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Tribunal Independence and the Role of Elected Officials: A Critical Examination of the Pat Pimm Conflict of Interest Opinion

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TRIBUNAL INDEPENDENCE AND THE ROLE OF ELECTED OFFICIALS: A CRITICAL EXAMINATION OF THE PAT PIMM CONFLICT OF INTEREST OPINION[1]

I. Introduction and Overview 1

II. Tribunal Independence and Impartiality 2

III. Fraser Conflict Opinion 5

A. Background Facts 5

B. Request for Fraser Opinion 7

C. The Findings and Recommendations of the Fraser Opinion 8

IV. Discussion 11

V. Conclusions and Recommendations 12

I. Introduction and Overview

This paper will examine the recent opinion of the BC Conflict of Interest Commissioner, dated August 30, 2014, which, in response to a request from Pat Pimm, the Honourable Member of the Legislative Assembly for Peace River North,[2] addressed Mr. Pimm's obligations under the *Members' Conflict of Interest Act*, R.S.B.C. 1996, c. 287 ("the Act") in respect of his role in a proceeding of the Agricultural Land Commission (the "Fraser Opinion").

The Fraser Opinion ultimately concluded that Mr. Pimm had met his obligations under the Act, but went on to provide a broader set of recommendations for the role of MLAs in BC administrative tribunal proceedings. It is those recommendations that are the specific subject matter of this paper, as they raise questions that should be of considerable interest to administrative law practitioners in this province, and, in our view at least, are troubling when viewed from a natural justice or tribunal impartiality perspective.

We will first review the law which surrounds the natural justice principles of tribunal independence and impartiality, and review how other jurisdictions have dealt with the role of elected officials in the context of conflict of interest regimes. The paper will then look critically at the Fraser Opinion and the lines that are drawn, *inter alia*, between different elected officials and stages of tribunal proceedings. Finally, we will consider some possible avenues for addressing the implications of the Fraser Opinion, including legislative reform and the development of policies by BC administrative tribunals.

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1 By Mark G. Underhill and Matthew R. Voell, both of Underhill, Boies Parker, Vancouver. Underhill Boies Parker provides advice and representation to a number of federal and provincial administrative tribunals, some of whom are listed in Appendix B to the Fraser Opinion, but the opinions expressed herein are solely those of the authors.

2 At the time of his request to Commissioner Paul D.K. Fraser, QC, made by letter dated November 12, 2013, Mr. Pimm was Minister of Agriculture in the Liberal government. He went on sick leave in January of 2014 and subsequently resigned as Minister for health reasons in April of 2014.

II. Tribunal Independence and Impartiality

It is now well recognized that administrative tribunals span the divide between the executive and the judicial branches of government, and that distinguishing between "adjudicative" or "quasi-judicial tribunals and those exercising legislative or policy functions is a matter of degree, not kind.[3] The courts accept that those tribunals at the "quasi-judicial" end of the spectrum have a vital role to play in the Canadian system of justice, as illustrated by the comments of Justice Bastarache in *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55:

> … the constitutional protection of judicial review of administrative tribunals, derived from s. 96 of the *Constitution Act, 1867*, integrates administrative tribunals into the unitary system of justice: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220. By performing judicial review of the decisions of administrative tribunals, superior courts play an important role in assuring respect for the rule of law (*Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21). While there are distinctions between administrative tribunals and courts, both are part of the system of justice. Viewed properly, then, the system of justice encompasses the ordinary courts, federal courts, statutory provincial courts and administrative tribunals. It is therefore incoherent to distinguish administrative tribunals from provincial courts for the purpose of deciding which subjects they may consider on the basis that only the latter are part of the unitary system of justice.[4]

Accordingly, as important arbiters of legal rights, it is not particularly controversial that the principles of natural justice require those tribunals to have a measure of independence and impartiality, subject to the express direction of the legislature. As the Supreme Court of Canada stated in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 ("*Ocean Port*"):

> [21] Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice: *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495, at p. 503; *Law Society of Upper Canada v. French*, [1975] 2 S.C.R. 767, at pp. 783-84. *In such circumstances, administrative tribunals may be bound by the requirement of an independent and impartial decision maker, one of the fundamental principles of natural justice*: *Matsqui*, supra (per Lamer C.J. and Sopinka J.); *Régie*, supra, at para. 39; *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405. *Indeed, courts will not lightly assume that legislators intended to enact procedures that run contrary to this principle, although the precise standard of independence required will depend "on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make": Régie*, at para. 39. [emphasis added]

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3 Frank A.V. Falzon, "The Integrated Administrative Tribunal: Spiritual Foundations and Blueprint for Change," a paper prepared for the 22nd Annual Conference of the Council of Canadian Administrative Tribunals, June 2006, online: http://www.ccat-ctac.org/downloads/E%20eng%20Falzon.pdf

4 *Paul* at para. 22. As Professor Ron Ellis has noted, this point was picked up by the majority of the BC Court of Appeal in *Christie v. British Columbia*:

> After *Paul*, in 2005, in a majority judgment in *Christie v. British Columbia*, the BC Court of Appeal, citing *Paul* an noting that administrative tribunals have become "important arbiters of legal rights and obligations in our society *in substitution for courts of law*," held that, for the purposes of "access to justice," tribunals are to be included "in the category of the "*judiciary*." Ron Ellis, *Unjust Design* (Toronto: UBCPress, 2013) at p. 218.

The principles of tribunal independence and impartiality are closely related, and are sometimes conflated when discussing the principles of natural justice, but they are distinct. This point was made some time ago by Justice Le Dain in *Valente v. The Queen*, [1985] 2 S.C.R. 673 at 685:

> Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" … connotes absence of bias, actual or perceived. The word "independent" in s. 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

Institutional independence, as it is sometimes called, has arisen in a number of contexts, including, in particular, with respect to the issue of security of tenure (see *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Ocean Port*, *supra*; *Canadian Telephone Employees Association v. Bell Canada*, [2003] 1 S.C.R. 884; and *CUPE v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539).

This paper is largely focused on the second principle of impartiality, or the freedom from the appearance of bias. The modern formulation of the Canadian doctrine of reasonable apprehension of bias is found in the dissenting judgment of de Grandpré J. in *Committee for Justice and Liberty et al. v. National Energy Board* (1976), 68 D.L.R. (3d) 716 (S.C.C), wherein the question was said by de Grandpré J. to be whether "an informed person, viewing the matter realistically and practically and having thought the matter through would reasonably apprehend bias on the part of the tribunal" (see also *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 60 and *Taylor Ventures Ltd. (Trustee of) v. Taylor*, 2005 BCCA 350).

The standard of impartiality required varies, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 47), which reflects the diversity of tribunals discussed above (*Ocean Port* at para. 24, per McLachlin C.J. and *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624, 2003 SCC 58 at para. 31).

The BC courts have established that the rules of natural justice, including the principle of impartiality, apply to the BC Agricultural Land Commission when it is making decisions pursuant to its statutory mandate.[5] In *Gowman v. British Columbia (Provincial Agricultural Land Commission)*, 2009 BCSC 267, a case in which the petitioners sought to quash a decision of the ALC excluding land from the Agricultural Land Reserve,[6] Justice Gerow found that the doctrine of legitimate expectations applied and that the petitioners were entitled to a meaningful opportunity to make further submissions to the Commission arising out of a site inspection.

While it has been recognized since *Roncarelli v. Duplessis*, [1959] S.C.R. 121 that tribunals must be free from direct political interference (subject again to express legislative direction), the common

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5 See, for example, *McCall v. Agricultural Land Commission*, 2014 BCSC 1717.

6 The three main types of applications heard and adjudicated by the BC Agricultural Land Commission are (1) applications for the inclusion of land in the Agricultural Land Reserve; (2) applications for the exclusion of land from the Agricultural Land Reserve; and (3) applications for the non-farm use of land in the Agricultural Land Reserve.

law is not particularly well developed on the degree of involvement by elected officials in administrative proceedings that might offend the principle of impartiality.

Having said that, in the context of conflict of interest legislation, the Integrity Commissioner for Ontario has suggested that is a matter of "parliamentary convention" that cabinet ministers cannot be involved in tribunal proceedings, a convention which:

> … prohibits ministers from appearing as advocates or supporters of a decision to be made by a provincial agency, board or commission about a particular matter affecting an individual or organization. The convention has evolved to ensure that members of these bodies can carry out their duties free from influence or the appearance of influence by cabinet ministers.[7]

This "convention" appears to have broad acceptance across the country, as illustrated by the following remarks of former BC Conflict of Interest Commissioner Ted Hughes, cited with approval in the Fraser Opinion at para. 67:

> This section emphasizes that the *Act* does not prohibit the Activities in which members normally engage on behalf of Constituents. I believe a liberal interpretation of this section is called for. After all, the essence of democratic government is the principle of representation. There are, however, some limits, particularly when the member sits in Cabinet.
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> It is a common practice for a member's constituency office to lend advice and , on occasion, to give advocacy assistance to a constituent who is seeking a remedy or redress from a commission, board, agency or other tribunal established by government. I have ruled that a minister must not make personal representation on behalf of a constituent in such a forum regardless of the ministry under which the commission, board, agency or other tribunal operates. A minister acting in such a way would always be seen as a minister of government and that is a position of responsibility that he or she cannot shed at will and it would be improper to appear in an advocacy role of this kind.
>
> I have concluded, however, that constituency assistants in a minister's office can give advocacy assistance to constituents provided it is not before a commission, board, agency or other tribunal within the sphere of the minister's legislative responsibility. Where that is the case, an alternative could be to have a constituency assistant in a neighbouring constituency office perform that role.
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> (emphasis added in Fraser Opinion)

Leaving aside the Fraser Opinion for the moment, there are certainly strong suggestions from other jurisdictions that there is also a more limited role for so-called "backbenchers" in administrative tribunal proceedings. This may in part stem from the different provisions of conflict of interest legislation found in those jurisdictions. For example, Members of Parliament must comply with the *Conflict of Interest Code for Members of the House of Commons*, which not only prohibits MPs from using their influence to advance their private interests, but also "those of a member of his or her family, or to improperly further another person's or entity's private interests."[8] The Federal

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7 Integrity: Office of the Integrity Commissioner of Ontario Annual Report 2012-2013, online: https://integrity.oico.on.ca/web-att.nsf/vw/2013/$FILE/AR12-13EN.pdf?OpenElement

8 *Conflict of Interest Code for Members of the House of Commons*, Appendix 1 to the *Standing Orders of the House of Commons*, 2010 (online: http://www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm). The Code articulates several purposes, including that of maintaining and enhancing public confidence and trust in the integrity of members, along with a number of principles intended to guide members in reconciling their private interests and public duties.

Conflict of Interest and Ethics Commissioner has stated that letters of support on behalf of constituents, including those to administrative tribunals, "should be limited to seeking clarification on policy, legislation or regulations, or obtaining information on programs, services and the processing of applications …"[9] This appears to suggest a limited role for all elected officials in administrative tribunal proceedings.

Similarly, s. 4 of Ontario's *Members' Integrity Act 1994*, S.O. 1994, c. 38 states that:

> [a] member of the Assembly shall not use his or her office to seek to influence a decision made or to be made by another person so as to further the member's private interest or improperly to further another person's private interest.

The Ontario Integrity Commissioner has stated that when making public statements, all Ontario MLAs should "be cautious of undermining the public confidence in processes established by statutory decision makers in Ontario and that an MPP can reduce the risk of his or her comments being construed as advocacy by clearly stating that he or she does not intend to influence the decision maker and respects the process underway."[10]

While there does appear to be a broad consensus that elected officials should be able to assist their constituents in providing information about various tribunal procedures and processes,[11] these comments suggest a very circumscribed role when it becomes to direct advocacy.

Those comments of course arise in the context of providing guidance to elected officials in complying with the particular conflict of interest legislation under which they operate. But we respectfully suggest, and argue more fully below, that those opinions or directions are entirely consistent with what the principles of natural justice, and in particular the principle of tribunal impartiality, would otherwise require. As we address in the section below, to the extent that Commissioner Fraser has departed from this approach, we believe that legitimate impartiality concerns arise.

III. Fraser Conflict Opinion

A. Background Facts

We will first address the background facts leading up to the Fraser Opinion.

In October 2012, a businessman and resident of Fort St. John, BC, Mr. Terry McLeod, applied to the Agricultural Land Commission ("ALC"), requesting that a 70 hectare parcel of land (the "Lands") within the Agricultural Land Reserve ("ALR") be designated for "non-farm use," pursuant to the provisions of the *Agricultural Land Commission Act*, S.B.C. 2002, c. 36 (the "ALC

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9 Conflict of Interest and Ethics Commissioner Mary Dawson, *Advisory Opinion: Issued under Members' Code ss. 26(4): Letters of Support* (December 12, 2013), online: http://ciec-ccie.parl.gc.ca/EN/ReportsAndPublications/Pages/AdvisoryOpinionLettersSupport.aspx

10 The Office of the Integrity Commissioner of Ontario, Annual Report 2011-2012 at page 13, online: http://www.oico.on.ca/docs/default-source/annual-reports/annual-report-2011---2012.pdf?sfvrsn=4

11 As the Ontario Integrity Commissioner stated in the Office of the Integrity Commissioner of Ontario Annual Report 2012-2013, *supra*, at page 10: "MPPs can assist their constituents with obtaining information about policies, procedures and/or the status of a matter. Such inquiries are acceptable whether the matter is within the jurisdiction of a government ministry, including agencies, boards and/or commissions, or the matter is within the jurisdiction of the police."

Act").[12] In particular, Mr. McLeod sought the ALC's permission to use the Lands as a new rodeo facility with indoor arenas, a campsite, a chuck wagon track, a restaurant and offices.

The application received approval from the Peace River Regional District, was formally received by the ALC in December 2012, and was first considered by the ALC in February of 2013. In March of that year, the ALC refused the application for the non-farm use of the Lands. Mr. McLeod subsequently contacted the ALC and requested that he be able to attend a meeting of the ALC in relation to his application. The ALC responded and noted that Mr. McLeod could request a reconsideration on the basis of new information. In addition, the ALC indicated that it could meet with the applicant if the Commissioners considered it advisable, either at the ALC offices or at the Lands.

An on-site meeting was arranged for May 2013, although a formal reconsideration application had not yet been filed by Mr. McLeod. On May 17, 2013 the ALC received a letter from then MLA Elect Pat Pimm, in which Mr. Pimm expressed formal support for Mr. McLeod's application, informed the ALC of his concern at its decision to refuse the application, and "strongly" requested that the ALC reconsider its decision to refuse the application for "non-farm" use.[13] This letter was not received by the ALC until May 31, 2013, three days after the on-site visit.[14]

On May 28, 2013, ALC staff attended to view the Lands. Mr. McLeod claimed that prior to the visit he had advised ALC staff that he had requested that both Fort St. John Mayor Lori Ackerman and Mr. Pimm attend the visit in order to show their support for the application, although none of the ALC Commissioners were aware that Mr. Pimm would be present.

In the ALC's August reconsideration decision, they described the on-site visit as follows (at para. 20):

> On May 27[sic], 2013, the Chair, two Commissioners and staff were in the Fort St. John area on other business and arranged with the Applicant to visit the subject property. Upon their arrival at the subject property, they were met by Mr. McLeod. The Mayor of Fort St. John also attended the site. The Mayor reiterated her strong support for this application, criticized the Commission's original decision, and then left. The Commission members and staff were toured around the proposed development during which time the Member of the Legislative Assembly Elect for the Peace River North Region arrived and joined the tour. The Member indicated his strong support for the application.

While the ALC Commissioners did not apparently object to the attendance of the politicians at the time, the Commission said this in its reconsideration decision:

> In our respectful view, [the] representations [from the Mayor of Fort St. John and the local Member of the Legislative Assembly] were not appropriate. They could create the impression for both the Commission and the public that these officials were attempting to politically influence the Commission. Where, as here, those officials began their representations before the Commission had even received a reconsideration application and involved unannounced personal attendance at a Commission site visit, and when those representations made no reference to the requirements of the legislation, the perception is even more concerning …[15]

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12 Fraser Opinion, *supra* at para. 7.

13 Fraser Opinion, *supra*, at para. 14.

14 *Ibid.* at para. 17.

15 Provincial Agricultural Land Commission, Request for Reconsideration—ALC Resolution #86/2013 (August 19, 2014) at para. 56, online: http://docs.alc.gov.bc.ca//application_status/Docs/53049d2a.pdf.

The events that followed the site visit can be summarized as follows:

- On June 6, Mr. Pimm's Constituency Assistant wrote an email to the ALC on behalf of Mr. Pimm, again, in support of the application.[16]
- On June 7, Mr. Pimm was appointed Minister of Agriculture, the Ministry in which the ALC is housed.
- On June 10, 2013, Minister Pimm was given a "mandate" by the Premier to, among other things "[e]nsure the Agricultural Land Reserve is working for British Columbia and propose any changes necessary …"
- On July 5, the ALC issued a policy statement concerning the role of elected officials in applications to the ALC, discussed more fully below.
- On July 18, the ALC met to formally deliberate on the McLeod reconsideration application.
- On July 22, Mr. McLeod sent an email to Minister Pimm, asking for assistance on the reconsideration.[17]
- On July 25 and 26, various emails were exchanged between Minister Pimm's staff and the ALC, in which the Ministry staff sought further information on the outcome of the decision on behalf of the Minister. We address below how Commissioner Fraser dealt with these emails, and the conflicting evidence about their intent and how they were perceived by the Commission.

On August 19, 2014 the ALC released its final decision, dismissing the reconsideration application, and specifically referencing the representations made by Minister Pimm and Fort St. John Mayor Lori Ackerman, stating that they were "not appropriate."[18]

B. Request for Fraser Opinion

Following the release of the ALC's decision, and various media reports referencing his involvement, Minister Pimm, by letter dated November 12, 2013, requested that Commissioner Fraser "undertake a review of the actions of both my office and myself to determine whether we have acted inappropriately in our dealings with this quasi-judicial body."[19]

In this particular context, the most germane provision of the Act with respect to Mr. Pimm's obligations is s. 5:

> A member must not use his or her office to seek to influence a decision to be made by another person, to further the member's private interest.

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16 Fraser Opinion at para. 31. Commissioner Fraser also placed significant emphasis on correspondence between Mr. McLeod and the Commission on June 5 and 6, but for purposes of this paper, nothing turns on that exchange.

17 Fraser Opinion at para. 36.

18 Provincial Agricultural Land Commission, Request for Reconsideration—ALC Resolution #86/2013 (August 19, 2014) at para. 56, online: http://docs.alc.gov.bc.ca//application_status/Docs/53049d2a.pdf.

19 Fraser Opinion, *supra*, at para. 2.

"Private interest" is defined in the Act in a negative manner, as follows:

> "private interest" does not include an interest arising from the exercise of an official power or the performance of an official duty or function that
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> (a) applies to the general public,
>
> (b) affects a member as one of a broad class of electors, or
>
> (c) concerns the remuneration and benefits of a member or an officer or employee of the Legislative Assembly;

In our view, an interesting threshold issue arises from the request itself. To our knowledge, there was never any suggestion by any party that Mr. Pimm had a "private interest" in the ALC proceedings, nor is one apparent on the facts as set out in the Fraser Opinion. Accordingly, it is unclear to us why Commissioner Fraser's jurisdiction was even engaged. For his part, the Commissioner seemed to focus on s. 6 of the Act, which states:

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

But if Mr. Pimm did not have a private interest in the ALC proceeding, or otherwise contravene another provision of the Act, it does not seem that the "exemption" under s. 6 would arise. One could go so far as to argue that, strictly speaking, the Fraser Opinion was not a proper exercise of statutory authority. For purposes of this paper, we think it simply highlights, with great respect, the dangers inherent in the Commissioner issuing broad recommendations about the role of MLAs in tribunal proceedings when his own jurisdiction was arguably not engaged.

C. The Findings and Recommendations of the Fraser Opinion

While the purpose of this paper is not to directly join issue with Commissioner Fraser's conclusion that Mr. Pimm did not contravene the Act (which, as above, is not a terribly surprising result), some of his conclusions and comments should be highlighted as they inform the later set of general recommendations about the role of MLAs in tribunal proceedings.

First, at paras. 50 and 51, Commissioner Fraser drew a very clear distinction between the actions of Mr. Pimm before and after he was appointed to the Cabinet on June 7, 2013:

> [50] In the matter at hand, some events occurred *before* Mr. Pimm was appointed to the Cabinet on June 7, 2013, and some *after*. The comparative analytical prism through which these events are assessed is, therefore, very different.
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> [51] The events surrounding Mr. Pimm's actions as the MLA for Peace River North are focused on the on-site visit that occurred on May 28, 2013 and on his letter to the ALC supporting the McLeod application, which, while dated and sent on May 17, was not received by the ALC until May 31, 2013 [see para 14]. The events that occurred after he became Minister of Agriculture are focused on the email correspondence that took place with the ALC on July 25 and 26th and on November 13, 2013.

His conclusions on Mr. Pimm's conduct include the following:

- The conversations between Mr. Pimm and ALC Commissioner Bullock at the May 28 on-site visit were "largely inconsequential and almost ceremonial."[20]

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20 *Ibid.* at para. 54.

- It is difficult to characterize Mr. Pimm's comments on May 28, 2014 "being inappropriate as part of a perceived attempt to politically influence the Commission."[21]
- The ALC's interpretation of Ministry staff emails of July 2014, namely, that the Minister was seeking to find out the outcome of the ALC determination prior to its release to the applicant was "most unlikely."[22] Rather, what appeared to have happened was simply a series of unfortunate communications resulting from "ambiguous language." Ministry staff were seeking to find out when the decision on the McLeod reconsideration was expected, and to be informed of the outcome when it was available so it could be passed on to the Minister.[23]

Importantly, at a general level, Commissioner Fraser effectively found that the Commission's perception of inappropriate political involvement on the part of Mr. Pimm and his staff was unwarranted or misplaced. We suggest below that, from a tribunal impartiality perspective, this very much "misses the point."

After reviewing Mr. Pimm's specific conduct, Commissioner Fraser went on to "provide some guidance suggestions for Members when assisting constituents in their dealings with a host of Administrative Tribunals exercising delegated executive power."[24]

The Commissioner reviewed s. 6 of the *Conflict of Interest Act*, under which these recommendations were apparently being issued (which, as above, is somewhat open to question), the opinions of Commissioner Hughes referenced above, and then stated the following:

> [69] … *Ministerial* involvement in a matter before an administrative tribunal is always inappropriate. However, in my opinion, it is not reasonable to subject *Private Members* to the same restrictions as Ministers. In British Columbia today there is, in my opinion, a public interest need for Members to engage in appropriate advocacy to assist their constituents as well as a need for the parameters of that advocacy to be clarified by this Office.
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> [70] There has been long-standing public and institutional concern that in our parliamentary system of government, the concentrated power and influence of the Cabinet and appointed opposition critics results in individual Private Members having little or no real influence on the course of legislative events. For years, individual MLAs have said publicly and privately that in addition to their roles as legislators their most productive and valuable work is often done at the constituency level, bringing forward the concerns and issues of their constituents and advocating for them. In my opinion, the interpretation of Section 6 of the Act has to be aligned with this reality in our representational government.
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> [71] As noted in paragraph 46 herein, the ALC in its decision dismissing the McLeod reconsideration application said this about representation to it by MLAs:
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> > As for Members of the Legislative Assembly, if a particular Member is of the view that an application is so significant, that Member may make whatever representations to his or her

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21 *Ibid.* at para. 55.

22 *Ibid.* at para. 62.

23 *Ibid.* at para 63.

24 *Ibid.* at para. 65. Appendix B includes the list of tribunals to which Commissioner Fraser was intending his recommendations apply.

> Cabinet colleagues he or she thinks appropriate in order to convince them that the matter should be taken out of the Commission's hands.
>
> [72] With respect, for some MLAs this suggestion is simply illusory. While the process described by the ALC certainly exists as outlined in sections 39 through 45 of the ALC Act, the institutional reality is that only MLAs on the government side are in a political position to make representation to "Cabinet colleagues". As a practical matter, all other MLAs would be, arguably, disenfranchised.

Commissioner Fraser went on to set out a number of recommendations or guidelines, "intended to assist Members to balance their responsibility to represent constituents with their responsibility to respect the independence of Administrative Tribunals," including the following (at paras. 75-80):

- Members must take care to ensure that they do not interfere with the quasi-judicial decision-making of a tribunal or appear to do so (para. 75);
- Factors to be taken into consideration to determine whether the activities undertaken on behalf of a constituent are appropriate include: the nature of the activity, whether the Member has a private interest, the other interests involved, the capacity of the constituent and public perception (para. 75);
- Activities that can be characterized as assisting constituents to navigate the "bureaucratic maze" of government, including requesting status updates or clarification on processes and procedures, enquiring about the reasons for delay or asking when a decision is expected to be made public, are permissible (para. 76);
- Members should be cautious before engaging in any kind of direct personal advocacy on behalf of a constituent and must take care to determine whether there is a legitimate role they can play (para. 76);
- Members should be clear with constituents that they should not expect to receive preferential treatment because of their MLA's involvement (para. 76);
- The bright line that distinguishes between activities that members "normally" engage in on behalf of constituents and those that are inappropriate is crossed once the particular tribunal has begun its deliberations. Once the deliberative stage has begun, Members should cease making all representations (para. 77);
- Members would be wise to review the tribunal's basic legislative framework to ensure that they do in fact have something useful to contribute to the process (para. 79);
- Members should consider whether there are any other factors that might militate against their involvement, and they should be sensitive to the political context and whether there are broader issues that would make their involvement contentious or improper (para. 80).

His ultimate conclusions were set out at paras. 82-83:

> [82] … MLAs can engage in activities on behalf of their constituents where the tribunal is gathering information to inform its deliberations. That is what occurred here. In the particular circumstances discussed and analyzed in this opinion I conclude that Mr. Pimm's attendance at the on-site visit, the limited representations he made there and in his letter of support for the reconsideration application were not in breach of the *Act* The making of such representations, while irrelevant in terms of the statutory test for reconsideration, did not amount to improper activity …
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> …

> [84] Finally … I am satisfied that Mr. Pimm as a Minister did nothing himself and gave no instructions to others to do anything that amounted to a personal representation for a constituent or a breach of the Act.

IV. Discussion

To frame this discussion, it is important to return to the test for a reasonable apprehension of bias set out by de Grandpré J. in *Committee for Justice*; namely, whether "an informed person, viewing the matter realistically and practically and having thought the matter through would reasonably apprehend bias on the part of the tribunal."

As was just outlined above, Commissioner Fraser ultimately concluded that Mr. Pimm did not breach the Act, and, more generally, that he and his staff did nothing that could be said to have amounted to any attempt to influence the Commission proceedings. In so doing, he directly dismissed the Commission's perception of same as being unfounded. Again, a finding that Mr. Pimm did not breach the Act is not particularly surprising given Mr. Pimm's lack of any private interest in the ALC proceedings. However, a separate paper could be devoted to the Commissioner's opinion (as above, an opinion arguably falling outside the scope of the Act) that "what was perceived by the ALC to be ministerial interference and/or an attempt to improperly obtain information was neither of those things."

For this discussion, the important point is that the Commissioner rejected the perception of the ALC as being unwarranted. This leads us to ask this question—what would a "reasonably informed" person have apprehended about Mr. Pimm's conduct, and its effect on the Commission's impartiality?[25] That in turn leads to a further question that is the focus of our discussion below—what would that reasonably informed person apprehend about a government backbencher MLA engaging in advocacy, at the "information gathering" stage, on behalf of a constituent before any of the administrative tribunals listed in Appendix B to the Fraser Opinion?

At the outset, it is important to keep in mind that, unlike the Conflict of Interest Commissioner, the reasonably informed person does not get to interview the various players, and reach any conclusions about what is actually going on in the mind of the MLA in question. The entire process is essentially watched from a distance. Accordingly, it is all about perception when it comes to tribunal impartiality.

First, would the reasonably informed person take the view that advocacy by a government backbencher would not give rise to any concerns about, or perception of, undue influence because of the "concentrated power and influence of the Cabinet"? With respect, we believe that an objective bystander, reasonably informed, would draw no such line, recognizing, as the ALC did, that a government MLA could very easily gain the ear of any number of "influential" cabinet ministers, who we know are to essentially play no role in any tribunal proceeding.

Similarly, in our opinion, the reasonably informed person would not be able to draw a line between the "information gathering" and "deliberative" stages of a tribunal proceeding. Leaving aside objections that can be made to the line that was drawn by Commissioner Fraser on the facts

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25 We recognize of course that there is no "opposing party" in the ALC proceeding who would ordinarily be the one to raise the issue of reasonable apprehension of bias, but there are opposing parties in the true adversarial proceedings of most of the "Appendix B" tribunals.

before him,[26] we simply do not see how that line can be drawn with respect to the processes of most of the quasi-judicial tribunals listed in Appendix B.

Arguably, formal "deliberations" do not begin until a hearing before a particular tribunal has run its course. Does one then characterize such a hearing as part of the "information gathering" stage, where MLAs can play an advocacy role? Such a position is obviously untenable, and with great respect, is perhaps the best illustration of the pitfalls that can be encountered when issuing broad recommendations outside the four corners of one's constituent statute.

A final "line drawing" point should also be made here. We acknowledge that the Commissioner did not give an unqualified "green light" to MLAs to engage in advocacy, even at the so-called information gathering stage. Rather, he instructed the members to "take care to determine whether there is a legitimate role they can play." If we are talking about actual advocacy, as opposed to the "navigation" assistance which everyone acknowledges is both permissible and valuable, one has to ask the question about what "legitimate" advocacy actually looks like. For our part, we have some difficulty envisioning how advocacy by a MLA would be anything but aimed at attempting to use the member's office to influence the outcome of the proceeding (or, more importantly, how it would be perceived as anything else). While Commissioner Fraser directed that members should be "clear with constituents that they should not expect to receive preferential treatment because of their MLA's involvement," we struggle to see how a third party would not see the member's involvement as being aimed at exactly that.

V. Conclusions and Recommendations

It should be clear by now that we are of the view that the Fraser Opinion leaves matters, from a natural justice perspective at least, in an unsatisfactory state in BC. More specifically, it is our opinion that the recommendations of the Fraser Opinion have the very real potential to compromise tribunal impartiality, and give rise to allegations of a reasonable apprehension of bias in future administrative proceedings.

What are the possible options to address these concerns, assuming they have some foundation?

First, although extremely unlikely from a practical perspective, is to see an amendment to the *Members' Conflict of Interest Act*, to align it more closely with the language found in other jurisdictions such as Ontario. Specifically, the legislation could be amended to incorporate the concept that MLAs should be precluded from using their influence to further the interests of third parties, including their constituents, in administrative proceedings. We think that would ultimately lead to a convergence of the views of conflict of interest commissioners across the country on the proper role of elected officials.

Second, and much more realistic, is that BC tribunals could follow the lead of the ALC and, as masters of their own procedure,[27] issue policies or policy statements about the proper role of elected officials in their particular processes. While we respectfully suggest that such policies need not

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26 Two points should be noted here. First, it was a reconsideration application, so it is unclear how it could be said that any stage of the proceeding was merely "information gathering." Second, Commissioner Fraser appears to have taken the ALC Chair's comments about "formal deliberations" far too literally—when put in the context of the Chair's other comments, it is clear the Commission did not think it was merely "gathering information" at the site visit.

27 A point that is acknowledged in the Fraser Opinion at para. 74.

comment on what may or may not be "unethical" for elected officials (as that is not really the concern of the tribunal), there is no reason why tribunals cannot provide that kind of guidance from an administrative law perspective.

We acknowledge that this is not an ideal solution, as it puts tribunals in the somewhat awkward position of potentially being seen to wade into "political" matters and be issuing policy documents in response to the very public controversy involving Mr. Pimm, the ALC, and the Fraser Opinion (the latter also receiving a fair degree of media attention). To be clear, there is nothing inappropriate about the issuance of such policy documents, it is just unfortunate that tribunals are being put in the position of having to take that action.

This brings us to a final point. We believe there is a role for lawyers here. The bar has a long history of speaking up and defending the judiciary when it is the subject of criticism by elected officials. While a slightly different context of course, we think there is room for advocacy by the Canadian Bar Association on this issue—preserving the impartiality of administrative tribunals seems to fall squarely within the governing principles of that organization. While we appreciate that all lawyers may not agree with the opinions expressed in this paper, we feel quite strongly that a healthy debate within the profession is both a necessary and appropriate next step on this important issue.