



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F09-08

CORPORATION OF THE VILLAGE OF BURNS LAKE

Michael McEvoy, Adjudicator

April 30, 2009

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Summary: Several entities denied a number of requests for records by the applicants on the grounds they are not public bodies under FIPPA. All of the entities in issue are found to be public bodies because they are owned by, and their officers are appointed under the authority of, a local government body. They must therefore respond to the applicants' requests.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, Schedule 1 definitions "public body", "local public body", "local government body"; *Interpretation Act* s. 8; *Municipal Freedom of Information and Protection of Privacy Act* (Ontario), ss. 2(1) and 2(3).

Authorities Considered: **B.C.:** Order F05-26, [2005] B.C.I.P.C.D. No. 35.

Cases Considered: *City of Toronto Economic Development Corp. v. Ontario (Information and Privacy Commissioner)*, [2008] O.J. No. 1799; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *H.J. Heinz Co. of Canada v. Canada (Attorney General)*, [2006] 1 S.C.R.

1.0 INTRODUCTION

[1] This decision arises from the requests by two applicants, a journalist ("applicant #1) and a former town councillor ("applicant #2) to the Corporation of the Village of Burns Lake ("Village") for records relating to several entities connected with the Burns Lake Community Forest Lands in the northern interior of BC.¹

¹ I will refer to the two applicants collectively as "the applicants" except where it is necessary to individually identify them.

[2] Between them, the applicants made three requests, under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”), for records. The first request was directed to the Village for the financial statements of a company called Endako River Timber Ltd. (“Endako”). The second was made to Burns Lake Community Forest Ltd. (“BLCF”) for records concerning Endako, Sheraton Holdings Ltd. (“Sheraton”) and BLCF itself. The third request was to ComFor Management Services Ltd. (“ComFor”) for records concerning Endako and Sheraton.

[3] The Village transferred its request to ComFor under s. 11 of FIPPA on the basis that ComFor had control of the records in question.² BLCF also transferred the request it received about ComFor to ComFor for the same reason. BLCF reserved its decision with respect to disclosing its own records, saying it needed more time to consult with “another public body” before responding.

[4] ComFor took the position neither it nor Sheraton or Endako is subject to FIPPA because none of them is a “public body”. Because the matter was not otherwise resolved, an inquiry was held under Part 5 of FIPPA concerning the preliminary issue of whether ComFor, BLCF, Endako, Sheraton, Lakes Communications Inc. (“Lakes Inc.”) and Whistle Lake Woodlot Ltd. (“Whistle”) are public bodies under FIPPA.³

[5] The corporate entities (“Companies”)⁴ referred to in the above paragraph jointly made a submission and reply while the Village and the applicants made separate submissions in response.

2.0 ISSUE

[6] The issue here is whether the Companies are public bodies under FIPPA.

3.0 DISCUSSION

[7] **3.1 Background**—In 1997 the Village established and financed a community steering committee for the purpose of securing a local forest tenure. The committee membership was drawn from the Village, local industry, small

² Section 11(1) of FIPPA allows a public body to transfer an access request to another public body for a number of reasons including where the record is in the custody or under the control of the other public body.

³ The applicants’ request for information from ComFor would necessarily involve Whistle and Lakes Inc. because the operations of both are integrated with ComFor. Whistle is a subsidiary of ComFor while Lakes Inc. is treated as a subsidiary of ComFor, as is evident, from ComFor’s 2007-2008 annual report. Properly speaking Lakes Inc. is a subsidiary of BLCF which in turn is 100% owned by ComFor.

⁴ I will refer to these corporate entities as the “Companies” except where it is necessary to refer to them separately.

business, tourism interests and First Nations. Its hope, in securing the tenure, was to enhance employment opportunities in the local forestry sector, as well as develop recreational, educational and tourism opportunities in the Burns Lake region.⁵

[8] When the provincial government decided, in 1999, to grant a forest tenure, the Village created BLCF as a vehicle to enter into a Long-Term Community Forest Agreement (“Community Forest Agreement”) with the province and to manage the operation of the community forest. The Village initially owned 100% of BLCF’s shares and appointed all of its board of directors. In 2001, the Village, on the advice of accountants, transferred all of its BLCF shares to ComFor in order to reduce taxes on the revenue generated by the community forest.⁶ The Village created ComFor, owns 100% of its shares and appoints all of its board of directors under the terms set out in the company’s articles.⁷ Those articles of incorporation were made subject to the approval of an Inspector of Municipalities, who directed that ComFor should be made subject to FIPPA.⁸ The Community Forest Agreement remains in the name of BLCF, though none of the parties suggested anything turns on this fact.

[9] ComFor is now charged with the responsibility of providing professional management and administrative services to the “ComFor group of companies”, which include BLCF, Endako, Whistle, Lakes Inc. and Sheraton.⁹

[10] These companies can be briefly described as follows:¹⁰

- *Endako*—responsible for a sawmill operation which ceased business in July 2007. ComFor owns 100% of Endako’s shares.
- *Sheraton*—now operates a sawmill employing eight full-time workers. ComFor owns 100% of Sheraton’s shares.
- *Whistle*—holds a woodlot license used for harvesting, recreational and cultural heritage purposes. ComFor owns 100% of Sheraton’s shares.

⁵ Companies’ initial submission, Affidavit of Bill Huxham, Exhibit P, pp. 9, 10 and 12.

⁶ Affidavit of Bill Huxham, Exhibit L, p. 1.

⁷ ComFor’s board of directors is appointed pursuant to motions approved at open meetings of the Village’s council. ComFor’s articles set the number of directors at 10 and state that this number is to be composed of six persons from the “community at large” and one each from the office of the Wet’suwet’en Hereditary Chiefs, the membership of the Burns Lake Band, the membership of Wet’suwet’en First Nation and the Village. See Affidavit of Tim Palmer, para. 9, and the Companies’ initial submission, para. 11

⁸ Village’s reply submission, para. 11. The Village and ComFor provided me with what each said was the wording of the article and though the two versions differ somewhat, ultimately nothing turns on this. I discuss the significance of the “FIPPA” appearing in ComFor’s corporate articles in the discussion section of this decision.

⁹ Affidavit of Tim Palmer, Exhibit M, p. 3.

¹⁰ Affidavit of Tim Palmer, Exhibit M. Exhibit M, containing this information, is the 2007-2008 ComFor Annual Report.

- *Lakes Inc.*—undertakes tasks such as erecting communication towers to supply wireless internet to area residents. BLCF owns 100% of Lakes Inc.’s shares.

[11] **3.2 Arguments of the Parties**—The Companies argue that they are neither specifically listed as public bodies under Schedule 2 of FIPPA nor captured by the definition of “local government body” under Schedule 1 of the statute. Therefore, they argue, they are not subject to FIPPA.¹¹

[12] The Companies note that the definition of a public body under FIPPA includes a local government body. The Companies argue that, in order for them to come within the definition of a local government body, two components of FIPPA must be satisfied. First, it must be shown that ComFor was created or owned by the Village. Second, all of ComFor’s “members” or “officers” must be shown to be appointed or chosen by or under the authority of the Village.¹²

[13] The Companies concede they meet the first component of the test, in that they were created or owned by the Village and, under the *Business Corporations Act*, they are wholly-owned subsidiaries of the Village.¹³ However the Companies qualify this by arguing that the Village is effectively a “nominee” or “figurehead” shareholder of ComFor because it holds its shares subject to certain “constraints and agreements.”¹⁴ The Companies argue that these “limitations” are “highly significant” and must be taken into account when considering the second aspect of the local government body test as to whether all of its members or officers are appointed or chosen by or under the authority of the Village.¹⁵

[14] The Companies submit that neither their members nor their corporate officers have been appointed by, or under the authority of, the Village. The Companies argue that the word “members” has no sensible or understood meaning in relation to a corporation under the *Business Corporations Act* and is therefore not relevant to a determination of this case.¹⁶

¹¹ Companies’ initial submission, pp. 9 and 10.

¹² Companies’ initial submission, para. 49.

¹³ “They” refers to all of the corporate entities that are the subject of this Order.

¹⁴ Companies’ initial submission, para. 55.

¹⁵ Companies’ initial submission, para. 54.

¹⁶ The Companies added, at para. 58 of their initial submission, that the word “members” might theoretically refer to members of a corporation board but that this interpretation would be inconsistent with the fact that “director” is used numerous times elsewhere in FIPPA to refer to a member of a corporate board of directors. The Companies argue that principles of statutory interpretation dictate that every word is presumed to make sense and to have a specific role to play in advancing the legislative purpose and those different words should be found to have different meanings. In short, if the Legislature had intended to encompass directors of a corporate board it would have explicitly used the word director.

[15] The Companies submit that, by contrast, the word “officers” has a clear meaning under the *Business Corporations Act* (which is distinct from a director) and that a corporation’s articles typically address the appointment of officers and that corporations routinely appoint officers. The Companies contend that in this case ComFor’s officers are appointed by its board of directors and not by or under the authority of the Village.¹⁷

[16] On this point, the Companies submit that this case is different from a recently decided case of the Ontario Court of Appeal, *City of Toronto Economic Development Corp. v. Ontario (Information and Privacy Commissioner)*.¹⁸ In that case the Court considered whether the City of Toronto Economic Development Corporation (“TEDCO”), an entity incorporated by the City of Toronto (“City”) to carry out an element of the City’s economic development policy, was covered by Ontario’s *Municipal Freedom of Information and Protection of Privacy Act* (“MFIPPA”). MFIPPA provides, in a similar way to FIPPA, that any body whose “members or officers” are appointed by or under the “authority” of a municipality is also covered by MFIPPA. TEDCO contended it was not subject to MFIPPA because, among other things, its officers were not appointed by or under the authority of the City but rather by TEDCO’s directors. The Court held that MFIPPA was to be given a liberal and purposive reading and on that basis determined that TEDCO’s officers were appointed under the authority of the City.

[17] The Companies submit that the Ontario Court of Appeal’s decision may be correct in light of the particular factual circumstances of that case but that the facts here are different. The Companies argue that a significant finding in *City of Toronto* was that the City had a great deal of control over TEDCO in that the City appointed all of TEDCO’s board of directors, TEDCO’s directors were all City of Toronto employees and the sole purpose of TEDCO was to “advance the economic development of the City”. The Companies argue that this is not the case here because:¹⁹

- the Companies carry on businesses that have nothing to do with the core operations of the Village such that their purpose is not to “advance the economic development” of the Village;
- the Companies operate at arm’s length from the Village;
- the Board of Directors for ComFor and each of its subsidiaries is controlled by directors who are not employees or officers of the Village (and the Village has no involvement in the appointment of directors to the subsidiaries);
- while the Village technically appoints the directors of ComFor Ltd., the Village is obliged by section 10.2 of the ComFor Articles (and perhaps also obliged by contract and/or common law) to appoint directors from

¹⁷ Companies’ initial submission, paras. 65 and 70.

¹⁸ [2008] O.J. No. 1799.

¹⁹ Companies’ initial submission, para. 78.

a list of specified stakeholder organizations (for example, the Burns Lake Band, the office of the Wet'suwet'en Hereditary Chiefs, etc.) and the listed stakeholder organizations are ones over which the Village has no *de facto* control;

- the Community Forest License effectively prevents ComFor and BLCF from paying out dividends to the Village and any attempt by the Village to exercise control over ComFor by firing the Board of Directors or by taking profits by way of dividends paid to the Village etc., would jeopardize the continuation of the Community Forest Agreement and would likely result in legal action by the affected First Nations;
- either ComFor profits²⁰ are invested at the corporate level or, from time to time, the directors of ComFor have approved community donations after reviewing applications from various community organizations - the Village has no particular claim on ComFor's profits;
- the Community Forest Agreement was clearly awarded and set up for the benefit of a number of stakeholders (including the Village, the inhabitants of the Village, the identified First Nations and other community members residing outside the Village boundaries) - the intention was that no one stakeholder would control the management of the Community Forest Agreement or its financial benefits.

[18] The Companies submit that because the Village lacks control over ComFor, "there is nothing of substance in the affairs" of ComFor that happens "under the authority of the Village".²¹

[19] The Companies also submit that although ComFor's corporate articles provide for the application of FIPPA, this:

...does not and cannot have the effect of making ComFor Ltd. a "public body" under *FOIPPA* and does not confer any jurisdiction on the OIPC. If anything, the existence of this provision of ComFor Ltd.'s Articles indicates that ComFor Ltd. is not, and was never intended to be, a "public body" under *FOIPPA* because if ComFor Ltd. is (or was intended to be) a "public body" under *FOIPPA*, Section 19.1 of ComFor Ltd.'s Articles would make no sense.²²

[20] The Village argues that ComFor is a corporation created by the Village and is owned by it. It submits that all of the officers of ComFor are appointed or chosen under the authority of the Village. The Village contends that, as with most corporations, the Village as shareholder is content to leave the

²⁰ Though not entirely clear from the submissions, the inference I draw is that any profits generated by the Companies are disbursed through ComFor.

²¹ Companies' initial submission, para. 80.

²² Companies' initial submission, para. 45.

management of ComFor to its duly appointed board of directors, so long as the Village is satisfied that ComFor is being managed appropriately. The Village submits, however, that as sole shareholder, it has the full legal authority to appoint the directors of ComFor and that it is not a mere “figurehead” shareholder of the company.²³ The Village argues that the fact that corporate articles contemplate representation on the board of directors from certain stakeholder groups, or that the Village may accept recommendations for the appointment of directors from interested parties, is immaterial. The fact that the Village has not refused such a recommendation to date should not be construed as an acknowledgment that its legal authority to do so is limited. The Village submits that it is solely responsible for the appointment of all directors and as sole shareholder may remove or appoint directors at will.²⁴

[21] The Village argues that evidence of its full legal control over the appointment of directors is further reinforced by the fact that the Village, as shareholder, has in the past, on its own initiative, amended the articles of incorporation to alter the constitution of the board of directors.²⁵

[22] The Village submits that the fact that the Community Forest Agreement held by ComFor, through BLCF, is intended to benefit a variety of stakeholders, both within and outside the Village, is also immaterial.²⁶

The question of who should benefit from [ComFor’s] activities, and the management of the [BLCF], is a completely separate question that should not be confused with the question of legal ownership of [ComFor], or any of its subsidiaries, or the authority for the appointment of directors of [ComFor] under the Articles of Incorporation. The [Community Forest Agreement] and the rights and obligations of BLCF Ltd. thereunder may well be the centerpiece of [ComFor’s] operations. As referred to in the Recitals to that Agreement, [BLCF] has agreed to manage that Agreement for the purpose of generating benefits for all residents of the Lakes Timber Supply Area. However, [BLCF’s] (and through it, [ComFor’s]) control of an asset such as the Community Forest, and their obligations under the [Community Forest Agreement] to manage the Community Forest for the benefit of the residents of the broader community, is a separate legal issue from ownership of the shares of [ComFor] and its subsidiaries, and the authority to appoint directors and officers...

[23] In support of its argument that ComFor’s officers have been appointed under the Village’s authority, the Village submits that the reasoning in *City of Toronto* is persuasive and should be followed here.²⁷ As noted above, in that case the Court concluded that TEDCO’s officers were “appointed or chosen by or

²³ Village’s response submission, para. 5.

²⁴ Village’s response submission, para. 14.

²⁵ Village’s response submission, para. 15.

²⁶ Village’s response submission, paras. 16 and 17.

²⁷ Village’s response submission, para. 21.

under the authority” of the City within the meaning of s. 2(3) of MFIPPA. The Village argues that the language of s. 2(3) of MFIPPA is substantially the same as the relevant FIPPA provision.

[24] The Village submits that:²⁸

...the facts as they relate to ComFor are indistinguishable from the circumstances in TEDCO. The fact that [ComFor] and its subsidiaries carry on business activities that are outside of what some might consider to be the traditional or usual “core” functions of a municipality is irrelevant. Under the *Community Charter*, the Village has broad corporate powers, and may engage in commercial activities, and may do so outside of its boundaries. The Village’s involvement with the Community Forest is clearly an exercise of its statutory powers. The fact that other stakeholders in the community are intended to benefit from [ComFor’s] business operations is irrelevant to the fact that the legal structure under which [ComFor] et al operate is owned and therefore controlled by the Village.

[25] The Village further argues that in the case of BLCF the same result should follow because:²⁹

[BLCF] was incorporated by the Village with the intention that it would hold the [Community Forest Agreement]. For tax reasons, the Village’s shares in [BLCF] were eventually transferred to [ComFor]. A fair, large and liberal interpretation of FOIPPA, keeping in mind its purposes, supports the view that the words “under the authority of” should be interpreted to include a situation where the officers of a wholly-owned subsidiary are appointed by directors of that subsidiary and who, ultimately, derive their authority from the municipality as sole shareholder of the parent company.

[26] The Village adds that this rationale also applies to the subsidiaries of ComFor (Endako, Sheraton and Whistle) and to BLCF’s subsidiary (Lakes Inc.) because it would be contrary to the purpose of FIPPA if the legislation could be avoided by transferring assets and control of operations down the chain of corporate ownership to a variety of subsidiaries.³⁰ In support of this, the Village cites the following passage from the *City of Toronto*:³¹

...it is contrary to the purpose of the Act and access to information legislation in general to permit the City to evade its statutory duty to provide its residents with access to its information simply by delegating its powers to a board of directors over which it holds ultimate authority.

[27] In regard to ComFor’s article of incorporation allowing for the application of FIPPA, the Village contends that it was required to include such a provision

²⁸ Village’s response submission, para. 32.

²⁹ Village’s response submission, para. 33.

³⁰ Village’s response submission, para. 35.

³¹ [2008] O.J. No. 1799 at para 39.

before the Inspector of Municipalities would approve the company's articles. The Village submits that this "clearly confirm[s] the understanding and intention of the Village, as sole shareholder, and as 'creator' of ComFor that ComFor would be subject to [FIPPA]."³²

[28] The applicants argue that ComFor is a public body because its shares are held by the Village and the Village appoints ComFor's board of directors. The applicants contend the forest land was intended to benefit the entire Burns Lake community. Though neither explicitly says so, I take their submissions to be that, because the companies in question administer the community forest on behalf of the public, that these entities should be classified as public bodies under FIPPA. Applicant #2 argues that because the profits generated by the Community Forest Agreement are for the benefit of the community "the need for complete openness and transparency must be met".³³ Both applicants point out that the Companies' consolidated financial statements appear in the financial statements for the Village. Applicant #2 asks, if the Village did not have ultimate control over the Companies, why would these statements appear in the Village's financial reports?³⁴

[29] In reply, the Companies contend that the financial statements were consolidated for "purely accounting purposes" and just because the Village did so "does not change the fact that constraints on it are significant and real."³⁵ The Companies submit that the Village has acknowledged those constraints on many occasions.³⁶

[30] The Companies submit that ComFor and related companies have been operating for several years as private businesses and that finding that it is a public body would have "significant implications" for its operations.³⁷

[31] **3.3 Analysis**—I begin with the question of whether ComFor is a public body under FIPPA.

[32] Under Schedule 1 of FIPPA a public body is defined to include a local public body. A local public body is in turn defined to include a local government body. A local government body means a

- (a) a municipality, ...
- (n) any board, committee, commission, panel, agency or corporation that is created or owned by a body referred to in paragraphs (a) to (m) and

³² Village's response submission, para. 13.

³³ Applicant #2's response submission, p. 2.

³⁴ Applicant #2's response submission, p. 2.

³⁵ Companies' reply submission, para. 22.

³⁶ Companies' reply, para. 22.

³⁷ Companies' reply submission, para. 30.

all the members or officers of which are appointed or chosen by or under the authority of that body...

[33] It is not disputed that the Village is a local public body under this definition. The parties also agree that ComFor is owned by the Village.

[34] The remaining question is whether the officers of ComFor are appointed or chosen by or under the authority of the Village. For the purposes of this analysis, I have ignored reference to the term “members” in subsection (n), because in my view, it has no application here. The term “members” might relate to the creation of a committee or board, for example, but does not have any connection to any of the corporate entities we are dealing with in this case.

[35] In determining whether the officers of ComFor are “appointed or chosen by or under the authority of” the Village, it is first necessary to affirm the appropriate interpretive approach. The modern approach to statutory interpretation has been set out in numerous court decisions, notably by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*³⁸:

...Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[36] This was reaffirmed by the Supreme Court of Canada in *H.J. Heinz Co. of Canada v. Canada (Attorney General)*.³⁹

[37] This approach has been restated in many orders of this Office⁴⁰ and is consistent with s. 8 of the *Interpretation Act* which states that

Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[38] The purposes of FIPPA are set out in s. 2 which reads in relevant part:

Purposes of this Act

2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

³⁸ [1998] 1 S.C.R. 27, at para. 21.

³⁹ [2006] 1 S.C.R., at para. 21.

⁴⁰ See for example the Commissioner’s comments in F05-26 [2005], B.C.I.P.C.D No. 35.

- (a) giving the public a right of access to records, ...

[39] This purpose of freedom of information legislation was given fulsome consideration in *Dagg v. Canada (Minister of Finance)*⁴¹ by La Forest J., dissenting on a different point:

As society has become more complex, governments have developed increasingly elaborate bureaucratic structures to deal with social problems. The more governmental power becomes diffused through administrative agencies, however, the less traditional forms of political accountability, such as elections and the principle of ministerial responsibility, are able to ensure that citizens retain effective control over those that govern them...

[40] Having considered the party's submissions, the case law provided and the approach to statutory interpretation noted above, it is my view that ComFor's records are subject to FIPPA because its officers are "appointed or chosen by or under the authority" of the Village. In reaching this conclusion, I have taken account of the reasoning in the *City of Toronto*. As I noted above, the Ontario Court of Appeal considered in that case whether TEDCO, an entity incorporated by the City of Toronto, was covered by Ontario's *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA"). As the Village noted, s. 2(3) of MFIPPA is very similar to paragraph (n) of the definition of "local government body".

[41] The Companies submit that in this case it is ComFor's board that appoints its officers and not the Village. TEDCO made the parallel argument in the *City of Toronto* in contending that its officers were not appointed by the City but rather by TEDCO's directors. The Ontario Court of Appeal rejected that argument, finding that TEDCO's officers were appointed or chosen under the authority of the City even though TEDCO's board of directors made the actual appointments. The Court carefully considered the meaning of the phrase "under the authority of" and drew the following conclusions:

34. ... In the *Canadian Oxford Dictionary* (2nd ed., 2004), the main definition of "authority" has two parts: "(a) the power or right to enforce obedience. (b) delegated power." In my view, given the purpose of access to information legislation and the modern approach to statutory interpretation, it is preferable to read s. 2(3) in light of the second part of the definition, rather than imposing a restrictive interpretation that embraces only the first part. A similar point emerges from the *New Shorter Oxford English Dictionary* (1993), which provides as one of its definitions of "authority" "Derived or delegated power".

...

⁴¹ [1997] 2 S.C.R. 403.

37. Second, beyond the ordinary meaning of the word “authority,” the language of s. 2(3) is cast in broad terms, which suggests that the legislature intended an examination of substance rather than a fixation on formal and technical appointment processes. The provision uses both the words “chosen” and “appointed” and also contemplates processes that are effected both “by the authority” and “under the authority” of City Council. In the face of this broad language, I question an approach that treats as decisive the mere fact that City Council has delegated direct appointment power to TEDCO’s board of directors.

38. Third, although City Council does not *directly* choose TEDCO’s officers and does not hold an official veto over that process, the City’s role as TEDCO’s sole shareholder provides a significant nexus between City Council’s authority and the officers of TEDCO. TEDCO’s board of directors, whose members are appointed directly by City Council, is always subject to City Council’s removal power. ...

39. Fourth, a formal and technical interpretation of s. 2(3) runs contrary to the purpose of the Act. We are dealing with a corporation whose sole shareholder is the City of Toronto, whose sole purpose is to advance the economic development of the City, and whose board of directors -- at the time of the proceedings before the adjudicator -- was populated by persons directly appointed by City Council, including the Mayor of Toronto (or his/her designate), the Chair of the City’s Economic Development and Parks Committee, two City Councillors, and the Commissioner of Economic Development, Culture and Tourism (or his/her designate). In light of what La Forest J. observed in the above-cited passage from *Dagg*, it seems to me that TEDCO is just another example of a complex bureaucratic structure of public administration. In my view, it is contrary to the purpose of the Act and access to information legislation in general to permit the City to evade its statutory duty to provide its residents with access to its information simply by delegating its powers to a board of directors over which it holds ultimate authority.

[42] What is of note here is that the Village is “not attempting to evade its statutory duty to provide its residents with access to its information simply by delegating its powers to a board of directors over which it holds ultimate authority”. The Village, in fact, readily acknowledges its ultimate authority and believes the Companies are public bodies and has called on them to comply with FIPPA “on behalf of the greater community”.⁴² It is the Companies that are asserting they are immune from the public’s right to know through coverage under FIPPA. The Companies make much the same argument TEDCO made, namely that they are not covered by the FIPPA because they essentially operate at arm’s length from the Village. Like the City, the Village in this case does not directly appoint ComFor’s officers or hold a veto over that process. Similarly, the Village’s role as sole shareholder gives it the authority over appointment of

⁴² Affidavit of Tim Palmer, Exhibit P.

ComFor's directors, as well as their removal.⁴³ Appointments are done through votes of the Village's Council. In order to assist the process, the Council has appointed a "special selection committee" to vet potential candidates and make recommendations about suitable prospects.

[43] As the sole shareholder of ComFor, the Village's authority over ComFor is wider than the power to appoint and remove its directors—the Village has used that power to increase the number of directors, for example.⁴⁴ ComFor's recognition of the Village's dominion over it, including its governing structure, was demonstrated in September 2007 when it requested that the Village approve amendments to its corporate articles to lower the quorum threshold for board meetings.⁴⁵ ComFor said that it was, at times, difficult to muster eight of the ten directors needed to carry on the board's business and asked the Village, as controlling shareholder, to amend ComFor's articles to set quorum at 50% plus one of all directors. The Village ultimately turned down the request. The Village's responsibility for ComFor is also accounted for in the Village's financial statements which consolidate ComFor's financial statements as well as those of BLCF, Endako, Whistle, Lakes Inc. and Sheraton. Those financial statements describe ComFor as a "wholly-owned company" that is a "government business enterprise".⁴⁶

[44] All of the above factors provide, in the words of the Ontario Court of Appeal in *City of Toronto*, a significant nexus between the Village's authority and the officers of ComFor such that, in conjunction with other findings below, I conclude that ComFor's officers have been chosen or appointed under the authority of the Village.

[45] The Companies argue that the Village has never used its authority to remove ComFor's directors and it would be "very unlikely" to do so given that the Village's mayor is on the board as well as representatives of the First Nations.⁴⁷ In my view the Company's assertion is premised upon considerations other than legal ones. What I understand the Companies to argue here is that the Village is constrained from exercising its ultimate authority because doing so would result in repercussions of a political kind. I make no comment on this contention nor is it within my authority to do so. What I do conclude is that there is nothing in ComFor's articles or any of the other evidence provided me which legally prevents the Village from exercising full authority to appoint or remove ComFor's board of directors. The fact that to date Council has not exercised the power to remove a director, for example, does not restrict its authority do so.

⁴³ See ComFor's Articles of Incorporation 11.3 which refers to the process by which vacancies arise in the event a director's removal. Affidavit of Bill Huxham, Exhibit B, p. 8.

⁴⁴ The Village decided to set aside one directorship from its ranks. Affidavit of Tim Palmer, Exhibit H.

⁴⁵ Affidavit of Tim Palmer, Exhibit I, p. 1.

⁴⁶ Affidavit of applicant #1, Exhibit 15.

⁴⁷ Affidavit of Bill Huxham, para. 4.

[46] The other arguments made by the Companies are also variations on the theme of why it believes the Village is constrained in its dealings with ComFor. The essence of these arguments, the specifics of which I have noted above, is that ComFor is in the nature of a joint venture agreement involving various parties, with the Village serving as a figurehead shareholder. The evidentiary difficulty with this argument is identified by the Companies when it states that this purported joint venture arrangement “has never been properly defined in the relevant documentation”.⁴⁸ Indeed, the Companies go on to say that a review done for the ComFor Consulting Working Group⁴⁹ (“Review”) has “attempted to remedy that failing” by making certain recommendations concerning ComFor’s governance, which if followed would distribute the shareholdings of ComFor more widely. If this occurred, the Companies argue, the result would be that it would no longer be a public body under FIPPA.

[47] My decision, however, must be based on the evidence as it is, not on conjecture or what might be the case if another set of circumstances existed. The evidence here is that, under the terms of ComFor’s articles of incorporation and the Village’s rights as 100% shareholder of ComFor, the Village has established that it has, ultimately, complete control and direction over ComFor. And although not determinative, I would note that the Review cited by ComFor concedes that the “de facto owners of ComFor (and by extension, it may be argued, ComFor’s subsidiaries) are the residents of Burns Lake, as represented by [the Village]”.⁵⁰

[48] The Review cited to me also discloses that the Village’s control of ComFor is an issue of concern to some in the community and no doubt is the basis for suggestions in the Review as to how the current structure could be changed.⁵¹ It is, however not within my purview to pass judgement on the merits of these suggestions. Again, I must be guided by the evidence as it is, not how others would wish it to be.

[49] I will make one final observation concerning the Companies’ contention that the Village is “constrained” in its dealing with ComFor because ComFor’s profits are distributed within the entire Burns Lake community. I do not accept that the sharing of ComFor’s profits is inconsistent in any way with the Village’s authority over ComFor. In the first place, it was the Village that initially “spearheaded the project” to engage the broader Burns Lake community in the 1990s when it sought a community forest agreement with the province.⁵² Second, the constraint, if one can call it that, of distributing “benefits for all

⁴⁸ Companies’ reply submission, para. 29.

⁴⁹ ComFor Consulting Working Group was formed by the Village, ComFor and BLCF to conduct what it termed a “Ten Year Review” of the Companies operations.

⁵⁰ Companies’ reply submission, Schedule B, p. 37.

⁵¹ Companies’ reply submission, Schedule B.

⁵² Affidavit of Bill Huxham, Exhibit L, p. 1.

residents of the Lakes Timber Supply Area⁵³ is found in the Community Forest Agreement between BLCF and the Ministry of Forests. Therefore, even if this “constraint” were found to exist, it is a matter between BLCF and the provincial government rather than any restriction in the Village’s authority in respect of ComFor.

[50] I also note that both the Village and the Companies have made reference to a provision of ComFor’s articles which purport to make ComFor’s records subject to the application of FIPPA. The provision in my view is not determinative of this matter because entities cannot, simply by their agreement, make themselves the subject of, or opt out of, FIPPA and this Office’s jurisdiction. That said, I note, in passing only, this provision appears to demonstrate recognition on the part of the Village and the Companies that the Companies’ activities and records relate to public matters.

[51] What must not be lost sight of, and what is at the heart of this case, is that the Village, a public body, has created and delegated to ComFor, and its subsidiaries, the responsibility to give effect to the public’s wish to gain the maximum benefit from publicly-held forest lands. It is my view that the Legislature’s inclusion of paragraph (n) in Schedule 1 in the definition of a “local government body” was intended to capture the public’s business which a municipality might delegate to a board, commission or corporation. To paraphrase the Court in *City of Toronto*, in light of the ordinary meaning of the word “authority”, the language of paragraph (n) of the definition of “local government body” in Schedule 1, the Village’s status as ComFor’s sole shareholder and the purpose of FIPPA, it would be wrong to permit ComFor to avoid FIPPA’s reach merely because the Village delegated its power to ComFor’s board of directors, over which it holds ultimate authority in any case.

[52] It would also be highly inappropriate for me to accede to the Companies’ request that I refrain from making any finding or order in this matter pending an opportunity by the parties “to complete the current restructuring process” referred to in the Review. Even if this restructuring were taking place, and there is no evidence before me that it is, this does not provide a basis to delay responding to the applicants’ request under FIPPA. Given my determination that ComFor is a local government body and therefore a public body, the applicants have a right under FIPPA to have their request processed.

[53] Having made my determination that ComFor is a “local government body”, it follows that the other related entities, BLCF, Endako, Whistle, Lakes Inc. and Sheraton, fall into the same category. I say this because ComFor has

⁵³ Affidavit of Bill Huxham, Exhibit J, p. 1.

acknowledged these entities are wholly-owned subsidiaries of the Village.⁵⁴ The Village also acknowledges this ownership in its audited financial statements by reporting the consolidated finances of the five entities.⁵⁵ Further, in the same way the Village delegated authority to ComFor's directors to appoint its officers, ComFor, a local government body, has done the same with BLCF, Endako, Whistle and Sheraton making them local government bodies. BLCF has in turn, as a local government body, delegated authority to Lakes Inc.'s board to appoint its officers. The fact that ComFor's wholly-owned subsidiaries are one step removed from the Village does not diminish the Village's complete control and direction of the Companies in any relevant sense. All are public bodies subject to FIPPA.

[54] Finally, I note that the Review, cited above reflects a concern by ComFor that some aspects of its business must remain confidential if it is to operate successfully. I make no comment on the merits of these concerns but observe that FIPPA provides for exceptions to disclosure in certain circumstances. A public body must consider FIPPA's disclosure exceptions in relation to an access request, but that is not a matter that is before me here.

4.0 CONCLUSION

[55] I find that ComFor Management Services, Burns Lake Community Forest Ltd., Endako River Timber Ltd., Whistle Lake Woodlot Ltd., Lakes Communications Inc. and Sheraton Holdings Ltd. are local government bodies within the meaning of paragraph (n) of the definition of "local government body" in Schedule 1 of FIPPA. Under s. 58 of FIPPA, I require them to respond to the applicants' under s. 7, in compliance with s. 8, respecting their access requests under FIPPA.

April 30, 2009

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

OIPC File: F08-34886

⁵⁴ The Companies' initial submission at para. 53 states it does not dispute that these entities are wholly owned subsidiaries of the Village.

⁵⁵ Affidavit of applicant #2, Exhibit 15.