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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

AND IN THE MATTER OF a decision of the Conflict of Interest Commissioner of the Northwest Territories dated November 24th, 1998

BETWEEN:

DONALD MORIN

Applicant

- and -

ANNE CRAWFORD, CONFLICT OF INTEREST COMMISSIONER FOR THE NORTHWEST TERRITORIES

Respondent

Ruling on a preliminary jurisdictional issue as to the applicability of parliamentary privilege to these proceedings.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J. Z. VERTES

Heard at Yellowknife , Northwest Territories
on December 11, 1998

Reasons filed: January 14, 1999

Counsel for the Applicant: Roderick C. Payne

Counsel for the Respondent: Elizabeth A. Johnson

Counsel for the Legislative Assembly of the Northwest Territories: Sheila M. MacPherson

Counsel for the Attorney-General of the Northwest Territories: Earl D. Johnson, Q.C.

Counsel for Roland Bailey: Charles F. McGee

Counsel for Milan Mrdjenovich: Alan Lefever, Q.C.

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REASONS FOR JUDGMENT

[1] These proceedings were commenced by Donald Morin (the applicant), a member of the Legislative Assembly of the Northwest Territories, who seeks judicial review of an inquiry and report by the respondent, Anne Crawford, the Conflict of Interest Commissioner for the Northwest Territories. In her report Ms. Crawford concluded that Mr. Morin had violated various conflict of interest provisions and recommended that he be reprimanded by the Assembly. Her report has been tabled in the legislature; it has been debated by the members (including Mr. Morin); and, the legislature has passed a resolution adopting the recommended sanctions in the report. Mr. Morin, however, still seeks judicial review arguing that there was a denial of natural justice in the Commissioner's inquiry.

[2] The particular matter I must address in these reasons is an application by the Conflict of Interest Commissioner to summarily dismiss Mr. Morin's application for judicial review. It is submitted by the Commissioner that this court has no jurisdiction to entertain Mr. Morin's application. This assertion is based on the proposition that the

actions of the Commissioner are an extension of the legislature's inherent privilege to discipline its members and thus immune from judicial review.

[3] This threshold issue of jurisdiction raises a number of other issues that have not been considered previously with respect to the Northwest Territories legislature, its status as a legislative body, and the extent of its privileges and immunities, if any. It also raises some fundamental questions about the proper role of the courts, as one branch of government, and their relationship to the legislative branch of government. Finally, it also calls into question the scheme of the conflict of interest legislation enacted by the Legislative Assembly to govern itself. These issues are not only a concern to the parties involved in this particular proceeding. They are a public interest concern since essentially it involves the question of how those who are elected to govern choose to govern themselves.

[4] For the reasons that follow, I have concluded that the powers exercised by the Conflict of Interest Commissioner are exercised within the ambit of a privilege enjoyed by the Legislative Assembly. As such, this court has no jurisdiction to entertain a judicial review application.

[5] The result is easy to state concisely. Unfortunately, because of the nature of the arguments presented on this application, these reasons will be anything but concise.

Summary of Background Facts:

[6] The conflict of interest proceedings undertaken by the respondent Commissioner have been the subject of previous applications to this court. On September 4, 1998, I released reasons for judgment on a question of statutory interpretation regarding the Commissioner's power to appoint counsel for interested parties: *Groenewegen v. Northwest Territories (Legislative Assembly)*, [1998] N.W.T.J. No. 129 (Q.L.). On November 25, 1998, I heard an emergency application by Mr. Morin for an injunction to prevent the delivery of the Commissioner's report to the Speaker of the Assembly (as required by the legislation). I refused the request for a number of reasons, not the least of which was my belief that such extraordinary and discretionary relief should not be granted at literally the last minute when Mr. Morin could have raised his objections earlier and still had the opportunity to raise them in the legislature once the report was tabled. In both instances I made some comments on the issue of privilege but, in neither case, was that issue the *ratio decidendi*. Nothing I said on this topic in those decisions can be considered as either conclusive or binding on the issue I must decide on this application.

[7] The conflict of interest proceedings commenced when, on February 16, 1998, another member of the legislature lodged a complaint with the Clerk of the Assembly alleging that Mr. Morin had violated the conflict of interest provisions of the *Legislative Assembly and Executive Council Act*, R.S.N.W.T. 1988, c. L-5 ("LAECA"). That Act provides that any such complaint be forwarded to the Conflict of Interest Commissioner who shall conduct an inquiry into the complaint. In this case the Commissioner conducted a preliminary review of the complaint, as contemplated by the Act, and directed that several specific allegations be put to a public inquiry.

[8] The public inquiry was held over 20 days. Commission counsel had responsibility for presenting the evidence. Mr. Morin was represented by counsel. The Commissioner also granted standing to the member who lodged the complaint and two other interested parties, Mr. Roland Bailey and Mr. Milan Mrdjenovich, two businessmen who were alleged to have inappropriate business dealings with Mr. Morin. Messrs. Bailey and Mrdjenovich were both represented by counsel who also participated in the inquiry. Forty-two individuals testified. The public inquiry concluded on November 17th.

[9] On November 24th, the Commissioner released a preliminary copy or a draft of her conclusions, on a confidential basis, to counsel for Mr. Morin and the other interested parties for the purpose of soliciting submissions as to appropriate sanctions. On that day as well Mr. Morin launched these proceedings for judicial review. After the unsuccessful attempt to enjoin the Commissioner from delivering her report to the Speaker, the report was tabled in the Assembly. In it the Commissioner concluded that Mr. Morin violated conflict of interest provisions with respect to seven matters. She recommended to the Assembly that Mr. Morin be reprimanded and that he pay the legal costs of the member who initially lodged the complaint. Two days of debate ensued on the floor of the legislature. Mr. Morin spoke and raised his concerns with the process and the conclusions of the Commissioner. On December 7, 1998, the Assembly voted overwhelmingly to adopt the sanctions recommended by the Commissioner. This was done with the knowledge that Mr. Morin's application for judicial review was pending before this court.

[10] The application for judicial review raises a number of complaints. It is alleged that: (a) there is a real, or reasonable, apprehension that the respondent Commissioner was biased against the applicant; (b) the Commissioner breached a duty of fairness in setting the procedures for the inquiry and in her conduct of the inquiry; (c) the decisions of the Commissioner were perverse or patently unreasonable because they were in conflict with the preponderance of the evidence; and, (d) the decisions of the Commissioner were, in whole or in part, inconsistent with the statutory provisions

governing the Commissioner and the conduct of such an inquiry, those being contained in Part III of LAECA. It is not necessary to review the evidence in support of these allegations for purposes of these reasons. It will suffice to say that many of these points, in particular the complaints about perceived bias and the manner in which the Commissioner conducted the inquiry, were raised before the Commissioner both prior to and during the inquiry. They were not, however, the subject of a judicial review application prior to the filing of Mr. Morin's application just before the release of the Commissioner's report.

Submissions of the Parties:

[11] This threshold issue of jurisdiction was argued solely on the basis of privilege. It was not argued on purely administrative law grounds. This is understandable because if privilege applies, as argued on behalf of the Commissioner, then there is no room for the application of administrative law principles. In such a case the court is without jurisdiction to do anything.

[12] This is an important point because, on the one hand, one would expect that the actions of the Commissioner are subject to judicial review. The Commissioner is empowered by Part III of LAECA to conduct a public inquiry. According to s.82(4) of LAECA, the inquiry must be conducted in accordance with the principles of natural justice. The Commissioner clearly acts in a quasi-judicial capacity. Generally speaking, where statutory duties are imposed upon a tribunal (such as the Commissioner in the conduct of an inquiry), those duties are public duties and the courts will enforce compliance with those duties. A perception of bias and a lack of fairness in the procedure go to the very jurisdiction of the tribunal and render any decision void. The superior courts will step in to quash such decisions.

[13] On the other hand, there is a strong argument that the courts do not have a role to play here in any event since all the Commissioner does is investigate a complaint and then report to the Assembly with her recommendations. The ultimate decision to accept or reject those recommendations lies with the Assembly. In a sense the Commissioner is no different than a commission of inquiry which merely forms opinions as to facts and makes recommendations to some other decision-maker. The traditional view is that such commissions are not subject to judicial review because they do not make final decisions: *Re Godson and the City of Toronto* (1891), 18 S.C.R. 36.

[14] I raise these points simply to note that, even if privilege did not apply, there may not be a straightforward response to these proceedings. Since these administrative law

points were not argued on this application I need not discuss them further (except with respect to two ancillary points raised by the parties, those being whether this case is moot and whether declaratory relief is available even if the report itself cannot be quashed). Of course, if privilege does apply, then there is no need for further discussion of these points at all. There would be no jurisdiction for the court to exercise. While administrative law remedies such as *certiorari* or a declaration are discretionary, a court cannot invoke discretion to assume jurisdiction where none exists.

[15] A number of interested parties appeared on this application to make submissions. Counsel for the Commissioner and for Mr. Morin placed the competing jurisdictional arguments before me. Mr. Morin was supported in this by counsel for Messrs. Bailey and Mrdjenovich. Counsel for the Legislative Assembly, instructed by the Speaker, took no position on whether the Commissioner enjoyed a privilege but asserted that at least the legislature enjoyed the privilege of regulating the conduct of its members. Counsel for the Attorney General of the Northwest Territories took no position on this application. I will summarize the submissions of the parties before going on to analyze the issues. Some of the points made by counsel will be discussed further in that analysis.

Submissions of the Commissioner:

[16] Counsel for the Commissioner submitted that the Legislative Assembly, both at common law and by statute, enjoys the privilege enjoyed by all legislative bodies to discipline its own members. Such a power is necessary in the public interest so as to maintain the standards and integrity of the legislature. By statute, as well, LAECA has preserved the privileges of the legislature to discipline members. The Commissioner is merely performing functions that are an extension of this privilege.

[17] Counsel relied on a decision of the British Columbia Court of Appeal, *Tafler v. British Columbia (Conflict of Interest Commissioner),* [1998] B.C.J. No. 1332, to support her argument. The issue there was whether the British Columbia Conflict of Interest Commissioner, acting on a complaint, was acting under legislative privilege such that the courts have no power of review in relation to the way the Commissioner carried out his tasks. The court held that the privileges of the legislature extended to the Commissioner and, therefore, any decisions made by the Commissioner were not reviewable by the courts. I will discuss this case further in these reasons.

[18] The Commissioner's counsel also submitted that, pursuant to LAECA, the Commissioner has certain duties to carry out. She must conduct an inquiry and must report to the Speaker. The legislature in turn must consider the report. It was argued

that these mandatory terms clearly reveal the legislative intent to leave no room for court intervention. The statutory requirement for compliance with natural justice in the conduct of an inquiry does not displace that intention nor does it waive the privilege. Counsel argued that any intervention by the court would clearly violate the legislature's right to deal with the report.

[19] The fact that the report has already been addressed by the legislature leads me to a brief discussion of the concept of mootness. Commissioner's counsel submitted, alternatively, that Mr. Morin's judicial review application is moot. Since the report has been dealt with by a resolution of the Assembly, it was argued, there is nothing on which an order of this court can act. Hence any decision of this court will have no practical effect. Therefore, in accordance with the principles in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (in particular at page 353), the court should decline to hear the case.

[20] In my opinion, it is correct to say that any decision I make cannot affect the resolution already adopted by the legislature. But that does not necessarily mean there is no remedy available to either Mr. Morin or perhaps to Messrs. Bailey and Mrdjenovich. I will discuss this briefly when I discuss Mr. Morin's request for the opportunity to seek declaratory relief. Furthermore, even if an issue is moot as far as the particular parties are concerned, there may still be an intrinsic importance to the case that would compel the court to exercise its discretion in favour of hearing the case. The Court in *Borowski* recognized this discretion.

[21] Having regard to the conclusion I have reached on this application, I need not make a definitive ruling on this point of mootness. All I will say is that I have doubts that one can truly say the process has been concluded. The legislation, in subsections 84(1) and (2) of LAECA, says that the Legislative Assembly shall consider the Commissioner's report and may order (or may reject) the imposition of the punishment recommended by the Commissioner. The debate in the Assembly satisfied the requirement to "consider" the report. The resolution passed by the Assembly, however, merely "adopted" the Commissioner's recommendations. To adopt them is not, in my opinion, the same thing as ordering the imposition of the punishment. It may nevertheless be good parliamentary practice. Erskine May's text on *Parliamentary Practice* (20th ed., 1983) notes that the appropriate practice in the British House of Commons is to agree, by resolution, to a report from the House Committee of Privileges before proceeding to carry out the penalties recommended (see page 172). So it seems to me there is one further step for the Assembly to take before one can truly say that the process is complete. That step

is the actual imposition of the punishment, in this case, the delivery of the reprimand in the Assembly. I would not consider this case moot in these circumstances.

Submissions of Mr. Morin:

[22] Counsel for Mr. Morin premised his submissions on the subsidiary constitutional position of the Northwest Territories vis-à-vis the federal government. Since the Legislative Assembly is the creation of a federal statute, specifically the *Northwest Territories Act*, R.S.C. 1985, c. N-27 (as amended), it has no entrenched constitutional status as do the federal Parliament and the provincial legislatures. Therefore, it cannot claim a statutory or historic right to a privilege over the discipline of members for conduct outside of the actual proceedings in the Assembly. This, it is argued, is the conclusion to be drawn from some venerable cases. The only privileges enjoyed by the Legislative Assembly are those as are incidental and necessary to enable them to perform their legislative functions. More specifically, the only inherent privilege recognized by the common law in Canada is the right to punish a member for an immediate obstruction to the due course of the proceedings in the Assembly. Since there is no inherent privilege to discipline a member for conduct outside of the Assembly, there can be no extension of privilege to the activities of the Conflict of Interest Commissioner. The only way for this legislature to enlarge or extend the scope of its privilege would be if its enabling statute, the *Northwest Territories Act*, expressly allowed it. Since it does not, then there can be no claim to privilege.

[23] It was further argued that the provisions of Part III of LAECA reveal an intention to create an arm's length procedure independent of the legislature. The Commissioner is not designated an "officer" of the Assembly (as the British Columbia Commissioner is designated under the statute in *Tafler*). Most significantly, the statute imposes the obligation to conduct inquiries in accordance with the principles of natural justice. Thus Part III establishes a statutory process subject to specific rules. It is not an exercise of privilege. Further, counsel submitted that it would be anomalous to set up a procedure, cloaked with the attributes of natural justice, and then leave no recourse for review when there is a complaint of a breach of natural justice. Finally, counsel argued that the conflicts of interest legislation in Part III of LAECA was not passed as something necessary to carry out legislative functions (and thus within the ambit of privilege). It was passed, he submitted, so as to maintain public confidence in elected officials (and therefore outside of the scope of common law privilege).

[24] During his oral submissions, counsel for Mr. Morin advanced an alternative claim that, should I decide that judicial review is not available so as to quash the report, Mr.

Morin should be allowed to seek declaratory relief. It was evident that this request came about as a result of discussion between myself and counsel during the hearing. It emanates from the example of the two "*Landreville*" judgments from the Federal Court Trial Division: *Landreville v. The Queen* (1973), 41 D.L.R. (3d) 574, and *Landreville v. The Queen (No. 2)* (1977), 75 D.L.R. (3d) 380. I will touch on them very briefly.

[25] Mr. Landreville sought judicial review of a federal commission of inquiry into his fitness to sit as a judge. The application was brought many years after the commission made its recommendations known to the government and, in fact, many years after Mr. Landreville had resigned his position. He sought to quash the Commission's report on the basis that the commission had exceeded its mandate and had breached its duty of fairness. The Federal Court held that it had no jurisdiction to quash the report since the commission report was merely a recommendation. It did not decide anything. The Court concluded, however, that it could still issue declaratory relief. Even though a declaration would have no legal effect, it may still have some practical benefit for the applicant. For example, it was said that a declaration that the commission had conducted the inquiry in disregard of the principles of natural justice would contribute to restore the applicant's reputation. In the end a declaration was issued.

[26] Had I come to a different decision on the privilege issue, I may have been persuaded that the *Landreville* procedure was one applicable to the situation before me. There is much to commend it. I would have been obliged, however, to invite further submissions on it. As it is, having decided that privilege does extend to the Commissioner's actions and conclusions, I need not consider this alternative remedy. As I noted previously, a discretionary power cannot be invoked to create a jurisdiction where none exists in law.

Submissions of Messrs. Bailey and Mrdjenovich:

[27] Counsel for Mr. Mrdjenovich simply filed written submissions. Counsel for Mr. Bailey adopted those submissions and made additional ones during oral argument.

[28] Messrs. Bailey and Mrdjenovich were granted participant status at the inquiry. The Commissioner's report contains several critical comments regarding the integrity and credibility of these individuals and others who were called as witnesses at the inquiry. These individuals are not members of the legislature and have had no opportunity to respond to the findings in the report.

[29] The position advanced by these interested parties was not that the legislature did not enjoy a privilege concerning the discipline of its members, merely that any such privilege did not extend to the Commissioner. It was argued that privilege was not necessary for the Commissioner to carry out her responsibilities nor was it desirable to insulate her actions from judicial review. On the contrary, review would ensure that the Commissioner carries out her functions in accordance with the statutory requirement for natural justice.

[30] Counsel also relied on the general proposition, as expressed by Lamer C.J.C. in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 (at page 350), that "courts are apt to look more closely at cases in which claims to privilege have an impact on persons outside of the Assembly than at those which involve matters entirely internal to the Assembly." Here counsel noted that, while Mr. Morin had an opportunity to raise his complaints on the floor of the legislature, these individuals, both of whom being the subject of adverse comment by the Commissioner in her report, had no recourse to any forum but the court to seek redress. Without an opportunity for redress, third parties such as these are left vulnerable to any misuse or abuse of power by the Commissioner.

[31] I must admit to having a great deal of sympathy for the position advanced on behalf of these interested parties. It seems to me that the courts should not be too quick to decline jurisdiction in situations where there is inadequate relief for violations of citizens' statutory and common law rights. But, as I will explain further in these reasons, once privilege applies, then it applies to everyone.

Submissions by the Legislative Assembly:

[32] Counsel for the Assembly submitted that the Northwest Territories legislature has all the privileges inherent in any Canadian legislature. They are not limited by the fact that this legislature is a mere creature of statute. One of those inherent privileges is the right to discipline its members. The conflicts of interest legislation found in Part III of LAECA was enacted as an exercise of that privilege.

[33] As noted previously, the Assembly took no position on the question of whether this privilege extends to the activities of the Commissioner. Instead, the Assembly's counsel put very well, and succinctly, the two sides of the argument. I repeat what counsel put in her written submissions, first in favour of extending the privilege:

> In support of the proposition that the privileges of the Legislature "cloak" the Commissioner with similar privileges is the fact that the Commissioner is acting as an arm of the Legislature—is doing what the Legislature is clearly authorized to do—and reports to the Legislature. Further, the Legislature retains ultimate control over the process by having the ability to adopt or to reject the recommendations, thereby, implicitly either adopting or rejecting the findings. In this regard, it can be argued that the Commissioner is acting as an agent of the Legislature in the exercise of its functions and that, just as the Courts would not question the right of the legislature to discipline its members, nor should the Court question the exercise of this power by the duly authorized agent of the Legislature.

And, next, in favour of maintaining judicial review:

> The requirement on the Conflict of Interest Commissioner to conduct her inquiry in accordance with the principles of natural justice is one of the features that supports the proposition that the Commissioner's activities are not cloaked with the privileges afforded to the collective entity of the Legislature... The question is raised: Who is to be the judge or judges of whether the Commissioner has acted in accordance with these principles? It is clear from the debate in unedited Hansard of Friday, December 4th and Monday, December 7th, that Members felt unable and ill equipped to give a forum to the concerns raised by the Applicant...
>
> If Members felt ill-equipped to address issues of natural justice, it does beg the question of whether it is fair or appropriate for the activities of the Commissioner to be cloaked with privilege such as to preclude other avenues to address the concerns raised by the Applicant.
>
> A second factor to consider in determining whether the activities of the Commissioner are to be cloaked with privilege is the limitation placed on the Legislative Assembly of the Northwest Territories in section 84(2) of the *Legislative Assembly and Executive Council Act* to either accept or reject the recommended punishment. The legislature is statutorily precluded from rejecting the finding of guilt. It can only implicitly reject the finding of guilt by rejecting the suggested punishment; it cannot substitute a finding of innocence. The legislative delegation of this function, without a reservation of the right to review the essence of the finding, may support a judicial finding that the Commissioner's activities are not cloaked with privilege.

[34] The position adopted by the Assembly on this application caused Mr. Morin's counsel to advance the argument that, if the Assembly is not claiming the privilege on behalf of the Commissioner, then there is no privilege. The privilege is the Assembly's

to invoke, not the Commissioner's, so if it does not invoke it then the Commissioner cannot claim the benefit of it.

[35] In my opinion, the fact that the Assembly is unsure of the extent of its privileges is immaterial. Either the privilege exists or it does not; either the privilege extends to the actions of the Commissioner or it does not. In the absence of a statutory enactment, it is not for the legislature to simply declare that something is or is not a matter of privilege. As I will discuss further in these reasons, the Supreme Court of Canada confirmed in the *New Brunswick Broadcasting* case the principle that it is the courts that determine the existence, extent and scope of a parliamentary privilege.

Issues:

[36] The arguments presented on this application require me to consider two distinct issues: (1) What privileges, if any, are enjoyed by the Northwest Territories Legislative Assembly; and, (2) If there is a privilege to discipline members for conflicts of interest, does that privilege extend to the activities of the Commissioner? This will necessarily entail a discussion of the "status" of this Assembly as a legislative body. I will start with a review of the applicable legislation.

Legislation:

[37] The legislative provisions under which the Commissioner conducted her inquiry are contained in Part III of LAECA. No one took issue with the power of the Legislative Assembly to enact such legislation.

[38] The "constitution" of the Northwest Territories, being the *Northwest Territories Act*, R.S.C. 1985, c. N-27, grants legislative power to the "Commissioner in Council", that is to the Commissioner of the Northwest Territories acting by and with the advice and consent of the Council. The Act establishes an elected Council. The terminology "Council" has become outdated and it is now referred to as the "Legislative Assembly". It is interesting to note that "Legislative Assembly" was the name applied to the elected legislature by the *Northwest Territories Act* as of 1888 (that statute also referred to the Commissioner of the Northwest Territories as a "lieutenant-governor"). Section 14 of the current *Northwest Territories Act* authorizes the Commissioner in Council to prescribe the qualifications of electors and candidates as well as "the reasons for which a member of the Council may be or become disqualified from being or sitting as a member of the Council". Some of these items are covered by legislation such as the *Elections Act*, R.S.N.W.T. 1988, c. E-2, but it seems to me that, irrespective of any

question of privilege, it is open to the Assembly to legislate the conditions under which a member may lose his or her seat.

[39] Part III of LAECA is a comprehensive regime for the regulation of conflicts of interest for the elected members of the legislature. The Act defines what are conflicts of interest generally and imposes positive obligations on members to avoid conflicts in the performance of their duties and to arrange their private affairs so as to conform to the legislative requirements.

[40] The position of Conflict of Interest Commissioner is placed in the central position of regulating compliance with Part III. The Commissioner is appointed by the Commissioner of the Northwest Territories upon the recommendation of the Legislative Assembly: s.79. The Commissioner is appointed for a four-year term. She may be removed only for cause or incapacity upon the recommendation of the Legislative Assembly. The Commissioner must submit an annual report to the Speaker who shall in turn lay the report before the Assembly. In addition, the Commissioner may at any time submit a report to the Speaker identifying any member who has failed to comply with the disclosure requirements of the Act.

[41] The Commissioner is also empowered with some decision-making authority. The Commissioner may authorize a member or a former member to accept a contract that he or she is otherwise prohibited from accepting: s.75.1. The Commissioner may give advice and recommendations to members respecting their obligations under the Act and, if the member complies with them, then the member is immunized from prosecution for a breach of those obligations: s.79.2.

[42] In terms of enforcement, the Act specifies that, upon receiving a complaint of an alleged violation, the Commissioner shall conduct an inquiry: s.81(1). The Commissioner may decline to conduct an inquiry if she determines that the complaint is frivolous or unsupported: s.81(2). If she proceeds with the inquiry, then she must conduct it in public unless she considers it necessary to conduct it in camera: s.82(1). The Commissioner, in the conduct of an inquiry, has the powers of a Board under the *Public Inquiries Act*, R.S.N.W.T. 1988, c. P-14, and is not subject to technical rules of evidence: s.82(2). The member complained of may not refuse to give evidence: s.82(3). Most significantly for our present purpose, the Commissioner must conduct an inquiry in accordance with the principles of natural justice: s.82(4).

[43] After conducting an inquiry, the Commissioner must submit a report to the Speaker who must in turn lay the report before the Assembly as soon as is reasonably

practicable: s.83(3). The report must provide reasons: s.82(2). 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 contravening a provision of Part III. In such a case she may recommend any one or more of a selection of penalties set forth in s.83(1)(b) of the Act. Those penalties include a reprimand, a fine, an order for compensation or restitution, a suspension, an order for costs, and the extreme sanction of declaring the member's seat vacant. If the Commissioner makes a report under s.83(1)(b), then the Assembly must consider it within 30 sitting days after the report is tabled: s.84(1). The Assembly then may order the imposition of the punishment recommended by the Commissioner or it may reject it: s.84(2). There is no other option.

[44] In the *Groenewegen* case, I made the following comments with respect to the public interest aspect of this legislation (at para. 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.

[45] The fact that this legislative scheme has a public interest aspect does not preclude a finding that it also has an "internal" aspect, internal and necessary to the functioning of the legislature, and thus an exercise of privilege. On that point I must first examine the

nature of the privileges, if any, enjoyed by the Legislative Assembly and whether they have been limited in any way.

The Legislative Assembly and Privilege:

[46] J.P.J. Maingot, Q.C., in his authoritative text *Parliamentary Privilege in Canada* (2nd ed., 1997), defines parliamentary privilege in the following general manner (at page 12):

> Parliamentary privilege is the necessary immunity that the law provides for Members of Parliament, and for Members of the legislatures of each of the ten provinces and two territories, in order for these legislators to do their legislative work. It is also the necessary immunity that the law provides for anyone while taking part in a proceeding in Parliament or in a legislature. In addition, it is the right, power, and authority of each House of Parliament and of each legislative assembly to perform their constitutional functions. Finally, it is the authority and power of each House of Parliament and of each legislative assembly to enforce that immunity and to protect its integrity.

The immunity provided by the privilege is viewed as necessary to maintain the independence and function of the legislative body as a separate branch of government.

[47] Parliamentary privilege has its origins in the development of parliamentary democracy in the United Kingdom. It was a concept transplanted to Canada in colonial times both by operation of the common law and by statutory edict of the Imperial Parliament. Since Confederation it is embodied in Canadian constitutional documents and legislation. At the federal level, s.18 of the *Constitution Act*, 1867, provides that the privileges, immunities and powers to be held, enjoyed and exercised by the Senate and the House of Commons shall be such as are from time to time defined by statute but not so that they exceed those held and exercised by the House of Commons of England. Pursuant to this authority, the *Parliament of Canada Act*, R.S.C. 1985, c. P-1, asserts, in s.4, that the Senate and House of Commons and their members hold, enjoy and exercise such like privileges, immunities and powers as held by the United Kingdom Commons. At the provincial level, s.45 of the *Constitution Act*, 1982 (originally enacted as s.92(1) of the 1867 *British North America Act*) provides that each province may amend its constitution. This includes the power of each provincial assembly to legislate their privileges: *Fielding v. Thomas*, [1896] A.C. 600 (P.C.). Thus, the provinces have enacted statutory provisions similar to that found in s.4 of the *Parliament of Canada Act*.

[48] The situation with respect to the Northwest Territories Legislative Assembly is different in a constitutional sense. The Northwest Territories is not a province so it has no independent constitutional status as such. It is in a sense a creation of the federal government. A short discussion of the status of the Territories and its legislature is warranted here because of the argument advanced on behalf of Mr. Morin that the Legislative Assembly has no inherent privileges other than those that are absolutely necessary or are authorized by federal legislation. The underlying suggestion is that this Assembly is somehow not a real legislature for purpose of invoking privilege.

[49] The federal jurisdiction over the Northwest Territories dates from the *Constitution Act*, 1871, which authorized the Parliament of Canada to make provision for the administration, peace, order and good government of any territory not included in a province. This was followed by the first *North West Territories Act* of 1875. This legislation authorized a lieutenant-governor to legislate with the aid of an appointed council. The appointed council was replaced by 1888 with a fully elected Legislative Assembly. Of course, in that era the Northwest Territories included what are now the provinces of Alberta and Saskatchewan, a large part of Manitoba, all of what is now Yukon, and parts of northern Ontario and Quebec. After 1905, the *Northwest Territories Act* replaced the designation of lieutenant-governor with that of Commissioner and reverted to an appointed council. That situation continued until gradually a fully elected legislature was once again a reality in 1975. It is worthwhile to note that the Legislative Assembly of the Northwest Territories, in one form or another, is one of the oldest political institutions in confederated Canada.

[50] Since 1975 the structure of territorial government has come more and more to resemble that of a provincial government. In 1979 the federal Minister of Indian Affairs and Northern Development issued instructions to the Commissioner of the Yukon Territory which had the effect of achieving responsible government. The Commissioner withdrew from the cabinet and the Assembly; all cabinet positions were to be filled by the Assembly from among elected members; and the Commissioner was to accept the advice of cabinet in all matters. Thus the Commissioner became once again a "lieutenant-governor" type of figure while the government leader selected from the Assembly became a "premier". These terms were soon applied as well in the Northwest Territories. For a full description of these developments, see P.L. Michael, "The Yukon—Parliamentary Tradition in a Small Legislature", and K.O'Keefe, "Northwest Territories—Accommodating the Future", both in G. Levy and G. White, eds., *Provincial and Territorial Legislatures in Canada* (1989).

[51] My reason for this excursion is to simply point out that this Assembly has a history and tradition. It looks like, acts like, and has all the attributes of, a "legislature" in the traditional sense of that term. It is also a "legislature" in the legal sense of that term.

[52] Through the instrument of the *Northwest Territories Act*, the Parliament of Canada delegated extensive powers of self-government to the Northwest Territories. The Commissioner in Council is given jurisdiction to legislate in a broad range of subjects similar to the jurisdictional powers of a province. There is *dicta* upholding the validity of this delegation: see *Re Gray* (1918), 57 S.C.R. 150 (at pages 170-171). There is jurisprudence from this court that has held that, while the Commissioner in Council legislates under the authority of an act of the federal Parliament, the laws enacted are laws of the Territories passed by a legislature constituted for the Territories: *Re Pfeiffer & The Commissioner of the Northwest Territories* (1977), 75 D.L.R. (3d) 407 (N.W.T.S.C.). The *Northwest Territories Act* does provide, in section 21(2), that the federal cabinet may disallow any statute passed by the territorial legislature within one year of its passage. In its practical effect, however, this is no different than the federal power of disallowance of provincial legislation, found in s.90 of the *Constitution Act*, 1867, a power that by constitutional convention is not used and is now regarded as obsolete: see P.W. Hogg, *Constitutional Law of Canada* (1997), section 5.3(e).

[53] It has long been recognized that the territorial assemblies, whether of the Northwest Territories or the Yukon, are not acting as agents or delegates of the federal Parliament when legislating within their sphere of powers. In this sense they have a sovereign-like legislative character. This was noted by the Yukon Court of Appeal in *R. v. Chamberlist* (1970), 72 W.W.R. 746, when discussing the powers of the Yukon Commissioner in Council (per Morrow J.A. at pages 749-750):

> Although the powers may be expressly limited, nevertheless it is quite possible for a parliament, such as that of the dominion of Canada, to pass on the power to legislate to another legislative body so long as these powers do not exceed those of the initiating legislature.
>
> For example, in discussing the question of delegation of legislative power in respect to the *Indian Councils Act*, 1861, 24 & 25 Vict., ch. 67 Lord Selborne states in *Reg. v. Burah* (1878) 3 App Cas 889, at p. 904:
>
> > " * * * The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is

> not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large, and of the same nature, as those of Parliament itself."

[54] The Legislative Assembly of the Northwest Territories has also achieved some limited constitutional recognition. Section 3 of the Charter of Rights and Freedoms guarantees: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." The right to vote has been described as the very embodiment of democracy, the right of citizens to elect their government: *Harvey v. New Brunswick*, [1996] 2 S.C.R. 876 (per La Forest J. at page 901). The rights protected by section 3 are "preferred" rights in that they are not subject to the notwithstanding clause found in s.33 of the Charter. Section 30 of the Charter states that "a reference ... to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be." This recognition reinforces my opinion that in no way can this Legislative Assembly be considered as merely an emanation or organ of the federal government. It is a separate and distinct legislative entity.

[55] It may be technically correct to say, as Laskin C.J.C. did in *Canada Labour Relations Board v. City of Yellowknife* (1977), 76 D.L.R. (3d) 85 (S.C.C.), that the Parliament of Canada has an "all-encompassing" legislative authority in the Northwest Territories (at page 86). But, considering the history, the legal powers, and the constitutional position of the Legislative Assembly of the Northwest Territories as an institution, I conclude that it is an independent legislative institution as fully effective within its sphere of jurisdiction as any other legislature.

[56] The nature and status of the Legislative Assembly as a "legislature" become important when one turns to consider the extent of its privileges. Counsel for both the Conflict of Interest Commissioner and Mr. Morin characterized the situation of this legislature as being equivalent to that of the pre-Confederation colonial legislatures. Maingot, in *Parliamentary Privilege in Canada*, notes that since the territorial legislatures are not competent to amend their own constitutions, they may not have the same power as the provinces to legislate the adoption of privileges and immunities as extensive as those enjoyed by members of the federal Houses of Parliament or the provincial legislatures. The territorial legislatures must rely on the common law. That, Maingot writes (at page 6), "provides that things that are necessary pass as incident, that is to say, legislatures are given such privileges and immunities as are incidental and necessary to enable them to perform their legislative functions."

[57] In the *New Brunswick Broadcasting* case (cited above), the Supreme Court of Canada reviewed the law relating to privilege. The colonial legislatures were held, at common law, to have certain inherent powers and privileges simply by virtue of their creation. They were not as extensive as those of the United Kingdom Parliament since the colonial legislatures did not share the same peculiar law (the *lex parliamenti*) as developed through history and tradition. The privileges they did enjoy were those necessary to enable them to perform their functions. As noted by both Lamer C.J.C. (at pages 342-343) and McLachlin J. (at pages 379-382) in that case, parliamentary privilege and immunity with respect to the exercise of that privilege are founded upon the doctrine of necessity, that is to say, those things that are necessary to the discharge of the legislature's functions and the protection of its dignity.

[58] McLachlin J. went on to note in *New Brunswick Broadcasting* that the principle of "necessity" is the means of distinguishing areas of judicial and legislative body jurisdiction. It is a jurisdictional test. It is not applied as a standard for judging the content of a claimed privilege, but for the purpose of determining the necessary scope of exclusive "parliamentary" or "legislative" jurisdiction. She wrote (at page 383): "If a matter falls within the necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not inquire into questions concerning such privilege." Thus, the courts can decide if a matter is an aspect of privilege, the existence and extent of that privilege, but if it is a matter of privilege then the courts cannot inquire into its exercise.

[59] In this regard the Supreme Court of Canada followed a line of authorities dating back many years. Counsel for Mr. Morin argued, however, that those authorities did not support the proposition that discipline for conflict of interest came within the inherent privileges of this legislature. In *Kielley v. Carson* (1842), 13 E.R. 225, the Privy Council held that the colonial legislature of Newfoundland had no power to arrest and commit to jail a member of the public for a contempt of the House committed outside of the House. The legislature was said to hold those powers that are necessary to the existence of such a body and the proper exercise of its functions, powers granted by the very act of its establishment (page 234). The power to commit for contempt was not such a necessary power. In *Landers v. Woodworth* (1878), 2 S.C.R. 158, the Supreme Court was asked to consider the power of a provincial assembly to hold a member in contempt, for refusing to make an apology that he was ordered to give, and thereby expel him from the House. The member was not disorderly at the time of his forcible expulsion. The Court held that the assembly had "no power to punish for any offence not an immediate obstruction to the due course of its proceedings and the proper exercise of its functions,

such power not being an essential attribute, nor essentially necessary, for the exercise of its functions" (at page 201). From these authorities counsel argued that the right to impose discipline for conflict of interest is not an exercise of privilege since anything done outside of the assembly cannot be considered to be an immediate obstruction to the due course of its proceedings.

[60] This argument begs the question as to whether the power to discipline a member, for any cause, is an inherent privilege of a legislature. This is critical since, as McLachlin J. put it in the *New Brunswick Broadcasting* case (at page 374): "... inherent privileges can enjoy constitutional status regardless of whether there exists a power to legislate in respect of privilege in the provincial constitution, and regardless of whether provisions relating to privilege have in fact been enacted." The way I interpret this is that, even though the *Northwest Territories Act* is silent about the legislature's ability to legislate its privileges, the legislature still enjoys inherent privileges, based on the principle of necessity, and may legislate with respect to those privileges. And, even if it does legislate with respect to some privileges, it still enjoys those inherent privileges which it may not have legislated.

[61] There is a long line of authority to support the proposition that a legislature has an inherent power to discipline its members for just cause. Maingot, in his text, quotes jurisprudence to the effect that the right of a legislature to impose discipline on its members is absolute and exclusive (at page 181) and that such powers are powers legally incidental to a legislature "because it is necessary for any such body to be able to protect itself should the circumstances warrant" (at page 211). It is primarily a protective power, not a punitive one. The grounds for discipline may extend to any conduct that would render the member unfit for parliamentary duties.

[62] In *MacLean v. Nova Scotia* (1997), 76 N.S.R. (2d) 296 (S.C.), Glube C.J.T.D. reviewed a number of authorities on the issue of discipline and the justification of such a power as a necessary incident to the functions of a legislature (at pages 303-304):

> The power to expel a member has long been a part of the prerogative of legislatures. In **Parliamentary Procedure and Practice in the Dominion of Canada** by Sir John George Bourinot (4th Ed. 1916) at p. 64:
>
> > "The right of a legislative body to suspend or expel a member for what is sufficient cause in its own judgment is undoubted. Such a power is absolutely necessary to the conservation of the dignity and usefulness of a body."

> **Beauchesne's Rules and Forms of the House of Commons of Canada** (5th Ed. 1978) states at p. 16, s. 37:
>
> > "There is no question that the House has the right to expel a Member for such reasons as it deems fit."
>
> In Erskine May's **Treatise on the Law, Privileges, Proceedings and Usage of Parliament** (20th Ed. 1983), at p. 139:
>
> > "The purpose of expulsion is not so much disciplinary as remedial, not so much to punish Members as to rid the House of persons who are unfit for membership. It may justly be regarded as an example of the House's power to regulate its own constitution. But it is more convenient to treat it among the methods of punishment at the disposal of the House."

[63] In *Chamberlist v. Collins* (1962), 34 D.L.R. (2d) 414 (B.C.C.A.), the court was called on to set aside the expulsion of the plaintiff by the Yukon Territorial Council for alleged violations of the *Territorial Elections Ordinance*. The majority held that a legislative assembly has exclusive jurisdiction to determine its own membership and the courts have no jurisdiction in such matters unless conferred by statute. It was held that provincial legislatures have the power to impose sanctions and disqualifications and so does the Yukon Council. This was a matter of privilege even though enacted in a statute.

[64] In the Australian case of *Armstrong v. Budd* (1969), S.R. (N.S.W.) 386, the Supreme Court of New South Wales considered the validity of a resolution of the Legislative Council expelling a member for conduct unworthy of a member. The member had given evidence in a civil suit and was the subject of adverse comment by the trial judge. The Court upheld the validity of the resolution holding that the power of discipline extends beyond disorderly conduct within the House to conduct outside which is sufficiently serious so as to disentitle the member from sitting. This was put on the premise that the honesty and probity of members is just as relevant to the carrying out of the legislative function as is the conduct of members in the House. Wallace J. wrote (at page 403):

> In the result I am of the opinion that the Legislative Council has an implied power to expel a member if it adjudges him to have been guilty of conduct unworthy of a member. The nature of this power is that it is solely defensive—a power to preserve and safeguard the dignity and honour of the Council and the proper conduct and exercise of its duties. The power extends to conduct outside the Council provided the exercise of the power is solely

> and genuinely inspired by the said defensive objectives. The manner and the occasion of the exercise of the power are for the decision of the Council.

[65] Finally, I turn to the case of *Harvey v. New Brunswick* (cited above). In that case a member challenged his expulsion and disqualification for electoral fraud. The challenge was to legislation and the majority addressed the issue on the basis of the application of the *Charter of Rights* to the legislation. That was the way it was argued before the Court. The majority expressly did not consider the question on the basis of privilege. The minority (L'Heureux-Dubé and McLachlin JJ.) agreed with the majority that the disqualification legislation was valid but they decided the case on the basis that expulsion and disqualification fell within the ambit of parliamentary privilege. The power to discipline for unfit behaviour was viewed as being necessary so as to maintain the dignity, integrity and efficient functioning of a legislature. Indeed, McLachlin J. put the power to discipline as a fundamental aspect of a legislature's ability to maintain its integrity (at page 913):

> If democracies are to survive, they must insist upon the integrity of those who seek and hold public office. They cannot tolerate corrupt practices within the legislature. Nor can they tolerate electoral fraud. If they do, two consequences are apt to result. First, the functioning of the legislature may be impaired. Second, public confidence in the legislature and the government may be undermined. No democracy can afford either.
>
> When faced with behaviour that undermines their fundamental integrity, legislatures are required to act. That action may range from discipline for minor irregularities to expulsion and disqualification for more serious violations. Expulsion and disqualification assure the public that those who have corruptly taken or abused office are removed. The legislative process is purged and the legislature, now restored, may discharge its duties as it should.

[66] With these comments in mind, I come to the following conclusions. The probity and conduct of members, with respect to the avoidance of conflicts of interest, are matters of public interest as well as matters of internal interest to the functioning of a legislature. As stated by McLachlin J., no legislature can tolerate corrupt practices among its members. Hence the power to discipline for misconduct is a necessary incident of the legislature's functioning and its ability to protect its integrity. It is an inherent privilege of every legislature. It is an inherent privilege of the Legislative Assembly of the Northwest Territories. The legislation enacted in Part III of LAECA codifies that privilege and is an exercise of that privilege by the legislature.

[67] In my opinion, the judgments in *Kielley* and *Landers* must be read with particular regard to their facts. Each one sets out an example of what is not part of the inherent privileges of a legislature. Both dealt with the punitive aspects of the power to punish for contempt. They did not delineate all the matters that are part of the inherent privileges. The ability to set rules of conduct (such as the rules for avoidance of conflicts of interest) and the power to punish for breaches of those rules are necessary mechanisms for the control of a legislature's internal affairs and proceedings. They are protective powers. And, as Maingot notes (*op. cit.*, at page 183), the privilege of control over its own affairs and proceedings, and the concomitant right to enforce discipline on members, is one of the most significant attributes of an independent legislative institution.

[68] Counsel for Mr. Morin made a number of submissions, however, to the effect that the legislature has somehow defined the scope of its privileges or limited those privileges by legislation. This calls for a review of some specific provisions of the *Legislative Assembly and Executive Council Act*.

[69] The Act does not purport to adopt powers and privileges as extensive as those enjoyed by the Parliament of Canada. It does not set out any exhaustive list of privileges. It does, however, preserve such inherent powers as it may have by s.1(2):

> (2) Nothing in this Act affects the inherent power of the Legislative Assembly to control its own proceedings, privileges or prerogatives, unless expressly provided otherwise.

[70] The Act expressly sets out certain immunities and privileges in sections 11 through 14. These are the classical protections afforded to individuals, members and others, who participate in proceedings of the Assembly:

> 11. No person who is
>
> (a) under lawful instructions from the Legislative Assembly, or
>
> (b) a witness before the Legislative Assembly or any committee of the Legislative Assembly,
>
> is liable for any act done by him or her, under those instructions or as a witness, to any other person in damages or otherwise.
>
> 12. Subject to Part III, no member is liable to any civil action or prosecution, arrest, imprisonment or damages

> (a) by reason of any matter or thing brought by the member by petition, bill, resolution, motion or otherwise, or
>
> (b) by reason of anything said by the member,
>
> before the Legislative Assembly or a committee of the Legislative Assembly.
>
> 13. Except for a contravention of this Act, no member of the Legislative Assembly is liable to arrest, detention or molestation for any debt or cause of a civil nature during a session.
>
> 14. The Clerk and all officers and employees of the Legislative Assembly and all persons summoned to attend before the Legislative Assembly or a committee of the Legislative Assembly are exempt from attending or serving as jurors before any court in the Territories during a session or meeting of a committee of the Legislative Assembly.

[71] Mr. Morin's counsel suggested that somehow s.12 (quoted above) waives privilege with respect to Part III of LAECA. I do not agree. The proviso in s.12 simply means that a member has the protection of the traditional immunities for his conduct as a member save and except for violations of the conflict of interest provisions. There the individual member may be liable to "prosecution", i.e., an inquiry, and may be liable to pay "damages", i.e., restitution or compensation.

[72] The Act also provides some specific instances in which a member may be expelled. Specifically, s.6.1 deals with expulsion in the event of conviction for certain types of crimes:

> 6.1. (1) A member shall not be or sit as a member if the member is, after his or her election, convicted of an offence under the *Criminal Code* prosecuted by indictment
>
> (a) involving the sexual exploitation of children; or
>
> (b) in the commission of which violence against a person is used, threatened or attempted.
>
> (2) Where a member is, after his or her election, convicted of an offence under the *Criminal Code* punishable on summary conviction
>
> (a) involving the sexual exploitation of children, or

> (b) in the commission of which violence against a person is used, threatened or attempted,
>
> the Legislative Assembly shall, as soon as is reasonably practicable, determine whether it is necessary, in the public interest and in the interest of the Legislative Assembly, to expel the member from the Legislative Assembly and to declare that his or her seat is vacant.

The Act, however, goes on to specifically preserve the right to discipline members:

> 6.2. Nothing in this Act shall be construed so as to limit the right of the Legislative Assembly to expel, suspend or discipline a member according to the practices, rules and procedures of the Legislative Assembly or the practices of Parliament or otherwise.

[73] Does the fact that the legislature chose to spell out certain powers expressly somehow limit the inherent powers of the legislature? Does the fact that the legislature chose to spell out certain powers in a statute convey jurisdiction to the courts to oversee the exercise of those powers? I think the answer to both questions is "no".

[74] Even though a legislature may legislate with respect to some of its powers, it may still retain others without the need for legislation. This is the purpose of the "preservation" provisions in sections 1(2) and 6.2 noted above. This was a point noted as long ago as the *Landers* case where it was said (at page 176): "... though some of the rights and privileges claimed have been defined by Act of Parliament, other important ones have not been given up." In addition, the fact that in two instances—one being the decision as to whether to expel a member for a conviction pursuant to s.6.1(2) and the other being the decision as to whether to accept the Commissioner's recommended sanctions pursuant to s.84(2)—the ultimate decision-making as to discipline remains with the Assembly is a strong indicator of the legislature's intention to maintain control over this subject-matter.

[75] The act of legislating some privileges also does not necessarily imply a surrender of those privileges to the jurisdiction of the court. The case of *Temple v. Bulmer*, [1943] 3 D.L.R. 649 (S.C.C.), provides an example of that. That case considered a section of the *Legislative Assembly Act* of Ontario which provided that where a seat in the legislature had been vacant for three months and no election writ had issued, the legislative clerk would immediately issue a writ. A constituent sought an order of

mandamus directing the clerk to issue the writ. The Supreme Court refused the relief on the ground that the issue of *mandamus* would constitute an intrusion into the functions and privileges of the legislature itself. Duff C.J.C. wrote (at page 651):

> We cannot agree with the contention . . . that s. 34 of the *Legislative Assembly Act*, R.S.O. 1937, c. 12 confers jurisdiction upon the Courts in relation to Parliamentary elections. Any duty imposed by that section upon the Clerk of the Crown in Chancery is imposed upon him in his character of an officer under the control of the Legislative Assembly and answerable to the Legislative Assembly.

This case is an example of a statutory provision, with wording implying the creation of rights and obligations, being unenforceable in a court because the subject-matter of the right or obligation deals with something that is essentially an aspect of parliamentary privilege.

[76] Mr. Morin's counsel also pointed to s.74 of LAECA, being contained in Part III, as an indicator of the legislature's intention to move out of the sphere of privilege and allow court intervention. That section imposes restrictions on activities of any former member who served as a minister or as Speaker for 12 months after ceasing to hold office. A contravention of that section is an offence punishable by summary conviction. Such an offence can only be prosecuted through the courts.

[77] In my opinion, this does not support counsel's argument. The statute makes it an offence because it is dealing specifically with former members. The legislature would have no other way to enforce internal rules on former members. This section merely recognizes that reality.

[78] In conclusion, the enactment of Part III of LAECA is an exercise of the legislature's inherent privilege to enforce discipline over its members as a necessary part of regulating its internal affairs. These are measures undertaken so as to protect the integrity and dignity of the legislature.

The Conflict of Interest Commissioner and Privilege:

[79] The Commissioner's counsel relied heavily on the *Tafler* decision (cited previously) from British Columbia for the proposition that the legislature's privilege extended to the work of the Commissioner so as to put it beyond judicial review. I will review that case in some detail including the applicable British Columbia legislation.

[80] The *Members' Conflict of Interest Act* of British Columbia establishes the position of a Conflict of Interest Commissioner who is expressly stated to be an "officer" of the Legislative Assembly. The Act defines when a member would be in a conflict of interest and sets out prohibitions as to acting in an official capacity when in a conflict. The Commissioner may give opinions to members and must file an annual report with the Speaker. The Commissioner may conduct an inquiry if requested to do so on the grounds that a member may be in contravention of the Act. The Commissioner reports his or her findings to the Speaker who then tables it in the Assembly. If the Commissioner finds that the member has contravened the Act, he or she may recommend a sanction as specified in the Act. The Assembly then must consider the report and may either order imposition of the sanction recommended by the Commissioner or it may reject the recommendation. There is no other option. So, in broad outline, the Act is similar to the provisions of Part III of LAECA.

[81] The issue in *Tafler* was whether the Conflict of Interest Commissioner, acting on a complaint, was acting under legislative privilege such that the courts had no power of review in relation to the way the Commissioner carried out his tasks. The Commissioner was conducting an inquiry at which witnesses were questioned. Apparently, the questioning was conducted in private. A journalist sought access to the hearing. The Commissioner denied access. The journalist then sought review in the courts.

[82] The British Columbia Court of Appeal concluded that the actions of the Commissioner were not subject to judicial review since his decisions were made within the ambit of the privileges of the legislature. Writing on behalf of the Court, Lambert J.A. set out the rationale (at paras. 14-17):

> I think it is noteworthy, first, that the Commissioner is an officer of the Assembly, (see sub-section 10(1)); second, that the Commissioner's obligation is to report his opinion to the Assembly (see sub-section 16(3)), and thereafter if he considers it proper to do so, to make a recommendation with respect to discipline of the member, (see sub-section 17(1)), but not himself to reach any enforceable decision; third, that the actual decision on any question of conflict of interest is made by the Assembly itself; and, fourth, that no action of any kind lies against the Commissioner for anything he or she does under the Act, (see section 18). I would like to note in passing that neither counsel referred to section 18 of the Act in the course of their arguments, and we have been left to our own devices in interpreting that section.
>
> I have considered the decisions of the Supreme Court of Canada in N.B. Broadcasting Co. v. Nova Scotia [1993] 1 S.C.R. 319 and Harvey v. A.G. New Brunswick [1996]

> 2 S.C.R. 876. Both of these cases relate to provincial Legislative Assemblies. Neither of those cases decides conclusively the question of whether a decision of the Assembly or of an officer of the Assembly, with respect to the conduct or mis-conduct of a member of the Assembly acting in relation to his or her office, is amenable to judicial review. But in both cases Madam Justice McLachlin wrote careful reasons on that question and concluded that any decision with respect to discipline in relation to such conduct comes within the sphere of decision-making under the exclusive control of the Legislative Assembly itself and, as such, is not amenable to judicial review.
>
> The Harvey case was decided after the judgment of Mr. Justice Melvin in this case and, of course, he did not have the benefit of that decision in preparing his reasons. But he relied on the N.B. Broadcasting case and, after quoting a number of passages from that decision, he said this:
>
> > Here, as I mentioned, the Commissioner is acting for and on behalf of the Legislative Assembly in providing that body with information and opinion. The nature of the investigation relates to the functioning of the member of the Legislative Assembly. Control over members or a member, or sanction of a member, remains with the Legislative Assembly. In my opinion, information gathering which may assist the Assembly in dealing with its own members is a vital step in the decision of the legislature and is necessary to the proper functioning of the Assembly as Madam McLachlin J. referred to in ... the New Brunswick Broadcasting decision. Consequently, the manner in which it chooses to deal with its members in the context is one cloaked with privilege, the exercise of which is not reviewable.
>
> I agree with that conclusion. In my opinion, the privileges of the Legislative Assembly extend to the Commissioner who is expressly made an officer of the Assembly by sub-section 10(1) of the Members' Conflict of Interest Act. In my opinion, decisions made by the Commissioner in the carrying out of the Commissioner's powers under the Act are decisions made within, and with respect to, the privileges of the Legislative Assembly and are not reviewable in the courts.

[83] In the case before me, I have already concluded that the discipline of members for misconduct (and there can be no doubt that a violation of conflict of interest rules constitutes "misconduct") is an exercise of the legislature's inherent privileges. It is a necessary aspect of the legislature's control of its internal affairs. It is something within the sphere of decision-making under the exclusive control of the legislature itself (to quote

from above). So the starting premise in this case is the same as in *Tafler* notwithstanding the fact that there it is a provincial legislature while here it is a territorial one.

[84] In this case, as in *Tafler*, the Commissioner is obligated to make a report to the Assembly on her findings and, if appropriate to do so, make recommendations as to a penalty. But, just as in *Tafler*, the Commissioner cannot herself make any enforceable decision; that lies with the legislature itself. Finally, just as in *Tafler*, no action lies against the Commissioner for anything done or not done in good faith in the performance of her duties or the exercise of her powers: see s.79.03 of LAECA.

[85] Counsel drew my attention, however, to the fact that pursuant to LAECA, unlike the legislation in *Tafler*, the Commissioner is not expressly referred to as an "officer" of the Legislative Assembly. In my opinion, there is no significance in this distinction. I say this for a number of reasons.

[86] The only officials explicitly referred to as "officers", in LAECA, are the Deputy Clerks, the Law Clerk and the Sergeant-at-Arms: see ss.48(d) and 49(3). Not even the Clerk of the Assembly is expressly referred to as an "officer" in the Act, yet I think anyone would be hard-pressed to convincingly argue that the Clerk is not an "officer" of the legislature.

[87] I am of the view that the Commissioner can be characterized in different capacities depending on the perspective. If we think of an "officer" in the usual sense of someone responsible for the management, direction or supervision of an entity (such as a corporation), then the Commissioner is clearly an "officer" in her management and direction of inquiries. She can be a decision-maker, such as when she grants authorization to a member to accept a contract that he or she would otherwise be prohibited from accepting. She can give advice and recommendations to a member on how to deal with obligations under the Act and, if the member follows that advice, the member is immunized from proceedings under Part III. All of this suggests a senior "officer" role for the Commissioner. The Commissioner is also a "public officer" in that she is required to discharge certain functions as stipulated by the statute, such as the obligation to conduct an inquiry when there is a complaint. On the other hand, the Commissioner can also be regarded as the "servant" of the Legislative Assembly. The legislature has delegated to her some aspects of the internal disciplinary code for its members. The Commissioner must submit an annual report. And, she can be removed or suspended for cause or incapacity.

[88] Therefore, in my opinion, the lack of an express designation as "officer" is immaterial. The Commissioner is carrying out functions on behalf of and for the benefit of the legislature and its members.

[89] The other significant distinction which counsel drew to my attention is the absence, in the British Columbia statute, of any express requirement for the Commissioner to conduct an inquiry in accordance with the principles of natural justice (as per s.82(4) of LAECA). This is a point that caused me greater concern.

[90] When I first considered this question I was inclined to agree with Mr. Morin's counsel that the legislature itself has encroached on its traditional privilege by erecting an arm's length, independent process for the review of conflicts of interest. Thus, while any decision of the legislature may not be subject to judicial oversight, the manner by which the Commissioner conducted an inquiry could be because of the statutory obligation upon her to do so in accordance with the principles of natural justice. However, I now think the better view is that, while the legislature has delegated some functions to the Commissioner, and while the activities of the Commissioner are meant to be conducted at arm's length from the Assembly so as to prevent interference, the legislature has retained its privilege over the entire process of internal discipline. The Commissioner is merely carrying out some functions within that process.

[91] In *Groenewegen* I described the inquiry process carried out by the Commissioner as a quasi-judicial one. But that characterization does not automatically lead to a conclusion that judicial review is available. In *Tafler*, the Court expressly did not consider it necessary to discuss whether the Commissioner's proceedings there are quasi-judicial in nature. But the British Columbia statute contains the following provisions:

> 16. (1) On receiving a request under section 15, and on giving the member concerned reasonable notice, the commissioner may conduct an inquiry.
>
> . . .
>
> (4) Where it appears to the commissioner that the report may adversely affect the member, the commissioner shall inform the member of the particulars and give the member the opportunity to make representations, either orally or in writing, at the discretion of the commissioner, before the commissioner finalizes the report.

[92] It seems to me that the requirement to give notice and the right of the member to be heard are very much aspects of natural justice. Indeed, they may be the principal

requirements of natural justice. These provisions therefore result in similar obligations on the Commissioner in British Columbia as on the one here.

[93] There is no comprehensive list of what constitute the principles of natural justice. Generally speaking they can be placed under the general rubric of fairness. The Supreme Court of Canada has said in recent times that all tribunals have a duty of fairness but the extent of that duty will depend on the nature and function of the particular tribunal. Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case and not on some classification such as quasi-judicial: see, for example, *Old St. Boniface Residents Association v. City of Winnipeg*, [1991] 2 W.W.R. 145 (S.C.C.), and *Newfoundland Telephone Co. Ltd. v. Board of Commissioners* (1992), 89 D.L.R. (4th) 299 (S.C.C.). So the mere reference to principles of natural justice does not either predetermine all that must be done nor whether what is done is subject to judicial review.

[94] In my opinion, the case before me is indistinguishable from the one in *Tafler*. The Commissioner is required to carry out an inquiry into alleged violations of conflict of interest rules that the members, as a collective body, enacted to govern themselves. The Commissioner reports to the Assembly through the Speaker. The ultimate decision on discipline is then taken by the members collectively. Since the discipline of members is an inherent privilege of the Legislature, and since the Commissioner is engaged in an investigation on behalf of the legislature, then her actions are an extension of the exercise of that privilege. Thus they are not subject to judicial review.

[95] Mr. Morin's counsel noted that there was no express privative clause ousting the court's jurisdiction so a court should not be quick to assume that it has none. But where, as here, there is a finding that something is a matter of privilege, then the starting point is that the court has no jurisdiction unless conferred by statute. There is no such conferral of jurisdiction, express or implied, in this case.

Ramification of Decision:

[96] One way of testing the soundness of this conclusion is to see what the result would be on, first, a member such as Mr. Morin, and, second, third parties such as Messrs. Bailey and Mrdjenovich who are not members. Great stress was placed in argument on the fact that individuals caught up in the inquiry process have no place to go for redress in case of injustice but to the courts.

[97] At the time I refused Mr. Morin's request for an injunction preventing the delivery of the Commissioner's report to the Speaker, I said that it was up to the legislature to decide what must be done and any complaints must be taken to the floor of the legislature. The members of the legislature chose this process. It is not for one branch of government, the judiciary, to tell another branch, the legislature, what or how they should go about enforcing discipline among its members. Mr. Morin took his complaints to the floor of the legislature and his fellow members voted to adopt the Commissioner's recommendations.

[98] Mr. Morin's counsel argued that a political forum such as the legislature is not the appropriate one in which to debate the methods and findings of the Commissioner. There is the danger of political interests influencing any decision. Counsel referred me to the comments of one of the judges on the 1878 *Landers* case (at page 213):

> One of the most important principles underlying the successful and proper administration of justice is, that those who pass upon the facts, and those who expound the law, should be without interest or prejudice; and how, then, are such principles maintained when the same excited (it might be political) majority occupied at the same time the position of accusers and judges. I am told such is the case in the House of Commons in *England*; but I answer, first, that a body like the latter, numbering hundreds, drawn from the first-class men of the kingdom, actuated by the highest aspirations, and supported, resting on and reflecting, day by day, the *highest toned public opinion*, is not to be compared with a Provincial Assembly, drawn, as a rule, not from the ranks of first-class public men, and whose numbers, being comparatively small, may be expected to become more bitterly excited by political squabbles, and whose supporters on both sides, out of the Legislature, would, in many cases, subordinate their judgments to their political proclivities, and thus a suitable controlling public opinion could not safely be relied on.

[99] Leaving aside whatever may be meant by "first-class men of the kingdom", I think the simple response to this argument is that the legislators, as a collective body, chose this process. The members collectively bound themselves to it. The question of conflicts of interest, while of the utmost public interest, is inherently also an internal matter, one that goes to the very nature of the role of members. What Mr. Morin has been found guilty of are not "crimes"; they are contraventions of internal rules of conduct. Thus those who are part of the collective body may be in the best position to make judgments on these matters.

[100] I think it is fair to say that a political forum would rarely be considered an adequate alternative to the courts for complaints of injustice. That is certainly the case

if a citizen was engaged in litigation against the state. But it may not be the case where the parties involved are either members, officers or servants of that political forum and the topic is one that relates to that forum's internal affairs. Debate on the floor of the House draws public attention to the issues and may alter the public's perception of the matters under debate. It may affect the reputations of both a member (such as Mr. Morin) and the Commissioner, for good or bad. The Assembly could be persuaded to reject the Commissioner's recommendations.

[101] What about complaints about the process during the course of the inquiry? It seems to me that it would be open to a member, such as Mr. Morin, who had a complaint of bias, for example, to raise that complaint at any time on the floor of the House as a point of privilege. If what the Commissioner is doing is nothing but an extension of what the legislature itself can do, then it is no different then if a complaint was made that a House committee member was biased. The Assembly could, if it accepted the complaint, recommend the removal of the Commissioner (for cause) and the appointment of a new one. That is the remedy that a member could seek from the Assembly. So I do not agree that the legislature is inappropriate to deal with these issues.

[102] There is a related concern, one identified by counsel for the Assembly, that the members may not feel qualified to judge issues about unfairness in the procedure. With respect, they may feel unqualified to make judgments about any number of issues, but that does not preclude them from carrying out their responsibilities. The legislature reserved to itself the ultimate decision as to whether to impose discipline or not. The legislators must have considered that sometimes they would be called on to decide some difficult questions. Perhaps that is why the statute (s.82(2) of LAECA) requires the Commissioner to give reasons so that the members could inform themselves. These are decisions that the elected members, answerable to the public and having regard to the public interest and the best interests of the Assembly as an institution, may be very well qualified to make. In my opinion, a lack of expertise is not a persuasive argument in favour of judicial review. If the members of the Assembly truly feel unqualified to deal with these issues, then they can always legislate jurisdiction to the courts in these matters.

[103] The situation with respect to Messrs. Bailey and Mrdjenovich is different. They have no opportunity to raise their concerns in any other forum. But, with respect, does this matter?

[104] These individuals were, first and foremost, witnesses at the inquiry. They were not the subject of the inquiry, Mr. Morin was. They faced no liability of any kind. Secondly, because they satisfied the Commissioner that they had a particular interest in

the inquiry, they were given standing so that they were represented by counsel who participated in the inquiry. This was in accordance with s.7(1) of the *Public Inquiries Act*:

> 7. (1) Every Board shall accord to any person who satisfied 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.

[105] The fact that these individuals were the subject of adverse comment does not in and of itself result in a requirement for judicial review. There are many statutes relating to administrative tribunals which do not allow either appeals or judicial review, so it is not as if this is such an unusual situation. More significantly, none of these adverse comments can lead to any liability since these people were not the subject of the inquiry.

[106] The Commissioner is required to conduct an inquiry. It is essentially an investigation into facts. She must report to the Assembly on her findings. These are findings of facts. The Commissioner must be able to make those findings that are relevant to explain her recommendations. She must necessarily be able to weigh testimony and make findings of credibility. If some of those findings turn out to be critical of some witness, then that is part of the inquiry process.

[107] It is said that any adverse finding results in harm to an individual's reputation. But, I think it is more accurate to say that harm comes from setting out the facts. As noted by Cory J. in *Re Canadian Red Cross Society et al. and Krever* (1997), 151 D.L.R. (4th) 1 (S.C.C.), since a commissioner has jurisdiction to find facts, why should a commissioner be prevented from drawing the appropriate conclusions which flow from those facts. He went on to write (at page 23):

> The findings of fact and the conclusions of the commissioner may well have an adverse effect upon a witness or a party to the inquiry. Yet they must be made in order to define the nature of and responsibility for the tragedy under investigation and to make the helpful suggestions needed to rectify the problem. It is true that the findings of a commissioner cannot result in either penal or civil consequences for a witness. Further, every witness enjoys the protection of the *Canada Evidence Act* and the *Charter*, which ensures that the evidence given cannot be used in other proceedings against the witness. Nonetheless, procedural fairness is essential for the findings of commissions may damage the reputation of a witness. For most, a good reputation is their most highly prized attribute. It follows that it is essential that procedural fairness be demonstrated in the hearings of the commission.

These comments were made in the context of an immense public inquiry into the national blood health system, but they are apropos of any investigative inquiry.

[108] In the inquiry conducted by the Commissioner, Messrs. Bailey and Mrdjenovich had the benefit of legal representation throughout the hearing. Their interests presumably were safeguarded by that representation. Thus it could be expected that procedural fairness would be accorded to any such individuals caught up in future inquiries. That is an obligation placed on the Commissioner by the statutory requirement to follow natural justice. But none of that amounts to an argument displacing the legislature's privilege over the subject-matter of the inquiry.

[109] What these witnesses really seek is an opportunity to rebut the Commissioner's findings. Yet there is no absolute rule giving any witness that right whether it be the findings of an administrative tribunal, a public inquiry, or a court of law. Every witness deserves fairness but every witness puts themselves to a certain risk by the fact of testifying. Their credibility may be attacked. Their conduct, if relevant, may be the subject of criticism. But just because it is does not give the witness a right of appeal or review.

[110] Privilege is a matter of substantive law. If it applies, then it applies completely. Therefore, since this is a matter of privilege, then there is no role for this court to play whether on behalf of the parties or on behalf of witnesses.

Conclusions:

[111] Mr. Morin's counsel quite appropriately referred me to the long line of authorities to the effect that the jurisdiction of the courts is not to be ousted except in the clearest language. He referred me to the judgment in *Rost v. Edwards*, [1990] 2 Q.B. 460, where this principle was set out as follows (at page 478):

> There are clearly cases where Parliament is to be the sole judge of its affairs. Equally there are clear cases where the courts are to have exclusive jurisdiction. In a case which may be described as a grey area a court, while giving full attention to the necessity for comity between the courts and Parliament, should not be astute to find a reason for ousting the jurisdiction of the court and for limiting or even defeating a proper claim by a party to litigation before it. If Parliament wishes to cover a particular area with privilege it has the ability to do so by passing an Act of Parliament giving itself the right to exclusive jurisdiction. Ousting the jurisdiction of the court has always been regarded as requiring the clearest possible words.

[112] In this case I have concluded that the power to discipline members for violations of the conflict of interest provisions of the statute is an exercise of parliamentary privilege. It is an inherent privilege of the legislature being necessary for the proper functioning of the legislature and the protection of its integrity. I have further concluded that the actions and decisions of the Conflict of Interest Commissioner are made within and with respect to that privilege. I have come to these conclusions based on the scheme of the legislation, the role of the Commissioner within that scheme, and the history and status of the Legislative Assembly of the Northwest Territories as a legislature.

[113] Since these matters come within the ambit of parliamentary privilege, they are not reviewable by the courts. It is not a matter of statutory language ousting the court's jurisdiction. It is a matter of deference to the independence of the legislature and to the rights and privileges necessary to the functioning of that institution. As stated by McLachlin J. In the *New Brunswick Broadcasting* case (at page 389):

> Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.

[114] For these reasons, the Commissioner's application for summary dismissal of these proceedings is granted. Costs may be spoken to if counsel are unable to agree.

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

Dated at Yellowknife, Northwest Territories
this 14th day of January, 1999

Counsel for the Applicant: Roderick C. Payne

Counsel for the Respondent: Elizabeth A. Johnson

Counsel for the
Legislative Assembly of
the Northwest Territories: Sheila M. MacPherson

Counsel for the
Attorney-General of the

Northwest Territories:	Earl D. Johnson, Q.C.
Counsel for Roland Bailey:	Charles F. McGee
Counsel for Milan Mrdjenovich:	Alan Lefever, Q.C.