OPINION

OF
THE CONFLICT OF INTEREST COMMISSIONER
PURSUANT TO SECTION 19 OF THE
MEMBERS' CONFLICT OF INTEREST ACT

IN THE MATTER OF APPLICATIONS BY
DAVID EBY, MLA (VANCOUVER–POINT GREY) AND
DUFF CONACHER
WITH RESPECT TO ALLEGED CONTRAVENTIONS OF THE
MEMBERS' CONFLICT OF INTEREST ACT
BY THE HONOURABLE CHRISTY CLARK, MLA
(WESTSIDE-KELOWNA) AND PREMIER OF BRITISH COLUMBIA

City of Victoria
Province of British Columbia

May 4, 2016

EXECUTIVE SUMMARY

In 1989 and 1990, Ontario and British Columbia were the first provinces to pass Conflict of Interest legislation providing for mandatory annual disclosure by Members of assets and liabilities in a process supervised by Commissioners. Other provinces followed over the years, as did the Federal Parliament.

In order to find the existence of a conflict of interest, or an apparent conflict of interest, the threshold question is whether there is an identifiable "private interest" that has been advanced. A Member must be found to have preferred his or her private interest over their public duty.

In British Columbia, the *Members' Conflict of Interest Act* (the "*Act*") defines and engages both direct conflicts and apparent conflicts of interest.

For the last decade at least, the established parties in British Columbia have raised funds at a variety of events. The existence of so-called "private" or "by invitation" events were well known as an opportunity to raise the significant amounts of funds necessary from generous supporters to operate the party apparatus and to finance expensive general election campaigns. The party in government wanted to solidify its support and the party in opposition was anxious to expand its donor base to include those not previously identified as supporters.

In recent months, the practice of politicians participating in "exclusive" fundraising events has been hotly debated, in British Columbia and across the country. Typically, the fundraising events in the spotlight are those where a party leader or cabinet minister is in attendance; the ticket price is relatively high (ranging from several hundred to several thousand dollars per person); and the number of attendees is relatively small. The general concern expressed is that it is inappropriate for politicians to "sell access" to themselves in this manner.

At the beginning of April 2016, I received two separate requests to address this issue. Mr. Duff Conacher of Democracy Watch, and Mr. David Eby, the Member for Vancouver-Point Grey, alleged that Ms. Christy Clark, the Member for Westside-Kelowna and Premier of British Columbia, had breached the *Act* by participating in a number of such "exclusive" fundraising events. Both Mr. Eby and Mr. Conacher are accomplished and experienced lawyers.

In his original submission, Mr. Eby described the private interest at stake for the Premier as "raising money for her own election prospects and those closely associated with her in the BC Liberal Party". Twenty-six days later and after counsel for the Premier had responded to the original request, Mr. Eby filed further grounds, alleging that the Premier had a direct, private interest in the donations from "exclusive" events "because the central party returns this money, in part, to the Premier through her Leader's Allowance". Such allowances have been paid by the BC Liberal Party to its leaders since 1993 and its existence has been disclosed annually in the comprehensive disclosure process established by the *Act*. The *Act* does not require Members to disclose dollar figures. According to media reports and confirmed by the Premier, the amount of the allowance has varied over the years. In 2015, the amount paid was set at $50,000.

In a further submission, Mr. Eby went so far as to say that the donations "may as well be passed directly to the Premier…in an envelope" and described the Leader's Allowance as being "laundered" through the Liberal Party. Mr. Eby argued that the Premier's private interest has thus been furthered and the Premier must now recuse herself from any decision involving donors who attended "exclusive" fundraising events.

The grounds for Mr. Conacher's single request are slightly different. He alleged that the donations received at "exclusive" fundraising events are gifts or personal benefits which must not be accepted under section 7 of the *Act*. It is convenient to address Mr. Conacher's concerns in this opinion rather than separately.

There may be circumstances where receiving a political donation places a Member in a conflict or apparent conflict of interest situation. However, they are generally limited to situations where a candidate receives a personal campaign contribution and due to a variety of other factors, is in a position to "return a favour" to the person who made the donation. That was the outcome of the first Opinion under the *Act* issued by Commissioner Ted Hughes of this Office in 1993 (*Blencoe*).[1] However, contributions to the Party are different altogether, as such donations do not benefit Members in a direct and particular way (*Harcourt)*.[2] In extensive briefs from the applicants, neither has been able to refer to any decisions in British Columbia or elsewhere that has held otherwise.

After considering all of the materials provided by the parties and their submissions, I am unable to conclude that the donations received by the Liberal Party in the circumstances described amount to a "private interest" for the Premier. Helping to boost the Party's financial wellbeing is a political benefit, rather than a private financial one. Nor can the Premier's Leader's Allowance paid to her by her Party be said to create a "private interest" that is furthered by the Premier's attendance at "exclusive" fundraisers.

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

The *Act* is entitled the *Members' Conflict of Interest Act* and it is confined to conflict of interest on a personal level. My jurisdiction, therefore, only extends to consideration of individual Members' private interests. The *Act* is not a moral code and I am not an arbiter of what may be political morality in the campaign finance context.

[1] http://www.coibc.ca/down/opinion/opinion_blencoe_1993.pdf

[2] [2] http://www.coibc.ca/down/opinion/opinion_harcourt_1995.pdf

With respect to Mr. Conacher's concerns, the donations in question do not constitute a "gift or personal benefit". Whether or not a Member participates directly or indirectly in fundraising activities for their Party, the donated money is never in the Member's possession or under their control. In the matters I have to decide, the funds raised at "exclusive" events are donated to the BC Liberal Party and are not accessible for the Premier's personal use.

Political fundraising is a legal activity that is governed by the *Election Act.* Whether the rules surrounding the limits on ticket prices to fundraising events, the advertising of such events, and the disclosure of attendees should be changed is a matter worthy of public ferment and debate. However, it is not appropriate for me, nor within my authority under the *Act,* to set parameters for the scope and scale of party fundraising events. Ultimately those decisions must be made by the Legislature in determining the campaign finance laws of this province. The *Act* is not a universal solvent. In our democracy it is important that legislation not be overly broad. It is also essential that legislation be interpreted in a way that is consistent with its real purpose and intent.

In the result, it is my opinion that the Premier has not contravened the provisions of the *Act* as alleged in both of the matters that have been brought before me.

I. INTRODUCTION

[1] By email on April 1, 2016, the Member for Vancouver-Point Grey, Mr. David Eby, requested my opinion pursuant to sub-section 19(1) of the *Members' Conflict of Interest Act* (the "Act") concerning Ms. Christy Clark, the Member for Westside-Kelowna and Premier of British Columbia. That sub-section provides:

> **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, but 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*.

[2] The *Act* sets out the Commissioner's three main roles: to provide advice to Members, to oversee the disclosure process, and when allegations are brought against a Member, to provide an opinion on whether the *Act* has been breached. Briefly, the purpose of the *Act* is to ensure that Members do not benefit personally from the exercise of their public duties. The *Act* is not a moral code and cannot be used as a universal solvent for any perceived ill that may impact on the workings of government. I have no authority to go beyond the jurisdiction granted to me under the *Act*, or to impose obligations on the Members that are not articulated in the *Act*.

II. ALLEGATIONS

[3] Mr. Eby reproduced excerpts from an article by Gary Mason that appeared in the Globe and Mail on March 28, 2016.[3]

> *At a recent dinner hosted by Simon Fraser University chancellor Anne Giardini, 10 guests paid $10,000 each to mingle with Ms. Clark and later sit down to a multicourse dinner. At a party fundraiser in Kelowna, a small group who paid $5,000 each got quality time with the Premier at a non-advertised, private reception before the main event. According to a source, admission to some of the more exclusive get-togethers with Ms. Clark can be as high as $20,000.*
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> […]
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> *That has allowed the Liberals to retire their debt from the last election - estimated to be more than $3 million – and building a formidable war chest for next year's campaign.*
>
> […]

[3] Available online at http://www.theglobeandmail.com/news/national/pricey-meetings-with-clark-helping-fuel-bc-liberal-fundraising-machine/article29413577/

> *Bob Rennie, chair of fundraising for the B.C. Liberals, estimated that between now and the election next May, the party might organize 20 or more of the type of small, intimate gatherings at which people can pay big money to get special access to Ms. Clark.*
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> […]
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> *Asked about the perception that people with money are buying privileged and potentially financially beneficial access, Mr. Rennie said those paying $10,000 or more to attend these intimate functions are often business leaders who support what the Liberals are doing and want to help ensure the party stays in power.*

[4] Mr. Eby alleged that the Premier's actions contravene sub-section 2(2) of the *Act* which prohibits apparent conflicts of interest. That sub-section provides:

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

[5] Mr. Eby's position is that by participating in "exclusive" fundraising events, the Premier's private interest has been furthered and the Premier must now recuse herself from any decision involving donors who attended those events. He asked me to investigate who attended the particular events noted in Mr. Mason's article, and determine whether any "upcoming or concurrent decisions by the Premier as part of her public office are in conflict".

[6] The day before receiving Mr. Eby's request, I received a letter from Mr. Duff Conacher on behalf of Democracy Watch. Mr. Conacher also referred to recent media coverage of "exclusive" fundraising events hosted by the BC Liberal Party with Premier Clark in attendance. Mr. Conacher alleged that donations for private, exclusive fundraising events constitute 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)."

[7] As a member of the public, Mr. Conacher asked me to declare that donations made at such events are "illegal gifts" prohibited under sub-section 7(1) of the *Act*, as well as to determine who has attended such events and "monitor all policy-making processes that affect the donors to ensure that no preferential treatment occurs". His request was made under sub-section 19(2) of the *Act*, which provides:

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

[8] Sub-section 7(1) of the *Act* provides:

> **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.

[9] Given the common factual matrix of Mr. Eby's and Mr. Conacher's requests, I advised Mr. Conacher that I would not be preparing a separate opinion in response to his request, as I expected that the concerns he raised could be addressed in the opinion issued in response to Mr. Eby's request.

III. PROCESS

[10] I received Mr. Eby's letter by email at approximately 4:00 p.m. on Friday, April 1, 2016. I confirmed receipt of his correspondence shortly thereafter, and immediately informed the Premier's office of Mr. Eby's request, and provided of copy of his correspondence. Mr. Eby apparently released his letter to the media simultaneously or soon after, as his request was reported in the media that same day[4]. As a courtesy, I urge Members to refrain from making their allegations public before my Office has had an opportunity to inform the Member who is the subject of the allegations.

[4] See for example "B.C. NDP seeks probe into Liberals' fundraising tactics", The Globe and Mail, April 1, 2016. Available online at http://www.theglobeandmail.com/news/british-columbia/bc-ndp-seeks-probe-into-liberals-fundraising-tactics/article29503534/

[11] On Monday, April 4, 2016, I requested that the Premier respond to the allegations by April 15, 2016. I also informed Mr. Eby of this timeline and advised that he would have an opportunity to review the Premier's response and provide further submissions. Given the high degree of public interest in the matter, I expressed my expectation that submissions from both parties would be provided expeditiously. I am grateful to them for their cooperation throughout the process.

[12] As requested, on April 15, 2016, the Premier responded to Mr. Eby's allegations. Counsel for the Premier confirmed the following:

1. The Premier, in her capacity as Leader of the BC Liberal Party, attends donor events such as the dinner hosted by Ms. Giardini referenced by Mr. Eby. Nine individuals attended this particular event. Seven of those contributed $10,000 each to the BC Liberal Party, and two others contributed $5,000 each. Two other individuals who were invited but did not attend, and made donations of $5,000 and $500 respectively.
2. It is the Premier's understanding that the money raised at such events goes to the central BC Liberal Party and is reported in accordance with the *Election Act.*
3. All donations to the central Party go into a general account from which they are used as the Party later decides.
4. Premier Clark is not personally involved in the organization or administration of Party fundraising events.

[13] Mr. Eby provided a further submission in reply to the Premier's response on April 20, 2016. He suggested that the information provided by the Premier through her counsel was "entirely unreliable and inadmissible" for a variety of reasons such as the statements are paraphrased, edited and unsworn and because of the "subordinate" position of the person who provided information on behalf of the BC Liberal Party.

[14] At this early "information gathering" stage, the usual process had been properly followed. Mr. Eby made certain allegations against the Premier and the Premier responded to those allegations in a written submission, as requested. To suggest that the Premier should have provided copies of all correspondence, transcripts of conversations, sworn statements etc supporting her responses is unreasonable. There is no basis on which to draw a negative inference from the information provided as suggested by Mr. Eby.

[15] He added the assertion that the Premier had a direct, private interest in the donations derived from "exclusive" events "because the central party returns this money, in part, to the Premier through her Leader's Allowance". He also raised concerns about the fact that the Premier is represented by legal counsel, suggesting that the question of how the Premier's legal counsel is paid is significant to the resolution of the complaint.

[16] On April 27, 2016, as the result of information reported in the media, Mr. Eby made further amendments to his allegations. First, he indicated that in recent years the Leader's Allowance has varied between $30,000 and $50,000. He alleged that:

> "Given the Premier's allowance varies from year to year, dependent on the financial fortunes of the central party, this commission-like payout establishes a personal financial benefit under the *Act* for the Premier. This benefit is directly related to her small, high cost, backroom and dinner parties because the benefit fluctuates depending on the party's fundraising. The Premier's role as the head of Cabinet adjudicating the interests of the donors who pay to attend these dinners she hosts – parties that fund, and if they are successful, increase, her personal financial transfer from the party worth in excess of $150,000 to the Premier".

[17] He went on to say:

> "The Premier's share of these donations may as well be passed directly to the Premier by the attendees of her parties in an envelope at the beginning of the evening – this conduct is outrageous, completely problematic, and directly contrary to the public interest. The laundering of donations through the party before they are passed to the Premier cannot conceal the reprehensible activity that is taking place here which has benefitted the premier in six figures"

[18] A separate allegation was advanced that a conflict of interest arises in the "administration of the public benefit of free legal counsel." His argument was that the Premier was using "public money to litigate her right to fundraise for the BC Liberal party as she sees fit, and now to defend her right to take a portion of that fundraising money for her own personal benefit".

[19] The Premier's counsel provided a further response on May 1, 2016, including a statement from Ms. Sharon E. White, Q.C., who has been President of the BC Liberal Party since 1993. Ms. White confirmed that donations to the central Party go into a general account of the central Party and are never earmarked for a particular purpose; and that donors are not able to direct their donation towards a particular expense including the Leader's Allowance. She also

confirmed that the Premier participates in a number of events for the central Party, including fundraising events, but does not engage in the organization of these events.

[20] Ms. White stated that the Allowance "is a longstanding administrative practice of the central Party, pre-dating the current Premier's tenure as Leader. Central Party financial records verifies (sic) the Allowance was provided from 2003 onwards; and corporate history confirms the Allowance was provided annually starting in 1993". She explained that the Allowance is set and approved by the central Party's Executive on an annual basis and does not "fluctuate" from year to year. Rather, she indicated it has only increased since its inception 23 years ago. She reported that the amounts paid to the Premier during her tenure were $42,000 in 2011, $44,000 in 2012, $45,000 in both 2013 and 2014, and $50,000 in 2015 and 2016. She added that the amount of the Allowance is not based on any "commission" or formula, or tied to either general fundraising totals of the Party or with the Leader's attendance at fundraising events or how much might be raised in connection with those events, or the particular financial state of the Party. She noted for example that in 2012, despite the Party running an operating deficit and being "millions in debt", the Allowance that year increased from the previous year.

[21] In respect of the payment of the Premier's legal fees, counsel for the Premier noted that caucus funds are provided to each Party to spend within their discretion to support their respective MLAs, and that an annual audit of these expenditures rests with the Legislative Assembly Management Committee. Given that the Premier sits in caucus as the Member for Westside-Kelowna, he submitted that engaging counsel to respond to a complaint alleging a breach of the *Act* which alleges that the Member has misconducted herself is an appropriate expenditure.

[22] Again, I provided the Premier's response to Mr. Eby, who requested further leave to reply with a final submission. Based on the information provided by Ms. White, he accepted as factual that the Allowance paid to the Premier cannot properly be described as a "commission"; and also that donors to the central BC Liberal Party are not permitted to direct funds specifically to the Premier. However, he maintained that the Leader's Allowance is still "directly connected to political donations by being entirely composed of political donations".

[23] Mr. Eby then made a new and further allegation that the "increase in central Party activities comes at the expense of her official role" and submitted that the Premier may be in breach of sub-section 9(1) of the *Act* which states:

> **9**(1) A member of the Executive Council must not
>
> (a) engage in employment or in the practice of a profession,
> (b) carry on a business, or
> (c) hold an office or directorship other than in a social club, religious organization or political party
>
> if any of these activities are likely to conflict with the member's public duties.

[24] For at least the last century in British Columbia, the Premier of the province has invariably been the Leader of the Party that has been elected to form government. The two responsibilities coincide and have been carried out by the same person. As a practical matter, it is difficult to imagine any other political reality. I expect that for all Premiers there has been a time management issue addressed by simply adding to the hours spent every day on public duties. In my opinion, and in the context of section 9(1)(a), the activity of being Party Leader cannot be properly interpreted as "engag[ing] in employment". To contend otherwise is inconsistent with the intent and purpose of the section.

[25] In my view, the issue of the Premier's legal expenses potentially being paid for out of caucus funds, is irrelevant to the determination of this complaint. The engagement of legal counsel has been triggered by Mr. Eby's allegations made pursuant to sub-section 19(1) of the *Act*, which necessarily relate to questions about the Premier's conduct in her capacity as a "member". Whether her legal expenses are properly paid for under the rules that govern caucus expenditures is not my determination to make.

[26] The fact that the Premier takes part in so-called "exclusive" fundraising events more or less as described is not in dispute by either party. Accordingly, the issue for me to determine in this opinion is whether participating in such events is prohibited by the *Act.* Specifically, the questions I must answer are (a) whether the Premier's "private interest" is advanced by participating in such events; and if so, whether there are circumstances that might place her in an

apparent conflict of interest situation; and (b) whether the donations represent a gift or personal benefit under section 7.

IV. DISCUSSION

[27] In order for there to be a violation of section 2, there must be an identifiable "private interest" that can be advanced. In his original submission, Mr. Eby described the private interest at stake for the Premier as "raising money for her own election prospects and those closely associated with her in the BC Liberal Party". In his surreply to the Premier's submission, Mr. Eby added his belief that the Premier has a direct, private interest in the donations derived from "exclusive" events "because the central party returns this money, in part, to the Premier through her Leader's Allowance".

[28] The Premier's position is that Mr. Eby's complaint does not allege any specific official power or duty that was exercised or performed by the Premier at a time she had a private interest. Rather, it more generally raises the issue of Members, on behalf of their political parties, attending smaller, sometimes private, events involving relatively large donors to their Party. The Premier submitted that any such donations do not constitute a private interest, and it follows that there can be no apparent conflict of interest.

[29] Both Mr. Eby and the Premier cited two seminal opinions written by Commissioner Ted Hughes in the formative days of this Office to support their position, the *Blencoe* opinion[5] and the *Harcourt* opinion[6].

[30] *Blencoe*, the first opinion delivered by this Office in 1993, considered whether campaign contributions could constitute a private interest. In that case, two long-time supporters of the provincial NDP (Milne and Tait) provided important financial and other assistance to the election campaign of Mr. Robin Blencoe. Soon after being elected, Mr. Blencoe was appointed the Minister of Municipal Affairs. Milne and Tait stood to gain financially from a project that required approval of certain by-laws, a decision that Minister Blencoe was called upon to make.

[5] http://www.coibc.ca/down/opinion/opinion_blencoe_1993.pdf
[6] http://www.coibc.ca/down/opinion/opinion_harcourt_1995.pdf

That decision was a discretionary one, and not an activity that a Member normally makes on behalf of constituents.

[31] Commissioner Hughes commented:

> Whether campaign contributions and assistance are described as pecuniary or non-pecuniary interests or some hybrid, given the circumstances leading to this complaint, it is necessary to consider them. Campaign contributions and assistance, whether financial or otherwise, can, in my opinion, in some circumstances, be a "private interest". I am conscious of the very real purpose and difference between these kinds of contributions and other kinds of pecuniary or non-pecuniary benefits that could pass to a Member. Indeed in our system of parliamentary democracy, campaign contributions and assistance are to be encouraged and fostered and must be seen in a positive light as an interest accruing not only to a political party but also to the public generally; it is thus an interest clothed with the public interest. This is particularly the case where the financial contribution is specifically directed to the candidate even though it is payable to the party. It is also the case where the non-financial contribution on behalf of a specific candidate (notwithstanding that it is also on behalf of the party that the candidate represents) can include an array of activities from distributing leaflets, knocking on doors, developing campaign strategies, public endorsements and fundraising. (emphasis added)

[32] The accumulation of factors led Commissioner Hughes to conclude that Mr. Blencoe was in an apparent conflict of interest, as there was a reasonable perception that Blencoe's ability to carry out an official duty (i.e. approval of the by-laws) would be affected by his private interest (i.e. contributions to his personal campaign from Milne and Tait).

[33] Mr. Eby correctly acknowledged that the mere fact that a Member's private interest is advanced by some activity is not sufficient for the *Act* to be engaged. What the *Act* prohibits is a Member acting in his or her official capacity if there is an opportunity for the Member to advance his or her private interest by doing so. He referred to the factors Commissioner Hughes considered in *Blencoe* which led him to conclude that there was an apparent conflict of interest:

- the timing of the contribution (the closer in time to the official act, the more relevant);
- the significance of the contribution in relation to both the candidate and the contributor;
- the motive for the contribution if that can be discerned and whether the candidate (now Minister) was aware of the contribution prior to the exercise by the Minister of the impugned official power, duty or function; and
- whether the impugned decision involves an activity which a Minister normally engages in on behalf of constituents because the *Act* provides that this would not be prohibited.

[34] Counsel for the Premier noted that all of the cumulative items that Commissioner Hughes found constituted a private interest in *Blencoe* were contributions to Mr. Blencoe as an individual candidate. Between Milne and Tait these contributions included:

- financial contributions to Blencoe over the years;
- working on at least 5 earlier Blencoe campaigns including as his official agent;
- both designating contributions to Blencoe's campaign, at least one of which was considered "relatively substantial", which designation was necessary since they did not live in Blencoe's riding;
- soliciting and encouraging contributions for Blencoe's campaign from employees;
- allowing his endorsement and photo to be used on Blencoe's campaign leaflet;
- attending a strategy meeting on fundraising for Blencoe's campaign;
- assisting Blencoe's campaign by knocking on doors, attending meetings and "whatever else needed to be done" (at p. 31-33 of *Blencoe*).

[35] Counsel for the Premier submitted that the *Blencoe* opinion is relevant to contributions made to a particular individual candidate, and is distinguishable from contributions made to the central Party, as was the case in the *Harcourt* opinion, issued in 1995.

[36] In the *Harcourt* opinion it was alleged that the Premier's longstanding relationship with an individual affiliated with NOW Communications placed the Premier in an apparent conflict when government contracts were awarded to that company. Commissioner Hughes determined that the Premier was not in a real or apparent conflict of interest, as no campaign contributions were made directly to the Premier and there was no evidence that the Premier was involved in deciding to whom contracts would be awarded or that he had knowledge of the contractual arrangements.

[37] Commissioner Hughes elaborated on a number of important points in considering how the term "private interest" should be interpreted in the context of political contributions. The following excerpt from *Harcourt* is instructive:

> Some may say that contributions to the Party may benefit the Premier more than they would benefit any particular member. That may be so but I am of the opinion that the distinction that I drew in the *Blencoe Opinion* between contributions to the candidate (or redirected to his or her constituency) and contributions to the Party must be maintained. Indeed, to fail to make that distinction when the Premier is the Member concerned would not only be unfair to the Premier but could hamstring the operation of government.

> Further, sight must not be lost of the fact that this is the *Members' Conflict of Interest Act* we are dealing with – not a statute that goes beyond that important limitation. It is thus only the private interest of the Member that is relevant. (emphasis added)

[38] Mr. Eby submitted that the *Harcourt* decision "cited by the Premier as standing for the remarkable proposition that a donation to the central Party can never, ever, be a private interest of the Premier or any other Member except where that donation also satisfies the elements of *Criminal Code* offences, does not stand for that proposition". With respect, the Premier did not in fact suggest such a strict interpretation of *Harcourt*. The proposition her counsel actually put forth was as follows:

> "This does not mean that there could never be a place for a valid complaint involving donations to a Political Party. For example, as Commissioner Trussler Q.C. notes in the Notley decision, it would be offensive to require a donation to the party of the Premier from those who want to schedule a meeting with the Premier or a Cabinet Minister at the Legislature. But the mere fact of any Member, including the Premier, taking part as a member of their Party in a fundraising event organized by their Party does not, without more, provide any basis for an allegation of breach of the COI *Act*. In particular the question of level of donations, or participation of the party leaders, or reporting rules, is, with respect, not a question for the Conflict of Interest Office but rather one for the Legislature."

[39] The "Notley decision" ("*Notley")* cited by counsel for the Premier refers to a very recent opinion (March 14, 2016) issued by the Ethics Commissioner of Alberta[7]. In that opinion, one of the issues Commissioner Trussler considered was whether Premier Notley would have been in violation of the Alberta *Conflicts of Interest Act* by attending a proposed invitation only $1,000 a person fundraiser as an "add-on" to a publicly announced $250 a person fundraiser.

[40] Mr. Eby suggested that the facts in *Notley* are not similar to the present case "except that both individuals are Premiers, and both sets of facts involve fundraisers". He described the subject matter of the Notley complaint as allegations involving the Premier's attendance at a fundraiser in Ontario for the Ontario NDP's direct benefit. This is true, but this characterization of the complaint is not entirely accurate. The question of the Premier's participation in a fundraising event in Ontario did indeed form one set of allegations brought against the Premier.

[7] http://ethicscommissioner.ab.ca/media/1564/march-14-2016-allegations-involving-premier-rachel-notley.pdf

For reference I include the exact wording of the other complaint, as cited in Commissioner Trussler's opinion:

> …I am on record having concerns that the Premier's party organized a secret, invitation only, $1,000 a person fundraiser as an add-on to a publicly announced $250 a person fundraiser. The Premier's office told members of the Alberta media that your office had cleared this event. I would seek clarification. It seems to me that a $1,000 a person invitation only event is exactly the type of access selling event that the former Commissioner Don Hamilton took a dim view of in his report of May 11th 2007. In particular, the fact that this event was unadvertised and only available to potential contributors by special invitation makes it more unseemly, in that it appears that special non-public access to the Premier can be purchased for $1,000. Such an activity damages the integrity and impartiality of the Premier's office (at p. 1)

[41] The nature of the concerns expressed above is substantially similar to those raised by Mr. Eby and Mr. Conacher and in my view *Notley* is directly on point. Commissioner Trussler emphasized that the prohibition in the *Conflicts of Interest Act* with respect to the Premier is that she cannot receive anything that furthers her private interest. She concluded that as the Premier would not benefit personally from the fundraiser, she would not in any way be in breach of the Alberta Act. Although the Alberta Act does not have an equivalent provision prohibiting apparent conflicts of interest, the threshold question of what constitutes a "private interest" is identical.

[42] In relation to "exclusive" fundraising events, Commissioner Trussler commented:

> Much is said about small intimate fundraisers where the Premier and Cabinet Ministers are present. The usual complaint is that access to the Premier or Ministers is being sold. The issue of selling access to the Premier or other ranking politicians has been the subject of considerable discussion both academically and in the media. Clearly if a fee is charged that goes personally to a premier or a cabinet minister for access then the Conflicts of Interest Act has been breached. It would also be offensive to require a donation to the party of the Premier from those who want to schedule a meeting with the Premier or a Cabinet Minister at the Legislature.
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> However, when it comes to general fundraising events by a political party, the complaint of selling access is not appropriate.
>
> ….

> There is also nothing [in the Act] that states that a party's function cannot be advertised as an evening with the Premier or the Leader of the Opposition or the leader of a named political party.
>
> This complaint raises the spectre that opposition parties are allowed to have fundraisers with their leaders and portfolio critics in attendance but the party in power is not allowed to hold such events. Clearly, such an unlevel playing field is neither fair nor appropriate. If the party in power is not allowed to have a fundraiser with the Premier in attendance then all other political parties should face the same restrictions on their leaders. (at p. 5-6)

[43] While decisions from other jurisdictions are not binding on me in any way, they are highly instructive and the reasoning set out in *Notley* is persuasive.

V. ANALYSIS

a. Is the Premier's "private interest" advanced by participating in "exclusive" fundraising events for the BC Liberal Party?

[44] The specific facts that led Commissioner Hughes to conclude that Blencoe was in an apparent conflict of interest vary substantially from those in the present case. Most significantly, all of the funds raised at the events in question accrue to the BC Liberal Party, and not to the Premier's campaign specifically.

[45] Commissioner Hughes addressed this vital distinction in the *Harcourt* opinion. I agree with his expressed view that as a general rule, campaign contributions directed to the Party do not give rise to a private interest under the *Act*, and therefore do not raise conflict or apparent conflict of interest concerns. Whether a donation directed to the Party might ever give rise to a private interest is a hypothetical question and I am not prepared to speculate. Based on the circumstances presented in this case, I am not prepared to depart from the principle in *Harcourt* articulated above.

[46] While it is likely that some portion of the funds raised at the events in question may be used to promote the election prospects of the Premier and others representing the Liberal Party, this is a general, political interest. Such a wide political benefit is not to be regarded as synonymous with a personal benefit. It is too remote and speculative to be considered a "private interest" for

the purposes of the *Act*. For a private interest to exist, there must be a direct and personal benefit accruing to the Member, rather than an indirect and political one.

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

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

[49] The objective test set out in sub-section 2(2) is as follows:

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

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

b. Limits on political fundraising activities

[51] As part of his request, Mr. Eby urged me to engage in a "line-drawing" exercise and set out the parameters for acceptable and non-acceptable fundraising limits. He suggested that "a Premier's official acts and duties are broader, and therefore more subject to potential restrictions under the Act, than is the case for party leaders not in power".

[52] The point is taken that those Members of the governing party have more direct influence on the outcome of government decisions. However, the rules set out in the *Act* apply equally to all Members. Opposition Members are also subject to the provisions of the *Act* with equal force. Particularly in the lead up to an election, presumably the Leader of the Opposition and Opposition Members are hopeful that their party will gain power. In my view there is no difference between the governing party and the opposition party hosting "exclusive" fundraising events. The Leader of the Opposition could very well be the Premier-in-waiting. As noted by counsel for the Premier, according to media reports the BC NDP has hosted similar "exclusive" fundraising events and intends to continue this practice unless election financing laws are changed or until the BC Liberal Party ceases such activity.[8]

[53] Mr. Eby discussed at length the special powers of the Premier, for example to set the agenda for Cabinet. The powers that Mr. Eby described are indeed those exercised by the Premier in a parliamentary democracy. It is the prerogative of the government to exercise those powers in order to carry out the government's agenda. He stated that:

> "the official powers this complaint is concerned with are the Premier's powers in relation to the executive committee of the Cabinet, her power to dominate the administrative machinery, her power to act as the guiding force, coordinator and arbitrator of the exercise of the executive decision-making process in a manner favourable to the interests of her political donors".

[8] For example, http://www.theglobeandmail.com/news/british-columbia/christy-clark-defends-position-on-private-political-fundraisers/article29548657/

[54] What Mr. Eby describes is patronage. Commissioner Hughes considered the issue of patronage and the role of this Office in *Harcourt* (at p. 27-28):

> 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 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.
>
> Some confusion respecting the relationship between patronage and conflict of interest may arise when campaign contributions of various kinds are in issue. Where such campaign contributions are for the direct and particular benefit of the Member and the Member awards a contract to the contributor, that can, in some circumstances, give rise to an apparent conflict of interest. That might also involve or be described as patronage. Where, however, the campaign contributions are for the Party and not for the direct and particular benefit of the Member then any subsequent contract awarded by the Member or any other government official to the contributor may raise an issue of patronage but it does not raise an issue of conflict or apparent conflict of interest. As such it is not my concern under the Act. (emphasis added).

[55] Mr. Eby posited that "it is well established in law and in the jurisprudence that the Act both calls on your office to act preemptively, even before a member has conducted an official duty or used an official power to benefit a third party who advanced his or her private interest. You must do so even in the situation of a reasonably perceived conflict." Mr. Eby cited *Blencoe* to support his assertion that I "need not wait for the Premier to act to benefit her benefactors before [I] intervene".

[56] In *Blencoe*, the Commissioner's finding was that if the Minister made a decision that directly benefited individuals who had recently provided personal campaign assistance, it would appear that his ability to make that decision would be influenced by the assistance he had received. The circumstances allowed the Commissioner to advise the Minister that the specific official action contemplated should not be taken in order to avoid an apparent conflict of interest.

The scope of the Commissioner Hughes' pronouncement in that case was vastly different than scenario proposed by Mr. Eby.

[57] Essentially what Mr. Eby is asking me to do is draw an arbitrary line between acceptable fundraising events and non-acceptable "exclusive" events that would apply on a retroactive basis; demand the attendance list for these events (going how far back?); investigate the business interests of each of the donors; determine what actual or potential official dealings all of those donors have or may have with the government at some point in the future; monitor all decision of the executive council that might affect those interests; and "intervene" before any action is taken that might affect any of those interests. His position is that only the Premier, due to her special executive powers, should be subject to such oversight.

[58] As everyone knows, a provincial general election will be held in May 2017, and presumably the Opposition is hoping to form government. The Leader of the Opposition, as noted previously (and not disputed by Mr. Eby) engages in similar "exclusive" events as the Premier. Given that one year from now, the Leader of the Opposition may very well be the Premier and Opposition Members who hold critic portfolios may be appointed to ministerial positions, logically the same restrictions and monitoring ought to apply to Opposition fundraising efforts to prevent whichever party is in power from exercising "the executive decision-making process in a manner favourable to the interests of [their] political donors".

[59] Such a proposal not only stretches the bounds of my authority as set out in the *Act*, it contorts my role out of all recognition. I do not have the jurisdiction to "freelance" in such a manner.

[60] The first point to note is that the *Election Act* does not limit the amount of money, property or services that an individual or organization can contribute. Registered political parties, registered constituency associations, candidates and leadership contestants must record all of the contributions they receive. They must identify the contributors of over $250 in a single year,

election campaign or leadership contest on their financing reports.[9] Other jurisdictions in Canada have different rules on campaign donation limits and reporting requirements.

[61] I concur with Commissioner Trussler's comments on the question of the Commissioner's role in setting parameters for political fundraisers:

> As I indicated, most people have some tolerance for these events. I suspect no one would have any problem with an event that cost $250 a ticket where 400 people attended. Likewise an event that cost $500 for 250 would not cause any problem. But what about an event for 100 people that cost $1,000 or even an event for 50 people that cost $5,000? Is there a limit to what can be charged? There are people in this province that cannot afford even $250 for a ticket let alone $1,000. Does that make an event exclusive?
>
> I expect that everyone has a view as to what should be allowed. Who is to draw the line? Should it be at the point where the media's sensibilities are offended or those of other political parties? Should it be the general view of the electorate? And how is that to be ascertained? I certainly have not been given the legislative authority to do so. (p 4)

[62] The second point is that I agree with Commissioner Hughes' pronouncement that it is not the role of this Office to act as a "watchdog on patronage". It is neither appropriate nor indeed within my capacity or authority to monitor what government decisions may be upcoming and speculate as to whether there may be a potential real or apparent conflict of interest arising for the Premier (or for any Member for that matter) based on party fundraising activities.

[63] It is prudent for Members to be aware of significant contributions to their personal campaigns, as it may assist the Member in avoiding a potential conflict of interest situation from arising. However, Party funding is a different issue.

[64] Should a situation arise, as in *Blencoe*, where the Premier receives a campaign contribution for her direct and particular benefit, and she is subsequently called upon to perform an official duty or function that might benefit the donor, a private interest could manifest. If that were to occur, the recusal process in the *Act* provides the appropriate mechanism to avoid an actual or apparent conflict of interest from occurring.

[9] See "Guide to the Election Act", Elections BC website at http://www.elections.bc.ca/docs/guidebooks/855-GuideToTheElectionAct.pdf

c. Did the Premier receive an "illegal gift"?

[65] Section 7 of the *Act* prohibits Members from accepting a "fee, gift or personal benefit" connected directly or indirectly with the performance of his or her duties of office, unless such gift or personal benefit is received as an incident of protocol or social obligations that normally accompany the responsibilities of office. If a Member does accept a gift or personal benefit in appropriate circumstances, it must be declared if its value exceeds $250. This information is disclosed on the Member's public disclosure statement. For example, Members may receive a thank you gift or complimentary hospitality when they attend an event in which they are appearing in their official capacity.

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

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

VI. SUMMARY

[68] The threshold question that I must answer is whether the Premier's private interest was engaged at any point by her participation in the impugned fundraising events, or whether she received an inappropriate gift or personal benefit.

]69] Campaign donations and other assistance directed toward a specific candidate may, in some circumstances, amount to a private interest. There may – as in the *Blencoe* case – be special or cumulative circumstances in which receipt of a campaign contribution may, when received in conjunction with other favours received, place a Member in a conflict of interest position. As campaign contributions to the Party do not accrue to the "direct and particular benefit of the member", it is rare that that a donation to the Party will result in a private interest being established for the purposes of the *Act*. There are no circumstances presented here that would cause me to depart from this general principle as articulated in *Harcourt*. Funds raised at the events in question were made to the BC Liberal Party. Improving the Party's financial standing overall no doubt assists the Premier, as Leader of her Party, in the furtherance of her political aspirations and the goals of the Party. However, any such benefit the Premier might derive from the donations is of an indirect, general and political nature, rather than of a direct, particular and personal nature.

[70] Nor am I able to conclude that the Leader's Allowance the Premier receives from the Party is even remotely sufficient to create a "private interest" in the context of section 2. While it is a financial benefit paid directly to the Premier, it is paid by the Party from general funds and is not attributable to any one donor or group of donors. Neither can such donations made to the Party be considered a gift or personal benefit for the purposes of section 7.

[71] Political fundraising is a legal activity that is governed by the *Election Act.* Whether the rules surrounding the limits on ticket prices to fundraising events, the advertising of such events, and the disclosure of attendees should be changed is a matter worthy of public debate. Indeed, it is an issue that has captured the attention of the public nationally and robust discussion is taking place throughout the country.

[72] I share the view of my colleague in Alberta that it is not appropriate for me, nor within my purview, to set parameters for the scope and scale of party fundraising events. Ultimately those decisions must be made by the Legislature.

VII. CONCLUSION

[73] For the reasons outlined herein, it is my opinion that the Premier was not in an apparent conflict of interest as alleged by Mr. David Eby, nor in receipt of a gift or personal benefit as alleged by Mr. Duff Conacher, by virtue of participating in "exclusive" fundraising events for the BC Liberal Party or by receiving a Leader's Allowance from the BC Liberal Party.

Dated this 4th day of May, 2016
In the City of Victoria, British Columbia.

_____
Paul D.K. Fraser, Q.C.
Conflict of Interest Commissioner