



No. S169841  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DEMOCRACY WATCH

PETITIONER

AND:

BRITISH COLUMBIA CONFLICT OF INTEREST COMMISSIONER

RESPONDENT

**RESPONSE TO PETITION**

**Filed by:** The Respondent, British Columbia Conflict of Interest Commissioner (the  
"Commissioner")

THIS IS A RESPONSE TO the Petition filed 25 October 2016.

**Part 1: ORDERS CONSENTED TO**

The Commissioner consents to the granting of the orders set out in NONE of the paragraphs of Part 1 of the Petition.

**Part 2: ORDERS OPPOSED**

The Commissioner opposes the granting of the orders set out in Part 1 of the Petition.

**Part 3: ORDERS ON WHICH NO POSITION IS TAKEN**

The Commissioner takes no position on the granting of the orders set out in NONE of the paragraphs of Part 1 of the Petition.

**Part 4: FACTUAL BASIS**

1. On 31 March 2016, the Petitioner Democracy Watch requested that the Commissioner give an opinion on whether the Honourable Christy Clark, M.L.A. and Premier of British Columbia, had contravened the *Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287.

Affidavit #1 of Alyne Mochan, at para. 2

2. In documents published on 4 May 2016 and 9 August 2016, the Commissioner expressed his opinion that the Hon. Ms. Clark had not contravened the *Act* ("the **Opinion**").

Affidavit #1 of Alyne Mochan, at para. 3

**Part 5: LEGAL BASIS**

3. This Petition should be dismissed for any of the following three reasons:

- (i) The Opinion of the Commissioner is protected by legislative privilege and immune from judicial review;
- (ii) The Opinion is not subject to judicial review under the *Judicial Review Procedure Act*;
- (iii) Democracy Watch lacks standing to bring this Petition.

**A. The Opinion is protected by legislative privilege and immune from judicial review**

*i. Legislative privilege*

4. The Legislative Assembly of British Columbia has “the privileges, immunities and powers that were held and exercised by the Commons House of Parliament of the United Kingdom ... on February 14, 1871, so far as not inconsistent with the *Constitution Act*”.

*Legislative Assembly Privilege Act*, R.S.B.C. 1996, c. 259, s. 1

5. Legislative privilege is “one of the ways in which the fundamental constitutional separation of powers is respected”. It ensures that “legislative activities” are “unimpeded by any external body or institution, including the courts”.

*Canada (House of Commons) v. Vaid*, 2005 SCC 30, at paras. 20-21

6. Judicial review is the process by which the judiciary supervises the executive to ensure it stays within the limits of the power it has been conferred by the Legislative Assembly. The separation of powers requires that matters internal to the Legislative Assembly be regulated solely by the Assembly itself and not subject to interference from the courts.

*Vaid*, at para. 29, point 12

7. A legislative assembly’s “disciplinary authority over members” is protected by legislative privilege. “The history of the prerogative of Parliament and legislative assemblies to maintain the integrity of their processes by disciplining, purging and disqualifying those who abuse them is as old as Parliament itself”.

*Vaid*, at para. 29, point 10  
*Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at para. 64,  
*per McLachlin J.*, as she then was, concurring

**ii. The Commissioner's role**

8. In essence, the Commissioner's role is to assist the Legislative Assembly in the exercise of its disciplinary authority over its members. When requested, the Commissioner expresses his opinion to the Assembly about whether a member has contravened the *Members' Conflict of Interest Act*, and may make a recommendation to the Assembly about whether and how it should discipline the member.

*Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287, s. 19

9. The Commissioner is "an officer of the Legislative Assembly" and not an "officer of the Legislature" like the Auditor General and Information and Privacy Commissioner.

*Members' Conflict of Interest Act*, s. 14(1)

*Auditor General Act*, S.B.C. 2003, c. 2, s. 2(1)

*Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 37(2)

10. This distinction is significant. The "Legislature" is "the Lieutenant Governor acting by and with the advice and consent of the Legislative Assembly". The "Legislative Assembly" is "the Legislative Assembly of British Columbia constituted under the *Constitution Act*", which "consists of the members elected in the manner provided for by the *Election Act*".

*Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29

*Constitution Act*, R.S.B.C. 1996, c. 66, s. 18(2)

*Election Act*, R.S.B.C. 1996, c. 106

11. That the Commissioner is an officer of the Legislative Assembly, as opposed to an officer of the Legislature, illustrates the extent to which the Commissioner is an integral part of the Assembly's internal processes for regulating the ethical conduct of its members. The Commissioner is more closely integrated with the inner workings of the Assembly and its members than even the Auditor General, who is merely an officer of the Legislature.

**iii. The Court of Appeal's conclusions in *Tafler***

12. In *Tafler*, the Court of Appeal found that the opinions and recommendations the Commissioner expresses to the Legislative Assembly are "necessary to the proper functioning" of the Assembly and "a vital step" in the process by which the Assembly decides whether and how to discipline its members.

*Tafler v. British Columbia (Conflict of Interest Commissioner)* (1998),  
161 D.L.R. (4th) 511, at paras. 16-17 (B.C.C.A.)

13. Accordingly, the Court of Appeal held in *Tafler* that the opinions and recommendations the Commissioner expresses to the Legislative Assembly are protected by legislative privilege and immune from judicial review. They are "made within, and with respect to, the privileges of the Legislative Assembly and are not reviewable in the courts".

*Tafler*, at para. 17

see also *R. v. Basi*, 2009 BCSC 739, at para. 45, *per* Bennett J., as she then was *Morin v. Crawford* (1999), 14 Admin. L.R. (3d) 287, at paras. 4, 67 (N.W.T.S.C.)

**iv. Conclusion: the Opinion is immune from judicial review**

14. *Tafler* is binding on this Court and dispositive of this Petition: the Opinion is protected by legislative privilege and immune from judicial review.

**B. The Opinion is not subject to judicial review under the *Judicial Review Procedure Act*.**

**i. Scope of judicial review**

15. In British Columbia, only “a decision made in the exercise of a statutory power of decision”, or a decision that could be set aside at common law on an application for relief in the nature of certiorari, is subject to judicial review.

*Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 3

16. A “statutory power of decision” is “a power or right conferred by an enactment to make a decision deciding or prescribing (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or (b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it”.

*Judicial Review Procedure Act*, s. 1

17. At common law, relief in the nature of certiorari is available against “any public body with power to decide any matter affecting the rights, interests, property, privileges or liberty of any person”.

*Martineau v. Matsqui Disciplinary Bd.*, [1980] 1 S.C.R. 602, at p. 628

18. In effect, only a decision that has legal consequences for a person can be the subject of a petition for judicial review.

**ii. The Opinion is not a decision that has legal consequences for a person**

19. The Opinion does not decide or prescribe any person’s rights, interests, property, privileges, eligibility for benefits or liberty. The Opinion does not decide or prescribe anything at all. It merely expresses the Commissioner’s opinion that the Hon. Ms. Clark had not contravened the *Members’ Conflict of Interest Act*. No legal consequences flow from this opinion. The Opinion itself has no legal consequences for any person.
20. Even if the Commissioner had reached the opposite conclusion, that the Hon. Ms. Clark had contravened the *Members’ Conflict of Interest Act*, the Opinion itself would not have

had any legal consequences for any person. When the Commissioner finds a contravention, he may “recommend” to the Legislative Assembly that it reprimand, suspend or fine the member, or that it declare the member’s seat vacant until an election is held. Importantly, however, only the Legislative Assembly itself has the power to decide whether a member will be reprimanded, suspended or fined, or his or her seat will be declared vacant.

*Members Conflict of Interest Act*, s. 22

21. The Federal Court of Appeal has held that opinions of the federal Conflict of Interest and Ethics Commissioner, who performs a similar function for Parliament, do not affect the rights of any person or carry legal consequences and are not subject to judicial review.

*Democracy Watch v. Conflict of Interest and Ethics Commissioner*,  
2009 FCA 15, at paras. 9-14  
see also *Clean Train Coalition Inc. v. Metrolinx*, 2012 ONSC 6593, at para. 16

**iii. Conclusion: the Opinion is not subject to judicial review under the Judicial Review Procedure Act**

22. The Opinion is not a “a decision made in the exercise of a statutory power of decision”, nor is it a decision that could at common law be set aside on an application for relief in the nature of certiorari. Accordingly, the Opinion is not subject to judicial review under the *Judicial Review Procedure Act*.

**C. Democracy Watch lacks standing to bring this Petition.**

23. In British Columbia, a person has standing to seek judicial review of a decision only if the legislation under which the decision was made gives an “express or implied right to persons in the position of the applicant to complain” about the decision.

*Sandhu v. British Columbia (Provincial Court Judge)*, 2013 BCCA 88, at para. 35  
quoting *Inland Revenue Commissioners v. National Federation of Self-Employed & Small Businesses Ltd.*, [1981] 2 All E.R. 93, at p. 108 (H.L.)

24. The *Members Conflict of Interest Act* does not give the public any express or implied right to complain about the Commissioner’s opinions and recommendations. The public may request that the Commissioner give an opinion on whether an M.L.A. has contravened the *Act*, but the public has no further involvement once a request is made.

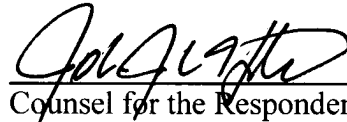
*Members Conflict of Interest Act*, s. 19(2)

**Part 6: MATERIAL TO BE RELIED ON**

25. Affidavit #1 of Alyne Mochan, made 24 November 2016.

The Commissioner estimates that the application will take 90 minutes.

Dated: November 28, 2016



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of Interest Commissioner

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