



OPINION

**OF THE CONFLICT OF INTEREST COMMISSIONER
PURSUANT TO SECTION 19(1) OF THE
*Members' Conflict of Interest Act***

**IN THE MATTER OF AN APPLICATION BY
HELMUT GIESBRECHT, MLA (SKEENA) WITH
RESPECT TO THE ALLEGED CONTRAVENTION OF PROVISIONS
OF THE *MEMBERS' CONFLICT OF INTEREST ACT*
BY MICHAEL DE JONG, MLA (MATSQUI)**

City of Victoria
Province of British Columbia

June 28, 1999

**IN THE MATTER OF AN APPLICATION BY
HELMUT GIESBRECHT, MLA (SKEENA) WITH
RESPECT TO THE ALLEGED CONTRAVENTION OF PROVISIONS
OF THE *Members' Conflict of Interest Act*
BY MICHAEL DE JONG, MLA (MATSQUI)**

REQUEST

Helmut Giesbrecht, MLA for Skeena has requested by letter dated May 21, 1999 pursuant to section 19(1) of the *Members' Conflict of Interest Act*, that I give an opinion respecting the compliance by Michael de Jong, MLA for Matsqui, with section 7(1) of the Act.

Section 7(1) reads as follows:

- 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.**
- (2) Subsection (1) does not apply to a gift or personal benefit that is received as an incident of the protocol or social obligations that normally accompany the responsibilities of office.
- (3) If a gift or personal benefit referred to in subsection (2) exceeds \$250 in value, or if the total value received directly or indirectly from one source in any 12 month period exceeds \$250, the member must immediately file with the commissioner a disclosure statement, in the form prescribed by the regulations, indicating
- (a) the nature of the gift or benefit,
 - (b) its source, and
 - (c) the circumstances under which it was given and accepted.

BACKGROUND

In July 1991, Mr. Harbance Dhaliwal provided a guarantee to the Bank of Montreal for a mortgage loan of approximately \$305,000 to Moe Sihota, MLA. The mortgage loan was repaid by Mr. Sihota to the mortgagee in December 1991, bringing the guarantee to an end. In 1992,

Mr. Sihota was appointed a provincial cabinet minister and in or about May 1992, on his recommendation, Mr. Dhaliwal was appointed a director of BC Hydro, a BC Crown Corporation. On November 28, 1996, Mr. de Jong, in a series of media interviews, made the following statements:

1. To reporters in the Legislative Press Gallery:

"We're talking about the sale of the public office here. We're talking about a breach of trust," Liberal critic Mike de Jong said Thursday. "The price to get on the BC Hydro Board in 1991 was apparently 300,000."

2. To an interviewer on BCTV:

"Well I think it has all the appearance of the worst kind of breach of the public trust, and that is the sale of public office, that Mr. Sihota needed some money, he got some money, then he appointed the guy who gave him the money and he didn't tell anyone about it."

3. To an interviewer on UTV:

"Mr. Sihota appears to have taken money and sold public office here. That could lend itself to an investigation by Mr. Hughes. It could lend itself to an investigation by the RCMP."

4. To an interviewer on CBC television:

"Mr. Dhaliwal gave him access to \$300,000 that he was in desperate need of. A few short months later Mr. Dhaliwal is appointed to a Board which Mr. Sihota has responsibility for. That strikes me and having all the appearance of selling public office and that is wrong."

Mr. Dhaliwal, a Member of Parliament, issued a Writ in the Supreme Court of British Columbia alleging that he had been defamed and severely injured in his character and his reputation as a citizen and a Liberal Member of Parliament and had been brought into public scandal and contempt. He claimed an Order that the defendant publicly retract and apologize to the plaintiff, and for damages and costs.

The action was settled on the day of trial upon the basis of an oral agreement between counsel which included conditions that Mr. de Jong complete a letter in terms provided by Mr. Dhaliwal's counsel, a Consent Dismissal Order of the Action and a requirement by Mr. Dhaliwal that the terms of the settlement agreement be kept confidential.

COMPLAINT

Mr. Giesbrecht's complaint is contained in two letters, both dated May 21, 1999.

In his complaint he alleges the following:

1. That the legal action Dhaliwal v. de Jong was settled in part on the basis of payment of a sum of money to the plaintiff by the Liberal Party.
2. That the action involved a legal matter "that the Member has said arose from the performance of his duties of office."
3. That it is reasonable to conclude that the settlement was a sizeable one and that it was beyond the personal capacity of the member to fund in its entirety.
4. That the Commissioner should conclude that in the defence of the action, the member received legal representation at a beneficial or discounted rate and that the difference between the fees charged and those normally charged by his solicitor would constitute a gift or benefit prohibited by the Act.
5. That the Commissioner has accepted that "Mr. de Jong was named as a defendant in a defamation litigation 'relating to the exercise of (his) duties as a member of the BC Liberal Official Opposition'."
6. That the settlement at the conclusion of the litigation process was paid by the BC Liberal Party to the plaintiff.

Mr. Giesbrecht submits that "the Liberal Party's payment to the plaintiff in the action in which Mr. de Jong was the defendant is a gift or personal benefit which is not excepted by 7(1) and 7(2) and which is not one which must be reported to the Commissioner under Section 7(3) and not one which is a matter for the Commissioner's public disclosure statement under Section 17(2)."

ISSUES

Members' Conflict of Interest Act: What is its purpose?

The *Members' Conflict of Interest Act* is legislation enacted to advance public confidence in the integrity of each member and thereby maintain the dignity of the Legislative Assembly and earn the respect which society holds for the Assembly and its members. It is concerned mainly with the manner in which members perform the duties which flow from their offices and the integrity and impartiality which they demonstrate in their decisions, particularly in those situations in which personal interests and public interests are involved.

A person who is elected as a Member of the Legislative Assembly of British Columbia is usually a member of one of the officially recognized political parties in this province. Following an election, each member takes an oath of office. In theory at least, the member puts aside his or her duties to the party and becomes the servant of the public.

Upon assuming office, certain responsibilities devolve upon every member. The member is now a legislator charged with the duty and responsibility of acting in the best interest of the public generally while still retaining his or her partisan political identity. In the role of legislator, the member in the performance of the duties attached to that position must demonstrate fairness and impartiality to all citizens irrespective of political affiliation. **So much for the MLA's duties and obligations in his or her role as an elected legislator.** A member **in his or her role as a partisan political activist**, on the other hand, is concerned with the interest and advancement of the party and his or her personal success. A strong and active party affiliation is part of our

democratic form of government which envisages more than one political party and thereby provides the electorate with a choice at the polling booth.

I have endeavoured to demonstrate that an elected member, in the role as a partisan politician, has an interest in promoting himself or herself and the party, but when the member is performing the duties associated with the performance of that member's responsibilities as a member of the Legislative Assembly, the roles are separate and distinct. When performing his or her duties of office, the member is a legislator, acting in a fiduciary capacity for the benefit of all citizens with respect to the trust and confidence which the relationship demands. A member of the Legislative Assembly "must not accept a fee, gift or personal benefit, ... that is connected directly or indirectly with the performance of his or her duties of office."

What mischief is this section designed to prevent? In legislative parlance the word "mischief" is used to signify the evil or danger which this statute is intended to cure or avoid. Clearly the mischief to be avoided is the corruption of a member by the acceptance from another person of a fee, gift or personal benefit with the intent to give some advantage inconsistent with the member's official duties and the rights of others. The corrupt misconduct must be "connected directly or indirectly with the performance of his or her duties of office". In other words, with the member's duties as a legislator and not in the capacity of a partisan political activist.

The section is somewhat similar to section 119(1)(a) of the Criminal Code of Canada which in part reads as follows:

Everyone who, being a member of the Legislature of a province, corruptly accepts any money, valuable consideration ... for himself ... in respect of anything done or omitted to be done or omitted by him in his official capacity ... is guilty of an indictable offence.

The **difference** is that in the penal statute there must be the mental element, i.e. the intent to act corruptly by doing or omitting to do something in his official capacity. The **similarity** is that both refer to the performance of his duties of office, that is acting in his official capacity as a member of the Legislature. The particular circumstances under which a gift or personal benefit

may be received by the member while performing the responsibilities of office are defined in section 7(2) and (3) which read as follows:

- 7 (2) Subsection (1) does not apply to a gift or personal benefit that is received as an incident of the protocol or social obligations that normally accompany the responsibilities of office.
- (3) If a gift or personal benefit referred to in subsection (2) exceeds \$250 in value, or if the total value received directly or indirectly from one source in any 12 month period exceeds \$250, the member must immediately file with the commissioner a disclosure statement, in the form prescribed by the regulations, indicating
- (a) the nature of the gift or benefit,
 - (b) its source, and
 - (c) the circumstances under which it was given and accepted.

In the present case, the essential requirements to establish a violation under section 7(1) is proof that the benefits (if any) are connected directly or indirectly with the performance of Mr. de Jong's duties of office, that is **as a legislator**. The purpose of section 7(1) is to prohibit a member of the Legislative Assembly from accepting a bribe or an illegal gratuity as the price of influencing the member in the discharge of his or her official duties to take or omit some action which will benefit the person giving the bribe, contrary to the member's responsibilities of office.

The first question which I must determine is whether any fee, gift or personal benefit (if such there was) was accepted "connected directly or indirectly with the performance by him of his or her duties of office".

FINDINGS OF FACT

The request for an opinion by the Honourable Member for Skeena is based, to some extent, on copies of newspaper reports. This seems an appropriate time for me to cite with approval the following extract from a report of the Honourable Robert C. Rutherford, Integrity Commissioner for the Province of Ontario, on the conduct of the Honourable Michael Harris, Premier of Ontario and the Honourable Charles Harnick, Attorney General, dated January 20, 1999 as follows:

A news report by itself is not a solid foundation upon which to base a belief that a contravention has occurred. The material submitted in the affidavits of Messrs. Hampton and McGuinty referring to the newspaper reports is not supported by an affidavit by the journalist who wrote the article. News reports are a journalist's opinion derived from sources which may or may not be accurate. The credibility of the information provided by the journalist is unknown and credibility becomes an issue

I wish to state clearly for the guidance of MLA's and others requesting the Commissioner's opinion in future cases that Commissioner Rutherford's ruling is one with which I concur.

The request involving Mr. de Jong has a more solid evidentiary basis. In the Supreme Court action, Dhaliwal v. de Jong, an amended statement of defence was filed on Mr. de Jong's behalf which contained the following two paragraphs:

The Defendant says in answer to the whole of the Statement of Claim that the statements attributed to him in paragraphs 4 and 5 of the Statement of Claim were spoken or published to certain members of the media to publish to certain electors and members of the Liberal Party of British Columbia on an occasion of qualified privilege, particulars of which are as follows: namely, that the defendant as the Member of Parliament of the British Columbia Legislature for the Constituency of Matsqui, had a duty to communicate the concern and position of the Official Opposition to electors and to members of his political party who had a legitimate interest in the matter involving Harbance Dhaliwal and Moe Sihota. The said words were spoken in good faith and in the honest belief that they were true and were spoken without malice towards the Plaintiff and in the premises the Defendant and the aforesaid electors and members of the Defendant's political party had a common and corresponding interest in the subject matter and publication of the said words.

The Defendant says in answer to the whole of the Statement of Claim that the statements attributed to him in paragraph 7 of the Statement of Claim were spoken or published to certain members of the media to publish to certain electors and members of the Liberal Party of British Columbia on an occasion of qualified privilege, particulars of which are as follows: namely the Defendant as the Member of Parliament of the British Columbia Legislature for the Constituency of Matsqui, had a duty to communicate the concern and position of the Official Opposition to electors and to members of his political party who had a legitimate interest in the matter involving Harbance Dhaliwal and Moe Sihota. The said words were spoken in good faith and in the honest belief that they were true and

were spoken without malice towards the Plaintiff and in the premises the Defendant and the aforesaid electors and members of the Defendant's political party had a common and corresponding interest in the subject matter and publication of the said words.

It should be understood that averments in a legal pleading (such as a statement of claim or a statement of defence) filed in a civil action are not evidence: the allegation raised in the statement of defence on Mr. de Jong's behalf that in making the statement complained of he was acting as an MLA was advanced as a basis for the legal defence of "qualified privilege" -- that defence was not, in due course, persisted in and the action was settled.

Mr. de Jong, outside the Legislative Assembly made statements, apparently attributing a measure of wrongdoing to Mr. Dhaliwal. Those statements were inappropriate and may well have been defamatory. When Mr. de Jong argued that those words were spoken by him as part of his duties as an MLA he was quite clearly mistaken. It is no part of the duties or privileges of a member of the Legislative Assembly to make slanderous or potentially slanderous statements about other people and if they do so, they do so at their peril and not in the course of their official duties. (I speak only of the duties and privileges of a member outside the Legislative Chamber - members' conduct within the Chamber is not before me.)

I, accordingly, find that the answer to the question whether anything was accepted by Mr. de Jong that was "connected directly or indirectly with the performance of his duties of office" that the answer is "no". Let me now deal with the subsidiary issues numbered one to six arising from Mr. Giesbrecht's allegations and referred to by me on page 3.

1. I find that the legal action *Dhaliwal v. de Jong* was settled on the basis of an oral agreement, the terms of which, at the request of the plaintiff, were kept confidential. It included a letter of apology from the defendant. Mr. de Jong has made public, as is his right, my earlier confidential opinion dated May 4, 1999 written in response to his request for guidance prior to his completion of his confidential disclosure statement under the *Members' Conflict of Interest Act*. This reads, in part, as follows:

You have brought to my attention the fact that, during the past year, you were named as a defendant in litigation relating to the exercise of your duties as a member of the BC Liberal Official Opposition. At the conclusion of that litigation process, a sum of money was paid by the BC Liberal Party to the plaintiff. The terms of that payment are contained in an agreement which includes a confidentiality provision at the request of the plaintiff. You have been kind enough to come in and discuss this matter with me. It is my view that the payment of this expense by the BC Liberal Party is not a matter which falls within the disclosure provisions of the *Members' Conflict of Interest Act*.

I have no knowledge of the particulars of the confidential agreement which brought the litigation process to an end, nor am I aware of the sum of money involved and whether it included damages or legal costs or a contribution to legal costs. It should be noted that although at the time of the appointment of Mr. Dhaliwal to the Board of BC Hydro, Mr. Dhaliwal was a private citizen, he was, at the time of the lawsuit, a Liberal Member of Parliament. Whether that fact had any bearing at all on any payment to the plaintiff by the Liberal party is a matter of sheer speculation. I find it both undesirable and unnecessary to endeavour to probe into the details of the settlement agreement which brought the action to an end and which included a confidentiality provision at the request of the plaintiff.

2. I have dealt with this issue as the main question to be decided.
3. There is no evidence whatsoever to reach the conclusion that the settlement was a sizeable one. Under our justice system, general damages in civil actions are at large and (unlike the practice in the United States) no specific sum is sued for.
4. There is no basis for concluding that Mr. de Jong received legal representation at a beneficial or discounted rate: although members of the legal profession pride themselves on a tradition of assisting the needy and indigent, I do not think that there is any suggestion that Mr. de Jong falls into that category nor am I aware of any traditional practice of reducing solicitors' fees charged to other members of the legal profession.

5. It is suggested that "the Commissioner has accepted that Mr. de Jong was named as a defendant in defamation litigation relating to the exercise of his duties as a member of the BC Liberal Official Opposition." I accepted no such thing: I noted that that was the view Mr. de Jong expressed to me and I have already found that he was mistaken in that view.

I wish to add the following comments on the subject of the acceptance of legal expenses by members from their political parties. I have already discussed earlier in this opinion, at some length, the purposes of the *Members' Conflict of Interest Act* and the mischief it is designed to prevent. I say, once again, that the purpose of section 7(1) of the Act is to prohibit a member of the Legislative Assembly from accepting a bribe as the price of influencing that member and the discharge of the member's legislative duties to take some action which would give to the donor some advantage inconsistent with the public interest and incompatible with the member's Oath of Office.

If the giving of gifts or personal benefits is a problem only when there is a possibility of thereby influencing a member in the exercise of his legislative duties to grant some advantage to the donor, what advantage could possibly accrue to the member's political party or riding association if legal expenses are provided by them?

The only gifts or benefits which are required to be filed are those which fall under section 7(2) and 7(3), that is gifts and personal benefits received as an incident of the protocol or social obligations that normally accompany the responsibilities of office.

Dated this 28th day of June, 1999

In the City of Victoria

The Hon. H.A.D. Oliver, Q.C.

Conflict of Interest Commissioner