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”