



BRITISH
COLUMBIA

**OPINION
OF THE
CONFLICT OF INTEREST COMMISSIONER**

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

**IN THE MATTER OF AN APPLICATION BY
GUY GENTNER, MLA FOR DELTA NORTH,
WITH RESPECT TO ALLEGED CONTRAVENTIONS
OF THE *MEMBERS' CONFLICT OF INTEREST ACT*
BY THE HONOURABLE GORDON CAMPBELL, MLA FOR
VANCOUVER-POINT GREY, PREMIER OF BRITISH COLUMBIA**

City of Victoria
Province of British Columbia

April 2, 2009

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I INTRODUCTION

This is an application pursuant to section 19(1) of the *Members' Conflict of Interest Act* ("the Act") by Guy Gentner, MLA for Delta North, requesting my opinion "about an appearance of conflict regarding the conduct of the MLA for Vancouver-Point Grey, Premier Gordon Campbell."

Section 19(1) of the Act provides:

- 19 (1) A member who has reasonable and probable grounds to believe that another member is in contravention of this Act ... may, by application in writing setting out the grounds for the belief and the nature of the contravention alleged, request that the commissioner give an opinion respecting the compliance of the other member with the provisions of this Act.

The original application was received on May 27, 2008 and was accompanied by a volume of documents which included a copy of the Premier's Public Disclosure Statement filed by the then Conflict of Interest Commissioner ("COIC") with the Clerk of the House on November 15, 2005. The Statement disclosed that the Premier and his spouse then owned an unspecified number of shares in Terra Energy Corp. ("Terra"). The material also included a copy of a notice of Material Change signed and filed by the then COIC with the Clerk of the House, indicating

that the shares in Terra and another company were disposed of on April 12, 2006. The remaining material included a copy of an Order in Council No. 787 dated October 26, 2005 which added “pipelines” to an existing tax regulation and was signed by the Premier and the Minister of Energy, Mines and Petroleum Resources (“EMPR”). In addition, there were copies of documents apparently from the records of the British Columbia Oil and Gas Commission (“OGC”) dated in 2005 and 2006 recording various land acquisitions made by Terra and the fate of various pipeline applications made by Terra to the OGC.

Additional information and documents concerning Terra and the alleged conduct of the Premier was provided in four supplementary submissions from Mr. Gentner from June until the end of November, 2008. This information included Order in Council No. 96, dated February 21, 2006 which amended a section of the *Social Services Tax Act Regulations* and was signed by the then Minister of Finance and by Premier Campbell.

The two fundamental assumptions that inform the allegations made in this application are, first: the Premier apparently knew of his shareholding in Terra at all material times, and second: that he caused the Government and/or its agencies and/or the OGC to act in a way that benefitted the company and, as a result, potentially increased the value of his shareholding. The allegations are that the Premier’s ability to exercise an official power, duty or function must (given the motive of profit) have been affected by his private interest and that he had an “exceptional advantage due to knowledge and information no other investor could have had.” No details of that “knowledge and information” were provided.

These allegations are serious and engage sections 2 and 3 of the *Act*, which are as follows:

- 2 (1) For the purposes of this Act, a member has a conflict of interest when the member exercises an official power or performs an official duty or function in the execution of his or her office and at the same time knows that in the performance of the duty or function or in the exercise of the power there is the opportunity to further his or her private interest.
 - (2) For the purposes of this Act, a member has an apparent conflict of interest if there is a reasonable perception, which a reasonably well informed person could properly have, that the member's ability to exercise an official power or perform an official duty or function must have been affected by his or her private interest.
- 3 A member must not exercise an official power or perform an official duty or function if the member has a conflict of interest or an apparent conflict of interest.

Mr. Gentner has confined his application for an opinion to what he refers to variously as “an appearance of conflict”; “the perception of conflict”; and “perceived conflict of interest”. I proceed, therefore, on the basis that what is sought is a finding that there has been a breach of the *Act* as a result of an apparent conflict of interest under sections 2(2) and 3 of the *Act*.

II FINDINGS OF FACT

Terra is an oil and gas exploration company that at all material times traded on the TSX Venture Exchange. In January, 2005 the company described itself as “a junior oil and gas company engaged in the exploration for, and development and production of, natural gas and oil in western Canada.” It was active in oil and gas exploration in north eastern British Columbia where significant increases in drilling activity occurred in 2003 and 2004. In late 2004 and early 2005 the company completed successful equity financing that supported the acquisition of production land and facilities in the Fort St. John area. From early August, 2005 until mid

February 2006, Terra made several applications to the OGC and was granted permission to construct a total of eight pipelines in the north eastern portion of the Province. At the end of March, 2006 it reported having issued 71.4 million common shares.

The records maintained in the office of the COIC indicate that the member's confidential disclosure form was signed by the Premier as of July 11, 2005. The form disclosed that he and his spouse owned shares in Terra and that the shares were held outside of any RRSP fund. The records also indicate that the Premier met with the then COIC on September 15. The Public Disclosure Statement was prepared by the then COIC and filed with the Clerk of the House on November 15, 2005. A notice of Material Change filed with COIC and the Clerk of the House indicates that the shares were disposed of on April 12, 2006.

As mentioned earlier, Order in Council No. 787 was approved by the Executive Council on October 26, 2005 and signed by the Premier as the presiding member of the Executive Council and by the Minister of EMPR. The information I have obtained indicates that the Executive Council meets weekly and that typically several Orders in Council are approved by the Cabinet. I am advised that approximately 90% of the time the Premier will sign the Orders in Council as the presiding member of the Executive Council and the Minister responsible for the substance of the matter dealt with in the Order in Council will also sign. There was, therefore, nothing unusual in the way in which the Order in Council was executed. One would expect to see the signatures of both the Premier and his Minister.

The substance of the Order in Council reads as follows:

... section 4 (9) of the Petroleum and Natural Gas Royalty and Freehold Production Tax Regulation, B.C. Reg. 495/92, is amended by adding “pipelines,” before “bridges, roads, rails or trails in support of resource exploration or development,”.

Mr. Gentner alleges that the effect of the Order in Council is to “add [ing] “pipelines” to the tax deductions the producer can claim.” He goes on to allege that “[t]he change in the Act (sic) means a pipeline company could then significantly decrease its corporate taxes and thereby increase its profitability.”

With respect, my inquiries in the course of gathering information have satisfied me that the amendment was to a Regulation and not an Act and did not confer any deductions in corporate taxes, nor was there any cost recovery for the use of pipelines. It appears that the purpose of the Order in Council was to include “pipelines” as an eligible infrastructure project for the Infrastructure Royalty Credit Program which was introduced in 2004, as part of the oil and gas development strategy announced by the Government in July 2003. The program provides royalty credit of up to 50% of the cost of building/upgrading oil and gas roads and building pipelines. The royalty credits are deducted from the company's royalty bill only after the project, i.e. road and/or pipeline, has been completed to the satisfaction of the Crown and only if the project is approved under the Program. The change in the regulation does not create a corporate tax break but does create the opportunity to apply for up to 50% of the cost of the construction of the project as a royalty deduction.

The Infrastructure Royalty Credit Program did not automatically benefit all oil and gas companies. Companies are required to apply and to compete for royalty credits, based on a set of criteria. The Ministry indicates that Terra did not apply to the program between 2004 and

2006. Terra did apply for the Program in 2007, but was unsuccessful. These facts were confirmed in media reports by the company's chief financial officer.

Mr. Gentner next refers to Order in Council 96 which was approved and ordered by the Executive Council on February 21, 2006. It was signed by the Premier and by the then Minister of Finance, the responsible Minister. The substance of the Order in Council is:

[E]ffective February 22, 2006, the Social Service Tax Act Regulations, B.C. Reg. 84/58, are amended as set out in the attached Schedule.

The material amendment in the Schedule provided a definition of the term "manufacture".

Mr. Gentner alleges as follows:

By including the extraction of natural gas (a primary resource industry) under manufacture (a secondary industry which undertakes to transform raw material into consumer goods) in order to provide a tax exemption to a targeted resource extraction sector, the OIC specifically excludes the primary resource extraction industries of logging and farming that would likewise benefit from a tax exemption.

He also alleges that:

The OIC amendment does provide a financial advantage to one extraction industry that is not equitably shared by other extraction industries ... and was very exclusive and did not grant general tax exemptions to similar natural resource industries. It would seem to any reasonable person that the Premier by signing OIC 96 was party to changing the meaning of manufacturing for a specific industry which he had a pecuniary interest in.

With respect, the information available to me indicates that Order in Council 96 does not provide any exclusive financial advantage to natural gas industries and a benefit not shared by other extraction industries such as other extraction industries such as logging and farming.

Order in Council 96 did not provide the Production, Machinery and Equipment (PM&E) exemption benefit to natural gas producers; that benefit had already been provided to them and to all other manufacturers and logging companies as well as to companies engaged in exploration for, discovery of or development of petroleum and natural gas in 2001 when the exemption was first introduced.

When the PM&E exemption came into effect in 2001, there was no definition of “manufacture.” Instead, the definition of “manufacturer” referred to a person who “fabricates, manufactures, processes or produces.”

The EMPR Ministry advises that because of a number of questions and a lack of clarity around what the regulations meant by “fabricates, manufactures, processes or produces”, amendments were made (as per OIC 96/06) that added a definition of manufacture to the regulations to clarify the term in a way that was consistent with how the exemption had been administered up to that point. OIC 96/06 should not be considered in isolation nor should it be considered exclusive to natural gas. The intent of 96/06 is to provide clarity of definition for the existing exemption to be applied to all sectors engaged in the defined activities “fabricates, manufactures, processes and produces.”

Mr. Gentner further alleges that during the time the Premier had shares in Terra, the company was “able to successfully purchase essential Crown lands” and was granted eight pipeline approvals by the OGC. The reason for raising these issues must be to support an inference that the Premier may have exerted some influence on the use, acquisition and disposition of Crown land, for the benefit of Terra shareholders.

The OGC is a Crown Corporation created under the *Oil and Gas Commission Act*. It is a separate entity from the EMPR Ministry and is a single-window regulatory agency with responsibilities for overseeing oil and gas operations including exploration, development, pipeline transportation, and reclamation.

This regulatory model was designed to provide an independent streamlined and efficient one-stop regulatory agency. Regulatory responsibility is delegated to the OGC through the *Petroleum and Natural Gas Act, Pipeline Act, Forest Act, Forest Practices Code of B.C. Act, Heritage Conservation Act, Land Act, Environmental Management Act, and Water Act*. The cost of operating the OGC is funded through the application of industrial fees and levies on a cost recovery basis.

The regulatory responsibility of the OGC extends from the exploration and development phases, through to facilities operation and ultimately decommissioning. It is charged with balancing a broad range of environmental, economic and social considerations. Disposition decisions are made solely by the OGC and its conclusions are in no way directed by the Government. In some cases, consultation with Ministry staff takes place to clarify policy.

With respect to the natural gas disposition process, the *Petroleum and Natural Gas Act* outlines the competitive process in place to dispose of Crown petroleum and natural gas rights in British Columbia. Section 71 of that *Act* states:

71 (1) The minister may dispose of Crown reserves of petroleum and natural gas, oil sand, oil sand products, oil shale and oil shale products under terms the minister sees fit. (2) A disposition under this section must be by public auction or public tender, not sooner than 2 weeks after publication of a notice of the intended disposal in the Gazette. (3) Unless otherwise directed by the minister, (a) a lease issued under this section is subject to the terms of this Act as though it had been applied for and issued under Part 6, and (b) a permit issued under this section is subject to the terms of this Act as though it had been issued under Part 5.

From a policy perspective, the disposition process is conducted as follows:

- (1) Companies request parcels for each sale;
- (2) A technical staff review confirms that requests are configured correctly and are able to be referred for pre-tenure review;
- (3) Parcels are referred to local/regional governments, First Nations and government agencies;
- (4) Caveats are assigned by technical staff to parcels based on referral comments;
- (5) A Crown rights analysis is performed by technical staff to determine rights available;
- (6) Parcels are published in a Notice of Public Tender. Parcels that are postponed, deferred or withdrawn are not published;
- (7) Landowners are notified that gas rights in an upcoming sale are beneath their private property;
- (8) Disposition (Sale Day).

Bid adjudication is based on a technical staff review of area geology, historic prices, current bidding trends, and the economic climate. This process is conducted by professional staff and is audited annually by the Office of the Auditor General. Individual decisions are not directed by the Premier, Minister, Deputy Minister, or Assistant Deputy Minister of the Ministry. Decisions to dispose of Crown land for the exploration and development of petroleum and natural gas is the responsibility of the Director of Petroleum Lands as defined in the *Petroleum and Natural Gas Act*.

Based on this information, it appears that pipeline approval and the process for the acquisition and disposition of Crown land are administered independently according to well established guidelines and rules. In all of these circumstances, no inference can reasonably be drawn that Terra received any special treatment or benefit, from the OGC, the Ministry of EMPR, the Premier or anyone else. It follows that one of the fundamental assumptions in this application that the Premier caused the Government and/or its agencies and/or the OGC to act in a way that benefited Terra is flawed and is not supported either directly or by inference by the information provided in support of the allegations. Indeed, it is negated by information sought and received from other available sources.

I turn now to the information received and obtained with respect to the Premier's knowledge of his shareholding in Terra at material times. In order to put events properly into context, it is necessary to understand the general disclosure and reporting procedures mandated by the *Act* and followed in the COIC's office.

The *Act* requires (section 16(1)) that every member must, within 60 days of being elected, and after that annually, file with the COIC a confidential disclosure statement in the form prescribed by the regulations. After filing the disclosure statement, the member, and spouse if available, must meet with the COIC to ensure that adequate disclosure has been made and to obtain advice and recommendations on complying with the member's obligations under the *Act* (section 16(3)).

After meeting with the member, the COIC must prepare a public disclosure statement (section 17(1)) containing all relevant information provided by the member and must, as soon as is practicable, file the public disclosure statement with the Clerk of the House who must make the statement available for public inspection (section 17(3)).

After the public disclosure statement has been filed by the COIC, the member must continue to disclose any material change in assets, liabilities and financial interests by filing a statement of material change with the COIC within 30 days of the material change (section 16(6)).

It is important to understand that the requirements of the *Act* in the form prescribed by the regulations are not intended to result in information being provided that would allow anyone looking at the public disclosure statement to determine the net worth of the individual member. Rather, the policy of the *Act* is to allow the public to ultimately know how a member and spouse are invested and the extent to which those assets are encumbered. The disclosure requirements are, therefore, qualitative and not quantitative.

Accordingly, the number of shares and their acquisition cost need not be disclosed. There have been media reports that the Terra transaction involved modest dollar and profit amounts. I agree with Mr. Gentner that the monetary details of an acquisition and disposition are irrelevant – the disclosure and reporting principle must be given paramouncy.

Members can, of course, determine for themselves what investment advice they obtain and what type of account they will set up to hold their share equity investments. If a member decides to make his or her own investment decisions in a self-administered account, the actual individual holdings must be disclosed annually and material changes must be reported within 30 days of the change taking place. If investment decisions are made for the member by others, different disclosure and reporting requirements may result. Investments placed within a blind trust need not be disclosed, but there is a requirement that the trust instrument be filed and that the trustee report annually to the COIC.

Because of the way most mutual funds are structured, no conflict of interest can reasonably be expected to arise from their ownership; therefore members have been advised by the COIC that an investment in an open-ended mutual fund that has broadly based investments not limited to one industry or one sector of the economy need not be listed in members' confidential disclosure statements.

In the matter at hand, the Premier held the Terra shares in an investment account where the brokerage firm made all of the buy and sell decisions. The account was opened in 2003 and its terms were as follows:

This is to confirm the arrangements made between us in connection with the operation by your company of a discretionary investment account on my behalf.

You are hereby authorized and requested to maintain a discretionary investment account (the "Account") in my name and to operate the Account from time to time by taking such action in connection herewith as you, in your sole discretion, shall deem necessary or desirable for the proper administration of the Account including, without limitation, the power

- (a) to buy, sell, exchange or otherwise deal with securities (including securities which I may deposit with you from time to time) and
- (b) to invest in securities selected by you, any funds deposited with you or otherwise made available to you in the course of operating the Account, including funds arising from your dealings with securities.

In his submissions with respect to "self directed investments", Mr. Gentner says the following:

Purchasing shares through a broker is a transaction where the individual buying takes advice from his agent. The decision of what to purchase when and why is clearly at the discretion of the purchaser. The decision rests with the client.

With respect, it is clear and unequivocal from the arrangements made between the Premier and his broker that the "sole discretion" to invest was given to the broker.

The reporting instructions given to the brokerage firm managing the account were that receipt of financial statements and annual reports as well as other materials "not required by corporate or securities law to be sent" was declined. The account was operated on the basis that transactional information was sent not to the Premier but to his Executive Assistant, who required the information for the Premier's annual confidential member's disclosure and for filing material change forms when acquisitions or dispositions took place. The instructions from the Premier were that all necessary disclosures were to be made and reported with respect to activity in the account. His officials prepared the necessary documentation and placed it in front of him for

signature. Great care was taken within the office to ensure that the information contained in the disclosure and reporting forms required by the *Act* was accurate, to avoid the necessity for formal review when the Premier signed off on the information. I am satisfied that the transactional information was handled appropriately in the Premier's office and in a way that combined accuracy with compliance.

I accept the Premier's assurance that he has no independent recollection of owning shares in Terra at the material time. In my view, simple knowledge of ownership by itself does not, in any case, give rise to conflict of interest concerns. It is how that knowledge is used or acted upon that is important for purposes of the *Act*.

There is, in my view, nothing improper or contrary to the *Act* about the investment in Terra made by the brokerage firm on the Premier's behalf in an account where all investment decisions had been delegated to it and information about the contents of the account were shielded from him in circumstances where arrangements had been made in his office for proper compliance with his disclosure obligations.

Accordingly, I find that the fundamental assumption that the Premier knew or was aware of the shareholdings he and his spouse had in Terra at material times has not been established on all the material provided and collected.

At the time these events occurred, the Premier's disclosure and reporting obligations under the *Act* remained extant, despite his complete delegation of investment decisions to the brokerage

firm and his decision to decline receiving ongoing information about the investments that had been chosen. Paradoxically, in the way that the administration of his trading account had been arranged, the Premier by complying with his disclosure obligations under the *Act*, became simply a messenger reporting on investment decisions made by others. In retrospect, a better solution, taking everything into consideration, would have been for the Premier as well as the officials he relies on to be screened from the investment choices made by the brokerage firm and, therefore, become free of transactional reporting obligations.

III CONCLUSIONS

To constitute a breach of the *Act*, a perception of conflict of interest cannot simply exist in the air or in the abstract, it must be established against a test of reasonableness. While the simple perception of conflict of interest may raise a “red flag” or give rise to suspicion, that is clearly not sufficient to support a finding of an apparent conflict of interest until the objective test of reasonableness, which is mandated by section 2(2), is applied to the particular circumstances under review. Whether a perception is “reasonable” depends on whether it is one that “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” (emphasis added). Notice has to be taken of the mandatory language of the section. The member’s ability must have been affected, not may have been or could have been affected, by his or her private interest. I interpret the *Act* to mean that for a member to be found to have had an apparent conflict of interest in breach of the *Act*, he or she must have acted knowingly, or have been deliberately blind in all of the circumstances.

In my opinion, the Premier has not conducted himself improperly and that there has been no breach of the *Act*.

With reference to section 2(2) of the *Act*, it is my opinion that a reasonably well informed person would be properly supportive of the discretionary investment arrangements the Premier had put in place. It is also my view that a reasonably well informed person would not reasonably perceive, as I do not, that the member's ability to perform his official duty or function must have been affected by his private interest in a shareholding obtained in circumstances where he has no independent recollection of owning the asset, having delegated all investment decisions in the particular account to his broker.

With reference to section 3 of the *Act*, in my opinion there is no basis whatever for concluding that the Premier exercised his official power, duty or function knowing he had either a conflict of interest or an apparent conflict of interest. It is clear from all of the information available to me that the governance system with respect to the use and regulation of Crown land worked properly.

Dated this 2nd day of April, 2009

In the City of Victoria, Province of British Columbia



Paul D. K. Fraser, Q.C.

Conflict of Interest Commissioner