**CANADIAN BAR ASSOCIATION**

**Public Sector and Municipal Law Section**

**Monthly Meeting: March 27, 2018**

**Three Recent Cases:**

**Conflicts of Interest, Municipal Referendums, and Federal Pipelines**

**Tom Irvine**

**A. *Council of the Rural Municipality of Sherwood No. 159 v. Probe*, 2018 SKQB 24, January 18, 2018.**

**Issue:** Conflict of Interest for Municipal Councillors.

**Legislation:** *The Municipalities Act*, SS 2005, c. M-36.1, ss. 141.1, 143, 144, 147, 148, 149.

**Facts:**

* R.M. passed a by-law indemnifying members of Council who retained counsel to represent them before the Barclay inquiry. Mr Probe, a member of the Council, was paid close to $50,000 under that by-law.
* that by-law was subsequently quashed: *Baker v. Sherwood No. 159 (Rural Municipality)*, 2015 SKQB 301.
* in the fall of 2015, the issue of requiring re-payment by the councillors was considered by Council and rejected. Councillor Probe declared a conflict and left the chamber for those discussions.
* in January, 2016, a ratepayer and a member of Council, Councillor Heenan, both raised the issue again and proposed that Council seek re-payment. Councillor moved that the matter of reimbursement be re-considered.
* Councillor Probe did not declare a conflict. He remained in the chamber and moved that the proposal be deferred, pending consideration by legal counsel. That motion to defer passed, 4-3, with Councillor Probe voting to defer. Under the rules of Council, if he had not voted, there would have been a tie and the motion to defer would have been defeated.

**Analysis:**

* the conflict of interest analysis has four steps:
  + is the councillor in a conflict of interest (s. 141.1)? The definition of conflict of interest states that a financial interest, as defined by the Act, is always a conflict of interest (s. 143(1)).
  + if in a conflict of interest, the councillor must declare it, disclose the general nature, abstain from taking any actions, and refrain from participating in any discussion, including leaving the room while Council discusses it (s. 144).
  + if the councillor is in a conflict of interest and does not comply with s. 144, the councillor is disqualified, and must resign (ss. 147, 148). If the councillor does not resign, the Court has the authority to remove the councillor (s. 148).
  + the Court has a discretion not to remove if the disqualification arose through inadvertence or honest mistake (s. 149).
* the Court concluded that:
  + Councillor Probe was in a conflict of interest, having a clear financial interest in the matter before Council;
  + he should have declared and withdrawn, from both the presentation by the ratepayers and the motion by Councillor Heenan;
  + his seat was vacant; and,
  + the mistake was not by inadvertence or an honest mistake.
* the Court rejected Councillor Probe’s argument that he was permitted to take part in a procedural motion, namely whether the Council had the authority to re‑visit the decision made in the fall not to seek re-imbursement. The Court held that the substantive/procedural distinction was irrelevant:

[41] Whether Councillor Heenan’s motion was procedurally deficient is of no consequence. To suggest that councillors in a conflict of interest situation can take part in procedural matters connected to a substantive matter in which they have a financial interest misses the whole point of the conflict of interest principle. If one is in a conflict of interest one cannot take part. This would include actions intended to prevent, hinder, question or delay a motion that could have negative financial consequences to the councillor. Making a motion to adjourn a motion calling for the repayment of just under $50,000 unquestionably constitutes a matter that could, directly or indirectly, cause Mr. Probe to be “adversely affected financially”. It was improper for Mr. Probe to move the motion to table Councillor Heenan’s motion, take part in the discussion and to vote on that tabling motion.

* the Court declared that Councillor Probe was disqualified and the seat was vacant.

**B. *Barbour v. Town of Ituna*, 2018 SKQB 50, February 6, 2018.**

**Issue:** Municipal referendums.

**Legislation:** *The Municipalities Act*, s. 358, 136, 137.

**Facts:**

* in March, 2015, the Town of Ituna purchased a disused liquor store from the Saskatchewan Liquor and Gaming Authority.
* in July, 2015, the Town Council defeated a motion to put the store up for sale by tender, and instead passed a resolution proposing that the library move into the building.
* in August, 2015, the Council passed a resolution to advise the Regional Parkland Library that the local library was required to move to the building.
* a group of electors collected signatures to request a referendum on the issue, with the question set out:

“Should the Ituna Town Council rescind its motion to relocate the Ituna Local Library and tender the former Ituna Liquor Store for sale?”

* at a meeting in September, the Town administrator advised Council that the petition was sufficient: “Even though the wording of the petition is not similar to the actual resolution the intent is there.”
* in November, the Council passed a resolution for the referendum to be held in February, 2016, with the question worded:

“Do you want the Town of Ituna to retain ownership of the former Liquor store and move the Parkland Regional Library Ituna Branch to that location?”

* the referendum was held in February 2016 and the question was defeated, 101 votes for “yes” and 114 votes for “no”, with one spoiled ballot.
* the Council called for tenders to sell the building. At a meeting in July, 2016, Council passed a Resolution rejecting all of the bids, stating that none were suitable. Council also rejected an alternative resolution calling on the building to be sold to the highest bidder.
* at a later meeting in July, Council passed another resolution, instructing the Ituna Library to move to the building as soon as possible.

**Analysis:**

* the Court has the jurisdiction to quash any by-law or resolution on the grounds of “illegality” (s. 358).
* case-law establishes that “illegality” can include failure to follow procedural requirements, such as making a decision behind closed doors.
* the Act gives the ratepayers the power to petition for a referendum on a given question. If the Town Administrator advises counsel that a petition meets the requirements of the Act, the municipality is required to hold the referendum, “in accordance with the request of the petitioners” (s. 136).
* if the referendum passes, the municipality is required to pass a resolution or by‑law to implement it (s. 137).
* the municipality has some flexibility in drafting the resolution or by-law, but it must be “in accordance” with the request.
* the Town submitted a resolution that differed from the petitioners’ request:
  + it put the question of ownership ahead of the decision to re-locate the library;
  + it re-phrased the question so that those who supported the petitioners’ request would be required to vote against the resolution;
  + it did not expressly ask the voters to rescind, or not, the Town’s decision to relocate the library.
* the Town did not have the discretion to re-word the question so significantly. The net effect was to submit a resolution to the electors which differed from the petitioners’ request.
* the Town’s failure to comply with s. 136 meant that the referendum process was illegal, which affected all of the subsequent resolutions. The key resolution, rejecting all the tenders, was quashed, under s. 358.

**C. *Trans Mountain Pipeline ULC – Expansion Project*, National Energy Board, Order MO 057-2017: Decision, December 6, 2017; Reasons for Decision, January 18, 2018.**

**Issue:** Interplay between permit under federal law to build an inter-provincial pipeline, and municipal zoning and land-use by-laws; paramountcy and inter-jurisdictional immunity.

**Legislation:** *Constitution Act, 1867*, s. 92(10)(a) (inter-provincial works and undertakings); *National Energy Board Act*, RSC 1985, c. N-7, s. 73; City of Burnaby Zoning By-law; City of Burnaby Tree Preservation By-Law.

**Facts:**

* in 2013, Trans Mountain Pipeline applied to the National Energy Board for approval to twin its pipeline from Alberta to the British Columbia coast. The original pipeline had been built in 1953.
* the NEB held three years of hearings. The City of Burnaby, where the pipeline would terminate, strongly opposed the application and took a vigourous role in the hearings.
* in 2016, the NEB recommended approval of the pipeline, subject to 157 conditions, including safety, environment, consultation and financial responsibility.
* in the fall of 2016, the federal Cabinet issued approval for the pipeline.
* one of the conditions was that Trans Mountain needed to comply with municipal zoning and land-use by-laws from municipalities in the route of the pipeline.
* Trans Mountain applied to the City of Burnaby for approvals under the necessary zoning and tree-preservation by‑laws.
* half a year went by, with no approvals issued, but no refusals either, from the City of Burnaby.
* in November, 2017, Trans Mountain applied to the NEB to vary the requirement that it comply with Burnaby’s by-laws, on constitutional grounds.
* Trans-Mountain argued that:
  + the by-laws were inoperative under the doctrines of federal paramountcy (frustrating the purpose of the approval under the *NEB Act*); and
  + the by-laws did not apply to the pipeline under the principle of inter-jurisdictional immunity, as the pipeline was an inter-provincial work and undertaking, under exclusive federal jurisdiction.
* the Attorneys General of Alberta and Saskatchewan intervened in support of Trans Mountain; the Attorney General of British Columbia intervened in support of the City of Burnaby.
* in early December, the NEB heard the application. Three days later it issued a decision in favour of Trans Mountain, reasons to follow.
* on January 18, 2018, the NEB issued its reasons.

**Submission of the Attorney General for Saskatchewan:**

* Saskatchewan noted the unusual situation, where Saskatchewan was intervening in support of federal jurisdiction, and contrary to the jurisdiction of another province.
* reason for that approach is that one of the purposes of our federation is that one province does not need permission from another province to ship its goods to tide-water. The federal government regulates inter-provincial trade and inter-provincial works and undertakings, in the interests of the country as a whole.
* It would not make any sense to require an inter-provincial pipeline to need regulatory approval from the federal government, and then also from each municipality on its route.
* Saskatchewan quoted from the *Confederation Debates*:

Canada [i.e. Ontario and Quebec] was, in fact, just like a farmer who might stand upon an elevated spot on his property, from which he could look around upon fertile fields, meandering streams, wood and all else that was necessary to his domestic wants, but who had no outlet to the highway. To be sure he might have an easy, good-natured neighbour, who had such an outlet, and this neighbour might say to him, “Don’t be uneasy about that, for I will allow you to pass on to the highway, through my cross road, and we shall both profit by the arrangement.” So long as this obliging neighbour was in good humour everything would go on pleasantly, but the very best natured people would sometimes get out of temper, or grow capricious, or circumstances might arise to cause irritation. And so it might come to pass that the excellent neighbour would get dissatisfied. … he might come to the isolated farmer and say to him, … “I am determined you will find some other outlet to the highway than my cross road, for henceforth my gate will be shut against you.” In such a case what is the farmer to do?

* Saskatchewan argued that the municipal by-laws frustrated the purpose of the federal law and were inoperative.

**Analysis:**

* the NEB found that Burnaby’s by-laws were frustrating the construction of the pipeline, as authorised under federal law. Both the paramountcy and the inter-jurisdictional immunity doctrines supported this conclusion.
* the NEB reached this conclusion even though Burnaby had never refused to issue the by-laws. Requiring the pipeline company to go through a lengthy application process but never make a decision could amount to a frustration of the federal permit.
* the NEB cited Saskatchewan’s argument:

The Board agrees with Saskatchewan’s submission that it would be contrary to a basic principle of federalism (that the federal jurisdiction takes into account the interests of all Canadians) if one province, or a single municipality of one province, could frustrate the construction of an interprovincial pipeline.

* the NEB relieved Trans Mountain from the obligation to comply with Burnaby’s by-laws.

**Appeal:**

* Burnaby and British Columbia both applied for leave to appeal from the NEB to the Federal Court of Appeal.
* on March 23, 2018, the Federal Court of Appeal denied leave to appeal.

**Other Proceedings:**

* in addition to this case, there is a case pending in the Federal Court of Appeal which challenged the original permit from the NEB/federal Cabinet. That appeal has been heard and is on reserve.
* British Columbia has stated that it will propose a constitutional reference to the British Columbia courts, to clarify its jurisdiction to regulate oil shipments through the province and the environmental protection of British Columbia’s coast lines.