



No. S169841
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DEMOCRACY WATCH

PETITIONER

AND:

BRITISH COLUMBIA CONFLICT OF INTEREST COMMISSIONER

RESPONDENT

APPLICATION RESPONSE

Application response of: the Petitioner, Democracy Watch (the "application respondent")

THIS IS A RESPONSE TO the notice of application of the Respondent, British Columbia Conflict of Interest Commissioner filed November 29, 2016.

Part 1: ORDERS CONSENTED TO

The application respondent consents to the granting of the orders set out in **NONE** of the paragraphs of Part 1 of the notice of application.

Part 2: ORDERS OPPOSED

The application respondent opposes the granting of **Paragraphs 1 and 2** of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent takes no position on the granting of the orders set out in **NONE** of the paragraphs of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. The Premier of British Columbia, Christina Clark, specifically in her role as Premier, lent her office as Premier to the sale of tickets to exclusive "cash-for-access" events to raise funds for the Liberal Party of British Columbia (the "Liberal Party") and concurrently received a salary from the Liberal Party, in part for attending the fundraisers, in the amount of \$50,000.00 per annum. Tickets for some of the fundraisers cost upwards of \$20,000.00.
2. The Petitioner says that the Premier is in an apparent conflict of interest because it is reasonable for an informed person, viewing the matter realistically and practically, and having thought the matter through, to conclude that:
 - a. ticket holders are paying to have access to the Premier because she is the most powerful member of the executive branch of government of the Province of British Columbia;
 - b. ticket holders pay to access the Premier because they expect to be able to influence the Premier's exercise of executive power;
 - c. The Premier attends the "cash-for-access" events expressly in her role as Premier, rather than in her role as a member of the Legislative Assembly or her role as the leader of the Liberal Party, because access to executive power is worth much more to donors than access to the influence of an MLA or party leader;
 - d. Christina Clark's duties as leader of the Liberal Party include attending at "cash-for-access" fundraising events and engaging in relevant conversations with ticket-holders;
 - e. Part of the salary paid to Christina Clark by the Liberal Party is in consideration for satisfaction of her "cash-for-access" fundraising duties;
 - f. Christina Clark receives a direct or indirect personal benefit for

attending the fundraisers by way of the salary paid by the Liberal Party, even though there is no known correlation between her Party salary and the number of "cash-for-access" fundraisers or the total amount raised at the "cash-for-access" fundraisers;

- g. The ticket prices paid to the Liberal Party by ticket holders for access to the Premier materially contribute to the Liberal Party's ability to pay the Premier's salary; and
 - h. The Premier's exercise of executive power may well be affected, whether consciously or unconsciously, by the payments received directly by the Liberal Party, by the personal receipt of the salary from the Liberal Party or by the lobbying that takes place at the "cash-for-access" fundraisers.
3. The Petitioner says that the Premier should be prohibited by s.3 of the *Members Conflict of Interest Act*, [RSBC 1996], c.287, (the "*Conflict of Interest Act*") from exercising any official power or performing any official duty or function in respect of the persons and organizations that paid to attend the "cash-for-access" fundraisers.
 4. On March 31, 2016, Democracy Watch complained about Christina Clark's apparent conflict of interest to the Conflict of Interest Commissioner. The Conflict of Interest Commissioner decided that there was no conflict of interest and, inferentially, refused to restrict the scope of the Premier's executive power pursuant to s.3 of the *Conflict of Interest Act*.

Part 5: LEGAL BASIS

1. The *Conflict of Interest Act* is intended to curtail conflicts of interests both for members of the Legislative Assembly and for members of the Executive Council. The *Conflict of Interest Act* defines "member" as "a member of the Legislative Assembly or of the Executive Council, or both".

Conflict of Interest Act, s.1

2. The distinction made by the *Conflict of Interest Act* between members of the Legislative Assembly and members of the Executive Council is a reflection of the fundamental distinction between the legislature and the government executive made by British Columbia's *Constitution Act*.

Constitution Act, [RSBC 1996], c.66

3. Section 9 of the *Constitution Act* provides that the Executive Council is composed of the persons the Lieutenant Governor appoints, including the Premier of British Columbia, who is president of the Executive Council. Executive Power is as defined by ss.4, 7, 8, 10 of the *Constitution Act* and by the common law.
4. The Legislative Assembly is distinct from the Executive Council. Section 17 of the *Constitution Act* establishes the Legislative Assembly, and its members consist of members elected as provided for by the *Election Act*. Section 18(3) of the *Constitution Act* provides that a member represents the electoral district for which the member was elected.

Election Act, [RSBC 1996], c.106

5. The distinction made by the *Constitution Act* and the *Conflict of Interest Act* between the Legislative Assembly and the Executive Council reflects legal distinctions between the judicial, executive and legislative branches of government that are profoundly constitutive of the rule of law and juristic order in Canada.

Reference re Secession of Quebec, [1998] 2 SCR 217, 1998 CanLII 793 (SCC) at paras.70-72

Roncarelli v. Duplessis, [1959] SCR 121, 1959 CanLII 50 (SCC)

Wells v. Newfoundland, [1999] 3 SCR 199, 1999 CanLII 657 (SCC) at paras.52-54

Ontario v. Criminal Lawyers' Association of Ontario, [2013] 3 SCR 3, 2013 SCC 43 (CanLII) at paras.27-31; see also footnote 3

6. The distinction between executive and legislative branches is further reflected in their different relationships with the judicial branch. The legislative branch

generally enjoys, and in British Columbia, the Legislative Assembly specifically enjoys, by way of parliamentary privilege, immunity from judicial review for members of the legislative assembly to the extent that the immunity is necessary "in order for these legislators to do their legislative work". The role of the courts is to ensure that a claim of privilege does not immunize from the ordinary law the consequences of conduct by Parliament or its officers and employees that exceeds the scope of the category of privilege.

Canada (House of Commons) v. Vaid, [2005] 1 SCR 667, 2005 SCC 30 (CanLII) at para.29

R. v. Basi, 2009 BCSC 739

Harvey v. New Brunswick (Attorney General), [1996] 2 SCR 876, 1996 CanLII 163 (SCC)

7. In contrast with the relationship between the judiciary and the legislative function, vigilant judicial review of the executive branch of government is inherent to the rule of law, with the exception of specific areas including the exercise of prosecutorial discretion, international relations and cabinet privilege.

Crevier v. A.G. (Québec) et al., [1981] 2 SCR 220, 1981 CanLII 30 (SCC)

8. In addition to the distinction between members of the Legislative Assembly and members of the Executive Council, the *Conflict of Interest Act* distinguishes between two types of opinions. Firstly, the *Conflict of Interest Act* provides for opinions consisting of recommendations to the legislative assembly for discipline or penalties pursuant to s.22 ("Discipline Recommendations"); and (2) opinions consisting of declarations of actual and apparent conflicts of interest with the effect of restricting powers, duties and functions of a member of the Executive Council or a member of the Legislative Assembly pursuant to ss.3, 11 and 18(2) of the *Conflict of Interest Act* ("Conflict Declarations").
9. Conflict Declarations have prospective effect on members of the Executive

Council pursuant to ss.3, 11 and 18(2) of the *Conflict of Interest Act*. Conflict Declarations prevent a member of the Executive Council, within the scope of the declared conflict of interest, from exercising any executive power or discretion granted to them by ss.4, 7, 8 or 10 of the *Constitution Act* or any other legislative or common law power accorded to that member of the Executive Council. The *Conflict of Interest Act* contains no provision allowing the conflict commissioner to directly impose penalties on members of the Executive Council.

10. The *Conflict of Interest Act* contains no provisions insulating members of the Executive Council from judicial review. Nor does it contain any privative clause preventing judicial review of the Commissioner's opinions.
11. Should the Court determine that *Conflict of Interest Act* does not expressly provide the Commissioner the power to issue a Conflict Declaration with effect pursuant to ss.3, 11 and 18(2) of the *Conflict of Interest Act*, the Petitioner relies on the doctrine of jurisdiction by necessary implication.

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006]
S.C.R. 140.

12. The *Tafler* decision should not be followed for three reasons. Firstly, *Tafler* did not extend legislative immunity to activities of the Executive Council. Secondly, the *Tafler* decision is factually distinct and deals primarily with media access to the investigative phase of the conflict commissioner's work and whether that investigative phase can be described as judicial or quasi-judicial in nature. Thirdly, the *Tafler* decision relates to a process that was oriented towards Discipline Recommendations.
13. The *Tafler* decision does not stand for the proposition that parliamentary privilege extends to both Conflict Declarations and Discipline Recommendations issued by the Conflict of Interest Commissioner. *Tafler* speaks only to the parliamentary privilege necessary to the disciplinary function of the legislature and the process leading to the legislature's discipline of legislative members.

Canada (House of Commons) v. Vaid, [2005] 1 SCR 667, 2005 SCC 30 (CanLII)

14. The Petitioner submits that, consistent with *Taffler*, the scope of the parliamentary privilege attached to the Conflict of Interest Commissioner ought to be limited to any Discipline Recommendation submitted to the Legislative Assembly under s.22 of the *Conflict of Interest Act* and the administrative process leading to a s.22 Discipline Recommendation. The Petitioner does not say that this Court should sit in review of decisions by the Legislative Assembly to expel or fine one of its members, for example, or sit in review of recommendations by the Commissioner to expel or fine one of the members of the Legislative Assembly.

15. However, the exercise of power by the Commissioner to determine and declare conflicts of interest is not a function of the legislature and is not necessarily linked to a function of the legislature. The Commissioner's declaration of a conflict of interest has the legal effect of limiting the exercise of power by a member of the Executive Council, to the extent of the conflict. Accordingly, it ought not to be shielded from judicial review by the parliamentary privilege. The member of the Executive Council and the person or persons whose complaint gave rise to the Conflict Declaration should have standing to challenge the Conflict Declaration.

16. The Petitioner acknowledges that it is challenging and precarious for the Court to distinguish between executive and legislative functions, particularly where only members of the Legislative Assembly are qualified for appointment to the Executive Council. In this case, however, the Premier is not contesting that she was fundraising in her role as Premier and President of the Executive Council rather than in her role as a member of the legislative assembly.

Review Jurisdiction

17. The Petitioner says that this Court has review jurisdiction over Conflict Declarations because such decisions are reviewable under the *Judicial Review Procedure Act*. The Conflict Commissioner, in limiting the powers of a

member of the Executive Council under ss.3, 11 or 18(2) of the *Conflict of Interest Act* by means of a Conflict Declaration, exercises a "statutory power of decision" under s.1 of the *JRPA*. "Statutory power of decision" under the *JRPA* includes "a power conferred... [here, on the Commissioner] ... to make a decision deciding or prescribing ... powers ... of a person".

18. Similarly, relief in the nature of certiorari is available under the common law against "any public body with power to decide any matter affecting the rights, interests, property, privileges or liberty of any person". With respect, the Conflict Commissioner's decisions have the effect of affecting the rights, interests and privileges of members of the Executive Council, and are, as such, reviewable under the common law.

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

19. The decisions of the Federal Court cited by the Respondent relate to jurisdiction to review decisions made under a very different federal conflicts scheme that contains a privative clause and makes no allowance for complaints from members of the public. The statutory test for jurisdiction under the *Federal Courts Act* also differs from the *JRPA*.

20. With respect, the Respondent's position makes no allowance for the legal effect of Conflict Commissioner's decisions under ss.3, 11 and 18(2).

Standing

21. Democracy Watch has standing to bring this petition. Democracy Watch is a party to a complaint under s.19(2) of the *Conflict of Interest Act*. Section 19(2) of the *Conflict of Interest Act* 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.

22. Section 19(2) of the *Conflict of Interest Act* provides express or implied

legislative standing to bring this Petition. The *Conflict of Interest Act* contains no privative clause or restriction on the Petitioner's right to seek judicial review. The Respondent's characterization of s.19(2) is inaccurate.

23. Alternatively, the Petitioner claims public interest standing and relies on *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524, 2012 SCC 45 (CanLII).

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Toby Rauch-Davis, affirmed October 24, 2016.
2. Such other materials as the Court may accept.

The application respondent estimates that the application will take one day.

The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Date: December 28, 2016

"JASON GRATL"

Signature of lawyer for application respondent
Jason Gratl