

**REPORT TO COMMITTEE OF THE WHOLE
MEETING OF WEDNESDAY, OCTOBER 28, 2020**

SUBJECT **First Nation Participation in Closed Committee Meetings**

ISSUE SUMMARY

To provide options that consider the inclusion of First Nations' elected officials in CRD meetings that are closed under Section 90 of the *Community Charter* (the *Charter*).

BACKGROUND

On October 14, 2020 the CRD Board approved the following motion arising from the First Nations Relations Committee, in consideration of the report on First Nations Inclusion in CRD Governance:

“That staff report back to the Governance and Finance committee in November with options relating to [First Nation Member attendance at] closed meetings.”

The specific bylaw amendments being considered in the October 14, 2020 report were referred to the Committee of the Whole (COW) for further discussion. As the issue of more inclusive governance and participation in closed meetings are related items, this report is being advanced to the COW for consideration in conjunction with the Inclusive Governance report.

ALTERNATIVES

Alternative 1

The Committee of the Whole recommends to the Capital Regional District Board:
That all closed matters be directed to Regional Board, where First Nation Member participation can be determined on an item-by-item basis.

Alternative 2

The Committee of the Whole recommends to the Capital Regional District Board:
That First Nation Members be included in closed meetings on an item-by-item basis, following resolution by the applicable Standing Committee or Board.

Alternative 3

That this report be referred back to staff for additional information.

IMPLICATIONS

Liability Implications

S.738(1)(r) of the *Local Government Act (LGA)* provides immunity for local public officers who are not municipal councilors, when appointed to a CRD committee or commission. First Nation Members, when appointed to a regional district committee, have immunity for damages as it relates to the duty or exercise of their power or for any alleged neglect in the same way that is extended to CRD Directors.

The CRD Board is responsible for all actions that would expose the corporation to liability or court proceeding. Within the legislative context establishing the roles and responsibilities of the CRD, the validity of decision-making depends on having the statutory authority, correctly following statutory procedural requirements, following CRD procedural requirements, following a duty to act fairly where property rights are affected, and the principles of *Canada's Charter of Rights and Freedoms*. Though CRD Standing, Select and Advisory Committees play a critical role in considering and reporting on items coming within their purview, it is the CRD Board that is ultimately responsible for the services provided and actions taken. As long as the CRD is operating in a way that ensures the validity of its decision-making, there is no additional liability associated with having First Nation Members participating in closed committee meetings.

Confidentiality Implications

S. 117(1) of the *LGA* establishes a duty for Board or committee members to respect confidentially, unless specifically authorized to rise and report on the item, and s.117(2) establishes that a local government may recover loss or damages from a person in breach of s.117(1). The *LGA* does not extend this to members of a Board Standing, Advisory or Select Committee and therefore First Nation Members, when participating at these committees, would not be subject to the same legislated duty or to the consequences of a breach of confidentially. This risk would be reduced though requiring that First Nation Members sign a Confidentiality and Non-Disclosure Agreement (NDA) in-keeping with the intent of s.117 of the *LGA*. This is the approach taken with the appointed members of the CAWTP Board.

While a NDA would provide a mechanism to impose sanctions for a breach of confidentiality, in practice these agreements can be difficult to enforce. At minimum, enforcement requires demonstrating that the breach itself was not inadvertent and that damages have occurred as a result of a breach. It would be possible to include clear sanctions in a NDA, but the harm caused to the CRD's relationship with the First Nation whose appointed representative was thought to be in violation could be significant. Additionally, there would likely be a need for a First Nation Member to engage their Chief, council colleagues and/or elders or knowledge-keepers to fully explore the First Nation's interests on a given item discussed in closed and this would increase the potential that the information would be disclosed in a way that is in contravention of a NDA.

Though there is certainly value in having the perspective of First Nation Members included in some items that are discussed in closed, these items should be shared with purpose and with a clear understanding by the CRD Board as to the value of the input and the risks associated with a possible disclosure of confidential information. This determination could best be made on a case-by-case basis.

Intergovernmental Implications

Section 91(2)(b) of the *Charter* permits the Board to allow persons other than officers and employees to attend a closed session where the Board considers it necessary. A resolution is required to permit persons other than a Member to be present for these meetings.

There is a considerable risk to the relationship between a First Nation and the CRD should there be a need, at a committee-level, for the First Nation Members to leave while Directors introduce, debate, and consider a motion to allow the First Nation Members back into the meeting. This would highlight the limited participation rights of First Nation Members at the committee table and could serve to undermine the intent of effective, open and respectful collaboration. In this situation, First Nation Members would also not have the materials in advance of a potential

resolution passing that would permit their participation in a closed session and their contribution would therefore be limited, further undermining the value of their engagement.

It should also be noted that the *Charter* is explicit on why meetings may be closed to the public and not all items would benefit from First Nation Member participation. Many items received in closed relate to corporate issues, like human resources, labour relations, or legal matters where it would not be appropriate to include First Nation Members. First Nations have expressed that the “acquisition, disposition or expropriation of land or improvements” are items of interest and these are included under s. 90(1)(e) of the *Charter*. It is further likely that s. 90(2)(b) in the *Charter* would also be of interest to First Nations as this includes “the consideration of information received and held in confidence relating to negotiations between the municipality and a provincial government or the federal government or both, or between a provincial government or the federal government or both and a third party.” This section would likely include any ongoing Treaty and/or Reconciliation Agreement discussions taking place within the Capital Region.

Therefore it would seem reasonable that the CRD Board, with the support of staff, first considers items in closed and determines if the item would benefit from First Nation Member input. A motion could then be considered which would refer the item to a subsequent meeting where First Nation Members are permitted, to allow their full participation on the item. This would satisfy s.91(2) of the *Charter*, preserve the relationship between the CRD and First Nations, allow First Nation Members to access materials in advance of a meeting, and enhance the discussions taking place in closed through bringing additional perspectives forward.

Operational Implications

Having any First Nation Member participation in closed meetings will require additional steps for staff. Specifically, when the Board refers a closed item to a committee for First Nations’ input, there will be a need for staff to distribute a secure link providing access to the closed meeting material directly to those First Nation Members appointed to the committee. This will provide access to only those items the Board has passed a resolution on in advance and creates additional complexity as there may be items discussed in closed where First Nation Members can participate and others where they will not be permitted. It will be the work of staff to order the agenda accordingly and discuss this in advance with First Nation Members to ensure an understanding.

There is also a risk of some delay in items as they would need to be discussed at the Board in closed prior to being referred to committee. This will add an additional step in that closed items would first go to the CRD Board and then would be referred down to committee where, following a resolution of the Board, First Nation Members can fully participate in the deliberations. Though it is unlikely this delay would significantly impact the CRD’s ability to deliver its services, staff across the organization will need to be mindful of this additional step in the process and the potential implications that could have on the specific initiative.

Governance Implications

While there is no statutory or procedural requirement that mandates the process for consideration of items in closed, it is the practice at CRD to consider closed items at the committee level prior to the item being advanced to a closed Board meeting. Currently, less than half of all standing committee meetings include a closed session as there are considerably fewer closed items than open items of business. The majority of items considered in closed relate to appointments, housing project approvals, grant awards, and land transactions. Discontinuing the practice of

having closed items first received at Standing Committees would avoid the awkwardness of excusing First Nation Members from committee meetings for the closed session, and would streamline the consideration of the majority of closed items by having them received only once at Board. This approach could also increase the level of confidentiality by having each item received and discussed only once. That said, not seeking committee input may impact decision making by the Board and the length of Board meetings could be increased if each closed report required an introduction.

The critical distinction between Alternative 1 and Alternative 2 is that Alternative 1 results in the CRD Board receiving all items in closed first to determine whether there is a need for additional consideration by First Nation Members at committee. If not, the Board would proceed to consider and vote on the item at that meeting. If it is determined that there is a desire to obtain First Nations consideration, the Board would then pass a motion referring the item to the appropriate standing committee, and permit First Nation Members to attend the closed committee meeting. Alternative 2 reflects the current corporate approach to the management of items in closed and would require the specific committee considering an item in closed to pass a motion prior to the First Nation Members being permitted to participate.

CONCLUSION

The most effective way for the CRD to include First Nation Members in closed meetings is to be deliberate and to make the determination on a case-by-case basis. A resolution by the Board would satisfy the legislative requirements to permit non-Members to participate in closed meetings while also allowing CRD staff to be focused when distributing sensitive information. Passing a resolution on the day that an item will be discussed will disadvantage First Nation Members, create awkwardness and risks harming the relationship. Therefore, it is the best course of action for the Board to first consider items in closed first and then, where needed, refer items to a committee that could include First Nation Members, who would then be permitted to fully participate in discussions on the item. Though this does add an extra step, it will position the CRD to be inclusive of First Nations' perspectives while also being cautious with how information is shared and discussed.

RECOMMENDATION

The Committee of the Whole recommends to the Capital Regional District Board:
That all closed matters be directed to Regional Board, where First Nation Member participation can be determined on an item-by-item basis.

Submitted by:	Don Elliott, MUP, Manager, First Nations Relations
Concurrence:	Kristen Morley, J.D., General Manager, Corporate Services & Corporate Officer
Concurrence:	Robert Lapham, MCIP, RPP, Chief Administrative Officer

Attachment(s)

Appendix A: Closed Item Process Diagram