



**OFFICE OF THE CONFLICT OF INTEREST COMMISSIONER
PROVINCE OF NEW BRUNSWICK**

**REPORT TO THE SPEAKER
OF THE
LEGISLATIVE ASSEMBLY OF NEW BRUNSWICK
OF THE
INVESTIGATION**

**BY THE HON. STUART G. STRATTON, Q.C.
CONFLICT OF INTEREST COMMISSIONER**

**INTO ALLEGATIONS BY MR. BERNARD RICHARD, THE MLA
FOR SHEDIAC-CAP-PELÉ AND THEN LEADER OF THE OFFICIAL
OPPOSITION, OF A POSSIBLE VIOLATION
OF THE *MEMBERS' CONFLICT OF INTEREST ACT*
BY MR. MICHAEL (TANKER) MALLEY,
THE MLA FOR MIRAMICHI-BAY DU VIN**

JUNE 5, 2003

I. REQUEST FOR INVESTIGATION

By letter dated August 8, 2001, Mr. Bernard Richard, the MLA for Shediac-Cap-Pelé and then Leader of the Official Opposition, (Mr. Richard), wrote to me alleging a possible violation of the *Members' Conflict of Interest Act*, (the Act), by the Miramichi-Bay du Vin PC Riding Association, (the Riding Association), acting as agent for Mr. Michael (Tanker) Malley, (Mr. Malley), the MLA for Miramichi-Bay du Vin.

More specifically, Mr. Richard requested me to review the circumstances surrounding a solicitation letter signed by Mr. Fernand N. Gibbs, Q.C., (Mr. Gibbs), the then Secretary of the Riding Association, which was sent to a number of companies and individuals, seeking donations for the Riding Association and support for their candidate, linking the payment of these donations to opportunities for future potential government support. A copy of the solicitation letter in question, dated July 17, 2000, (sic), was attached to Mr. Richard's affidavit filed with me pursuant to section 36 of the Act.

The letter soliciting funds for the Riding Association is written on the letterhead of the Progressive Conservative Party of New Brunswick with a typed-in subheading of "The Miramichi-Bay du Vin Riding, 70 Princess St., Miramichi, N.B., E1N 2K8, Tel: (506) 773-9334". The letter begins with the heading "Re: Contributions to the above mentioned association". The text of the letter is as follows:

"We wish to inform you that upon reviewing the public accounts list of the provincial government as of March 30th 2000, we see that you had done business with our provincial government by way of contract or by receiving a grant or financial help.

In order for you to continue receiving further contracts or financial help from the said government, it is necessary to keep it in power. To achieve that it is also necessary to support our Progressive Conservative candidate financially and otherwise, in the next provincial election which is fast coming.

Therefore the Executive Committee of the said association would greatly appreciate a contribution from you at this time. . . .

P.S./ A cheque may be mailed to the above mentioned address."

A copy of the solicitation letter quoted above is attached to this Report as Schedule "A". The return

address referred to in the letter is the home address of Ms. Tilley Gordon, the President of the Miramichi-Bay du Vin PC Riding Association, (Ms. Gordon).

In his affidavit in support of his request for an investigation, Mr. Richard includes copies of the transcripts of interviews with Ms. Lisa Keenan, aired on CBC Radio (Saint John) on July 30, 2001, and CBC Radio (Fredericton) on August 1, 2001. Ms. Keenan is President of the Progressive Conservative Party of New Brunswick. Also attached to Mr. Richard's affidavit are newspaper articles which appeared in the *Miramichi Leader* on August 2 and 7, 2001, together with an undated letter signed by Ms. Keenan, the text of which is as follows:

“It has come to my attention that a letter has been sent to you by Mr. Fernand Gibbs, Secretary of the riding association of Miramichi Bay du Vin. That letter was inappropriate and was not approved by the Progressive Conservative Party of New Brunswick. Please disregard that letter completely.

Any contracts with, or other benefits from the provincial government are in no way conditional upon or given as rewards for, political contributions. Any suggestions otherwise, are untrue, and contrary to the fundraising policies of the Progressive Conservative Party of New Brunswick. As a party, we abide by the Political Process Financing Act of New Brunswick.

Any contributions that may have resulted from this letter will be returned immediately.”

A copy of Ms. Keenan's letter quoted above is attached to this report as Schedule “B”.

It is Mr. Richard's contention in his letter requesting an investigation that the solicitation letter signed by Mr. Gibbs and quoted above implies that the receipt of donations will result in influence being used to favorably further such donors' private interests. In this respect, sections 4 and 6 of the Act may be in issue. These sections provide:

4 A member shall not make a decision or participate in making a decision in the execution of his or her office if the member knows or reasonably should know that in the making of the decision there is the opportunity to further the member's private interest or to further another person's private interest.

6 A member shall not use his or her office to seek to influence a decision made by another person so as to further the member's private interest or to further another

person's private interest.

In addition to his request for an investigation by this office, Mr. Richard advised me that he had lodged a complaint with the Supervisor of Political Financing alleging a breach of the provisions of the *Political Process Financing Act*. He further advised me that he had alleged that the solicitation letter constitutes a breach of the *Criminal Code* and that he had therefore also referred the matter to Chief Superintendent Payne of the RCMP for investigation.

Upon receipt of the latter information, I wrote Mr. Richard pointing out that since the matter referred to the Commission had also been referred to the RCMP for a criminal investigation, section 39 of the Act would have application. That section reads as follows:

39 If the Commissioner, when conducting an investigation, discovers that the subject matter of the investigation is being investigated by police or that a charge has been laid, the Commissioner shall suspend the investigation until the police investigation or charge has been finally disposed of, and shall report the suspension to the Speaker.

Mr. Richard acknowledged and agreed that in the circumstances I was required to suspend any investigation of the matter by this office until such time as the police investigation was finally disposed of. As mandated by the Act, I reported the suspension of our investigation to the Speaker of the Legislative Assembly.

On March 26, 2003, the media reported that the RCMP would not be laying any criminal charges in this matter. By letter dated March 28, 2003, Mr. Richard advised this office that the investigation by the RCMP had been completed and requested me to revive his original request for an investigation. I accordingly commenced a review of the circumstances surrounding the allegations contained in his affidavit.

II. INVESTIGATION

Upon receipt of Mr. Richard's letter of March 28, 2003, I immediately wrote Mr. Malley and sent a copy of my letter to Ms. Gordon. With that letter, dated March 31, 2003, I enclosed a copy of Mr.

Richard's letter to me of March 28 together with a copy of Mr. Richard's affidavit originally filed with me in August of 2001, as well as a copy of an abstract of a CBC interview with Mr. Gibbs of March 27, 2003. In that interview Mr. Gibbs is alleged to have said that he was satisfied from talking to the secretary in the Member's constituency office that Mr. Malley was aware that the solicitation letter was written and did not have any objections, but Mr. Gibbs could not say whether Mr. Malley had read the letter himself.

On April 3, 2003, I wrote Ms. Gordon a separate letter in which I referred to the copy of my original letter to Mr. Malley requesting her to write to me her recollection of the events surrounding the Gibbs letter. On that same day, i.e. April 3, 2003, I also wrote to Mr. Gibbs asking him to write me his recollection of the events surrounding the solicitation letter here in question.

I received a response from Mr. Gibbs on April 15, 2003, requesting a reply from me by fax. In my fax to Mr. Gibbs I accepted his offer to provide an affidavit setting out his recollection of the facts surrounding the issue of the solicitation letter.

Further, on April 15, 2003, not having received any response from Mr. Malley to my letter to him of March 31, 2003, I wrote him again to request his response to the allegations made by Mr. Richard. In that letter I also advised Mr. Malley of the substance of what had been written to me by Mr. Gibbs, namely, that he [Mr. Malley] had been present at three meeting of the Riding Association "where the matter of the [solicitation] letter was discussed"; and that the solicitation letter "was in [Mr.] Malley's office for some days when Mr. Malley was in and out of the office and I am satisfied that he was fully aware of the work being done and that he has (sic) read the letter."

On April 25, 2003, I received a further letter from Mr. Gibbs enclosing his affidavit sworn April 19, 2003. On that same day I wrote again to Mr. Malley as follows:

"Further to my letters to you of March 31 and April 15, I wish to inform you that I have now received an affidavit from Mr. Fernand N. Gibbs, Q.C. in which he swears that you were present at the three meetings that preceded his contentious letter dated July 17, 2000, (sic), written to various individuals and businesses in your area.

Mr. Gibbs further swears that you submitted the list of names of those individuals to whom he was to write, and that he gave this list to the student secretary in your riding association office to obtain postal codes and prepare envelopes. Mr. Gibbs further swears that he specifically suggested to the secretary that she obtain your permission to do this work, that the letter was in your office for some days and that “he [was] satisfied that [you were] fully aware of the work being done and that [you] had read the letter.”

I am most anxious to receive your response to Mr. Gibbs’ correspondence and his affidavit. I must also remind you that under a recent amendment to the *Members’ Conflict of Interest Act* all MLA’s are required to “respond promptly and completely” to the Commissioner’s enquiries. While I can appreciate that you may be busy with constituency affairs, in view of the time now elapsed since I first wrote to you, the matter is now urgent. I would accordingly appreciate your early attention and reply to my enquiries.”

On April 29, 2003, not having received any response from Ms. Gordon, who is alleged to have read and approved of the solicitation letter before it was mailed, I wrote her again requesting her co-operation. To this date, I have not heard from her.

On May 6, 2003, I received a letter dated April 27, 2003, signed by Mr. Malley finally acknowledging receipt of my correspondence of March 31, 2003. This letter purports to seek clarification and is in the following terms:

“I acknowledge receipt of your letter of March 31 regarding the “assertions” of Mr. Richard. Thank you for offering me with an opportunity to respond.

However, in order to make a meaningful response I require some clarification. Is Mr. Richard alleging a violation of the Members’ Conflict of Interest Act by me? If so, what specific section of the Act is he alleging that I violated? If Mr. Richard is making an allegation against my riding association, or some member thereof, I fail to understand how the Act would be involved at all.

Can you please obtain clarification of these matters for me so I can better assist you in your review.”

I immediately replied to Mr. Malley by my letter of May 6, 2003, which I now quote in its entirety:

“This will acknowledge receipt here this afternoon of your letter dated April 27 with respect to the above noted matter.

In response to the clarification requested in your letter, it is my understanding that Mr. Richard is alleging that the solicitation letter dated July 17, 2000 (sic) breached section 6 of the *Members' Conflict of Interest Act*.

Specifically, as stated in his affidavit, a copy of which I sent to you with my letter of March 31 last, Mr. Richard in paragraph 14 states the following:

“Fernand N. Gibbs, in his capacity as Secretary of the Progressive Conservative Riding Association for Miramichi-Bay du Vin, does create a reasonable perception in the minds of those who received the letter that he is acting as an agent or representative for the member in that riding and by the precise language used in the solicitation letter clearly makes the impression that receipt of donations will result in influence being used to favorably further such donors' private interest.”

Rightly or wrongly, I perceive your letter to me of April 27 to be an attempt to delay your response to the allegations made by Mr. Richard. If this is correct, you will leave me no alternative but to turn my private investigation into an inquiry and use my subpoena powers to compel all who are involved in this matter to appear for a public hearing.”

On May 13, 2003, I received a further letter from Mr. Malley. The text of which follows:

“Thank you for your letter of May 6th.

Now that I have clarification, I hope the following comments will adequately respond to any concerns you may have.

It has been made clear repeatedly, but I shall reiterate here, the circumstances surrounding Mr. Gibbs' unfortunate letter:

1. I am given to understand that the text of this letter did not have the approval of the Miramichi-Bay du Vin PC Riding Association. While I can not speak directly to that matter, certainly the subsequent actions of the Association tend to support that understanding, as well as subsequent statements made to me and others by members of that association.
2. Certainly, to speak to something of which I do have direct knowledge, Mr. Gibbs' letter was not reviewed by me nor was it approved by me. Indeed, I see no-one alleging that it was. They instead make vague allegations as to appearances.

3. To the extent Mr. Gibbs put himself forward as an agent of the Progressive Conservative Riding Association of Miramichi-Bay du Vin, it seems clear to me that he exceeded his reasonable authority to do so.
4. Certainly in no way was Mr. Gibbs my agent in sending this letter.

Beyond this, I am not certain what more useful information I have for you. Mr. Richard says that certain “perceptions are created in the minds of those who received the letter.” Your letter asks me to comment as to what perceptions a letter which I did not draft or approve created in other people. I cannot really speak to that with any more accuracy than Mr. Richard can. My understanding is that to the extent an incorrect perception may have arisen, the Association took clear action to attempt to rectify that misunderstanding.

Again, however, these are not matters of which I can speak definitively. What perceptions are must be a matter for others to judge. I can only deal with the facts as to my own personal knowledge, as I have done above.

If you feel these statements require further clarification or [if] you have further questions for me, I shall be happy to meet with you at a mutually convenient time.”

I replied to Mr. Malley’s letter the same day that I received it. The text of that letter is as follows:

“This will acknowledge receipt here this morning of your letter dated May 9, 2003.

I begin this reply by stating that I unreservedly deny your assertion that “it has been made clear repeatedly ... the circumstances surrounding Mr. Gibbs’ unfortunate letter”. Indeed, I have had to write you numerous letters to obtain any response from you. This is clearly contrary to the statutory requirement contained in the *Members’ Conflict of Interest Act* that Members shall reply “promptly and completely” to all enquiries by the Commissioner.

I would add further that, except for Mr. Gibbs, it is my opinion that there has been a conspiracy of silence surrounding my enquiries to those involved in this matter. I truly expected better of you Mr. Malley.

In any event, as I previously reported to you, Mr. Gibbs filed an affidavit with me stating his opinion in this matter. I enclose a copy for your perusal. In these circumstances, I would appreciate receiving an affidavit or statutory declaration from you setting forth your response to Mr. Gibbs’ assertions. Specifically, did you know about, read or approve the contentious solicitation letter when it was in your office before it was mailed out to the various companies and individuals named on a list you are alleged to have prepared?

I would appreciate receiving your immediate response to this request because, as I had not heard from you, I retained outside counsel to act in respect of an inquiry under the *Inquiries Act*, a procedure that may now not be necessary.

You may find it convenient to deliver the suggested affidavit or statutory declaration to me personally at which time I will be pleased to discuss the matter with you before submitting my report to the Speaker.”

During the course of my investigation, I was informed that Ms. Christine O’Reilly was the student secretary employed in Mr. Malley’s office at the time the solicitation letter here in question was processed. I attempted to telephone Ms. O’Reilly on three occasions. On the latter two occasions I left detailed messages on her voice mail and asked for her co-operation by responding to my inquiries. Not having received any response from her, I wrote her May 8, 2003, as follows:

“As you know, I have telephoned you and left messages on your voice mail urgently requesting you to respond to my enquiries concerning your knowledge of the circumstances surrounding the Gibb’s solicitation letter of June 17, [2000]. My information is that you were the secretary for Mr. Malley at the relevant time.

Also, as I tried to explain in my messages, under the *Members’ Conflict of Interest Act* it is my duty to investigate any complaints made against a Member, in this case, Mr. Malley, and then report the results of my investigation to the Speaker of the Legislative Assembly. As this particular complaint has been outstanding for so long pending the conclusion of the criminal investigation, I am most anxious to bring it to a conclusion without further delay.

I must advise you that if you fail to respond to my enquiries I must inform the Speaker of that fact and this could result in embarrassment to you. Hence this letter to again request you to write or phone me to give me your recollection of the facts surrounding the letter here in question.

May I please hear from you as soon as possible and thus avoid the consequences of your failure to respond.”

On May 26, 2003, I received a written reply from Ms. O’Reilly in which she alleges that she was not Mr. Malley’s secretary at the relevant time. As she put it, “I was just a 19 year old, summer student working as a Receptionist there for my summer employment at the time.” She adds that “since I worked under the Civil Service I solemnly swore that I would not disclose or make known any matter that comes to my knowledge due to my employment at Mr. Malley’s office.” Ms. O’Reilly

concluded her letter by stating “I feel that my previous student summer employment should not be involved in this conflict, as I was not the secretary and did not type the letter in question at the relevant time.”

I must record that I do not find Ms. O’Reilly’s letter to be particularly helpful in resolving the issues that have arisen in this complaint. If some other person was the “student secretary” at the relevant time, she could, for example, have given me his or her name so that I could obtain a statement from that person. Moreover, in Mr. Gibbs’ sworn affidavit he did not allege that the student secretary typed the solicitation letter, but only looked up postal codes and prepared envelopes. This notwithstanding, although her letter does not materially assist me in my investigation, I express my appreciation to her for at least responding to my request for information. In any event, I wrote Ms. O’Reilly again May 27, 2003, requesting her to advise me whether she had any specific recollection as to whether Mr. Malley knew about, read or approved of the Gibbs letter seeking financial contributions. At the date of concluding this Report, I have not received a reply from Ms. O’Reilly.

On Friday, May 30, 2003, Mr. Malley came in to my office and personally delivered to me an affidavit that he had sworn on May 29, 2003. In this affidavit Mr. Malley deposed that he had indeed been present at the three meetings of the Riding Executive that preceded the writing of the solicitation letter here in issue. He further deposed that he was aware “that a letter writing campaign was being considered by the Executive of the Progressive Conservative Association with a view of obtaining financial support for the Party.” He agrees that a list of those companies and individuals who were to be canvassed was prepared from the public accounts. He then swears as follows:

“I have reviewed the Affidavit of Fernand N. Gibbs, Q.C., dated April 19, 2003 and I categorically deny the allegation contained in paragraph 6 of the said Affidavit where he stated “I am satisfied that he was fully aware of the work being done and that he read the letter.” I at no time prior to reading the letter in the local newspaper, read the letter as written by Mr. Gibbs.

When a letter writing campaign for funds was proposed, I did not have any objection and I understood that Mr. Gibbs, a retired Judge and former Federal P.C. candidate, would write the letter as the Secretary of the Association. I did not have objection to Mr. Gibbs writing the letter, as I felt that with his background and knowledge, he

would appropriately word the letter within acceptable limits.

I did not have any prior knowledge of the wording of Mr. Gibbs' letter and would not have approved of the wording of the said solicitation letter."

III. FINDINGS

A. Jurisdiction

I would first record that although the issue has not been raised before me, I have given consideration to the question of my jurisdiction to investigate and report with respect to this particular complaint at this particular time. The Act does not contain any specific provisions dealing with cases such as the present one where an election has been called before my investigation and Report have been concluded. In this respect, it is a well recognized principle that when the Legislative Assembly is dissolved, the Members cease to be Members. This notwithstanding I have concluded that I do have the necessary jurisdiction to conclude my investigation and make my Report to the Speaker. I have come to this conclusion because the alleged misconduct in this case occurred while Mr. Malley was a Member and he was also a Member when I received the two requests to enquire into his alleged misconduct. In this respect, I refer as well to section 2 of the Act which provides that a re-elected Member of the Assembly is deemed to have been a Member for the period between dissolution of the House and re-election. Thus, if Mr. Malley is re-elected there can be no question as to my jurisdiction.

B. Involvement of Member

As I see it, the first issue to be resolved in this case is whether Mr. Malley knew about, read or approved of the contentious solicitation letter when it was in his office before it was mailed out to the various companies and individuals named on a list he is alleged to have prepared. As to this, two different versions of the events surrounding the letter have been given to me. Mr. Gibbs, the author of the letter, swears in his affidavit as follows:

"That on the 11th day of February 2001 at the monthly meeting of the said Association, the local M.L.A. Michael Malley produced a list of names with respect to the matter referred to in the opening paragraph of this affidavit. It was then moved seconded and unanimously adopted that the secretary was mandated to write a letter to all those named on the list, asking for a contribution to be made to the local

Association in order to build a local fund to support our Candidate in the next election campaign. . . .

That at the meeting of the Association on the 21st of May 2001 the matter of writing the letter was brought up again. . . .

That on June 5th, 2001 at the monthly meeting of the association, Mr. Michael Malley M.L.A. again submitted a list of the same names for the very purpose of writing the letter to raise funds for the election of the local Candidate in the next Provincial election. The local M.L.A. Mr. Malley was present at the three meetings where the matter of the letter was discussed. . . .

That I, as secretary of the Association attended at Mr. Malley's riding office and gave the list of names to the student secretary in order for her to go to the post office and obtain the postal code for each name on the list and she was also asked to prepare the envelopes. Before she did any work, I specifically suggested to her that she [obtain] Mr. Malley's permission to do the said work. She said she would talk to Mr. Malley about it and I am satisfied that she did.

That I then proceeded to prepare the letter. It was made up of three short paragraphs. I showed it to some members of the executive and to the President of the Association, they all approved it. I took it to the said student secretary along with the necessary postal stamps, to have it properly addressed and mailed out. The letter was in [Mr.] Malley's office for some days when Mr. Malley was in and out of the office and I am satisfied that he was fully aware of the work being done and that he has read the letter."

As noted above, on May 30, 2003, Mr. Malley appeared at my office and personally delivered his affidavit in response to what had been alleged by Mr. Gibbs. In that affidavit, Mr. Malley categorically denied Mr. Gibbs' assertion that he had read the solicitation letter while it was in his office. In fact, he swore that "at no time prior to reading the letter in the local newspaper, [had he] read the letter as written by Mr. Gibbs." The other two persons who may have had helpful evidence to assist in resolving the factual issues, i.e. Ms. Gordon, the President of the Riding Association, and Ms. O'Reilly, the student secretary, have either failed to respond to my correspondence or failed to provide helpful information. This being so, I do not have evidence supporting the sworn affidavits of Mr. Gibbs or Mr. Malley.

Upon consideration of the information made available to me, I accept the sworn testimony of Mr.

Gibbs that Mr. Malley was present at the three meetings of the Miramichi-Bay du Vin PC Riding Association which preceded the issue of the contentious solicitation letter and that it was Mr. Malley who supplied the list of names to whom the letter was to be sent. I further find that Mr. Gibbs' statement that he was sure that Mr. Malley read the letter while it was in his office is insufficient direct evidence that he did in fact do so. In the face of Mr. Malley's affidavit denying any direct involvement with the solicitation letter, I must conclude that he, as an honourable Member of the Legislative Assembly, did not know of the contents of the solicitation letter until it was brought to his attention after the event. Having determined Mr. Malley's limited involvement with the preparation of the solicitation letter, I now turn my attention to the specific provisions of the Act which may be in issue.

C. Section 4

Section 4 of the Act, which is a provision applying to all Members, defines what constitutes a conflict of interest. For ease of reference, I quote that section again:

4 A member shall not make a decision or participate in making a decision in the execution of his or her office if the member knows or reasonably should know that in the making of the decision there is the opportunity to further the member's private interest or to further another person's private interest.

It will be noted that the section makes reference to decisions made by a Member "if the Member knows or reasonably should know" there is an opportunity to further the Member's private interest. The term "private interest" is defined in the definition section of the Act as follows:

"private interest" does not include an interest in a matter
(a) that is of general public application,
(b) that affects a person as one of a broad class of persons, or
(c) that concerns the remuneration and benefits of a member or an officer or employee of the Assembly;

It will be observed that the term "private interest" is defined in the negative, or, in other words, it defines what are not private interests. I discussed this term in two previous reports to the Speaker (*Weir - Blaney, 2000* and *Richard - Volpé, 2001*). In any event, a question arises under this section

as to whether Mr. Malley participated in making a decision in the execution of his office which he knew created an opportunity to further his or another person's "private interest".

While I believe it to have been established that Mr. Malley participated in the decision that a solicitation letter should be prepared and dispatched to businesses and individuals in his riding, there has been no evidence supporting a conclusion that the Gibbs letter would further a "private interest" as opposed to a "political interest". Further clarification of the terms "private interest" and "political interest" can be found in the following analysis of section 6.

D. Section 6

The term "private interest" is also included in section 6 of the Act and is the section relied upon by the complainant in this present matter. For ease of reference I quote again the provisions of section 6 of the Act:

6 A member shall not use his or her office to seek to influence a decision made by another person so as to further the member's private interest or to further another person's private interest.

In the *Richard - Volpé* case referred to above, I recorded my opinion that the term "private interest", as used in the *Members' Conflict of Interest Act*, did not include a "political interest", or, more specifically, financial support for the desire for election or re-election to political office. I also recorded the opinion that in order to constitute a breach of the Act under section 6 a "private interest" rather than a "political interest" must be involved. The raising of election funds in these cases was, in my view, the furtherance of a "political interest" rather than a "private interest".

With these decisions as background, I turn now to a consideration of the principal allegations contained in Mr. Richard's affidavit which initiated this investigation. These are as follows:

"The solicitation letter indicates that in order to continue receiving further contracts or financial help from the government it is necessary to keep the government in power and to support the local Progressive Conservative candidate financially.

Fernand N. Gibbs, in his capacity as Secretary of the Progressive Conservative Riding Association for Miramichi-Bay du Vin, does create a reasonable perception

in the minds of those who received the letter that he is acting as an agent or representative for the member in that riding and by the precise language used in the solicitation letter clearly makes the impression that receipt of donations will result in influence being used to favourably further such donors' private interest.

At the very least, the solicitation letter leaves the reasonable perception that a decision not to donate could affect the potential for further receipt of contracts or financial help from the government.”

As I understand Mr. Richard's affidavit, he is first alleging that in writing the solicitation letter here in question, Mr. Gibbs created the perception that he was acting as agent or representative for Mr. Malley. But on a close reading of the letter, it could be argued that because the letter does not specifically refer to Mr. Malley, funds were being sought only for the Riding Association. Moreover, it is to be noted that the letter makes mention of “our Progressive Conservative candidate” but there is nothing in the letter that states directly that financial support is being sought for or on behalf of Mr. Malley, the sitting Member.

Secondly, Mr. Richard alleges, in support of his contention that the letter breached section 6 of the Act, that the solicitation letter “makes the impression that receipt of donations will result in influence being used to favourably further such donors private interest.” The use of the quoted words abstracted from Mr. Richard's affidavit indicates to me that Mr. Richard is alleging that the solicitation letter suggests the possible furtherance of the donor's private interest, rather than the private interest of Mr. Malley. But the *Members' Conflict of Interest Act* does not authorize me to consider “impressions” any more than it does with “apparent conflicts of interest”. As well, Mr. Richard is alleging that donations will result in influence being used, meaning the use of influence will not take place until after the donations have been received. However, section 6 requires evidence that a Member sought to influence another person. To my knowledge, there is no evidence that Mr. Malley used or sought to use his influence to further the private interests of the donors or anyone else.

The contents of the solicitation letter here in issue received wide attention by the media and the

public. Most reactions to it were negative. Indeed, the President of the Progressive Conservative Party of New Brunswick wrote that the letter was “inappropriate” and that it was disapproved by her party. Clearly, in my view, the language used in the solicitation letter was, to say the least, inappropriate. This notwithstanding, I would repeat what I have written on former occasions that appropriate fundraising is an important and legitimate part of the political process and that the raising of funds for political purposes does not generally constitute a breach of the Act as there is not usually a furtherance of a private interest. What is involved is a “political interest”. Moreover, in the present case there was no direct evidence before me that the Member was directly involved with the preparation or dispatch of the solicitation letter.

In addition, I would also point out that this case was different from the two decisions previously referred to. This was not a case involving fundraising by a Cabinet Minister, seeking donations from those with whom his department did substantial business. Rather it was an attempt by a Riding Association to raise funds for a candidate, whose influence would not generally be equal to that of a Member of the Executive Council. In any event, it has become increasingly clear that the solicitation of political funding is not an activity regulated by the *Members’ Conflict of Interest Act*.

I conclude with respect to sections 4 and 6 of the Act that neither has application in this case. I find rather that the issue here involved was a “political interest” rather than a “private interest”. What occurred in this case is an issue to be decided by the electorate, rather than under the Act.

E. Subsection 37(2.1)

The latter findings, unfortunately, do not completely dispose of this matter because it is my opinion that my decision herein was knowingly unreasonably delayed by Mr. Malley’s failure to comply with his statutory duty to respond promptly and completely to my enquiries as required by subsection 37(2.1) of the Act which provides as follows:

When the Commissioner conducts an investigation or an inquiry under this section, the member who is the subject of the request under section 36 shall respond promptly and completely to all of the Commissioner’s questions and requests for information.

While I acknowledge that when an election is called, it is obviously a busy time for Members seeking

re-election, but this does not, in my opinion, excuse the Member from complying with the provisions of the Act. To state the obvious, the Commissioner does not make the law but merely administers it. Indeed, it was the Members of the Legislative Assembly who enacted the *Members' Conflict of Interest Act* and proclaimed it into effect as of May 1, 2000. Under the Act I have the duty, responsibility and obligation to adhere to the mandatory provisions of the Act and to enforce them. This I have done in this case as an independent officer of the New Brunswick Legislative Assembly.

In reviewing the responses to my enquiries of him, Mr. Malley appears to be under the impression that I should have known all about his position in this matter, presumably from reading newspaper reports and listening to radio broadcasts. But my duty under the Act is to carry out my own independent investigation of complaints and to determine the facts from those directly involved, not from media reports. Moreover, if I were to rely on media reports in this case, I would be obliged to note that Mr. Malley has reportedly given several different explanations as to his personal involvement in this matter.

Our file indicates that I first wrote Mr. Malley March 31, 2003, advising him that Mr. Richard had renewed his complaint, but it was not until May 30, 2003, almost two months later, that he delivered his affidavit, which was his first substantial response to my repeated requests for his co-operation in my investigation of this matter. The letters from Mr. Malley dated April 27 and May 9, 2003, referred to herein, although signed by Mr. Malley, were not, in my opinion, authored by him nor does he appear to have any clear recollection concerning their content. In addition, both letters, in my opinion, were an attempt to delay my investigation as they failed to respond completely to my enquiries.

When he spoke with me on May 30, Mr. Malley apologized profusely for his delay in responding promptly and completely to my correspondence. In response to my request of him as to the reason for his delay, Mr. Malley blamed his delay on having been given misguided advice. It is my opinion, however, that "misguided advice" is not a satisfactory answer for the delay which occurred in this case.

Prior to the completion of my Report to the Speaker, it appeared to me that my Report might adversely affect Mr. Malley. Because of this I wrote Mr. Malley on May 23, 2003, as follows:

“Pursuant to subsection 40(2) of the *Members’ Conflict of Interest Act*, because my report to the Speaker may adversely affect you, I wish to provide you with the opportunity to make representations to me before I complete my report.

Currently, as a result of your delay in responding to my requests for information, I am considering concluding my report with the recommendation that you be reprimanded for your inaction in this matter.

I am prepared to hear such representations from you on or before June 2, 2003. If I do not hear from you by that date, I will complete my report and file it with the Speaker as soon as it is translated.”

The only representations made by Mr. Malley to me following my letter to him of May 23, took place at our meeting of May 30. As noted above, Mr. Malley apologized and blamed his delayed response on “misguided advice”.

IV. CONCLUSION

I find that Mr. Malley was not directly involved in the preparation of the solicitation letter. I accept his sworn affidavit that he did not know of the contents of the solicitation letter until it was brought to his attention after the event.

I further find that neither section 4 nor section 6 of the Act has been breached, as the solicitation of political donation, in this case, involves a “political interest” rather than a “private interest”.

Finally, I find that Mr. Malley’s failure to comply with his statutory duty to respond promptly and completely to my enquiries supports the inference that he was involved in a conspiracy of silence that has surrounded my investigation of this complaint. I find that Mr. Malley’s conduct in this regard constitutes a serious breach of subsection 37(2.1), an important provision of the *Members’ Conflict of Interest Act*. If the Commissioner is to carry out the duties assigned to him by the Act, he must have the prompt and complete co-operation of the Member complained against. For this

reason, even though there is no express provision in the Act which provides for a penalty for breach of subsection 37(2.1), should Mr. Malley be re-elected, I would recommend that he be reprimanded.

The Honourable Stuart G. Stratton, Q.C.
Conflict of Interest Commissioner

June 5, 2003