

The Organizational Cold Shoulder: A Shunning Saga

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The word "shun," derived from the Middle English *shunnen* and the Old English *scunian* ("to abhor"), refers to the act of deliberately avoiding association with, and habitually keeping away from, an individual or a group. The practice has a "long history as a means of organizational influence and control," and its targets often include those who defy or fail to comply with the standards of the shunning group.

In 2008, Duncan Barnett was an elected member of the Cariboo Regional District (CRD) Board of Directors, and had served as an elected member for several terms previously. The CRD claimed that his unpleasant conduct as a member had led to numerous complaints from its staff, other Board members, and the public. As a result, the Board's Chair and Vice-Chair directed that the municipality's Chief Administrative Officer, Ms. Bell, prepare a report with the purpose of addressing Barnett's "behaviour and its negative effect on CRD staff." The result was a seven-page "Bell Report," dated September 2008. This apparently contained nothing specific – no complaining staffers were named and no particular misconduct was identified – and apart from allegations of "harassment" and "intimidation," it concluded that Mr. Barnett was not much liked by the staff and some of the other Board members, that he could be abrasive and difficult to deal with, and that the staff preferred not to deal with him.

On October 10, 2008, the CRD held an open meeting, followed by a closed meeting. The agenda for both meetings was published electronically for the Board members a week earlier and stated that there would be "various items suitable for discussion In-camera." Two items were identified for the closed session, but the agenda did not mention that the Bell Report would be discussed as part of that meeting. Although the CRD's procedural bylaw required that materials be distributed to the Board at the commencement of the meeting or "as soon thereafter as practical and possible," the decision not to provide copies of the report in advance was to avoid having CRD staff "contacted with respect to any of the underlying details." The decision to close the meeting to the public was based in s. 90(1)(d) of the *Community Charter* ("the subject matter being considered" related to "the security of the property of the municipality").

The report was distributed at the closed session, after which the Board passed a resolution, #IC.08-10A-6, directing that "Duncan Barnett not have contact or communication with staff, on a person to person basis, except through e-mail or written correspondence delivered to the front desk, addressed to the Chief Administrative Officer or designate. Further, that this directive be brought forward for review by the Board in a period of one year." All copies of the report were then collected, in accordance with the usual practices of the Board. Barnett was later refused a reconsideration of the decision. He was subsequently offered a copy of the report on the condition of undertakings, which he rejected. The resolution was later reaffirmed after a new Board was elected and sworn-in at the end of 2008.

Barnett brought an application for judicial review, challenging the resolution on the grounds that the CRD had no jurisdiction to pass the resolution, or, alternatively, if it had jurisdiction, that he was denied reasonable notice and denied basic procedural fairness. Barnett also alleged bias, claiming the CRD Chair had previously threatened him, and had responded to his concerns by saying that "in other circumstances he would deal with my situation by... laying a beating on me." Barnett sought an order setting the resolution aside and requiring the CRD to disclose the Bell Report. His counsel described the CRD's process as characteristic of "nasty small town politics," adding that the court should "take the opportunity to rein in an errant council that has been thwarting due process for years." The CRD's position was that the action was well within its jurisdiction to govern its own internal procedure by regulating the conduct of its members; that any procedural defects at the October 10 meeting were rectified by the later meetings which re-affirmed the resolution; and that Barnett could have applied under the *Freedom of Information and Protection of Privacy Act* to obtain a copy of the report.

The court began its analysis with an overview of the *Local Government Act*, noting that there was no provision in the Act or otherwise that limited the CRD's Board from exercising its "powers, duties and functions" in terms of addressing the day-to-day conduct of a member. "The weight of the statutory and judicial authority suggests that a Regional Board has the ability to determine its own internal procedures, which surely must include the ability to control misconduct by a Director." While the subject matter was within the CRD's jurisdiction, the court found significant problems with the procedural aspects. The court expressed "serious concerns in relation to why the CRD relied on s. 90(1)(d) of the *Community Charter*

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Visual Presentations

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2003), available at http://totalcommunicator.com/vol1_4/audience_article_print.html (last visited March 25, 2009).
10. Mark Twain, Roughing It 257 (New American Library, ed. 1980) (1871).
11. Fred H. Cate & Newton N. Minow, *Communicating with Juries*, 68 Ind. L.J. 1101, 1112 (1993).
12. Federal Judicial Center 2001, *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial*, 42 (Federal Judicial Center and National Institute for Trial Advocacy, eds., 2001).
13. United States. v. Williams, 657 F.2d 199, 203 (8th Cir. 1981).
14. Hinkle v. City of Clarksburg, 81 F.3d 416, 424 (4th Cir. 1996); Fusco v. General Motors Corp., 11 F.3d 259, 264 (1st Cir. 1993); Gilbert v. Cosco, Inc., 989 F.2d 399, 402 (10th Cir. 1993).
15. *Hinkle*, 81 F.3d at 425; Robinson v. Missouri Pac. R.R. Co., 16 F.3d 1083, 1088 (10th Cir. 1994).
16. *Hinkle*, 81 F.3d at 425.
17. Fed. R. Evid. 106.
18. Nicole J. DeSario, *Merging Technology with Justice: How Electronic Courtrooms Shape Evidentiary Concerns*, 50 Clev. St. L. Rev. 57, 66 (2003).
19. Federal Judicial Center 2001, *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial*, 191-96 (Federal Judicial Center and National Institute for Trial Advocacy, eds., 2001).
20. Fed. R. Evid. 611(c) and 602.
21. Fed. R. Evid 402 provides, in part, that "[a]ll relevant evidence is admissible, except as otherwise provided. ... Evidence which is not relevant is not admissible."
22. Fed. R. Evid. 802, 803, 804, 901, and 902.
23. Fed. R. Evid 703.
24. United States v. Barefoot, 952 F.2d 397 (Table) (4th Cir. 1991) (per curiam); United States v. Diez, 515 F.2d 892, 905 (5th Cir. 1975), *cert.* denied, 423 U.S. 1052 (1976); United States v. Possick, 849 F.2d 332, 339 (8th Cir. 1988). ML

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instead of s. 90(1)(c) ("labour relations or other employee relations") to close the meeting, and whether the report was distributed "as soon as practicable and possible." However, because of the deference the court was required to give to the Board in relation to its own procedure, those defects alone were "not sufficient at this stage to warrant intervention." That was not the case with the remaining procedural issues – that the matter was raised without prior notice and an opportunity to investigate and respond. The fundamental problem with the CRD's approach to disciplining its member was that he was "never given any specifics of the complaints that might permit a reasoned and structured response," and never given "any opportunity to consult counsel or even any reasonable opportunity to study and respond to the vague allegations. ... In that light, it is difficult to see how the petitioner's right to be heard was respected in any sense." The fact that other Board members and Bell had spoken to Barnett about his conduct, and Bell had cautioned him that his conduct would be raised at the next Board meeting, did not constitute notice in law. "Notice" required that the recipient be capable of appreciating that some specific conduct would be discussed and sanctions sought, and be able to come to the meeting fully prepared to answer the charges. The report at issue "contained nothing specific" and "appear[ed] to merely bandy about words like 'harassment' and 'intimidation' without more." Further, the Chair's comments indicated "not only a clear bias against" Barnett, but "also a complete disregard for any fair process." Because Barnett was denied reasonable notice and denied procedural fairness, the resolution was set aside. As this mooted his claim for a copy of the report, the court advised that he apply, as suggested, under the *Freedom of Information and Protection of Privacy Act*. The case is *Barnett v. Cariboo Regional District*, 2009 BCSC 471 (B.C.S.C. Apr. 08, 2009). ML

Ordinances

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interest was substantial: banning new offsite billboards promoted traffic safety and reduced blight, even if all billboards were not eliminated; further, the State had a significant financial interest in allowing grandfathered billboards to stay, as otherwise it would have to pay just compensation to the billboard owners. In any event, Maldonado purchased the property in the 1990's, so he was not similarly situated to the grandfathered landowners.

The remainder of 2009 may provide equally active for billboard litigation in the Ninth Circuit. In March, a federal judge in California found that the City of Los Angeles had violated an injunction by refusing the opportunity for a billboard company to seek permits for new "supergraphic"[13] signs. As 2009 continues, there is no doubt that cities around the country will have to continue to do battle in sign wars.

Notes

1. Clear Channel Outdoor, Inc., Q4 2008 Earnings Report (2008), at http://www.clearchanneloutdoor.com/assets/downloads/pdfs_corp/CCO_Q4_2008_Release.pdf.
2. *Id.*
3. Patrick Mcgreevy, *Schwarzenegger Considers Selling Ads on Freeway Signs*, LATimes.com, Sept. 24, 2008 at http://articles.latimes.com/2008/sep/24/local/me-signs24.
4. 551 F.3d 898 (9th Cir. 2009).
5. Los Angeles, Calif. Municipal Code, § 91.6205.11 (2004).
6. Metro Lights, L.L.C. v. City of Los Angeles, 488 F. Supp.2d 927, 947 (C.D. Cal. 2006).
7. 551 F.3d at 910.
8. *Id.*
9. *Id.* at 914.
10. 556 F.3d 1037 (9th Cir. 2009).
11. *Id.* at 1045.
12. *Id.* at 1046.
13. Phil Willon, *Judge's ruling is a setback to L.A.'s efforts to combat supergraphics*. Los Angeles Times, Mar. 16, 2009 at http://www.latimes.com/news/local/la-me-supergraphics17-2009mar17,0,3230970.story. ML