OFFICE OF THE ETHICS COMMISSIONER
PROVINCE OF ALBERTA

REPORT TO THE SPEAKER
OF THE LEGISLATIVE ASSEMBLY
OF THE INVESTIGATION

BY THE ETHICS COMMISSIONER

INTO ALLEGATIONS INVOLVING
HON. STOCKWELL DAY, PROVINCIAL TREASURER
AND MEMBER FOR RED DEER-NORTH

November 15, 1999

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THE ALLEGATIONS

By letter dated September 8, 1999, Gary Dickson, Member of the Legislative Assembly ("M.L.A.") for Calgary-Buffalo, requested that I conduct an investigation pursuant to section 22(1) of the *Conflicts of Interest Act* ("the Act"). In that letter, Mr. Dickson set out the alleged breach of the Act by Stockwell Day, M.L.A. for Red Deer-North, with respect to payment of Mr. Day's legal expenses resulting from a lawsuit launched against him.

Mr. Dickson raised possible breaches of three sections of the *Conflicts of Interest Act*.

Section 2 of the Act provides:

> **2**(1) A Member breaches this Act if the Member takes part in a decision in the course of carrying out the Member's office or powers knowing that the decision might further a private interest of the Member, a person directly associated with the Member or the Member's minor child.
>
> (2) Where a matter for decision in which a Member has reasonable grounds to believe that the Member, the Member's minor child or a person directly associated with the Member has a private interest is before a meeting of the Executive Council or a committee of the Executive Council or the Legislative Assembly or a committee appointed by resolution of the Legislative Assembly, the Member must declare that interest and must withdraw from the meeting without voting on or participating in the consideration of the matter.
>
> (3) A Member who fails to comply with subsection (2) breaches this Act.
>
> (4) If a matter referred to in subsection (1) requires a decision of a Minister, the Minister may request another Minister to act in the Minister's stead in connection with the decision and the Minister to whom it is referred may act in the matter for the period of time necessary.

Section 3 of the *Conflicts of Interest Act* provides:

> **3** A Member breaches this Act if the Member uses the Member's office or powers to influence or to seek to influence a decision to be made by or on behalf of the Crown to further a private

interest of the Member, a person directly associated with the Member or the Member's minor child.

Section 9 of the *Conflicts of Interest Act* provides:

> **9**(1) A Member breaches this Act if, while being a Member, the Member or a person directly associated with the Member accepts a payment of public money from the Crown or a person acting on behalf of the Crown otherwise than as permitted by subsection (2).
>
> (2) A Member or a person directly associated with the Member may accept a payment of public money from the Crown or a person acting on behalf of the Crown if
>
> (a) the payment is made to the Member pursuant to Part 3 or 4 of the *Legislative Assembly Act* or otherwise in the Member's capacity as a Member of the Legislative Assembly, as a member of the Executive Council or as the holder of an office to which the Member is elected by the Legislative Assembly or appointed by or at the nomination of the Lieutenant Governor in Council or a Minister of the Crown in right of Alberta, and the payment is authorized by or pursuant to
>
> (i) the *Legislative Assembly Act* or any other enactment,
> (ii) a resolution or order of the Legislative Assembly, or
> (iii) a supply vote or Heritage Fund vote as defined in the *Financial Administration Act,*
>
> (b) the recipient is, according to the enactment authorizing the payment, entitled to the payment as a matter of right or subject only to compliance with the requirements of that enactment that are conditions precedent to the payment,
>
> (c) the recipient of the payment
>
> (i) is, according to the enactment under which the payment is authorized, eligible to apply for the payment and complies with the requirements of that enactment that are conditions precedent to the payment,

(ii) in respect of the recipient's application is given no preference not available to others, and

(iii) receives no special benefit in relation to the recipient's application or the payment,

or

(d) the payment is made under a contract that may be entered into without the Member being in breach of section 8.

News Release Setting out Parameters of My Investigation

On September 27, 1999, I issued a News Release (attached as Appendix 1) setting out the parameters of this investigation. In the News Release, I state that the investigation would focus on possible breaches of sections 2 and 3 and expressly eliminates consideration of a breach of section 9. Reference will be made in this report to that section, however, as it relates to the historical background of the coverage provided to Members. As I said in my News Release:

> The issue of the indemnity and what it is intended to cover and how it operates is a matter for the Members' Services Committee," the Commissioner said. For that reason, he said he would not deal with the legal question (as raised in the allegations under the Act) that the payments from the Fund would be a violation of section 9 of the *Conflicts of Interest Act*.

I also stated in the News Release that I would not wander into the area of the lawsuit itself or the appropriateness of public funds paying for a Member's defence. I recognize that the public has expressed its opinions on the matter through Letters to the Editor and phone calls or letters to my office. I agree that the matter raises questions but I believe the Legislature itself is the appropriate place to deal with those questions.

THE INVESTIGATION

In conducting this investigation, I chose to conduct preliminary interviews and then requested Statutory Declarations from various individuals.

The following individuals were interviewed:

- Hon. Stockwell Day, Provincial Treasurer;
- Mr. Peter Kruselnicki, Deputy Provincial Treasurer;

- Mr. Doug Rae, Q.C., Assistant Deputy Minister, Civil Law, Alberta Justice;
- Mr. Richard Whitehouse, Director, Risk Management and Insurance, Alberta Treasury; and
- Dr. David McNeil, Clerk, Legislative Assembly Office.

The following individuals were asked to submit Statutory Declarations:

- Hon. Stockwell Day, Provincial Treasurer and Member for Red Deer-North (Appendix 2);
- Terrence Kowalchuk, Executive Assistant to the Provincial Treasurer (Appendix 3);
- Hon. David Hancock, Q.C., Minister of Justice and Attorney General (Appendix 4);
- Peter Kruselnicki, Deputy Provincial Treasurer (Appendix 5);
- Julian Nowicki, Deputy Minister, Executive Council (Appendix 6);
- Richard Whitehouse, Director, Risk Management and Insurance, Alberta Treasury (Appendix 7); and
- Dr. W.J. David McNeil, Clerk of the Legislative Assembly (Appendix 8) (Due to volume, the attachments to Appendix 8 are not attached to this report but are available for viewing at my office.)

All individuals interviewed responded promptly to my requests for interviews and cooperated with my investigation by providing me with documentation relating to the matter under investigation.

I also spoke, by phone, with the former Speaker of the Legislative Assembly, Dr. David Carter. Information was also obtained from Howard Sapers, M.L.A. for Edmonton-Glenora, regarding a lawsuit in which he was involved.

Background Information on Insurance Coverage for M.L.A.s

There was considerable media coverage in September regarding when and how Members came to be covered by the insurance program administered through the Risk Management and Insurance Division of Alberta Treasury. The following is a chronology of events relating to this insurance coverage, as provided through the evidence of the various interviewees and persons providing Statutory Declarations.

- The Legislative Assembly Office has been able to locate a chart dated March 19, 1985, titled "Crown Insurance Coverage Summary." A copy of that document is attached as Appendix 9 to this report. That chart indicates that both Members and Ministers were covered as of that date for "Member/Employee Liability to 3rd party for acts of Member/Employee in connection with office."

  At the bottom of the document, a notation provides that

  > Both Personnel Administration Office and Treasury
  > have agreed to rewrite the basic definition of "Insured"

> in all policies to make sure that Members and staff are covered in the same way as all Government staff. At present the coverage is usually an addendum or rider; however, all parties agree that coverage exists.

The March 19, 1985 chart was replaced by an April 3, 1985 chart. That chart contains a split heading for "Assembly Liability" and "Member/Staff Liability" over a heading that says "Liability to third parties for acts of Member/Staff on duty." The notation on the bottom says that

> Personnel Administration Office and Treasury will rewrite the basic definition of "Insured" in all policies to make sure that Members and staff are covered in the basic definition as all Government staff. At present the coverage is usually an addendum or endorsement; however, all parties agree that coverage exists.

The Clerk of the Legislative Assembly has identified these charts as having been prepared by Parliamentary Counsel. He states that the charts were provided as briefing documents to the Members' Services Committee.

A March 20, 1985 *Alberta Hansard* transcript contains the following comments by Michael Clegg, Q.C., Parliamentary Counsel, at page 1:

> Mr. Chairman, with this summary and some comments which I have summarized on the bottom [of] the sheet, I hope it is now possible for me to report to the committee such that the committee will understand that the insurance coverage present now is the same as for government employees. I have perused all the policies that affect government employees. Although the way in which Legislative Assembly members, officers, staff, and contract employees were covered in various ways by these contracts was not ideal, nor even particularly satisfactory in some cases, because it was done by endorsement, by addition, by addendum, by implication, there was no doubt between the negotiating parties -- in other words, the risk management people, PAO, and the insurers -- that the intention was that we should be covered. Nevertheless, to repair this deficiency in the manner in which it was done, it has been agreed that in every case, in all the insurance policies which affect personnel and members, the basic definition of the named insured, which is the very first item in any insurance policy, should be rewritten so as to clearly include members, officers, and staff of the Legislative Assembly and the Legislative Assembly Office itself.

> This is in the process of being done, and the people responsible for the administration of insurance are going to advise me in writing when it has been. They have assured me that both they and the insurers are quite happy to make these changes. When this has been done, not only will the spirit and intent of the insurance policies be clear but it will be abundantly clear from the very most basic definition that there is coverage.

The Committee directed that Mr. Clegg distribute a copy of his March 19, 1985, chart to all Members. An April 17, 1985, *Alberta Hansard* transcript notes that the March 19, 1985, chart had some corrections made to it and was distributed to Members' Services Committee members for the April 17 meeting. During that meeting, it was noted that the government was initiating a process for charging certain costs back to departments and that insurance coverage would be one of the costs charged back.

- By memorandum dated August 2, 1989, to the Clerk of the Legislative Assembly, Mr. Clegg recommended that the Members' Services Committee pass an Order at its next meeting

> to authorize what is already happening by agreement, and what has been happening for many years, and that is the coverage of M.L.A.s under public liability insurance policies which cover the rest of the Public Service. It would then bring the payment of any damages clearly within section 29 [of the *Legislative Assembly Act*] as being not a basis for disqualification (as well as being indirect). It would authorize the payments of the premiums on behalf of the Members and would also make the Members Group Plans Order more complete because it would show the coverage that in fact exists already and which is not otherwise reflected in Members Services Orders.

- At an August 21, 1989 meeting of the Members' Services Committee questions were raised regarding legal aid costs for Members. Mr. Wickman specifically asked about coverage for litigation and, after a brief adjournment, moved to table the issue until the next meeting to allow Parliamentary Counsel to report back to Members. The matter was briefly discussed the following date (August 22, 1989) at a Members' Services Committee meeting and was again tabled to allow for further information to be provided to Members. According to Minutes for an August 28, 1989 meeting of the Members' Services Committee, Mr. Michael Ritter, Parliamentary Counsel, reported that "there had never been on record in the Legislative Assembly Department, the occasion of the Assembly going to the legal defence of any Member involved in litigation." He also provided comments relating to parliamentary privilege. The matter was again tabled and Mr. Wickman advised that he had asked Mr. Clegg to investigate the circumstances surrounding the

specific case Mr. Wickman raised at the August 21, 1989 meeting (a lawsuit between the Hon. Elaine McCoy and Sheldon Chumir, Member for Calgary-Buffalo).

- On August 28, 1989, the Members' Services Committee approved an amendment to its Members' Group Plan Order as follows:

> Section 1 is amended by adding the following after clause (c):
>
> (d)(i) Members shall be provided general liability coverage related to the performance of their duties as Members.
>
> (ii) Costs incurred pursuant to subclause (i) shall be paid by the Crown on behalf of Members.

The Order was effective on passage and was signed by former Speaker David Carter on August 28, 1989, and was approved as to form by Michael Ritter, former Parliamentary Counsel.

- Questions concerning Members' insurance coverage were raised at a December 21, 1989 meeting of the Members' Services Committee. Mr. Clegg provided Members with a briefing document on the issue that listed litigation cases involving Members that were publicly known and discussed "legal assistance for M.L.A.s." In that document, Mr. Clegg writes:

> With respect to matters arising outside the House the issue is very different. Liability for a civil wrong **such as defamation** that is made outside the House is not covered by parliamentary privilege. Members' protection of absolute immunity only extends to proceedings in Parliament or "in the House." **However, legal liability might come within the scope of coverage provided by Government, if the act or omission could reasonably be viewed as covering within the normal function of an M.L.A.** Members and staff of the Legislative Assembly benefit from this coverage in the same way that public servants are covered while fulfilling their duties of employment, unless the act was a deliberate attempt to harm, unauthorized or beyond the normal scope of the duties. Because of the nature of a Member's position as an independent elected official and not an employee, the scope of "normal function" may be a little more difficult to determine and would have to be handled case by case. However, it would seem that normal and reasonable acts are presently covered. The coverage extends to legal representation and indemnity for damages. [emphasis added]

> An unusual or deliberately harmful act by a Member would not be covered. When the House is dissolved the Members cease to be Members, and would not be covered. Also, during the course of a Legislature a Member may participate in activities which are clearly not part of the official duties of an M.L.A. such as party and party promotional activities. These would not be covered by the Crown.

During the December 21 meeting, Mr. Wickman, M.L.A. for Edmonton-Whitemud (now M.L.A. for Edmonton-Rutherford) moved a motion to have Parliamentary Counsel develop a set of expanded guidelines that would clarify when a Member was acting as a Member. That motion was defeated. There has been some suggestion in media reports that the motion related to liability coverage for Members and that it was defeated, meaning that Members chose at that time not to be covered for personal liability. Based on my review of the *Alberta Hansard* transcript and the Minutes from that meeting, I believe the motion related solely to developing some guidelines to clarify when an M.L.A. is acting within the scope of his or her duties and when the Member is not.

- Parliamentary Counsel and Risk Management continued to discuss wording and aspects of the insurance coverage between September 1989 and June 1990. In a June 5, 1990 memorandum to Mr. Whitehouse in Risk Management, Mr. Clegg writes:

> The Risk Management Fund operates under the authority of section 76.1 of the Financial Administration Act and participants in the Fund are listed as including departments and Provincial agencies and the Legislative Assembly Office, etc. Subsection 11 also permits the Treasury Board to make regulations respecting participants. However, the Act does not provide any specific definition as to who in the participant organizations are to be covered, obviously employees are covered, but Members of the Legislative Assembly not being employees in any sense of the word, might not actually be covered by the Fund. You explained to me that you have a document which governs the operation of the Fund which specifically refers to coverage of Members and this therefore shows an intent that the Fund should cover M.L.A.s.
>
> However, we agreed that it was advisable for a Treasury Board regulation to be issued which would clearly specify M.L.A.s as participants because that is the authority which the Act provides for such definition. You agreed to look into the matter and to arrange for Treasury Board to be asked to pass the appropriate

> regulation so that M.L.A.s are clearly covered. We discussed the need, not only to ensure that they receive payment, but to ensure that the payment is authorized by an enactment (which would include a regulation) so that to avoid the risk of an allegation that it was an improper receipt of money by a Member which might jeopardize his seat. For this reason it is necessary to give the most formal recognition of their entitlement to receive payment.

- Mr. Whitehouse responded to Mr. Clegg's June 5, 1990 memorandum on June 8, 1990. Mr. Whitehouse advises that "we are proceeding with a request for Treasury Board approval to amend regulations applicable to Section 76.1, Financial Administration Act specifically identifying members of the Legislative Assembly as eligible for coverage." His memorandum further comments on separate coverage for Ministers who may or may not be carrying out "duties of Members" with respect to general liability coverage. Mr. Clegg agreed that further protection for Ministers was required (memorandum dated June 27, 1990). Mr. Clegg further comments "… the concern is not only to make sure that the Member is covered and receives payment but that it is demonstrably **his legal right to do so**. This removes the risk that a Member either in the capacity of M.L.A. or as Cabinet Minister might be accused of receiving a benefit from the Crown that was not demonstrably his legal right to receive." [emphasis added]

- The Members' Services Orders were consolidated in 1992 (Order No. MSC 7/92, effective November 1, 1992, signed by Speaker David Carter and approved as to form by Mr. Ritter). The relevant new wording for the Members' Group Plans Order (RMSC 1992, c. M-4) read:

> 9(1) Members shall be provided general liability coverage related to the performance of their duties as Members.
>
> (2) Costs incurred pursuant to subsection (1) shall be paid by the Legislative Assembly on behalf of Members.

- On February 22, 1993, Treasury Board Regulation 01/93 was approved. The Regulation is attached as Appendix 10. The Regulation amends the Alberta Risk Management Fund Regulation by adding "members of the Executive Council of Alberta" and "members of the Legislative Assembly of Alberta" as participants. It added the following after section 3(2):

> 3(3) Pursuant to section 76.1(10)(b) of the Act, members of, directors of, employees of and volunteers for participants under subsection (2) and for participants under section 76.1(10)(a) of the Act are prescribed to be participants

while acting within the scope of their duties, whether receiving compensation or not.

- On April 5, 1994, a memorandum was sent by the Deputy Provincial Treasurer to a list of individuals, including the Clerk of the Legislative Assembly, regarding Risk Management and Insurance. The purpose of the memorandum was to advise departmental officials that "Consistent with the Government of Alberta's intention of have individual departments and agencies more accountable and responsible for their financial administration, Alberta Treasury's business plan includes a goal of increasing the accountability of departments and agencies for risks of loss and reduced cost of administration." It appears from records provided to me that individual departments subsequently started receiving invoices for insurance premiums in the 1995-96 fiscal year. From April 1, 1996, "general liability" coverage has been listed on the invoice submitted to Legislative Assembly by Alberta Risk Management and Insurance.

- On March 13, 1996, Treasury Board Regulation 01/96 was approved, being the Alberta Risk Management Fund Amendment Regulation. The relevant parts of the regulation state:

> 2(1) The Provincial Treasurer may enter into an agreement or make other arrangements with a participant, except a member of the Legislative Assembly or a member of the Executive Council, to provide to the participant services respecting risk management and to indemnify the participant against loss arising out of:
>
> (a) liability imposed by law because of bodily injury or property damage resulting from an accident or occurrence or an error or omission,
>
> (b) loss of or damage to property, and
>
> (c) other exposures or risks.
>
> 2(2) An agreement entered into or an arrangement made under subsection (1) may contain such terms and conditions as the Provincial Treasurer considers appropriate and, without restricting the generality of the foregoing, may provide that charges for the risk management will be made by the Provincial Treasurer.
>
> 2(3) The charges referred to in subsection 2 shall be set on the basis of historic loss experience and risk, of both the

participant and the Fund, and shall include additional charges for any risk management services provided.

3(2) Pursuant to section 76.1(10)(b) of the Act, the following are prescribed to be participants:

(e) Members of the Executive Council of Alberta

(f) Members of the Legislative Assembly of Alberta

3(3) Pursuant to section 76.1(1)(b) of the Act, members of, directors of, officers gf, employees of and volunteers for participants under subsection (2) and for participants under section 76.1(10)(a) of the Act are prescribed to be participants while acting within the scope of their duties, whether receiving compensation or not.

4(1) In addition to those amounts set out in section 76.1(7) of the Act, the following shall be paid into the Fund:

(d) amounts charged for the provision of risk management services;

4(2) Pursuant to section 76.1(11)(c) of the Act, this regulation requires the following money to be paid out of the Fund pursuant to section 76.1(8)(c) of the Act:

(c) expenditures incurred to provide risk management services;

(d) the money required to indemnify participants under classes (e) & (f) of section (3)(2) pursuant to Schedule 1 attached.

- On August 14, 1996, Treasury Board Regulation 04/96 was signed. That regulation amended the Alberta Risk Management Fund Amendment Regulation as follows:

Section 3(2) is amended by deleting the following:

(e) members of the Executive Council of Alberta; and

- Schedule 1 to the Risk Management Fund Amendment Regulation (01/96) states that "The Participant(s) described below shall be indemnified in accordance with the wordings contained herein." "Participants" include "Members of the Executive

Council of Alberta and Members of the Legislative Assembly of Alberta." Additional relevant clauses state:

3. Agency Clause:

   For the purpose of transactions of loss control, loss settlement, annual review, coverage, control or arbitration, the Risk Management and Insurance Division (RMI) of Alberta Treasury is the representative of the named participant(s).

4. Limit of Liability:

   $35,000,000 each accident or occurrence

6. Coverage:

   All sums resulting from liability imposed upon the participant(s) by law, or for which the participant(s) is legally obligated, for loss or damage (including damages for care and loss of services) caused by an occurrence, because of:

   (A) Bodily injury and personal injury

      2. Personal injury arising out of false arrest, humiliation, mental anguish, mental injury, shock, malicious prosecution, wrongful detention or imprisonment**, libel, slander, defamation of character**, invasion of privacy, wrongful eviction or wrongful entry, discrimination and any other legal action alleging the foregoing by any other name. [emphasis added]

8. Special Provisions and Definitions of the Coverage:

   (A) With respect to coverage's provided, RMI will:

      (1) Serve the participant(s), upon notice of bodily injury, personal injury or property damage, by investigation and by such

negotiations or settlement of any resulting claims as may be deemed expedient.

(2) Defend, in the name of and on behalf of the participant(s), suits which may be instituted against them alleging bodily injury, personal injury or damage to property, based on negligence and demanding damages on account thereof, even if such suit is groundless, false or fraudulent.

(3) Pay costs associated with the defence, and reasonable related expenses, including immediate medical relief.

(B) All coverage's, terms and conditions are subject to interpretation by RMI Division after consultation with the participant(s).

(C) The protection afforded shall apply to any action brought against any of the participants by any other participant, in the same manner as though each were separately covered.

(D) The unqualified word "participant" shall include any current or former Member, while acting within the scope of his or her duties as a Member.

(E) The word "occurrence" as used herein shall mean an accident or a happening or an event, including a continuous or repeated exposure to conditions, which is not deliberately or intentionally caused by the participant(s).

9. General Conditions of this Coverage:

(A) The named participant(s) shall give to RMI as soon as practicable on discovery, such particulars as are available of any claim and shall forward to RMI as soon as practicable every written letter, document or advice from or on behalf of the claimant.

This condition shall not apply, however, where authority has been granted by Risk Management

and Insurance to the participant(s) for claims settlement.

(B) Except as has been specifically agreed in writing with RMI, the participant(s) shall not voluntarily assume any liability or settle any claim except at his own cost, nor shall the participant(s) interfere in any negotiations for settlement or in any legal proceeding: but whenever requested by Risk Management and Insurance, the participant(s) shall aid in securing information, evidence and the attendance of any witness, and shall co-operate with RMI, except in a pecuniary way, in the defence of any action or proceeding or in the prosecution of any appeal.

(C) RMI shall be subrogated to the extent of any payment under this coverage to all rights of recovery of the participant(s) against any person or organization, and the participant(s) shall execute all papers required and shall co-operate with RMI to secure such rights; however, the protection granted under this coverage shall not be prejudiced in the event that RMI is unable to subrogate against the participant(s) or against any person or organization in respect of which the participant(s) has assumed liability under any contract or agreement.

- The *Members' Guide*, prepared by the Legislative Assembly Office and provided to all M.L.A.s, includes a brief section on insurance coverage for Members, although it does not specifically detail the coverage provided on behalf of Members.

- Documents provided to me show that since 1997, there have been discussions between the Legislative Assembly Office and Risk Management and Insurance regarding a Memorandum of Understanding to deal with the issue of insurance coverage for Members of the Legislative Assembly. There is no indication in the materials I have received that a final Memorandum of Understanding has been agreed to by both parties.

THE CLAIM BY STOCKWELL DAY

Background of Legal Action

A Statement of Claim against Mr. Day was issued by the Court of Queen's Bench of Alberta, Judicial District of Calgary, on June 10, 1999. The Statement of Claim was served on Mr. Day on or about June 16, 1999. Briefly, the Statement of Claim alleges that Mr. Day defamed the Plaintiff in a letter that Mr. Day wrote to the Red Deer Advocate. The letter was dated April 7, 1999 and was written on Legislative Assembly letterhead that listed Mr. Day's Legislature and constituency office addresses. The letter was signed by "Stockwell Day, M.L.A. Red Deer-North." The content of the letter dealt with the Plaintiff's legal defence of a client who was charged with a number of counts under the *Criminal Code*, including possession of child pornography. Mr. Day's legal counsel served a Statement of Defence on July 15, 1999.

Actions Relating to Involvement of Risk Management and Insurance

Mr. Day said that shortly after receiving the Statement of Claim, he contacted Hon. David Hancock, Q.C., Minister of Justice and Attorney General. Mr. Day asked whether there was insurance coverage for Members for such legal actions. Mr. Day said that Mr. Hancock indicated he would check with his department and let Mr. Day know. Mr. Day said that he did not contact Risk Management and Insurance and that he was not at that time aware of the coverage provided on behalf of Members.

Mr. Hancock's testimony supports Mr. Day's recollection regarding the timing of the question put to Mr. Hancock. Mr. Hancock adds that he did not contact Risk Management on Mr. Day's behalf, nor did he ask his officials to secure a favourable ruling for Mr. Day with respect to whether or not coverage would be provided to Mr. Day.

Mr. Whitehouse, Director, Risk Management and Insurance Division, advised that no forms were submitted to Risk Management relating to this claim. Alberta Justice provided Risk Management with a copy of the Statement of Claim and a copy of the letter that was the subject of the lawsuit. Mr. Whitehouse said it was not unusual for no claim or form to be submitted. He said he felt that Risk Management had all the information it required to make a decision on coverage.

Dr. McNeil testified that the Legislative Assembly Office became aware of the insurance claim as a result of newspaper articles and inquiries his office made to Risk Management. The Legislative Assembly Office was not advised by Risk Management of the claim nor did Justice advise the Clerk of the claim.

Mr. Rae, Assistant Deputy Minister, Civil Law Division, Alberta Justice, said that Alberta Justice received a copy of the Statement of Claim via fax from the Court House in Calgary. He said Justice routinely receives copies of court documents that involve or may involve the Crown or Members of the Legislative Assembly. Separately from any discussions between Mr. Day and Mr. Hancock, Alberta Justice (Mr. Rae and his staff in the Civil Law Division) initiated inquiries with Risk Management and Insurance to determine whether Mr. Day would be covered for legal costs.

Mr. Rae gave evidence that there were discussions between Risk Management and Alberta Justice regarding the applicability of Risk Management coverage for this particular case. Alberta Justice provided Risk Management with a legal opinion on the matter.

Mr. Rae also gave evidence that Justice staff met with Mr. Hancock and advised him that it was their legal opinion that the lawsuit against Mr. Day fell within the scope of the insurance coverage.

Mr. Whitehouse said that he was never approached by Mr. Day regarding coverage. Mr. Whitehouse confirms the evidence of Mr. Rae that discussions occurred between Risk Management and Alberta Justice.

Mr. Whitehouse, in his Statutory Declaration, says "I, Rich Whitehouse, made the decision that coverage was provided." A document on the Risk Management file specifically noted the fact that the letter that is the subject of the lawsuit was written on Mr. Day's M.L.A. letterhead and was sent to a newspaper that publishes in Mr. Day's constituency. Those factors were considered by Risk Management in its decision regarding whether or not the actions of Mr. Day fell within "scope of duties" within the meaning of Treasury Board Regulation 01/93, section 3(3). According to Mr. Rae, Risk Management specifically asked whether Mr. Day believed he was acting as an M.L.A. when he wrote the letter. Mr. Rae raised that concern with the Minister during their meeting and, according to Mr. Rae, Mr. Hancock said that Mr. Day told him that he believed he was acting as an M.L.A. in writing the letter.

Mr. Whitehouse testified that Mr. Day has never spoken directly to him or anyone else in Risk Management regarding this claim and no one from Mr. Day's office has spoken with anyone within Risk Management on this issue.

Mr. Day's Deputy Minister, Peter Kruselnicki, and his Executive Assistant, Terrence Kowalchuk, have both declared that they did not approach Risk Management on Mr. Day's behalf nor did they approach Risk Management on their own initiative to discuss this specific claim. [As a result of *Freedom of Information and Protection of Privacy Act* requests, there have been discussions between the Deputy Minister and Risk Management with respect to responding to those requests.]

A letter from Mr. Day's legal counsel, Mr. Gerald Chipeur, confirms Mr. Rae's testimony that it was Mr. Rae who notified Mr. Chipeur that Risk Management would cover Mr. Day's legal expenses. Mr. Day testified that he believes he learned about the Risk Management coverage from his counsel, Mr. Chipeur. Alberta Justice approved the appointment of Mr. Chipeur as legal counsel for Mr. Day and Justice now has responsibility for reviewing all legal bills.

By memorandum dated September 15, 1999, Mr. Day asked Mr. Hancock to assume Ministerial responsibility for any decisions arising from or relating to the Risk

Management file. A copy of that memorandum is attached to Mr. Day's Statutory Declaration. Responsibility for all decisions on this claim was transferred to Alberta Justice on that date.

Legal Opinion Provided to the Ethics Commissioner

Insurance law is a specialized area of law. Therefore, I sought outside legal counsel to assist me in reviewing the Risk Management and Insurance coverage. The counsel I retained is David R. Syme, Q.C., with the firm Brownlee Fryett. A copy of the entire legal opinion may be obtained from my office upon request. Mr. Syme gave the following opinion:

> What is meant by the term "general liability"?
>
> The Manual contains a resume of coverage's. For example, the first type of coverage described in the Manual is Property coverage. A general description of what is involved in Property coverage is described in section 2.2 of the Manual and then the specifics of coverage under the Property coverage are set out in section 2.2.1 pages 1-13. "General liability" is a type of coverage provided and it is described in a general sense in section 2.4 of the Manual with the specifics of the coverage being set out in section 24.1 pages 1-12. The purpose of general liability coverage is to provide protection against claims made against a participant by a third party arising from damages allegedly sustained to that third party resulting from the acts of the participant.
>
> The action brought by Mr. Goddard against Mr. Day in the Statement of Claim is obviously a cause of action based upon the tort (i.e. a civil wrong) of defamation.
>
> Is there coverage for defamation pursuant to the provisions of the program? Liability coverage is provided and, as previously stated, one must refer to the specific wording of schedule 1 of the Regulation in order to determine the provisions of that coverage. Clause 6(A) in schedule 1 states as follows:
>
> > "6. COVERAGE:
> >
> > All sums resulting from liability imposed upon the participant(s) by law, or for which the participant(s) is legally obligated, for loss or damage (including damages for care and loss of services) caused by an occurrence, because of:
> >
> > (A) BODILY INJURY AND PERSONAL INJURY:

…

2) Personal injury arising out of false arrest, humiliation, mental anguish, mental injury, shock, malicious prosecution, wrongful detention or imprisonment, **libel, slander, defamation of character,** invasion of privacy, wrongful eviction or wrongful entry, discrimination, **and any other legal action alleging the foregoing by any other name."**

Accordingly, RMI will indemnify members of the Legislative Assembly of Alberta, in accordance with the wordings contained in schedule 1, against all sums the member is legally obligated to pay resulting from his libel, slander or defamation of a third party. As a member of the Legislative Assembly of Alberta, Mr. Day qualifies as a "participant" within the meaning of the coverage provided. Although section 2(1) of Regulation 01/96 appears to exclude members of the Legislative Assembly from indemnification with respect to liability imposed by law because of bodily injury or property damage, since defamation falls under the heading "personal injury", the exclusion referred to in section 2(1) does not apply.

Having concluded that the program provides coverage for actions framed in defamation brought against members of the Legislative Assembly, one must next determine if there are any qualifications on the entitlement to indemnification or any exclusions that would preclude the participant's reliance upon the coverage provided.

A review of the exclusions set out in clause 7 of schedule 1 confirms that there are no exclusions that are applicable to these circumstances.

However, pursuant to the provisions of clause 3(3) of Regulation 01/96 and clause 8(D) of schedule 1, indemnification to a participant is only available in the event that the participant was acting within the scope of his or her duties as a member at the time of the occurrence which becomes the subject matter of the action against the member. It is only logical that the coverage provided by the program would be in relation to potential exposures in performing one's duties in a representative capacity and not as a private individual.
…

The entitlement to indemnification will only arise if there is a settlement of the action involving a payment of damages to Mr. Goddard or a judgment following trial that is unfavourable to Mr.

Day. In the latter instance where there is a trial, the trial Judge will make findings of fact relative to the issues raised by the pleadings. Mr. Day's public status at the time of the alleged defamatory statements has been brought into issue by the pleadings in the action and the trial Judge will have to make a finding of fact in this regard. If the trial Judge determined that Mr. Day did defame Mr. Goddard but that he did so while acting in the course of his duties as an MLA then this qualification on entitlement to indemnification pursuant to the coverage provided by the program will not come into play. If on the other hand, the trial Judge determined that Mr. Day did defame Mr. Goddard and that he was not acting in the course of his duties as an MLA then the qualification to indemnification would be triggered and Mr. Day would not be entitled to rely upon the program for payment of the damages awarded against him. [emphasis added]

Furthermore, there is no entitlement to indemnification if it is determined that the participant deliberately or intentionally caused the result for which damages are awarded against him (clause 8(E) of schedule 1). That is, if it is found that Mr. Day intentionally defamed Mr. Goddard then Mr. Day would not be entitled to indemnification under the insurance program. While the Statement of Claim alleges that Mr. Day intentionally and knowingly ascribed words to Mr. Goddard maliciously or recklessly (i.e. paragraphs 10 and 21 of the Statement of Claim), the Statement of Defence denies any intentional infliction of damage (paragraph 13 of the Statement of Defence). **Again, these are issues of fact to be determined by the trial Judge and those findings of fact will affect the entitlement to indemnification in the same manner as discussed above with respect to the issue of whether or not Mr. Day was acting within the scope of his duties as a Member. [emphasis added]**
…

Although the same qualifications applicable to indemnification also apply to the entitlement to a defence, as the facts necessary for that determination have not yet been established, a preliminary decision must be made in this regard. This decision is reserved to RMI pursuant to clause 8(B) of schedule 1 which states that all coverage's, terms and conditions are subject to interpretation by RMI division after consultation with the participant. Given that Mr. Day was a member of the Legislative Assembly at the time of the alleged defamatory acts and given that coverage under the Fund is provided for acts of defamation, it would seem a reasonable decision to provide defence costs to Mr. Day regarding Mr. Goddard's action when the facts pertaining to the matters qualifying Mr. Day's entitlement to coverage are in dispute and, as yet, undetermined.

As noted in my News Release setting out the parameters of this investigation, issues surrounding the lawsuit itself would not be reviewed. As Mr. Syme points out, there are matters relating to this insurance coverage that will only b**e determined as a result of a settlement or trial of the lawsuit itself.**

FINDINGS OF FACT

Sections 2 and 3 of the Conflicts of Interest Act

I will deal with the allegations relating to sections 2 (taking part in a decision to further a private interest) and 3 (use of influence to further a private interest) together.

No Part Taken in Any Decision

There is no indication that Mr. Day has made any decisions as Minister responsible for the Risk Management and Insurance Division regarding his own claim. The Statutory Declaration by Mr. Nowicki, Deputy Minister, Executive Council, indicates that no decisions were requested of Cabinet on this issue. Mr. Day did advise Cabinet of the status of the lawsuit but otherwise, according to Mr. Nowicki's testimony, no other discussions on this claim took place in Cabinet.

The evidence is that Mr. Day did not personally contact anyone in his department to seek to have his claim covered by Risk Management. There is evidence that he took steps -- albeit after the matter was fully before the public -- to pass responsibility for decision making to another Minister, as required by section 2(4) of the Act.

A question which must be asked is whether a staff member of the Minister's own department would be influenced or feel pressure to rule in favour of the Minister even without the Minister requesting any special treatment or contacting the staff member. I put that question to Mr. Whitehouse. He strongly denied that he felt any influence and he said the decision that coverage applied was made by him on his independent judgment and that he stood by that decision. I was impressed with Mr. Whitehouse's testimony and found him to be a credible witness.

"Private Interest"

Even if Mr. Day had taken part in the decision, in order for a breach to have occurred under any one of the sections of the *Conflicts of Interest Act*, the Member must act to further or seek to further a "private interest."

Section 1(1)(g) lists a number of things that do not constitute a "private interest." That section states:

1(1) In this Act,

(g) "private interest" does not include the following:

(i) an interest in a matter

(A) that is of general application,
(B) that affects a person as one of a broad class of the public, or
(C) that concerns the remuneration and benefits of a Member;

(ii) an interest that is trivial;

(iii) an interest of a Member relating to publicly-traded securities in the Member's blind trust.

My investigation relative to "private interest" centred on whether the Risk Management and Insurance program was a matter of "general application." If it is, then it is not a "private interest" and receipt of the benefit is not a conflict of interest. Subsection 1(1)(g)(i)(C) may also have application in this case as the insurance coverage may be considered to be a benefit to Members under this section; however, I will deal firstly with the question of whether the insurance coverage is a matter of general application.

There is coverage under the Risk Management and Insurance program and it applies to Members of the Legislative Assembly, among others. I am concerned by the apparent confusion surrounding the program as it applies to M.L.A.s and the lack of information readily available to persons covered.

Several persons interviewed confirmed that there have been no recent cases involving M.L.A.s being sued for defamation. Neither Risk Management nor Alberta Justice officials could recall any Member ever raising the possibility of coverage with them relating to a specific lawsuit. The lack of enquiries is certainly a factor in the confusion surrounding the program. That is to say, the issue simply has not arise very often.

During the course of my investigation, I asked Mr. Sapers, M.L.A. for Edmonton-Glenora, about his experiences in seeking coverage in the Spring of 1996. He advised that he made verbal inquiries of the Speaker's office regarding the role played by Parliamentary Counsel or Alberta Justice when an M.L.A. is sued. He said he was told that there a Member should retain private counsel and he did so. Certainly remarks made at the Members' Services Committee meetings in 1989 would seem to indicate that the two Parliamentary Counsel were not certain of the application of the Risk Management and Insurance coverage as it related to litigation claims.

It would seem to me, however, that if Members were debating "legal aid costs" for MLAs in 1989, some documentation setting out an explanation of the Risk Management program ought to have been created and ought to be readily available for both administration and Members so that the process for making claims was known. I would expect that at the very least, some documentation would exist within the Legislative Assembly Office that clearly outlined for Members the process to be followed when lawsuits are filed. Instead, Members are left to contact the appropriate source themselves but as occurred in Mr. Sapers' case, the appropriate source is not known to the Member. The Legislative Assembly Office pays premiums for insurance coverage on behalf of Members and yet has no role to play relative to claims -- including providing simple advice on where claims or questions should be addressed.

It is my belief that lack of information has contributed to inconsistent responses to Members' inquiries regarding coverage. For example, it does not appear that Alberta Justice was directly advised of the lawsuit against Mr. Sapers when it was filed with the Court. When news of the lawsuit was made public, it does not appear that anyone acted to determine whether there was coverage that could be provided to him.

Nevertheless, I am satisfied that the program is one of general application.

Since the program is one of general application, there is no "private interest" in this case. Having made the determination that the program has general application, I do not need to address whether it is also a matter "that concerns the remuneration and benefits of a Member" under section 1(1)(g)(i)(C).

I am satisfied with the actions taken by the Provincial Treasurer in removing himself from the decision-making role pursuant to section 2(4) of the *Conflicts of Interest Act*.

As noted in Mr. Syme's legal opinion, the decisions by Risk Management to date are reasonable in light of the terms of the program.

CONCLUSION

It is my decision that Mr. Day has not breached sections 2 or 3 of the *Conflicts of Interest Act*.

I have concerns -- and I expect the public would share these concerns -- about the appropriateness of government employees making decisions on politicians' legal claims. I believe the public may perceive that public servants are subject to influence -- real or perceived -- and that no politician's claim would ever be denied. It may be that some structure needs to be put in place to ensure independence and transparency when a Member seeks coverage under the program.

On the other hand, I am also concerned about the prospect of M.L.A.s going to the public or to the private sector to set up legal defence funds or to find "sponsors" for their legal defence. A lawsuit is a daunting prospect. Anyone defending a lawsuit is vulnerable. I would be very concerned about M.L.A.s having to seek public or business contributions in order to defend themselves. I believe that contributions to a "legal defence fund" are presently prohibited by section 7 of the *Conflicts of Interest Act*. But even if they were not, acceptance of such gifts or benefits would raise serious questions of conflicts of interest in my mind.

I simply raise the question of whether it is more in the public interest to enable M.L.A.s to speak their minds with some degree of freedom (with respect to their elected responsibilities) without them having to privately raise funds, thereby possibly becoming indebted to private interests, in order to defend themselves. Members currently have the legal right to make claims through the Risk Management and Insurance program and, so long as Members meet the qualifications for coverage, that may be the most appropriate mechanism for handling such legal claims. As Mr. Syme noted, the questions relating to "scope of duties" may be left to a trial Judge for final determination.

I make no recommendation in this regard but raise this issue as a concern that Members may wish to address in whatever forum they choose.

I would suggest that material setting out the extent of the coverage provided on behalf of Members be developed and distributed to all Members. I would recommend that a contact be specifically noted for any questions relating to coverage.

All of which is respectfully submitted.

Robert C. Clark
Ethics Commissioner
November 15, 1999