OPINION OF THE COMMISSIONER OF CONFLICT OF INTEREST ON A CITIZEN'S COMPLAINT OF ALLEGED CONTRAVENTION OF THE MEMBERS' CONFLICT OF INTEREST ACT BY THE HONOURABLE ROBIN BLENCOE, MINISTER OF MUNICIPAL AFFAIRS, RECREATION AND HOUSING

I. INTRODUCTION

A June 4, 1993 letter to me from a member of the public of British Columbia (the Complainant) opens with the following paragraph:

> "I am concerned about a possible conflict of interest, under section 15(1.1) of the Members' Conflict of Interest Act, Chapter 54, involving the Honourable Robin Blencoe, Minister of Municipal Affairs. I am also concerned about possible non-compliance of section 2.1 of the above stated Act."

Section 15(1.1) was enacted during the 1992 session of the Legislature. It empowers a member of the public, who has reasonable and probable grounds to believe that there has been a contravention of the Act, to apply to me in writing setting out the grounds for the belief and the nature of the contravention alleged, for an opinion, respecting the alleged contravention. This is that opinion.

The contravention alleged is a violation of section of 2.1 of the Act. That section, also enacted at the 1992 session of the legislature reads:

> "2.1. A member shall not exercise or perform an official duty or function if the member has a conflict of interest or an apparent conflict of interest."

Section 2 (1) and (2), also enacted in 1992, are relevant and they read as follows:

> "2. (1) For the purposes of this Act, a Member has a conflict of interest when the Member exercises an official power or performs an official duty or function in the execution of his or her office and at the same time knows that in the performance of the duty or function or in the exercise of the power there is the opportunity to further his or her private interest.
>
> (2) For the purposes of this Act, a Member has an apparent conflict of interest where there is a reasonable perception, which a reasonably well informed person could properly have, that the Member's ability to exercise an official power or perform an official duty or function must have been affected by his or her private interest."

Five grounds were expressed for the belief that the Honourable Robin Blencoe ("Blencoe") has a conflict of interest. One of them does not bear on the actions or the involvement of Blencoe and will, therefore, not be considered in this opinion. That has been explained to the Complainant. The four remaining grounds all relate to a development proposal on Vancouver Island which is referred to as the "Bamberton Project" and are as follows:

> "a) Mr. Blencoe's official agent during the last Provincial election was a Mr. Robert Milne. Mr. Milne is also the legal counsel representing South Island Development Corporation (SIDC) who are seeking an amendment to the Official Community Plan (OCP) for area A (Mill Bay) within the Cowichan Valley Regional District (CVRD) to allow rezoning of approximately 1560 acres from F-1 Forestry to Residential, in order to accommodate a development of 4900 residences, housing up to 15000 people. This amendment will require the Minister's approval.
>
> b) The CVRD Directors requested Municipal Affairs to request that the Provincial Government Ministries research, investigate and report, through their respective departments matters upon which the approval or rejection would be considered including:

i) Environment, regarding water supply, pollution of Saanich Inlet and environmental impact.

ii) Highways, the impact of added traffic, and the costs of additional highway construction.

iii) Aboriginal Affairs, potential land claims and court action by the Malahat Nation.

iv) Agricultural and Fisheries, regarding the use of Oliphant Lake as a water source, and the impact on the fishing.

c) These matters of concern were deemed beyond the scope and ability of the CVRD staff to perform.

It was stated that this information was needed in order to provide the CVRD and residents with adequate information to reach an informed decision on this development proposal.

After several months the Minister of Municipal Affairs sent the matter back to the CVRD without any research or recommendations.

The Minister directed the CVRD to complete their rezoning process before any provincial studies would be considered.

d) Mr. Edwin Tait, a director of SIDC, an admitted fund raiser for Mr. Blencoe's 1991 Election Campaign, pressured his employees to make substantial contributions to Mr. Blencoe's re-election bid. (See CBC documentary on Bamberton - June 1, 1993)"

These four paragraphs contain allegations of fact which, in turn, relate to both the past exercise by the Minister of his powers, duties or functions as well as the exercise in the future of such powers duties or functions. I will set out all the background facts that I am aware of, which relate to both past and future decision-making and then deal more specifically with those past and future decisions. Obviously, the former relates to whether there has been a breach of the Act and the latter whether there would or could be such a breach. In the

course of arriving at my conclusions I will explore in some detail the proper interpretation of "conflict of interest" and "apparent conflict of interest" as those terms are used in the Act.

II. BACKGROUND

A. General

To be in a position to evaluate the grounds advanced by the complainant, it is necessary to recite some background. Besides the complainant and Blencoe I have interviewed Robert Milne ("Milne"), and Edwin B. Tait ("Tait") and several Ministry personnel.

B. The Involvement of Tait

The lands in question are owned by Bamberton Investments Ltd. (Bamberton). Bamberton is owned by four holding companies that maintain pension funds for four separate unions. South Island Development Corporation (South Island) has a contract with Bamberton to manage the development of the lands. It is in the course of fulfilling that obligation that South Island has made the request to the Cowichan Valley Regional District (CVRD) that the Official Community Plan for Area A (Mill Bay) within the CVRD be amended to allow for the rezoning to occur in order to accommodate an extensive proposed residential development on the lands.

South Island is owned by three holding companies. One of them is owned exclusively by Tait. Tait's ownership interest in South Island, through his holding company, is 35%.

J.D. Tait and Associates Inc. (JDT) is owned exclusively by Tait and his wife. That company has a contract with South Island to provide expertise in meeting its contractual obligations to Bamberton. In the course of meeting those obligations JDT provides such services as management of the site, coordination of engineering work, planning, architectural and design services on design of the project. JDT is the major supplier of services to South Island during the present stage of this development proposal. JDT employs between 25 and 30 people in supplying these services. Tait's wife is in charge of community/media public relations at the Bamberton site and is responsible for the operation of the information centre located there.

Tait has been a member of the New Democratic Party for the past ten or twelve years. Prior to the last election, he was not deeply involved in its affairs. He attended the odd meeting but has never held office. Over the years he has contributed small amounts ($50.00 maximum) from time to time in response to mail outs.

Although Tait does not reside in Blencoe's riding, he accepted an invitation from Blencoe's campaign manager early in the 1991

campaign to attend a strategy meeting on fund-raising for the campaign. Before attending, he called together the staff of JDT and encouraged the approximately 15 attending to make donations through him to Blencoe's campaign. He accepted and delivered the contributions of those who decided to participate. The total amount delivered was $385.00. $100.00 of this amount was Tait's personal donation, $100.00 was the donation of JDT and the remaining $185.00 was the contribution of 5 or 6 employees, the largest of which was $50.00.

Tait and Blencoe have known each other for some time. They are acquaintances rather than personal friends. However Tait's individual picture along with those of ten other supporters of Blencoe appeared in a "re-elect Robin Blencoe, New Democrat" brochure in the 1991 election with the following quote attributed to Ed Tait, Development Consultant:

> "Robin Blencoe is one of the most concerned individuals I know - concerned enough to be accessible to the people he serves, and concerned enough to take the action necessary to make a difference".

On November 25, 1992, Tait, on JDT letterhead, wrote to the Premier of British Columbia and said:

> "Re: Bamberton
>
> I have been an NDP member and in the development industry for many years now, and I know that you will understand that this is <u>not</u> a contradiction in terms.
>
> My firm of 38 professionals has been the principal consulting firm to David Butterfield and South Island

> Development Corporation since 1985. David was once referred to in a press article as a developer with a "social conscience", after having worked in partnership with him for some years and been involved in what he has created in Victoria, I have come to know that it is, in fact, an accurate representation of who David is.
>
> Bamberton has recently been described as the most significant thing to happen on Vancouver Island, and having been involved with David from the very beginning of this project, and a 42 year old resident of Vancouver Island, I also know this to be true.
>
> As you know, Bamberton has been referred to your government by the CVRD.
>
> Bamberton is too important to Vancouver Island, to the economy of British Columbia and as a model to the world of the way development should be done; to be stalled by political inaction. I, therefore, respectfully request your personal involvement in the provincial decisions that will be necessary before Bamberton can become a reality. I thank you for this opportunity to discuss Bamberton with you. I look forward to your response."

I am advised that the Premier has not replied to that letter which I consider to be of a lobbying nature.

C. The Involvement of Milne

Blencoe and Milne are personal friends of long standing as well as being political colleagues. Milne has been a member of the New Democratic Party for many years. He has held office at the constituency level. Milne has been a worker in Blencoe's campaigns in many different ways. He has door-knocked, attended meetings, worked in the constituency office and done whatever was requested of him. He has been a financial contributor throughout his years of association with the party. He has donated to Blencoe's campaigns and made a relatively significant contribution in the 1991 campaign. Milne was Blencoe's official agent in the last provincial election. He has performed the same duties for Blencoe in previous elections - the federal

election of 1980 and the provincial elections of 1983 and 1986. He assisted Blencoe in his Victoria aldermanic campaigns in the 1970's. He has always lived in the constituency where Blencoe has been the candidate except in the 1991 election.

Milne is a lawyer in private practice in Victoria. He is one of a number of lawyers used by South Island from time to time but he is the principal lawyer used by the company and does most of its solicitor's work. The registered office for South Island is located at his law firm. Milne owns no interest whatever in South Island and has no involvement whatever with that company other than performing professional legal services for which he is paid. As its solicitor, he works on its development projects arranging for easements, preparing disclosure statements and at the end, doing the conveyancing. He incorporated South Island in 1988 and has acted as its solicitor ever since. He has never been present at meetings with South Island officials and Blencoe. Milne has acted as a lawyer from time to time for JDT and, personally, for Tait. He is not the solicitor of record for JDT. Milne said that he did a lot of work for JDT on Bamberton. Milne and Tait are friends, both social and business.

D. Campaign Contributions

All donations that are made to the party or anyone on its behalf are channeled through the official office of the party and the funds received are divided 15% to the federal party, 25% to the provincial party and 60% to the constituency office at the provincial level designated by the donor. If there is no particular designation the contribution is credited to the constituency association within the boundaries of which the donor resides. For Blencoe's campaign to receive 60 % of Tait's 1991 contribution, he had to designate that fact because he does not reside in Blencoe's riding. The same applied to

Milne's 1991 financial contribution to Blencoe's campaign.

Blencoe has made it his business not to know who donates to his campaigns. He knew nothing about Tait's fundraising efforts in the 1991 campaign until he was interviewed about the matter in or about May 1993, by the CBC. Blencoe was unaware of Milne's financial contributions. Milne said that he was not necessarily aware of the contributors to Blencoe's campaigns as that was not one of the functions of the official agent. His responsibility in that position was to authorize the payment of campaign expenses for services and initiatives decided on by the campaign committee.

The Bamberton development proposal was received by the CVRD in April of 1991. On June 24, 1992, first reading was given to Official Plan Amendment Bylaw # 1500 and Zoning Amendment Bylaw # 1501, both specifically directed to deal in a detailed manner with the scale, scope and location of the Bamberton project. The files of the Ministry of Municipal Affairs, Recreation & Housing (the Ministry) indicate that the first contact by the project proponents with the government took place before the current administration took office which was October 1991. It was in April 1991 when officials of the Ministries of the Environment and Economic Development suggested, to those inquiring of them, that an approach to discuss the project be made to the Ministry of Municipal Affairs. At about the same time, CVRD staff also approached the Ministry, the object being, to have the project become subject to the Major Project Review Process.

After he became Minister of Municipal Affairs, Recreation & Houseing, Blencoe was involved in a few meetings with respect to

the Bamberton project. On September 28, 1992, he met with the proponents of the Development, Tait being one of those in attendance at the meeting. They were there to outline the virtues of the proposal. It is reasonable to say that they were lobbying in favour of the proposal. On the same day, Blencoe met with officials of CVRD. Later in the year he met with Friends of South Cowichan, a group opposed to the development who, it can be said, were also there to lobby but against the Project. Recently, two opponents to the proposal came to the Minister's office and Blencoe talked with them.

There has also been some correspondence pass between CVRD and the Minister. On September 21, 1992 Blencoe wrote Brian Harrison, a Director of the CVRD, who had expressed concerns that if the CVRD was to adopt land use and development bylaws they could be changed by a municipal council if Bamberton were to be incorporated. The Minister advised Mr. Harrison that there were "several levels of protection" by which the "interests of the existing Mill Bay community could be protected if Bamberton were to be incorporated whether as part of a larger municipality or as a separate municipality" and he then proceeded to identify in some detail the kinds of protective mechanism, some of which are automatic by virtue of existing legislation "while others are potentially available through special provisions." These special provisions allow for the inclusion of an extraordinary provision in the Municipalities "Letters Patent" of a land-use bylaw process "over and above the Act" as well as the fact that the new municipality would have to register its bylaws with the Inspector of Municipalities.

On September 30, 1992 the CVRD Board passed a motion asking that the government of British Columbia undertake a thorough technical, social and environmental review of the Bamberton Project. Blencoe replied to the CVRD on January 27, 1993. He

acknowledged the responsibilities of the government to both regulate the Bamberton project and provide support to the CVRD. He advised that the Ministry was prepared to explore the use of grant programs to help the CVRD in carrying out its mandate. It was acknowledged that the government's responsibilities were in areas of liquid waste treatment and disposal, water supply, geotechnical suitability, road design and layout. Blencoe pointed out, however, that the most important issue was a decision by the CVRD as to whether it supports a community of the scale, scope and location being proposed. The Minister wrote:

> "The Government must now be assured, before investing significant tax dollars, that assuming our role sufficiently answers those areas currently of concern, there is no other reason why the Board would move from its current position of approval in principle for the development.
>
> Therefore, I request that the regional Board pass a special resolution specifically confirming CVRD support for a community of the scale, scope and location being proposed and endorsing the parameters of provincial government participation outlined in the attached document.
>
> With such a resolution the Government of British Columbia can then effectively carry out its responsibilities."

The document attached to the Minister's letter is three pages in length, addressing "significant development proposal concerns" and "pre-design approval and pre-development concerns". The letter itself was prepared by Ministry staff for Blencoe's signature and they describe it as a comfort letter to the CVRD that government would be there to meet its many responsibilities, most of which fell to other ministries of government to fulfill but which found a coordinating focal point within the Ministry. In their view this was not a commitment

letter that ultimate approval would be given by the Minister - rather it was a letter that kept process between two levels of government open, as this very mammoth proposal was assessed for its suitability and acceptability.

On March 10, 1993 a motion was passed by the CVRD Board which advised Blencoe that first reading of the two bylaws had been given on June 24, 1992 and "that the topics and general parameters of the Provincial Government Review as outlined in the Minister's letter of January 27th, 1993 be endorsed …"which I understand from the resolution to be an endorsement of the "scale, scope and location" of the Project as requested by the Minister.

As well the motion has two additional parts as follows:

> That the CVRD public information sessions be scheduled as soon as practical and that the representatives of Provincial Ministries be requested to attend. The purpose of the public information sessions would be to provide an update on the Province's current findings on Bamberton and to provide a forum for public questions and comment.
>
> That the Province commit to providing the funding necessary to undertake the further ccordination of the CVRD's project review process following the public information sessions if necessary.

Blencoe responded on April 13, 1993, saying that he "appreciated receiving confirmation of your Board's position on this proposed development" and he also acknowledged that a public meeting had been held on March 31, 1993 that included participation of

senior staff from the Ministry of Municipal Affairs, the Ministry of Transportation and Highways and the Ministry of Environment Lands and Parks. Blencoe also confirmed that he was "in favour of the use of the Planning Grant Program to support this initiative and will give your proposal serious consideration. He again reviewed the items that would be considered by government including those already detailed and he then said:

> "While the majority of the items listed above will be considered after rezoning, in accordance with normal processes, government agencies will act upon information as it is received from the developer. At this time, from a Provincial interest perspective, there does not appear to be any impediment to the Regional District fulfilling its responsibilities to make an appropriate land use decision. At the same time the Province will fulfill its responsibilities. In particular, detailed conditions relating to the proposed development which are subject to Provincial approvals will be based on thorough and public review in accordance with established procedures"

A month later, on May 12, 1993 Blencoe wrote again to the CVRD advising that he was "pleased to inform you" that the CVRD was eligible to receive a planning grant of $35,000.00 to assist in the Bamberton Review Process and to prepare an affordable Housing study relative to this project.

In two memoranda to me, both dated June 25, 1993, one 11 pages and the other 6 pages, the Minister reviews his involvement in the matter.

In his eleven page memorandum he describes his involvement as follows:

"a) my agreement that relevant provincial agencies would provide the CVRD board and staff with review and comment on developer-provided information for the purpose of helping to inform the public hearing process currently conducted by the CVRD. I authorized Ministry official to participate in a March public hearing held by the CVRD as part of that process.

b) upon advice of Ministry officials that the CVRD's request for planning funds was consistent with the mandate of the province-wide program, I approved a planning grant to help support the CVRD's planning and public review process.

c) providing written advice to the CVRD on how the Regional District could protect both regional interests and the original intent of rezoning and Official Community plan amendment by-laws were the development to proceed and the Bamberton site to be incorporated."

In his six page memorandum to me, Blencoe gives additional detail of that involvement, how it was initiated and how it relates to standard Ministry practice. He said:

"I received several requests from the CVRD board for my assistance with its review of the Bamberton project. These and my responses follow - see appendix 2 for copies for correspondence with the CVRD Board:

a) The CVRD Board's September 30, 1992 resolution requested assistance in evaluating the project.

After careful deliberation involving detailed discussions with senior Ministry officials in my Ministry and from several other key Ministries, which had been involved in reviewing matters related to the Bamberton proposal, I replied on January 27, 1993 noting what the Province was prepared to do to fulfill its statutory responsibilities but indicating that the Province was not prepared to engage in detailed studies, at Provincial expense, until such time as CVRD reaffirmed its position on the proposed land use from a local government perspective. Specifically, I was asking the CVRD to endorse the parameters of provincial agency involvement in the review.

b) The CVRD's March 12 response to my January 27th letter endorsed the Province's position as well as requested additional reviews and funding assistance in the form of

> a planning grant to assist the regional district in assessing the socio-economic and affordable house matters and to help support the public review process.
>
> In an April 13, 1993 letter, I responded to the main points of the March 12th letter reiterating the provincial agency responsibilities and the likely timing. I followed this up with a letter approving the requested planning grant.
>
> Please note that the Planning Grant Program is a Province-wide program which provides funds to assist local government in preparing community plans and related by-laws. My staff advised me that given the unique nature of demands being placed on the regional district to respond to a project of the size and complexity of that being proposed for Bamberton, it was reasonable to provide a grant in response to the CVRD's Request.
>
> In terms of involvement with the CVRD, the only variation from common provincial practice was, in response to a request from the CVRD to assist the regional district by having relevant provincial agencies review and comment on developer provided information earlier than would be normal. This was justifiable given the size, complexity and sensitivity of the project. As well, provincial officials participated in a public meeting convened by the CVRD in March of this year.
> . . .
>
> I have exchanged correspondence with numerous individuals and organizations that were either supportive of or opposed to the project. In all responses, I have emphasized my role in the legislative process and made it clear that I had no position on the desirability of the project."

I have made further inquiries respecting the issuance of the Grant. It was a "Special Planning Grant" rather than one made under the standard Planning Grant Program. One reason that this is significant is that the grant made in this instance is to assist in 100% of the costs up to a maximum of $35,000 whereas a standard grant would be for only 75% (for 1992 fiscal year) or 50% (for 1993 fiscal year) of the costs up to a maximum of

$30,000. This grant was recommended for approval in a Memorandum from the Deputy Minister of Municipal Affairs, Recreation and Housing, to the minister, dated March 30, 1993 which reads:

> "Re: 1992 Special Planning Grant - Cowichan Valley Regional District
>
> This memo recommends approval of a 1992 Special Planning Grant of $35,000.00 to the Cowichan Valley Regional District to assist in the Bamberton Review Process and to fund an affordable housing study relative to this project.
>
> The Regional District has submitted this request following your letter of January 27, 1993 to the Regional District. The request is for funding assistance to help with the immediate cost of the public involvement process and for coordination of the process up to and including the Public Hearing.
>
> The recommendation is for a Special Planning Grant rather than the approval of a grant under the standard planning grant program as the proposal is to assist with 100% of the cost up to the maximum of the grant. Previous grant applications for other projects have been rejected due to lack of funds and anticipated commitments to other grant programs. However, not all funds have been allocated under the Regional Strategic and Housing Grant Programs for the 1992/93 fiscal year and we are still within the $3 million maximum. Therefore, the special grant is recommended for approval.
>
> . . .
>
> If you concur with the recommendation, please sign the attached letter of approval to the Regional District."

I asked Ministry staff for further information on the grant and in response I received a Memorandum dated July 21, 1993 which gives a very detailed account of the reasons for the issuance of the Special Planning Grant. The Memorandum advises that:

- The regional district requested $30,000 for socio-economic studies and to assist with the public process activities of the CVRD in relation to the Bamberton proposal,

- including a public meeting which had taken place on March 30, 1993.

- The regional district also requested the Ministry to prepare an affordable housing study. Since the Ministry does not conduct studies of that kind, it was agreed to provide an additional $5000 to allow the CVRD to have a study of this kind carried out.

- The late applications referred to in the March 30, 1993 memorandum that had been rejected met that fate primarily because the normal planning grant program was fully subscribed earlier in the fiscal year. Funds were allocated to the housing planning grant program, but because of delays in preparing the guide, (which was only released on July 5, 1993) the $400,000 set aside for this program was available at fiscal year-end.

- The 1992 Planning Grant brochure did not make reference to a "special grant program". It had been developed initially to respond to a funding request to assist with the first year of participation of local government representatives on the Fraser Basin Management Agreement Board. The context of a tri-level agreement (federal, provincial and municipal governments) was entered into too late in local governments' fiscal year-end to enable the participating municipalities to pay for their expenses. The grant totaled $46,200 which was split between three local governments.

- Last fall, the Association of Vancouver Island Municipalities applied for a grant to support for participation on CORE's Vancouver Island's Regional Planning Table. A $12,000 grant was made for this purpose. Similar funding is being provided for the same purpose in other regions of the Province.

- When the CVRD request came in, given its lateness in the fiscal year, the availability of unexpended funds, and the nature of the request insofar as it not being listed in the 1992 brochure, staff considered options for dealing with this and concluded that it should be treated as a special planning grant matter.

- Over the years when planning grant applications were received which did not meet program eligibility criteria described in the applicable year's planning grant brochure Ministry staff endeavored to respond if requests were

considered to be in the local or provincial public interest. Often when such exceptions were made, consideration was given to including the type of project funded in this way in the following year's planning grant program so that such funding would be accessible to all local governments in future years.

- The CVRD's March 13 request for funds in this instance, if it was made after March 31, 1993, would have been dealt with under Item 12 in this year's program brochure and Item 12 is one that was added to respond to new initiatives over recent years.

- Thus, in considering the CVRD's request, although it was late in the year and involved items not specified in the 1992 Planning Grant brochure, a positive response from the Ministry was considered to be reasonable given years of program development which responded to unanticipated requests from local governments for assistance and the availability of funds.

- The recommendation in the March 30 memorandum was developed as a result of discussions internal to the Ministry with the CVRD Planning Director. That is to say, it was solely at the staff level.

Paragraph 12 of the Memorandum explaining the 1992 Planning Grant Program (which is similar to paragraph 12 of the 1992 Brochure under the heading "Other Projects") provides:

> Special Projects
>
> Consideration may be given to other planning projects which lead to the establishment of policies and procedures on physical, economic and social issues relating to the management of development. Applications must be supported by an overall planning program and priorities or a Planning Needs Assessment as well as a detailed justification of the project in terms of the objectives of the grant program. For example, municipal maintenance programs for municipalities with a 1992 population of 15,000 or less may be given consideration.

While there was an application for a grant it appears that it

was not supported by the kind of material or information referred to in the above cited paragraph.

Public meetings have been held over recent weeks. The next step will be for CVRD to decide whether or not to give third reading to the two bylaws. If it does, a statutory responsibility will then rest with Blencoe. Under section 948 of the Municipal Act, the Board is required to send the two bylaws after third reading to the Minister and "the board shall not give final reading to the bylaw adopting the plan and the plan has no effect until the Minister has approved it".

Blencoe correctly points out that even if he gives approval, this does not assure that the Bamberton Project will proceed. That is because it would still have to go through fourth reading at CVRD and it would have to succeed in gaining development permits from CVRD and other permits and other approvals under statutorily required processes proscribed by, among others, the Land Titles Act, the Waste Management Act and the Water Act. My study of the matter does indicate, however, that approval of a section 948 application by the Minister is unlikely before knowing that all other ministries whose approval is required and who must issue permits and licenses, are either onside with approval being given or they will be comfortable with approval occurring once stipulated conditions have been met.

The Minister has supplied to me his views with respect to the responsibility resting with him under section 948 of the Municipal Act. He makes these points:

1. CVRD has primary and final land use decision making authority for the Bamberton project.

2. The official community plan amendment for the Bamberton Project must receive Ministerial approval before it can be enacted. His responsibility is to consider the bylaw from a provincial public interest perspective and he has enumerated the following points that he would consider and they are these:

   - "outstanding concerns or conflicts with matters pertaining to such significant interests of provincial ministries and

   - agencies as the environment, public health and safety, the economy, aboriginal rights, transportation and social well-being;

   - general consistency with the provision of the Municipal Act on matters of content and process. My approval does not guarantee legal certainty;

   - correspondence from the public and the statements made at public meetings and the public hearing required under the Municipal Act; and

   - if applicable, whether or not the bylaw conflicts with, or is contrary to, a stated provincial public policy goal or objective."

3. Technical advice on the acceptability of such a bylaw is prepared by staff of ministries who review draft bylaws and supporting material provided by the Regional District and project proponents.

4. Ministerial approval under section 948 does not replace nor necessarily limit the outcome of specific applications for approval under a variety of statutes. Rather it gives notice that a Project is provincially acceptable subject to it meeting the detailed requirements of licensing and other approvals under statutes such as the Land Title Act, Waste Management Act

and the Water Act.

5. The Minister states that his range of options when the matter comes before him for a decision under section 948, are four in number:

   i. approve;

   ii. return without approval;

   iii. withhold approval pending the resolution of outstanding concerns identified by a range of provincial ministries and agencies;

   iv. give approval with a request to a regional district board to consider certain follow-up actions

Blencoe also says that everything he has done in this matter, up until this time, as reviewed by me in preceding paragraphs, was done by him at the request of the Board of staff of CVRD. I accept that to be the case with the exception of receiving delegations in his office from proponents and opponents of the Project.

III. CONSIDERATION OF THE *MEMBERS' CONFLICT OF INTEREST ACT*

Before considering whether there has been or could be a breach of the Act, it is necessary to consider the meaning of the phrases "conflict of interest" and "apparent conflict of interest" as referred to in s. 2(1) and 2(2) of the Act with particular reference to the meaning of the phrase "private interest" as used in both subsections.

Helpful to me and hopefully to readers of this opinion is the genesis and raison d'être for our conflict of interest

legislation enacted in 1990 and amended in 1992. My conclusion is that this is legislation enacted and amended to promote public confidence in elected public officials as they conduct public business. I conclude that this was seen and continues to be seen as necessary because of the low ebb to which that public confidence has sunk in recent years. I believe that this legislation is a positive move, perhaps a first step, in addressing the problem it was enacted and amended to help remedy. That said, given the set of facts on which I am now called upon to pass judgment, my endeavour will be to reach a conclusion that will honour the heart and soul of this legislation - the restoration of public confidence in the conduct of the people's business by politicians who have achieved electoral success.

A consideration of the debate in the House at the time of enactment and amendment provides some sense of the purpose of the Act and supports what I have said in the preceding paragraph. I quote passages from each occasion:

July 1990 (The original Act) - The Provincial Secretary,

(Honourable Howard Dirks) on first reading:

> "The people of British Columbia have the right to be assured that decisions of elected officials are being made in an atmosphere free of conflict of interest... We are all aware in public office that the perception of a conflict of interest can be as harmful to the process of government as an actual conflict of interest."
>
> The Provincial Secretary, (Honourable Howard Dirks) on second reading:
> "This legislation stems from our belief in the public's right to know. The citizens of British Columbia have a right to

know that the business of this House and the executive council is carried out in a manner that meets the highest standards of conduct."..."Mr. Speaker, this bill establishes a process which will give British Columbians a firm guarantee that public business is conducted free from conflict of interest."

Leader of the Official Opposition, (Michael Harcourt) on second reading:
"New Democrats believe that our province deserves the toughest conflict of interest laws that we can come up with".

June 1992(The Amendments) - The Attorney General, (Honourable Colin Gabelmann) on first reading:

"I am pleased to introduce Bill 64, Members' Conflict of Interest Amendment Act, 1992. This Bill contains a number of significant amendments that significantly strengthen the Members' Conflict of Interest Act and reflects the government's commitment to rigorous and fair conflict of interest rules. Such rules are of critical importance in helping to ensure the high standard of conduct on the part of Members of the Legislative Assembly which British Columbians rightfully expect".

The Attorney General, (Honourable Colin Gabelmann) on second reading:

"The government has made clear its commitment to strengthening the *Act* that is now on the books. Conflict of interest rules that are strong and fair are essential to ensure that the conduct of government is open and honest, and is seen to be so by British Columbians. The amendments contained in this bill will strengthen the *Act*, and by doing so will meet the rightful expectations of British Columbians that Members of Cabinet and of the Legislative Assembly adhere to the highest standard of ethics. By clarifying conflict of interest requirements, the amendments will also assist present and future members to avoid inadvertently coming into conflict. Our objective, Hon. Speaker, is to have conflict of interest rules in British Columbia which are second to none in terms of rigour and fairness. The amendments to this bill are merely the first step towards that objective..."

Another important addition to the act contained in these amendments is the inclusion of a definition of "apparent conflict of interest". This is defined in terms of a reasonable perception which a reasonably well informed person could properly have that a member's ability to carry out official powers, duties or functions must have been affected by that member's private interests. Inclusion of that

definition is important in recognition of the principle that justice must not only be done but also seen to be done....

I think in the final analysis what we need here is legislation that has public confidence and the confidence of all Members of the House" ... "There are things we give up when we come to public life. The public expects us to have a higher standard, to behave differently in respect of our private interests. The public is increasingly demanding a degree of honour that is tough sometimes to keep up to, but I think those demands are correct. We have to find ways of ensuring that both our standards are exemplary and of the highest magnitude."

The Attorney General, (Honourable Colin Gabelmann) in Committee:

We are, as far as statute law is concerned, breaking new ground. It raises questions that have not been answered before in this country - how you determine this apparent conflict."

"... Cabinet made the decision to recommend to the House that we proceed with this section based on our view that this is what the public wants. The principle was raised in the Sinclair Stevens affair, and in that case Judge Parker talked about apparent conflict of interest and gave it a definition. We borrowed extensively - in fact, we borrowed the words almost precisely - from Judge Parker, in respect of the definition of apparent conflict of interest.

It gets back to a fundamental tenet of western parliamentary democracies: the old cliché about justice must not only be done, it must be seen to be done. So the appearance is as bad as the actuality."

Blencoe has been helpful and fully cooperative as I have undertaken an assessment of this problem. With respect to all that has occurred to date, Blencoe is of the view that "I did not have a conflict of interest in those instances and did not act in breach of section 2.1". He gave essentially three reasons for this view:

(i) that a conflict of interest requires that there be a pecuniary gain or potential therefore;

(ii) that neither he nor his spouse had any financial interest in the Bamberton Project;

(iii) that any decision by him to approve the project would not ensure a future pecuniary gain from anyone and that would include any future campaign contributions or assistance from Tait or Milne.

In his eleven page memorandum to me Blencoe expressed himself in the following way:

> Neither my spouse nor I have a financial relation to the project, its proponents, or associated individuals or groups. This land use decision, or consequent development decisions, offers no opportunity for my family to advance our personal financial interest, directly or indirectly.
>
> It is my submission that the presence of a potential for pecuniary gain is fundamental to a determination that there is a private interest that could be furthered in the exercise of my powers or the performance of my duties or functions...
>
> I fundamentally believe that the intent of the Act is to provide the public with protection against elected officials who would use their public office to further their own pecuniary interests...
>
> ...There has been no promise made to me of a pecuniary gain that would arise were I to decide the question that may come before me one way or the other. Nor would my decision be affected by any concern for providing a benefit to Mr. Milne or Mr. Tait, or doing such things as may be required to ensure their continued participation in, or contribution to, NDP election campaigns." (the underlining is mine)

While I am in accord with some of what Blencoe has said, Nevertheless, I have two fundamental disagreements with him.

Firstly, while I agree that "private interest" includes a pecuniary interest, I disagree with him insofar as he limits it to that. Secondly, what appears not to be appreciated by Blencoe is that the pecuniary or other private interests are not limited to those that are contemporaneous with or subsequent to the exercise of the power, duty or function. Insofar as an "apparent conflict of interest" is concerned, at least, it is enough that the Member be a recipient of a past "private interest" that creates the reasonable perception that the Member's ability to exercise an official power or perform an official duty or function "must have been affected by his or her private interest." Where the Member's decision can be perceived to create a scenario, perhaps usefully described as a "quid pro quo" for past favours, that is also caught in the Act.

While there is some judicial support for Blencoe's argument that "private interest is limited to pecuniary interest", I do not find it persuasive insofar as the present Act is concerned.

In Blyth et al vs. County of Northumberland (1990) 75 O R (2d) 576 the issue before the Ontario Court (General Division) was whether three municipal councilors who voted on a bylaw to approve the construction of a new civic building were in a position of conflict of interest because they were members of a Board of Health that administered the Health Unit whose rental payments would be required to finance the new building. The

Court ruled that they were not in such a position. Crossland, J. said:

> "Under both the common law and the statutory law, the interest which is said to offend the conflict of interest rules must be a private interest that is capable of being measured pecuniarily: Re: L'abbe and Blind River (Village) (1904) 7 O.L.R. 230 (Div. Ct); Re Blustein and North York (Borough) (1967) 1 O.R. 604, 61 DLR (2d) 659 (H.C.J.)(affd (1967) 1 O.R. 609n, 61 D.L.R. (2d) 664n (C.A.) leave to appeal to S.C.C. refused (1967) 1).R. 609n 61 D.L.R. (2d)664n; municipal Conflict of Interest Act, 1983, S.O. 1983, C. 8 ...
>
> In the case at bar, there is no evidence that these three members of council had any pecuniary interest, direct or indirect, in the result of the vote on the bylaws."

A reading of the judgment of Stark J. in Re: Blustein and North York will reveal that the common law rule was one that has existed in England since the 1600's.

Our legislature, which made no reference to "pecuniary interest" in the Members' Conflict of Interest Act, is not unfamiliar with the use of that term when legislating on conflict of interest matters. In particular, in part 5 of the School Act under the heading "Conflict of Interest" it defines the phrase "pecuniary interest" and then spells out the duty of school trustees when they find they have a pecuniary interest in any matter coming before the school board for consideration.

In the absence of a definition of the phrase "private interest" in the Members' Conflict of Interest Act as it appears in our

statute of the 1990's I decline to interpret it in the manner formulated four centuries ago. I believe it has to be interpreted in the climate in which it was enacted. I believe that climate to be as expressed in the passages of Hansard from which I have quoted. That leads to a definition that is not limited to pecuniary or financial interests. It was open to the Legislature to have placed words of limitation on "private interest". It did not do so.

IV. WHAT CONSTITUTES A PRIVATE INTEREST?

With that background, I will now attempt to provide some greater content to what I understand the phrase "private interest" includes.

As stated above, private interest certainly includes any pecuniary interest or economic advantage. The pecuniary interest can be for even a small amount so long as it is not de minimus. Whether the pecuniary interest is remote or speculative is also a relevant factor that needs to be taken into account.

As I have said, private interest is not limited to a pecuniary or economic advantage. It can include any real or tangible benefit that inures to the personal benefit of the Member.

Whether campaign contributions and assistance are described as

pecuniary or non-pecuniary interests or some hybrid, given the circumstances leading to this complaint, it is necessary to consider them. Campaign contributions and assistance, whether financial or otherwise, can, in my opinion, in some circumstances, be a "private interest". I am conscious of the very real purpose and difference between these kinds of contributions and other kinds of pecuniary or non-pecuniary benefits that could pass to a Member. Indeed in our system of parliamentary democracy, campaign contributions and assistance are to be encouraged and fostered and must be seen in a positive light as an interest accruing not only to a political party but also to the public generally; it is thus an interest clothed with the public interest. Nevertheless, it would be wrong to deny that in some circumstances it is also an interest that accrues to individual candidates and is thus also a private interest. This is particularly the case where the financial contribution is specifically directed to the candidate even though it is payable to the party. It is also the case where the non-financial contribution or assistance is of particular benefit to the candidate. The non-financial contribution on behalf of a specific candidate (notwithstanding that it is also on behalf of the party that the candidate represents) can include an array of activities from distributing leaflets , knocking on doors, developing campaign strategies, public endorsements and fundraising. While these factors may constitute a "private interest", the mere receipt of a private interest does not constitute a breach of the Act for reasons

which I set out below.

I want to emphasize that I do not intend that anything that I have said or will say hereafter to be interpreted as in any way discouraging or disapproving of campaign contributions or assistance. Indeed, I wish to express my complete support for those who choose to participate in the democratic process in this way. Political parties are essential to properly functioning parliamentary democracies. To be effective they require membership and resources. I start from the premise that those who contribute to political party viability through contributions of time or resources or both, to either the party or one of its candidates, should not be prejudiced in subsequent dealings with government as private citizens, regardless of whether the political party they support does or does not form the government of the day. Similarly, those who choose not to participate in the political process should not be, nor be seen to be, prejudiced in their dealings with government as a result of their non-participation in the political process. It is to be emphasized, however, that a Member who has received a campaign contribution, financial or otherwise, must not, at least in some circumstances, discussed in more detail below, thereafter put him or herself in a position to confer an advantage or a benefit on the person who made that contribution. As I will elaborate below, the Legislature has provided a simple and sensible solution in section 9.1 of the Act for the Member in those circumstances to step aside and allow the business of

government to proceed unimpeded by having another Member exercise the official power, function or duty.

Private interest of other persons can also be, in some circumstances, a private interest that is to be attributed to the Member. While this class of persons is likely a narrow one, it would encompass those persons who are in a close and proximate relationship to the Member where it is reasonable to assume that the Member would benefit directly or indirectly from the benefit to the third party. Such persons would include the Member's spouse (as I have stated on other occasions) but in some circumstances could include other family members and close personal friends and perhaps even business associates.

The above list of "private interests" is not meant to be either categorical or exhaustive. Each case will have to be looked at all the circumstances taken into account.

V. CONCLUSION RELATING TO A PRESENCE OR ABSENCE OF PRIVATE INTEREST IN THIS INSTANCE

I am of the view that Blencoe's private interest was advanced by virtue of the cumulative effect of both Milne's and Tait's financial and other support and particularly during the most recent provincial election campaign. The facts are beyond dispute. I summarize them again for convenience:

Tait has been a member of the NDP for 10-12 years; he participated in the 1991 campaign by attending a campaign meeting to strategize on fundraising for Blencoe's campaign; he made a personal contribution of approximately $100, and approximately $100 from JDT, a company he owns with his wife; the candidate's or constituency portion of the financial contribution (60%) was expressly designated by Tait to Blencoe's campaign because Tait resided in a different riding and, but for that designation the contribution would have been directed to the candidate in the riding in which he lived; he solicited and encouraged contributions from approximately 15 employees for Blencoe's campaign and collected approximately $185 from 5 or 6 of them; he personally delivered his and their financial contributions to Blencoe's office; he allowed his photo to be used along with only 10 other persons, likely strategically selected, on Blencoe's campaign leaflet with a most positive endorsement of Blencoe; he attended the victory party on election night.

Milne has been a long time supporter of the NDP; he and Blencoe are old friends and colleagues; over several years he has held some constituency position in the Party; he was Blencoe's official agent when he ran in the 1980 federal election as well as for his provincial campaigns in 1983, 1986 and 1991; he worked in Blencoe's aldermanic campaigns in the 1970's; he has made financial contributions to Blencoe over the years and in the 1991 campaign he designated a relatively substantial contribution to Blencoe's campaign

which designation was necessary since he does not live in Blencoe's riding; he has also assisted Blencoe's campaigns by knocking on doors, attending meetings and whatever else needed to be done.

The fact that Blencoe's private interest was advanced by Milne and Tait does not by itself mean however that there has been or would be a violation of the Act. I address that point in the section that follows.

VI ON THESE FACTS, HAS BLENCOE EITHER VIOLATED THE ACT OR WOULD HE BE IN THAT POSITION IF HIS PARTICIPATION CONTINUES?

A. General

Having concluded that Blencoe's private interest was advanced by Tait and Milne, and before there can be any finding that there has been or could be a violation of section 2.1 of the Act, which in turn requires an analysis of sections 2(1) or 2(2) of the Act, further inquiries must be made:

i) under s. 2(1) it must be determined whether the Minister "at the same time knows that there is an opportunity to further his private interest"; or,

ii) under s. 2(2) would there be a reasonable perception which a reasonably well informed person could properly

have that the Minister's participation must have been affected by his private interest.

I will address these questions in reverse order because in this case the issue of "apparent conflict of interest" is somewhat easier to deal with that actual "conflict of interest". I will also deal firstly with the proposed exercise by the Minister of his powers under section 948 of the Municipal Act thus addressing whether there could or would be a breach of the Act by him doing so. I will then deal with whether there has been, in the past, any exercise by the Minister of an official power, duty or function such as to give rise to a breach of the Act.

B. Would there be a breach of s. 2.1 by virtue of an apparent conflict of interest were the Minister to have made a Decision under s. 948 of the Municipal Act to approve the Bylaws respecting the Bamberton Project?

In the course of determining whether it is reasonable to assume that the Minister, in the exercise of his official function, power or duty must have been affected by this private interest that I found to exist, it will be relevant to consider other factors which include the timing of the contribution (the closer in time, the more relevant), the significance of the contribution in relation to both the candidate and the contributor, the motive for the contribution if that can be discerned and whether the candidate (now Minister) was aware of the contribution prior to the exercise by the Minister of the

impugned official power, duty or function. As well, it will be very important to ascertain whether the impugned decision involves an activity which a minister normally engages in on behalf of constituents because section 5 of the Act provides that this would not be prohibited. These factors are neither definitive nor exhaustive.

I am of the opinion that there is a reasonable perception which a reasonably well informed person could properly have that Blencoe's ability to exercise his official power, duty or function would be affected by his private interest were he to make a decision to approve the bylaws allowing for the Bamberton Project because of the following factors:

- Both Tait and Milne's campaign contributions and assistance, both financial and non-financial, looked at in their entirety were important contributions to Blencoe's campaign and were significant whether viewed from Blencoe's perspective or that of Milne and Tait.

- Both Milne and Tait stand to gain in a very significant financial way if Blencoe decides to approve the CVRD bylaws allowing for the Bamberton Project; Tait has lobbied hard in favour of the project including meeting with Blencoe as part of the South Island delegation on September 28, 1992 and writing the Premier on November

25,1992 and stressing his ties with the NDP for many years;

- Both Tait and Milne's contributions were recent;

- Insofar as Tait is concerned it is not without significance that his involvement in the 1991 campaign and Blencoe's campaign in particular was greater than his involvement in earlier campaigns and that the Bamberton proposal began to materialize only in 1991;

- Tait and Milne are friends and Tait would have known of Milne's close relationship with Blencoe;

- while Blencoe may not have known that either Milne or Tait had made financial contributions at the time of the campaign the fact is that Blencoe knew of the effect of Milne's involvement and of Tait's non-financial contribution and knows now of Tait's financial contribution and he has this knowledge prior to exercising his power and duty to decide, pursuant to s. 948 of the Municipal Act, whether to approve the CVRD bylaw allowing the Bamberton development.

- the exercise by the Minister of his discretion under section 948 of the Municipal Act would not be an activity which a Member normally engages in on behalf of

constituents.

Towards the end of his submission to me, Blencoe, said:

> "My requirement to act, should it arise, would be in the context of a process that is clearly prescribed by legislation and requires that I act in good faith and in the provincial public interest."

His concluding paragraphs read:

> "In conclusion, my consideration of any OCP amendment by-law respecting Bamberton, should such a circumstance arise, will be based on an assessment of provincial interests as identified by other Ministries and agencies of the provincial government. There has been no promise made to me of a pecuniary gain that would arise were I to decide the question that may come before me one way or another. Nor would my decision be affected by any concern for providing a benefit to Mr. Milne or Mr. Tait, or doing such things as may be required to ensure their continued participation in, or contribution to, NDP election campaigns.
>
> None of these considerations are legitimate considerations in the decision that may lie ahead of me. There are no considerations in the realm of my political or personal associations that could induce me to neglect my duty and conduct myself in any manner other that in good faith, with paramount concern for the provincial public interest."

In my judgment those expressions overlook the 1992 amendment adding the "apparent conflict of interest" provision. I accept the sincerity of Blencoe's above assertions and that he would exercise his power under s. 948 of the Municipal Act in good faith with only the public interest in mind. Likewise, I accept the sincerity of his statement that he would not be influenced or motivated by Milne or Tait's contribution or assistance to him in the election campaigns past or future. But, that is beside the point. It is the perception of a conflict of

interest held by a reasonably well-informed person that Mr. Blencoe and I must be concerned with and for all of the reasons that I have given I am satisfied that there would be a perception of an "apparent" conflict of interest if Blencoe were to proceed to act under s. 948 of the Municipal Act.

Section 2(2) of the *Act*, of course, uses the phrase, "must have been affected by his or her private interest". I use the phrase "would be" because I am looking at the matter before the Minister exercises his discretion under section 948 of the Municipal Act, if indeed he is called upon to exercise that discretion at some future time. I do not believe he will have a problem with me addressing the matter before the event rather than afterwards.

I also appreciate that he has not yet made any decision and if left to do so he may well not approve the bylaw and therefore would not be in any apparent conflict of interest. Nevertheless given that the question has arisen prior to his decision it is prudent that I express this opinion at this time with respect to the consequences of an affirmative decision by him. Given my finding, it would be wrong and unfair to the CVRD and the developer were Blencoe to proceed to make any decision given that the only decision that he could now make that would not place him in a violation of the *Act* would be a negative one; the inference might be drawn that such a decision was not made on the merits of the bylaws but rather driven by an overriding concern for the Members' Conflict of Interest Act. The

proponents of the Project are entitled to a decision from a Minister who is under no such constraints.

It is another 1992 amendment that provides for the Minister stepping aside in a situation such as present itself here. 9.1(2) of the Members' Conflict of Interest Act reads:

> "The Lieutenant Governor in Council may appoint a Member of the Executive Council to act in the place of a Member referred to in subsection (1) for any matter with respect to which the Member referred to in subsection (1) has a conflict of interest or an apparent conflict of interest."

That utilization will prevent the occurrence of a violation of the Act. All concerned, Blencoe included, should be appreciative of the efforts of the complainant in bringing this matter forward for my consideration. If that had not occurred, this consideration might have occurred after the event, which could have meant a finding of violation in a very significant situation with significant consequences that would have followed from such a finding.

C. Would there be breach of s. 2.1 of the Act by virtue of an actual "conflict of interest" were the Minister to make a Decision under s. 948 of the Municipal Act to approve the Bylaws respecting the Bamberton Project?

Given that I have concluded that Blencoe would be in an apparent conflict of interest were he to make a decision under s. 948 of the Municipal Act to approve the Bamberton Project, I do not

consider it necessary to determine whether he would also be in an actual conflict of interest.

D. Has there been a breach of s. 2.1 of the *Act* by virtue of an apparent conflict arising out of the Minister's involvement to date?

The issue here is whether the Minister has exercised, to date, an official function, power or duty that bestows an advantage or benefit on the proponents of the Project and specifically Milne and Tait. If that is the case then given the facts that I have already recounted there would be a reasonable perception that the Minister's actions must have been affected by his private interest. While the future exercise by the Minister of his power under s. 948 of the Municipal Act to approve a bylaw is a clear example of the exercise of an official power, function or duty that confers a benefit or advantage, there may have been other instances, perhaps less clearly identified, in which the Minister made a decision of the same kind, even if of a different degree. Whether there have been such instances is something I will now consider.

The Minister claims that his position to date has been one of neutrality; the complainant suggests the contrary.
I confess to having considerable difficulty in resolving this issue. However, there are five areas of concern.

The first is perhaps the easiest to deal with and that relates to the Minister's communication with Mr. Harrison, the Director of the CVRD for Electoral Area "A". As I understand Mr. Harrison's concern, it was that if the CVRD approved the Bamberton Project and thereafter Bamberton became incorporated or part of a larger municipality, this latter municipality could undermine the strictures imposed on the Bamberton Project by the CVRD which would be of particular concern to the residents in the Mill Bay community which Mr. Harrison represents.

I am satisfied that by providing Mr. Harrison with assurance that mechanisms were available (some automatic by virtue of existing legislation and some potentially available through special provision) to provide protection against that eventuality, the Minister was simply providing publicly available information and was in no way expressing or revealing any predisposition in favour of the Bamberton Project and was in no way exercising a function that could be said to bestow any advantage or benefit on the proponents of the Project.

My second concern relates to the Minister's decision, reflected in his letter of April 13, 1993, that "government agencies will act upon information as it is received from the developer". This, on its face, appears entirely appropriate but in his June 25, 1993 (six page) Memorandum to me he says:

"In terms of involvement with the CVRD, <u>the only variation</u>

> from the common provincial practice was, in response to a request from the CVRD, to assist the regional district by having relevant provincial agencies review and comment on developer provided information earlier than would be normal. This was justifiable given the size, complexity and sensitivity of the project..." (the underlining is mine)

My investigation reveals that this so-called "variation from common provincial practice" was not as stated. Provincial agencies had for some time been reviewing and commenting on developer-provided information and this, in fact, was a normal provincial practice. However, what was a variation from normal provincial practice was that the request for the review came from the CVRD to the Minister directly and the Minister acted on it. The only reasonable explanation for this is that the CVRD was looking to involve the Minister in the early stages. This may be understandable given the size, complexity and sensitivity of the Project but it also suggests an attempt to obtain the Minister's early involvement or perhaps even endorsement for the Project. However, I am not satisfied that his involvement in this way reflected any predisposition on his part to the Project nor was it sufficient to confer an advantage or benefit on the proponents of the Bamberton Project such to give rise to a violation of the Act.

The third issue of concern is the Minister's decision to require the CVRD to endorse the scale, scope and location of the Project as a condition for any funding and is best expressed by another member of the public in a letter that I received about June 21,

1993 and it reads as follows:

> "It is my understanding that the Minister has suggested he should not be seen to be in conflict since he will only become part of the process of approval after the CVRD has accepted the project. I do not believe that this suggestion is quite accurate. In September of 1992, the CVRD, finding its own resources to evaluate the project to be limited, asked Mr. Blencoe to provide provincial assistance in undertaking a multifaceted review of the implications of the project. It was the expressed hope of the CVRD board that such a review would allow them to make a more informed final decision. Mr. Blencoe turned down this request and indicated that such help would be available only if the CVRD first indicated support for the project. I have attached two newspaper clippings describing the Minister's actions in this respect.
>
> Clearly, Mr. Blencoe's actions were of benefit to those proposing the Bamberton project. The time frame for approval of their proposal by the CVRD would be greatly speeded up since they need not wait for the extensive and lengthy investigation requested. In addition, any review eventually undertaken would take place in an environment of prior approval. Presumably, unless unusually serious environmental hazards were discovered, the project would be allowed to proceed. In making this decision the Minister became directly involved in the process of approval at a very early date. Since he appears to have close connections to some of the principals in the Bamberton proposal, his actions seem to raise at least a strong suggestion of conflict." (the underlining is mine)

I accept that the Minister was motivated by reason of a concern for needlessly spending the taxpayers' dollars on a review that may be unnecessary should the CVRD reject the Project in the early stages. Nevertheless, the points expressed in the above-noted letter have some merit. The Minister's decision would have the effect, even if not intended, for the CVRD to move more quickly in endorsing or supporting the proposed "scale, scope and location" of the Bamberton Project and any subsequent review

would take place in an environment of prior approval.

It is true that the CVRD had previously given its approval in principle to the development as Blencoe noted in his letter of January 27, 1993. This was presumably reflected in having given the amendment to the Official Plan and Zoning Bylaws "first reading". However, the CVRD's Resolution of March 10, 1993, expressly endorsing, at the Minister's request, the "scale scope and location of the project" was no doubt welcomed by the proponents of the Project and was accordingly of benefit to them.

Nor can it be denied that any subsequent review would take place in "an environment of prior approval". This is not intended as any criticism of the Minister or the CVRD. I accept that the purpose of the March 10, 1993 Resolution was to ensure that there would be full and thorough review process, which included public information sessions which could result in the Project being rejected or approved by the CVRD. I am prepared, and entitled, to assume that the members of the CVRD still had open minds and would not make any final decision unless and until they were apprised of all of the important and necessary facts which the review process would provide. Nevertheless, the fact remains that by making the receipt of funding conditional upon the CVRD having endorsed the "scale, scope or location" of the Project, the Minister exercised an official power or function that had the appearance of being an inducement or incentive to cause the CVRD to move the Project to the next stage and this in

turn meant that any subsequent decisions would be made in an "environment of prior approval". Even with the assumption of continuing "open minds" on the part of CVRD Board Members, I do not know what impact their march 10, 1993 endorsement of the scale, scope or location of the Project will be in the final analysis and I am not prepared to assume that it will be of no consequence. The undisputed fact remains that the decision to give third reading will be made in "an environment of prior approval".

My fourth area of concern relates to the Minister's decision to make a Special Planning Grant to the CVRD. The Grant was given even though it did not strictly conform to the Guidelines set out in the Planning Grant Brochure of either 1992 or 1993. It was not limited to 50% or 75% of the costs of the Project as the 1992 and 1993 Guidelines require, respectively. The application was not "supported by an overall planning program and priorities or a Planning Needs Assessment as well as a detailed justification of the Project in terms of the objectives of the grant program." Nevertheless, I am assured by Ministry staff, that it was a very deserving and worthwhile grant and one that was within the "spirit of those guidelines" and within the "letter" of the "Planning Grants" Regulations B.C. Reg. 536/77 enacted under the Revenue Sharing Act. I accept that it was. I also accept that neither the purpose nor effect of the Grant was to register any preference for the Project but rather was to ensure that a thorough and public review of the proposal take

place to ensure that any final decision be made in the local and provincial interest. Nevertheless, it cannot be doubted that while the Grant was not for the developer, it was to the advantage of the developer as a rejection of it would have been at least some impediment to CVRD taking consideration of the Project to the next stage. The Grant did not ensure that the CVRD would finally approve the Project but, without it, the CVRD may have, at least delayed approval of the Project and at worst caused a rejection of it.

My fifth concern relates to the fact that the Minister met with the proponents and received oral submissions from them. I appreciate that he did the same with respect to those who were opposed to the Bamberton Project. While I accept that no decisions were made by the Minister at that time, the fact remains that he exercised his discretion to give the proponents of the Project, including Tait, a meeting. It was obviously considered to be of some advantage or benefit to the proponents to request and receive an opportunity to meet with the Minister who ultimately had the power to prevent the Project from proceeding by exercising his authority under section 948 of the Municipal Act. While no decisions were made by the Minister, at that time, it cannot be assumed that the meeting did not have any effect on the Minister or that it would not play any role in any subsequent decision that he must make under section 948 of the Municipal Act. I can now assume that the Minister will not

make any decision under section 948 of the Municipal Act but that does not erase the fact that he made a decision to meet with the proponents of the Project. All of his past conduct must be viewed from the perspective, or on the assumption, that the Minister was intending to eventually exercise his power under section 948 of the Municipal Act. However, the Minister should have known, for the reasons I have stated in this opinion, that he could not exercise his power under section 948 of the Municipal Act. Accordingly, the Minister should not have been exercising any official power, function or duty which were steps in the process leading to the exercise of the section 948 decision and which could be said to confer some advantage or benefit on the proponents of the Project. This would include any meeting with the proponents of the Project. Blencoe should have removed himself from this process at the very early stages once it became apparent or should have been apparent to him that he could not make the final decision under section 948 of the Municipal Act.

While I accept that the Minister's motives in making these decisions (referred to as my third, fourth and fifth areas of concern) were what he perceived to be in the public interest, I believe that the effect of them creates a reasonable perception that they must have been affected by the past favours done for the Minister by the proponents of the Project or others standing

to materially benefit from the Project. Accordingly, I have concluded that these three decisions create an apparent conflict of interest.

Again, I refer to s. 9.1 of the Act, whereby the Lieutenant Governor in Council can appoint another Member of the Executive Council to act in place of a Member who is in a situation of apparent conflict of interest. In my view, given that Blencoe was aware of the roles of Milne and Tait, he should have availed himself of this option at an early date and certainly prior to exercising the official powers or performing the official duties or functions that I have reviewed.

VII. CLOSING

This is an opinion prepared pursuant to section 15(1.1) of the Act at the request of a member of the public. For all purposes, I consider it as such and not as a Report prepared subsequent to an inquiry.

I am advised by Legislative Counsel, and I accept the advice given, that an opinion prepared pursuant to section 15(1.1) is not one to be reported to the Speaker pursuant to section 16(3). It will be made available today to the citizen making the initial complaint and to the Honourable Robin Blencoe. Tomorrow, a copy will be delivered to all other Members of the Legislature for their information and as of that day, it will be

a public document.

Attorney General Gabelmann was quite correct when he told the Legislature in June of 1992, that with respect to legislation placing a prohibition on a Member acting in a matter where he or she has an apparent conflict of interest:

> "We are, as far as statute law is concerned, breaking new ground. It raises questions that have not been answered before in this country - how you determine this apparent conflict".

Notwithstanding that nearly all other provinces and territories have recently passed conflict of interest legislation, none of them have included a prohibition with respect to conduct that has the appearance of conflict of interest, as distinct from an actual conflict of interest. All of them prohibit conduct falling within the latter category. In this sense, the 1990 Leader of the Official Opposition can be said to have ensured in 1992, as Premier of the Province, "the toughest conflict of interest laws that we can come up with".

The Attorney General reasoned that "breaking new ground" was occurring because "…this is what the public wants". He assured the people of the Province in 1992 that the Members' Conflict of Interest Act, as it reads today,

> "…will meet the rightful expectations of British Columbians that Members of Cabinet and of the Legislative Assembly adhered to the highest standard of ethics".

It should be appreciated that until now, there have been no interpretations or legal pronouncements of any kind with respect to the 1992 amendments. Also, interpretation of British Columbia's 1990 legislation, and of like statutes recently enacted across the country, have been very sparse. I believe that this opinion, in many aspects, for the first time, tells Honourable Members something of the interpretation that this Office places on their actions insofar as the constraints of the Members' Conflict of Interest Act are concerned. Perhaps the most significant contribution that this opinion will make to the politics of the 1990's is its educational value. In the future, Members finding themselves in the position Blencoe was in, in this instance, will know the standards by which their conduct will be judged.

Dated at the City of Victoria, in the Province of British Columbia, August 16, 1993.

E.N. (TED) HUGHES
COMMISSIONER OF CONFLICT OF INTEREST