



BRITISH
COLUMBIA

OPINION

**OF THE CONFLICT OF INTEREST COMMISSIONER
PURSUANT TO SECTION 19(1) OF THE
*MEMBERS' CONFLICT OF INTEREST ACT***

**IN THE MATTER OF AN APPLICATION
BY MICHAEL DE JONG, MLA (MATSQUI)
WITH RESPECT TO THE ALLEGED CONTRAVENTION OF PROVISIONS
OF THE *MEMBERS' CONFLICT OF INTEREST ACT*
BY THE HONOURABLE CATHY MCGREGOR, MLA (KAMLOOPS),
THE HONOURABLE CORKY EVANS, MLA (NELSON-CRESTON), AND
THE HONOURABLE GLEN CLARK, MLA (VANCOUVER-KINGSWAY)**

City of Victoria
Province of British Columbia

June 3, 1998

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Introduction

A. General

This is an Opinion requested by Michael de Jong, MLA for Matsqui pursuant to Section 19(1) of the *Members' Conflict of Interest Act*. Section 19(1) of the *Members' Conflict of Interest Act* (the Act) provides:

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.

Pursuant to that provision, the member wrote to me on May 11, 1998 requesting compliance with the provisions of the Act by the Honourable Cathy McGregor, MLA (Kamloops) and Minister of Environment, Lands and Parks, the Honourable Corky Evans, MLA (Nelson-Creston) and Minister of Agriculture and Food, and the Honourable Glen Clark, MLA (Vancouver-Kingsway), Premier of British Columbia. Mr. de Jong makes the following four allegations:

1. The actions of the Members for Kamloops, Nelson-Creston and Vancouver-Kingsway, as disclosed herein, constitute a violation of Section 3 of the Act insofar as these members exercised an official power or performed an official duty in the execution of their office as either a private Member or Member of the Executive Council at the same time they knew that in the performance of the duty of exercise of the power there was the opportunity to further their private interest contrary to Section 2(1) of the Act.
2. The actions of the Members for Kamloops, Nelson-Creston and Vancouver-Kingsway, as disclosed herein, constitute a violation of Section 3 of the Act

insofar as there is a reasonable perception which a reasonably well informed person could properly have, that the Members' ability to exercise an official power or perform an official duty as either a private member or member of the Executive Council, must have been affected by their private interests contrary to section 2(2) of the Act.

3. The Members for Kamloops, Nelson-Creston and Vancouver-Kingsway, in their capacity as either a private member of a member of the Executive Council, used their office, is disclosed herein, to seek to influence a decision, to be made by another person, to further their private interest contrary to section 5 of the Act.
4. The Member for Kamloops has violated sections 10 and/or 11 of the Act insofar as those sections prescribe a specific procedure for a private member and member of the Executive Council to follow in the event that a matter arises with respect to which the member has a conflict of interest or apparent conflict of interest. The Member for Kamloops failed to follow the prescribed procedure even after determining in her own mind that an apparent conflict of interest existed.

B. Brief History

This complaint relates to what has become known as the Six Mile Ranch case.

1. In 1991, application was submitted by ALM Company (the then owners) to the Agricultural Land Commission (ALC) for approval to develop a resort and golf course at the west end of Six Mile Ranch. At the time, ALC had certain discretionary authority to consider golf course developments.
2. In 1992, the provisions allowing for golf course construction on ALR lands were ended and ALM Co. was given two years to complete its project.
3. In 1994, ALM Co. not having commenced construction at the Six Mile site, ALC approval of the project lapsed.
4. In 1995, Six Mile Ranch was purchased by Pagebrook Inc.

5. In 1996, Pagebrook sought Cabinet approval to proceed with its own resort/golf course development. Approval was denied.
6. In 1997, Pagebrook proceeded with its own application to ALC for approval to proceed with a resort development. The application for exclusion of Agricultural Land Reserve lands was denied by ALC in July, 1997.

Mr. de Jong alleges continuing attempts on the part of the three members to bring about ALC approval of the Six Mile Ranch project by improperly exercising "political interference" and applying political pressure to achieve their objective.

The Role of the Commissioner

It must be clearly understood that the Conflict of Interest Commissioner is a creature of Statute who has those powers and those carefully delivered powers only which have been vested in him by the *Members' Conflict of Interest Act*. The jurisdictional sections of the Act applicable to the Commissioner's powers in the present case are as follows:

Section 19(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.

Section 21

- (1) On receiving a request under section 19, and on giving the member concerned reasonable notice, the commissioner may conduct an inquiry.
- (2) If the request for an opinion is made under section 19 or the commissioner undertakes a special assignment under section 20, the

commissioner has the powers of a commissioner under section 15 and 16 of the *Inquiry Act*.

The allegations of misconduct into which in the present case I am required to inquire are those contained in the following sections:

Section 2 - Conflict of Interest

- (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) 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.

Section 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.

Section 5

A member must not use his or her office to seek to influence a decision, to be made by another person, to further the member's private interest.

Section 10

- (1) A member who has a reasonable and probable grounds to believe that he or she has a conflict of interest in a matter that is before the Legislative Assembly or the Executive Council, or a committee of either of them, must, if present at a meeting considering the matter,
 - (a) disclose the general nature of the conflict of interest, and

- (b) withdraw from the meeting without voting or participating in the consideration of the matter.
- (2) If a member has complied with subsection (1), the Clerk of the Legislative Assembly or secretary of the meeting must record
 - (a) the disclosure,
 - (b) the general nature of the conflict of interest disclosed, and
 - (c) the withdrawal of the member from the meeting.

These and these alone are the statutory provisions with which I am entitled to concern myself in this matter. Any popularly held belief that the Conflicts Commissioner is some sort of supreme Legislative Guardian appointed to enforce compliance with his personal ethical views and biases is based on a misconception of the responsibilities entrusted to him.

Allegations of Fact

A. Against the Honourable Cathy McGregor, MLA

Elected to the Legislature on May 28, 1996, she publicly stated her support for the Six Mile Ranch Project. On September 23, 1996, she sent a memo to the Premier setting out her position with respect to the project as follows:

With the announced closure of Afton Mines and the loss of 200 high paying union jobs, I will be under considerable pressure to bring new investment and jobs to Kamloops. This proposal would be extremely helpful in that regard. During the election and post election period, I have made several references to our government's interest and commitment to economic development. This project is necessary from that perspective alone and will be significant from a re-election point of view, as Kamloops is well known as the "bell-weather" riding.

Additionally, both the Thompson-Nicola regional District and the City of Kamloops are supportive of this proposal. There has been a fair bit of local medial coverage on this potential project, and much local constituent support. I have yet to hear a negative comment about the project. Conversely, there was some very negative coverage of this issue in the past; our government was accused of dragging its feet in supporting this

proposal in its original form. During the election campaign, the Liberals suggested we lost the development due to our lack of commitment and slowness to act. The Mayor in particular has had some harsh words for the Agricultural Land Commission, and Kirk Miller in particular.

I am hopeful that positive statements to the Agricultural Land Commission about the importance of this project, and to Kirk Miller in particular, will enable us to achieve our goal: economic development without compromising the principle of protecting agricultural land. With your support, we can help Kamloops in a significant way, and help mitigate against any job loss in my constituency.

On January 6, 1997, Ms. McGregor was appointed Minister of Environment Lands and Parks with responsibilities that included the administration of Crown Lands.

There is no doubt that as the local MLA, Ms. McGregor was a strong supporter of what she saw as a desirable development, economically beneficial, environmentally acceptable and providing much needed employment opportunities in her constituency.

On May 16, 1997, Pagebrook Inc. made donations of \$1,000.00 each to the Liberal Party, the New Democratic Party, and the Conservative Party in the course of the federal election. Each party delivered to Pagebrook Inc. its official receipt under the *Canada Elections Act*. The Pagebrook donation was credited by the New Democratic Party to Mr. Svend Robinson's campaign fund. He has since written to Pagebrook, advising that at the time of receipt he was unaware of the Six Mile Ranch proposal which he has publicly opposed, and returning the campaign donation.

As an MLA, Ms. McGregor lobbied members of Cabinet and the Legislative Assembly in favour of the Six Mile Ranch project. She ceased doing so once she became a member of Cabinet. Around February 6, 1998, Ms. McGregor as Minister directed her Deputy Minister to take on direct responsibilities related to decisions relating to her capacity as Minister of Lands and to report on those matters to the Minister of Education. She states that she did so out of an abundance of caution because she then believed there might have been a perception of a conflict of interest. Ms. McGregor

states that in retrospect, she probably acted prematurely and without having received advice from anyone. She did not make a conflict of interest declaration pursuant to section 10 of the Act having concluded that she was not, after all, in a conflict situation.

B. Against The Honourable Corky Evans

The allegations of misconduct on the part of Mr. Evans are very much more vague than those against Ms. McGregor. They basically amount to this: that Mr. Evans, as Minister of Agriculture, attempted repeatedly to influence the ALC to reconsider its earlier refusal to approve the Pagebrook application.

C. Against The Honourable Glen Clark

The allegations against this member are somewhat lacking in specificity and are to be found largely in xerox copies provided to me of columns from the Vancouver Sun Newspaper by Mr. Vaughan Palmer. Though Mr. Palmer's writings are always entertaining, generally edifying and frequently accurate, they seem to me to be of limited value as a crutch to support Mr. de Jong's case against Mr. Clark. The case against Mr. Clark seems to rest largely on alleged attempts by a senior member of the Premier's staff to influence the chairman of the ALC with a view to bringing about a reconsideration by the Commission of its earlier decision so as to obviate the necessity for Cabinet intervention and the ordering of a public hearing.

I express no view at this point as to whether or not such an approach took place or as to the impropriety or otherwise of such an intervention: I merely seek to identify the nature of the complaint against the Honourable Glen Clark.

Discussion

Upon receipt of Mr. de Jong's request for an opinion on the conduct of the three members named, I met in my office with Mr. de Jong and with the Director of Legal

Services in the Premier's office. As a result of that meeting, I asked to hear preliminary submissions as to whether there are reasonable and probable grounds to conclude that each or any of the members named in the application by Mr. de Jong had breached the *Members' Conflict of Interest Act*. It will be recalled that section 21(1) of the Act provides that, on receiving a request under section 19 and on giving the member concerned reasonable notice, the Commissioner may conduct an inquiry. Bearing in mind that the Legislature is presently in session, and that the allegations involve three members holding ministerial office, and that it would be inappropriate to proceed until the end of the session, I have, in consultation with the parties, agreed to hear preliminary submissions on the issue of jurisdiction and as to the existence or otherwise of reasonable and probable grounds to conclude that each or any of the members named in the application has breached the Act. I accordingly held a hearing on Tuesday, May 26, 1998 and heard submissions by Mr. Michael de Jong, MLA (the complainant member) and by Brenda Edwards on behalf of the three respondent members.

A number of key elements must be proved, to establish that a member has contravened the statute, but one essential element is common to each of the four counts contained in the allegations against the respondent members: it is the private interest element. Thus, in counts one and two a conflict of interest must be shown to exist between the exercise of the member's official function on the one hand, and the knowledge that in the performance of that function there is the opportunity to further the member's private interest. A conflict between two competing interests will not suffice to satisfy the definition of conflict of interest under the section where the two interests are, for example competing public interests: the existence of competing public interests might, at first glance, bear the appearance of a conflict of interest but will not suffice to constitute a conflict within the meaning of the Act. It is only when one of the interests is a "private interest" that sections 2 and 3 of the Act come into play.

A. What Constitutes a Private Interest?

The term is not defined with any precision by the statute. Section 1, the definition section defines what a private interest is not. My distinguished predecessor, Commissioner Hughes, dealt with this question extensively in his opinion in the Blencoe case (1993). He reviewed judicial decisions, some of considerable antiquity, and found that the common law rule which had existed in England since the 1600's had laid down that such an interest must be capable of being measured pecuniarily. Commissioner Hughes had this say:

In the absence of an exhaustive definition of the phrase "private interest" in the Members' Conflict of Interest Act as it appears in our statute of the 1990's, I decline to interpret it in the manner formulated four centuries ago. I believe it has to be interpreted in the climate in which it was enacted. I believe that climate to be as expressed in the passages of Hansard from which I have quoted. That leads to a definition that is not limited to pecuniary or financial interests. It was open to the Legislature to place words of limitation on "private interest", it did not do so.

He found that private interest certainly includes any pecuniary interest or economic advantage even though for a small amount and found that the question of whether the pecuniary interest is remote or speculative is a relevant factor. Private interest, he found, includes any real or tangible benefit that inures to the personal benefit of the member. Commissioner Hughes was careful to avoid an exhaustive definition of the term "private interest" which can, of course, in differing circumstances take a wide variety of forms. I respectfully concur in and adopt both the definition I have quoted above and Commissioner Hughes' refusal to attempt an exhaustive definition. I believe that the Legislature, in refraining from a detailed definition, did so quite deliberately and I refrain, also quite deliberately, from tying my own hands or those of future Commissioners by attempting an exhaustive definition.

B. Was There a Private Interest?

Counts One and Two -- in these counts, the private interest allegation against Ms. McGregor appear to rest largely on:

- 1) a campaign contribution from Pagebrook Inc.,
- 2) Ms. McGregor's hopes of re-election, and
- 3) that Ms. McGregor acted as she did for partisan political purposes.

The circumstances in which a campaign contribution may involve a member's private interest were discussed by Commissioner Hughes in Blencoe (1993) and in Harcourt (1995). I have considered Mr. Hughes' analysis of the factors involved in those cases. In some circumstances, campaign contributions and assistance to a candidate who is, or subsequently becomes, a member can be a "private interest" and the cumulative effect of financial and other support to a candidate could be seen as advancing the "private interest" of a member. No such accumulation of factors exists in this case. It is clear that the \$1,000.00 campaign contribution by Pagebrook Inc. was not given or directed to Ms. McGregor. It was neither intended to benefit her nor was ever used for that purpose. I accept that it was one of three identical campaign contributions made by the company to the Liberal Party of Canada, the Conservative Party, and the New Democratic Party at the time of the federal general election. It was obviously intended as a federal campaign contribution. There have not been shown to have been any financial contributions from Pagebrook to Ms. McGregor for her personal election campaign or otherwise nor any direct effort or personal support given by Pagebrook to the member in connection with any political campaign in which she participated or otherwise. In his submissions, Mr. de Jong stated very frankly that there was no suggestion of Ms. McGregor's financial involvement in Pagebrook's project.

In his written complaint, Mr. de Jong quoted from Ms. McGregor's memo of September 23, 1996 to the Premier in the following words: "This project ... will be significant from a re-election point of view ..." and relies on that quotation to bolster his "private interest" argument. When one places that quotation in its proper context

(as I have done on page 5 above) its true meaning becomes more readily understandable. Read in context, the "re-election point of view" comments clearly refer to the re-election prospects of the government as a whole rather than to those of the writer. One must also wonder whether in urging the Premier to consider a project as significant from a re-election point of view, a member can be thought to be acting improperly or to be advocating or pursuing a "private interest". Is it not arguable that where a politician urges that some project is "significant from a re-election point of view" she is doing no more than to say: 'In my view the majority of my constituents want this to go ahead'? If that was Ms. McGregor's meaning, was she not doing her duty as an elected representative?

In the final analysis I do not accept the suggestion that open support by an MLA of some cause or project for partisan political reasons (if such be the case) can be equated with the pursuit of a private interest within the meaning of the *Members' Conflict of Interest Act*. I am not persuaded that a member who supports some cause or votes in favour of or against some project merely because he or she believes such a cause to be beneficial to the political interest the member is elected to represent, is thereby pursuing a "private interest" within the meaning of the Act. I find the argument that the re-election issue is capable of constituting a "private interest" is too vague and speculative to form the basis of a conflict of interest or apparent conflict of interest charge against the Honourable Cathy McGregor.

Count Three -- it is conceded that the allegations against the member for Nelson-Creston and the member for Vancouver-Kingsway are lacking in the degree of direct involvement alleged against the member for Kamloops. Nothing alleged against the member for Nelson-Creston and the member for Vancouver-Kingsway involves any private interest by either member. In this charge of seeking to influence a decision to be made by another person, it must be noted that section 5 of the Act prohibits such a course only if done "to further the member's private interest". Having found in connection with counts one and two that no such private interest on the part of the Honourable Cathy McGregor has been shown to exist, it becomes unnecessary and indeed improper for me to pursue this question any further. It was agreed that I would hear no argument on the issue of what approaches, if any, may be made directly or

indirectly to members of a statutory or quasi-judicial tribunal and that I would hear no evidence as to what, if any, approaches were made and, if so, to whom and by whom until it had been established that I had jurisdiction to do so -- that is to say, until it had been shown that whatever was done was done in furtherance of a private interest of the individual doing it. No such private interest has been shown to exist. In this respect, what is true for the member for Kamloops is also true for the members for Nelson-Creston and Vancouver-Kingsway.

Count Four -- this count relates only to the Honourable Cathy McGregor, MLA and alleges that she failed to follow the prescribed procedure for a private member and a member of the Executive Council in the event that a matter arises with respect to which the member has a conflict of interest or an apparent conflict of interest. The real or apparent conflict of interest relied upon by the complainant is again necessarily based on a pre-existent private interest and that private interest is the same as that relied upon in counts one, two and three. Even though the member, acting without the benefit of advice, suspected at one stage that she might have an actual or apparent conflict of interest, she then concluded that she was mistaken -- as I do also. Once again, the position is that the requirement to follow a specific procedure presupposes the existence of a real or apparent conflict of interest and that, in turn, presupposes the existence of a private interest. I have already determined that no private interest existed and that, accordingly, there was no conflict in respect of which the member was required to make a declaration either as a member of the Legislative Assembly or as a member of Executive Council.

Opinion

After careful consideration of the able submissions made to me by Mr. Michael de Jong, MLA (complainant), and of counsel for the three respondent members, I have concluded that each of the four counts advanced in the complaint was based on a misapprehension of the requirements of the statute: there can be no conflict of interest under the *Member's Conflict of Interest Act* without it being shown that the member in question had a "private interest" to further or pursue. I am satisfied that none of the

three members whose conduct is impugned had such a private interest and that there is, accordingly, no basis upon which I ought to proceed to conduct an inquiry.

This is not the forum in which suggestions that an independent commission was "leant upon" may (absent the existence of a private interest) be pursued, nor need it concern myself with the interesting question of the circumstances in which it is appropriate for Cabinet to invoke the provincial interest pursuant to section 40 of the *Agricultural Land Commission Act* which is already the subject of an ongoing inquiry chaired by a distinguished agricultural scientist.

Dated this 3rd day of June, 1998
in the City of Victoria, Province of British Columbia

H. A. D. Oliver, Q.C.
Conflict of Interest Commissioner