–58.

[72] Two types of "fundamental flaws" indicate that an administrative decision is unreasonable, namely, a failure of rationality internal to the reasoning process or a failure of justification given the relevant legal and factual constraints: *Vavilov* at para. 101. Where, as here, the decision-maker does not give reasons or the underlying reasoning is unclear, the focus of review will be on the latter type of flaw: *Yu v. Richmond (City)*, 2021 BCCA 226 at para. 51. Factual and legal constraints that may bear on the decision include: the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence and facts; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the affected individual: *Vavilov* at para. 106.

[73] The governing statutory scheme always operates as a constraint on an administrative decision-maker. In addition, statutory language may sometimes limit the number of reasonable interpretations available to only one: *Vavilov* at para. 68; *Mason* at para. 71. Where an administrative decision engages issues of statutory interpretation, the task of the reviewing court is to determine whether the decision-maker applied the modern principle of statutory interpretation. Where the decision-maker did not give reasons on the meaning of a relevant provision, the court may be able to discern their interpretation from the record, and must evaluate whether

that interpretation is reasonable: *Vavilov* at paras. 119–123; *Mason* at paras. 68–69.

Was the Censure Decision Unreasonable?

Positions of the Parties

Ms. Anderson

[74] As noted, Ms. Anderson submits the Censure Decision was unreasonable because she did not breach confidentiality or privilege by disclosing the February and March Legal Opinions and the Peterson Report to her own lawyer, and therefore the Censure Decision lacked any legal or factual foundation. Alternatively, she submits, the SRD selectively waived its confidentiality and privilege interest in those materials by voluntarily providing them to her.

[75] In support of her primary submission, Ms. Anderson acknowledges the SRD has important confidentiality and solicitor-client privilege interests in the legal opinions and the Peterson Report. She also acknowledges that she lacked authority to waive or otherwise compromise those interests in any way. However, Ms. Anderson says, she did neither when she disclosed the confidential materials to her lawyer for the purpose of obtaining personal legal advice. This is so because her lawyer is duty-bound by the privilege arising out of their solicitor-client relationship to keep all of the information she disclosed to him confidential, including the confidential Board information, and thus, like her, to safeguard its confidentiality.

[76] According to Ms. Anderson, the real issue is whether she violated s. 117 of the *Community Charter* by disclosing the confidential Board materials to her lawyer. In other words, she says, the question is whether the obligation created by s. 117 precludes a Board member from sharing confidential Board information with their own lawyer to obtain independent legal advice on a matter that affects them personally. In her submission, the answer must be no.

[77] In support of her submission, Ms. Anderson emphasizes that solicitor-client privilege exists to protect the fundamental right to seek and obtain legal advice, which value underlies the privilege. She argues that any interpretation of the *Community Charter* or the SRD Code of Conduct Bylaw that limits a Board member's ability to exercise that fundamental right, fully and meaningfully,

undermines the right itself, and is therefore patently unreasonable. Specifically, it was unreasonable for the Board to interpret the material statutory and bylaw provisions as precluding directors such as herself from obtaining independent legal advice on their personal liability with respect to confidential Board matters. In support, she notes the right to obtain legal advice is so fundamental that even lawyers are permitted to disclose their client's confidential and privileged information for the purpose of obtaining independent legal and ethical advice: s. 3.3, *Code of Professional Conduct*.

[78] Moreover, Ms. Anderson submits, an interpretation of s. 117 that limits a Board member's ability to obtain independent legal advice is inconsistent with ss. 100(4) and 104(2) of the *Community Charter*. In particular, she says, s. 100(4) expressly contemplates a Board member obtaining legal advice in connection with a possible conflict of interest, and s. 104(2) contemplates a Board member instructing a representative to exercise their right to be heard in circumstances involving a conflict of interest. According to Ms. Anderson, a Board member's ability to share confidential Board information with their own lawyer when obtaining such advice is necessarily implicit in those provisions.

[79] Given all of the foregoing, Ms. Anderson says her duty of confidentiality did not preclude her from disclosing the confidential materials to her lawyer to obtain personal legal advice. In her submission, in enacting s. 117 of the *Community Charter*, the legislature could not have intended to impose such an unreasonable and unnecessary constraint on such a fundamental right. Rather, she remained within a permissible zone of confidentiality when she made the impugned disclosures. It follows, she says, that the Censure Decision was unreasonable as it had no basis in fact or in law.

[80] Alternatively, Ms. Anderson relies on the doctrine of "selective waiver of privilege" described in *Gotha City v. Sotheby's*, [1998] 1 W.L.R. 114 (C.A.). In doing so, she concedes that this doctrine has not received much consideration in Canadian jurisprudence. However, she says, the doctrine is logical and avoids an undesirable all or nothing result when a privileged document is intentionally disclosed to one person alone. In her submission, applied in this case, selective waiver would eliminate whatever protection privilege confers over the February

and March Legal Opinions beyond the protection conferred by s. 117 of the *Community Charter*.

The SRD

[81] The SRD responds that the Censure Decision has a clear and undisputed factual basis. Specifically, Ms. Anderson has always acknowledged that she disclosed the privileged legal opinions and confidential report to her counsel without first obtaining its authorization. According to the SRD, in these circumstances the only real issue is whether it was unreasonable for the Board to conclude that her disclosures breached the material statutory and bylaw restrictions. In the SRD's submission, it was reasonable, or alternatively correct, for the Board to conclude they did, and therefore to find that Ms. Anderson's conduct warranted censure.

[82] The SRD acknowledges that the Board did not provide reasons for making the Censure Decision. However, it says, Ms. Anderson made arguments before the Board similar to those she makes on appeal, and the Board clearly rejected them. It says further that, based on the ordinary meaning of their words, it was reasonable for the Board to interpret s. 117 of the *Community Charter* and s. 27 of the SRD Code of Conduct Bylaw as prohibiting the impugned disclosures without its authorization or, if authorization was withheld, by court order.

[83] The SRD argues that a purposive approach also supports the Board's interpretation of s. 117 of the *Community Charter* and s. 27 of the *SRD Code of Conduct Bylaw*. In its submission, local governments need to be able to share confidential information with board members without the risk that confidentiality will be lost or their confidential information will be used against their interests. In support, the SRD notes that a duty to keep confidential information confidential is not unique to members of a local government's governing body. For example, it says, directors and officers of corporations also have a duty of confidentiality, and must not use a corporation's confidential information for their own benefit without the informed consent of the company, citing *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68 and *Coastal Contacts Inc. v. Muhlbach*, 2010 BCSC 1415.

[84] The SRD also emphasizes that the solicitor-client privilege in the legal opinions belongs to the SRD, not to Ms. Anderson, and that her lawyer owes the

SRD no duty. In addition, it says, as her lawyer's letters demonstrate, Ms. Anderson used the SRD's privileged information to advance her personal position when she and the SRD were, in her words, in "financially adverse" positions. Moreover, it says, ss. 100(4) or 104(2) of the *Community Charter* do not conflict with its interpretation of s. 117 because they also require prior authorization for the release of confidential Board information to a Board member's own lawyer.

[85] Finally, the SRD submits, it did not intend to waive privilege over the February and March Legal Opinions by providing them to Ms. Anderson, who received them in her capacity as a member of the Board. According to the SRD, this did not amount to a waiver of privilege for any purpose, limited or otherwise, nor can waiver be implied from its conduct. As to selective waiver, it notes the doctrine does not apply in Canada and says there is no good reason to adopt it because limited waiver principles address the "all or nothing" concern that Ms. Anderson identifies. Further, the SRD says, regardless of any waiver of solicitor-client privilege, Ms. Anderson's obligations under s. 117 of the *Community Charter* precluded her from disclosing confidential Board materials to anyone, including her own lawyer.

Analysis

[86] The central question under this ground of appeal is whether the Board acted reasonably in censuring Ms. Anderson for breaching her duty of confidentiality. To answer that question, it is necessary to decide whether, correctly interpreted, s. 117 of the *Community Charter* precludes a Board member from disclosing confidential Board information to their own lawyer to obtain personal legal advice without prior authorization. In my view, it does not.

[87] To repeat, s. 117 provides:

> 117(1) A council member or former council member must, unless specifically authorized otherwise by council,
>
> a) keep in confidence any record held in confidence by the municipality, until the record is released to the public as lawfully authorized or required, and
>
> b) keep in confidence information considered in any part of a council meeting or council committee meeting that was lawfully closed to the public, until the council or committee

> discusses the information at a meeting that is open to the public or releases the information to the public.
>
> [Emphasis added.]

[88] Section 117 must be interpreted in accordance with its text, context, and purpose. In my view, interpreted textually, by the ordinary meaning of its words read in their immediate context, s. 117 imposes a duty to "keep [confidential Board records and information] in confidence" by shielding them from public disclosure. Pursuant to its terms, this duty persists unless and until confidential records and information are released to the public, discussed in an open public meeting, or their disclosure is authorized. In other words, the parameters of the duty under s. 117 with respect to confidential information are expressed textually in direct contrast to the ability to disclose it publicly.

[89] In my view, disclosing confidential information to a lawyer to obtain personal legal advice is not captured by this language. Confiding in a lawyer does not involve public disclosure of any kind. A lawyer is duty-bound by solicitor-client privilege to maintain confidentiality in all information provided by a client, and not to disclose it publicly. For example, when, in *Smith*, Dr. Smith sought legal advice concerning his confidential interview with Mr. Jones he did not fail to keep that information "in confidence" or disclose it publicly. Rather, he necessarily brought his lawyer into the permissible zone of confidentiality to obtain needed legal advice.

[90] Consideration of the larger legal context supports this textual interpretation of s. 117. For example, as I have explained, in the context of a breach of confidence claim, to commit an actionable breach of confidence a defendant must misuse confidential information to the detriment of the conveying party. Without more, confiding information to a lawyer to obtain related legal advice cannot fairly be characterized as detrimentally misusing that information. Rather, it is the only means by which an individual can adequately inform themselves of their legal position in relation to that information.

[91] As I have also explained, all citizens have an interest in full and ready access to meaningful legal advice in matters of personal importance. In my view, it is highly unlikely the legislature would intentionally limit that fundamental right in s. 117 by requiring officials such as Ms. Anderson to obtain prior authorization

before they are entitled to exercise that right. Nor is it likely the legislature intended to limit the access of an official's lawyer to information needed to provide legal advice when ss. 100(4) and 104(2) are engaged, particularly in the absence of any express words to that effect.

[92] A purposive approach to interpreting s. 117 also supports this interpretation. The manifest purpose of that provision is to establish a well-protected sphere of confidentiality to enable municipal governments to function effectively. The prospect that their officials might disclose confidential Board information to the public without authorization would obviously interfere with their ability to function openly, optimally and productively. However, I am unable to see how or why the prospect that officials might obtain personal legal advice in confidence in connection with confidential Board matters could impair their ability to function. In particular, there should be no chilling effect from a functional perspective for municipal government officials to be fully legally informed.

[93] Further, in my view the requirements of s. 27 of the SRD Code of Conduct must be interpreted harmoniously with the requirements of the *Community Charter*. Section 27 refers directly to Board members fulfilling their duties under the *Community Charter* when dealing with confidential records and information, and shares the same overarching purpose. It follows that, correctly interpreted, in referring to disclosure or release of confidential information, s. 27 prohibits the public disclosure or release of that information.

[94] In sum, as I see it, interpreted textually, contextually and purposively, the *Community Charter* and the SRD Code of Conduct Bylaw do not preclude an official such as Ms. Anderson from disclosing confidential Board information to a lawyer to obtain personal legal advice without prior authorization. Given that interpretation, it is not necessary to consider Ms. Anderson's thoughtful supplementary submission on the doctrine of selective waiver. That said, I am inclined to agree with the SRD that the Canadian doctrine of implied waiver adequately addresses the "all or nothing" concern she identifies. However, I would leave to another day the resolution of that issue.

[95] In the result, the Censure Decision cannot be justified. The *Community Charter* and the SRD Code of Conduct Bylaw did not preclude Ms. Anderson from

disclosing the confidential materials to her lawyer, and therefore the Censure Decision was unreasonable.

Were the Indemnification Decisions Unreasonable?

Positions of the Parties

Ms. Anderson

[96] Finally, Ms. Anderson contends the Indemnification Decisions were unreasonable. In her submission, indemnification was clearly mandatory based on the ordinary meaning of the words of s. 2 of the SRD Indemnification Bylaw. Although she notes that its words are imprecise and used inconsistently, she says its purpose is obvious: to protect indemnitees such as herself from the cost of legal attack in circumstances where they are ultimately vindicated, as she was with respect to the Disqualification Petition.

[97] According to Ms. Anderson, the only reasonable interpretation of s. 2 of the SRD Indemnification Bylaw is that it applies in these circumstances. She submits the SRD's argument that the Disqualification Petition was not a "claim, action or prosecution" violates the principles of statutory interpretation, exploits the poor drafting of the SRD Indemnification Bylaw, and rewards the SRD for failing to draft its own bylaw clearly. Moreover, Ms. Anderson says, the suggestion that she did not receive the alleged gifts in connection with the exercise of her powers as a Board member is manifestly untenable. In her submission, her receipt of gifts was only alleged to be disqualifying because, in exercising her powers as a Board member, she voted when she should not have done so due to her alleged conflict of interest.

The SRD

[98] The SRD responds that the Indemnification Decisions were reasonable and are entitled to deference. It acknowledges that reasons were not provided, but submits it is clear from the record that the Board rejected Ms. Anderson's interpretation of s. 2 of the SRD Indemnification Bylaw. According to the SRD, the Board must have concluded that the Disqualification Petition did not meet its requirements for mandatory indemnification either because it was not a "claim, action or prosecution" or because it was not connected to the exercise of official powers. In its submission, both implicit interpretations are reasonable.

[99] In support of its submission, the SRD notes that the terms “claim”, “action” and “prosecution” are not defined in the SRD Indemnification Bylaw. Therefore, it says, they must be interpreted in light of their purpose and the statutory context. According to the SRD: a “claim” generally requires the claimant to be seeking damages; under the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, R. 1-1(1), an “action” means a proceeding started by a notice of civil claim; and a “prosecution” is a proceeding commenced by a public body regarding an offence. In other words, the SRD argues, by the plain language of s. 2, the Disqualification Petition does not trigger mandatory indemnification because it is not a “claim, action or prosecution”.

[100] The SRD also argues that the SRD Indemnification Bylaw, interpreted contextually and purposively, does not reflect an intention to protect indemnitees in Ms. Anderson’s circumstances. Rather, it reflects an intention to limit mandatory indemnification to a subset of circumstances and related costs. In particular, it says, the SRD Indemnification Bylaw defines the word “proceeding” broadly, but does not use that term to trigger indemnification, and, although it differentiates between three different categories of costs, the mandatory provision at s. 2 applies to only some of them.

[101] Alternatively, the SRD submits that, even if the Disqualification Petition was a “claim, action or prosecution”, the costs sought must be “connected” to the “exercise or intended exercise of the official’s powers or the performance or intended performance of the official’s duties or functions”. According to the SRD, that connection is absent in this case. In support of this alternative submission, it relies on *Rawana v. Sarnia (City)* (1996), 30 O.R. (3d) 85, 1996 CanLII 8201 (Gen. Div), aff’d 35 O.R. (3d) 640, 1997 CanLII 17174 (C.A.). In doing so, the SRD emphasizes the Court in *Rawana* upheld the City’s decision not to indemnify a city councillor acquitted of accepting a bribe to vote in favour of a matter, although it accepted the councillor would not have been charged with the offence had he not been a member of council. However, it found the councillor was not entitled to indemnification because his actions were not taken in any official capacity. According to the SRD, similar reasoning applies here, and the Board was entitled to conclude the alleged wrongful collection of donations at the center of the Disqualification Petition were not connected to the performance of Ms. Anderson’s powers, duties or functions.

Analysis

[102] In my view, there is only one reasonable interpretation of s. 2 of the SRD Indemnification Bylaw available in the circumstances, namely, that Ms. Anderson is entitled to be indemnified for her reasonable legal costs incurred in relation to the Disqualification Petition. It follows that the Indemnification Decisions were also unreasonable.

[103] To repeat, the most salient provisions of the SRD Indemnification Bylaw provide:

> 1. […]
>
> 'Indemnify' means to pay the amounts required:
>
> a) to defend against a claim, action or prosecution brought against an official in connection with the exercise or intended exercise of the official's powers or the performance or intended performance of the official's duties or functions;
>
> b) to satisfy a judgement, award or penalty imposed in connection with a claim, action or prosecution referred to in paragraph (a); or
>
> c) in relation to an inquiry under the *Public Inquiry Act* or to another proceeding that involves the administration of the Regional District or the conduct of the Regional District's business;
>
> but does not extend to a fine imposed as a result of a conviction for an offence, other than a strict or absolute liability offence.
>
> 'proceeding' means an action, trial, hearing or application before a court, tribunal or other body that has authority to impose civil or criminal penalties, but does not include a proceeding before the Board of Directors.
>
> 'reasonable legal costs' means the out of pocket costs, including disbursements, that are incurred by an official or by the Regional District in seeking, retaining or engaging legal counsel with respect to a proceeding covered by this bylaw.
>
> 2. The Regional District will indemnify an official against a claim, action or prosecution brought against the official, including reasonable legal costs incurred in relation to the proceeding, provided that the official for whom indemnification is sought complies with the provisions of this bylaw.
>
> [Emphasis added.]

[104] As is apparent from its language, s. 2 of the SRD Indemnification Bylaw provides for mandatory indemnification under the prescribed conditions. I agree with Ms. Anderson that its purpose is to protect indemnitees such as herself from the cost of a legal attack brought against them in connection with the exercise or performance of their official powers, duties or functions. I also agree that

protection of this kind for their officials is essential to the proper functioning of local governments.

[105] Further, I agree with Ms. Anderson that the Disqualification Petition was manifestly connected to the exercise and performance of her official powers, duties and functions. Specifically, the Disqualification Petition related directly to her impugned actions in the discharge of those powers, duties and functions, namely, voting on Board matters while in a position of alleged conflict. In other words, unlike the councillor in *Rawana*, Ms. Anderson's impugned actions were undoubtedly taken in an official capacity.

[106] As to whether the Disqualification Petition was a "claim, action or prosecution" within the meaning of s. 2, again, there is only one reasonable interpretation available in the circumstances based on its text, context and purpose. As Ms. Anderson points out, the words of ss. 1 and 2 are imprecise and used inconsistently throughout the SRD Indemnification Bylaw, so a straightforward textual analysis is impossible. However, when the bylaw is read as a whole and s. 2 is interpreted contextually and purposively, in my view, the only reasonable interpretation available is that it provides for mandatory indemnification for all costs incurred in defending all types of legal proceeding connected to an official's actions taken in an official capacity other than fines imposed on conviction for offences that are not strict or absolute liability offences. I see no principled reason to read these provisions together as excluding petition proceedings from that critical coverage, nor has the SRD proposed one.

Conclusion

[107] For all of these reasons, I would allow the appeal, set aside the order below, quash the Censure Decision and the Indemnification Decisions, and declare that the SRD must indemnify Ms. Anderson for her reasonable legal costs in defending the Disqualification Petition.

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

“The Honourable Mr. Justice Fitch”