Annual Report

of the

Commissioner of Conflict of Interest

The Hon. E. N. (Ted) Hughes, Q.C.

1994-95

Legislative Assembly
Province of
British Columbia

**Office of
Commissioner of
Conflict of Interest**

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June 6, 1995

The Honourable Emery O. Barnes
Speaker of the Legislative Assembly
Parliament Buildings
Victoria, British Columbia
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Dear Mr. Barnes:

It is my honour to present to you my fourth Annual Report as Commissioner of Conflict of Interest under the *Members' Conflict of Interest Act*. I would ask you to please place the Report before the Legislative Assembly during the current session. It covers the period from May 24, 1994 to May 23, 1995.

The Report has been prepared in accordance with the requirements of section 11 of the *Act*. I believe it adequately reports on the affairs of this office as well as on general conflict of interest issues in the province. Reference is also made to some of the other jurisdictions in the country that have similar legislation and a commissioner's office.

Please express to all members of the Legislature my appreciation for the cooperation that they have extended over the past year to this office.

Yours truly,

E.N. (Ted) Hughes
Commissioner of
Conflict of Interest

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I THE YEAR IN REVIEW

The *Members' Conflict of Interest Act* (the "*Act*") was passed at the 1990 session of the Legislature. A number of amendments were made at the 1992 session. For reference purposes, a copy of the amended Statute is reproduced in this Report as Appendix A.

The *Act* came into force on the first day of December 1990. After serving as Acting Commissioner from that time until May 23, 1991, I was appointed Commissioner under the *Act* for a five year term commencing on that latter date. This Report covers the fourth year of operations - from May 24, 1994 to May 23, 1995.

This Report will follow the same format as last year's Report. In a number of respects it will be a follow-up or an up-date on several developments about which I reported a year ago.

In this first chapter I will review the three principal functions performed by this office. They are:

A. Disclosure Requirements (sections 12 and 13 of the *Act*)

B. Opinions and Advice (sections 14 and 15 of the *Act*)

C. Complaints and Conduct of Inquiries (sections 15, 16 and 17 of the *Act*)

There are other responsibilities placed on this office by the *Act*. One of them is the maintenance of a central record of disclosures of conflict of interest made by members to the Assembly, the Executive Council or a committee of either of them, and of the withdrawals from the meetings where the disclosures were made without voting or participating in the consideration of the matter giving rise to the conflict. The Central Record discloses the date and place of each disclosure and withdrawal and identifies the subject matter which caused the disclosure of a conflict of interest to be made. Inspection of the Central Record is available at this office for review by members of the public.

A. DISCLOSURE REQUIREMENTS

On November 29, 1994, disclosure forms were sent by this office to each member. Members were asked to complete the forms and return them by December 31. The requirement resting with each member is to disclose, in a confidential submission, the nature of the assets, liabilities, and financial interests (including sources of income) of the member, the member's spouse and minor children, and also the same details about private corporations controlled by any of them. Members complied with that requirement in a timely way such that by mid January 1995 all the returns had been received.

During January I studied all the returns and prepared for my annual individual and private meeting with each member, and spouse if available. The 74 meetings were held through February and the first half of March. On March 31, I filed a Public Disclosure Statement with the Clerk with respect to each of the members. It contains, with two minor exceptions detailed in section 13(1) of the *Act*, all relevant information provided to me in written and oral form. The Public Disclosure Statement is available for inspection by members of the public in the Office of the Clerk of the Legislative Assembly. The Public Disclosure Statement also contains information about gifts and benefits received by the member, as an incident of the protocol or social obligations that normally accompany the responsibilities of office, that have been disclosed to me by the member, as is required, when the value of the gift or benefit exceeds $250.00.

During the year, members are required to report to this office any material change by way of acquisition or disposition of assets, liabilities and financial interests. This was a requirement placed in the *Act* in 1992. I am satisfied that members have come to know and understand what is expected of them during the year if a material change has occurred. A notice of the change is then immediately prepared by this office and filed with the Clerk of the Legislative Assembly. It is also available there for public inspection.

All members cooperated fully in meeting the disclosure requirements of the *Act* and any additional requests made of them, by me, in the course of my endeavors to achieve full compliance.

The forms of the 75th member of the Assembly, elected in the May 3 by-election in Abbotsford, are now in the process of being completed and, within the required 60 day period after election, the forms will be filed with me, the meeting with the member and spouse will take place and the public disclosure statement pertaining to that member will be filed with the Clerk of the Assembly.

B. OPINIONS AND ADVICE

This has reference to what I describe as the "preventive medicine" provisions of the *Act.* It is a function that is on-going throughout the year. Requests for my advice can be made to me in writing under the following circumstances:

(i) Members may request my advice on matters respecting their obligations under the *Act* or under a section of the *Constitution Act*. It is section 14 of the *Member's Conflict of Interest Act* that provides the basis for and procedure by which such a request for advice is made and is, subsequently, complied with by this office. The section of the *Constitution Act* that is referred to prohibits, with certain stipulated exceptions, members of the Legislature from accepting from the Crown money for the supply to the Province of goods, services or work. An opinion given under section 14 in response to a request from a member is confidential unless released by the member. The section is generally utilized when a member is contemplating a possible course of action, involvement or participation and wants assurance that what is contemplated would not bring him or her into a position of possible violation of the *Act* or of the indicated provision of the *Constitution Act.*

Most requests under section 14 come from ministers. The responsibilities that they carry at the executive level of government pose far more possibilities for conflict, than arise for other members of the Assembly,

when they must stop and consider the impact of section 2.1 of the *Act* which provides that "A member shall 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". From time to time, ministers present a factual situation to me and ask whether, under the circumstances, he or she ought to request that section 9.1(2) of the *Act* be utilized. That section provides for an alternative minister acting in the place and stead of a minister in a situation that has raised for the minister a matter of conflict of interest or of an apparent conflict of interest.

Because of the confidential nature of opinions prepared under this section, it is not possible to particularize to any extent with respect to the content of those opinions. Generalizing, I can say that, over the past year, opinions I have given under this section cover such matters as involvement in pension legislation decisions given a members' past employment outside of government; limitations that a member's profession or trade may place on specific involvements in ministerial or parliamentary secretary initiatives that impact on that profession or trade; limitations on decision-making at the executive level because of the nature of employment responsibilities of a spouse. By no means is that an exhaustive list but it does indicate the awareness of members with respect to compliance with the statute. In all instances, it has been possible to find a satisfactory solution to problems that have been raised with me. I consider this to be one of the most important services provided by this office to members.

(ii) The Executive Council may request that I give an opinion on any matter respecting the compliance of a member of the Executive Council or a Parliamentary Secretary with the provisions of the *Act* or the section of the *Constitution Act*. This is provided for in section 15(2) of the *Act*. Requests made of this office under this section are rare.

(iii) The Legislative Assembly may request that I give an opinion on any matter respecting the compliance of a member with the provisions of the *Act* or the section of the *Constitution Act*. This is provided for in section 15(2.1) of the *Act*. Requests under this section to date have been non-existent.

I continue to be available for telephone conversations with members and their staff. Similarly, I endeavor to accommodate requests for face to face discussions with members. However, I must again emphasize that if members require a formal and thought-out opinion that affords them the assurances provided for in section 14 of the *Act* they must make their request for my opinion or recommendation in writing as required by section 14(1) of the *Act*. If members wish to quote my opinion in the House, or elsewhere, as authority for a position they are taking, they must have my written opinion in their possession. I emphasize this point every year because it comes to my attention from time to time that a member has announced that he or she has an opinion from me to support a particular position, whereas all that has occurred has been a conversation between us without the follow-up of a formal request for a written opinion.

C. COMPLAINTS AND CONDUCT OF INQUIRIES

1. General Discussion

Besides seeking an opinion about their own involvements or activities, members of the House can also seek an opinion on the compliance with the *Act* or the section of the *Constitution Act* by a duly elected colleague in the Assembly. That course is open to a member under section 15(1) of the *Act* who must proceed by way of a written application setting out the reasonable and probable grounds that he/she has for a belief that his/her colleague is in contravention of the *Act* or the section of the *Constitution Act*. The nature of the contravention must also be identified. If that has been done, then I must fully acquaint myself with the matter and prepare an opinion respecting compliance by the member about whom the complaint of contravention has been made.

Members of the public are similarly empowered by section 15(1.1) of the *Act* to request an opinion from me respecting an alleged contravention of the *Act* or the section of the *Constitution Act* by a duly elected member of the Assembly. A written application from a member of the public must meet the same test as a member who alleges contravention by a colleague. If that has been done, my responsibility is to inquire into the matter and prepare an opinion.

Given that members of the House have knowledge of the *Act,* what it says and how it works, written applications from them about a colleague member generally reflect that background. That is likely one good reason why applications of this kind are rare. Another good reason, I believe, is that the very presence of this legislation and of this office has had both a salutary and a positive influence on members striving to avoid contraventions of the *Act.* That is to say, that presence has so focused on "conflict of interest" as an important component of ethical conduct, that members are constantly mindful of compliance. That is equally so with respect to other sections of the *Act*, prohibiting other branches of unethical conduct, such as the use of inside information, undue influence and the acceptance of extra benefits such as fees and gifts connected to the performance of the member's duties of office. Anyone close to the 1995 climate in the Assembly well knows that there would be no hesitancy to utilize section 15(1) if a sound and *bona fide* basis exists for it. The fact that instances of its use are rare speaks well for members' compliance with the *Act* insofar as the aspects of ethical conduct covered by the *Act* are concerned. I believe it is to the credit of all members that they take compliance with the *Act* as seriously as they do. If I am correct in the impact that I attribute to this legislation and to the presence of this office, a logical question would be whether proscribing in legislative form other components of unethical conduct would produce a similar beneficial result.

Correspondence about the actions or involvements of members of the Assembly from members of the public is much more widespread than from a member about a member. I attribute that in large part to a lack of knowledge by the public about the *Act*, what it says and how it works. That is quite understandable. Often, those who write to me have little background about the *Act,* particularly of the definitions in section 2 of a "conflict of interest" and "an apparent conflict of interest". When I send a copy of the *Act* to those who write to me and explain to them what must be shown

in order to come within section 15(1.1), there is usually an understanding and an acceptance as to why, what was thought to be a possible contravention of the *Act*, may no longer appear to be so. This office endeavors to be of every possible assistance to members of the public who believe they have a basis to utilize section 15(1.1).

Where a complainant has come within either section 15(1) or 15(1.1) of the *Act*, then it is my practice to proceed as provided for in section 16 of the *Act*. It is helpful in determining how I go about the task of acquainting myself with the matter, preparatory to writing the opinion that has been requested.

During the period covered by this Report, two inquiries were conducted utilizing the procedures of section 16. I will review each of them. The first was the result of an application under section 15(1) brought by the Member for Power River-Sunshine Coast with respect to an alleged contravention of the *Act* by the Member for Matsqui. My opinion was dated October 26, 1994 and was filed with the Clerk of the House that day.

The second opinion was the result of two applications alleging contravention of the *Act* by the Honourable Member for Vancouver-Mount Pleasant (The Premier). The first application was brought under section 15(1.1) by a member of the public, Kim Emerson, and the second application arrived a day or two later and was brought by the Member for Peace River South. My opinion was dated the 17th day of April, 1995 and was filed with the Speaker the following day. In the course of this second inquiry, an application was made to the Supreme Court of British Columbia which resulted in a judicial interpretation being given for the first time with respect to some provisions of the *Act* and to procedures followed in pursuing an inquiry under section 16. I will record in this Report the essence of what the court said in that regard.

2. The October 26, 1994 Opinion

The allegation was that the member for Matsqui contravened section 2.1 of the *Act* by partaking in debate and voting on amendments to the *Legal Services Society Act*. That is to say, by so participating he placed himself in either a situation of conflict of interest or apparent conflict of interest.

The *Legal Services Society Act* establishes the Legal Services Society, a public body charged, with substantial provincial government funding, to deliver legal aid services to individuals in the province meeting the criteria set for eligibility. A portion of those legal services are provided by members of the private bar. The member for Matsqui is a member of the private bar and had recently been in receipt of remuneration from the Legal Services Society for services rendered to individuals qualifying for legal aid. I found that the amendments to the *Legal Services Society Act*, debated and voted on by the member for Matsqui, did not impact on remuneration to members of the private bar as alleged by the complainant. I found no personal benefit accruing to the member as a result of the amendments he debated and voted upon. I further concluded that a reasonably well informed person, who studied the amendments and was appreciative of the history of the delivery of legal aid services in the province, would not conclude that the member's ability to debate and vote on the amendments would have been affected by his private interest. He was accordingly found not to have contravened the *Act* by debating and voting on the amendments. The nature of the amendments are clearly recorded in the opinion of October 26, 1994 and do not require detailed repeating here other than to say that it was suggested that two of them could have the effect attributed to them by the complainant. The first provided for a restructuring of the Legal Services Society Board of Directors (section 7 of Bill 55 amending section 5 of the *Legal Services Society Act*) and the second was a new "capping" section that directs the Society to live within its income (section 8 of Bill 55).

What I believe is important about the October 26th document is that it represents the first opinion in Canada that attempts "... to define the extent of limitation on participation in House proceedings that Conflict of Interest legislation enacted in

recent years across Canada has imposed on democratically elected members". The following passages of the opinion bear on that important aspect of the matter:

> It is trite but worthy of note that we are governed under a system of representative democracy because all citizens debating and voting on legislation would be unwieldy, chaotic, impossible and in the end, would undoubtedly result in anarchy. Citizens in a defined geographic area therefore select by ballot persons to represent them at the various levels of government. Mr. de Jong is the representative for approximately 28,000 registered voters and other residents in the provincial electoral district of Matsqui.
>
> It is therefore with thoughtful consideration and great caution that I undertake an adjudication that could result in the denial to those 28,000 voters of the voice in the legislature that they selected to represent them.
> . . .
>
> The same thoughtful consideration and caution of which I speak, and the same reasons that brought me to meet my responsibility in that manner, causes me to conclude that I must be *quite satisfied* that a member has offended section 2.1 of the Act by debating and voting in the House before I rule that a violation has, in fact, occurred. Because the very foundation of our democratic system rests on freedom of speech and action by those elected to represent us, no lesser standard than that is acceptable for determining when a muzzle is to be placed on a member's participation. In a sense, what is required is a delicate balancing of a member's right to fully participate against his/her obligations to comply with the provisions of the *Members' Conflict of Interest Act*. Relevant as a factor for consideration, in arriving at what that balance ought to be, is an appreciation that a parliament is a conglomerate of individuals who each bring with them their experiences in life and the expertise they have acquired through training and experience. That expertise should not be denied to one's colleagues in the House, as they grapple with serious legislative decisions, without meeting the standard I have specified.
> . . .
>
> I decline to give section 2.1 an expansive interpretation that would unnecessarily curtail freedom of expression, appreciating always, however,

that the Legislature has made it very clear that curtailment must occur when a member has a conflict of interest or an apparent conflict of interest as those terms are defined in sections 2(1) or 2(2) of the Act.

. . .

... the bottom line in this instance is that the amendments in section 7 of Bill 55 to section 5 of the *Legal Services Society Act* were not of a nature to trigger, for Mr. de Jong, the requirements for disclosure and withdrawal as provided for in section 9(1) of the Act. The amendments contained in section 7 of Bill 55 did not have the effect on remuneration to private bar legal aid lawyers as attributed by Mr. Wilson. Mr. de Jong's continuing presence and participation through the debate and voting procedure on section 7 did not breach his obligation of compliance with the *Members' Conflict of Interest Act*.

. . .

... he [de Jong] voted in favour of the "capping" section. Even if I were to assume without finding that the "capping" section could have a detrimental effect on private bar lawyers doing legal work, including Mr. de Jong, his vote in favour of the "capping" provision hardly seems consistent with acting in a manner that furthered his private interest.

Further, even if it could be speculated that the "capping" section could have the effect of reducing the remuneration of private bar lawyers, such a conclusion does not meet the standard of satisfaction that I find as being necessary in order to conclude adversely against the member. To deny Mr. de Jong participation in the debate and voting on section 8 of Bill 55, on the basis of all that I know and have repeated in this decision, would not reflect an equitable balance of the interests of the approximately 28,000 registered voters and other residents of Matsqui that he represents with his obligation to comply with the requirements of the *Members' Conflict of Interest Act*. This is because from all that I know about the matter, I am far from being *quite satisfied* that his participation offended section 2.1 of the Act.

3. The April 17, 1995 Opinion

The allegations were that the member for Vancouver-Mount Pleasant contravened the *Act* by awarding government contracts to a public relations/communications

company with whose principals he had had a long standing political association, knowing that in doing so there was an opportunity to further his private interest. Alternatively, it was alleged that in the awarding of those contracts to that company under those circumstances, there was created a reasonable perception in the mind of a reasonably well informed person that the member's ability to award those contacts must have been affected by his private interest.

In making the allegations, both parties placed reliance on an opinion I reported in my last Annual Report that concluded that there existed, in the situation I was then examining, both the potential for and the actual presence of an "apparent conflict of interest" with respect to a statutory responsibility of approving or disapproving of a proposed land development scheme by the then Minister of Municipal Affairs pursuant to powers resting with him under section 948 of the *Municipal Act*. In that earlier opinion I concluded, *inter alia*, firstly, that in addition to the traditional definition of "private interest" as being pecuniary in nature, a "private interest" could be non-pecuniary, providing it confers a real and tangible benefit on the member and, secondly, a "private interest" is not limited to one that is contemporaneous with or subsequent to the exercise of an official power, duty or function by a member and at least insofar as an apparent conflict of interest is concerned, it is enough that a member be a recipient of a past benefit amounting to a private interest.

I received no information to support any contention that the member for Vancouver-Mount Pleasant is or was in an actual conflict of interest. My attention was then directed to the question of whether he had an apparent conflict of interest. I indicated that in deciding that question I had to consider not only whether the member was in receipt of a benefit amounting to a private interest but, as well and most importantly, whether in all of the circumstances the reasonably well informed person could perceive that this private interest could affect the exercise or performance of an official power, duty or function. For reasons stated, I expressed my satisfaction that the member was not in receipt of any real or tangible benefit of significance from the public relations/communications company or any of its principals. I found that the only thing that could arguably amount to the exercise of an official power or the performance of an official duty or function would be the awarding of government contracts to the public relations/communications firm. I

found there was nothing to suggest that the member for Vancouver-Mount Pleasant had, himself, directed the awarding of any such contracts or played any role at all in the awarding of contracts generally but, rather, those responsibilities had been left to senior officials in government. I expressed the view that the reasonably well informed person would not perceive that the Premier would be involved in such bureaucratic minutiae or in such an issue of "micro-management". I concluded with the opinion that a reasonably well informed person would not perceive that the awarding of contracts to the company must have been affected by the member's private interest. The ultimate result was that he was found not to be in contravention of the *Act.*

What I believe to be particularly significant about this opinion is that in discussing the "nature of the official power, duty or function" as an important factor to be considered in determining what the reasonably well informed person would perceive, it addressed the power or function of contracting on behalf of government. That consideration lead to a look at what, if any, relationship there is between conflict of interest and patronage. The following passages will be helpful in appreciating the distinction between them:

> This [the exercising of the statutory power under section 948 of the *Municipal Act* referred to in the previous opinion] would have undoubtedly involved the exercise of an "official power or ... function" and indeed one that has about it the very essence of a governmental function. When the exercise of such a governmental function is at issue the public expects and is entitled to expect a high degree of impartiality in the decision making process.
> . . .
>
> ... the power to contract is one that is somewhat different from other governmental functions that may be described as legislative or involving the exercise of executive or administrative powers pursuant to a statute. It seems to me that the reasonably well informed person would take into account the differentiation that I have noted and will consider that the government must have a certain amount of latitude in deciding from whom it purchases goods or services.

> . . .
>
> Patronage has been described in many different ways but one common way offered by Professor Ian Stewart in ***Despoiling the Public Sector*** (chapter 5 in Langford and Tupper at p. 92) is "the giving of employment, grants, contracts and other government perquisites on the basis of party affiliation".
>
> . . .
>
> ... patronage has been a fact of political life in Canada since Confederation; and there are many well respected academics who would defend many forms of patronage as a legitimate force in that political life.
>
> . . .
>
> Under the ***Act*** and particularly section 2 my concern is with determining whether a Member has a conflict of interest or an apparent conflict of interest. It is neither express nor implicit in those sections that I am to act as a "watchdog on patronage" and thus it is generally not my duty to monitor whether government contracts are awarded on the basis of party affiliation. It becomes my concern however if a government decision, in which a Member has had a role to play, is made or reasonably perceived to have been made after a personal benefit amounting to a "private interest" has been conferred upon the Member by someone who stands to gain from the decision. This will amount to either a conflict or an apparent conflict of interest.

One further significant part of the opinion that I believe is worthy of being repeated relates to the "nature of the contract" as another important factor to be considered in determining what the reasonably well informed person would perceive. The following passage will, I believe, be helpful in appreciating a distinction to be drawn in this regard:

> Some contracts awarded by government by their nature involve sensitive policy matters. In relation to those contracts, Members and their senior staff might reasonably seek out persons with whom the government has a high level of comfort, trust and confidence, which may be based in whole or in part upon sharing similar political views. In a government system dependent on political parties this fact cannot be ignored. I believe that the

> reasonably well informed person can be expected to understand this fact and to take it into account in determining whether an apparent conflict of interest exists.
>
> Furthermore, it is an important fact that advertising agencies, public relations and communications firms provide a service to government that is political in the broadest sense of that term. It makes sense that, in some instances, contracts for such services would be given to persons who share the same political or ideological point of view of the government in power. ... In my view, the reasonably well informed person would take all of this into account.

4. April 4, 1995 Judgment of the Supreme Court of British Columbia

As I met my statutory obligations in gathering the information I required to enable the preparation of my opinion of April 17, 1995 (reviewed *supra)*, I received an application from an editor of a magazine/newspaper to have access to the "present preparation of opinion by your office requested by Messrs. Emerson and Weisgerber". The applicant argued the question of access and I ruled against the request. The petitioner immediately commenced court proceedings asking that the court order access and that it issue a declaration that my proceedings were judicial or quasi-judicial. Ultimately my inquiry was adjourned pending the pronouncement of the court.

In his ruling of April 4, 1995 the presiding Justice said:

> In support of the Petitioner's submission, they rely on section 2(b) of the ***Canadian Charter of Rights and Freedom***, the ***Members' Conflict of Interest Act*** and various other British Columbia statutes ... .
>
> The foundation of the Petitioners argument is that the proceedings before the Conflict Commissioner are judicial or quasi-judicial in nature and as such must be open to the public.

Section 2(b) of the *Canadian Charter of Rights and Freedoms* reads:

> 2. Everyone has the following fundamental freedoms:

(a) ...
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communications;
(c) ...
(d) ...

The Justice then proceeded to consider the language of the *Members' Conflict of Interest Act* and its purpose to determine "... where in the continuum, from an administrative to a judicial, the Commissioner's functions lie". He reviewed several authorities, particularly pronouncements by the Supreme Court of Canada, including that in *Minister of National Revenue* v. *Coopers & Lybrand* where in 1979 one of the justices said:

> "It is possible, I think, to formulate several criteria for determining whether a decision or order is one required by law to be made on a judicial or quasi-judicial basis. The list is not intended to be exhaustive.
> (1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
> (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
> (3) Is the adversary process involved?
> (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?
> These are all factors to be weighed and evaluated, no one of which is necessarily determinative."

The Justice then said about the *Members' Conflict of Interest Act*:

> As to its purpose, I suggest it is obvious. From time to time allegations arise of a real, apparent or perceived conflict of interest. The issue may originate from the public, the media or members of the Legislative Assembly itself. The subject may have been and has been in the past the focus of some debate and perhaps some rancor. The solution, short of resolution by the Assembly, was to be found, in the past, in caucus or in cabinet or in hopes of some; effluxion of time.

> In my opinion, the ***Members' Conflict of Interest Act*** was enacted to attempt to provide a means of resolution of the allegations of conflict of interest by the creation of a Commissioner who has the ability to obtain information and to provide a report to the Legislative Assembly about one of its members.

The Justice then undertook a section-by-section review of the *Act*. After completion of that review he said:

> A number of factors, I think, should be considered in the light of that review. First is that the proceedings amount to a request for an opinion and that secondly, the Commissioner may, again permissive, conduct an inquiry. The legislation is silent as to the process. Thirdly, the Commissioner has subpoena and contempt power. Fourthly, the Commissioner's report shall go to the Speaker, and it is important, in my view, to note that under the provisions of the legislation it is the opinion that is reported to the Speaker. Fifthly, that as I mentioned, if the report is adverse to the member, a member is given then the opportunity to make submissions. Next, that the Speaker lays the report, the opinion, before the Legislative Assembly. The report may contain a sanction and the Legislative Assembly may accept or reject that recommendation after having thirty days to consider.

He continued:

> Looking at the four criteria set forth in the decision of ***Coopers Lybrand*** that I referred to a moment ago, in answer to the first, there is no necessity for a hearing. As to the second, the member is not directly or indirectly affected, that is, a member's rights or obligations are not directly affected by the report or the opinion. One must accept, of course, that there is reputation and public awareness of the content but other than that, there is no direct or indirect affect on the right or obligations of the member. The rights and obligations are affected by the decision of the Legislative Assembly whether to impose sanctions. Thirdly, as to the adversarial process, it is clearly not involved, and finally, there is no decision in this instance except by the Legislative Assembly.
>
> In the final analysis, the Commissioner investigates in a manner he decides and arrives at an opinion of the existence or non-existence of a conflict of

> interest. It is an information gathering process coupled with an opinion. The Legislative Assembly needs a means of acquiring information and has created this position for that purpose coupling it with the Commissioner's entitlement to express an opinion as to whether or not the member is in conflict as defined.

The Justice then arrived at the conclusion that the activities of the Commissioner under the *Act* are not judicial or quasi-judicial in nature. That being so, he held that the application failed and that there had been no violation of section 2(b) of the *Canadian Charter of Rights and Freedoms*.

The Justice then turned his attention to a final matter that he thought required consideration. He described it as:

> ... whether or not the actions of the Commissioner are protected or covered or carry with it some immunity pursuant to the privilege of the Legislative Assembly; a privilege which generally exempts members of the Legislative Assembly or the Assembly itself from the general law, that is civil law.

He then said:

> The Commissioner is a creature of the legislature carrying out matters heretofore dealt with by the Legislative Assembly. He performs a function which impacts on the integrity of the Assembly in the sense that the integrity of a member may be challenged and his or her ability to function as a member of the Legislative Assembly may be significantly affected by the decision of that Assembly.

After reviewing a 1993 decision of the Supreme Court of Canada on the issue of legislative privilege, the Justice of the Supreme Court of British Columbia in the instant case concluded his ruling by saying:

> 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 ... . 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. The public knowledge interest will be met by the Legislative Assembly dealing in its proceedings publicly, if it wishes, with the information and the opinion it receives in the usual fashion in the legislative chamber.
>
> Consequently, the Petitioners fail on this ground as well as the petition is dismissed.

It must be recorded that on the 2nd day of May, 1995 a Notice of Appeal was filed by the editor in the Court of Appeal of British Columbia. At this point in time, no date for the appeal to be argued has been set. The results of the appeal will ultimately be made known publicly and, if available at the time of preparing the 1995-96 Annual Report, those results will be detailed in that Report.

II A COMMITMENT KEPT

In my 1993-94 Annual Report, I expressed a desire to dialogue with a cross-section representation of the Assembly about possible "improvements that could be made that would be beneficial to the public, for whose benefit the legislation *[The Members' Conflict of Interest Act]* exists, as well as for the members of the Assembly and for this office".

I made the following commitment:

> An initiative will originate from this office, immediately following the summer months of 1994, directed to the leaders of the recognized parties in the House to see if a satisfactory procedure can be agreed upon whereby the dialogue can commence.

I expressed the opinion, at that time, that an all-party review made practical sense in an environment where those who would be engaged in the dialogue shared my view that

this is an area for non-partisan consideration of matters that are everybody's business - the business of all members of the House and their constituents. I found that to be the view of the three recognized parties in the House. Each of them responded promptly, willingly and cooperatively to my request for a meeting. That meeting was held on October 21, 1994 with a representative of each of the New Democratic, Liberal and Reform parties present. A second meeting was held on November 30 with representatives of the New Democratic and Reform parties in attendance. The representative of the Liberal party was unavailable but I had accepted an invitation of the Liberal Caucus to discuss the operation of the *Act* with its members on November 16 and I had a discussion with the representative of the Liberal party on November 29.

At the first meeting we discussed the items listed in my last annual report under the heading "Possible Amendments for Consideration". Between the first and second meetings, I acquainted the three representatives with extensive changes that were ultimately made in December 1994 to the conflict of interest legislation in Ontario. The 1990 British Columbia *Act* was patterned almost exclusively on the Ontario Act that had been enacted in 1988. The Ontario statute, which received Royal Assent on December 9 but which has not yet been proclaimed, is the *Members Integrity Act* and my counterpart in that jurisdiction is described as the *Integrity Commissioner*. The changes made in the Ontario legislation caused me to raise in our discussions whether there was merit in embracing, within our legislation, other forms of ethical conduct besides just conflict of interest and the present sections dealing with insider information, undue influence and the accepting of extra benefits. Movement into the wider sphere in Ontario has, in some respects, been through the enactment of a preamble to the *Act* and provision for the Integrity Commissioner to opine on whether a member has contravened Ontario parliamentary convention and, if so, to recommend what penalty, if any, should be imposed as a result of that contravention. Also, provisions addressing a broad range of ethical conduct other than just conflict of interest, exist in relevant legislation in place today in some other jurisdictions in the country.

Before the October 21 meeting, I was made aware that the legislative agenda for the 1995 session of the Legislature had been settled. That fact was reemphasized at the two meetings by the representative of the government party. That fact did not turn out to be a critical factor because it was apparent at the first meeting and became abundantly

clear by the time the second meeting was held that the three parties shared a view of general satisfaction with the *Act* in its present form and with the administration of it. By the time our discussions were concluded, it was clear that at this time little need was seen for change and I readily accepted that consensus, as that is a decision that is properly for members to make and not for me. I have a measure of satisfaction, however, in having brought the group together, thereby affording the opportunity for intelligent and reasoned discussion by those directly affected by the legislation.

It may be that some day a committee of the Legislature will exist where the kind of dialogue I initiated in this instance could occur at regular intervals. I recorded a year ago that I favoured an "all-party dialogue" provided that independent officers of the Assembly are kept at arms length from the government and the bureaucracy and that there not be an assumption of any supervisory power over those officers as a result of such a dialogue. I pointed out in my last Annual Report that Alberta works on that basis through a standing committee of the Legislature entitled "Legislative Officers". I also reported last year that my colleague in Newfoundland had proposed to the House of Assembly in that jurisdiction, for its consideration, a number of amendments to the existing legislation. In his 1994-95 Report, he advises that a Select Committee of the House of Assembly of Newfoundland was established to deal with his 1993-94 Annual Report. Also in my last Annual Report, I alluded to the fact that the new Ontario *Integrity Act* would be enacted largely as a result of the work of a committee that had representation on it named by each of the three parties in the House and chaired by the Commissioner. When the estimates of this office were under consideration in the British Columbia Legislature, on June 30, 1994, the Minister of Employment and Investment indicated that my 1993-94 Report was "an appropriate area for a parliamentary committee". More recently, I note that the member for West Vancouver-Garibaldi, on April 13, 1995, recommended the establishment of an all-party committee of the House to review the operation of the *Act.*

III CONTINUING WIDESPREAD INTEREST IN CONFLICT OF INTEREST MATTERS

I have discussed in the Annual Report of each of the last two years, the calls and communications received in this office from citizens who have concerns about conflict

of interest matters pertaining to public bodies or officials other than the Legislature of British Columbia and its 75 elected members. The volume of those calls and communications has been maintained over the last 12 months.

As in the past, inquiries about elected municipal officials top the list. Also included are queries covering school board members and those who sit on publicly appointed boards and commissions and non-profit societies. Also, as in previous years, because of the sparsity of the locations where assistance with these concerns is available, this office has continued to assist in a very informal way but always emphasizing that the jurisdiction of this office is limited officially to conflict of interest matters pertaining to the elected members of the legislature.

Last year I reported on what I described as "two possible avenues of assistance on the horizon" for those who seek guidance in these other areas. They both remain on that horizon.

The first pertained to work by the Law Reform Commission of British Columbia on conflict of interest issues pertaining to Directors and Societies. I commented on the favourable and widespread response to the Commission's 1993 consultation paper on this subject which proposed changes to existing law, presently found within the *Societies Act*, particularly with respect to the duties and responsibilities of directors of non-profit and/or charitable bodies when conflict of interest issues arise for them, vis-à-vis their public responsibilities as directors on the one hand and their private interests on the other hand. I indicated that the Commission's final report to the Attorney General recommending legislative change would be filed by the end of 1994. I am now advised that, while good progress has been made on the project and all the recommendations to be made by the Commission have been settled in principle, there is some remaining work required before the final document is completed but it is anticipated that the final report will be submitted to the Attorney General before the end of the summer of 1995. It is my belief that this report and whatever legislative action follows will be of considerable assistance to many of those who make inquiries at this office.

The second avenue of assistance that I addressed a year ago dealt with pronouncements from government officials that indicated that legislative developments could be

expected in the area described in the House by the Attorney General in 1992 as the "tier two level" - municipal councils, hospital boards, school boards, and the public service. Those developments have not yet occurred and, insofar as I am aware, remain under study.

Meanwhile, what I described in the 1993-94 Annual Report as "a recent Ontario Development" has partially come to pass. *The Local Government Disclosure of Interest Act, 1994* received Royal Assent on December 9 of that year. In a general way it parallels legislation applicable to members of the Legislature by requiring members of municipal councils, school and other public boards to; avoid participation in matters in which they have a pecuniary interest; decline the acceptance of gifts connected with the performance of duties of office; file a financial disclosure statement with the municipal clerk or secretary of the board. Provision is made for the appointment of a Commissioner to investigate any alleged breaches of the *Act* and after completion of investigation, to bring an application to the Ontario Court (general division) to determine whether there has been a contravention of the *Local Government Disclosure of Interest Act*. To date that legislation has not been proclaimed into law.

IV OFFICE OPERATIONS

There have been no changes in personnel nor physical plant in the past year. This continues to be a two person office and I see no reason for that to change in the foreseeable future. The second position is job shared by two employees and that is an arrangement that works quite satisfactorily.

For the first time since the opening of this office over four years ago, a deficit occurred during the past fiscal year in the operating costs of the office. The reduced budget for 1994-95 was $195,000 but expenditures over the twelve month period totalled $252,439.07. This was largely caused by retaining professional services during the year of lawyers and accountants. With a minimum staff in the office, the retaining of professional services is sometimes necessary. That is particularly so during investigations but also occurs in the course of preparing confidential opinions for members when complications in the fact pattern make that course advisable. In commenting a year ago that I had suggested a budget decrease because of a history of

coming in under budget with respect to the cost of normal operations (excluding cost of renovations and acquisition of capital assets that occurred in 1993-94), I cautioned that it must be appreciated that if circumstances require investigations to be carried out, the amount required for office operations in a year could increase to accommodate that activity. That came to pass in 1994-95. The budget for 1995-96 has again been reduced, this time to $185,000. For normal office operations that sum is adequate. I must again add the same caution as last year with respect to costs when special situations arise.

I am appreciative of the loyalty of staff members Jill Robinson and Daphne Thompson. Also, I express my thanks for the valuable assistance of the Legislative Comptroller and his staff in carrying out the accounting procedures for this office.

V CLOSING

Like last year, I have a commitment to make with respect to an initiative that will originate from this office immediately following the summer months of 1995. The 40 page disclosure statement that members are required to complete annually has been in use in its original form since the beginning of 1991. On five annual occasions members have filled out the same document. Those with ownership interests in private controlled corporations must also fill out a further 12 page document for each such company. With the experience of the five occasions available, I believe it is timely to review whether the forms drafted in 1990 are, in fact, today the most concise and efficient way of meeting the reporting requirements of section 12 of the *Act*. In that review I will consider the documents and forms in use in all other provinces and territories of the country that have conflict of interest legislation requiring annual disclosure and I also will seek the views of all members of the current Legislature of British Columbia.

The disclosure forms in use come into existence by Regulation made by this office but subject to the approval of the Lieutenant Governor in Council as provided for in section 21 of the *Act*. If some revisions are found to be warranted, as I expect could likely be the case, it is my intention to have them available for discussion, subsequent approval by the Lieutenant Governor in Council and in use in 1996.

The comments that I made under this concluding heading a year ago have equal relevance today. During the next year, some members of the public will refer to an Annual Report from this office for the first time, and therefore, I believe it appropriate to repeat them in the following two paragraphs.

The content of this report likely goes further than the responsibility I have under section 11 of the *Act,* to "... report annually upon the affairs of his or her office ...". It covers a spectrum of conflict of interest issues that are topical in this province at the present time and which seem to find a focal point in this office because of the lack of any other repository for all that is being generated by the growing interest in this subject.

I recognize that my first obligation with respect to this Report is, through the Speaker, to the Members of the Assembly. I believe I have met that obligation. Throughout the year, many calls are made on this office for information in printed form about the general subject of conflict of interest and the operations of this office in particular. A copy of this Report, with the *Act* as Appendix A, is part of the material supplied to those who inquire. That explains its secondary and, I believe, quite justified use as an educational resource. Also, I distribute it to classes on political science at our universities and colleges when asked to guest lecture about the function and working of the *Members' Conflict of Interest Act* in our province. I believe these educational initiatives are useful contributions to the process of building and enhancing ethical standards throughout our society whether in elective office, the business community or other endeavours of human activity. It is because of contributing to that goal that I consider it to be appropriate to canvass the wider scene in this Report.