



No. S15097  
Campbell River Registry

In the Supreme Court of British Columbia

Between

NOBA ANDERSON

Petitioner

and

STRATHCONA REGIONAL DISTRICT

Respondent

### APPLICATION RESPONSE

**Application response of:** Strathcona Regional District ("SRD")

THIS IS A RESPONSE TO the Notice of Application of Noba Anderson filed November 5, 2020.

#### Part 1: ORDER CONSENTED TO

The SRD consents to the granting of NONE of the orders set out in Part 1 of the Notice of Application.

#### Part 2: ORDERS OPPOSED

The SRD opposes the granting of ALL of the orders set out in Part 1 of the Notice of Application.

#### Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The SRD takes no position on the granting of NONE of the orders set out in Part 1 of the Notice of Application.

#### Part 4: FACTUAL BASIS

1. The SRD restates and relies on the facts as set out in its Response to Petition.
2. The Petitioner, Noba Anderson ("Director Anderson"), has served as a director on the SRD board of directors (the "Board") since in or about November 2008.

Affidavit No. 1 of David Leitch, made October 8, 2020 ["Leitch Affidavit"] at para. 7

3. In this petition proceeding, Director Anderson seeks a judicial review of the Board's decision not to indemnify Director Anderson with respect to a petition proceeding that sought her disqualification from the Board based on an alleged conflict of interest (the "Indemnification Decision") and the Board's decision to censure and sanction Director Anderson with respect to the disclosure of the SRD's privileged and confidential information (the "Censure Decision").

4. The Indemnification Decision was made by the Board at closed Board meetings on May 8, 2019 (the "May 8 Resolution") and July 24, 2019 (the "July 24 Resolution").

Leitch Affidavit at paras. 62, 68

5. The decision to proceed with a censure hearing was made by the Board at a closed Board meeting on September 11, 2019 (the "September 11 Resolution"), and the Censure Decision was made by the Board at a closed meeting on October 24, 2019 (the "October 24 Resolution").

Leitch Affidavit at paras. 73, 78

### **The Records of the Proceedings**

6. The SRD has included the record of the proceeding (the "Record") with respect to the May 8 Resolution, July 24 Resolution, September 11 Resolution, and October 24 Resolution (together, the "Challenged Resolutions") as exhibits to the Leitch Affidavit.

Leitch Affidavit at Exs H – V

7. The Record contains those records with respect to the Challenged Resolutions that fall within the definition of "record of the proceeding" in the *Judicial Review Procedure Act* (the "JRPA"). In particular, the Record includes, among other things:

- (a) the documents commencing the proceedings at issue, including the requests for indemnification from Director Anderson's legal counsel and the Board's notice to Director Anderson with respect to the meeting at which it would be considering proceeding with a censure hearing;
- (b) notices of the hearings, including the Board's notice of censure hearing to Director Anderson;
- (c) intermediate decisions made by the Board, including the Board's resolution to proceed with the censure hearing;
- (d) the evidence before the Board when it considered the Challenged Resolutions, including submissions from Director Anderson's legal counsel that set out, among other things, her position as to why she should be indemnified and as to why she should not be censured; and
- (e) the Board's decisions and any reasons, including the Challenged Resolutions and letters communicating those resolutions to Director Anderson.

Leitch Affidavit at Exs H – V

*Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 1 (the "JRPA")

8. The SRD does not create transcripts of Board meetings, and does not have any such transcript with respect to the requested meetings, including those where the Challenged Resolutions were passed.

Affidavit No. 1 of Tom Yates, made November 16, 2020 ["Yates Affidavit"] at para. 19

9. The Record does not include legal advice sought and obtained by the SRD from its legal counsel including with respect to the SRD's legal rights and obligations regarding indemnification of Directors, including the Petitioner; the unauthorized release of the SRD's privileged information; and the censure of Directors, including the Petitioner (collectively, the "Legal Opinions", and individually, a "Legal Opinion"), or summaries of the Legal Opinions. That solicitor-client privileged information has been redacted from Exhibits H, K, O, and T of the Leitch Affidavit (the "Redacted Privileged Information").

Yates Affidavit at paras. 6–8

10. The SRD has not waived its privilege over the Legal Opinions or the Redacted Privileged Information.

Yates Affidavit at para. 8

11. The staff reports and Legal Opinions that Director Anderson has identified as not being previously provided to her were not provided to her because they contain legal advice given to the SRD, and the SRD had become aware that Director Anderson, who had received some of the Legal Opinions in her capacity as Director, had disclosed those Legal Opinions without the authorization of the Board.

Yates Affidavit at para. 9

#### **Recordings of Board Meetings**

12. It has been the practice of the SRD to make an audio recording of Board meetings for the sole purpose of assisting in the preparation of meeting minutes (collectively "Audio Recordings", and individually, an "Audio Recording"). In accordance with usual practice, the Audio Recordings are generally deleted once the meeting minutes have been approved, and approved meeting minutes of closed meetings, while kept confidential, are made available to the Directors, including Director Anderson.

Yates Affidavit at paras. 10–13

13. The SRD's Code of Conduct Bylaw No. 330, provides that the substance of deliberations at closed Board meetings are not to be disclosed to the public prior to the Board adopting a resolution to release the information to the public. While they exist, Audio Recordings of closed Board meetings are kept confidential and are not released publically.

Leitch Affidavit at Ex C p 13

Yates Affidavit at para. 11

14. The SRD does not have Audio Recordings of the Board's meetings on November 7, 2018; April 10, 2019; and May 22, 2019.

Yates Affidavit at para. 14

15. The SRD does not have an Audio Recording of the portion of the Board's closed meeting on May 8, 2019, in which the resolution respecting indemnification was deliberated, because that resolution was deliberated upon and passed after a recess and the Audio Recording does not include the post-recess portion of the meeting.

Yates Affidavit at para. 15

16. The SRD has an Audio Recording of the Board's closed meeting on June 12, 2019, but the Board did not pass any of the Challenged Resolutions that day.

Yates Affidavit at para. 16

17. The SRD has an Audio Recordings of the Board's meetings on July 24, 2019 and September 11, 2019. These recordings are lengthy and include portions of the meetings that are not in respect to the Challenged Resolutions, closed session discussion by the Board of legal advice to the Board, and private deliberations by the Board in closed session.

Yates Affidavit at para. 17

18. The SRD has a partial Audio Recording of the Board's closed censure hearing meeting on October 24, 2019. This recording includes the reading of a written statement from the Chair, the reading of a written statement from Director Anderson's legal counsel, a closed session discussion by the Board of legal advice given to the Board, and the private deliberations of the Board in closed session.

Yates Affidavit at para. 18

19. The SRD did not create, and does not have, transcripts of the Board's closed meetings on November 7, 2018; April 10, 2019; May 8, 2019; May 22, 2019; June 12, 2019; July 24, 2019; September 11, 2019; or October 24, 2019.

Yates Affidavit at para. 19

20. The SRD did not create, and does not have, video recordings of the Board's closed meetings on November 7, 2018; April 10, 2019; May 8, 2019; May 22, 2019; June 12, 2019; July 24, 2019; September 11, 2019; or October 24, 2019.

Yates Affidavit at para. 20

21. The disclosure of recordings sought by Director Anderson is unwarranted, and not appropriate for a petition proceeding brought under the *JRPA*. The SRD has filed the complete record of the proceeding with respect to the decisions being challenged in this petition.

## **Part 5: LEGAL BASIS**

### **Solicitor Client Privileged Information Is Not Producible**

1. There is no basis at law, common law or otherwise, for an order requiring the production of the redacted solicitor-client privileged information by the SRD in this case.
2. Solicitor client privilege has been described as the "highest privilege", "a rule of evidence, a fundamental civil and legal right, and a principle of fundamental justice in Canadian law". With respect to protecting this information, courts have described:

[57] The courts have continually affirmed that the protection of confidentiality provided by lawyer-client privilege must be as close as possible to absolute to

ensure public confidence. As a class privilege, it does not involve a balancing of interests on a case-by-case basis. Disclosure of information subject to lawyer-client privilege must be ordered only when it is absolutely necessary to achieve the ends of justice. [Emphasis added.]

*Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 at paras. 55–57

3. The Supreme Court of Canada has held that communications covered by solicitor-client privilege will be disclosed only where absolutely necessary, and gave penitentiary safety or wrongful convictions as examples of where documents subject to solicitor-client privilege could be disclosed. Absolute necessity “is as restrictive a test as may be formulated short of an absolute prohibition in every case.”

*Ontario (Ministry of Correctional Services) v. Goodis*, 2006 SCC 31 at para. 20

4. Directors that are adverse in interest to the corporate entity on which board they serve are not entitled to that entity’s solicitor-client privileged information. As cited by the British Columbia Supreme Court, referencing a decision of the Ontario courts, “To hold otherwise would lead to the ludicrous result that the director engaged in litigation with the corporation would not be entitled to access in his capacity as a litigant, but would be entitled to access in his capacity as a director, thereby indirectly negating the solicitor client privilege or litigation privilege of the corporation.”

*Gardner v. Viridis Energy Inc.*, 2014 BCSC 204 at paras. 39–40

5. In *Pritchard v. Ontario (Human Rights Commission)*, the Supreme Court of Canada confirmed that procedural fairness does not affect solicitor-client privilege and does not require the disclosure of privileged information in the administrative law context:

31 Procedural fairness does not require the disclosure of a privileged legal opinion. Procedural fairness is required both in the trial process and in the administrative law context. In neither area does it affect solicitor-client privilege; both may co-exist without being at the expense of the other. In addition, the appellant was aware of the case to be met without production of the legal opinion. The concept of fairness permeates all aspects of the justice system, and important to it is the principle of solicitor-client privilege. [Emphasis added.]

*Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31

6. In this case, the high bar of absolute necessity has not been met. The disclosure of the SRD’s solicitor-client privileged information to Director Anderson is not necessary to meet the ends of justice. Director Anderson was represented by legal counsel throughout, and one of the issues in these proceedings arises out of the fact she had provided her legal counsel with two of the SRD’s Legal Opinions, without authorization. It is clear from the submissions and correspondence from Director Anderson’s legal counsel, which are included in the Record, that Director Anderson knew the case to be met in terms of the contested resolutions. Among other things:

- (a) Director Anderson’s legal counsel wrote to the Board as to why Director Anderson ought to be indemnified on multiple occasions and one of her counsel’s letters responded directly to one of the Legal Opinions that had been disclosed to him without the Board’s authorization;

Leitch Affidavit at Ex H pp 96–97, Ex K pp 120-121, Ex T pp 256–258

- (b) Director Anderson's legal counsel wrote to the Board as to why the Board should not proceed with a censure motion, which letter took the position that there had been no breach of confidentiality; and

Leitch Affidavit at Ex O pp 169–170

- (c) Director Anderson's legal counsel provided written and oral submissions to the Board with respect to why Director Anderson ought not to be censured, which submissions detailed, in summary, Director Anderson's position that there was no factual or evidentiary basis for the censure motion and that there was no legal basis for the censure motion.

Leitch Affidavit at Ex S pp 212–218

7. There is also no authority, statutory or otherwise, for the order being sought for the production of legal opinions in a judicial review.
8. In *Pritchard*, the Supreme Court of Canada considered a provision in Ontario's *Judicial Review Procedure Act* that provided the court discretion to order the production of the record on a judicial review. The Court held that unless privilege is clearly and unequivocally abrogated, the record will not include legal opinions:

33 Legislation purporting to limit or deny solicitor-client privilege will be interpreted restrictively; see *Lavallee, supra*, at para. 18. Solicitor-client privilege cannot be abrogated by inference. While administrative boards have the delegated authority to determine their own procedure, the exercise of that authority must be in accordance with natural justice and the common law.

34 Where the legislature has mandated that the record must be provided in whole to the parties in respect of a proceeding within its legislative competence and it specifies that the "whole of the record" includes opinions provided to the administrative board, then privilege will not arise as there is no expectation of confidentiality. Beyond that, whether solicitor-client privilege can be violated by the express intention of the legislature is a controversial matter that does not arise in this appeal.

35 Section 10 of the [Ontario *JRPA*] in any event, does not clearly or unequivocally express an intention to abrogate solicitor-client privilege, nor does it stipulate that the "record" includes legal opinions. As such, "record of the proceedings" should not be read to include privileged communications from Commission counsel to the Commission. [Emphasis added.]

*Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31

9. Section 17 of the *JRPA* is the equivalent provision in British Columbia to that addressed in *Prichard*. Section 17 provides that on application a court may direct that any part of the "record of the proceeding" be filed in a judicial review. The definition of "record of the proceeding" does not include legal advice, but rather includes:

- (a) a document by which the proceeding is commenced;

- (b) a notice of a hearing in the proceeding;
- (c) an intermediate order made by the tribunal;
- (d) a document produced in evidence at a hearing before the tribunal, subject to any limitation expressly imposed by any other enactment on the extent to which or the purpose for which a document may be used in evidence in a proceeding;
- (e) a transcript, if any, of the oral evidence given at a hearing;
- (f) the decision of the tribunal and any reasons given by it.

*JRPA*, ss. 1, 17

10. As per *Pritchard*, section 17 of the *JRPA* must be read restrictively, and as the *JRPA* does not clearly and unequivocally express an intention to abrogate solicitor-client privilege, such documents do not fall within the scope of the “record of the proceeding”, and should not be ordered produced.

#### **The Recordings Being Sought Are Not Producing**

11. Courts in British Columbia have consistently confirmed that a petitioner is not entitled to document production as of right in a petition proceeding.

*Ip v. Wilson*, 2019 BCCA 189 at para. 3

12. In *Ilczaszyn v. Association of Registered Nurses of British Columbia*, the court stated: “[I]t is not the case that petition proceedings automatically incorporate the full array of discovery procedure available to an action. Petition proceedings are designed to be summary proceedings.” The court then held that only directly relevant documents should be produced.

*Ilczaszyn v. Association of Registered Nurses of British Columbia*, 2017 BCSC 1260 at para. 137, 144

13. While this Court has jurisdiction to order document production in a petition proceeding, that jurisdiction is a narrow one. As this Court held in *Brar v. College of Veterinarians of British Columbia*: “[T]he discretion of the court to order a decision maker or tribunal to produce documents must – at minimum – be exercised with great caution, only in exceptional circumstances, and only when the documents are both necessary and relevant.”

*Brar v. College of Veterinarians of British Columbia*, 2011 BCSC 215 at para. 20

14. Where a petition is brought under the *JRPA*, courts have taken an even more restrained approach to ordering document production. The *JRPA* was specifically designed to eliminate the technical complexities of litigation. Courts have therefore been wary of importing the procedural steps associated with the trial of an action to a judicial review. As the Court of Appeal held in *Lawson v. British Columbia (Solicitor General)*: “[i]t would be a retrograde step to encourage the application of the procedural steps associated with the trial of an action to judicial review.”

*Lawson v. British Columbia (Solicitor General)*, 1992 CanLII 5955 (BCCA) at para. 73

15. The court has recently summarized that: "This court has accepted that, generally, the only admissible evidence on a judicial review is the 'record of proceeding', as defined in s. 1 of the *JRPA*."

*Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2020 BCSC 1441 at paras. 65–66

16. Moreover, the court was clear that a decision maker's private deliberations should be protected from disclosure:

[113] The presumption of regularity provides that the court must presume that adjudicators and administrative decision makers discharge their duties and make decisions fairly, absent clear evidence otherwise. Further, the principle of deliberative secrecy protects the private deliberations of adjudicators and administrative decision makers from disclosure, except in rare cases where the presumption of regularity has been defeated. [Emphasis added.]

*Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2020 BCSC 1441 at para. 113

17. Section 117 of the *Community Charter*, which applies to the SRD as per section 205(1)(d) of the *Local Government Act*, and section 27 of SRD's Code of Conduct Bylaw No. 330, confirm that the information considered at closed meetings is to be kept in confidence and is not to be disclosed to the public unless authorized by the Board.

Leitch Affidavit at Ex C p 13  
*Community Charter*, S.B.C. 2003, c. 26, s. 117  
*Local Government Act*, R.S.B.C. 2015, c. 1, s. 205(1)(d)

18. The SRD does not have Audio Recordings of the Board's closed meetings on November 7, 2018; April 10, 2019; and May 22, 2019. As such, those Audio Recordings cannot be produced.

Yates Affidavit at para. 14

19. SRD has an Audio Recording of a portion of the Board's meeting on May 8, 2019, but it is not a complete recording of the May 8, 2019 meeting and does not include the Board's deliberation upon or passing of the resolution respecting indemnification. As such, this Audio Recording does not fall within the section 1 definition of the record of the proceeding, is irrelevant to the matters at issue, and ought not to be ordered produced.

Yates Affidavit at para. 15

20. None of the Challenged Resolutions were made at the Board's meeting on June 12, 2019. Director Anderson has pled that this recording is "directly relevant to resolving the conflict in the evidence, and whether the Board has acted unreasonably". The only conflict in the evidence appears to be whether the Board required Director Anderson to leave the meeting. The resolution of that conflict is irrelevant to the judicial review at issue, and this Audio Recording is not of any of the meetings where the Challenged Resolutions were made. As such, this Audio Recording does not fall within the section 1



definition of the record of the proceeding, is irrelevant to the matters at issue, and ought not to be ordered produced.

Application at Legal Basis para. 5  
Leitch Affidavit at para. 50

21. The Audio Recordings of the Board's meetings on July 24, 2019 and September 11, 2019; and the partial Audio Recording of the Board's closed meeting on October 24, 2019, ought not to be ordered produced in this case for multiple reasons, including that:

- (a) "Audio recordings" are not listed as a record falling within the definition of "record of the proceeding" in section 1 of the *JRPA*. The British Columbia cases relied upon by the Petitioner for support of the order it is seeking for disclosure of the recordings are all cases where transcripts were referenced by the court. The definition of "record of the proceeding" in section 1 of the *JRPA* includes "a transcript, if any, of the oral evidence given." However, the SRD does not maintain any transcripts of any Board meetings. Transcripts are different in nature from audio recordings, particularly in the context of the *JRPA*, which provides that judicial reviews generally proceed on the basis of documentary evidence only.

Application at Legal Basis para. 3(a)  
*1139652 B.C. Ltd. v. Whistler (Resort Municipality)*, 2018 BCSC 1806 at para. 27  
*G.S.R. Capital Group Inc. v. The City of White Rock*, 2020 BCSC 489 at  
paras. 129, 138  
*Mak v. Vancouver (City) Board of Variance*, 2018 BCSC 888 at para. 12

- (b) There is no need for the court to listen to an audio recording of the meetings to ascertain the reasons of the Board as written reasons were given for the decisions and a fulsome record of the proceedings is in evidence.

Leitch Affidavit at Exs H–V

- (c) These Audio Recordings include a discussion of solicitor-client privileged matters, which discussions, for the reasons set out above, ought not to be ordered produced.

Yates Affidavit at paras. 17–18

- (d) These Audio Recordings include the private deliberations of the Board. This is not a rare case where the presumption of regularity has been defeated, and, as such, for the reasons set out above, those private deliberations ought not to be ordered produced.

Yates Affidavit at paras. 17–18

22. In summary, the *JRPA* does not provide for the production of the recordings sought. There are no exceptional circumstances to warrant production of the recordings. Director Anderson has not established that such evidence is relevant and necessary and, as such, this Court should respectfully refrain from exercising its narrow jurisdiction in this regard.

23. In the alternative, the principle of deliberative secrecy and privilege apply to require that any recordings ordered to be produced first be edited to remove deliberation and privileged information prior to disclosure.

**Part 6: MATERIAL TO BE RELIED ON**

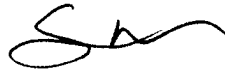
1. Affidavit No. 1 of David Leitch, made October 8, 2020;
2. Affidavit No. 1 of Tom Yates, made November 16, 2020;
3. Response to Petition filed October 21, 2020; and
4. Such other material as counsel may advise and this Court accept.

The application respondent estimates that the application will take two hours.

The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Norton Rose Fulbright Canada LLP

per:



per:

Date: 16/Nov/2020

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Signature of lawyer for Strathcona Regional District

James H. Goulden, Q.C

No. S15097  
Campbell River Registry

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In the Supreme Court of British Columbia

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**APPLICATION RESPONSE**

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