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Docket: CV 07836

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the *Legislative Assembly and Executive Council Act*, R.S.N.W.T., 1988, c.L-5

IN THE MATTER OF a decision of the Conflict of Interest Commissioner dated March 18, 1998 regarding the provision of independent legal counsel for Ms. Jane Groenewegen as it relates to her complaint of February 16, 1998 with respect to alleged contraventions of the *Legislative Assembly and Executive Council Act* by the Honourable Member for Tu Nedhe, Don Morin

AND IN THE MATTER OF a decision of the Northwest Territories Legislative Assembly Management and Services Board dated July 28, 1998

BETWEEN:

JANE GROENEWEGEN

Applicant

- and -

SAM GARGAN, FOR AND ON BEHALF OF THE LEGISLATIVE ASSEMBLY OF THE NORTHWEST TERRITORIES AS SPEAKER OF THE ASSEMBLY AND AS CHAIR OF THE MANAGEMENT AND SERVICES BOARD

Respondent

Heard at Yellowknife on August 26, 1998

Judgment filed: September 4, 1998

REASONS FOR JUDGMENT OF THE HONOURABLE J.Z. VERTES

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Counsel for the Attorney General of the N.W.T.:	Earl D. Johnson, Q.C.

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REASONS FOR JUDGMENT

[1] The applicant seeks declaratory relief respecting certain aspects of the powers enjoyed by the Conflict of Interest Commissioner appointed by the Legislative Assembly of the Northwest Territories. Specifically, the issue posed is whether the Commissioner can appoint counsel and direct payment of counsel fees for individuals who will be interested participants in an inquiry into alleged conflict of interest of a member of the legislature. The Commissioner and the Management and Services Board of the Legislative Assembly differ as to the statutory power enjoyed by the Commissioner in this respect.

[2] It is necessary to provide an outline of the background to this dispute.

[3] On February 16, 1998, the applicant, Jane Groenewegen, an elected member of the legislature, lodged a complaint with the Clerk of the Legislative Assembly alleging conflicts of interest by another member, Don Morin, who is also the Premier of the Northwest Territories. The *Legislative Assembly and Executive Council Act*, R.S.N.W.T. 1988, c.L-5 (the "*LAECA*"), provides that any such complaint shall be forwarded to the Conflict of Interest Commissioner (the "Commissioner") who shall conduct an inquiry into the complaint. The Commissioner may, however, decline to conduct an inquiry if she determines that the complaint is frivolous or vexatious or not made in good faith or there are insufficient grounds to warrant an inquiry: see s.81(2), *LAECA*. In this case, the Commissioner conducted the preliminary review contemplated by s.81(2) and filed her report on May 29, 1998. The Commissioner directed that several specific items be put to a public inquiry.

[4] The subject matter of the complaints is not pertinent for this application. Suffice it to say that there are certain allegations made respecting Mr. Morin's dealings with two private individuals, Milan Mrdjenovich and Roland Bailey, and Mr. Morin's role in certain contracts between the Government of the Northwest Territories and these individuals. As a result of these other individuals being named in the terms of reference for the public inquiry, the Commissioner subsequently gave them standing to participate in the hearings, in person or by counsel, including the right to receive disclosure of materials and to examine and cross-examine witnesses. The Government of the Northwest Territories was also given standing since its contracting practices are brought into question. Finally, Ms. Groenewegen, as the complainant in this process, was given standing. The scope of what standing entailed with respect to each interested party was outlined by the Commissioner on August 4, 1998.

[5] Right from the filing of the complaint, the issue of funding for counsel has been a significant one. Ms. Groenewegen expressed her concern to the Commissioner that she has no resources to retain counsel to assist her with the preparation of information requested by the Commissioner. Ms. Groenewegen, as a member, asked the Management and Services Board of the Legislative Assembly (the "Board") for assistance in retaining legal counsel. She had the support of the Commissioner in this request. The Commissioner, on February 24, 1998, wrote to Ms. Groenewegen, with a copy to the Speaker of the Assembly, the respondent Sam Gargan (who also serves as chair of the Board), as follows:

> In your case the substance of the complaint is far more complicated and involves corporate entities of various kinds and legal transactions and documentation which would be difficult for a Member to properly evaluate without legal advice.
>
> I would support a request to the Management Services Board for you to obtain Counsel, because at this point it would assist the Commissioner in fairly and promptly determining the scope of the complaint and whether it meets the standard set in 81(2).

The Board rejected the applicant's request. I am not aware of the Board giving any written reasons for the rejection other than to say that Ms. Groenewegen, as a member, has access to the services of the Legislative Assembly Law Clerk who can provide her with general legal advice and information (but not to act as her "advocate").

[6] I was informed that the Board did approve, in response to a request made after the filing of the complaint, funding for independent counsel for Mr. Morin. There are apparently no minutes of Board meetings so I do not know what policy considerations, if any, went into the decision to fund counsel for Mr. Morin but not for Ms. Groenewegen. I was told that the Board acted on the basis of what it did on one previous conflict of interest complaint when it funded outside counsel for the member who was being investigated then. There are apparently no rules of procedure or policy statements in place to guide the Board. It apparently decides to fund legal services for members on a case-by-case basis. In any event, Mr. Morin's counsel is being paid pursuant to a contract between that counsel and the Speaker and I was told that there is no limit on the total amount that may be paid under that contract.

[7] Ms. Groenewegen raised concerns about having to rely on the services of the Law Clerk and asked the Commissioner if she could obtain independent counsel through the office of the Commissioner. The Commissioner sought submissions on this point, including an opinion from Commissioner's counsel, and then issued the ruling that is the catalyst for this application.

[8] In a written decision issued on March 18, 1998, the Commissioner concluded that she has statutory authority to appoint counsel for a complainant (such as Ms. Groenewegen). The applicable test is whether, in the opinion of the Commissioner, the appointment of counsel for the particular complainant would "aid and assist" the Commissioner in the conduct of the inquiry. As part of her decision, the Commissioner wrote about the basis for the exercise of her authority in this regard:

> The authority to appoint must be exercised in a manner consistent with the mandate of the Commissioner. The Assembly looks to maintain the confidence of the public in government and in the affairs of government by creating a complaints process in which individuals (some of whom may be Members of the Assembly, but in their individual capacities) can challenge the acts of elected Members. In doing so the Assembly implicitly anticipates that, almost without exception, the complainant will have fewer resources at his or her disposal than will the Member complained against. It also anticipates that the acts complained of may not be immediately open for public scrutiny and may require additional resources to articulate.
>
> In the context of s.81(2), it is neither the role of the Commissioner to solicit and enhance a complaint nor to restrict and limit a complaint. It is the role of the Commissioner to make clear to the complainant the threshold requirements for a complaint and the information needed to cross that threshold. The complainant must be given a fair and adequate opportunity to meet those requirements. Failure to do so leads to the implication that process has overwhelmed substance, and that even in a forum designed to promote confidence and fairness in government, only the most sophisticated, legally trained, articulate, and perfectly informed need apply.

The Commissioner then set out a series of factors that are relevant and concluded that Ms. Groenewegen's request for the appointment of publicly funded counsel satisfied those factors. The Commissioner also stressed the benefits to the inquiry process in having a level playing field respecting the resources of the participants:

> In order to maintain balance and fairness in the process in this case, the discretion of the Commissioner should be exercised in favour of authorizing Counsel. To have a balanced process assists the Commissioner in reaching a fair decision on the merits of the matter. A transparent and fair decision is to the benefit of all involved.

[9] All parties recognized that it is not for me to say whether the Commissioner has appropriately assessed the various factors that may be relevant to such an exercise of power. My role is to determine if she has the power. I quote from this decision, however, because an essential part of the applicant's argument is that the Commissioner may appoint counsel for any participant so long as such an appointment is to aid and assist the Commissioner. In these extracts, it is argued, the Commissioner has set out how this appointment will aid and assist the inquiry process.

[10] As a result of this decision counsel (chosen by Ms. Groenewegen) was retained by the Commissioner. When the first bill was forwarded to the Board for payment, the

Board refused to pay on the basis that the Commissioner did not have the statutory authority to engage publicly funded counsel on behalf of anyone other than herself. This position had been communicated to the Commissioner shortly after she issued her March ruling. This dispute has been at an impasse ever since.

[11] The Commissioner, in her March decision, only went so far as to order that Ms. Groenewegen is entitled to retain independent counsel at the commission's expense (and hence at the legislature's expense) for the preliminary investigation phase. She ruled that, if the process continues to a public inquiry, then the need for independent counsel will be reassessed. That reassessment was done at the August 4th meeting when she granted standing to Ms. Groenewegen and to Messrs. Mrdjenovich and Bailey. Clearly the Commissioner intended to authorize that counsel for Ms. Groenewegen continue to be publicly funded. She also gave a clear indication that, once this particular dispute is resolved, and if she does have the authority to do so, she will direct that counsel for Messrs. Mrdjenovich and Bailey also be publicly funded. The Commissioner indicated in August that:

> If and when it [the dispute over counsel funding] is resolved it would be my intention that the parties I have just named would be entitled to counsel funding for the reason that they are bearing the burden of the preparation of the public inquiry. They have no potential for recovery of costs as they would have in a court proceeding and it enhances the process to ensure that there is adequate balance among the main participants.

[12] Resolution of this dispute is obviously critical, in the eyes of many of the participants and in the opinion of the Commissioner, to the integrity of the inquiry proposed to be held into this complaint. As a result the applicant brought this motion seeking the following relief:

> 1. A declaration that the jurisdiction of the Conflict of Interest Commissioner includes the power to engage counsel, in addition to Commission Counsel, to assist and represent a party other than the Commissioner where the engagement of such counsel will aid and assist the Commissioner in the inquiry.
>
> 2. A declaration that the decision of the Conflict of Interest Commissioner dated March 18, 1998 is **intra vires** the jurisdiction of the Conflict of Interest Commissioner.

[13] Supporting the applicant's position is counsel for the Commissioner. The Commissioner is entitled to appear on the basis that her submissions are directed to the specific issue of her jurisdiction to make the order that she did: see *Northwestern Utilities Limited, et al v. City of Edmonton* (1978), 7 Alta.L.R.(2d) 370 (S.C.C.), at pages 388-389. No one took issue with this point.

[14] In opposition were counsel for the Speaker of the Assembly (on behalf of the Board) and counsel for the Attorney General of the Northwest Territories. The Attorney General appeared for the purpose of fulfilling its statutory duty to ensure that the administration of public affairs accords with the law: see *Department of Justice Act*, R.S.N.W.T. 1988, c.97 (Supp.), s.4(b).

[15] The other parties who have a stake in the upcoming public inquiry (which has been scheduled to commence on October 13th) were served with notice of these proceedings but did not appear in person or by counsel.

Legislation:

[16] The *LAECA* creates a regime for the regulation of conflicts of interest for elected members of the legislature. The Act defines what are conflicts for members (whether they be actions of the members or their families) and imposes positive obligations on members to avoid conflicts in the performance of their duties of office and to arrange their private affairs so as to conform to the legislative requirements. The statute imposes disclosure obligations as well as a "cooling off" period for any former member who served as Speaker or a Cabinet minister.

[17] The *LAECA* also creates the office of Conflict of Interest Commissioner as the central enforcement power for the obligations imposed on members. The Commissioner is appointed by the Commissioner of the Northwest Territories on the recommendation of the Legislative Assembly. The Commissioner is appointed for a four-year term and holds office during good behaviour. The appointment may only be revoked for cause or incapacity. The Commissioner, upon appointment, must take an oath to faithfully and impartially perform her duties.

[18] The Commissioner is clearly an independent public official. She must submit an annual report to the Speaker which in turn must be laid before the Legislative Assembly. She may provide opinions and recommendations to members as to their

obligations under the Act. Most significantly, the Commissioner must conduct an inquiry into any complaint of a contravention by a member of the conflict of interest provisions.

[19] After conducting an inquiry, the Commissioner must submit a report to the Speaker who in turn must present it to the legislature. The Commissioner may report that the complaint is dismissed. If so, that is the end of the matter. Or, the Commissioner may report that she has found the member to be guilty of a contravention of the *LAECA* conflict of interest provisions. In that case she may recommend any one or more of a list of punishments, set forth in s.83(1)(b) of *LAECA*, including from the extreme of declaring the member's seat vacant to a fine or a reprimand. She may recommend that compensation or costs be paid by the member. The legislature must consider the report within a fixed time period and it may order the imposition of the punishment recommended or it may reject it (s.84(2) *LAECA*). The statute does not provide for any other alternative, such as imposing some other punishment (nor can the legislature not accept the finding of guilt).

[20] It seems obvious that the reservation to itself of the ultimate decision in respect of punishment is an exercise by the legislature of its traditional parliamentary privilege of regulating the conduct of its members. The exercise of a privilege is not subject to review by the courts: see *New Brunswick Broadcasting Co. v. Nova Scotia* (1993), 100 D.L.R.(4th) 212 (S.C.C.). But that, in my opinion, does not mean that the legislature can act arbitrarily. The statute has encroached on the traditional privilege by enacting the conflict of interest rules and by creating the office of the Commissioner. Hence any decision by the legislature must be a *bona fide* one made in conformity with the purpose of the legislation and in the public interest.

[21] In carrying out an inquiry the Commissioner acts in a quasi-judicial capacity. This is made clear by s.82 of *LAECA*:

> 82(1) Any hearing in an inquiry shall be conducted in public unless the Conflict of Interest Commissioner considers that it is necessary in the public interest to conduct the hearing *in camera*.

(2) In the conduct of an inquiry, the Conflict of Interest Commissioner

(a) may require the Clerk to produce a disclosure statement or a supplemental disclosure statement received by the Clerk under section 77;

(b) has the powers of a Board under the *Public Inquiries Act*, including the power to engage the services of counsel, experts and other persons referred to in section 10 of that Act; and

(c) is not subject to technical rules of evidence.

(3) The member complained of may not refuse to give evidence at the inquiry.

(4) The Conflict of Interest Commissioner shall conduct an inquiry in accordance with the principles of natural justice.

[22] The reference in s.82(2)(b) above to the *Public Inquiries Act*, R.S.N.W.T. 1988, c.P-14 (the "*PIA*"), is significant. That statute empowers the Commissioner of the Northwest Territories to establish a public inquiry when necessary or in the public interest. The powers of a "Board" under that statute (and applicable to the Commissioner when conducting an inquiry under *LAECA*) are several:

4(1) Subject to subsection (1) and sections 6 to 9, the conduct of and the procedure to be followed on an inquiry is under the control and direction of the Board.

(2) Every Board may, subject to reasonable notice,

(a) summon any person as a witness;
(b) require any person to give evidence on oath or affirmation; and
(c) require any person to produce the documents and things that the Board considers necessary for a full and proper inquiry.

5. Every Board has the same power as is vested in a court of record in civil cases

(a) to administer oaths and affirmations;
(b) to enforce the attendance of any person as a witness;
(c) to compel any person to give evidence; and
(d) to compel any person to produce any document or thing.

. . .

10. The Board, if authorized by the statutory instrument establishing the Board, may engage

(a) the services of accountants, engineers, technical advisors or other experts, clerks, reporters and assistants that the Board considers necessary or advisable, and
(b) the services of counsel,

to aid and assist the Board in the inquiry.

[23] These powers are fairly common in statutes respecting administrative tribunals and boards of inquiry. They extend a wide discretion to the board, or the Commissioner in this instance, to determine how best to proceed with the inquiry. The overriding consideration is that the inquiry be conducted in accordance with the principles of natural justice (as per s.82(4) *LAECA*).

[24] What these provisions do not include, in the absence of an express reference, is the power to award "costs" as that term is known in ordinary civil litigation. Counsel are in apparent agreement on this point. "Costs" in this sense are an award made at the conclusion of a case whereby the unsuccessful litigant compensates the successful one for part or all of the latter's costs of litigation. The power to award such costs is an inherent one enjoyed by superior courts and one usually contained in court rules of procedure. But with respect to administrative tribunals, such a power must be expressly provided in the tribunal's enabling statute. Even a reference, as in s.5 of *PIA* to the powers of a "court of record", does not include the power to award costs: *Reference re National Energy Board Act* (1986), 29 D.L.R. (4th) 35 (Fed.C.A.), leave to appeal to S.C.C. refused.

[25] Counsel also agree that the ability of the Commissioner to recommend, as a penalty on a guilty finding, that the member pay "costs" is a reference to the member being obligated to pay an amount to offset the costs of the inquiry itself, not the costs incurred by other parties to the inquiry. But, in any event, as the applicant's counsel noted, this case is not about the ability of the Commissioner to order costs; it is about the power of the Commissioner to engage counsel.

[26] The *PIA* also contains a provision that imposes both an obligation and a power on a "Board" (which also apply to the Commissioner here):

> 7(1) Every Board shall accord to any person who satisfies it that he or she has a substantial and direct interest in the subject matter of an inquiry, an opportunity during the inquiry to give evidence and to call and examine or to cross-examine witnesses personally or by his or her counsel or evidence relevant to his or her interest.

This subsection imposes the obligation on the Commissioner to give any person with a substantial and direct interest the opportunity to participate in person or by counsel at the hearing. It also gives the power to the Commissioner to give standing to any such person and allow them to appear by counsel. The importance of such a provision was pointed out by Schroeder J.A. in *Re Ontario Crime Commission; Ex Parte Feeley* (1962), 34 D.L.R.(2d) 451 (Ont.C.A.), at page 475:

> In the present inquiry, allegations of a very grave character have been made against the applicants, imputing to them the commission of very serious crimes. It is true that they are not being tried by the Commissioner, but their alleged misconduct has come under the full glare of publicity, and it is only fair and just that they should be afforded an opportunity to call evidence, to elicit facts by examination and cross-examination of witnesses and thus be enabled to place before the commission of inquiry a complete picture rather than incur the risk of its obtaining only a partial or distorted one. This is a right to which they are, in my view, fairly and reasonably entitled and it should not be denied them. Moreover it is no less important in the public interest that the whole truth rather than half-truths or partial truths should be revealed to the Commissioner.

The Court also pointed out that it was unrealistic to think that the interests of such interested persons could be adequately protected by counsel acting directly for the Commissioner.

[27] As noted before, the issue in this case is the scope of the Commissioner's power to engage counsel. No one disputes that she may appoint counsel or others to advise and assist her in the conduct of the inquiry. The question is whether she may engage counsel to represent parties who are appearing before her at the inquiry. That is a matter of statutory interpretation, not just of the specific provisions but of the purpose of the legislation as a whole so as to place the specific provision within the context of the whole. And, in doing so, I must give the legislation "such fair, large and liberal

construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, R.S.N.W.T. 1988, c.I-8, s.10.

Discussion:

[28] The Legislative Assembly, by enacting the conflict of interest provisions of *LAECA*, has given expression to the public's expectation that elected officials will work in the public's interest, not in their own private interest. As the applicant's counsel submitted, the legislation's purpose is the maintenance of public confidence that members of the Assembly are conducting themselves in accordance with their obligations. The enforcement powers of the Commissioner serve the public interest by ensuring that there is an effective and independent process to regulate compliance with those obligations. The public interest aspect of this type of legislation was well expressed by Robins J. in *Re Moll and Fisher* (1979), 96 D.L.R.(3d) 506 (Ont.Div.Ct.), at page 509:

> This enactment, like all conflict-of-interest rules, is based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well-meaning men and women may be impaired when their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose. And the Act, by its broad proscription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interest may be in conflict with their public duty. The public's confidence in its elected representatives demands no less.

[29] Above I referred to the Commissioner's role in conducting an inquiry as a quasi-judicial one. This is a term that is not used as often as it once was in administrative law but it is apt for this situation. It means that the Commissioner, when conducting an inquiry, is exercising powers which are essentially judicial in nature. She must conduct the inquiry in accordance with the principles of natural justice. Traditionally there are two broad "principles of natural justice". First, an adjudicator must be disinterested and unbiased (*nemo judex in causa sua*); second, the parties must be given an opportunity to be heard (*audi alteram partem*). These broad principles have been delineated further into specific aspects of procedural fairness: the right to notice, to disclosure of all information in the possession of the adjudicator that has a bearing on the decision, to particulars of the allegations, to present evidence, to cross-examine witnesses, to open and public proceedings, to know the reasons for the decision, to have a disinterested and unbiased adjudicator, and the right to be represented by

counsel. I do not think anyone can argue that these rights are not contained within the ambit of the "natural justice" obligation imposed on the Commissioner when conducting an inquiry. But how this obligation is carried out is very much part of the discretion enjoyed by the Commissioner.

[30] The "rights" enumerated in the preceding paragraph are clearly applicable to the person who is the subject of the inquiry (in this case Premier Morin). He is clearly in jeopardy having regard to the range of penalties that may be imposed should there be a finding of guilt. He has every right to be represented by counsel. Whether that counsel should be funded from the public purse, as the Board has already decided, is not for me to say. I think a strong argument can be made in favour of such funding since defending these types of charges can be an extremely costly affair. But, as I said, this is not part of the issue before me. The Board has made its decision.

[31] It also seems to me that the "rights" listed above also apply to those parties who have been implicated in these alleged violations (Messrs. Mrdjenovich and Bailey respectively). The Commissioner has given these individuals standing to participate. She has exercised her authority and the obligation to comply with s.7(1) of *PIA* (as quoted above).

[32] The applicant, as the complainant in this proceeding, also comes within the purview of s.7(1) as a person with a substantial and direct interest in the inquiry. The Commissioner has so held. As noted in *Re Public Inquiries Act & Shulman* (1967), 63 D.L.R.(2d) 578 (Ont.C.A.), a complainant, especially one who holds public office, is liable to be discredited in the eyes of the public if the allegations of wrongdoing should prove to be unfounded. A complainant is therefore a person affected by the inquiry.

[33] The applicant also had the burden of gathering together documents and other information for the Commissioner. This imposed on the applicant (as it does on Messrs. Mrdjenovich and Bailey) a heavy obligation. It is only reasonable that the applicant would turn to professional legal assistance. But when the applicant, who is also a member of the legislature, turned to the Board for funding for counsel she was refused. The Board did not say why. All it did say was that Ms. Groenewegen could use the services of the Assembly's Law Clerk. This was described, in a letter of March 2nd from the Board's Secretary to the Commissioner, as the same assistance that is offered to any member of the assembly. Evidently that was not meant to include the type of assistance offered to Mr. Morin.

[34] I think the Commissioner, in deciding to engage counsel for the applicant and in flagging her intention to do the same for Messrs. Mrdjenovich and Bailey, was clearly attempting to satisfy the natural justice requirements for the inquiry process. She identified numerous relevant factors that went into consideration.

[35] The position of the applicant, as well as that of the Commissioner, is that s.82(2)(b) of *LAECA* and s.10 of *PIA* empower her to engage counsel for a party appearing at the inquiry so long as that will aid and assist the Commissioner in the conduct of the inquiry. It is submitted that the power to make such a determination is a necessary incident of her public responsibilities in carrying out the inquiry. It is said that the inability to appoint counsel would fetter the Commissioner's ability to carry out these responsibilities. Counsel argued that such power is expressly conferred by the above-noted sections of *LAECA* and *PIA* and, if not, then it exists by necessary implication.

[36] The Board, supported by the Attorney General, takes the position that the only appointment power enjoyed by the Commissioner is to appoint counsel directly for herself and not for others. It is argued that the power to appoint publicly funded counsel for parties must be one expressly conferred by statute.

[37] Before analyzing these respective positions specifically, I want to comment on some general points that arose in the evidence and during the hearing. They are important so as to clarify the issue in dispute.

[38] No one contests the general proposition that having competent legal representation for the parties with standing would be beneficial to the efficient and effective workings of the inquiry. Therefore, in a broad sense, such representation would aid and assist the Commissioner in her work. But this could be said for every proceeding, in court or otherwise, that has an adversarial quality to it (and one should make no mistake -- this is not some information-gathering exercise; this is an inquiry into conduct that allegedly violates the law and could result in severe consequences -- it is very much adversarial).

[39] Similarly, I do not think anyone can contest the fact that the Board could, if it wanted to, fund counsel for the applicant. Indeed it seems to me it could fund counsel for the other parties with standing even though those individuals are not members of the

legislature. I recognize, of course, that since we are discussing the expenditure of public funds, the Board should have good reason to do so (and perhaps that reason can be the same one that impels the Commissioner in this matter). But there is no statutory impediment to the Board doing so. The Speaker is exempt from the contracting provisions of the regulations passed pursuant to the *Financial Administration Act*, R.S.N.W.T. 1988, c.F-4. By s.47(1) of *LAECA*, the Speaker may, with the approval of the Board, enter into any agreement on behalf of the Assembly that the Speaker considers advisable "for the purposes of carrying out the provisions of (the *LAECA*)". Presumably that includes the provisions dealing with conflict of interest inquiries.

[40] I raise this because one of the concerns expressed by the Board, in response to the Commissioner's ruling of March 18th, was that the decision, since it involves the expenditure of public funds, must be authorized by statute. Fair enough. But, whether the Commissioner has the authority or not, it is clear that the Board has the authority to fund counsel for these parties. This point was conceded by respondent's counsel at the hearing.

[41] Further, even though the *LAECA* does not mention payment of the Commissioner's costs or the expenses of an inquiry, it clearly contemplates that any such expenses would be paid out of the public purse. The Commissioner is a public officer carrying out statutory duties. Therefore, if the Commissioner does have the power to engage counsel for anyone, then obviously the costs incurred by such engagement would also be paid out of the public purse.

[42] Some of these issues were brought to the forefront by a press release issued by the Board on July 29, 1998. This release contained the following:

> It has always been the view of the Board that the Commissioner has exceeded the scope of the authority given to her by the Legislative Assembly and Executive Council Act in ordering legal counsel to aid and assist Mrs. Groenewegen.
>
> While the Commissioner clearly has legal authority to retain counsel to aid and assist her, the powers granted to her do not extend to giving her the power to order the appointment of legal counsel for a person who files a complaint under the Act.
>
> "The Act is designed to enable anyone to file a complaint without the benefit of or requirement of legal advice or counsel," said the Hon. Sam Gargan, Speaker of the Legislative Assembly and Board Chairman. "In passing this legislation, it was never intended that the Assembly would pay the legal costs of a person launching a

> complaint against a Member. We support the work of the Commissioner and will do what we can to assist her, however, we can not support her ruling which we feel is outside the scope of her jurisdiction."
>
> Members confirmed that the Legislative Assembly would not cover the legal costs incurred by Mrs. Groenewegen, the complainant in the Conflict of Interest Public Inquiry against Premier Don Morin.
>
> During their meeting earlier this week, Members also decided against covering the legal costs of witnesses who may be called to testify by the Conflict of Interest Commissioner.

[43] Insofar as the release conveys the Board's opinion that the Commissioner does not have the statutory authority to engage counsel to represent the applicant or others then it is fair comment. But, as noted above, that misses the point. Even if, for sake of argument, the Commissioner does not have this authority, the Board certainly does. The Board's mandate is to provide services to members and generally be the administrative controller for the legislature: see s.37 *LAECA*. The Speaker is the chair. The Board is accountable only to the Assembly and essentially the only control the Assembly has is the power to appoint and remove the members of the Board (other than the Speaker).

[44] The press release fails to indicate any appreciation for the specific circumstances that compelled the Commissioner to make the ruling that she did. She carefully explained her reasons. Her ruling does not include the provision of publicly funded counsel for all witnesses. She was very careful to say that her intention to direct publicly funded counsel was for those persons who she said had a substantial and direct interest in the inquiry. The availability of counsel for those persons was held by the Commissioner to be of assistance to the workings of the inquiry process and to her ability to fulfill her responsibilities. I certainly cannot say she was wrong. It seems to me that the Board should at a minimum have considered these factors instead of simply relying on the point that the Commissioner has no authority to do this or the bootstrapping argument that they never intended the legislation to provide for this result. The "natural justice" issues raised by this situation must necessarily be assessed on their merits.

[45] Insofar as the Board acts on behalf of the legislature it enjoys certain parliamentary privileges. Parliamentary privilege has been called the collection of rights and immunities which enable the legislators to do their work. But these rights and immunities are founded upon the basis of necessity. It is those rights that are absolutely necessary for the due execution of the legislature's function that constitute the privilege: see *New Brunswick Broadcasting Co. v. Nova Scotia, supra.*

[46] The reservation to the legislature of the ultimate decision as to whether or not to accept the Commissioner's recommendation as to punishment can be viewed as an aspect of the privilege enjoyed by the legislature to discipline its members. But, a decision as to whether or not to fund legal counsel for any type of work or for any individual can hardly be said to be the exercise of privilege. It is the exercise of a discretion, one that has to be animated by the purposes of the request and its relationship to the purposes of the *Legislative Assembly and Executive Council Act.*

[47] I want to be clear that I do not intend to say, and I do not decide, that a decision by the Board to fund counsel is something subject to judicial review. That point is not before me. The *New Brunswick Broadcasting* case, however, recognized that the courts have the authority to decide what is or is not an aspect of parliamentary privilege. It just seems to me that there is no clearly discernible principle that would elevate the case-by-case decision to fund legal counsel to the lofty level of privilege.

[48] I am reinforced in these opinions by the extent to which the legislature has encroached on its privilege to discipline its members through the powers delegated to the Commissioner and the limitations it imposed on itself. The Commissioner carries out the inquiry. She makes determinations. If she dismisses the complaint then her decision is final. If she finds the member complained of guilty, then that decision is final. The only thing the legislature can do is either accept or reject the Commissioner's suggested punishment. The fact that the legislature has delegated so much discretion and responsibility to the Commissioner suggests to me that it wanted to repose a significant degree of autonomy on the Commissioner. Therefore, I think the public may be quite sceptical as to any perceived attempt to limit or second-guess the Commissioner in the performance of her duties.

[49] I have gone on at length on these points at the risk of obscuring the obvious. In my opinion, the Board is correct on the narrow point put before me. The Commissioner does not have the statutory power to engage publicly funded counsel for anyone but

herself. However, as everyone agreed at the hearing, the Commissioner can certainly make a request (or make a recommendation, however one wishes to phrase it) that publicly funded counsel be made available to specific parties. Any such request, coming as it does as part of the conduct by the Commissioner of the statutorily mandated inquiry, should be given careful consideration by the Board on its merits. If such a request was turned down, I think the public would expect that the Board had compelling reasons, reasons that can be publicly defended within the context of the legislature's aims in establishing the conflict of interest regime contained in the legislation. It seems to me that the dignity and integrity of the legislature require no less than good and compelling reasons to refuse a request from the independent officer that the legislature itself appointed to carry out the duties of investigating and adjudicating complaints against its own members. The public perception of the integrity of the legislature would be sorely tested by anything less.

[50] Why do I say that the Commissioner does not have the statutory authority she seeks?

[51] First, as a general proposition, any board or tribunal, including the position of Conflict of Interest Commissioner, being created by statutes, can only exercise the powers conferred upon them by their enabling legislation. The plain interpretation of the words used in s.82(2)(b) of *LAECA* ("the power to engage the services of counsel") or s.10(b) of *PIA* ("may engage...the services of counsel to aid and assist") is that the "services of counsel" are meant for the Commissioner.

[52] The Commissioner's counsel submitted that the power sought by the Commissioner exists by necessary implication from the wording of the statute, its structure and its purpose. I agree that it is possible to necessarily imply some power to a tribunal: see *Bell Canada v. CRTC* (1989), 60 D.L.R.(4th) 682 (S.C.C.). Counsel argued that the legislation vests in the Commissioner the discretion to determine whether and to what extent she will engage the services available to her under s.10 of *PIA*. The only criterion to be applied is whether any service will "aid and assist" the Commissioner in the inquiry. Hence, it is argued, whatever will aid and assist the Commissioner must be implicitly included in her power of engagement.

[53] The difficulty I have is that almost anything that would enable the inquiry to function more efficiently and effectively would, by definition, aid and assist the Commissioner. On a narrower point, I think a useful analogy can be drawn, as was

done in the submissions on behalf of the Board and the Attorney General, to funding for intervenors before administrative boards and tribunals. It has been held that the power of a statutory tribunal to grant intervenor funding in advance of the hearing must be expressed in clear language in the statute: *Re Regional Municipality of Hamilton-Wentworth et al* (1985), 19 D.L.R.(4th) 356 (Ont.Div.Ct.).

[54] I recognize that the applicant and Messrs. Mrdjenovich and Bailey are not mere "intervenors". They are persons who have already been granted standing because they have a substantial and direct interest in the subject matter of the inquiry. As such they have certain rights. Those rights are ones that would accord with the principles of natural justice. The right to examine and cross-examine witnesses is one. The right to be represented by counsel is another. But, there is nothing in the principles of natural justice that mandate the provision of publicly funded counsel. A common sense of fairness may tell us that if one member of the legislature is provided with funds for his counsel then perhaps another member should be too. But that does not equate to a legal obligation.

[55] The same issue arose before the Federal Court in *Jones v. Canada (Royal Canadian Mounted Police Public Complaints Commission)*, [1998] F.C.J. No.1051 (T.D.). The issue there was whether the R.C.M.P. Complaints Commission could either direct or recommend that publicly funded counsel be made available for the complainants. There was considerable support for the proposition that, without publicly funded counsel, the complainants would be at a great disadvantage: "there will not be a level playing field" (paragraph 7). The court found no statutory authority, express or implied, to authorize such a step. More significantly for this discussion, the court noted that no convincing argument can be made that there is a constitutional right to publicly funded counsel.

[56] I have examined the relevant portions of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c.R-10, and they are in sum and substance to the same effect as the relevant portions of *LAECA* and *PIA*. In my opinion, the conclusions to be drawn from these statutory provisions are the same.

[57] The court also noted, however, that nothing in the legislation prevented the Complaints Commission from recommending to the government that such funding be provided or precluded the government from providing such funding. As Reed J. wrote (at paragraph 19):

> The Commission has an obligation under subsection 45.45(5) to ensure that "the parties [which includes a complainant] and any other person" are afforded "a full and ample opportunity" to present evidence, to cross-examine witnesses and to make representations. If the Commission considers that for the purposes of the present inquiry, "a full and ample opportunity" can best be achieved by the complainants having counsel, then it is open to the Commission to recommend that the state fund counsel. If the Commission wishes to do so in a public as opposed to a private manner, that is also within the Commission's discretion.

I think the same points apply equally to the case before me. The lack of an express authority in the statute to recommend such a step is no impediment to doing so if it is in the interests of justice.

[58] The respondent's counsel submitted that the issue of providing public funds for counsel for complainants and witnesses in public inquiries is a significant policy issue. Thus it is one that must be expressly stated. She noted the serious cost implications to such a policy. I agree that there are significant implications. But, with respect to this case, that argument carries much less weight since the Board has already decided to pay Mr. Morin's legal fees and apparently without any limit on the amount.

[59] Counsel were unable to provide me with any judicial authority to support the Commissioner's position. The applicant's counsel referred to the "modern rule" of statutory interpretation: see R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed.), at page 131. He argued that the authority sought for the Commissioner is supportable having regard to its compliance with the legislative text, its promotion of the legislative purpose, and the reasonableness and justness of the outcome of such an interpretation. The only qualification I would add to this is that the actual words under review must be able to reasonably bear that interpretation. The power sought may promote the legislative objects and result in a more just regime. But, in my opinion, the words of the statute are plain and clear. Whether I think such a power would be a good thing is irrelevant. My function is to interpret the statute. I have concluded, based on all of the submissions, that the Commissioner's power to engage counsel does not extend to the engagement of counsel for parties at public expense.

Conclusions:

[60] The applicant sought declaratory relief. This remedy is used to declare the rights of the parties. It is an unenforceable remedy, unlike judgments in normal litigation. Its power comes from the fact that it is a judicial opinion. Traditionally it is expected that government and other public authorities will respect a declaration by a court: see Jones & deVillars, *Principles of Administrative Law* (2nd ed.), at page 554.

[61] The declarations sought by the applicant are refused for the reasons given. However, as alternative relief, a declaration will issue to the effect that the Commissioner has the authority to make a recommendation, if she thinks it appropriate to do so, that the Board provide funding for the provision of legal counsel for designated parties before the inquiry. The form and contents of such a recommendation are within the Commissioner's discretion. The decision is then the Board's to make. The public's expectation though is that the Board's decision would be made keeping in mind the objects and purpose of the legislation, the public interests involved, the demands of justice, the reasons given by the Commissioner for the request, and the responsibilities delegated to the Commissioner by the legislation.

[62] An order in accordance with these reasons will issue. I thank all counsel for their helpful submissions. Costs of these proceedings will be reserved for further argument should it become necessary.

J.Z. Vertes,
J.S.C.

Dated at Yellowknife, NT, this
4th day of September 1998

Counsel for the Applicant:	Barrie Chivers
Counsel for the Respondent:	Sheila M. MacPherson
Counsel for the Conflict of Interest Commissioner:	Elizabeth A. Johnson
Counsel for the Attorney General of the N.W.T.:	Earl D. Johnson, Q.C.

CV 07836

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the *Legislative Assembly and Executive Council Act*, R.S.N.W.T., 1988, c.L-5

IN THE MATTER OF a decision of the Conflict of Interest Commissioner dated March 18, 1998 regarding the provision of independent legal counsel for Ms. Jane Groenewegen as it relates to her complaint of February 16, 1998 with respect to alleged contraventions of the *Legislative Assembly and Executive Council Act* by the Honourable Member for Tu Nedhe, Don Morin

AND IN THE MATTER OF a decision of the Northwest Territories Legislative Assembly Management and Services Board dated July 28, 1998

BETWEEN:

JANE GROENEWEGEN

Applicant

- and -

SAM GARGAN, FOR AND ON BEHALF OF THE LEGISLATIVE ASSEMBLY OF THE NORTHWEST TERRITORIES AS SPEAKER OF THE ASSEMBLY AND AS CHAIR OF THE MANAGEMENT AND SERVICES BOARD

Respondent

REASONS FOR JUDGMENT OF
THE HONOURABLE J.Z. VERTES