

VANCOUVER
APR 20 2017
COURT OF APPEAL
REGISTRY

Court of Appeal File No. 44269
Supreme Court File No. 169841
Vancouver Registry

COURT OF APPEAL

BETWEEN:

DEMOCRACY WATCH

Appellant
(Petitioner)

AND:

BRITISH COLUMBIA CONFLICT OF INTEREST COMMISSIONER

Respondent
(Respondent)

APPEAL RECORD

APPELLANT

Democracy Watch

COUNSEL FOR APPELLANT

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RESPONDENT

British Columbia Conflict of
Interest Commissioner

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S- 16984.1

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the matter of a Decision of the Conflict of Interest Commissioner on May 4, 2016
pursuant to the *Members' Conflict of Interest Act*, RSBC 1996, c.287

BETWEEN:

DEMOCRACY WATCH

PETITIONER

AND:

BRITISH COLUMBIA CONFLICT OF INTEREST COMMISSIONER

RESPONDENT

PETITION

ON NOTICE TO:

Conflict of Interest Commissioner
PO Box 9289 Stn Prov Govt
Victoria, BC V8W 9J7

Attorney General of British Columbia
PO Box 9289 Stn Prov Govt
Victoria, BC V8W 9J7

Christina Joan Clark
PO Box 9289 Stn Prov Govt
Victoria, BC V8W 9J7

This proceeding is brought for the relief set out in Part 1 below, by Democracy Watch (petitioner).

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s)
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioners,

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	<p>The address of the registry is:</p> <p>800 Smithe Street Vancouver, BC</p>
(2)	<p>The ADDRESS FOR SERVICE of the petitioners is:</p> <p>Gratl & Company Barristers and Solicitors 601-510 West Hastings Street Vancouver, BC V6B 1L8</p> <p>Email address for service of the petitioners: jason@gratlandcompany.com</p>
(3)	<p>The names and office addresses of the petitioner's lawyers are:</p> <p>Jason Gratl Gratl & Company Barristers and Solicitors 601-510 West Hastings Street Vancouver, BC V6C 1L8 Phone: (604) 694-1919</p>

Claim of the Petitioner

OVERVIEW

This is a judicial review by Democracy Watch of decisions made by the British Columbia Conflict of Interest Commissioner on May 4, 2016 and August 9, 2016. Conflict of Interest Commissioner Paul Fraser's decision unreasonably concluded that it was not a real or apparent conflict of interest pursuant to s.2 of the *Members' Conflict of Interest Act* ("the Act") for the Premier to receive \$50,000 annual payments from the BC Liberal Party ("LPBC") while fundraising for the BCLP at exclusive informal events at which special access to the Premier was sold for high amounts (up to \$20,000 per person). The Commissioner's decision also unreasonably concluded that donations made to attend the events and the annual salary drawn by the Premier from the BCLP were not a personal benefit for the Premier that are indirectly connected with the performance of her duties of office as prohibited under s.7 of the Act.

Part 1: ORDERS SOUGHT

The Petitioner seeks the following orders:

- (a) An order in the nature of *certiorari* quashing and setting aside the opinions of the Conflict Commissioner issued May 4, 2016 and August 9, 2016, and remitting the issue to a substitute decision-maker for reconsideration;
- (b) An order protecting the Petitioner from adverse costs liability in the event that this petition is dismissed; and
- (c) Such other and further relief as this Court deems appropriate and just.

Part 2: FACTUAL BASIS

1. Christina Joan Clark, in her role as both Premier of British Columbia and leader of the BC Liberal Party, hosts small, invitation only, events where a cost of entrance is required. The cost of entrance may range anywhere from \$2,000 to \$20,000 or more per person. As an example, the Premier attended an event hosted by the Simon Fraser University Chancellor, Anne Giardini, where 9 individuals attended and the cost of entrance was \$10,000 for seven attendees and \$5,000 for the other two..
2. The Premier admits that funds raised at these events go directly to the general account of the BC Liberal Party ("LPBC") or the LPBC Westside-Kelowna Riding Association ("WKRA"). The Premier admits that she is an employee of the LPBC who receives an annual salary of \$50,000 per year from her party, which is paid from the LPBC general account. The Premier's employment duties with LPBC

include fundraising for LPBC.

3. John Paul Fraser is the son of the Conflict of Interest Commissioner, Paul Fraser, QC. John Paul Fraser has personal ties to the Premier and is a senior member in the BC Liberal Party. He is currently serving as the deputy minister for government communications and public engagement.

Procedural History

4. On April 1, 2016, pursuant to section 19(1) of the *Act*, the Member for Vancouver – Point Grey, Mr. David Eby, requested the opinion of the British Columbia Conflict of Interest Commissioner with regards to Premier Clark's attendance at private fundraising events.
5. On March 31, 2016, pursuant to section 19(2) of the *Act*, Mr. Duff Conacher submitted a request on behalf of Democracy Watch, asking for a declaration that donations made at such exclusive events are 'illegal gifts' prohibited under sub-section 7(1) of the *Act*.
6. In responding to the complaints, the Premier and her representatives made limited disclosure of documents. The Premier did not provide any sworn affidavits or documentary evidence regarding who attends these events, what is discussed at such events, how much money attendees contribute or where that money goes.
7. The Conflict of Interest Commissioner for British Columbia, Paul D.K. Fraser, Q.C., gave his opinion regarding both matters on May 4, 2016 and issued an addendum to the May 4, 2016 opinion on August 9, 2016.
8. The May 4, 2016 opinion concluded that the Premier was not in an apparent conflict of interest, or in receipt of a gift or personal benefit in contravention of the *Act*.
9. This petition seeks a judicial review of that opinion based on the following considerations.

PART 3: LEGAL BASIS

Standard of Review

10. The standard of review is reasonableness.

Dunsmuir v. New Brunswick, 2008 SCC 9 (CanLII)

11. The function of judicial review is to ensure the legality, the reasonableness and the fairness of both the administrative process and its outcomes. In addition to being concerned with the existence of justification, transparency and intelligibility, a reviewing court is concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Dunsmuir v. New Brunswick, 2008 SCC 9 at paras.28 and 47

Reasonable Apprehension of Bias

12. A decision may be set aside if the process leading to the issuance of the decision is marred by the reasonable apprehension of bias.

Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 SCR 623, 1992 CanLII 84 (SCC)

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817

13. The test for a reasonable apprehension of bias was set out by the Supreme Court of Canada in *Committee for Justice and Liberty v. Canada (National Energy Board)*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at p 394:

what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

14. That test has been affirmed by the Supreme Court of Canada and British Columbia courts in numerous subsequent decisions.

Wewaykum Indian Band v. Canada, 2003 SCC 45

R v. S (RD), 1997 CanLII 324 (SCC), [1997] 3 SCR 484

Gordon v. Pielak, 2012 BCPC 3867 (CanLII)

15. The Petitioner submits that it is more likely than not that Commissioner Fraser has a reasonable apprehension of bias which precludes him from making a fair decision.

(a) Family connection with the Premier

16. Paul Fraser's son, John Paul Fraser has personal ties to the Premier and is a senior member in the BC Liberal Party. He is currently serving as the deputy minister for government communications and public engagement. It is reasonable to suggest that the close family connection to senior members of the BC Liberal Party, including Premier Clark, is a factor indicating a reasonable apprehension of bias.

(b) Previous Instance of Recusal

17. In 2012 Liberal MLA John van Dongen launched a complaint against Premier Clark. On that instance, Commissioner Fraser recused himself from investigating and ruling on the complaint on the basis that his son's senior role in the Liberal government and ties to Clark could create the 'perception' of a conflict of interest.

The Commissioner's admission in 2012 that there was sufficient perception of bias to recuse himself from ruling on a complaint concerning the Premier is inconsistent with the Commissioner's refusal to recuse himself from ruling on the complaints made in 2016 by Mr. Eby and Democracy Watch. The Commissioner's inconsistency is neither transparent nor intelligible.

News Release, November 13, 2012, "Statement from Paul D.K. Fraser, Q.C. - Conflict of Interest Commissioner"

18. An informed person, viewing the matter in a realistic and practical manner, would conclude that someone in the position of Paul Fraser would more likely than not make an unfair decision. This conclusion is likely after considering the fact that Paul Fraser: (a) holds a close familial connection to a senior member of the BC Liberal Party; and (b) has previously recused himself in similar circumstances, acknowledging that there was potential for the perception of a conflict of interest.

The Decision is Not Justified, Transparent or Intelligible

19. The Decision is unreasonable as it is not justified, transparent or intelligible.

Dunsmuir v. New Brunswick, [2008] 1 SCR 190, 2008 SCC 9 (CanLII)

20. In the assessment of reasonableness, "reviewing courts should ask whether 'when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision' (para. 163)." In assessing the reasonableness of the Commissioner's opinion it is imperative that we consider the "nature of the statutory task".

Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), [2011] 3 SCR 708, 2011 SCC 61 (CanLII) at para 18

Canada Post Corp. v. Public Service Alliance of Canada, 2010 FCA 56 (CanLII), [2011] 2 F.C.R. 221, rev'd in part 2011 SCC 57 (CanLII), [2011] 3 S.C.R. 572

21. The purpose of the *Act* was discussed at length in the *Blencoe* decision. At page 22, Commissioner Hughes stated his goal was to "reach a conclusion that [would] honour the heart and soul of [the] legislation."

Alleged Contravention of the Members' Conflict of Interest Act by the Honourable Robin Blencoe, Minister of Municipal Affairs, Recreation and Housing (16 August, 1993), online:
http://www.coibc.ca/down/opinion/opinion_blencoe_1993.pdf ("*Blencoe* decision")

22. Also at page 22, Commissioner Hughes went on to hold that the general purpose of the *Act* is to "promote public confidence in elected public officials as they conduct

public business." This sentiment was more or less repeated at page 12 of the *Harcourt* opinion. This general purpose provides guidance in assessing the reasonableness of Commissioner Fraser's decision.

Alleged Contravention of Provisions of the Members' Conflict of Interest Act by the Honourable Michael Harcourt, Member of the Legislative Assembly for Vancouver-Mount Pleasant (17 April, 1995), online: http://www.coibc.ca/down/opinion/opinion_harcourt_1995.pdf ("*Harcourt decision*")

Statutory Provisions

23. The relevant provisions of the *Act* are as follows:

2(1) For the purposes of this Act, a member has a conflict of interest when the member exercises an official power or performs an official duty or function in the execution of his or her office and at the same time knows that in the performance of the duty or function or in the exercise of the power there is the opportunity to further his or her private interest.

2(2) For the purposes of this Act, a member has an apparent conflict of interest if there is a reasonable perception, which a reasonably well informed person could properly have, that the member's ability to exercise an official power or perform an official duty or function must have been affected by his or her private interest.

3 A member must not exercise an official power or perform an official duty or function if the member has a conflict of interest or an apparent conflict of interest.

7(1) A member must not accept a fee, gift or personal benefit, except compensation authorized by law, that is connected directly or indirectly with the performance of his or her duties of office.

1. Unreasonable to conclude Premier did not have Private Interest

24. It was unreasonable for the Commissioner to conclude that the Premier did not have a "private interest" within the meaning of s.2 of the *Act* in hosting or attending these exclusive fundraising events at an official function.

25. The Commissioner unreasonably concluded that the Premier's employment income derived from LPBC, which is secured in part by her fundraising activities, does not create a private interest sufficient to conflict with her duties to the public as Premier. This problem is manifest at page 4 of the Executive Summary of the Commissioner's May 4, 2016 decision, in the following passage:

Ultimately, Mr. Eby conceded (in his final submission) that it was

inaccurate to describe the Leader's Allowance as a "commission". In my opinion, there is no convincing evidence or information to suggest that the Leader's Allowance is determined according to the success or failure of "exclusive" fundraising events in which the Premier participates. The Premier's private interest is not advanced by any particular donor or group of donors at these events. She cannot, therefore, be in an apparent conflict of interest in relation to those donors.

26. This point is elaborated at paragraphs 47 of the Decision as follows:

[47] Mr. Eby argues that "the Premier is personally financially dependent to some extent on these large private donations coming from these private parties". In particular, Mr. Eby identified the receipt of a Premier's Allowance from the BC Liberal party as a "direct and personal" benefit which therefore constitutes a private interest. However, this benefit is paid to the Premier by the Party out of its general funds. Receipt of the allowance is not dependent upon nor attributable to any one donor or group of donors. As noted above, Mr. Eby concedes that the allowance cannot properly be described as a "commission", nor are donors able to direct funds to the Premier.

[48] To be considered an apparent conflict of interest, a reasonable person would have to conclude that the Premier's ability to carry out an official duty or function must be impaired by her receipt of the Leadership Allowance, which the Premier would receive from the Party regardless of who is in attendance at a particular fundraising event or how much they donate to the Party. ...

[50] In a nutshell, the mischief section 2 seeks to avoid is a *quid pro quo* situation; i.e. to prevent Members from using public office to return a favour to someone who has given them a private benefit, or appear to be doing so. The link between the multiple individual donations to the Party and the payment of the Allowance to the Premier out of aggregated Party funds, is in my view, far too diffuse and indirect to establish a private interest in relation to each individual donor. Based on the circumstances under consideration in this request, receipt of the Premier's Allowance does not constitute a breach of the Act.

27. The Commissioner clearly believed that there could only be an actual or apparent conflict if the Premier's employment income could specifically be traced to or caused by ("determined according to") a specific donation or group of donations. In the Petitioner's submission, the Premier need not receive a commission or percentage of the large donations in order for there to be an actual or apparent conflict of interest. All that is required under s.2(1) of the Act for a conflict to exist is that the Premier "knows that in the performance of the duty or function or in the exercise of the power there is the opportunity to further his or her private interest".

28. It is important to note that the Premier has not directly denied that that the Premier attended the fundraisers in the role of Premier. No evidence was adduced to suggest that Ms. Clark put aside her role as Premier during these fundraisers and spoke only about party issues. There was no question that her attendance at the events was "in the performance of a duty" or "in the performance of a function". The sole issue for determination by the Commissioner under s.2(1) of the *Act* was whether the Premier knew that in the performance of that function or duty there was an opportunity to further her private interest.
29. The Commissioner never considered whether the Premier knew that attendance at the events involved "an opportunity to further her private interest". It was an unreasonable error for the Commissioner to require that the Premier's interests be advanced directly by the donations or that the Premier's salary be determined by the success or failure of the fundraisers in order to establish knowledge of an opportunity to further the Premier's private interest.
30. Similarly, under s.2(2) of the *Act*, "a member has an apparent conflict of interest if there is a reasonable perception, which a reasonably well informed person could properly have, that the member's ability to exercise an official power or perform an official duty or function" is affected by his or her private interest. The Commissioner did not consider the sole issue under s.2(2) of the *Act*: whether there is a reasonable perception that the salary paid to the Premier by LPBC affected her attendance at the events.
31. In the Petitioner's submission, for the purposes of s.2 of the *Act*, the Premier knows that the events are an opportunity to further her private interest if the funds raised at these exclusive events materially contribute to LPBC's ability to pay the Premier's salary. It was unreasonable for the Commissioner to require a causal connection between the Premier's salary and specific donations.
32. The Petitioner respectfully submits that there is a conflict of interest when a material part of the Premier's salary is paid by large donors and another part of the Premier's salary is paid by the people of British Columbia.

2. Unreasonable to Conclude Large Donations do not create a Private Interest

33. The Commissioner failed to distinguish the few high dollar donations that served as a barrier to entry for the Premier's events from numerous smaller anonymous donations. At paragraph 45 of his judgment, Commissioner Fraser found the facts in this case to be similar to *Harcourt* and thus applied the *Harcourt* principle that "as a general rule, campaign contributions directed to the Party do not give rise to a private interest under the *Act*."
34. The application of this principle is unreasonable given the factual distinction between the Premier's events and the event in *Harcourt*. In *Harcourt* the complaint

involved a party banquet that had a cost of \$40 per ticket. It is unreasonable to suggest that principle applies equally to a \$40 entrance ticket and a \$20,000 entrance ticket.

35. As a matter of reasonable perceptions, the higher the cost of attendance the higher the chance that a private interest will be engaged. At some point, the sheer size of a donation gives rise to an inference that the reasonable perception is that a donation is given in exchange for special access to the Premier (ie. lobbying access) or perhaps even in exchange for the future consideration, whether specific or inchoate, in the form of an exercise of the Premier's powers to benefit the donor.

3. Unreasonable to Conclude that Fundraising Events did not create Apparent Conflicts of Interest that affected Premier's future decisions

36. It was unreasonable for the Commissioner to conclude that high-dollar fundraising events did not create apparent conflicts of interest that affected the Premier's future decision-making.
37. The Commissioner expressly refused to consider the actual or apparent conflict of interest arising from the size of the donation and refused to consider whether a conflict arises when large donors ingratiate themselves with the Premier. At paragraph 62, the commissioner states that "it is neither appropriate nor indeed within my capacity or authority to monitor what government decisions may be upcoming and speculate as to whether there may be a potential real or apparent conflict of interest arising for the Premier (or for any Member for that matter) based on party fundraising activities."
38. The Petitioner says that this approach unnecessarily fetters the discretion of the Commissioner and ignores relevant considerations. If large donations are consistently made by mining concerns who might stand to gain if the Province perpetuates its lax spill regulatory regime and continues not to enforce its spill regulations, for example, that is something the Commissioner must take into account. If the large donations are made by real estate developers who might benefit from lax regulation or advance notice of changes to property transfer tax rates, that is something the Commissioner must take into account.
39. The Commissioner received a request under s.19(1) of the Act from Mr. Eby to examine whether hosting and attending the exclusive, high-priced fundraising events created a private interest for the Premier because she is paid a salary paid in part by the pool of funds raised and whether there is a reasonable perception that a reasonably well informed individual could properly have concluded that these financial exchanges will affect her future exercise of power. This was an explicit request for the Commissioner to rule whether each event put the Premier in an apparent conflict of interest that prohibits her under s.3 of the Act from exercising powers or performing official duties or functions that affect the donors who attend each event. It was unreasonable for the Commissioner to respond only partially to

Mr. Eby's request and refuse to issue a ruling on this issue.

40. As part of the Commissioner's refusal to respond fully to Mr. Eby's request, it was unreasonable for the Commissioner to refuse to investigate the identity of the donors who purchased event tickets to meet with the Premier. With or without knowing the identities of the ticket purchasers, it was unreasonable for the Commissioner to conclude that the purchases and paid attendance of the Premier did not create a reasonable perception that the Premier now has a private interest that will affect her exercise of official powers or official functions.
41. It was equally unreasonable for the Commissioner to conclude that each of the four sponsors who donated \$2,500 to fundraising events held by the Premier's LPBC Westside-Kelowna Riding Association did not create a private interest for the Premier. Sponsorship of this fundraising event was analogous to the assistance provided to a member that a past Commissioner concluded in the *Blencoe* ruling was significant enough to create a private interest for the member.
42. Section 18(1) of the *Act* holds that a "member may request, by application in writing, that the commissioner give an opinion or recommendation on any matter respecting the obligations of the member under this *Act*." The language here, and contained throughout the *Act*, does not imply that the Commissioner may only look at past exercises of power and refuse to consider anticipated exercises of power, particularly when the exercise of power is ongoing, as it is when the power is exercised to maintain or perpetuate regulatory attitudes or frameworks.
43. The purpose of the *Act*, at the very least, intends the Commissioner to prevent any conflict of interest, rather than just respond to past conflicts.

4. Unreasonable Conclusion Regarding "Personal Benefit"

44. The Commissioner unreasonably concluded, in light of the large individual donations to LPBC that are the price of entry to exclusive events with the Premier, that the salary received by the Premier from LPBC is not a "personal benefit.... that is connected directly or indirectly with the performance of his or her duties" pursuant to s.7 of the *Act*.
45. The Commissioner's reasons in concluding that the Premier did not breach s.7 are brief in the extreme:

[66] Whether or not a Member participates directly or indirectly in fundraising activities for their party, the donated money is never in the Member's possession or under their control. The funds raised at "exclusive" events are donated to the BC Liberal Party and are not accessible for the Premier's personal use. Contributions to Members' Parties are properly reported to Elections BC in accordance with the *Election Act*.

[67] What, then, is the "personal benefit" that could be subject to section 7 disclosure? As noted above, there may be a general, political benefit that accrues to the Premier by bolstering the financial capacity of the Party. However, something more direct and tangible is required to be considered a "personal benefit" i.e. something that is capable of being reported and disclosed. In my view it is inconsistent with the intent and purpose of section 7 to interpret "personal benefit" as encompassing a political benefit, whether direct or indirect.

46. The Petitioner respectfully submits that the indirect benefit received by the Premier from the purchasers of expensive entry tickets from LPBC for exclusive events with the Premier is a salary from LPBC. Attendance at LPBC fundraisers is undoubtedly not the only duty of the leader of the LPBC for which she is paid and the donations from wealthy donors attending exclusive LPBC fundraisers is undoubtedly not the only source of funds for LPBC.
47. The Petitioner says it is unreasonable to conclude that a salary is not a personal benefit. The only question is whether receipt of the personal benefit is "connected... indirectly with the performance of the Premier's duties". On this question, it is unreasonable to conclude that the high-dollar draw of the fundraisers does not arise from the Premier's political power and influence or that the Premier's salary is not paid in part for her attendance and participation at fundraising events.
48. By getting paid by the LPBC to attend fundraisers, the Premier accepted a personal benefit that is connected to her holding public office. To conclude otherwise is unreasonable.
49. The Premier breached s. 7 of the *Act* by getting paid to attend a series of events, where the events themselves traded on the Premier's power and influence. The reason why LPBC is able to charge as much for event access tickets as they did is the draw of the political influence of a Premier sitting in office. It is absurd not to recognize that the ticket price is influenced by the power or anticipated power of the office holder. A leader of an opposition party that sells high-priced event access tickets when that party is expected to win a majority of seats in the next election creates the same actual or perceived conflict of interest.

The Decision is Unreasonable as to Outcome

50. The Commissioner's decision that there was no conflict of interest under ss.2 and 7 of the *Act* was unreasonable and does not fall within a range of possible, acceptable outcomes for the reasons given above.
51. Based on the above considerations the decision ought to be quashed and set aside and the issues remitted to a delegate of the Commissioner who is not himself or herself in a conflict of interest.

Costs

52. This judicial review raises issues that are of broad public importance. Even if the Petitioners are unsuccessful on this application for judicial review, the public interest will have been served, and the Petitioners ask that no costs be awarded against them.

Enactments and Other Grounds Replied Upon

1. *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.
2. *Supreme Court Civil Rules*, B.C. Reg. 168/2009.
3. *Members' Conflict of Interest Act*, [RSBC 1996] c.287.
4. Such other enactments and grounds as counsel may identify.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Toby Rauch-Davis, affirmed October 24, 2016.
2. Such other materials as counsel may identify.

The petitioners estimate that the hearing of the petition will take one day.

Dated this 25th day of October, 2016.



Jason Gratl
Counsel for the Petitioner

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs of Part 1 of this petition
☐ with the following variations and additional terms:

.....

.....

.....

.....

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.....

.....

Date: _____

 Signature of ☐ Judge ☐ Master



No. S169841
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DEMOCRACY WATCH

PETITIONER

AND:

BRITISH COLUMBIA CONFLICT OF INTEREST COMMISSIONER

RESPONDENT

RESPONSE TO PETITION

Filed by: The Respondent, British Columbia Conflict of Interest Commissioner (the
"Commissioner")

THIS IS A RESPONSE TO the Petition filed 25 October 2016.

Part 1: ORDERS CONSENTED TO

The Commissioner consents to the granting of the orders set out in NONE of the paragraphs of Part 1 of the Petition.

Part 2: ORDERS OPPOSED

The Commissioner opposes the granting of the orders set out in Part 1 of the Petition.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Commissioner takes no position on the granting of the orders set out in NONE of the paragraphs of Part 1 of the Petition.

Part 4: FACTUAL BASIS

1. On 31 March 2016, the Petitioner Democracy Watch requested that the Commissioner give an opinion on whether the Honourable Christy Clark, M.L.A. and Premier of British Columbia, had contravened the *Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287.

Affidavit #1 of Alyne Mochan, at para. 2

2. In documents published on 4 May 2016 and 9 August 2016, the Commissioner expressed his opinion that the Hon. Ms. Clark had not contravened the *Act* ("the Opinion").

Affidavit #1 of Alyne Mochan, at para. 3

Part 5: LEGAL BASIS

3. This Petition should be dismissed for any of the following three reasons:
 - (i) The Opinion of the Commissioner is protected by legislative privilege and immune from judicial review;
 - (ii) The Opinion is not subject to judicial review under the *Judicial Review Procedure Act*;
 - (iii) Democracy Watch lacks standing to bring this Petition.
- A. The Opinion is protected by legislative privilege and immune from judicial review
 - i. *Legislative privilege*
4. The Legislative Assembly of British Columbia has "the privileges, immunities and powers that were held and exercised by the Commons House of Parliament of the United Kingdom ... on February 14, 1871, so far as not inconsistent with the *Constitution Act*".

Legislative Assembly Privilege Act, R.S.B.C. 1996, c. 259, s. 1
5. Legislative privilege is "one of the ways in which the fundamental constitutional separation of powers is respected". It ensures that "legislative activities" are "unimpeded by any external body or institution, including the courts".

Canada (House of Commons) v. Vaid, 2005 SCC 30, at paras. 20-21
6. Judicial review is the process by which the judiciary supervises the executive to ensure it stays within the limits of the power it has been conferred by the Legislative Assembly. The separation of powers requires that matters internal to the Legislative Assembly be regulated solely by the Assembly itself and not subject to interference from the courts.

Vaid, at para. 29, point 12
7. A legislative assembly's "disciplinary authority over members" is protected by legislative privilege. "The history of the prerogative of Parliament and legislative assemblies to maintain the integrity of their processes by disciplining, purging and disqualifying those who abuse them is as old as Parliament itself".

Vaid, at para. 29, point 10
Harvey v. New Brunswick (Attorney General), [1996] 2 S.C.R. 876, at para. 64,
per McLachlin J., as she then was, concurring

ii. The Commissioner's role

8. In essence, the Commissioner's role is to assist the Legislative Assembly in the exercise of its disciplinary authority over its members. When requested, the Commissioner expresses his opinion to the Assembly about whether a member has contravened the *Members' Conflict of Interest Act*, and may make a recommendation to the Assembly about whether and how it should discipline the member.

Members' Conflict of Interest Act, R.S.B.C. 1996, c. 287, s. 19

9. The Commissioner is "an officer of the Legislative Assembly" and not an "officer of the Legislature" like the Auditor General and Information and Privacy Commissioner.

Members' Conflict of Interest Act, s. 14(1)

Auditor General Act, S.B.C. 2003, c. 2, s. 2(1)

Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165, s. 37(2)

10. This distinction is significant. The "Legislature" is "the Lieutenant Governor acting by and with the advice and consent of the Legislative Assembly". The "Legislative Assembly" is "the Legislative Assembly of British Columbia constituted under the *Constitution Act*", which "consists of the members elected in the manner provided for by the *Election Act*".

Interpretation Act, R.S.B.C. 1996, c. 238, s. 29

Constitution Act, R.S.B.C. 1996, c. 66, s. 18(2)

Election Act, R.S.B.C. 1996, c. 106

11. That the Commissioner is an officer of the Legislative Assembly, as opposed to an officer of the Legislature, illustrates the extent to which the Commissioner is an integral part of the Assembly's internal processes for regulating the ethical conduct of its members. The Commissioner is more closely integrated with the inner workings of the Assembly and its members than even the Auditor General, who is merely an officer of the Legislature.

iii. The Court of Appeal's conclusions in *Tafler*

12. In *Tafler*, the Court of Appeal found that the opinions and recommendations the Commissioner expresses to the Legislative Assembly are "necessary to the proper functioning" of the Assembly and "a vital step" in the process by which the Assembly decides whether and how to discipline its members.

Tafler v. British Columbia (Conflict of Interest Commissioner) (1998),
161 D.L.R. (4th) 511, at paras. 16-17 (B.C.C.A.)

13. Accordingly, the Court of Appeal held in *Tafler* that the opinions and recommendations the Commissioner expresses to the Legislative Assembly are protected by legislative privilege and immune from judicial review. They are "made within, and with respect to, the privileges of the Legislative Assembly and are not reviewable in the courts".

Tafler, at para. 17
see also *R. v. Basi*, 2009 BCSC 739, at para. 45, *per* Bennett J., as she then was
Morin v. Crawford (1999), 14 Admin. L.R. (3d) 287, at paras. 4, 67 (N.W.T.S.C.)

iv. Conclusion: the Opinion is immune from judicial review

14. *Tafler* is binding on this Court and dispositive of this Petition: the Opinion is protected by legislative privilege and immune from judicial review.

B. The Opinion is not subject to judicial review under the *Judicial Review Procedure Act*.

i. Scope of judicial review

15. In British Columbia, only “a decision made in the exercise of a statutory power of decision”, or a decision that could be set aside at common law on an application for relief in the nature of certiorari, is subject to judicial review.

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, s. 3

16. A “statutory power of decision” is “a power or right conferred by an enactment to make a decision deciding or prescribing (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or (b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it”.

Judicial Review Procedure Act, s. 1

17. At common law, relief in the nature of certiorari is available against “any public body with power to decide any matter affecting the rights, interests, property, privileges or liberty of any person”.

Martineau v. Matsqui Disciplinary Bd., [1980] 1 S.C.R. 602, at p. 628

18. In effect, only a decision that has legal consequences for a person can be the subject of a petition for judicial review.

ii. The Opinion is not a decision that has legal consequences for a person

19. The Opinion does not decide or prescribe any person’s rights, interests, property, privileges, eligibility for benefits or liberty. The Opinion does not decide or prescribe anything at all. It merely expresses the Commissioner’s opinion that the Hon. Ms. Clark had not contravened the *Members’ Conflict of Interest Act*. No legal consequences flow from this opinion. The Opinion itself has no legal consequences for any person.
20. Even if the Commissioner had reached the opposite conclusion, that the Hon. Ms. Clark had contravened the *Members’ Conflict of Interest Act*, the Opinion itself would not have

had any legal consequences for any person. When the Commissioner finds a contravention, he may "recommend" to the Legislative Assembly that it reprimand, suspend or fine the member, or that it declare the member's seat vacant until an election is held. Importantly, however, only the Legislative Assembly itself has the power to decide whether a member will be reprimanded, suspended or fined, or his or her seat will be declared vacant.

Members Conflict of Interest Act, s. 22

21. The Federal Court of Appeal has held that opinions of the federal Conflict of Interest and Ethics Commissioner, who performs a similar function for Parliament, do not affect the rights of any person or carry legal consequences and are not subject to judicial review.

Democracy Watch v. Conflict of Interest and Ethics Commissioner,
2009 FCA 15, at paras. 9-14

see also *Clean Train Coalition Inc. v. Metrolinx*, 2012 ONSC 6593, at para. 16

iii. Conclusion: the Opinion is not subject to judicial review under the Judicial Review Procedure Act

22. The Opinion is not a "a decision made in the exercise of a statutory power of decision", nor is it a decision that could at common law be set aside on an application for relief in the nature of certiorari. Accordingly, the Opinion is not subject to judicial review under the *Judicial Review Procedure Act*.

C. Democracy Watch lacks standing to bring this Petition.

23. In British Columbia, a person has standing to seek judicial review of a decision only if the legislation under which the decision was made gives an "express or implied right to persons in the position of the applicant to complain" about the decision.

Sandhu v. British Columbia (Provincial Court Judge), 2013 BCCA 88, at para. 35
quoting *Inland Revenue Commissioners v. National Federation of Self-Employed & Small Businesses Ltd.*, [1981] 2 All E.R. 93, at p. 108 (H.L.)

24. The *Members Conflict of Interest Act* does not give the public any express or implied right to complain about the Commissioner's opinions and recommendations. The public may request that the Commissioner give an opinion on whether an M.L.A. has contravened the *Act*, but the public has no further involvement once a request is made.

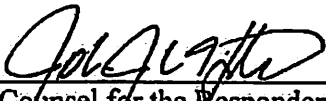
Members Conflict of Interest Act, s. 19(2)

Part 6: MATERIAL TO BE RELIED ON

25. Affidavit #1 of Alyne Mochan, made 24 November 2016.

The Commissioner estimates that the application will take 90 minutes.

Dated: November 28, 2016


Counsel for the Respondent, British Columbia Conflict
of Interest Commissioner
John J.L. Hunter, Q.C.
Hunter Litigation Chambers Law Corporation

The Commissioner's address for service:	c/o Hunter Litigation Chambers 2100 – 1040 West Georgia Street Vancouver, B.C. V6E 4H1
Fax number address for service:	604 647 4554
E-mail address for service:	jhunter@litigationchambers.com
Names of the Commissioner's lawyers:	John J.L. Hunter, Q.C. Trevor J.S. Bant



No. S169841
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DEMOCRACY WATCH

PETITIONER

AND:

BRITISH COLUMBIA CONFLICT OF INTEREST COMMISSIONER

RESPONDENT

NOTICE OF APPLICATION

Name of applicant: The Respondent, British Columbia Conflict of Interest Commissioner (the "**Commissioner**")

TO: The Petitioner, Democracy Watch

TAKE NOTICE that an application will be made by the applicant to the presiding judge at the Courthouse at 800 Smithe Street, Vancouver, B.C. V6Z 2E1, on Thursday the 5th day of January 2017 at 9:45 a.m. for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order pursuant to R. 9-5(1)(a) striking the whole of the Petition filed 25 October 2016 by Democracy Watch and dismissing the application for judicial review.
2. Costs.

Part 2: FACTUAL BASIS

3. On 31 March 2016, the Petitioner Democracy Watch requested that the Commissioner give an opinion on whether the Honourable Christy Clark, M.L.A. and Premier of British Columbia, had contravened the *Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287.
4. In documents published on 4 May 2016 and 9 August 2016, the Commissioner expressed his opinion that the Hon. Ms. Clark had not contravened the *Act* ("the **Opinion**").

Affidavit of Alyne Mochan made 24 November 2016, at para. 3 (see Exhibit A)

5. On 25 October 2016, Democracy Watch filed a Petition applying for judicial review of the Opinion.

Part 3: LEGAL BASIS

6. For the following three reasons, the Petition discloses no reasonable claim and the application for judicial review should be dismissed:
 - (a) The Opinion is protected by legislative privilege and immune from judicial review;
 - (b) The Opinion is not subject to judicial review under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 3; and,
 - (c) Democracy Watch lacks standing to bring the Petition.

A. The Opinion is protected by legislative privilege and immune from judicial review.

i. Legislative privilege

7. The Legislative Assembly of British Columbia has “the privileges, immunities and powers that were held and exercised by the Commons House of Parliament of the United Kingdom ... on February 14, 1871, so far as not inconsistent with the *Constitution Act*”.

Legislative Assembly Privilege Act, R.S.B.C. 1996, c. 259, s. 1

8. Legislative privilege is “one of the ways in which the fundamental constitutional separation of powers is respected”. It ensures that “legislative activities” are “unimpeded by any external body or institution, including the courts”.

Canada (House of Commons) v. Vaid, 2005 SCC 30, at paras. 20-21

9. Judicial review is the process by which the judiciary supervises the executive to ensure it stays within the limits of the power it has been conferred by the Legislative Assembly. The separation of powers requires that matters internal to the Legislative Assembly be regulated solely by the Assembly itself and not subject to interference from the courts.

Vaid, at para. 29, point 12

10. A legislative assembly’s “disciplinary authority over members” is protected by legislative privilege. “The history of the prerogative of Parliament and legislative assemblies to maintain the integrity of their processes by disciplining, purging and disqualifying those who abuse them is as old as Parliament itself”.

Vaid, at para. 29, point 10

Harvey v. New Brunswick (Attorney General), [1996] 2 S.C.R. 876, at para. 64,
per McLachlin J., as she then was, concurring

ii. The Commissioner's role

11. In essence, the Commissioner's role is to assist the Legislative Assembly in the exercise of its disciplinary authority over its members. When requested, the Commissioner expresses his opinion to the Assembly about whether a member has contravened the *Members' Conflict of Interest Act*, and may make a recommendation to the Assembly about whether and how it should discipline the member.

Members' Conflict of Interest Act, s. 19

12. The Commissioner is "an officer of the Legislative Assembly" and not an "officer of the Legislature" like the Auditor General and Information and Privacy Commissioner.

Members' Conflict of Interest Act, s. 14(1)

Auditor General Act, S.B.C. 2003, c. 2, s. 2(1)

Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165, s. 37(2)

13. This distinction is significant. The "Legislature" is "the Lieutenant Governor acting by and with the advice and consent of the Legislative Assembly". The "Legislative Assembly" is "the Legislative Assembly of British Columbia constituted under the *Constitution Act*", which "consists of the members elected in the manner provided for by the *Election Act*".

Interpretation Act, R.S.B.C. 1996, c. 238, s. 29

Constitution Act, R.S.B.C. 1996, c. 66, s. 18(2)

Election Act, R.S.B.C. 1996, c. 106

14. That the Commissioner is an officer of the Legislative Assembly, as opposed to an officer of the Legislature, illustrates the extent to which the Commissioner is an integral part of the Assembly's internal processes for regulating the ethical conduct of its members. The Commissioner is more closely integrated with the inner workings of the Assembly and its members than even the Auditor General, who is merely an officer of the Legislature.

iii. The Court of Appeal's conclusions in *Tafler*

15. In *Tafler*, the Court of Appeal found that the opinions and recommendations the Commissioner expresses to the Legislative Assembly are "necessary to the proper functioning" of the Assembly and "a vital step" in the process by which the Assembly decides whether and how to discipline its members.

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161 D.L.R. (4th) 511, at paras. 16-17 (B.C.C.A.)

16. Accordingly, the Court of Appeal held in *Tafler* that the opinions and recommendations the Commissioner expresses to the Legislative Assembly are protected by legislative privilege and immune from judicial review. They are "made within, and with respect to, the privileges of the Legislative Assembly and are not reviewable in the courts".

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20. At common law, relief in the nature of certiorari is available against “any public body with power to decide any matter affecting the rights, interests, property, privileges or liberty of any person”.

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23. Even if the Commissioner had reached the opposite conclusion, that the Hon. Ms. Clark had contravened the *Members’ Conflict of Interest Act*, the Opinion itself would not have had any legal consequences for any person. When the Commissioner finds a contravention, he may “recommend” to the Legislative Assembly that it reprimand,

suspend or fine the member, or that it declare the member's seat vacant until an election is held. Importantly, however, only the Legislative Assembly itself has the power to decide whether a member will be reprimanded, suspended or fined, or his or her seat will be declared vacant.

Members Conflict of Interest Act, s. 22

24. The Federal Court of Appeal has held that opinions of the federal Conflict of Interest and Ethics Commissioner, who performs a similar function for Parliament, do not affect the rights of any person or carry legal consequences and are not subject to judicial review.

Democracy Watch v. Conflict of Interest and Ethics Commissioner,
2009 FCA 15, at paras. 9-14

see also *Clean Train Coalition Inc. v. Metrolinx*, 2012 ONSC 6593, at para. 16

iii. Conclusion: the Opinion is not subject to judicial review under the Judicial Review Procedure Act

25. The Opinion is not a "a decision made in the exercise of a statutory power of decision", nor is it a decision that could at common law be set aside on an application for relief in the nature of certiorari. Accordingly, the Opinion is not subject to judicial review under the *Judicial Review Procedure Act*.

C. Democracy Watch lacks standing to bring the Petition.

26. In British Columbia, a person has standing to seek judicial review of a decision only if the legislation under which the decision was made gives an "express or implied right to persons in the position of the applicant to complain" about the decision.

Sandhu v. British Columbia (Provincial Court Judge), 2013 BCCA 88, at para. 35
quoting *Inland Revenue Commissioners v. National Federation of Self-Employed & Small Businesses Ltd.*, [1981] 2 All E.R. 93, at p. 108 (H.L.)

27. The *Members Conflict of Interest Act* does not give the public any express or implied right to complain about the Commissioner's opinions and recommendations. The public may request that the Commissioner give an opinion on whether an M.L.A. has contravened the *Act*, but the public has no further involvement once a request is made.

Members Conflict of Interest Act, s. 19(2)

Part 4: MATERIAL TO BE RELIED ON

28. The Petition filed 25 October 2016 by Democracy Watch.
29. The Affidavit of Alyne Mochan made 24 November 2016.


The applicant estimates that the application will take ninety minutes.

- ☐ This matter is within the jurisdiction of a master
- ☒ This matter is not within the jurisdiction of a master

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that:
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (ii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: 29 November 2016


Counsel for the Respondent, British Columbia
Conflict of Interest Commissioner
John J.L. Hunter, Q.C.
Hunter Litigation Chambers Law Corporation

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs _____ of Part 1 of this notice of application☐ with the following variations and additional terms:

Date: _____

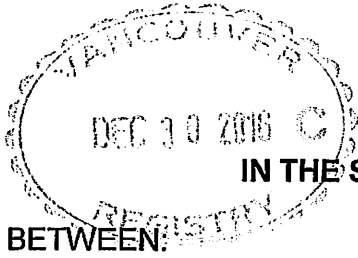
Signature of ☐ Judge ☐ Master

APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts



No. S169841
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DEMOCRACY WATCH

PETITIONER

AND:

BRITISH COLUMBIA CONFLICT OF INTEREST COMMISSIONER

RESPONDENT

APPLICATION RESPONSE

Application response of: the Petitioner, Democracy Watch (the "application respondent")

THIS IS A RESPONSE TO the notice of application of the Respondent, British Columbia Conflict of Interest Commissioner filed November 29, 2016.

Part 1: ORDERS CONSENTED TO

The application respondent consents to the granting of the orders set out in **NONE** of the paragraphs of Part 1 of the notice of application.

Part 2: ORDERS OPPOSED

The application respondent opposes the granting of **Paragraphs 1 and 2** of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent takes no position on the granting of the orders set out in **NONE** of the paragraphs of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. The Premier of British Columbia, Christina Clark, specifically in her role as Premier, lent her office as Premier to the sale of tickets to exclusive "cash-for-access" events to raise funds for the Liberal Party of British Columbia (the "Liberal Party") and concurrently received a salary from the Liberal Party, in part for attending the fundraisers, in the amount of \$50,000.00 per annum. Tickets for some of the fundraisers cost upwards of \$20,000.00.
2. The Petitioner says that the Premier is in an apparent conflict of interest because it is reasonable for an informed person, viewing the matter realistically and practically, and having thought the matter through, to conclude that:
 - a. ticket holders are paying to have access to the Premier because she is the most powerful member of the executive branch of government of the Province of British Columbia;
 - b. ticket holders pay to access the Premier because they expect to be able to influence the Premier's exercise of executive power;
 - c. The Premier attends the "cash-for-access" events expressly in her role as Premier, rather than in her role as a member of the Legislative Assembly or her role as the leader of the Liberal Party, because access to executive power is worth much more to donors than access to the influence of an MLA or party leader;
 - d. Christina Clark's duties as leader of the Liberal Party include attending at "cash-for-access" fundraising events and engaging in relevant conversations with ticket-holders;
 - e. Part of the salary paid to Christina Clark by the Liberal Party is in consideration for satisfaction of her "cash-for-access" fundraising duties;
 - f. Christina Clark receives a direct or indirect personal benefit for

attending the fundraisers by way of the salary paid by the Liberal Party, even though there is no known correlation between her Party salary and the number of "cash-for-access" fundraisers or the total amount raised at the "cash-for-access" fundraisers;

- g. The ticket prices paid to the Liberal Party by ticket holders for access to the Premier materially contribute to the Liberal Party's ability to pay the Premier's salary; and
 - h. The Premier's exercise of executive power may well be affected, whether consciously or unconsciously, by the payments received directly by the Liberal Party, by the personal receipt of the salary from the Liberal Party or by the lobbying that takes place at the "cash-for-access" fundraisers.
3. The Petitioner says that the Premier should be prohibited by s.3 of the *Members Conflict of Interest Act*, [RSBC 1996], c.287, (the "*Conflict of Interest Act*") from exercising any official power or performing any official duty or function in respect of the persons and organizations that paid to attend the "cash-for-access" fundraisers.
4. On March 31, 2016, Democracy Watch complained about Christina Clark's apparent conflict of interest to the Conflict of Interest Commissioner. The Conflict of Interest Commissioner decided that there was no conflict of interest and, inferentially, refused to restrict the scope of the Premier's executive power pursuant to s.3 of the *Conflict of Interest Act*.

Part 5: LEGAL BASIS

- 1. The *Conflict of Interest Act* is intended to curtail conflicts of interests both for members of the Legislative Assembly and for members of the Executive Council. The *Conflict of Interest Act* defines "member" as "a member of the Legislative Assembly or of the Executive Council, or both".

Conflict of Interest Act, s.1

2. The distinction made by the *Conflict of Interest Act* between members of the Legislative Assembly and members of the Executive Council is a reflection of the fundamental distinction between the legislature and the government executive made by British Columbia's *Constitution Act*.

Constitution Act, [RSBC 1996], c.66

3. Section 9 of the *Constitution Act* provides that the Executive Council is composed of the persons the Lieutenant Governor appoints, including the Premier of British Columbia, who is president of the Executive Council. Executive Power is as defined by ss.4, 7, 8, 10 of the *Constitution Act* and by the common law.
4. The Legislative Assembly is distinct from the Executive Council. Section 17 of the *Constitution Act* establishes the Legislative Assembly, and its members consist of members elected as provided for by the *Election Act*. Section 18(3) of the *Constitution Act* provides that a member represents the electoral district for which the member was elected.

Election Act, [RSBC 1996], c.106

5. The distinction made by the *Constitution Act* and the *Conflict of Interest Act* between the Legislative Assembly and the Executive Council reflects legal distinctions between the judicial, executive and legislative branches of government that are profoundly constitutive of the rule of law and juristic order in Canada.

Reference re Secession of Quebec, [1998] 2 SCR 217, 1998 CanLII 793 (SCC) at paras.70-72

Roncarelli v. Duplessis, [1959] SCR 121, 1959 CanLII 50 (SCC)

Wells v. Newfoundland, [1999] 3 SCR 199, 1999 CanLII 657 (SCC) at paras.52-54

Ontario v. Criminal Lawyers' Association of Ontario, [2013] 3 SCR 3, 2013 SCC 43 (CanLII) at paras.27-31; see also footnote 3

6. The distinction between executive and legislative branches is further reflected in their different relationships with the judicial branch. The legislative branch

generally enjoys, and in British Columbia, the Legislative Assembly specifically enjoys, by way of parliamentary privilege, immunity from judicial review for members of the legislative assembly to the extent that the immunity is necessary "in order for these legislators to do their legislative work". The role of the courts is to ensure that a claim of privilege does not immunize from the ordinary law the consequences of conduct by Parliament or its officers and employees that exceeds the scope of the category of privilege.

Canada (House of Commons) v. Vaid, [2005] 1 SCR 667, 2005 SCC 30 (CanLII) at para.29

R. v. Basi, 2009 BCSC 739

Harvey v. New Brunswick (Attorney General), [1996] 2 SCR 876, 1996 CanLII 163 (SCC)

7. In contrast with the relationship between the judiciary and the legislative function, vigilant judicial review of the executive branch of government is inherent to the rule of law, with the exception of specific areas including the exercise of prosecutorial discretion, international relations and cabinet privilege.

Crevier v. A.G. (Québec) et al., [1981] 2 SCR 220, 1981 CanLII 30 (SCC)

8. In addition to the distinction between members of the Legislative Assembly and members of the Executive Council, the *Conflict of Interest Act* distinguishes between two types of opinions. Firstly, the *Conflict of Interest Act* provides for opinions consisting of recommendations to the legislative assembly for discipline or penalties pursuant to s.22 ("Discipline Recommendations"); and (2) opinions consisting of declarations of actual and apparent conflicts of interest with the effect of restricting powers, duties and functions of a member of the Executive Council or a member of the Legislative Assembly pursuant to ss.3, 11 and 18(2) of the *Conflict of Interest Act* ("Conflict Declarations").
9. Conflict Declarations have prospective effect on members of the Executive

Council pursuant to ss.3, 11 and 18(2) of the *Conflict of Interest Act*. Conflict Declarations prevent a member of the Executive Council, within the scope of the declared conflict of interest, from exercising any executive power or discretion granted to them by ss.4, 7, 8 or 10 of the *Constitution Act* or any other legislative or common law power accorded to that member of the Executive Council. The *Conflict of Interest Act* contains no provision allowing the conflict commissioner to directly impose penalties on members of the Executive Council.

10. The *Conflict of Interest Act* contains no provisions insulating members of the Executive Council from judicial review. Nor does it contain any privative clause preventing judicial review of the Commissioner's opinions.
11. Should the Court determine that *Conflict of Interest Act* does not expressly provide the Commissioner the power to issue a Conflict Declaration with effect pursuant to ss.3, 11 and 18(2) of the *Conflict of Interest Act*, the Petitioner relies on the doctrine of jurisdiction by necessary implication.

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] S.C.R. 140.

12. The *Tafler* decision should not be followed for three reasons. Firstly, *Tafler* did not extend legislative immunity to activities of the Executive Council. Secondly, the *Tafler* decision is factually distinct and deals primarily with media access to the investigative phase of the conflict commissioner's work and whether that investigative phase can be described as judicial or quasi-judicial in nature. Thirdly, the *Tafler* decision relates to a process that was oriented towards Discipline Recommendations.
13. The *Tafler* decision does not stand for the proposition that parliamentary privilege extends to both Conflict Declarations and Discipline Recommendations issued by the Conflict of Interest Commissioner. *Tafler* speaks only to the parliamentary privilege necessary to the disciplinary function of the legislature and the process leading to the legislature's discipline of legislative members.

Canada (House of Commons) v. Vaid, [2005] 1 SCR 667, 2005 SCC 30 (CanLII)

14. The Petitioner submits that, consistent with *Tafler*, the scope of the parliamentary privilege attached to the Conflict of Interest Commissioner ought to be limited to any Discipline Recommendation submitted to the Legislative Assembly under s.22 of the *Conflict of Interest Act* and the administrative process leading to a s.22 Discipline Recommendation. The Petitioner does not say that this Court should sit in review of decisions by the Legislative Assembly to expel or fine one of its members, for example, or sit in review of recommendations by the Commissioner to expel or fine one of the members of the Legislative Assembly.

15. However, the exercise of power by the Commissioner to determine and declare conflicts of interest is not a function of the legislature and is not necessarily linked to a function of the legislature. The Commissioner's declaration of a conflict of interest has the legal effect of limiting the exercise of power by a member of the Executive Council, to the extent of the conflict. Accordingly, it ought not to be shielded from judicial review by the parliamentary privilege. The member of the Executive Council and the person or persons whose complaint gave rise to the Conflict Declaration should have standing to challenge the Conflict Declaration.

16. The Petitioner acknowledges that it is challenging and precarious for the Court to distinguish between executive and legislative functions, particularly where only members of the Legislative Assembly are qualified for appointment to the Executive Council. In this case, however, the Premier is not contesting that she was fundraising in her role as Premier and President of the Executive Council rather than in her role as a member of the legislative assembly.

Review Jurisdiction

17. The Petitioner says that this Court has review jurisdiction over Conflict Declarations because such decisions are reviewable under the *Judicial Review Procedure Act*. The Conflict Commissioner, in limiting the powers of a

member of the Executive Council under ss.3, 11 or 18(2) of the *Conflict of Interest Act* by means of a Conflict Declaration, exercises a "statutory power of decision" under s.1 of the *JRPA*. "Statutory power of decision" under the *JRPA* includes "a power conferred... [here, on the Commissioner] ... to make a decision deciding or prescribing ... powers ... of a person".

18. Similarly, relief in the nature of certiorari is available under the common law against "any public body with power to decide any matter affecting the rights, interests, property, privileges or liberty of any person". With respect, the Conflict Commissioner's decisions have the effect of affecting the rights, interests and privileges of members of the Executive Council, and are, as such, reviewable under the common law.

Martineau v. Matsqui Disciplinary Bd., [1980] 1 S.C.R. 602 at p.628

19. The decisions of the Federal Court cited by the Respondent relate to jurisdiction to review decisions made under a very different federal conflicts scheme that contains a privative clause and makes no allowance for complaints from members of the public. The statutory test for jurisdiction under the *Federal Courts Act* also differs from the *JRPA*.

20. With respect, the Respondent's position makes no allowance for the legal effect of Conflict Commissioner's decisions under ss.3, 11 and 18(2).

Standing

21. Democracy Watch has standing to bring this petition. Democracy Watch is a party to a complaint under s.19(2) of the *Conflict of Interest Act*. Section 19(2) of the *Conflict of Interest Act* provides:

19(2) A member of the public who has reasonable and probable grounds to believe that there has been a contravention of this Act or of section 25 of the *Constitution Act* may, by application in writing setting out the grounds for the belief and the nature of the contravention alleged, request that the commissioner give an opinion respecting the alleged contravention.

22. Section 19(2) of the *Conflict of Interest Act* provides express or implied

legislative standing to bring this Petition. The *Conflict of Interest Act* contains no privative clause or restriction on the Petitioner's right to seek judicial review. The Respondent's characterization of s.19(2) is inaccurate.

23. Alternatively, the Petitioner claims public interest standing and relies on *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524, 2012 SCC 45 (CanLII).

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Toby Rauch-Davis, affirmed October 24, 2016.
2. Such other materials as the Court may accept.

The application respondent estimates that the application will take one day.

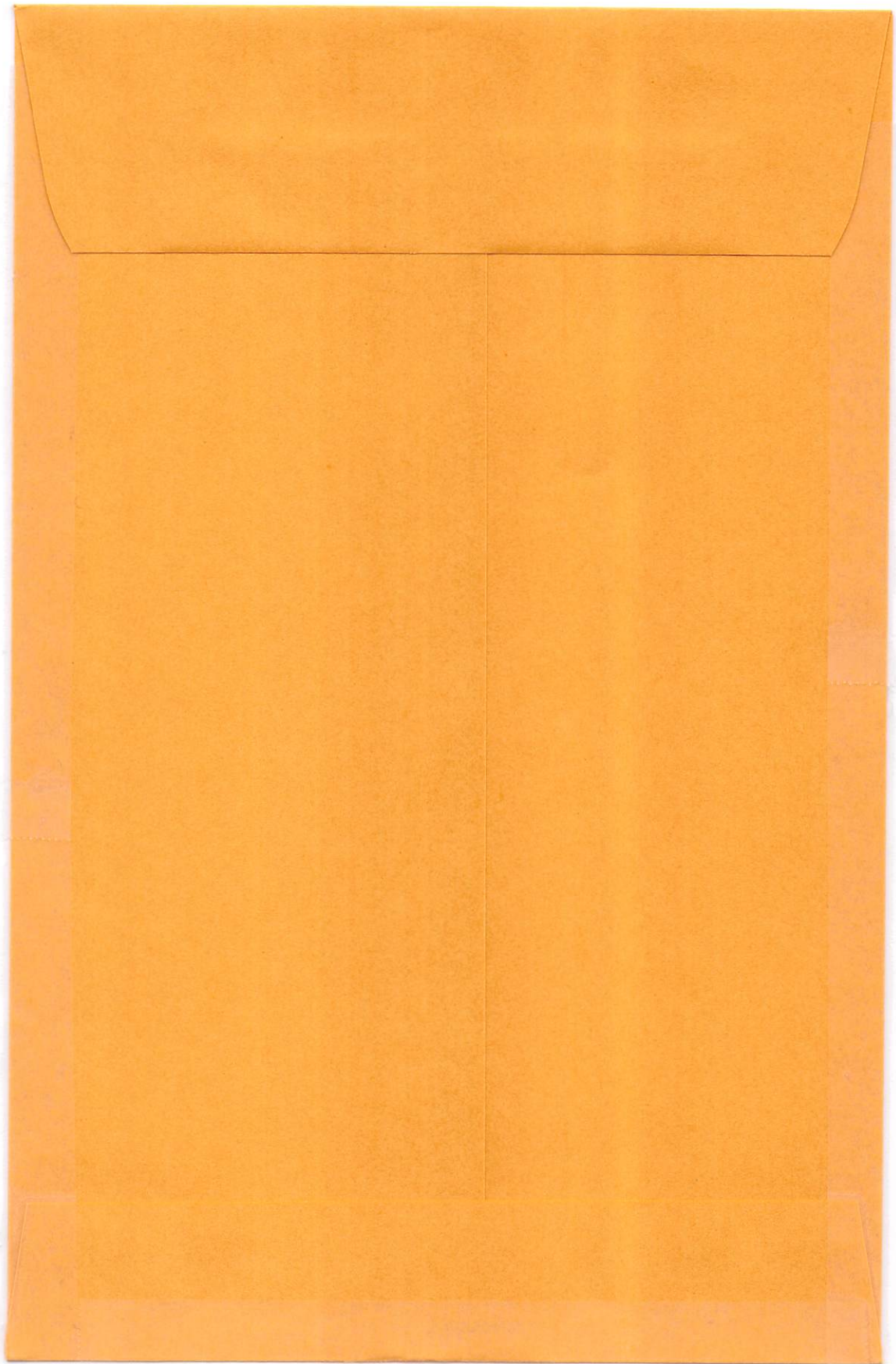
The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Date: December 28, 2016

"JASON GRATL"

Signature of lawyer for application respondent

Jason Gratl



IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Democracy Watch v. British Columbia*
(Conflict of Interest Commissioner),
2017 BCSC 123

Date: 20170125
Docket: S169841
Registry: Vancouver

Between:

Democracy Watch

Petitioner

And

British Columbia Conflict of Interest Commissioner

Respondent

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Petitioner:

J.B. Gratl

Counsel for the Respondent:

J.J.L. Hunter, Q.C.

Place and Date of Trial/Hearing:

Vancouver, B.C.
January 13, 2017

Place and Date of Judgment:

Vancouver, B.C.
January 25, 2017

INTRODUCTION

[1] Democracy Watch has petitioned this Court for an order reviewing and setting aside the opinions of the Conflict of Interest Commissioner (the Commissioner) issued on May 4, 2016 and August 9, 2016 concerning certain Liberal Party of B.C. fundraising activities. Democracy Watch requests an order remitting “the issue” to a different decision-maker for reconsideration.

[2] In an introductory “overview” to the petition the “issue” is described as follows

This is a judicial review by Democracy Watch of decisions made by the British Columbia Conflict of Interest Commissioner on May 4, 2016 and August 9, 2016. Conflict of Interest Commissioner Paul Fraser’s decision unreasonably concluded that it was not a real or apparent conflict of interest pursuant to s.2 of the *Members’ Conflict of Interest Act* (“the Act”) for the Premier to receive \$50,000 annual payments from the BC Liberal Party (“LPBC”) while fundraising for the [LPBC] at exclusive informal events at which special access to the Premier was sold for high amounts (up to \$20,000 per person). The Commissioner’s decision also unreasonably concluded that donations made to attend the events and the annual salary drawn by the Premier from the [LPBC] were not a personal benefit for the Premier that are indirectly connected with the performance of her duties of office as prohibited under s.7 of the Act.

[3] In response to the application for judicial review, the Commissioner applies for an order dismissing the petition on the basis this Court lacks jurisdiction to entertain it. In particular it is asserted by the Commissioner that the challenged opinions are immunized from judicial review by a legislative privilege. The Commissioner also submits that Democracy Watch lacks standing to petition this Court in the present circumstance.

[4] These reasons address the jurisdictional issue only.

THE FACTUAL BACKGROUND

[5] On March 31, 2016 Mr. Duff Conacher, on the letterhead of Democracy Watch, wrote to the Commissioner as follows:

I am writing because the media has revealed that the B.C. Liberals are holding fundraising events where the party leader or other Cabinet ministers are essentially selling access to themselves. The cost of tickets is very high,

and in return the donor is invited to an exclusive, private event where they have access to the leader or minister.

Subsection 7(1) of the B.C. *Members' Conflict of Interest Act* states:

"7(1) A member must not accept a fee, gift or personal benefit, except compensation authorized by law, that is connected directly or indirectly with the performance of his or her duties of office."

While the donations for these events go to a party or riding association, access to the politician is part of the ticket price for these exclusive events (which connects the donation to their position as a politician). The politician takes part in directing the spending of the money (as the party leader or senior party official or local politician for the riding association), and at least some of the donated money is spent on the politician's re-election campaign (directly or indirectly through the party's campaign). As a result, the politician is receiving at least part of a donation made because the politician attended an event - and therefore the politician is receiving an illegal gift.

Democracy Watch is not claiming that all fundraising events are illegal --just high- priced, exclusive events where politicians sell access to themselves in return for a donation. Low-priced, large, public events at which no one gets special access to the politician are clearly legal under the conflict-of-interest laws because the donation is not made to gain access to the politician (and therefore is not connected directly or indirectly to their position).

As a result, Democracy Watch requests that you:

1. Issue an immediate ruling that states that donations made for private, exclusive fundraising events at which special access is given to a politician are illegal gifts prohibited by subsection [7(1)] of the *Members' Conflict of Interest Act*,

[6] The statutory authority for a member of the public to lodge a complaint with the Commissioner is found in section 19(2) of the *Members Conflict of Interest Act*, R.S.B.C. 1996, c. 287 ["the Act" or the "present Act"] which reads:

(2) A member of the public who has reasonable and probable grounds to believe that there has been a contravention of this Act or of section 25 of the *Constitution Act* may, by application in writing setting out the grounds for the belief and the nature of the contravention alleged, request that the commissioner give an opinion respecting the alleged contravention.

[7] In April 2016 Mr. David Eby, in his capacity as a member of the Legislative Assembly, wrote to the Commissioner " Re: Complaint under section 19(1) of [the Act] concerning the Hon. Christy Clark" which subsection reads:

(1) A member who has reasonable and probable grounds to believe that another member is in contravention of this Act or of section 25 of the *Constitution Act* may, by application in writing setting out the grounds for the

belief and the nature of the contravention alleged, request that the commissioner give an opinion respecting the compliance of the other member with the provisions of this Act.

[8] Mr. Eby's letter describes a media "allegation" that "the Member for Westside – Kelowna, and Premier of British Columbia, Christy Clark" had recently attended a dinner where "10 guests paid \$10,000 each to mingle with Ms. Clark" and at a fundraiser in Kelowna a "small group who paid \$5,000 each got quality time with the Premier". Mr. Eby made extensive submissions; requested the Commissioner "investigate this matter immediately", and suggested the Commissioner "find the Premier has placed herself in a conflict of interest".

[9] On May 1, 2016, Sharon E. White, Q.C. president of the British Columbia Liberal party wrote to the Commissioner describing an annual "Leaders Allowance" paid to the Premier by the British Columbia Liberal party. Ms. White advised that in 2016 the allowance was \$50,000. The Commissioner copied Ms. White's letter to Mr. Eby who submitted to the Commissioner that in his view the allowance created a conflict of interest for the Premier.

[10] In a written "Opinion" of May 4, 2016, the Commissioner concluded that the Premier had not contravened the *Act* as asserted by either Democracy Watch or Mr. Eby. In an addendum to that opinion dated August 9, 2016 the Commissioner declined to reconsider his opinion.

THE COMMISSIONER'S SUBMISSIONS

[11] The burden of demonstrating that a legislative privilege precludes this Court from reviewing the Commissioner's opinions rests on the Commissioner. To discharge that burden he relies on the decision of the Court of Appeal in *Tafler v. British Columbia (Conflict of Interest Commissioner)* (1998), 49 B.C.L.R. (3d) 328, which the Commissioner submits is dispositive of the petition.

[12] The facts in *Tafler* were as follows. In 1995 a member of the public, who was not Mr. Tafler, and a member of the Legislative Assembly each complained that Premier Harcourt had contravened the provisions of s. 15(1) of the *Member's*

Conflict of Interest Act, S.B.C. 1990, c. 54 [“the 1990 Act”]. The Commissioner conducted hearings to which he denied Mr. Tafler access. Mr. Tafler sought judicial review of that decision. On the hearing of the judicial review application Mr. Justice Melvin, in reasons found at (1995), 5 B.C.L.R. (3d) 285, held that a legislative privilege prevented this Court from reviewing the Commissioner’s decision denying Mr. Tafler access to the hearings.

[13] Mr. Tafler appealed from that decision, and Mr. Justice Lambert, with whom the other judges of the Court of Appeal agreed, began his reasons as follows:

The principal issue in this appeal is whether the Conflict of Interest Commissioner, acting under the *Members’ Conflict of Interest Act* [1990], on the complaint of a member of the public or of a member of the Legislative Assembly, is acting under legislative privilege such that the courts have no power of review in relation to the way the Commissioner carries out his tasks.

[14] In his reasons for dismissing the appeal Lambert J.A. set out the language of subsections 15(1) and (1.1) of the 1990 Act which is identical to the language of subsections 19(1) and (2) of the present Act. Lambert J.A. also referred to section 10(1) of the 1990 Act, which provided that “there shall be a commissioner who is an officer of the legislature”. Likewise s. 14(1) of the present Act provides that “there must be appointed a commissioner who is an officer of the legislative assembly”.

[15] Lambert J.A. referred to s. 16(1) of the 1990 Act, which enabled the Commissioner, on receiving a request under s. 15, to conduct an inquiry and to “report his or her opinion” to the speaker of the legislature. Under section 17(1) of the 1990 Act the Commissioner could “recommend in a report that is laid before the legislative assembly” that a member, who the Commissioner found was in contravention of the 1990 Act, be subject to a penalty. Section 17(3) of the 1990 Act read:

(3) The Assembly may order the imposition of the recommendation of the commissioner under subsection (1) or may reject the recommendation, but the Assembly shall not further inquire into the contravention nor shall the Assembly impose a punishment other than the one recommended by the commissioner. [Emphasis that of Lambert J.A.]

[16] Section 22 of the *Act* has language identical to that in section 17 of the 1990 *Act*.

[17] At para. 14 of the reasons in *Tafler* these words are found:

I think it is noteworthy, first, that the Commissioner is an officer of the Assembly, (see sub-section 10(1)); second, that the Commissioner's obligation is to report his opinion to the Assembly, (see sub-section 16(3)), and thereafter if he considers it proper to do so, to make a recommendation with respect to discipline of the member, (see sub-section 17(1)), but not himself to reach any enforceable decision; third, that the actual decision on any question of conflict of interest is made by the Assembly itself; and, fourth, that no action of any kind lies against the Commissioner for anything he or she does under the *Act*, (see section 18). I would like to note in passing that neither counsel referred to section 18 of the *Act* in the course of their arguments, and we have been left to our own devices in interpreting that section. [Emphasis added.]

[18] The Commissioner on the present hearing did not rely on s. 23 of the present *Act* which is in the same terms as s. 18 in the 1990 *Act*.

[19] Mr. Justice Melvin, relying on the decision of the Supreme Court of Canada in *N.B. Broadcasting Co. v. Nova Scotia*, [1993] 1 S.C.R. 319, had come to the following conclusion at para. 53 of his reasons:

Here, as I mentioned, the Commissioner is acting for and on behalf of the Legislative Assembly in providing that body with information and opinion. The nature of the investigation relates to the functioning of the member of the Legislative Assembly. Control over members or a member, or sanction of a member, remains with the Legislative Assembly. In my opinion, information gathering which may assist the Assembly in dealing with its own members is a vital step in the decision of the legislature and is necessary to the proper functioning of the Assembly as Madam McLachlin J. referred to in ... the New Brunswick Broadcasting decision. Consequently, the manner in which it chooses to deal with its members in the context is one cloaked with privilege, the exercise of which is not reviewable.

[20] Lambert J.A. agreed with Melvin J. and added the following:

... In my opinion, the privileges of the Legislative Assembly extend to the Commissioner who is expressly made an officer of the Assembly by sub-section 10(1) of the *Members' Conflict of Interest Act*. In my opinion, decisions made by the Commissioner in the carrying out of the Commissioner's powers under the *Act* are decisions made within, and with respect to, the privileges of the Legislative Assembly and are not reviewable in the courts.

[21] In *Canada (House of Commons) v. Vaid*, 2005 SCC 30, Binnie J. for the Supreme Court of Canada, wrote of “parliamentary privilege” that it is:

the necessary immunity that the law provides for Members of Parliament, and for Members of the legislatures of each of the ten provinces . . . in order for these legislators to do their legislative work. [Emphasis added.]

[22] At page 688 of *Vaid*, Binnie J. wrote:

Proof of necessity is required only to establish the existence and scope of a *category* of privilege. Once the category (or sphere of activity) is established, it is for Parliament, not the courts, to determine whether in a particular case the *exercise* of the privilege is necessary or appropriate. In other words, within categories of privilege, Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts: “Each specific instance of the exercise of a privilege need not be shown to be necessary” (*New Brunswick Broadcasting*, at p. 343) [Emphasis that of Binnie J.]

[23] Justice Binnie observed that the “categories” of parliamentary privilege include the discipline of members, for which proposition he cited *Tafler*.

[24] The Commissioner points out that in the United Kingdom a similar privilege precludes the courts in that country from exercising a supervisory role over the U.K. parliamentary commissioner. In *Regina v. Parliamentary Commissioner for Standards, ex parte AL Fayed*, [1998] 1 W.L.R. 669 at 673 Lord Woolf M.R. wrote:

... On the other hand, the focus of the Parliamentary Commissioner for standards is on the propriety of the workings and the activities of those engaged within Parliament. He is one of the means, by which the select committee set up by the House carries out its functions, which are accepted to be part of the proceedings of the House. This being the role of the Parliamentary Commissioner for Standards, it would be inappropriate for this court to use its supervisory powers to control what the Parliamentary Commissioner for Standards does in relation to an investigation of this sort. The responsibility for supervising the Parliamentary Commissioner for Standards is placed by Parliament, through its standing orders, on the Committee of Standards and Privileges of the House, and it is for that body to perform that role and not the courts.

THE PETITIONER’S POSITION AND THIS COURT’S JURISDICTION

[25] The petitioner’s response to the submissions of the Commissioner is that *Tafler* is not authority which precludes this Court from reviewing the Commissioner’s

opinions because they were not directed to the conduct of the Premier as a member of the Legislature, but rather to her role as President of the Executive Council.

[26] To demonstrate the role in which it is submitted the Premier acted when in an alleged conflict of interest the petitioner refers to the constitutional basis for executive government in this province. Section 7 of the *Constitution Act*, R.S.B.C. 1996 c. 66 (the "*B.C. Constitution Act*") provides that "executive power" in the province continues, so far as un-altered by that *Act*, as it existed on February 14, 1871 subject to various sections of the *Constitution Act 1867*, 30 - 31 Victoria c. 3 (U.K.) and to an Imperial order in council. Section 9 of the of the *B.C. Constitution Act* provides for an Executive Council composed of those persons appointed by the Lieutenant Governor, including the Premier who is the Council's President. By contrast sections 17 and 18 of the *B.C. Constitution Act* enable the Lieutenant Governor to make laws in and for British Columbia but only on the advice and consent of the Members of the Legislative Assembly who are elected in the manner provided in the *Elections Act*, R.S.B.C. 1996, c. 106.

[27] The petitioner then emphasizes s. 1 of the *Act*, which defines "member" to mean "a member of the legislative assembly or of the Executive Council, or both". The petitioner submits this definition reflects the distinction that must be drawn between the legislative branch of government and the executive.

[28] The petitioner accepts that members of the legislative branch of government enjoy a privilege which precludes judicial review of their conduct as members of the Legislature, but rejects the proposition that the conduct of the Premier in her role as President of the Executive Council is insulated from judicial review.

[29] The petitioner submits that the decision of the Premier to engage in the fundraising activities, of which it and Mr. Eby complain, was a decision made not as a member of the Legislature but as President of the Executive Council. The petitioner argues that it is fundamental to the rule of law that executive decisions of government must be subject to review by the courts to ensure they are made within lawful authority.

[30] The petitioner relies on the reasons of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9. Paragraphs 27 and 28 from those reasons read:

[27] As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

[28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[31] At para. 31 of *Dunsmuir* these words are found:

[31] The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government.

[32] The petitioner's position on jurisdiction in essence is that there is an inviolable constitutional rule in Canada that decisions of the executive branch of government must be subject to judicial review and that the Commissioner's opinions must be seen as addressing a fundraising decision made by the Premier not as a member of the elected Legislative Assembly but as a member of the Executive Council.

MY DECISION

[33] The petitioner's argument has a superficial plausibility but I cannot agree with it. The *Act* is directed to potential conflicts of interest by "members". The definition of member is intended to encompass both those who are elected members of the Legislative Assembly and those who are appointed to the Executive Council but who

have not been elected to the Legislature. In our system of government a person may be appointed to the Executive Council (the Cabinet as it is commonly described), even though that person has not been elected to the Legislature. If a complaint is made that such a person is in a conflict of interest the Commissioner is authorized by the *Act*, to investigate and to give an opinion and perhaps a recommendation. I do not, however, read the definition of "member" to mean that the Commissioner is clothed with authority to investigate an executive decision by a member of the Executive Council and then report to the Legislature, and perhaps recommend a penalty to be imposed on that person.

[34] The *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, provides a means for an aggrieved person to seek judicial review of the exercise of a statutory power of decision. That may include a decision of the Executive Council or one of its members. If the Legislature had intended that the *Act* also provide the Commissioner with the power to investigate, report to the Legislature and perhaps recommend a penalty to be imposed on a member of the Executive Council, for an executive decision, I would expect the Legislature to have said so expressly. It did not.

[35] Nor do I accept the petitioner's submission that *Dunsmuir* has application to the present matter. *Dunsmuir* dealt with judicial review of decisions made by administrative tribunals. An "officer of the Legislature" cannot be equated to an administrative tribunal.

[36] There is an abundance of high authority against the petitioner's position on jurisdiction. It is for the Legislature to consider the conduct of its officers, when they are performing their assigned role, not the courts.

[37] I will add that the Commissioner is authorized by the *Act* to do no more than conduct an inquiry; arrive at an opinion, and in the appropriate circumstance make a recommendation to the Legislative Assembly. It is then for the Legislature, not the Commissioner, if it chooses to do so to exercise discipline authority over its

members. An opinion of the Commissioner has no legal consequence unless and until the Legislature acts on it.

[38] The petition is dismissed.

[39] The petitioner seeks an order “protecting the petitioner from adverse costs liability in the event that this petition is dismissed”. The petitioner submits this is public interest litigation in which the usual rule ought to apply that no court costs award is made. The Commissioner submits on the other hand that the governing authorities are so patently against the petitioner that the “discipline” of costs ought to prevail.

[40] The petitioner has made a novel argument with at least a modicum of plausibility. There will be no costs order.

“Mr. Justice Affleck”

VANCOUVER

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CA 44269

FEB 23 2017

COURT OF APPEAL
REGISTRY

Court of Appeal File No.....
Supreme Court File No. S169841
Supreme Court Registry Vancouver

COURT OF APPEAL

BETWEEN:

DEMOCRACY WATCH

Appellant
(Petitioner)

AND:

BRITISH COLUMBIA CONFLICT OF INTEREST COMMISSIONER

Respondent
(Respondent)

NOTICE OF APPEAL

Take notice that Democracy Watch hereby appeals to the Court of Appeal for British Columbia from the order of The Honourable Mr. Justice Affleck of the Supreme Court of British Columbia pronounced the 25th day of January, 2017, at Vancouver, British Columbia.

1. The appeal is from a:

- | | |
|--|---|
| <input type="checkbox"/> Trial Judgment | <input type="checkbox"/> Summary Trial Judgment |
| <input type="checkbox"/> Order of a Statutory Body | <input checked="" type="checkbox"/> Chambers Judgment |

2. If the appeal is from an appeal under Rule 18-3 or 23-6 (8) of the Supreme Court Civil Rules or Rule 18-3 or 22-7 (8) of the Supreme Court Family Rules, name the maker of the original decision, direction or order:

N/A

3. Please identify which of the following is involved in the appeal:

- | | | |
|---|--|--|
| <input checked="" type="checkbox"/> Constitutional/Administrative | <input type="checkbox"/> Civil Procedure | <input type="checkbox"/> Commercial |
| <input type="checkbox"/> Divorce (Family) | <input type="checkbox"/> Family Law Act | <input type="checkbox"/> Corollary
Relief in a
Divorce
Proceeding |
| <input type="checkbox"/> Other Family | | |
| <input type="checkbox"/> Motor Vehicle Accidents | <input type="checkbox"/> Municipal Law | <input type="checkbox"/> Real Property |
| <input type="checkbox"/> Torts | <input type="checkbox"/> Equity | <input type="checkbox"/> Wills and Estates |

(The Divorce Registry will, as applicable, be notified by the Court of Appeal Registry on filing if the appeal involves divorce, corollary relief in divorce proceeding or matters under the *Family Law Act*)

And further take notice that the Court of Appeal will be moved at the hearing of this appeal for an order setting aside the decision of the Honourable Mr. Justice Affleck and remitting the matter to the Supreme Court of British Columbia for consideration on the merits of the judicial review, and costs of this appeal and the application below. The Appellant asks that, if unsuccessful, costs not be ordered against it as this proceeding is in the public interest.

The hearing of this proceeding occupied 1 day.

Dated at Vancouver , British Columbia, this 23rd day of February, 2017.



Solicitor for the Appellant
Jason Gratl

To the respondent: British Columbia Conflict of Interest Commissioner

And to its solicitor: John Hunter, QC

This Notice of Appeal is given by Jason Gratl of Gratl & Company, solicitors for the Appellant, whose address for service is 601-510 West Hastings Street, Vancouver, BC, V6B 1L8.

Telephone: 604-694-1919

Fax: 604-608-1919

To the respondent(s):

IF YOU INTEND TO PARTICIPATE in this appeal, YOU MUST GIVE NOTICE of your intention by filing a form entitled "Notice of Appearance" (Form 2 of the Court of Appeal Rules) in a Court of Appeal registry and serve the notice of appearance on the appellant WITHIN 10 DAYS of receiving this Notice of Appeal.

IF YOU FAIL TO FILE A NOTICE OF APPEARANCE

- (a) you are deemed to take no position on the appeal, and
- (b) the parties are not obliged to serve any further documents on you.

The filing registries for the British Columbia Court of Appeal are as follows:

Central Registry:

B.C. Court of Appeal
Suite 400, 800 Hornby Street
Vancouver BC V6Z 2C5

Other Registries:

B.C. Court of Appeal
The Law Courts
P.O. Box 9248 STN PROV GOVT
850 Burdett Ave Victoria BC V8W 1B4

B.C. Court of Appeal
223 – 455 Columbia Street
Kamloops BC V2C 6K4

Inquiries should be addressed to (604) 660-2468 Fax filings: (604) 660-1951

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- 5 Order of The Honourable Mr. Justice Affleck made on January 25,
 2017

PART 3 – JUDGMENT OR REASONS

- 6 Reasons for Judgment of the Honourable Mr. Justice Affleck dated
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