IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Port Clements (Village) (Re)*, 2015 BCSC 1675

Date: 20150917
Docket: S155085
Registry: Vancouver

Re: The Village of Port Clements in the Matter of Section 129 of the *Community Charter*, S.B.C. 2003, c. 26

Before: The Honourable Madam Justice Harris

Reasons for Judgment

Counsel for Village of Port Clements:	S. Dubinsky
Counsel for Certain Residents:	A. J. Turton
Place and Date of Hearing:	Vancouver, B.C. August 25 - 26, 2015
Place and Date of Judgment:	Vancouver, B.C. September 17, 2015

Overview

[1] The Village of Port Clements (the "Village") is a small municipality of approximately 350 people in Haida Gwaii, British Columbia. The Village is governed through an elected Council, comprised of the Mayor and four councillors.

[2] On July 2, 2015, the Village obtained an order from Mr. Justice Melnick, pursuant to s. 129(5) of the *Community Charter* to permit Mayor Ian Gould, Councillor Matthew Gaspar and Councillor Charleen O'Brien Anderson to discuss and vote on the Village's Bylaw No. 184, Amendment Bylaw No. 426 (the "Rezoning Bylaw 426") and an Official Community Plan Bylaw, Amendment Bylaw No. 425 (the "OCP Amendment Bylaw"), despite their having a conflict of interest in respect of the proposed bylaws.

[3] Section 129(5) of the *Community Charter* allows a municipality to make an application to court where, due to the conflicts of interest, it is unable to achieve the quorum necessary to conduct business.

[4] Certain residents and taxpayers of the Village, namely Travis O'Brien, Dennis Reindl, Urs Thomas and Elizabeth Stewart (the "Residents"), seek to set aside the order of Justice Melnick pursuant to Rule 8-5(8) of the *Supreme Court Civil Rules* on the basis that the Petition and affidavits filed in support of the Petition failed to disclose to the court all of the relevant and material facts that were related to the involvement of Mayor Gould and Councillors in the subject matter of the Rezoning Bylaw 426 and the OCP Amendment Bylaw.

[5] Although normally such an application would be heard by the judge who made the order, in light of Justice Melnick's schedule, he allowed the matter to be decided by another judge.

Background

[6] The construction of a barge facility in the Village had been the subject of discussion in the community for a number of years. A barge sub-committee was

established by the former Village Council to consider the matter and it sought grant funding for the project.

[7] The Village received a rezoning application from Infinity West Enterprises Inc. ("Infinity West") on November 4, 2014, to allow for the construction of a barge facility. This application was subsequently revised.

[8] Subsequent to receiving the application, the Village held two public hearings regarding the proposal, on November 17, 2014 and December 8, 2014. On January 19, 2015 the Council gave three readings to a proposed rezoning bylaw, Rezoning Bylaw No. 419 (the "Rezoning Bylaw 419"). There was no declaration of a conflict of interest made during those meetings by Mayor Gould, Councillor Gaspar, or Councillor Anderson with respect to the proposed Rezoning Bylaw 419.

[9] There was opposition by some residents of the Village to the rezoning application of Infinity West, on the basis of its environmental impact and the effect on property values. The Residents brought their concerns forward to Council.

[10] Rezoning Bylaw 419 was on the Council agenda for adoption on February 2, 2015. At that time, the Residents had legal counsel present a letter to Council which, amongst other things, identified Councillor Gaspar to be in a conflict of interest regarding Infinity West and its rezoning application.

[11] Following receipt of the letter from legal counsel, the Village tabled the proposed Rezoning Bylaw 419 and did not proceed with it. Subsequently, Mayor Gould, Councillor Gaspar and Councillor Anderson determined they had a conflict of interest in relation to Infinity West. As the Village could not achieve a quorum as a result of the declared conflicts of interest, the Village brought the Petition seeking relief under s. 129 of the *Community Charter*. The Village sought to have one or more of these members of Council be allowed to discuss and vote on a new Rezoning Bylaw 426 and an OCP Amendment Bylaw.

[12] The conflicts of interest of Mayor Gould, Councillor Gaspar and Councillor Anderson were described in their affidavits in support of the Petition. In summary,

Mayor Gould referred to his being indirectly employed by Infinity West, the applicant for the rezoning, through Gaspar Forest & Marine. He also deposed that his employment prospects as a boom man could be detrimentally affected if the amendments were adopted.

[13] Councillor Gaspar referred to his agreement with Infinity West to conduct log booming. He also referred to his part-time business, Gaspar Forest & Marine. He deposed his business may be negatively affected if the amendments to the bylaws were passed.

[14] Councillor Anderson referred to her immediate family members being employees of a family company, which was a competitor of Infinity West and her friendship with the principals of Infinity West. She deposed that her brother had signed a community petition opposing the application by Infinity West.

[15] The fact that the Village was bringing a Petition was reported in the local media on April 17, 2015. It did not make reference to the date for the hearing of the Petition. The Village did not give notice of the hearing of the Petition to the Residents.

[16] Once the Village obtained the order of Justice Melnick, the Village proceeded with the new Rezoning Bylaw 426 and the OCP Bylaw Amendment.

Position of the Residents

[17] The Residents bring their application to set aside the order of Justice Melnick pursuant to Rule 8-5(8) of the *Supreme Court Civil Rules*, which permits applications to set aside orders which have been made without notice.

[18] The Residents assert that they have standing to bring the application on the basis of the test for public interest standing established by the Supreme Court of Canada in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* 2012 SCC 45.

[19] The Residents submit that the Village failed to disclose relevant and material facts to the court. In summary, they allege the Village failed to disclose:

1. That Mayor Gould had been a member of the barge sub-committee since at least 2012;

2. That Councillor Gaspar had previously served as councillor prior to the November 15, 2014 election;

3. That the matter of Infinity West's request for rezoning was before the Village Council at a public hearing on November 17, 2014, at which time Councillor Gould and Councillor Gaspar participated in a discussion regarding the rezoning application, without disclosing their conflict of interest with Infinity West;

4. That on November 17, 2014, the Council had allowed Infinity West to resubmit their application for rezoning to address public concerns and provide further information and that a new public hearing would be scheduled when the new application was submitted.

5. That the matter of Infinity West's proposal was before the Council at a public hearing on December 8, 2014, at which meeting Mayor Gould and Councillor Anderson participated in the discussion and did not declare a conflict of interest;

6. That the amending Rezoning Bylaw 419 was given first, second and third reading on January 19, 2015 meeting of the Council, was passed, without Mayor Gould, Councillor Gaspar or Councillor declaring a conflict of interest;

7. That on January 5, 2015, the Council authorized the Village to sign an agreement with Northern Development Initiative Trust for a $250,000 grant for the proposed barge facility;

8. That on February 2, 2015, the legal counsel for the Residents submitted a letter to Council which, among other things, identified Councillor Gaspar as

having a conflict of interest, which letter was received and discussed at the February 2, 2015 meeting of council.

[20] The Residents also submit that the references in the affidavits filed in support of the Petition were misleading in referring to Infinity West applying for amendments to the official community plan, as Infinity West only applied for an amendment to the zoning bylaw.

[21] The Residents assert that the failure to disclose these facts was not innocent.

[22] The Residents refer to the Court of Appeal's decision in *Politeknik Metal San ve Tic A.S. v. AAE Holdings Ltd.,* 2015 BCCA 318, as confirming that there is a high duty of disclosure on an applicant who is asking for a without notice order and that failure to provide full and frank disclosure is a proper basis for setting aside a resulting order.

Position of the Village

[23] The Village submits that the Residents' application should be dismissed on the basis that:

1. The Residents do not have standing to apply to set aside the order of Justice Melnick;

2. Rule 8-5(8) of the *Supreme Court Civil Rules* has no application. It applies to without notice orders brought for reasons of urgency under Rule 8-5(6). Rule 8-5(8) does not apply to orders made pursuant to s. 129 of the *Community Charter*. Section 129(5) orders cannot properly be characterized as an "*ex parte*", as there is no opposite party who is adverse in interest;

3. The prior consideration of Rezoning Bylaw 419 is not relevant to the application brought pursuant to s. 129(4), particularly where the Village was no longer proceeding with this bylaw and was starting *de novo* to consider the rezoning application;

4. The work of the previous barge sub-committee and the funding commitments secured by the Village are not material to Village's Petition under s. 129(4) of the *Community Charter*; and

5. The Residents have alternative remedies available to address their concerns about the proposed Rezoning Bylaw 426. The Residents' application to set aside the order of Justice Melnick on the basis of the prior conduct of the Village or Council constitutes an impermissible collateral attack.

Legal Framework

[24] Division 6, Part 4 of the *Community Charter* establishes a comprehensive scheme governing conflicts of interest. Section 100 requires council members to disclose matters which are before Council in which they have a pecuniary interest or other conflict and stipulates that they are not to participate in discussion, vote, or attempt to influence the voting on a matter in which they have a conflict of interest.

[25] A person who fails to disclose a conflict of interest is disqualified from office under s. 101(3), unless the contravention was done inadvertently or because of an error in judgment made in good faith:

> **Restrictions on participation if in conflict**
>
> **101**
>
> ...
>
> (3) A person who contravenes this section is disqualified from holding office as described in section 108.1 *[disqualification for contravening conflict rules]* unless the contravention was done inadvertently or because of an error in judgment made in good faith.

[26] Section 111 provides a procedure for electors or the municipality to challenge a council member who does not disclose a conflict of interest under s. 110:

> **Application to court for declaration of disqualification**
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> **111** (1) If it appears that a person is disqualified as referred to in section 110 and is continuing to act in office,
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> (a) 10 or more electors of the municipality, or
>
> (b) the municipality,
>
> may apply to the Supreme Court for an order under this section.

(2) As a restriction, a municipality may only make an application under subsection (1) if this is approved by a resolution that

(a) is adopted by a vote of at least 2/3 of all council members, and

(b) identifies the grounds for disqualification referred to in section 110 which the council considers apply.

(3) Sections 100 *[disclosure of conflict]* and 101 *[restrictions on participation if in conflict]* do not apply to the council member who is subject to a resolution referred to in subsection (2) of this section in relation to that resolution.

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

(a) any of the electors bringing the application, in the case of an application under subsection (1) (a), or

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

(5) Within 7 days after the petition commencing an application under this section is filed, it must be served on

(a) the person whose right to hold office is being challenged, and

(b) in the case of an application under subsection (1) (a), the municipality.

(6) On the hearing of the application, the court may declare

(a) that the person is qualified to hold office,

(b) that the person is disqualified from holding office, or

(c) that the person is disqualified from holding office and that the office is vacant.

[27] In the event that the municipality cannot achieve a quorum because of conflicts of interest, s. 129 (4) provides that the municipality may apply to the Supreme Court for relief:

Quorum for conducting business

129 (1) Subject to an order under subsection (3) or (4), the quorum is a majority of the number of members of the council provided for under section 118 *[size of council]*.

(2) The acts done by a quorum of council are not invalid by reason only that the council is not at the time composed of the number of council members required under this Act.

(3) If the number of members of a council is reduced to less than a quorum, the minister may either

(a) order that the remaining members of the council constitute a quorum until persons are elected and take office to fill the vacancies, or

> (b) appoint qualified persons to fill the vacancies until persons are elected and take office to fill them.
>
> (4) The municipality may apply to the Supreme Court for an order under subsection (5) if, as a result of section 100 *[disclosure of conflict]*, the number of council members who may discuss and vote on a matter falls below
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> (a) the quorum for the council, or
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> (b) the number of council members required to adopt the applicable bylaw or resolution.
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> (5) On an application under subsection (4), the court may
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> (a) order that all or specified council members may discuss and vote on the matter, despite sections 100 *[disclosure of conflict]* and 101 *[restrictions on participation]*, and
>
> (b) make the authority under paragraph (a) subject to any conditions and directions the court considers appropriate.
>
> (6) An application under subsection (4) may be made without notice to any other person.

[28] Rule 8-5 of the *Supreme Court Civil Rules* provides for without notice applications and the setting aside of such orders:

> **Orders without notice**
>
> (6)The court may make an order without notice in the case of urgency.
>
> **Service of orders required**
>
> (7)Promptly after an order is made without notice by reason of urgency, the party who obtained the order must serve a copy of the entered order and the documents filed in support on each person who is affected by the order.
>
> **Setting aside orders made without notice**
>
> (8)On the application of a person affected by an order made without notice under subrule (6), the court may change or set aside the order..

Issues

[29] The essential issues which arise in this case are:

1. Do the Residents have standing to seek to set aside the order of Justice Melnick? Does Rule 8-5(8) have application?

2. Did the Village in its Petition fail to disclose relevant and material facts? Should the order of Justice Melnick be set aside on the basis of non-disclosure?

Discussion

Do the Residents have standing to seek to set aside the order of Justice Melnick? Does Rule 8-5(8) have application?

Standing

[30] The parties agree that the test for public interest standing was formulated by the Supreme Court of Canada in *Canada (Minister of Justice) v. Borowski,* [1981] 2 S.C.R. 575, and was most recently confirmed by the court in the *Downtown Eastside Sex Workers* case. In exercising the discretion to grant public interest standing, it held that a court must consider three factors :

a) whether there is a serious justiciable issue raised;

b) whether the party bringing the action has a real stake or genuine interest in it; and,

c) whether, in all of the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.

[31] The applicant seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing.

[32] Applying these factors to the case, the Village contends that there is not a serious issue to be tried and that, while the Residents may have an interest in the barge project, that is a different matter than whether, as a matter of procedure, the Council may consider and vote on the Rezoning Bylaw 426. There are other procedures in place by which the Residents can challenge the decisions made by Council in respect of the barge project.

[33] The Residents respond that this is a proper case for public interest standing as this is the only reasonable and effective means by which they can bring forward

their concern about the propriety of the conduct of the Village in obtaining the order from Justice Melnick.

[34] In considering whether I should exercise my discretion to allow the Residents to bring the application to set aside the order of Justice Melnick, I note, first of all, that counsel have not referred me to any case in which there has been judicial consideration of s. 129 of the *Community Charter* or similar legislation. This appears to be a case of first instance.

[35] I consider that the Residents have raised serious issues as to the extent of the obligation of the Village to disclose all relevant and material facts to the court when it applied for relief under s. 129(5) and what, if any, remedy ought to flow from a failure to disclose relevant and material facts. These issues are not frivolous.

[36] The legislative provisions governing conflicts of interest in the *Community Charter* underscore the importance that the legislature has assigned to the obligation on elected officials who hold public office to disclose any private interests which could affect the exercise of their public duties. An official who does not disclose a conflict of interest is liable to be disqualified from holding office.

[37] In my view, insofar as s. 129(5) allows elected officials to be involved in a matter despite a declared conflict of interest, it is an exceptional remedy - which the legislature has determined will only be permitted with court approval and subject to judicial oversight.

[38] In considering whether the Residents have a genuine interest in bringing the matter before me, I note that there was no obligation on the Village to give notice to the Residents of the Petition. Section 129(6) expressly provides that a municipality may bring an application under s. 129(4) without notice. However, it does not necessarily follow that members of the public had no interest in the Petition. As members of the public, they had a legitimate interest in whether the Council properly obtained the approval of the court to allow their elected representatives to discuss

and vote on matters in which they had a declared conflict of interest. The Residents are not, therefore, mere busybodies.

[39] I also do not agree with the Village that s. 129(5) should simply be characterized as merely a procedural provision. It grants a substantive right to the Village, in allowing it to proceed with its business despite the declared conflict of interest of certain council members. I am satisfied that allowing the Residents' application to proceed would not place an unjustified burden on judicial resources.

[40] Further, I am satisfied there is no other reasonable and effective means to bring forward the particular concern raised by the Residents. While there are avenues of redress which would allow electors to challenge a councillor who does not disclose a conflict of interest and to challenge a bylaw which was improperly adopted, these remedies would not address the specific and immediate question at issue: whether the Village failed to disclose sufficient facts to the court to justify an order under s. 129(5) that the Council could proceed with rezoning application of Infinity West.

[41] I conclude that granting public interest standing is desirable to ensure the legality of the action taken by the Village. Accordingly, the Residents are granted public interest standing.

Rule 8-5(8)

[42] With respect to the application of Rule 8-5, as noted above, the Village submits that the Rule has no application to the order of Justice Melnick, as it was granted under s. 129(5) of the *Community Charter* and not under Rule 8-5(6). It says that the authority of the court to set aside a without notice order under Rule 8-5(8) does not apply, unless the order was initially made under Rule 8-5(6). Further, the Village submits that an order made under s. 129(5) is not truly a "without notice order", as there was no adverse party whose interests would be affected by the *ex parte* order.

[43] In my view, the position of the Village on this point does not bear scrutiny. I note that s. 126(6) states that an application by the public authority may be made "without notice". As this is what occurred in this case, I do not accept that it is inaccurate to characterize the order of Justice Melnick as a "without notice" order.

[44] Although the Village also suggests it should not be considered a "without notice order" because there was no opposite party to the Petition, that was because the Village elected to proceed on a without notice basis. It could have given notice to the Residents who had raised the conflict of interest issue in February of 2015. The Village was not strictly obliged to do so, but it does not necessarily follow that there was no party who had an interest in the Village's Petition. It was the Residents, not the members of Council who first raised the concern about a conflict of interest in relation to Infinity West.

[45] Further, I agree with the Residents that the Court of Appeal decision in *Politeknik* supports the availability of an application under Rule 8-5(8), even where the governing legislation expressly provides for without notice orders. In that case, the Court considered the *Court Order Enforcement Act,* R.S.B.C. 1996, c. 78, which authorized the issuance of garnishing orders without notice pursuant to s. 3(2)(d). The Court confirmed a without notice order made under s. 3(2) of that *Act* could be set aside under Rule 8-5(8).

> [25] Section 3(2) of the *COEA* authorizes the issuance of garnishing orders without notice. A defendant who asserts that the requirements of s. 3(2)(d) were not satisfied may apply under Rule 8-5(8) of the *Supreme Court Civil Rules* to have the *ex parte* order set aside.
>
> [26] In addition to making application under Rule 8-5(8), s. 5 of the *COEA* provides a second alternative to a defendant whose funds have been garnished. Under s. 5(2), the court may order that all or part of the garnished funds be released if the court "considers it just in all the circumstances". The types of circumstances contemplated by s. 5(2) include those where the garnishment creates an undue hardship, or is an abuse or is unnecessary: see *Min-En Laboratories Ltd. v. Westley Mines Ltd.* (1983), 57 B.C.L.R. 259 at 261 (B.C.C.A.). Another example is where it is demonstrated that some of the monies in the garnished bank account were held by the defendant in trust for a third party: see *Mutual of Omaha Insurance Company v. Gestion Professionnelle (Autorema) Inc.*, [1990] B.C.J. No. 1807 (S.C.).

[46] I am satisfied, therefore, that the Residents' application was not improperly brought under Rule 8-5(8). In that regard, I note that while petitions are generally governed by Rule 16-1, the court may apply any other provisions of the *Rules* pursuant to Rule 16-1(18). Here, in light of my conclusions regarding the Residents' public interest standing, I consider it is appropriate that the matter be considered under Rule 8-5(8).

Should the order of Justice Melnick be set aside on the basis of non-disclosure?

[47] I also agree with the Residents that, as a general matter, the Village had a duty to disclose all facts that were "relevant and material" to its application under s. 129(4) of the *Community Charter*. The obligation on an *ex parte* applicant to make full and frank disclosure of all material facts and the authority of the court to set aside the order where there has been a failure to do so is well established, see *Wilder Estate v. Davis & Co.* (1994), 92 B.C.L.R. (2d) 385 (C.A.); *Evans v. Umbrella Capital LLC.*, 2004 BCCA 149.

[48] This obligation has been held to apply even where there is a statutory authority to make a without notice order. In *Politeknik,* the Court of Appeal referred to its previous decision in *Environmental Packaging Technologies Ltd. v. Rudjuk,* 2012 BCCA 342, in which it held that the principle of full and frank disclosure applicable to *ex parte* applications is not ousted by the provisions of the *Court Order Enforcement Act* and applies equally to the issuance of garnishing orders under that *Act.*

[49] I consider that where the court is being asked to make an order under s. 129(5), which order would effectively override the conflict of interest provisions of the *Community Charter*, the principle of full and frank disclosure is similarly justified.

[50] Did the Village comply with its duty of disclosure? It is not seriously disputed that the Village did not disclose the information which the Residents say should have been disclosed. In particular, they did not disclose their participation at meetings at which Rezoning Bylaw 419 had been discussed, prior to the Residents first raising

their concern that Councillor Gaspar had a conflict of interest in February of 2015. However, it is also not disputed that by the time the Village filed its Petition, it had disclosed to the court, through the affidavits of Mayor Gould, Councillor Gaspar, and Councillor Anderson, the nature of their declared conflict of interest in Infinity West's rezoning proposal. The dispute between the parties, therefore, relates to the extent of disclosure required.

[51] On this point, I note that the Court of Appeal, in *Politeknik* and *Environmental Packaging,* confirmed that in order to set aside an *ex parte* order on the basis of non-disclosure, the non-disclosure had to be "material". Justice Tysoe stated in *Politeknik*:

> [33] Thus, the plaintiff in this case was required to make full and frank disclosure of all material facts related to the cause of action asserted against the defendants. A material fact is one that may have affected the outcome of the application: see *Evans v. Umbrella Capital LLC*, 2004 BCCA 149 at para. 33.

[52] Would the facts pertaining to the prior involvement of Mayor Gould, Councillor Gaspar and Counsellor Anderson in Rezoning Bylaw 419 have affected the outcome of the application? I believe it is unlikely.

[53] As noted above, at the time of the hearing of the Village's Petition, the Village had disclosed the nature of the conflicts of interest affecting Mayor Gould, Councillor Gaspar and Councillor Anderson in relation to Infinity West. The Village had also disclosed, through the affidavit of Ms. Mushynsky, the Chief Administrative Officer of the municipality, that the Village had received a rezoning application from Infinity West on November 4, 2014 and a revised application on November 21, 2014, which proposal was to permit marine and foreshore industrial activities at the site. The proposed rezoning would be from a Resource Area Zone to a newly created Marine Industrial Zone. Ms. Mushynsky's affidavit further disclosed that processing the rezoning application required an amendment to the Village's Official Community Plan.

[54] Although the fact that the Council members had participated in discussions on Rezoning Bylaw 419 was not expressly disclosed, I consider that it was apparent from the affidavits filed in support of the Petition that the matter had previously been before Council while they were members of Council. Ms. Mushynsky deposed that the current Council had received Infinity West's application for rezoning on November 4, 2014 and an amended application for rezoning on November 21, 2014. Councillor Anderson's affidavit refers to a public meeting regarding the rezoning application being held on December 8, 2014. Further, it was apparent from the affidavits of Mayor Gould, Councillor Gaspar and Councillor Anderson, that their conflict of interest was in relation to the matter of the Infinity West's rezoning application generally. It was not suggested that their conflict arose only in relation to the Rezoning Bylaw 426.

[55] In my view, the Village should ideally have provided more of the factual context for the Rezoning Bylaw 426 in the affidavits in support of the Petition. The Village's affidavit material could best be described as "lean". However, I note that s. 129 does not provide any direction as to what information is to be contained in an application under s. 129(4). In its application, the Village did clearly disclose the nature of the declared conflicts of interest and, through the affidavit material it filed, it was apparent that Infinity West's application for rezoning had previously been before Council in November and December of 2014. The Village also disclosed that it had determined that an amendment to the Official Community Plan was required. It disclosed the proposed Rezoning Bylaw 426 and OCP Amendment Bylaw.

[56] I am not persuaded on the evidence before me that the Village intentionally omitted or misrepresented relevant facts, as the Residents suggest. Further, I am not persuaded that the disclosure of particulars of the history of the barge project and the consideration of Rezoning Bylaw 419 were material in the sense that they would have affected the outcome, which pertained to Rezoning Bylaw 426. I agree with the Village that s. 129(4) is intended to provide an avenue to obtain prospective permission, in order that a municipality can conduct its business. It is not intended to provide retroactive absolution.

[57] In that regard, if the Residents believed that members of council failed in their obligation to declare a conflict of interest when they participated and voted on the rezoning application prior to February of 2015, they had a remedy available to them under s. 111.

[58] The role of the court under s. 129(5) is to consider whether, given the circumstances pertaining to the declared conflicts of interest, the court should nevertheless allow one or more of council members to participate in the discussion and vote on the matter at issue. Section 129(5) also allows the court to consider whether any order made should appropriately be subject to conditions or directions.

[59] Justice Melnick determined, based upon the information before him regarding the conflicts of interest, that an order allowing the three council members to discuss and vote on the matter was appropriate. Although it was specifically brought to his attention that he could distinguish between the council members, he elected not to do so. He did not issue any directions or conditions.

[60] In all of the circumstances, I decline to set aside the order of Mr. Justice Melnick. The material facts before me remain the same as they were before him. Whether or not these council members should have participated in discussion and voting on the proposal on Rezoning Bylaw 419 was not the issue before him. At the time the Petition was heard, all three of these council members had declared that they had a conflict of interest in relation to Infinity West's barge project and acknowledged that they required an order of the court to consider Rezoning Bylaw 426 and OCP Amendment Bylaw.

[61] I would add that, even with the benefit of the affidavits provided by the Residents, I am satisfied that Mayor Gould, Councillor Gaspar and Councillor Anderson should be permitted participate and vote on the matter of the barge project. It is apparent that this is a hotly contested issue in the community. The affidavits filed by the members of council suggest that they are alive to the potential consequences to the community should the barge project proceed. I consider that it is in the interests of the Village that it be able to conduct its business and determine

what course of action it will take in respect of the barge proposal - with the assistance of all members of Council. This is not a case where conditions or directions are appropriate.

[62] I, therefore, dismiss the application of the Residents. There will be no order as to costs.

"Madam Justice Harris"