

IN THE MATTER OF THE MEMBERS' CONFLICT OF INTEREST ACT
AND IN THE MATTER OF A COMPLAINT BY
TSAWWASSEN HOMEOWNERS ASSOCIATION
AGAINST THE HONOURABLE JOHN VAN DONGEN,
MLA FOR ABBOTSFORD-CLAYBURN

REQUEST FOR COMMISSIONER'S OPINION

INTRODUCTION

The Office of the Conflict of Interest Commissioner has received a number of requests from members of the public for a conflict of interest review of the Honourable John van Dongen, Minister of Agriculture, Food and Fisheries. On the day of the first such request, the Commissioner had also received from Mr. van Dongen himself a request for advice on the same subject - which the Commissioner decided to defer in favour of the public applications. All pertain to decisions by the Department of the Ministry of Agriculture, Food and Fisheries relating to land use in Delta, which, in the view of the applicants, may affect the value of two parcels of farm land owned respectively by the brother and the sister of the Minister.

For some years now, the community of Delta has been struggling with conflicts between agriculture and other community interests, most notably urban development and wildlife conservation. Recent growth in the greenhouse industry has accelerated this conflict culminating in the preparation of a number of restrictive bylaws by the Municipality.

The existing legislation which forms the basis of any intervention by the Minister of Agriculture, Food and Fisheries is the *Local Government Act* enacted some six years ago under the NDP government then in power. By Section 916 of that *Act*, the Minister responsible for the administration of the *Farm Practices Protection (Right to Farm) Act* (presently Mr. van Dongen) "may establish, publish and distribute standards in relation to farming areas for the guidance of local governments in the preparation of zoning bylaws and bylaws under this Division." Section 917 of the *Act* reads as follows:

917(1) A local government may make bylaws in relation to farming areas

- (a) respecting the conduct of farm operations as part of a farm business,*
 - (b) respecting types of buildings, structures, facilities, machinery and equipment that are prerequisite to conducting farm operations specified by the local government and that must be utilized by farmers conducting the specified farm operations,*
 - (c) respecting the siting of stored materials, waste facilities and stationary equipment, and*
 - (d) prohibiting specified farm operations.*
- (2) A bylaw under subsection (1) may be different for one or more of the following:*
- (a) different sizes or types of farms;*
 - (b) different types of farm operations;*
 - (c) different site conditions;*
 - (d) different uses of adjoining land;*
 - (e) different areas.*
- (3) Unless exempted under subsection (4), a bylaw under subsection (1) may only be adopted with the approval of the minister.*
- (4) The minister may make regulations*
- (a) defining areas for which and describing circumstances in which approval under subsection (3) is not required, and*
 - (b) providing that an exception under paragraph (a) is subject to the terms and conditions specified by the minister.*
- (5) Regulations under subsection (4) may be different for different regional districts, different municipalities, different areas and different circumstances.*

Pursuant to that statute, the Government of British Columbia on June 11, 2001 passed an Order in Council restricting the ability of the Municipality of Delta to enact bylaws prohibiting or restricting farming activities on land in the Agricultural Land Reserve without approval of the Minister of Agriculture. The Minister, in an attempt to resolve the conflict between the Government of British Columbia and the Municipality of Delta, appointed a three-member Mediation Team with impressive credentials. Their names and qualifications are attached as Schedule 1. The Mediation Team operated independently of the provincial and municipal

governments and completed its work in 2001 between early July and late October. The Team invited submissions from members of the community by placing advertisements in local community newspapers and had numerous meetings with representatives of the municipal and provincial governments, representatives from other agencies, farmers, greenhouse operators, conservationists and environmentalists. The Team received numbers of letters, briefs and electronic submissions. The Mediation Team gathered and analyzed stakeholders' comments and the findings of its research. When necessary, expert advice, notably legal counsel, was sought. The Mediation Team developed a range of alternatives and evaluated their consequences and effectiveness. The Team concluded by developing a series of recommendations.

Minister van Dongen noted that the new draft bylaw submitted by the Municipality of Delta made no provision to empower the Municipality to compensate farmers whose property rights were to be severely and adversely affected for their loss. The Minister evidently was of the view that where a person is to be dispossessed of his or her property rights, wholly or partially, for public purposes, then consideration should be given to some manner of compensation, whether in money, by appropriate tax concessions, or otherwise, if an injustice is to be avoided. The Minister brought this to the attention of the Mayor and Council as something which was worthy of attention and might have been overlooked.

In the Minister's letter to Mayor Lois Jackson dated February 11, 2002, the Minister refers to several of the proposed amended bylaws made by Delta Council and indicated that there was a **"high level of mutual agreement"** in many areas. He stated that he was encouraged by these results but had three specific concerns relating to these proposed amended bylaws that he wished to share with Council. They were stated as follows:

1. *"The agriculture industry in Delta continues to express a high level of concern about the direction Delta is going with its bylaws. It is important to be able to demonstrate appropriate consultations and dialogue with farmers and other interested parties in the communities."*
2. *"There are a number of critical aspects of agricultural bylaw development which are proceeding through different planning mechanisms pertaining to provisions for co-*

generation, greenhouse light abatement, screening and heating fuels. It will be important to be able to see the whole picture and fully understand the overall implications for greenhouse agriculture in Delta when considering a zoning bylaw proposal".

3. *"The current proposal still calls for two zones, one of which will directly impact modern farming practices and larger greenhouses. I remain concerned with this approach, and particularly so in the absence of any plans to compensate farmers for surrendering a potentially economic option for their agriculture. I urge you to continue to work on this aspect of your bylaw, and hope you will find other ways to achieve your planning objectives."*

THE JURISDICTION OF THE CONFLICT OF INTEREST COMMISSIONER

The Conflict of Interest Commissioner is a creature of statute. He has only those powers which the Legislature has entrusted to him under the *Members' Conflict of Interest Act*. He is not a Member of Government, nor a government appointee, nor a civil servant. He is a totally independent Officer of the Legislative Assembly. He is not an Inspector General of Government Activities. He has neither the right nor the duty nor the wish to consider the political wisdom of a particular course of action, nor to embroil himself in questions involving government policy or the exercise of ministerial discretion.

Here are the relevant extracts from the *Members' Conflict of Interest Act*:

- 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.*
- 6 *This Act does not prohibit the activities in which members normally engage on behalf of constituents.*

BACKGROUND

Ms. Joyce Kelsall, on behalf of the Steering Committee of Tsawwassen Homeowners Association wrote to me as Conflicts Commissioner on June 13, 2002. I quote from that letter:

*"We understand from a definition of "conflict of Interest" received from your office, that a member of the legislative assembly must not be involved in a decision during the course of public duties with the knowledge that there is an opportunity to further the Member's private interests, and, moreover, that "private interests" could include the interest of a spouse, child, **relative**, or other, non arms length person.*

Given that Mr. van Dongen has a brother and sister who each have a farm in Delta, as well as other family members farming in various parts of British Columbia, it would seem that there is a conflict of interest in his demand that compensation be paid by Delta to farmers whose properties may be devalued by amended zoning.

We urge that you investigate the actions of Mr. van Dongen in this matter, for there is a great deal of concern among many of the citizens of our community who perceive that there may indeed have been a conflict of interest."

Definition vs Comment (an explanation)

The definition of the term "conflict of interest" is defined in the *Members' Conflict of Interest Act*, Section 2 and Ms Kelsall's suggestion that the Commissioner has changed the statutory definitions of "conflict of interest and "private interest" is based on a misapprehension. The quotation on which she relies may be based on a pamphlet entitled Conflict of Interest Policy for Members of the British Columbia Legislature published in 1990 - some 12 years ago at the time the *Member's Conflict of Interest Act* first came into force. The extract reads as follows:

The Act stipulates that an MLA must not be involved in a decision during the course of public duties with the knowledge that there is an opportunity to further the Member's private interests. Private interests are not restricted to direct personal gain. They could include the interests of a spouse, minor child, relative or other, non-arms-length persons.

It is clearly not part of the *Act* but merely comment on the contents of a new statute as may be seen from the use of the words "could include". Members of the Legislative Assembly to whom the pamphlet was addressed would have read the *Act* itself - but I can see how a member of the public might be misled into the belief that it constituted a statutory definition.

When, as a result of letters from members of the public, I was made aware of a misconception created by the wording of the pamphlet (which had found its way onto our website) I asked for the web site wording to be amended. In short: An MLA is required by the Members' Conflict of Interest to disclose to the Conflicts Commissioner the financial affairs of him/herself, spouse, minor children and private corporations controlled by any of them.

The affairs of any of these would appear to constitute *prima facie* potential private interests. That term has been deliberately left undefined in the Province's legislation - as in that of other provinces - to reduce the likelihood of attempts to circumvent the intent of the legislation by technical legal argument - leaving it to the Commissioner to determine the issue in each individual case.

There are additionally innumerable categories of non-arms length transactions which are capable of falling within the prohibited clause. It follows that there are many circumstances not involving relatives where the member may have a private interest and many others that do involve relatives where no such interests exist.

OPINION

1) Conflict of Interest

In my response of June 20, 2002, I asked the applicant to assist me by advising in the fullest possible detail of the nature and extent of Mr. van Dongen's alleged interest in the investments or holdings of either his brother or his sister. I have not received a response to this request. I also pointed out that the mere fact of blood relationship however close or remote is not sufficient per

se to constitute evidence of a private interest within the meaning of Section 2 of the *Members' Conflict of Interest Act*. I have interviewed Mr. van Dongen, his brother and his sister individually. Each of them denies quite emphatically that Mr. van Dongen has the slightest interest in their farmland or operations. (I have interviewed others, including Her Worship Mayor Jackson who was helpful and generous with her time.)

I fail to understand how the allegation that "other family members are farming in various parts of British Columbia" can be of relevance to the issue before me. It should also be pointed out that Mr. van Dongen has not made a "demand that compensation be paid by Delta to farmers whose properties may be devalued by amended zoning". He has, however, in a letter to the Mayor drawn attention to the apparent absence of any plans to compensate farmers for surrendering a potentially economic option for agriculture. I have been advised by the BC Assessment Authority that the records show 530 folios with Farm classification in the District of Delta. It seems to me not unreasonable for a Minister of Agriculture, in considering a municipality's plan to expropriate (that is to say dispossess an owner of his property rights, wholly or partially) to suggest to the Municipality that thought be given to compensation (whether by payment of cash equivalent or by a tax concession or otherwise).

Compensation

A word about "Compensation": the term means making things equivalent, satisfying and making amends - also that equivalent in money which is paid to the owners or occupiers of lands taken or injuriously affected for public purposes. It is not a reward or benefit but merely an attempt by the state to make good injury on damage to property or property rights.

Application for Compensation

Once an appropriate bylaw has been passed, it must be assumed that any question of compensation (when, and whether, and to whom, and in what manner, and in what amount) would be determined by some designated body, or tribunal, or by the Courts (see as an example the Expropriation Compensation Board under the Expropriation Act, or a Commissioner appointed by the Supreme Court under the Local Government Act). Such a designated body would act totally independently, and there is no way in which the Minister could properly

intervene in its proceedings in the hypothetical event of any application for compensation before it. Until that occurs the concerns expressed by the applicant are entirely premature.

In my Opinion, no conflict of interest within the meaning of the *Members' Conflict of Interest Act* has been shown to exist.

a) Apparent Conflict of Interest

I can understand how the existence of a blood relationship between the Minister and a brother and sister owning farms in the affected area may, at first sight, create suspicion. I must therefore consider carefully the definition in section 2(2) of the *Act* of "**apparent** conflict of interest". 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. B.C. is the only jurisdiction which prohibits apparent (as well as actual) conflict of Interest (by section 2(2) of the *Members' Conflict of Interest Act*. This section must be interpreted with great care in order to avoid the danger of finding the existence of an apparent conflict of interest based on mere suspicion. The question I am required by law to ask myself is whether there exists a reasonable perception which a reasonably well-informed person could properly have A suspicion by an uninformed or ill-informed person is no substitute for a reasonable perception by a reasonably well-informed person. I am satisfied that an ill-informed person upon becoming reasonably well informed of the facts relating to the business and property-owning relationship between the Minister and his siblings and thus becoming a well-informed person can not conclude that the Minister's ability to exercise as official power or perform an official duty or function must have been affected by a private interest.

In my Opinion, no apparent conflict of interest within the meaning of the *Members' Conflict of Interest Act* has been shown to exist.

Dated this 25th day of July, 2002

In the City of Victoria, Province of British Columbia

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

Conflict of Interest Commissioner

SCHEDULE 1

DELTA MEDIATION TEAM MEMBERS

Keith Saddlemyer is a management consultant from Victoria. He works with both public and private sector clients. His education includes a bachelor of administration, masters of public administration, law degree and graduate studies in economics. Mr. Saddlemyer has held a broad range of senior position with the provincial and federal governments. In recent years, he has worked with the BC Human Rights Tribunal, BC Mushroom Marketing Board, BC Property Assessment Appeal Board. Saddlemyer was chair of the mediation team.

Robert Hobson is planner and public administrator from Kelowna. He has worked with all levels of government. His education includes a bachelors in political science and masters degrees in public administration and community and regional planning. Mr. Hobson has been involved with the Fraser River Estuary Management Program, Okanagan Basin water board, Nature Conservancy of Canada. Hobson has been a member of Kelowna's city council since 1988 and has chaired the Regional District of Central Okanagan since 1993. He is a third generation farmer.

Suzanne Veit is a former public servant, who has held various senior positions with the provincial government. Most recently, she was deputy minister of BC Ministry of Municipal Affairs for five years. Prior to her public service career, she was a consultant, specializing in the environmental assessment of large scale projects on small communities. Her education includes a bachelor of social science and a master of social work. Ms. Veit currently chairs the BC Medical Services Commission and the Homeowner Protection Office of British Columbia. She also sits on the board of directors of Katimavik, Canada's national youth corps.