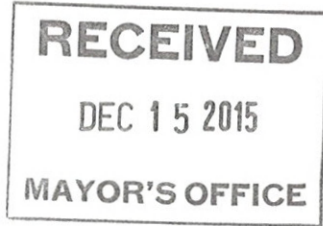




www.rlr-law.com
info@rlr-law.com



RAMSAY LAMPMAN RHODES

D. PETER RAMSAY, Q.C.
PETER C.P. BEHIE, Q.C.**
STEPHEN MCPHEE, Q.C.**
CHELSEA D. WILSON
DYLAN M. KOZLICK
SARAH BETH HUTCHISON
THOMAS SENEAL

RICHARD N. RHODES**
DEREK R.S. JONSON**
JENNIFER MILLBANK**
CAROLINE M. DEANE
SONYA PARKIN
MELISSA ANDERSON

DAVID R. BROOKS**
MICHAEL WASSERMANN**
DONNA L. KYDD**
NICOLE E. SMITH**
LISA M. LOW
ESTHER L. ROBSON

ASSOCIATE COUNSEL
JOHN W. HORN, Q.C.
ADAM de TURBERVILLE**

RETIRED
JONATHAN W. LAMPMAN
JAMES A. VANSTONE, Q.C.
ERIC JOHN MOSLEY

**LAW CORPORATION

OUR FILE: C9678
REPLY ATTENTION: Peter C.P. Behie, Q.C.
E-MAIL: pbehie@rlr-law.com
REPLY TO: Nanaimo Office

December 10, 2015

City of Nanaimo
455 Wallace Street
Nanaimo, BC V9R 5J6

Attention: Bill McKay, Mayor

Dear Sir:

RE: Conflict with Nanaimo City Council

We are counsel for Diane Brennan who, as you know, is a Councillor for the City of Nanaimo.

We have reviewed with our client the facts around the recent events concerning the in camera decision to hire Ms. Samra as the interim Chief Administrative Officer and the Council's steps to investigate and censure certain Councillors, including our client, for allegedly breaching the confidence of an in-camera meeting.

We have advised our client of the following:

- (a) the motion by Council passed on 30 November 2015 to censure our client and others on Council is without legal foundation since both the substantive decision of a breach was erroneous and the process by which the decision was made failed to observe the basic elements of fairness;
- (b) the entire meeting at which apologies were demanded of Councillors was equally flawed as it failed to comply with principles of natural justice, including the right to obtain and seek legal advice;
- (c) the will of the in-camera meeting of the City Manager Selection Committee (which was a committee of the whole Council) on 13 November 2015 and of the subsequent Council meeting 16 November 2015 was to allow the

members to rise and report on the process by which Ms. Samra was hired. Accordingly, members of Council, in keeping with recognized conventions, were permitted to speak to the public on the process by which Ms. Samra was hired;

- (d) accordingly, there was no breach of confidence by our client or any other members of Council;
- (e) the decision made at the City Manager Selection Committee on 13 November 2015 to offer employment to Ms. Samra constituted a complete abridgement of the agreed upon hiring process and is tainted by the failure to provide notice of the intention to hire Ms. Samra and set aside Council's hiring process;
- (f) a court would set aside the motions referred to above upon judicial review;
- (g) Ms. Samra's conduct since her hiring has demonstrated a willingness to threaten Council members and an ignorance of the conflict between her duty to Council and her interest in maintaining her position; and
- (h) furthermore, and in any event, Ms. Samra is in a hopeless position of conflict and should not be permitted to play any role in the required process to unravel the tainted process and legally flawed decisions concerning her hiring.

We are of the view that you, as Mayor, should take the following steps:

- (a) suspend Ms. Samra pursuant to section 151 of the Community Charter (which is attached to this letter) until the City has a complete understanding based on independent legal advice concerning the steps described above;
- (b) cause the City to retain legal counsel to review the entire process by which Ms. Samra was hired including the Council's decisions to hire and to censure to determine the soundness of our view that this entire process is without legal foundation and would be set aside by a court. We strongly suggest that the counsel hired recently by Ms. Samra not be considered for this role but that the City retain its previous lawyers for this work; and
- (c) ask Council to formally and publicly repudiate the offending motions of censure by a reconsideration motion.

Facts

With the relatively sudden departure of its C.A.O., Council took the decision to hire an interim C.A.O. It was understood by Council and confirmed in public statements by the City's Human Resources Manager that it would create a short list of candidates, interview those candidates from the list and check all references of the successful candidate. It was also agreed that this process would take place in an in-camera committee of the whole.

At the first meeting to review the applications on 27 October 2015, the Committee directed the HR manager to advertise the interim C.A.O. position.

On 2 November 2015 seven applications were brought before the Committee along with a long list of interested individuals supplied by the Local Government Management Association. At that meeting Council requested the HR manager to review the list and bring back a list of individuals with C.A.O. experience who could begin working relatively quickly.

On 13 November 2015 the Committee met again with the goal of reviewing the list composed by the HR manager. There were twenty-two candidates in all and staff created a table of each applicant with a summary of their background in preparation for an in-camera meeting. Each Councillor was asked to name their top three candidates.

There was no notice given that there was to be a motion to abridge the hiring process and hire one candidate without interviewing and reviewing the references of the candidate. Councillors Thorpe, Pratt and Brennan prepared such a list. Councillors Fuller, Kipp had only two on their list. Councillors Bestwick and Yoachim had only Ms. Samra on the list and each said she was the only qualified candidate even though this candidate had no C.A.O. experience. Councillors Kipp and Fuller said that upon further contemplation they accepted that Ms. Samra was the most qualified and withdrew the other candidate on their list.

To the surprise of our client a motion was made by Councillor Bestwick to hire Ms. Samra. Councillors Thorpe and Brennan objected and asked why the short listing process was not being followed. No answer was provided to the unannounced departure from the process. The question was called and the motion passed with Brennan, Pratt, and Thorpe dissenting. I understand that you absented yourself from this meeting.

Our client then raised at this meeting the issue of the abridged process of hiring. Our client expressed her view that Councillors should be able to speak about the lack of process by which the decision was made to hire Ms. Samra. It was agreed and a motion was passed unanimously to rise and report on the process by which the City selected the interim C.A.O. with the proviso that the actual vote on the motion not be released to the public.

At the council meeting on 16 November 2015, the in-camera decision to hire Ms. Samra came to the floor and it was ratified. Our client then raised the issue rising and reporting on the hiring process. There was a consensus that this was permitted. A motion was put to this effect and seconded and called. It is unclear whether the clerk recorded the motion. Again, you as Mayor took the view that you had a conflict and removed yourself from the room.

We realize that you have said publicly that there was some doubt about whether there was a consensus on the motion to rise and report on the C.A.O.'s hiring process. However, we are of the view that even if the clerk failed to record the motion the will of Council was clear that the confidence of the in-camera hiring process was waived and Councillors were at liberty to speak to the public on this process.

Some Councillors did speak to members of the public on this issue subsequent to this meeting.

An in-camera meeting was called by the new C.A.O. which was held on 30 November 2015 to consider this issue. No notice was given to Councillors at the meeting that Council would be called upon to censure members and so the affected councillors were not afforded the opportunity to seek legal advice. Ms. Samra did advise Council that she was bringing a legal opinion but no written opinion was provided in advance or at the meeting.

With no notice, Ms. Samra hired a new law firm and a member of that firm attended the meeting (Ms. Sandra Carter). Ms. Carter was of the view that rise and report motions did not allow all councillors to speak on the matter, only the Mayor. This is not the convention locally. She also offered the opinion that there was a breach of confidence (likely based on a report of the abridged process provided by Ms. Samra). It is not clear whether this opinion was based on her view of the nature of rise and report or whether it was based on the view that the will of Council was not to waive the confidence of the in-camera meeting.

Ms. Carter offered the view that Council had to censure the members who were in breach and outlined the range of options. Members who were subject to being censured were asked to apologize at the meeting. These members apologized – without legal advice – advising that they made a mistake. This apology was not accepted since other councillors wanted an admission that there was a breach. Our client was intimidated by the rapid move to judgment and apologized even though she believed (and continues to believe) that she was authorized to speak in public. She was brow beat into an apology by the threat of consequences of failing to apologize including removal from committees.

The meeting started a 3:00 p.m. and lasted until 9:30 p.m. A deadline was given to our client to offer the agreed upon apology by 7 December 2015. What occurred at the 30 November 2015 meeting was the antithesis of due process.

At the subsequent 7 December meeting, our client advised Ms. Samra that she was going to seek legal advice on these issues. Ms. Samra, in front of other councillors, threatened to sue our client for defamation should she seek legal advice. Ms. Samra then left the meeting in a rage. We pause to simply note that it was inappropriate for Ms. Samra to make such a threat since it involves a personal claim and she was at a meeting in her capacity as the new C.A.O. This view will be made known directly to Ms. Samra. Councillor Thorpe, exhausted by the process, issued an apology.

Document Request

We also request that you provide to us all documentation generated by staff related to or associated with the meetings referred to above including any and all notes, recorded motions, and any opinions obtained by the City.

Next Steps

Let me conclude by advising you that in the event that you or Council decline to take steps requested above, we will seek instructions from our client to issue legal process to have a judicial review of this matter. In that proceeding we will seek orders setting aside the motion of censure and of hiring of Ms. Samra.

It is our view that there is a very significant issue of fairness raised here not just in relation to the treatment of our client but of integrity which goes to the heart of this Council. We are of the view that the public, once it realizes what has occurred here, will *lose confidence in the Council*. We are asking you to take active steps to reverse the tainted process and stand on the side of open, fair government.

We look forward to hearing from you.

Yours truly,

RAMSAY LAMPMAN RHODES



Peter C.P. Behie, Q.C.

PCPB:so

- (a) reinstate the officer or employee,
- (b) confirm the suspension,
- (c) confirm and extend the suspension, or
- (d) dismiss the officer or employee.

Termination of officers

152 (1) Subject to a contract of employment and subject to providing the officer with an opportunity to be heard, the appointment of a municipal officer may be terminated by the council as follows:

- (a) in the case of termination for cause, by immediate termination without any period of notice;
- (b) in any other case, by termination on reasonable notice.

(2) A termination under subsection (1) (b) may only be made by the affirmative vote of at least 2/3 of all council members.

Prohibition against interfering with municipal officers and employees

153 A person must not interfere with, hinder or obstruct a municipal officer or employee in the exercise or performance of his or her powers, duties or functions.