MANITOBA LEGISLATIVE ASSEMBLY

OFFICE OF THE ETHICS COMMISSIONER

REPORT OF

JEFFREY SCHNOOR, K.C.

ETHICS COMMISSIONER

Re:	**Heather Stefanson**	**Former Member of the Legislative Assembly for Tuxedo**
	Cliff Cullen	**Former Member of the Legislative Assembly for Spruce Woods**
	Jeff Wharton	**Member of the Legislative Assembly for Red River North**
	Derek Johnson	**Member of the Legislative Assembly for Interlake-Gimli**

May 21, 2025

TABLE OF CONTENTS

EXECUTIVE SUMMARY

On October 3, 2023, Manitobans voted in a Provincial general election. The sitting government of the Progressive Conservative party was defeated and a new government of the New Democratic Party was sworn in on October 18, 2023. Cabinet ministers of the defeated government remained in office between these two dates (the "transition period").

This report deals with allegations that, during the transition period, four Cabinet ministers of the defeated government contravened *The Conflict of Interest (Members and Ministers) Act* (the "Act") by attempting to approve a license application made by Sio Silica Corp. ("Sio Silica"), under *The Environment Act.* The requests for an inquiry were made by Mike Moyes, MLA for Riel.

The four Cabinet members are Heather Stefanson, then Premier and MLA for Tuxedo, Cliff Cullen, then Deputy Premier, Minister of Finance and MLA for Spruce Woods, Jeff Wharton, then Minister of Economic Development, Investment and Trade and MLA for Red River North, and Derek Johnson, then Minister of Agriculture and MLA for Interlake-Gimli. Although the PC government was defeated in the election, Ms. Stefanson, Mr. Wharton and Mr. Johnson were re-elected to the Legislative Assembly. Mr. Cullen did not run for re-election.

The Act came into force on October 4, 2023. It applies to everyone who was a Cabinet minister on and after that date, whether or not they were a member of the Legislative Assembly. The Act therefore applies to each of the four former Cabinet ministers who are the subject of this report.

Ms. Stefanson resigned her seat as member for Tuxedo on May 6, 2024. In accordance with the Act, however, Mr. Moyes asked that the investigation continue.

All four of the requests for inquiry are based on essentially the same facts and allegations. Therefore, to avoid repetition, they are being addressed in a single report. However, separate findings will be made in respect of each of the four respondents.

I conducted a lengthy and detailed investigation. Nineteen individuals, including the respondent Cabinet ministers, were interviewed under oath, sometimes more than once. Hundreds of pages of emails, briefing notes, text messages and phone records were reviewed.

As a result of the investigation, I made the following findings:

1) During the transition period, the outgoing PC government was required to adhere to the caretaker convention.

2) The caretaker convention is a constitutional principle that requires the incumbent government to act with restraint once an election is called, until the will of the voters is known and the new government is sworn in. In particular, restraint should be exercised in

controversial matters and where a decision would unreasonably bind the freedom of decision-making of an incoming government. The incumbent government should continue to handle routine matters and day-to-day administration but must refrain from significant decisions, actions or expenditures subject to a few exceptions such as, for example, if the matter is urgent.

3) All four respondents were present when a presentation was made to Cabinet in August 2023 about the caretaker convention. All four respondents confirmed during their interviews that they understood the requirements of the caretaker convention.

4) Sio Silica submitted a proposal to mine silica sand, known as the Vivian Sands Extraction Project (the "Project") in 2021. The Project required a Class 2 license under *The Environment Act*. Class 2 licenses are issued by a public servant – the Director of the Environmental Approvals Branch (the "Director") – within the Department of Environment and Climate (the "Department"), as it was then known. A decision by the Director can be appealed to the Minister.

5) The Project was very controversial and attracted considerable opposition. As permitted by *The Environment Act*, the Project license application was referred to the Clean Environment Commission ("CEC") for review. The CEC's report was submitted on June 22, 2023. The decision of whether to issue the Project license to Sio Silica then remained with the Director.

6) At no time during the transition period or otherwise did the Director approve the Project license.

7) The evidence indicated that the decision about whether to issue the Project license did not need to be made during the transition period.

8) Prior to the election, members of the PC government had shown an interest in issuing the Project license and had instructed the Department to take steps that would allow the Director to consider the license approval.

9) Immediately following the election, members of the PC government continued to be interested in issuing the Project license. Mr. Cullen took the lead and continued to be in contact with both the Department and representatives of Sio Silica with the goal of having the Project license issued during the transition period. Mr. Cullen was in regular contact with Ms. Stefanson.

10) On October 5, 2023, Mr. Cullen was advised by the deputy minister of the Department that, in light of the caretaker convention, the Department would not issue the Project license until the incoming NDP government was briefed. Upon learning this, Mr. Cullen

told Kathryn Gerrard, the Clerk of the Executive Council, that the government had an interest in seeing the license issued before the NDP government was sworn in and he directed Ms. Gerrard to ask the NDP transition team whether it would be comfortable with the outgoing government doing so.

11) Mr. Cullen also asked Ms. Gerrard to look into options in the event the Director did not or would not issue the Project license during the transition period and the incoming NDP government would not agree with the license being issued during the transition period.

12) Representatives of the incoming NDP government were meeting daily with Ms. Gerrard and other senior staff during the transition period to be briefed on pending issues and other matters relating to the transition. The NDP transition team was led by Mark Rosner, Chief of Staff to the Premier-Designate, Wab Kinew.

13) On October 6, 2023, at the regularly scheduled morning transition team meeting, Mr. Rosner was briefed on the Sio Silica matter. The recollections of the participants at this meeting differed greatly. However, Mr. Rosner was left with the impression that the Project license approval was moving forward, possibly as soon as that day. Mr. Rosner objected, noting the caretaker convention and the significance of the decision. As a result, Ms. Gerrard offered, and Mr. Rosner agreed, to a further briefing that afternoon.

14) The afternoon briefing included the deputy minister of the Department, as well as Mr. Wharton's deputy minister. Mr. Rosner said that he would take the information back to the incoming Premier to confirm the incoming NDP government's position. He told Ms. Gerrard that the outgoing government was not to issue the Project license until he was able to speak with Mr. Kinew.

15) Following that meeting, both deputy ministers believed that, although a definitive direction had not yet been given, it was clear there was no interest from the incoming NDP government in the license being issued during the transition period. Mr. Wharton's deputy minister told Mr. Wharton that the incoming NDP government was not consenting to issuing the Project license during the transition period. Ms. Gerrard told Mr. Cullen the same thing. She also cautioned Mr. Cullen that the outgoing PC government could not proceed with issuing the Project license without the NDP's agreement, due to the caretaker convention.

16) In response to Mr. Cullen's request for the Department to find "options", the Department sent Ms. Gerrard an email later in the afternoon of October 6 that provided information about section 11.1 of *The Environment Act* (the "Section 11.1 Email"). That section allows the Minister of the Department to review and make decisions about Class 2 licenses in the

place of the Director. The Section 11.1 Email noted that the section had never been used before.

17) At the next transition team meeting on October 10, 2023, the Tuesday morning after the Thanksgiving long weekend, Mr. Rosner confirmed that the incoming NDP government opposed the outgoing PC government issuing the Project license during the transition period. Shortly after that meeting ended, Ms. Gerrard shared this information with Mr. Cullen.

18) Later that afternoon, responding to his previous request for options for the outgoing government to issue the Project license, Ms. Gerrard forwarded the Section 11.1 Email to Mr. Cullen. Shortly after that, Mr. Cullen phoned Ms. Stefanson. In the 42-minute call that followed, Mr. Cullen told Ms. Stefanson that the NDP was opposed to issuing the Project license during the transition period and explained the section 11.1 option to her. He and Ms. Stefanson then agreed that he would share the information about the section 11.1 option with Mr. Wharton. They did so with the intention that he act on that information.

19) On October 12, 2023, Mr. Cullen called Mr. Wharton and told him that the incoming NDP government was opposed to issuing the Project license during the transition period and provided him with details of the section 11.1 process.

20) Mr. Wharton offered to contact Kevin Klein, then the Minister of Environment and Climate, to ask him to approve the Project license. There had previously been discussions that Mr. Klein's First Acting Minister, Rochelle Squires, could provide the approval if Mr. Klein refused and Mr. Wharton also offered to contact her in that event.

21) Mr. Wharton called first Mr. Klein and then Ms. Squires. He told them that they had the power to approve the Project license and asked them to do that. Both refused.

Sections 2 and 3 of the Act, read together, prohibit a member from making a decision or participating in making a decision where they know or ought reasonably to know that there is an opportunity to further their private interests or those of their family or to improperly further the private interests of another person. A private interest does not actually have to be furthered; it is sufficient that there is an opportunity to do so.

Section 5 of the Act prohibits a member from using their position to seek to influence someone else's decision so as to further their private interests or those of their family or improperly further the private interests of another person. The section is breached whether or not the attempt to influence a decision is successful.

In conducting this inquiry, I found no evidence that the respondents were trying to gain nor did they gain a financial benefit for themselves or members of their family. That is, none of the

respondents sought to further their own private interests or the private interests of their family members or had an opportunity to do so.

However, it was obvious that the actions of Ms. Stefanson, Mr. Cullen and Mr. Wharton, had they been successful, would have furthered the private interests of Sio Silica; it would have been able to proceed with its business plans. These ministers clearly knew or ought reasonably to have known that their actions created an opportunity to further the private interests of Sio Silica. Their attempts to influence the decisions of Mr. Klein or Ms. Squires also would have furthered the private interests of Sio Silica. The facts clearly demonstrate that each of Ms. Stefanson, Mr. Cullen and Mr. Wharton, in their official capacities, made a decision and sought to influence someone else's decision that they knew or ought to have known furthered the interests of Sio Silica, in breach of the caretaker convention.

It is important to point out that the ministers' actions, by themselves, would not constitute a breach of the Act. It is commonplace for members of the Legislative Assembly, and especially Cabinet ministers, to take actions that further the interests of others. It is precisely what we expect members and governments to do. Members are elected to make decisions, and their decisions will inevitably further the interests of some people (and sometimes disadvantage others). However, members must not take any of these actions if they will further the interests of others improperly.

By attempting to have the Project License issued in the transition period without the consent of the incoming NDP government, Ms. Stefanson, Mr. Cullen and Mr. Wharton contravened the caretaker convention and thereby acted improperly. As such, Ms. Stefanson, Mr. Cullen and Mr. Wharton breached sections 2, 3 and 5 of the Act.

Although Mr. Johnson was clearly aware of the plan to seek approval of the Project license during the transition period, I found that there was insufficient evidence to demonstrate that he participated in the improper actions. I therefore concluded that he did not contravene the Act.

The Act provides that, when the Ethics Commissioner concludes that the Act has been breached, he may recommend the following penalties:

- the member be reprimanded;
- the member be fined an amount not exceeding $50,000;
- the member's right to sit and vote in the Assembly be suspended for a specified period or until the fulfilment of a condition imposed by the Commissioner;
- the member's seat be declared vacant.

In my view, the penalties are listed in ascending order of severity. The least serious contravention should be penalized with a reprimand. The most serious contravention should result in the

member's seat being vacated. I am also of the view that I can only recommend one of the four penalties for each respondent.

Since Ms. Stefanson and Mr. Cullen are no longer members of the Assembly, only the first two penalties can be recommended with respect to their conduct. All four penalties are available in respect of Mr. Wharton.

A breach of the caretaker convention is a serious matter. It is an affront to the basic democratic principle that a government must have the confidence of the Legislative Assembly and of the electorate when it acts. The caretaker convention stands at the very core of our democracy. The legitimacy of a government depends on the support of the electorate, expressed in elections. A government that loses an election has lost the confidence of the people and has lost the legitimacy to do anything beyond maintaining the status quo until the new government can take office. The exercise of power by an outgoing government to make significant decisions except in the most exceptional circumstances is a serious affront to our democratic institutions and to voters.

The efforts to have the Project license approved by Ms. Stefanson, Mr. Cullen and Mr. Wharton were taken despite their knowledge that voters had rejected the former government and had placed their trust in a new government. All three knew the requirements of the caretaker convention and both Mr. Cullen and Mr. Wharton had been given specific warnings that approving the Project license during the transition period would breach the convention. The exercise of power in a matter of great controversy and with long term implications, even if well motivated, was improper within the meaning of the Act and calls for significant denunciation.

In considering my recommendations as to penalty, I find that as head of government, Ms. Stefanson should bear greater responsibility. Mr. Wharton indicated a willingness to apologize, and I accepted this as a mitigating factor.

I therefore recommend the following penalties:

- Ms. Stefanson – a fine in the amount of $18,000
- Mr. Cullen – a fine in the amount of $12,000
- Mr. Wharton – a fine in the amount of $10,000

The final decision rests with the Legislative Assembly. The Act provides that it must vote to either accept or reject my recommendations. It may not inquire into the matter further or impose any other penalty.

I. Introduction

1. On October 3, 2023, Manitobans voted in a Provincial general election. The sitting government of the Progressive Conservative party was defeated and a new government of the New Democratic Party was sworn in on October 18, 2023. Cabinet ministers of the defeated government remained in office between these two dates, the transition period.

2. *The Conflict of Interest (Members and Ministers) Act*[1] (the "Act") came into force on October 4, 2023. It applies to everyone who was a Cabinet minister on and after that date, whether or not they were a member of the Legislative Assembly. The Act therefore applies to each of the four former Cabinet ministers who are the subject of this report.

3. This report deals with allegations that, during the transition period, four Cabinet ministers of the defeated government contravened the Act by attempting to approve a license application under *The Environment Act* made by Sio Silica Corporation ("Sio Silica").

4. Sio Silica proposed to extract silica sand (also known as quartz) from a major deposit in south-east Manitoba. The proposal, known as the Vivian Sands Extraction Project (the "Project"), was very controversial. I want to be clear at the outset that this report does not address the merits of the Project. Similarly, this report does not judge the conduct of Sio Silica and its officers and directors or the conduct of the public service in considering the application for the Project license under *The Environment Act*. This report deals only with questions within my mandate: whether, in the course of the consideration of Sio Silica's application, the four Cabinet ministers of the outgoing government breached the Act.

[1] *The Conflict of Interest (Members and Ministers) Act*, C.C.S.M. c. C171.

II. Background

5. Before setting out the requests for an inquiry, some background information about the license application and *The Environment Act* is useful. I will also provide a brief explanation of the caretaker convention since it is central to the requests for an inquiry.

(a) The License Application and *The Environment Act*

6. In order to proceed, the Project required a license under *The Environment Act*. That Act sets out three classes of licenses and the Project fell within Class 2. Class 2 licenses are issued by a public servant, the Director of the Environmental Approvals Branch (the "Director"). *The Environment Act* provides that a decision by the Director can be appealed to the minister responsible for that act, at the time, the Minister of Environment and Climate.

7. As permitted by *The Environment Act*, the Project license application was referred to the Clean Environment Commission (the "CEC") for review. The CEC's report was submitted on June 22, 2023.

8. Following the submission of the CEC's report, the decision on whether to issue the Project licence to Sio Silica remained with the Director of the Environmental Approvals Branch. However, section 11.1 of *The Environment Act* allows for an extraordinary procedure after a matter has been considered by the CEC. In that case, the minister has the option to step into the shoes of the Director and directly issue or refuse to issue a Class 2 license. The minister's decision can be appealed to Cabinet. I was advised that this procedure had never been used.

9. Two other aspects of the Project, unrelated to the Project license application, are noteworthy. First, RCT Solutions GmbH ("RCT Solutions"), a German company, had plans to build a manufacturing plant in Manitoba to make solar panels using the silica extracted by Sio Silica. Second, as part of its Project financing, Sio Silica intended to go public on a stock exchange by merging with another company, Pyrophyte Acquisition Corp ("Pyrophyte"). Pyrophyte's website

describes it as "a blank check company . . ., newly incorporated as a Cayman Islands exempted entity for the purpose of effecting a merger, share exchange, asset acquisition, share purchase, reorganization or similar business combination with one or more businesses or entities."

(b) The Caretaker Convention

10. Not all of Canada's constitutional law is contained in its written Constitution. Some rules are unwritten and are known as constitutional conventions. They are binding on governments but are not enforced by the courts.

> By conventions of the constitution, we mean binding rules of constitutional behaviour which are considered to be binding by and upon those who operate the constitution, but which are not enforced by the law courts (although the courts may recognise their existence), nor by the presiding officer in the Houses of Parliament.[2]

11. The caretaker convention is a constitutional practice that governs the conduct of governments while an election is underway and during the transition period from one government to another. The convention holds that, once an election is called, the incumbent government must govern with restraint until the new government is sworn in. The incumbent is a "caretaker", waiting for the voters to decide who has their confidence. The confidence of voters is essential to the legitimacy of a government.

12. Simply put, the caretaker convention allows the incumbent government to continue to handle routine matters and day-to-day administration to ensure that essential public services are maintained. However, the incumbent government must refrain from significant decisions, actions or expenditures. As explained by the federal Privy Council office:

> To the extent possible, however, government activity following the dissolution of Parliament – in matters of policy, expenditure and appointments – should be restricted to matters that are:

[2] G. Marshall and G. Moodie, *Some Problems of the Constitution*, page 29, quoted in A. Heard*, Canadian Constitutional Conventions: The Marriage of Law & Politics* (Oxford University Press Canada, 2014) at page 5.

a. routine, or
b. non-controversial, or
c. urgent and in the public interest, or
d. reversible by a new government without undue cost or disruption, or
e. agreed to by opposition parties (in those cases where consultation is appropriate).[3]

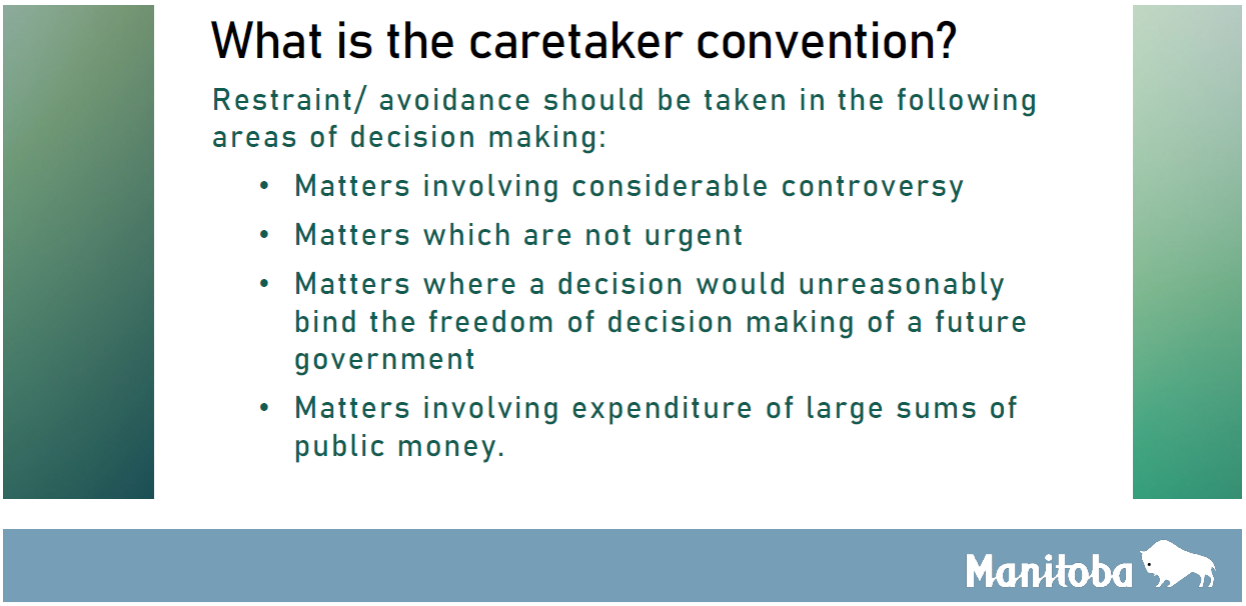
13. The caretaker convention was in effect in Manitoba from the time the Provincial general election was called on September 5, 2023 until the new government was sworn in on October 18, 2023.

14. The caretaker convention was well known within the Government of Manitoba during this time.

15. In anticipation of the election, the Office of the Clerk of the Executive Council (as Cabinet is officially known) prepared a PowerPoint presentation explaining the caretaker convention. This presentation was provided by the Clerk's Office to all deputy ministers on March 17, 2023, to political staff on July 31, 2023, and to Cabinet on August 23, 2023. All Cabinet ministers were reminded by the Clerk's Office that it was their responsibility to review the presentation and to understand its requirements. The presentation was uploaded to the platform on which Cabinet documents are shared.

16. The following slide from the presentation explained the limits of government actions during the caretaker period:

[3] Guidelines on the conduct of Ministers, Ministers of State, exempt staff and public servants during an election - Canada.ca (Government of Canada, Privy Council Office, August 2021)



17. The caretaker convention will be discussed further in the Analysis section of this report.

III. The Requests for Inquiry

18. With that background, I turn now to the requests for an inquiry that are the basis for this report.

19. The Act provides in section 44(1) that a member of the Legislative Assembly may ask the Ethics Commissioner to investigate an alleged contravention of the Act committed by another member:

> **Member may request commissioner's opinion**
>
> 44(1) A member who has reasonable grounds to believe that another member has contravened this Act may request the commissioner to give an opinion respecting the compliance of the other member with this Act.

20. On January 12, 2024, I received two requests for an inquiry from Mike Moyes, the member of the Legislative Assembly for Riel (Mr. Moyes is now a member of Cabinet).

21. The first request related to the conduct of Heather Stefanson. Ms. Stefanson was the member for Tuxedo and, at the relevant time, was the Premier of Manitoba. I set out the request in full, together with its footnotes:

> This complaint is against Heather Stefanson, MLA for Tuxedo, and Leader of the Official Opposition and concerns attempts made by her Ministers to use their position to influence a pending decision of the Manitoba Government regarding the issuance of a license for a silica sand mine in Eastern Manitoba as well as public allegations of a conflict of interest by her former cabinet colleague.
>
> The Manitoba Election was held October 3rd, 2023, after which the Conflict of Interest Act came into effect. While Rochelle Squires and Kevin Klein both lost the election as candidates for MLA for the constituencies of Riel and Kirkfield Park respectively, from the period of October 3 to October 18th they remained members of the Executive Council. Jeff Wharton was returned as MLA and was an outgoing Minister of Economic Development and Trade. Heather Stefanson was returned as MLA in Tuxedo constituency and was outgoing Premier (and later became Leader of the Official Opposition).
>
> Section 1(2)b states the Act applies to a minister once they are sworn in to Executive Council and presumably applies until such time as they are no longer a member of executive council.[1]
>
> Statements by Rochelle Squires and Kevin Klein both affirm that Jeff Wharton requested they each deliver a ministerial directive to the department of Environment and Climate to issue a license to a proponent for a sand mine in Eastern Manitoba during the period between the election and prior to the swearing in of the new Government on October 18. Both publicly state they refused the request. Squires asserts the former First Minister, Heather Stefanson, was aware of these requests.
>
> Squires states on October 12, Jeff Wharton, Minister of Economic Development and Trade called her to make the request. She writes: "He asked me, in my capacity as an acting minister of the environment, to approve the Sio Silica sand mine project. He assured me the project could get green-lighted via a director's order (meaning a bureaucrat could sign off at this stage without it going to cabinet for approval) and all that was required was a ministerial directive to that director to proceed. He then told me it was a project of significant importance to the (defeated) premier, but because of a conflict, she herself couldn't offer that directive."
>
> She later writes: "I knew the minister responsible, former PC MLA Kevin Klein, had also declined approving, hence the reason for my being asked."[2]
>
> Stefanson failed to act to prevent an improper request being made to violate the caretaker convention by a Minister in her Government.
>
> What's more a former colleague of Stefanson's asserts she was not only aware of the improper request made by Wharton but in addition Stefanson would have made that request except for the fact she was in a conflict of interest. This is a serious allegation that merits investigation.

According to the Act a conflict of interest arises when a member exercises an official power that improperly furthers another person's private interests.

It is a foundation of our parliamentary democracy and our vision of responsible government that the Caretaker Convention is operative from the time period of when an election is held and a new Government is sworn into office.

This is a constitutional convention that has been recognized by the courts and many leading experts and authorities on Canada's political and constitutional history.

The basis of the convention stems from the fact that a government must be responsible to the House. With the Assembly dissolved for the purposes of an election the outgoing Government cannot be held to account - and as a result there should only be routine or non-controversial business conducted during the time prior to the swearing in of a new government. The Federal Privy Council has issued guidelines for the implementation of the Caretaker Convention that have been publicly available for many years.[3]

The caretaker convention ensures it is Manitobans who have a say who governs our province through their votes and that our elected representatives are accountable to them.

Simply put, failing to take action to stop members of her cabinet from violating the Caretaker Convention during the transition period is a serious breach of the Act. Violating the caretaker convention to advance the interests of a private company by issuing a license is improper for the purposes of the Act, and wrong, and should be deemed a violation.

I am requesting you investigate this matter with the utmost urgency and vigour. I am also requesting you ensure there is real accountability and consequences for the above noted violations. Given this Act is new it is important that it be demonstrated for all Manitobans that there are serious and severe consequences for intentional and repeated breaches of the Act by people charged with the highest responsibilities in our province.

I look forward to your response.

[1]https://web2.gov.mb.ca/laws/statutes/2021/c02321e.php#
[2]https://www.winnipegfreepress.com/breakingnews/2023/12/28/gradual-then-sudden-corruption
[3]https://www.canada.ca/en/privy-council/services/publications/guidelines-conduct-ministers-state-exempt-staff-public-servants-election.html

22. Ms. Stefanson resigned her seat in the Legislative Assembly on May 6, 2024. The Act provides that the Ethics Commissioner must suspend an inquiry when a member resigns their seat but must resume it if either the member who requested the inquiry or the member who is the subject of the inquiry requests that it be resumed. On May 22, 2024, Mr. Moyes requested that I resume my investigation, and I did so.

23. Mr. Moyes' second request related to Jeff Wharton, the member for Red River North. At the relevant time, Mr. Wharton was the Minister of Economic Development, Investment and Trade ("EDIT"). The request is similar, and I again set it out in full with its footnotes:

This complaint is against Jeff Wharton, MLA for Red River North, and concerns attempts made by him to use his position to influence a pending decision of the Manitoba Government regarding the issuance of a license for a silica sand mine in Eastern Manitoba.

The Manitoba election was held October 3rd, 2023, after which the Conflict of Interest Act came into effect. While Rochelle Squires and Kevin Klein both lost the election as candidates for MLA for the constituencies of Riel and Kirkfield Park respectively, from the period of October 3 to October 18th they remained members of the Executive Council. Jeff Wharton was returned as MLA and was an outgoing Minister of Economic Development and Trade.

Section 1(2)b states the Act applies to a minister once they are sworn in to Executive Council and presumably applies until such time as they are no longer a member of Executive Council.[1]

Statements by Rochelle Squires and Kevin Klein both affirm that Jeff Wharton requested they each deliver a ministerial directive to the Department of Environment and Climate to issue a license to a proponent for a sand mine in Eastern Manitoba during the period between the election and prior to the swearing in of the new Government on October 18. Both publicly state they refused the request. Rochelle Squires assert the former First Minister, Heather Stefanson, was made aware of these requests.

Squires states on October 12, Jeff Wharton, Minister of Economic Development and Trade called her to make the request. She writes: “He asked me, in my capacity as an acting minister of the environment, to approve the Sio Silica sand mine project. He assured me the project could get green-lighted via a director’s order (meaning a bureaucrat could sign off at this stage without it going to cabinet for approval) and all that was required was a ministerial directive to that director to proceed. He then told me it was a project of significant importance to the (defeated) premier, but because of a conflict, she herself couldn’t offer that directive.”

She later stated: “I knew the minister responsible, former PC MLA Kevin Klein, had also declined approving, hence the reason for my being asked.”[2]

Klein publicly stated: "I received a request to approve the project following the election. I strongly declined for three reasons. First, because we lost the election and it would have been inappropriate to approve something like this in the transitional period between governments. Second, because I had serious concerns with this project [and] third, I gave my word to residents that the decision would be made by experts. Now in saying that, I was extremely disappointed this was even proposed in the transition period”[3]

Under the Act a conflict of interest arises when a member exercises an official power that improperly furthers another person’s private interests. It is clear the granting of the license would benefit a private interest.

It is a foundation of our parliamentary democracy and our vision of responsible government that the Caretaker Convention is operative from the time period of when an election is held and a new Government is sworn into office.

This is a constitutional convention that has been recognized by the courts and many leading experts and authorities on Canada’s political and constitutional history.

The basis of the convention stems from the fact that a government must be responsible to the House. With the Assembly dissolved for the purposes of an election the outgoing

> Government cannot be held to account - and as a result there should only be routine or non-controversial business conducted during the time prior to the swearing in of a new government. The Federal Privy Council has issued guidelines for the implementation of the Caretaker Convention that have been publicly available for many years.[4]
>
> The caretaker convention ensures it is Manitobans have a say who governs our province through their votes.
>
> Simply put, requesting Ministers issue a directive to issue a license violated the Caretaker Convention during the transition period. Violating the caretaker convention to advance the interests of a private company by issuing a license is improper for the purposes of the Act, and wrong, and should be deemed a violation.
>
> I am requesting you investigate this matter with the utmost urgency and vigour. I am also requesting you ensure there is real accountability and consequences for the above noted violations. Given this Act is new it is important that it be demonstrated for all Manitobans that there are serious and severe consequences for intentional and repeated breaches of the Act by people charged with the highest responsibilities in our province.
>
> I look forward to your response.
>
> [1]https://web2.gov.mb.ca/laws/statutes/2021/c02321e.php#
> [2]https://www.winnipegfreepress.com/breakingnews/2023/12/28/gradual-then-sudden-corruption
> [3]https://www.cbc.ca/news/canada/manitoba/sio-silica-kinew-pcs-approval-rush-manitoba-1.7069415
> [4]https://www.canada.ca/en/privy-council/services/publications/guidelines-conduct-ministers-state-exempt-staff-public-servants-election.html

24. On May 28, 2024, Mr. Moyes submitted two further requests for an inquiry. Both related to the facts alleged in the requests concerning Ms. Stefanson and Mr. Wharton and were raised because of an email that had come into Mr. Moyes' possession following a request under *The Freedom of Information and Protection of Privacy Act*. The first of the further requests for an inquiry related to Cliff Cullen, the former member for Spruce Woods (he did not run for re-election). At the relevant time, he was the Deputy Premier and the Minister of Finance. The following is the request:

> This complaint is against Cliff Cullen, the former Minister of Finance, and concerns an attempt made by him to use his ministerial position to influence a pending decision of the Manitoba Government regarding the issuance of a license for a silica sand mine in Eastern Manitoba during the caretaker period, after the October 3rd 2023 election but prior to the October 18th 2023 swearing-in of the new government.
>
> New information obtained in a freedom of information response indicates that on or around October 12, 2023, former Minister Cullen requested information from the Department of Environment and Climate Change (ECC) regarding the process for the issuance of a licence for the silica sand mine project. More specifically, the information

shows that the outgoing Clerk of the Executive Council wrote to the Deputy Minister of ECC in an email stating:

> "I understand there has been a request from Finance, EDIT and AG ministers for this information. To respect Ministerial responsibility, it is imperative that any furtherance of this information is provided by your minister to these ministers.
>
> I will continue to state as provided to these Ministers, that we are in care taker convention until the new government is sworn in. [Redacted]."

This email communication is evidence that Minister Cullen was acting in a similar fashion to former

Economic Development, Investment and Trade (EDIT) Minister Jeff Wharton and former Premier Heather Stefanson in their attempt to improperly issue a licence for the silica sand mining project despite it being the caretaker period.

As you know, former PC cabinet ministers stated publicly that Minister Wharton and Premier Stefanson had improperly tried to pressure other ministers to issue a license for the sand mining project during the caretaker period. This new information shows that more Ministers, specifically Cliff Cullen and Derek Johnson, were actively seeking the same information for the same goal – the issuance of a license for the sand mining project during the caretaker period.

In seeking this information, former Minister Cullen breached section 4 of the Conflict of Interest (Members and Ministers) and Related Amendments Act, which reads that:

> "A member must not use or communicate information that is obtained in their position as a member and that is not available to the public to further or seek to further the member's private interests or those of their family or to improperly further or seek to further another person's private interests".

Like former Minister Wharton, former Minister Cullen clearly sought to access this information to benefit private interests of the Sio Silica stakeholders by granting them a licence, in contravention of the Act.

It is a foundation of our parliamentary democracy and our vision of responsible government that the caretaker convention is operative during the period between the conclusion of an election and the swearing-in of a new administration. This constitutional convention has been recognized by the courts and many leading experts and authorities on Canada's political and constitutional history.

The basis of the convention stems from the fact that a government must be responsible to the House. With the Assembly dissolved for the purposes of an election the outgoing Government cannot be held to account - and as a result there should only be routine or non-controversial business conducted during the time prior to the swearing in of a new government. The Federal Privy Council has issued guidelines for the implementation of the Caretaker Convention that have been publicly available for many years.

The caretaker convention ensures it is Manitobans have a say who governs our province through their votes.

Simply put, seeking information in order to determine the manner for a Minister to issue a directive to issue a license for a sand mining project violated the Caretaker Convention

during the transition period. Violating the caretaker convention to advance the interests of a private company by issuing a license is improper for the purposes of the Act, and wrong, and should be deemed a violation.

While Mr. Cullen is no longer a member of the Assembly the information obtained is new, he was a Minister of the Crown and subject to the Act at the time of the alleged violation and as such he should be legitimately viewed as subject to the provisions of the act.

I am requesting you investigate this matter with the utmost urgency and vigour. I am also requesting you ensure there is real accountability and consequences for the above noted violations. Given this Act is new it is important that it be demonstrated for all Manitobans that there are serious and severe consequences for intentional and repeated breaches of the Act by people charged with the highest responsibilities in our province.

[1]https://www.canada.ca/en/privy-council/services/publications/guidelines-conduct-ministersstate-exempt-staff-public-servants-election.html

25. The second of the further requests for an inquiry related to Derek Johnson, the member for Interlake-Gimli. At the relevant time, he was the Minister of Agriculture. The following is the request:

This complaint is against Derek Johnson, the MLA for Interlake-Gimli, and concerns an attempt made by him to use his ministerial position to influence a pending decision of the Manitoba Government regarding the issuance of a license for a silica sand mine in Eastern Manitoba during the caretaker period, after the October 3rd 2023 election but prior to the October 18th 2023 swearing-in of the new government.

New information obtained in a freedom of information response indicates that on or around October 12, 2023, former Minister Johnson requested information from the Department of Environment and Climate Change (ECC) regarding the process for the issuance of a licence for the silica sand mine project. More specifically, the information shows that the outgoing Clerk of the Executive Council wrote to the Deputy Minister of ECC in an email stating:

"I understand there has been a request from Finance, EDIT and AG ministers for this information. To respect Ministerial responsibility, it is imperative that any furtherance of this information is provided by your minister to these ministers.

I will continue to state as provided to these Ministers, that we are in care taker convention until the new government is sworn in. [Redacted]."

This email communication is evidence that Minister Johnson was acting in a similar fashion to former Economic Development, Investment and Trade (EDIT) Minister Jeff Wharton and former Premier Heather Stefanson in their attempt to improperly issue a licence for the silica sand mining project despite it being the caretaker period.

As you know, former PC cabinet ministers stated publicly that Minister Wharton and Premier Stefanson had improperly tried to pressure other ministers to issue a license for the sand mining project during the caretaker period. This new information shows that more

> Ministers, specifically Cliff Cullen and Derek Johnson, were actively seeking the same information for the same goal – the issuance of a license for the sand mining project during the caretaker period.
>
> In seeking this information, Minister Johnson breached section 4 of the Conflict of Interest (Members and Ministers) and Related Amendments Act, which reads that:
>
> "A member must not use or communicate information that is obtained in their position as a member and that is not available to the public to further or seek to further the member's private interests or those of their family or to improperly further or seek to further another person's private interests".
>
> Like Minister Wharton, Minister Johnson clearly sought to access this information to benefit private interests of the Sio Silica stakeholders by granting them a licence, in contravention of the Act.
>
> It is a foundation of our parliamentary democracy and our vision of responsible government that the caretaker convention is operative during the period between the conclusion of an election and the swearing-in of a new administration. This constitutional convention has been recognized by the courts and many leading experts and authorities on Canada's political and constitutional history.
>
> The basis of the convention stems from the fact that a government must be responsible to the House. With the Assembly dissolved for the purposes of an election the outgoing Government cannot be held to account - and as a result there should only be routine or noncontroversial business conducted during the time prior to the swearing in of a new government. The Federal Privy Council has issued guidelines for the implementation of the Caretaker Convention that have been publicly available for many years.1 The caretaker convention ensures it is Manitobans have a say who governs our province through their votes.
>
> Simply put, seeking information in order to determine the manner for a Minister to issue a directive to issue a license for a sand mining project violated the Caretaker Convention during the transition period. Violating the caretaker convention to advance the interests of a private company by issuing a license is improper for the purposes of the Act, and wrong, and should be deemed a violation.
>
> I am requesting you investigate this matter with the utmost urgency and vigour. I am also requesting you ensure there is real accountability and consequences for the above noted violations. Given this Act is new it is important that it be demonstrated for all Manitobans that there are serious and severe consequences for intentional and repeated breaches of the Act by people charged with the highest responsibilities in our province.

26. All four of the requests for an inquiry are based on essentially the same facts and allegations. Accordingly, to avoid repetition, I have decided to address all four requests in a single report. However, at the end, I will make separate findings about each of the four respondents so the Legislative Assembly can consider them individually.

IV. The Inquiry Process

27. I would like to begin by noting that my Office does not have investigative staff. Normally, I carry out investigations and prepare reports to the Legislative Assembly on my own. However, as will soon be apparent, this was an extraordinarily complex investigation. I therefore engaged outside counsel, Sherri Walsh, to assist me; she in turn was assisted by two other members of her firm, Sarah McEachern and Connor Jonsson. Ms. Walsh is eminent counsel with considerable experience in conducting investigations and inquiries and her colleagues also brought considerable knowledge and expertise. I wish to express my sincere gratitude to my legal team for their outstanding assistance and support.

(a) Notice of the Inquiry

28. The Act requires that I give notice of an inquiry to members whose conduct is the subject of the inquiry (the "respondents"):

> **Notice of inquiry**
>
> 46 Before conducting an inquiry, the commissioner must give the member whose conduct is the subject of the inquiry reasonable notice.

29. I provided the required notice to each of the four respondents after I received the requests from Mr. Moyes. In each case, I told the respondents that I would be interviewing them under oath and that, if they wished, they could provide me with a written response to the allegations prior to being interviewed, although they were under no obligation to do so. Their responses will be discussed later in this report.

(b) Scope of the Inquiry

30. Before interviewing them, each respondent was advised of the scope of my inquiry: based on the allegations that were raised in the complaint made against them, I indicated that I would be looking into their conduct with respect to Sio Silica's application for a license under *The Environment Act*, primarily during the time the caretaker convention was in effect, and that I

would be making factual findings as the result of my review. Based on those findings I would decide whether they had breached any or all of sections 2, 3, 4, and 5 of the Act. In making that assessment, I would not be bound by the opinion expressed in the requests for an inquiry as to which sections of the Act were contravened.

31. Sections 2, 3, 4 and 5 of the Act are set out in full and analyzed later in this report.

(c) Interviews and Documentary Disclosure

32. The Act provides that an inquiry can be held in public or in private: s. 47(2). I decided that this inquiry would be conducted in private.

33. I interviewed 19 individuals, including the respondents, between March and November 2024. Some individuals were interviewed more than once. All interviews were conducted in person except for two that were done by videoconference.

34. Each interview was conducted under oath. Witnesses were allowed to be accompanied by legal counsel and some chose to proceed with counsel present.

35. Although all witnesses voluntarily cooperated with my request to meet with them, some asked that I provide them with a subpoena and I did so when requested. As Ethics Commissioner, I have the powers of a commissioner under Part V of *The Manitoba Evidence Act*: s.47(1). These powers include the power to subpoena witnesses to require their attendance and testimony and to require the production of documents.

36. The following is a list of all the individuals I interviewed.

Respondent	Position held at the relevant time
Cliff Cullen	MLA for Spruce Woods Minister of Finance Deputy Premier
Derek Johnson	MLA for Interlake – Gimli Minister of Agriculture
Heather Stefanson	MLA for Tuxedo Premier
Jeff Wharton	MLA for Red River North Minister of Economic Development, Investment and Trade

Witness	Position held at the relevant time
Peter Fath	Chief Executive Officer, RCT Solutions GmbH
David Filmon	Member, Board of Directors, Sio Silica Corp.
Kathryn Gerrard	Clerk of the Executive Council and Cabinet Secretary
Kelvin Goertzen	MLA for Steinbach Minister of Justice
Kevin Klein	MLA for Kirkfield Park Minister of Environment and Climate
Ryan Klos	Deputy Minister, Department of Environment and Climate
Shannon Kohler	Assistant Deputy Minister, Environmental Stewardship Division, Department of Environment and Climate
Melanie Maher	Special Assistant to Rochelle Squires

Mark Rosner	Chief of Staff to the Premier-Designate, Wab Kinew
Elliot Sims	Associate Clerk of the Executive Council
Feisal Somji	Chief Executive Officer, Sio Silica Corp.
Rochelle Squires	MLA for Riel Minister of Families
Jerin Valel	Deputy Minister, Department of Economic Development, Investment and Trade
Shandy Walls	Lobbyist for Sio Silica Inc.
Agnes Wittman	Director, Environmental Approvals Branch, Department of Environment and Climate

37. For the most part, witnesses responded to my requests for interviews and made themselves available to meet with me in a timely way. Although witnesses were generally cooperative, scheduling interviews was often difficult and extended the length of time required to complete my investigation.

38. Each respondent and each witness was asked to produce any relevant documents in their possession, including emails, text messages and phone records. Many of them made considerable effort to provide me with detailed documentation and information and I thank them and their counsel for that cooperation.

39. I also asked the Government of Manitoba, through the Clerk of the Executive Council and Cabinet Secretary, Sarah Thiele, to produce any relevant documents in its possession. This also involved considerable effort, and I thank Ms. Thiele and Charlotte Price, then Assistant Deputy Minister, Cabinet Operations and Coordination Clerk of the Executive Council Office, for the time and effort that went into complying with my request.

40. When the inquiry was expanded by the additional requests for an inquiry in May 2024, I renewed and expanded my request for documents from the Clerk and others.

41. In the end, my team received and reviewed hundreds of pages of emails, memos, text messages and phone records.

42. In the interest of fairness, in advance of their interviews, the respondents were each provided with copies of the documents that were of relevance or potential relevance to their testimony.

43. During the course of their interviews, the respondents were asked questions about those documents. They were also informed of the evidence given by other respondents or witnesses that was relevant to them in order to allow them an opportunity to respond to that evidence.

44. Certain aspects of the interview and documentation discovery process warrant special mention.

a. Access Convention

45. The documents that I sought were created by the previous government of then Premier Stefanson. As a result, they were subject to the access convention. That is an accepted practice (a convention) that the confidential documents of previous governments are protected from disclosure to a new government without the consent of the government for which the records were created.

46. In providing these documents to me, Ms. Thiele appropriately noted that they were subject to the access convention, while also acknowledging the powers of discovery granted to the Ethics Commissioner by the Act. I confirmed that I would be exercising discretion in the treatment of the documents her Office provided for the investigation.

b. Cabinet Confidentiality

47. Some of the documents and some of the testimony that I sought were subject to Cabinet confidentiality. This is a convention that protects discussions within Cabinet and documents prepared for Cabinet. As described by the Supreme Court of Canada in *Ontario (Attorney General)* v. *Ontario (Information and Privacy Commissioner)*:

> Cabinet confidentiality grants the executive the necessary latitude to govern in an effective, collectively responsible manner . . . Cabinet secrecy is 'essential to good government . . . as it promotes deliberative candour, ministerial solidarity, and governmental efficiency by protecting Cabinet's deliberations[4]

48. However, Cabinet confidentiality is not absolute. The following extracts from another Supreme Court case, *Carey* v. *Ontario*, demonstrate the factors that must be considered by a decision maker:

> Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest. . . Courts must proceed with caution in having them produced. . .
>
> To these considerations, . . . one must, of course, add the importance of producing the documents in the interests of the administration of justice. On the latter questions, such issues as the importance of the case and the need or desirability of producing the documents to ensure that it can be adequately and fairly presented are factors to be placed in the balance. (at page 670-671)
>
> . . . .
>
> . . . if there has been harsh or improper conduct in the dealings of the executive with the citizen, it ought to be revealed. The purpose of secrecy in government is to promote its proper functioning, not to facilitate improper conduct by the government. (at page 673)[5]

49. Based on the foregoing, I concluded and advised all respondents and witnesses who were Cabinet ministers that they were required to answer all relevant questions, including those that would reveal a Cabinet confidence. I advised them that I would protect any Cabinet confidences

[4] *Ontario (Attorney General)* v. *Ontario (Information and Privacy Commissioner),* 2024 SCC 4 (CanLii), para. 3
[5] *Carey* v. *Ontario*, 1986 CanLII 7 (SCC), [1986] 2 SCR 637

that I learned except to the extent that their revelation was necessary for the purposes of this inquiry.

50. All respondents and witnesses who were Cabinet ministers accepted this conclusion.

c. Solicitor-Client Privilege

51. In responding to my disclosure request, the Clerk's Office redacted certain portions of the documents they provided on the basis of solicitor-client privilege. They indicated that the documents contained legal advice and stated that, in recognition of the importance of the principle of solicitor-client privilege, the Government of Manitoba does not as a matter of policy waive solicitor-client privilege and they were not prepared to do so in this case.

52. In order to assist me, the Clerk, Ms. Thiele, offered to meet with me to discuss in general terms the context in which the redacted legal advice was sought and provided. While I appreciated this offer and did meet with her, I ultimately decided that, in the interests of the fairness and thoroughness of my investigation, I needed to see the relevant documents in their unredacted form. This was especially so, given that one of the documents for which solicitor-client privilege was claimed was relied on as the basis for the complaints that were submitted about the respondents Cliff Cullen and Derek Johnson.

53. I was of the view that the current government could not waive the privilege (since, under the access convention, it could not view those documents). Therefore, I took the position that Heather Stefanson, as the former Premier and head of the executive of the government that was in office at the time the documents were created, had the authority to waive the solicitor-client privilege that attached to the documents. I therefore made that request of her through her legal counsel.

54. Ms. Stefanson agreed to my request and provided her written authority to waive the solicitor-client privilege that attached to the relevant documents in order to allow me and my

legal team to see and make use of them in their unredacted form. I very much appreciate her cooperation in doing so.

55. I provided Ms. Stefanson's waiver of privilege to Ms. Thiele. However, Ms. Thiele took the position that a former member of the Executive Council does not retain any residual legal authority to act on behalf of the Crown. She argued that, in this circumstance, she, as Clerk of the Executive Council, had the authority to waive (or refuse to waive) the privilege. I did not agree. Nonetheless, Ms. Thiele decided that waiver of solicitor-client privilege was appropriate in the unique and exceptional circumstances of this case. In doing so, she confirmed that she was waiving solicitor-client privilege only with respect to the requested documents and for the sole purpose of satisfying my request to ensure the fairness and thoroughness of my inquiry into the complaints.

56. Although we disagreed on this legal question, I appreciate her decision to give me the requested documents without redaction.

d. Corporate Records

57. As I did with all witnesses, I asked Sio Silica to produce any documents in its possession, whether in paper or electronic form, that contained, described or related to communications that occurred from September 5, 2023 to October 18, 2023 between any director, officer, or employee of Sio Silica or its predecessor corporations and a number of specified individuals including the respondents and members of the public service, relating to the Sio Silica license application. Sio Silica complied with this request.

58. I also asked to be provided with any records of Sio Silica including relevant extracts from its minute books or corporate records that identified the shareholders of the corporation. It was able to provide me with a list of shareholders of record at two points in time: September 5, 2023 and October 18, 2023. It also advised that, between those dates, any changes related to the normal course exercise of a certain category of shares that were, generally, held by directors. It

also noted that it was only able to produce a list of shareholders who are registered directly. Where shares are held indirectly (for example, by a brokerage on behalf of a client), they were unable to identify the beneficial ownership. As a result, I asked each respondent directly if they had any relevant financial ties to Sio Silica, RCT Solutions or Pyrophyte.

e. Responses to Preliminary Conclusions

59. Section 47(3) of the Act provides that members must be given an opportunity to respond to the possibility of an adverse finding by the Ethics Commissioner:

> **Representations by affected member**
>
> 47(3) If it appears to the commissioner that the commissioner's report may adversely affect the member, the commissioner must inform the member of the particulars and give the member the opportunity to make representations — either orally or in writing, at the discretion of the commissioner — before the commissioner finalizes the report.

60. After due consideration, I determined that it was likely that I would be making adverse findings. Accordingly, I wrote to Ms. Stefanson, Mr. Cullen and Mr. Wharton on February 21, 2025 and invited them to make representations, both in respect of the possibility that they would be found in breach of the Act and in respect of an appropriate penalty in the event that such a finding was made. The letters set out my preliminary findings in detail so they would be able to respond fully. In some cases, a respondent requested an extension of time to make their representations. All written representations were received by March 21, 2025.

61. I determined that I would not be making an adverse finding in respect of Mr. Johnson and so did not invite him to make representations.

V. Facts and Chronology

62. This investigation was prompted by the phone calls that Mr. Wharton acknowledged he made to Mr. Klein and Ms. Squires during the transition period, where he sought to have Sio Silica's Project license approved.

63. Those calls were the culmination of events that began before the election was called on September 5, 2023. In this section, I will set out a full chronology of these events.

64. The chronology is long and, at some points, complex and so I will divide it into segments. It is based on the interviews with the respondents and other witnesses and on the documentary evidence that I obtained and reviewed.

65. Unfortunately, I found that the memories of some respondents and witnesses were at times surprisingly poor. In many cases, their testimony was vague or contradictory.

66. In assessing the testimony of the respondents and witnesses, I considered both their credibility and reliability. As explained by the Ontario Court of Appeal:

> Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable.[6]

67. With these comments in mind, where there is a discrepancy in the evidence received, I will make a finding of fact. Where the evidence of people I interviewed is contradictory, I will make a finding as to whose evidence I prefer. All findings of fact will be determined on a balance of probabilities, that is, whether something is more likely than not to be true. To satisfy the balance of probabilities test, evidence must be sufficiently clear, convincing and cogent.

[6] *R.* v. *Morrissey*, 1995 CanLII 3498 (ON CA).

(a) Pre-Election Call: Events Prior to September 5, 2023

68. The CEC issued its report about the Sio Silica license application on June 22, 2023. The CEC concluded that "significant conditions be required for the project to proceed". The CEC report went on to state: "the mining approach proposed by Sio Silica does have merit if the risks posed to the quality of water in the affected aquifers can be better defined and the management of those risks can be adequately addressed". Accordingly, the CEC report recommended that a number of conditions be implemented prior to the approval of a license for the Project.

69. After the CEC issued its report, consideration of the Project license application continued within the public service in the normal course. An interdepartmental group of experts, known as the Technical Advisory Committee, considered the recommendations of the CEC and consultations with Indigenous communities and other organizations continued.

70. Throughout this process, the government was being lobbied by various parties with respect to the Project. A concerted effort was made by some members of the public to make their opposition to the Project known. Similarly, representatives of Sio Silica were in contact with Cabinet ministers in an effort to promote the Project. Individuals representing Sio Silica's interests were Feisal Somji (Chief Executive Officer), Brent Bullen (Chief Operating Officer) and Laura Weedon (Vice President of Engineering). Sio Silica also contracted Shandy Walls to lobby for its interests to members of the government.

71. David Filmon was and is a member of the board of directors of Sio Silica. He was also in communication with the government during the transition period, specifically with Mr. Cullen and Ms. Stefanson. Mr. Filmon is well known for his connections with the Progressive Conservative party; in addition to his political ties to the government, Mr. Filmon has a close longstanding friendship with Ms. Stefanson.

72. Ms. Stefanson told me that she had little involvement with the consideration of the Project and that Mr. Cullen and Mr. Wharton were the "point people" between Sio Silica and her

government. Ms. Stefanson confirmed that she was aware that the Project was controversial and that the decision of whether to issue the Project license was significant.

73. She also told me that she was aware that Mr. Filmon was a member of the board of Sio Silica and that they likely would have had a discussion about Sio Silica "at some point". Ms Stefanson did not recall the nature of that discussion but said that Mr. Filmon did not advocate for the Project's license approval to her.

74. While Ms. Stefanson said she received periodic updates on the progress of the license approval process, she had no specific recollection of any discussions about the Project license. Ms. Stefanson did recall that, given the Project's Class 2 designation, the license could be issued at the director level.

75. On July 26, 2023, the government issued a news release to announce that it had signed a Memorandum of Understanding with RCT Solutions to explore the construction of a solar panel manufacturing plant within the province. The news release touted the potential to create 8,000 permanent full-time jobs. The Memorandum of Understanding was signed by Mr. Wharton on behalf of the government as Minister of EDIT at the time.

76. The manufacture of solar panels requires a reliable supply of high-quality silica sand and Mr. Somji told me that the ability of RCT Solutions to proceed with the construction of a solar panel manufacturing plant was contingent on the approval of Sio Silica's Project license. The CEO of RCT Solutions, Dr. Peter Fath, agreed that the proposed solar panel manufacturing plant needed access to high-quality silica sand (quartz), though not necessarily the sand from Sio Silica's proposed mine.

77. It is clear that there was strong support within the government to approve the Project license. Mr. Cullen explained that, while the sitting government was "interested in moving the Project forward", there was a recognition of a "time crunch" due to the impending election.

78. I was told by Kathryn Gerrard, then Clerk of the Executive Council, that some ministers had expressed a desire to have the license issued before the election. The public service advised them that this would be operationally difficult, creating a challenging amount of work to be done in a short amount of time. Ultimately, the decision was made not to issue the Project license prior to the election.

79. Although members of the NDP, then in Opposition, met with representatives of Sio Silica and RCT Solutions on two or three occasions before the election, according to Mark Rosner, then the Chief of Staff to the Leader of the Opposition, the NDP never communicated to representatives of Sio Silica, RCT Solutions or publicly that the Project license would be approved in the event the NDP won the 2023 election. Mr. Rosner's evidence was corroborated by Mr. Somji. No evidence was presented in the course of this investigation that supports any suggestion that, prior to the election, the NDP communicated a position on the Sio Silica Project license, either privately or publicly.

(b) September 5 to October 3, 2023: The Election Period

80. On September 5, 2023, a Provincial general election was called to take place on October 3, 2023. At this point, the caretaker convention came into effect. This meant that the day-to-day operations of the government should have continued and major decisions should have been deferred until the will of the people was determined.

81. During the election, Ms. Stefanson was occupied by the campaign and it appears that she relied on Mr. Cullen, who was not running for re-election, to be responsible for the day-to-day operations of the government, in his capacity as Deputy Premier.

82. Ms. Stefanson stated that she had a close working relationship with Mr. Cullen and that he acted as a liaison between her and other ministers before and after the election. Ms. Stefanson told me she was in contact with Mr. Cullen most days, either by phone, text or email.

83. Consideration of the Project's license continued within the Department of Environment and Climate (the "Department"). Assuming the license application was not being refused, the next step in the process was to send Sio Silica a draft license for its comments.

84. According to Ryan Klos, then deputy minister of the Department, advice was sought and received from the Office of the Clerk of the Executive Council that it was permissible under the caretaker convention to issue a draft license to Sio Silica during the election period. Mr. Klos understood the advice from the Clerk's office to be that, as long as no final licensing decision was being made, the Department could continue to prepare for the possible issuance of the Project license. While Ms. Gerrard did not recall providing this advice, she said that her Office generally instructed departments to ensure that projects were prepared and ready so that the incoming government could move forward with any project if they wanted to, but to "proceed with caution".

85. Both Mr. Cullen and Mr. Wharton told me that they had an interest in moving forward with the Project license after the election and that they canvassed that objective with Mr. Klos. From both Mr. Cullen's and Mr. Wharton's perspective, the Project was of significant economic importance to the province and, given the Project's Class 2 designation, the approval of the Project license by the Director was "business as usual". Mr. Cullen had previously been Minister of EDIT and so was familiar with the proposed Sio Silica Project.

86. During the election period, Mr. Cullen sought and received frequent updates on the progress of the license application from Mr. Klos. Mr. Klos recalled that Mr. Cullen expressed a specific desire to be provided with updates about the Project license.

87. Mr. Cullen was also in contact with representatives of Sio Silica during the election period. I was told by Mr. Somji that he invited Mr. Cullen and his spouse to watch a Blue Bombers football game from a suite on September 9, 2023. Mr. Cullen said that he and his spouse just happened to bump into Mr. Somji at the game and was then invited to the suite. The day after the game, Mr. Cullen texted Mr. Somji:

Thank you so much for inviting [my wife] and I yesterday! It was a great opportunity to meet some new people and enjoy a fantastic atmosphere. Thank you for supporting the Bombers, an important part of the culture in our Province. I am available to chat anytime. I believe Manitoba has plenty to offer and would love to be part of the conversation. Thank you again for the great hospitality!"

88. While Mr. Somji denied discussing the Project license in the course of the game, Mr. Cullen said that the two did discuss the licensing process. It is hard to imagine that the Project license was not discussed.

89. Several days later, on September 14, 2023, Mr. Cullen texted Mr. Klos: "*How are we doing with Sio draft*?", referring to the issuance of a draft license to Sio Silica. In response, Mr. Klos texted: "*Review is going well, and staff are on-track to share draft with Sio tomorrow. Will let you know tomorrow to confirm when shared. Let me know if helpful to chat"*.

90. Mr. Cullen said that he made this inquiry of Mr. Klos because Sio Silica and RCT Solutions had expressed an urgency in relation to the timing of when the Project license would be issued. Shortly after the text exchange, Mr. Cullen and Mr. Klos spoke by phone for approximately nine minutes. While neither recalled the specifics of the discussion, Mr. Klos believed the phone call related to the draft license.

91. On September 15, 2023, the Department provided a draft license to Sio Silica in order to get its feedback and to work through the conditions that the CEC had recommended. Mr. Klos texted Mr. Cullen at 2:19 p.m. that day, "*Draft license shared with Sio. Sio contacts include Feisal Somji, Brent Bullen and Laura Weedon. Let me know if anything further needed*".

92. Throughout the election period, Mr. Cullen continued to stay in regular contact with Mr. Klos by text message:

- On September 19, 2023, Mr. Cullen texted Mr. Klos: "*Do you have time for a quick chat*?"
- On September 20, 2023, Mr. Klos texted Mr. Cullen: "*Available for an update*?"

- On September 21, 2023, Mr. Cullen texted Mr. Klos: "*I would love an update. I know you are busy today but let me know when works.*"
- On September 22, 2023: Mr. Cullen texted Mr. Klos: "*Are you in the building? Do you want to come down for a chat*?" To which Mr. Klos responded, "*Just getting back from a rural office visit and not at leg…call whenever you are free.*"

93. On September 25, 2023, representatives of the Department and Sio Silica met to discuss the draft license. After the meeting, Mr. Klos texted Mr. Cullen, "*Good meeting today…clarified and concerns addressed*". In response, Mr. Cullen texted, "*Perfect! Everybody happy*?" to which Mr. Klos responded, "*Yes... everyone seemed good and appreciative*".

94. Mr. Cullen confirmed that this exchange of text messages related to the meeting between the Department and representatives of Sio Silica about the draft Project license. He wanted to know whether the Department and the representatives of Sio Silica were satisfied with the draft Project license so it could move forward.

95. Mr. Klos told me that Mr. Cullen's behaviour during the election period strongly suggested that he wanted the Project license to be approved, and Mr. Klos said that he felt pressure to get that done.

96. It is clear that Mr. Cullen's frequent requests for updates about the Project license during the election put the Department under pressure to move Sio Silica's application forward at that time.

97. While Mr. Somji was not present at the September 25 meeting, he said that he was told by his colleagues, Mr. Bullen and Ms. Weedon, that the Department had advised that they were working towards getting a recommendation to the Director by October 6, 2023. Given the issuance of the draft license, Mr. Somji assumed that the recommendation would be positive.

(c) October 3 -5, 2023: Post-Election Activity

98. The Provincial general election was held on October 3, 2023 and the Progressive Conservative government was defeated by the NDP. As noted at the beginning of my report, Cabinet ministers of the outgoing government remained in office pending the swearing in of the new government on October 18, 2023. The caretaker convention remained in effect and it took on greater significance, given the impending change of government.

99. During the transition period, the outgoing government remained responsible for the day-to-day activities and operations of government. Ms. Stefanson advised that she returned to spending most days at the Legislature and continued to be in daily communication with Mr. Cullen as the government prepared to transition to the NDP.

Urgency and Continued Desire to Issue a License to Sio Silica

100. It was clear from the evidence I received that members of the PC government continued to be interested in issuing the Project license, even after they lost the election. Mr. Cullen took the lead and continued to be in contact with both the Department and representatives of Sio Silica with the goal of having the Project license issued.

101. Mr. Cullen said he wanted to move the Project license forward after the election because of communications he had received from both Sio Silica and RCT Solutions indicating that the issuance of the Project license was urgent. In particular, he said that representatives of Sio Silica told him that they had timelines associated with obtaining financing for the Project. He also said that RCT Solutions was considering other jurisdictions in which to construct their solar panel manufacturing plant. Mr. Cullen said that he was concerned about losing the potential investment and jobs in Manitoba should the Project license not be issued.

102. When pressed, Mr. Cullen said that his discussions with Peter Fath of RCT Solutions and Feisal Somji of Sio Silica led him to believe that the broad timeframe for when the Project needed to be approved was by the end of 2023.

103. In his interview, Mr. Somji said that there was no immediate urgency to have the Project license approved in the days or weeks following the election. He indicated that his company hoped to have the Project license approved by the end of 2023. He also confirmed that RCT Solutions was being courted by other jurisdictions and, to a certain extent, there were pressures on Sio Silica to obtain the Project license.

104. Dr. Fath said that RCT Solutions would have likely required confirmed access to the Project's sand by the end of 2023 or the beginning of 2024. He said he shared this timeline with both Mr. Cullen and Mr. Wharton.

105. Mr. Filmon advised that he was not aware of any specific timelines to get the Project license approved, either from Sio Silica or RCT Solutions. However, he acknowledged that there were pressures on Sio Silica related to financing and RCT Solutions' interest in other jurisdictions.

106. While Ms. Stefanson's recollection of her communications with Mr. Cullen on this topic was vague, she did recall Mr. Cullen briefing her on "some urgency" related to financing that had been brought to him by representatives of Sio Silica shortly after the election. According to Ms. Stefanson, Mr. Cullen told her that he would be looking into the matter for Sio Silica.

107. In short, no one that I interviewed, including representatives of Sio Silica and RCT Solutions, indicated that there was any urgency to issue the Project license measured in the days or weeks following the election. Rather, Mr. Cullen, Mr. Wharton and representatives of Sio Silica and RCT Solutions all confirmed that Sio Silica hoped to have the license issued by the end of 2023.

108. I therefore find that there was no urgency to have the Project license approved during the transition period. Any urgency to approve the Project license, immediately, during the transition period, can only have come from the PC government's positive views of the Project and its merits, its impending loss of control over the decision and its concern that the incoming NDP government would not approve the Project license.

October 4, 2023: Ongoing Communications, Ongoing Pressure

109. After the election, Mr. Cullen remained in communication with representatives of Sio Silica. On October 4, 2023, the day after the election, Mr. Filmon texted Mr. Cullen early in the morning: "*Can we have a quick chat today*?".

110. Mr. Filmon said that he reached out to Mr. Cullen to inquire about the approval process for the Project license. He explained that he had seen Mr. Cullen the day before (election day) and had asked him about the status of the Project license in light of the government's defeat. Mr. Filmon said Mr. Cullen told him he would look into the matter.

111. After he sent the text message, Mr. Filmon said he spoke with Mr. Cullen by phone and that Mr. Cullen told him that the decision to issue the Project license was a "bureaucratic decision" to be made by the Director of the Environmental Approvals Branch. Mr. Filmon also said that Mr. Cullen told him that there was a "possibility" that the license would be issued by the Director prior to the swearing in of the incoming NDP government. As a result of this conversation, Mr. Filmon said he believed that the Project license could be issued within the days following that October 4 phone call.

112. Mr. Cullen said that his conversation with Mr. Filmon on October 4 prompted him to text Mr. Klos, at 10:51 a.m.: "*Good Morning. How are things on the permit front*." Mr. Klos told me he interpreted this to mean that Mr. Cullen was still asking the Department to move forward with the Project license approval.

113. Mr. Klos was not the only member of the public service who was receiving pressure from Mr. Cullen to move the Project license forward.

114. Ms. Gerrard said that she also received a phone call from Mr. Cullen shortly after the election in which he said that he wanted the Project license to move forward and that a commitment had been made to Sio Silica to issue the Project license within the days following the election.

115. Mr. Cullen confirmed that he contacted Ms. Gerrard shortly after the election and told her that the outgoing PC government had an interest in issuing the Project license after the election. However, he denied saying that a commitment had been made to Sio Silica to issue the Project license after the election.

116. Both Mr. Somji and Mr. Filmon denied ever receiving a commitment from any member of the government that the Project license would be issued, either before or after the election.

October 5, 2023: The Outgoing Government is Interested in Approving the Project License During the Transition Period

117. Mr. Cullen continued to communicate with Mr. Filmon in the days following the election. On October 5, 2023, they exchanged the following text messages:

- Mr. Filmon "*Just following up on our call from yesterday. Is everything still on track for tomorrow? Obviously a lot of anxiety on our end*".
- Mr. Cullen "*I am working on it. Just hang in there*."

118. Mr. Cullen confirmed that Mr. Filmon's text message was about the Project license. However, he did not recall speaking with Mr. Filmon about a specific date that the Project license would be issued. Instead, Mr. Cullen said his reference to "working on it" meant he was "working" on understanding the process for the issuance of the license – that he was simply attempting to ascertain its status within the Department.

119. Shortly after this text exchange, Mr. Cullen called Mr. Klos to ask if the Department would be issuing the license. He said Mr. Klos told him that the Department would not issue the Project license until the incoming NDP government had been briefed.

120. Mr. Klos said that he understood that Mr. Cullen was "unhappy" with the Department's position and he expected Mr. Cullen would be escalating the matter, likely to the Clerk's Office, which is exactly what happened.

121. I do not accept Mr. Cullen's evidence about the purpose of his text communications with Mr. Filmon on October 5, 2023. The explanation he provided does not make sense in light of Mr. Filmon's query: "*Is everything still on track for tomorrow*?" Given the phone call that occurred between Mr. Cullen and Mr. Klos shortly after, it is reasonable to conclude that Mr. Cullen was not merely "working on" understanding the status of the Project; he was "working on" getting the Project license approved.

122. However, Mr. Klos' statement to Mr. Cullen that the Department would not issue the Project license until the incoming NDP government had been briefed stood in the way of Mr. Cullen's objective.

123. Mr. Klos spoke with Ms. Gerrard later on October 5, 2023 to alert her about his call with Mr. Cullen. Mr. Klos said he felt that Mr. Cullen's call was inappropriate and he wanted to ensure that Ms. Gerrard was prepared for the likelihood of a discussion with Mr. Cullen on the matter.

124. Although Ms. Gerrard did not have a specific recollection of her phone call with Mr. Klos, she confirmed that he had come to her at some point to let her know that he was getting pressure from Mr. Cullen to have the Project license issued and that he had told Mr. Cullen that the Department would not issue the license without the consent of the incoming NDP government.

125. Mr. Cullen confirmed that he told Ms. Gerrard that the government had an interest in seeing the license issued before the NDP government was sworn in and that he directed Ms. Gerrard to ask the NDP transition team whether it was comfortable with the outgoing government issuing the Project license before the NDP government took office.

126. Mr. Cullen also asked Ms. Gerrard to look into options in the event the Director did not or would not issue the Project license during the transition period. Mr. Cullen told me that Ms. Stefanson was aware that he was providing these instructions to Ms. Gerrard. Ms. Stefanson confirmed that she understood that "ministers were looking at exploring some options", but said she did not "direct them one way or another".

127. Following Mr. Cullen's instructions, in the afternoon of October 5, 2023, Ms. Gerrard called a meeting with Mr. Klos, Elliot Sims, the Associate Clerk of the Executive Council, and Jerin Valel, Mr. Wharton's Deputy Minister. At this meeting, Ms. Gerrard told the deputy ministers that the outgoing government had an interest in issuing the Project license during the transition period, before the new government was sworn in. She directed Mr. Klos to prepare an Advisory Note to brief the NDP's transition team and the incoming Premier about Sio Silica and the Project license.

128. Ms. Gerrard also asked Mr. Klos to look into what options were available for approving the Project license in the event that the Director would not issue it.

129. At 5:33 p.m. on October 5, 2023, Ms. Stefanson called Mr. Cullen. The phone records indicate that the call lasted for only one minute. According to Mr. Cullen, Ms. Stefanson told him in that call that she believed the Project license was an important decision for Manitoba and that they should ensure the NDP transition team appreciated the scope of investment, timeline and urgency of getting approval for the Project license. Mr. Cullen recalled that he also told Ms. Stefanson that the Project license was not proceeding as anticipated and the two agreed to obtain advice about the process. According to Mr. Cullen, he and Ms. Stefanson agreed it would be "important to make sure the NDP transition team understood where things were at". In his interview, Mr. Cullen said "if they were not, well, then it's certainly a tougher decision to move forward on the license".

130. I find it is unlikely that this dialogue occurred over the course of a one-minute phone call. Given Ms. Stefanson's evidence that she directed both Mr. Cullen and Ms. Gerrard to broach the Project's license with the NDP transition team, it is likely that the conversation described by Mr. Cullen with Ms. Stefanson occurred earlier in the day, and prior to the directions Mr. Cullen gave to Ms. Gerrard.

131. Ms. Stefanson recalled being informed that the Director did not want to move forward with the issuance of the Project license as they were uncomfortable doing so, and that it would be a "political decision". Ms. Stefanson told me she communicated to both Mr. Cullen and Ms.

Gerrard that the Project license decision should be forwarded to the incoming government, given the urgency she said had been expressed by Sio Silica. However, Ms. Stefanson's evidence about when she informed either Mr. Cullen or Ms. Gerrard of this direction was unclear.

132. In considering the evidence of Mr. Cullen and Ms. Stefanson, I find that, on October 5, 2023, they were both aware that the Project license would not be issued at the director level and had agreed to obtain advice and explore options for the issuance of the Project license.

(d) October 6: Two Transition Team Meetings

133. During the transition period, representatives of the incoming NDP government were meeting daily with Ms. Gerrard and other members of the public service to be briefed on important pending issues and other matters relating to the transition. The NDP transition team was led by Mr. Rosner. The transition team discussions were understood to be confidential.

October 6 at 9:30 a.m.

134. The transition team had a regularly scheduled meeting on October 6, 2023 at 9:30 a.m., the Friday before the Thanksgiving long weekend. According to Ms. Gerrard, she told Mr. Rosner at that meeting that she had been asked to inquire whether the incoming NDP government planned to issue the Sio Silica Project license or, alternatively, whether it was comfortable with the outgoing PC government issuing the license during the transition period.

135. Ms. Gerrard said she explained to Mr. Rosner that the Project license was ready to be issued and that there was an urgency to issuing it. She said that Mr. Rosner told her he didn't think the incoming NDP government would agree to the outgoing government approving the Project license. As a result, Ms. Gerrard offered to provide him with a further briefing later that afternoon and Mr. Rosner agreed.

136. Mr. Rosner described this meeting differently. He said that Ms. Gerrard raised the Sio Silica Project license as one of several rather routine items and told him that the license had been signed and would be made public later that day.

137. Mr. Rosner said that he was taken aback by Ms. Gerrard's statement and that he responded by saying that issuing the Project license was a significant decision that invoked the caretaker convention and should not proceed. He recalled that Ms. Gerrard said that the caretaker convention did not apply to the issuance of the Project license as it was a routine administrative matter. Mr. Rosner said he felt he was being "pressured", right before the Thanksgiving weekend, to simply agree to the issuance of the Project license and move on but he confirmed that he agreed to receive a further briefing on the matter.

138. After the morning meeting, Mr. Rosner called Premier-Designate Kinew to tell him what had happened at the transition team meeting and specifically what Ms. Gerrard had said about the issuance of the Project license.

139. Mr. Rosner said Mr. Kinew instructed him to continue to oppose the issuance of the Project license during the transition period and that, if necessary, he would attend the further briefing himself to help make their opposition clear.

140. Mr. Rosner said he was so concerned by what he was told in the morning meeting that he contacted legal counsel to obtain advice on the matter. He said that it was unclear to him the extent to which he had the ability to influence what the outgoing government was going to do. On the one hand, the issuance of the Project license was being presented to him as a routine matter that was outside of the incoming government's purview and, on the other hand, the incoming government's approval or at least acquiescence was being sought.

141. Mr. Sims, the Associate Clerk, was also at this meeting. He denied that he heard Ms. Gerrard say that the license had been signed or that it would be issued that day. He recalled that a license was never signed but there was a "strong interest in getting a decision as quickly as

October 6". Mr. Sims also recalled Mr. Rosner commenting "what is the rush?" and saying, "I don't understand why it needs to be done now".

142. Ms. Gerrard denied that she informed Mr. Rosner that the license had been signed and issued and was going to be made public that day. She also denied that she presented the issuance of the license as a routine administrative matter. She further denied telling Mr. Rosner that the caretaker convention did not apply. Ms. Gerrard said she did not think Mr. Rosner was upset by their discussion but rather was uncertain which was why she offered, and he agreed, to attend a further briefing meeting about Sio Silica and the Project license.

143. Mr. Rosner took notes at the October 6 morning meeting and he provided them to me. No one else who attended that meeting took notes. Mr. Rosner's handwritten notes support his version of events: "*Environmental License → Sio License signed*."

144. It is noteworthy that the records of the Department provided to me showed that it had prepared a Communication Action Plan on October 6, 2023 that stated that the Project license had been issued.

145. Based on all the evidence, including the notes Mr. Rosner took during the meeting, without determining the exact language that Ms. Gerrard used, I find that, at the transition team meeting in the morning of October 6, she conveyed to Mr. Rosner that approval of the Project license was moving forward that day.

146. I accept that Ms. Gerrard was placed in a very uncomfortable position by Mr. Cullen. I find it likely that the pressure within the outgoing government to move forward with the issuance of the Project license informed her conduct during the transition team meetings held on October 6, 2023 and afterwards.

October 6 at 1:00 p.m.

147. A further briefing for Mr. Rosner was arranged to take place later in the afternoon of October 6, 2023.

148. Before that meeting occurred, Mr. Klos sent an email to Ms. Gerrard, copying Mr. Valel, to which he attached the Advisory Note Ms. Gerrard had asked him to prepare about the Sio Silica Project license. That document included the following statement:

> *"There will be significant public and media interest with a licensing decision. There is a risk of issuing a license during the caretaker period prior to the Minister establishing a monitoring committee with public reporting and transparency given the significant interest".*

149. Mr. Klos said he purposely included this statement to highlight that the caretaker convention was in place.

150. At 1:00 p.m. on October 6, 2023, Ms. Gerrard and Mr. Sims met with Mr. Rosner again. Mr. Klos and Mr. Valel also attended to provide a briefing on the Sio Silica Project license. When asked why the briefing was scheduled for that same day – just before the long weekend – Ms. Gerrard said it was due to the pressure she was receiving from Mr. Cullen to issue the license.

151. After the briefing, Mr. Rosner said he would take the information back to the incoming Premier to confirm the incoming NDP government's position. Mr. Rosner said he told Ms. Gerrard that the outgoing government was not to issue the Project license until he was able to speak with Mr. Kinew.

152. Both Mr. Klos and Mr. Valel said in their interviews that, although Mr. Rosner did not provide a definitive direction on the Project license during that briefing meeting, it was clear that there was no interest from the incoming NDP government to issue it at that time.

153. Mr. Valel said that, after attending the afternoon meeting on October 6, he informed his minister – Mr. Wharton – that the incoming NDP Government would not consent to the issuance of the Project license during the transition period.

154. Although Mr. Wharton denied that he received any information about the transition team meetings, I prefer Mr. Valel's evidence on this point. I find it likely that Mr. Valel, as the deputy minister of EDIT, would have kept his minister informed, especially given Mr. Wharton's interest in pursuing the Project license after the election.

155. It was interesting to hear from Ms. Gerrard that, after the second meeting on October 6, she also sought legal advice about the caretaker convention and its impact on her obligation to follow the directions of Cabinet ministers. She explained that she felt this was necessary as a result of increasing pressure she was receiving from Mr. Cullen to have the Project license approved during the transition period despite the NDP transition team's apparent opposition to that approval.

156. Mr. Cullen called Ms. Gerrard after the briefing meeting. Ms. Gerrard said that she told him that Mr. Rosner had indicated that the NDP was likely not interested in having the Project license issued during the transition period, but that Mr. Rosner was going to seek the incoming Premier's input and provide Ms. Gerrard with a formal response at a later date.

157. Ms. Gerrard recalled that Mr. Cullen responded by stating something about his reputation being on the line and that "we" made a commitment to Sio Silica.

158. Although she could not recall her exact words, Ms. Gerrard said that, in the call, she cautioned Mr. Cullen that the outgoing PC Government could not proceed with the issuance of the Project license without the NDP's agreement, due to the caretaker convention.

159. Mr. Cullen confirmed that Ms. Gerrard told him that the incoming NDP government was likely not interested in issuing the Project license and would provide a final response at a later date. He denied, however, making the comments attributed to him by Ms. Gerrard.

160. Based on the evidence above, it is clear that, by the end of the day on October 6, 2023, both Mr. Cullen and Mr. Wharton were aware that the incoming NDP government had not consented to allowing the PC government to issue the Project license during the transition period and was unlikely to do so.

(e) "Did we get it done today?"

161. Mr. Filmon texted Mr. Cullen at 1:37 p.m. on October 6, 2023, asking: "*Did we get it done today Cliff*?".

162. Mr. Cullen did not respond to Mr. Filmon's text message until 3:41 p.m., after he had spoken with Ms. Gerrard, writing:

> *"Apparently the bureaucracy failed to mention to me there would be a different outcome on issuing if the NDP won. Makes me look bad. I feel sick. Working on some options with Kathryn [Gerrard]. Will have more on Tuesday."*

163. When asked about his text, Mr. Filmon said he had understood that the Project license could be issued by the Director during the transition period, but that he had no expectation that it would be issued on October 6, 2023.

164. Mr. Cullen said that he had assumed that the Project license would be issued by the Director after the election and that his text was simply confirming that understanding to Mr. Filmon.

165. I do not accept this explanation. I find that Mr. Cullen's use of the phrase, "*Makes me look bad*", suggests that he had indeed made a commitment about issuing the Project license to Sio Silica. Taken together with Mr. Filmon's use of the phrase, "*Did we get it done today*", it is

reasonable to believe that Mr. Filmon understood from Mr. Cullen that the Project license would in fact be issued on October 6, 2023. The "options" that Mr. Cullen said that he and "Kathryn" were "working on" related to Mr. Cullen's request that she look for alternative ways to issue the Project license during the transition period, if the Director would not issue it.

166. Ms. Stefanson acknowledged that she was aware the transition team meetings were occurring; however, she stated that she had no involvement in those meetings. She also said that communications that occurred within the transition team meetings were not relayed to her by Mr. Cullen or Ms. Gerrard. As I discuss below, however, I find that she was being kept informed about communications with the incoming government and about actions by her Cabinet ministers regarding the license approval.

167. Mr. Cullen confirmed that he had a conversation with Shandy Walls, a lobbyist for Sio Silica, about what had happened at the transition team meetings. After that conversation Ms. Walls texted Mr. Rosner on October 6, 2023 to ask if he had time to talk.

168. When Mr. Rosner did not respond, Ms. Walls texted him at 3:56 p.m.:

> *"Ok- didn't want to do this over text, but here goes as it = 8,000 jobs*
> *1. Dr. Fath has given us a one week extension on licensing before he moves on*
> *2. We were sent a DRAFT license Sept 15 by the department*
> *3. After a few meetings we have both agreed license is good and ready to be executed*
> *We understamd (sic) you also know this from communication from the Clerk today.*
> *There is the important economic benefit of keeping Dr. Fath amd (sic) 8,000 jobs.*
> *AND the political benefit of having the department approve the license SOLELY based on science and CEC revommendations (sic) and keeping politics out.*
> *I am available any time day or night to answer questions…*

169. Ms. Walls' reference to "a one week extension" was clearly intended to create a sense of urgency. However, as previously noted, Mr. Somji, Dr. Fath and Mr. Filmon all said there was no urgency that required the Project licence to be issued in the days or weeks following the election.

170. Mr. Rosner did not reply to Ms. Walls' text.

(f) The Search for Other Ways to Approve the License

171. As noted above, at Mr. Cullen's direction, the Clerk's office had instructed Mr. Klos on October 5 to look for options under *The Environment Act*, or otherwise, that would allow the outgoing government to issue the Project license without the Director's approval.

172. On October 6, 2023, at 3:35 p.m., Assistant Deputy Minister Shannon Kohler sent Mr. Klos an email regarding section 11.1 of *The Environment Act* (the "Section 11.1 Email"). Her email noted that the section had never been used before and was added with the intent to remove the director from decision-making. The email further set out in detail the procedural steps that the use of section 11.1 required.

173. Section 11.1 of *The Environment Act* allows the Minister of Environment and Climate to review and make decisions about proposals for Class 1 and Class 2 developments in the place of the Director if the proposals have been the subject of a public hearing by the CEC. As explained by Ms. Kohler, the minister would provide written notice to the Director and the development proponent that the minister intended to exercise the power under that section. The Department would provide the minister with relevant information, including summaries of Indigenous consultations and possible accommodation measures, public concerns, technical advisory input and legal input. Once a decision was made, the minister would direct the Department to prepare documentation to notify the proponent and the public. The decision of the minister could be appealed to Cabinet.

174. Mr. Klos forwarded the Section 11.1 Email to Ms. Gerrard at 3:42 p.m. on October 6. Although his recollection was somewhat unclear, he believed that he also had a conversation with Ms. Gerrard about the Department needing to prepare to issue the license should Mr. Klein, as the minister, choose to exercise the section 11.1 option.

175. Mr. Klos said he continued to provide status updates about the Project license to Mr. Cullen, at Mr. Cullen's request.

(g) The Public Service is Not Comfortable Issuing the Project License

176. In her interview, the Director, Agnes Wittman, said that, as of October 6, she did not feel comfortable making a decision about the Project License because of its sensitivity and the public attention surrounding the Project.

177. Assistant Deputy Minister Kohler recalled that she received a phone call from Mr. Klos telling her that the Department would be holding off on the licensing decision until the new minister was sworn in.

178. Although she could not recall the exact date when she received that call, phone records show she spoke several times with Mr. Klos on October 6, with the last call being at 2:33 p.m. It is likely that this is when the call occurred.

179. I find that, as of the end of the day on October 6, 2023, the public servants within the Department had determined that they would not take any further steps with respect to issuing the Project license until the new government was sworn in. The same, however, cannot be said about the elected officials.

(h) October 10, 2023: Incoming Government Confirms Its Opposition

180. At a transition team meeting on October 10, 2023, the Tuesday morning after the Thanksgiving weekend, Mr. Rosner confirmed that the incoming NDP government opposed issuing the Project license during the transition period.

181. Shortly after the meeting ended, Ms. Gerrard said she went to Mr. Cullen's office to inform him of the NDP's formal opposition, and he told her that he was "not surprised".

(i) October 10, 2023: Sharing the s. 11.1 Option

182. On October 10 at 2:18 p.m., Ms. Gerrard forwarded the Section 11.1 Email to Mr. Cullen.

183. Shortly after receiving the email, Mr. Cullen called Ms. Stefanson and they spoke for about 42 minutes. Mr. Cullen said that, in the call, he told Ms. Stefanson that the NDP was opposed to issuing the Project license during the transition period and he explained the section 11.1 option. He said that he and Ms. Stefanson agreed that he would talk to Mr. Wharton about "what the process would be to move forward" with the Project license. In his interview, when asked why he told Mr. Wharton about the section 11.1 option after knowing the incoming government was opposed to issuing the Project license, Mr. Cullen said that he was providing the information to Mr. Wharton as a "courtesy".

184. Ms. Stefanson could not recall the details of this phone call with Mr. Cullen. I note that, by her own admission, Ms. Stefanson's memory of these events was quite poor. In response to many of the questions that were posed during her interview, Ms. Stefanson said that she had no recollection. With respect to this phone conversation with Mr. Cullen, she suggested that she was distracted by her upcoming speaking engagement at an important event. Specifically, Ms. Stefanson did not recall Mr. Cullen telling her that the NDP was opposed to issuing the Project license, nor did she recall Mr. Cullen relaying the information he received about section 11.1. In her interview, however, she confirmed that she was not denying that Mr. Cullen told her these things; she simply could not remember.

185. When asked whether she agreed with Mr. Cullen to share the section 11.1 option with Mr. Wharton, Ms. Stefanson said that, although she did not recall having that specific conversation with Mr. Cullen, it would not be unusual for options to be explored. She went on to say that she did not direct Mr. Cullen to have a conversation with Mr. Wharton about section 11.1, nor would she have provided such a direction if she had been informed that the NDP was opposed to issuing the Project license during the transition period.

186. In his interview, Mr. Filmon made a point of telling me that, sometime between October 3 and October 18, 2023, he had a brief conversation with Ms. Stefanson where she told him that the decision with respect to the Project License was up to the NDP. Mr. Filmon could not recall the circumstances of the conversation, what prompted this comment nor what Ms. Stefanson may have meant. This information was therefore of little assistance to me in determining when Ms. Stefanson became aware of the NDP's position about approving the Project license or whether or when she provided instructions that the incoming NDP government was to make the decision.

187. I accept Mr. Cullen's evidence about what he told Ms. Stefanson during their call on October 10, 2023. While Ms. Stefanson was vague in her description of most events discussed during this inquiry and acknowledged to me that she had little recollection of the specific phone call with Mr. Cullen on October 10, Mr. Cullen was very clear about what information he communicated to Ms. Stefanson during that call.

188. Before Mr. Cullen called Ms. Stefanson on October 10, he had learned from the Clerk that the NDP had definitively said "no" to issuing the Project license during the transition period; he had also learned that section 11.1 of *The Environment Act* provided a means of issuing the license without involving the Director. It defies belief that, within the 42-minute call Mr. Cullen had with Ms. Stefanson immediately after learning this information, he would not have shared the information with her and would instead have withheld it. My finding that this discussion took place is consistent with Ms. Stefanson's evidence about her frequent communications with Mr. Cullen throughout the transition period.

189. I therefore find that Ms. Stefanson was informed by Mr. Cullen on October 10, 2023 that the NDP was opposed to issuing the Project license during the transition period and that there was an option to issue the Project licence under section 11.1 despite the NDP's opposition and without the Director's approval. I further find that Mr. Cullen and Ms. Stefanson agreed that the section 11.1 option would be shared with Mr. Wharton. Ms. Stefanson may not recall this conversation clearly because she was distracted, as she claims. However, Ms. Stefanson's

purported distraction does not alter my finding of the nature of the conversation that occurred between her and Mr. Cullen.

190. After speaking with Ms. Stefanson, Mr. Cullen immediately called Ms. Gerrard. Ms. Gerrard said that she told him it would be inappropriate to invoke section 11.1 in light of the caretaker convention. While Mr. Cullen did not recall the conversation, he accepted Ms. Gerrard's evidence about what she told him.

191. I note that, after the Thanksgiving weekend, it appears that representatives of Sio Silica were still hopeful the Project license would be approved. Just after noon on October 10, Mr. Filmon texted Mr. Cullen, "*Any update Cliff? Hope you had a nice Thanksgiving weekend!*". Mr. Cullen did not respond.

192. Over the course of that day, Ms. Walls sent Mr. Rosner several text messages, ultimately requesting a phone call. That evening, Mr. Rosner called her. Ms. Walls told him that the Director signing the license within the government "gap" would not be politics and would help everyone.

(j) The Clerk Meets with the Ministers

193. Although unclear on the exact date, Ms. Gerrard recalled that around this time she was called to a meeting in Mr. Wharton's office where she said Mr. Cullen and Mr. Johnson were also present. Ms. Gerrard said the ministers told her that the Project license needed to be issued for the good of the province. She said she responded that issuing the Project license was not permissible during the transition period because of the caretaker convention. Ms. Gerrard recalled that Mr. Wharton talked about the value of the Project to the province's economy and that she felt he was quite aggressive in his attempt to convince her that the license could be issued.

194. Mr. Cullen, Mr. Wharton and Mr. Johnson all denied that such a meeting took place. However, I prefer Ms. Gerrard's evidence as it relates both to the fact that the meeting took place and what was said. Although she could not recall the exact date of this meeting, she was able to

recall other details about it and her evidence is consistent with the totality of the evidence that I heard in this inquiry that efforts were being undertaken to explore using the section 11.1 option to issue the Project license during the transition period.

(k) October 11, 2023: Preparing to Use Section 11.1

195. Ms. Gerrard said that, as of October 11, 2023, members of the public service began to receive more pressure from ministers within the outgoing PC government to prepare to use the section 11.1 option.

196. Mr. Klos confirmed that, in the first week after the election, at Mr. Cullen's request, the Department had reviewed the section 11.1 process and sought legal advice on its use. Part of that review had included what to do in the event the minister, Mr. Klein, declined to sign the license. It was determined that, if Mr. Klein declined to exercise the section 11.1 option, the First Acting Minister, Rochelle Squires, could be asked to sign the license.

197. Acting ministers are appointed by the authority of section 4 of *The Executive Government Organization Act*. It allows for the appointment of "a minister as acting minister for any other minister **during the absence or incapacity** from any cause of that other minister". I have emphasized the words "during the absence or incapacity" because, as I read the section, it does not confer power on the acting minister if the minister gives an answer that others do not like.

198. Mr. Filmon texted Mr. Cullen at 4:23 a.m. on October 11, "*Just checking in again thanks*". Mr. Cullen responded to the text message at 7:00 a.m.: "*Good morning, It is messy. Bottom line, it is up to the NDP. I will keep you posted*."

199. Mr. Filmon said that he was asking Mr. Cullen about the Project license and he understood Mr. Cullen to be saying that, whatever he was looking into, there were no other options and the decision was now being passed on to the incoming NDP government.

200. Despite the response he had given to Mr. Filmon, Mr. Cullen confirmed that the Section 11.1 Email he received on October 10, 2023 from Ms. Gerrard and his subsequent conversation with Ms. Stefanson prompted him to call Mr. Wharton to discuss the options to issue the license. Phone records show that Mr. Cullen and Mr. Wharton spoke on October 11 and 12, 2023. Mr. Wharton recalled that it was on October 12 that Mr. Cullen told him about the section 11.1 option.

201. Mr. Wharton and Mr. Johnson had a FaceTime call with Shandy Walls, the lobbyist for Sio Silica, on October 11, 2023. Mr. Wharton said they wanted to make sure that Sio Silica was "up to date" in order to facilitate a decision being made on the file by the incoming NDP government. However, I note that Mr. Wharton was already aware of the NDP's opposition to issue the Project license during the transition period.

202. Although Mr. Johnson denied that this call occurred and denied knowing Ms. Walls, text messages show that on October 11, 2023 at 8:21 p.m. Ms. Walls texted Mr. Rosner to say:

> *"Just had a meeting with Wharton and Johnson – they are 100% in support of the license-politics totally aside."*

(l) October 12, 2023: Attempt to Use Section 11.1

203. The efforts to have the Sio Silica Project license issued came to a head on October 12, 2023.

204. At **8:23 a.m.,** Ms. Walls texted Mr. Rosner:

> *"Just following up from our chat Tuesday. Will allowing dept to sign license be possible?".*

205. Mr. Rosner did not reply.

206. At **1:01 p.m.,** Mr. Cullen called Mr. Wharton to tell him about the section 11.1 process. While Mr. Cullen did not recall specifically telling Mr. Wharton to call Mr. Klein, he said that he

may have done so. In any event, Mr. Cullen said that Mr. Wharton told him that he would contact Mr. Klein about issuing the Project license under section 11.1.

207. Mr. Wharton said that he offered to contact Mr. Klein, as opposed to being directed to do so by Mr. Cullen and said that he had assumed that the information provided by Mr. Cullen about using the section 11.1 option had been vetted through the "proper channels".

208. I find there is little distinction to be made between providing information about the Section 11.1 process to Mr. Wharton and directing him to contact Mr. Klein. Mr. Cullen did not provide Mr. Wharton this information as a "courtesy"; he clearly intended Mr. Wharton to act on the information. There was no other reason for him to be sharing the information at this point.

209. Mr. Cullen denied that he discussed approaching Ms. Squires as First Acting Minister in the event that Mr. Klein declined to exercise the option. However, Mr. Wharton recalled that they did discuss the possibility of approaching Ms. Squires. I prefer Mr. Wharton's evidence on this point, as the Department had already considered this possibility.

210. Mr. Johnson called Mr. Wharton not long after Mr. Wharton's call with Mr. Cullen. Mr. Wharton said that, while he could not say for certain, he believed that he told Mr. Johnson that he planned to contact Mr. Klein to exercise the section 11.1 option.

211. Mr. Johnson said that he did not remember this call but both told me they are good friends and typically spent a lot of time with each other. The phone records showed that they called each other frequently during the transition period.

212. Mr. Johnson clearly had an interest in seeing the Project license being issued. He was present at the meeting where Ms. Gerrard was told that the sitting government wanted to have the license issued. He also participated in a FaceTime meeting on October 11, 2023 with Ms. Walls, the lobbyist for Sio Silica. I find it more likely than not that Mr. Wharton told Mr. Johnson

about his plan to contact Mr. Klein to exercise the section 11.1 option and therefore prefer Mr. Wharton's evidence on the nature of his conversation with Mr. Johnson.

213. At **3:46 p.m.**, Ms. Walls sent Mr. Rosner a text message with a GIF of Tina Fey giving herself a high-five and the question "Yes?".

214. At **3:49 p.m.**, Ms. Stefanson called Mr. Cullen and they spoke for approximately 10 minutes. Mr. Cullen did not recall what they discussed. Ms. Stefanson denied that she and Mr. Cullen discussed the Project license or Mr. Wharton's plan to contact Mr. Klein.

215. At **5:28 p.m.**, Mr. Wharton called Ms. Walls to let her know that he planned to ask Mr. Klein to issue the Project license under section 11.1.

216. At **5:31 p.m.,** Mr. Wharton called Mr. Klein. They spoke for approximately 6 minutes. The evidence of Mr. Wharton and Mr. Klein is essentially consistent on the material aspects of their conversation.

217. Mr. Klein said Mr. Wharton told him that the Department had prepared a document for him to sign to approve the Project license. In response, Mr. Klein said he told Mr. Wharton that he had not been re-elected in the Provincial election and therefore felt that he was not authorized to issue the license. Mr. Klein recalled that Mr. Wharton continued to insist that he was. The call ended with Mr. Wharton telling him that he would get somebody else to sign it.

218. Mr. Wharton said he told Mr. Klein that he could sign a letter to the Director of the Environmental Approvals Branch requiring the Department to issue the Project license but that Mr. Klein refused. He said he then asked Mr. Klein if he would be OK with him phoning Ms. Squires and asking her to issue the "directive" to which Mr. Klein said, "you do you".

219. The evidence is therefore clear: Mr. Wharton asked Mr. Klein to issue the Project license and, when Mr. Klein declined to do so, Mr. Wharton told Mr. Klein that he would ask Ms. Squires to issue the Project license.

220. Meanwhile, Ms. Gerrard had become aware of Mr. Wharton's plan to contact Mr. Klein and, at **5:35 p.m.**, she sent an email to Mr. Klos and Mr. Sims entitled, "Section 11.1 of The Environment Act". The email was part of a thread that started with the Section 11.1 Email that Mr. Klos had sent to Ms. Gerrard on October 6 and read as follows:

> *I understand that there has been a request from Finance, EDIT and AG ministers for this information. To respect Ministerial responsibility, it is imperative that any furtherance of this information is provided by your minister to these ministers.*
>
> *I will continue to state as provided to these Ministers, that we are in care taker convention until the new government is sworn in. Due to the nature of this proposal my advice is that a decision not be made until the care taker period ends.*
>
> *Please advise if your Minister provides direction to issue a license under 11.1 under the Environment Act immediately to my office.*

221. The reference to "Finance, EDIT and AG ministers" was to Mr. Cullen, Mr. Wharton and Mr. Johnson. The reference to "this information" was the information about section 11.1 that the Department had obtained and provided to the Clerk on October 6.

222. At **5:37 p.m.**, immediately after his call with Mr. Wharton, Mr. Klein phoned Ms. Stefanson. When he did not reach her, he left a voicemail for her to call him and immediately sent her a text message stating "*We need to talk ASAP. Silica thing is out of control*". Ms. Stefanson responded with a text, "*Just on the other line*". Mr. Klein wrote back, "*Ok. Just got off the phone with Wharton, not good*".

223. Mr. Klein then called Mr. Cullen at **5:38 p.m.** and left him a voicemail asking him to call him about his phone call with Mr. Wharton.

224. Before returning Mr. Klein's phone call, Ms. Stefanson phoned Mr. Cullen at **5:41 p.m.** and spoke with him for several minutes before adding Mr. Klein to their call. The three then had a discussion that lasted 14 minutes.

225. Mr. Klein said that he told Ms. Stefanson about the call with Mr. Wharton and that he was "vehemently opposed" to issuing the license. He recalled that Ms. Stefanson was "very upset because she said she didn't know what was happening". From Mr. Klein's perspective, Ms. Stefanson agreed with his refusal to issue the Project license. Mr. Klein described Mr. Cullen as being "very quiet" on the call but he said that he would look into the matter further.

226. According to Ms. Stefanson, Mr. Klein told her he was concerned that he was being asked to issue the Project license. Mr. Klein also said to Ms. Stefanson that he was concerned that he was being asked to do so at her direction. Ms. Stefanson said she told him that was not the case, that it was the incoming NDP government's decision to make, and that she had directed that the NDP transition team be briefed. Ms. Stefanson said she was surprised to hear about Mr. Wharton's call to Mr. Klein.

227. For his part, Mr. Cullen said that he told both Ms. Stefanson and Mr. Klein that he would look into the matter and ensure that it was known that the outgoing PC government would not be issuing the Project license.

228. It is noteworthy that neither Ms. Stefanson nor Mr. Cullen said they asked the other during this conversation what the NDP's position on the matter was. I find that this is because they were already aware of the NDP's opposition to the issuance of the license during the transition period as of October 10, 2023.

229. I accept Mr. Klein's evidence about the discussion that occurred during this call. I find the behaviour of Ms. Stefanson and Mr. Cullen during the call was disingenuous at best. By the time of this call, both Mr. Cullen and Ms. Stefanson were already aware that the incoming NDP government was opposed to issuing the Project license during the transition period and they had agreed to share the section 11.1 option with Mr. Wharton.

230. At **5:49 p.m**., Mr. Klos forwarded Ms. Gerrard's email to Mr. Klein. Mr. Klein told me that he never saw it because he was not reading his government emails by that time.

231. At **5:56 p.m.,** immediately after the three-way phone conversation with Mr. Klein and Ms. Stefanson, Mr. Cullen called Mr. Wharton and they spoke for 12 minutes. Mr. Cullen said he told Mr. Wharton that Mr. Klein did not want to exercise the section 11.1 option (a fact Mr. Wharton already knew) and that Ms. Stefanson agreed with Mr. Klein. He said Mr. Wharton agreed with the direction he gave, not to pursue the section 11.1 option further.

232. Mr. Wharton's recollection of this phone call was very different. He recalled discussing with Mr. Cullen that Mr. Klein said he did not want to exercise the section 11.1 option because he had lost his seat. Mr. Wharton said he told Mr. Cullen that he would be contacting Ms. Squires to ask her to approve the Project license under the section. Mr. Wharton denied that Mr. Cullen directed him, on behalf of Ms. Stefanson, to stop pursuing the section 11.1 option.

233. I prefer the evidence of Mr. Wharton about his conversation with Mr. Cullen. To accept Mr. Cullen's version of the conversation, I would have to believe that Mr. Wharton defied a direction to stop pursuing the section 11.1 option and went off on his own to call Ms. Squires. I find no basis to believe that Mr. Wharton would have continued with the plan to utilize section 11.1 without the support of the Deputy Premier. I find it more likely that, in the course of the phone call, Mr. Wharton confirmed to Mr. Cullen that he would proceed to contact Ms. Squires and that Mr. Cullen agreed or did not direct him not to make that call.

234. Mr. Klein recalled that he phoned Ms. Stefanson again later that night. Phone records indicate that he called her again at **6:04 p.m.**, not long after their original call. The phone call lasted approximately 2 minutes. Ms. Stefanson does not recall the conversation. Similarly, Mr. Klein's recollection of the phone call was somewhat limited. Nonetheless, it appears that Mr. Klein may have been following up on his earlier discussion with Ms. Stefanson.

235. Shortly after his call with Mr. Cullen ended, Mr. Wharton called Mr. Johnson at **6:09 p.m.** In his interview, Mr. Wharton said he assumed that he told Mr. Johnson about his phone call to Mr. Klein, because Mr. Johnson was interested in moving the Sio Silica file forward. He said Mr.

Johnson was also aware that he would be calling Ms. Squires to ask her to issue the Project license under section 11.1.

236. Mr. Johnson did not recall any specifics of the phone conversation, claiming to have had no interest in the issuance of the Project license and no knowledge of attempts to utilize the section 11.1 option. He did however say that he was generally interested in RCT Solutions and, by extension, the issuance of the Project license because of the economic opportunities associated with the project. He said he believed that having the first solar panel manufacturing plant in North America was "game changing for Manitoba".

237. Overall, I find that the inability of Mr. Johnson to recall what happened after the election, when interviewed, puts his credibility at issue. Based on the timing of Mr. Wharton's phone call, I prefer Mr. Wharton's evidence that he was keeping Mr. Johnson updated on the attempts to exercise section 11.1.

238. At **6:18 p.m.**, Mr. Wharton texted Ms. Squires, asking to speak with her. Ms. Squires immediately called him, and they spoke for approximately eight minutes.

239. Ms. Squires said that Mr. Wharton told her that, in order to move the Project forward, all they needed was a "Ministerial Directive" and he asked her to approve an order that would allow the Project to move forward. Ms. Squires said she felt that this was an odd request as she was not familiar with Mr. Klein's files. She was, however, aware of the Sio Silica Project and the controversy surrounding it. She reported feeling "confused" by the call, and that the request was inappropriate as the outgoing government was in "caretaker", with six days remaining until the swearing-in of the new government.

240. Ms. Squires also told me that Mr. Wharton said the Project was of particular importance to Ms. Stefanson, but that "it would not look right" for her to issue the directive herself; she was not certain if he used the words "conflict of interest". Ms. Squires said she told Mr. Wharton that

she was not comfortable complying with his request to issue the Project license and she refused to do so.

241. Ms. Squires' evidence is supported by the evidence of Melanie Maher, Ms. Squires' executive assistant. She reported that she attended a dinner with Ms. Squires that evening, on October 12, 2023, where Ms. Squires told her she was very upset about the call she had just received from Mr. Wharton and that he had attempted to have her approve the Project license.

242. Mr. Wharton confirmed that he told Ms. Squires that Mr. Klein was not interested in issuing the Project license and he asked her whether "she would be prepared as the Acting Minister to sign a letter to the Director", to which Ms. Squires responded "no".

243. Mr. Wharton denied saying that it would not "look right" for Ms. Stefanson to issue the directive. Mr. Wharton also denied that he told Ms. Squires that Ms. Stefanson had a conflict related to Sio Silica, nor was he aware of such a conflict. However, Ms. Squires' statement is consistent with the comment that Mr. Klein made to Ms. Stefanson that he felt he was being asked to approve the Project at her direction. Although I cannot come to a definitive conclusion on what Mr. Wharton meant, I find it likely that he made these statements.

244. In any event, the evidence is clear: Mr. Wharton called Ms. Squires to ask her to approve the Project license during the transition period.

245. At **6:17 p.m.**, Ms. Gerrard tried calling Ms. Stefanson but did not reach her. Ms. Stefanson returned Ms. Gerrard's phone call at **6:26 p.m.** and they spoke for 6 minutes.

246. According to Ms. Gerrard, she was attempting to reach Ms. Stefanson to get her direction on the attempts within the outgoing government to exercise section 11.1. She said that, when she returned her call, Ms. Stefanson told her that Mr. Wharton and other ministers may be "trying to push through" the Project license and she asked Ms. Gerrard if she was aware of this. Ms.

Gerrard confirmed that she was. Ms. Gerrard said Ms. Stefanson then said that the Project license was not to be issued, as the outgoing government was bound by the caretaker convention.

247. Ms. Stefanson's recollection corroborates Ms. Gerrard's version of what was said in this call with one exception. According to Ms. Stefanson she also asked Ms. Gerrard what the NDP's position was and it was during this phone call she said that she first learned of the NDP's opposition to issuing the Project license during the transition period.

248. I find that Ms. Stefanson's testimony that she did not know what the NDP's position was until she received the call from Ms. Gerrard at 6:26 p.m. on October 12 is simply not consistent with other aspects of her evidence or the evidence in its totality that I received in this inquiry. Mr. Cullen had already told Ms. Stefanson on October 10 that the NDP had definitively said "no". At this point, she also knew that options were nonetheless being explored to issue the Project license. Further, in response to questions during her interview seeking details about her statement that it was during this phone call that she first learned of the NDP's opposition, Ms. Stefanson's evidence was vague and confusing.

249. It is also noteworthy that Ms. Stefanson did not initiate the call to Ms. Gerrard to tell her what was happening and to instruct her that no Project license should be issued. It was Ms. Gerrard who called Ms. Stefanson. This was almost an hour after Mr. Klein had told Ms. Stefanson about Mr. Wharton's call.

250. After speaking with Ms. Gerrard, Ms. Stefanson called Mr. Cullen at **6:40 p.m.** and they spoke for approximately 19 minutes. Mr. Cullen does not recall what they discussed. Ms. Stefanson said it was during this call that she would have told him that the NDP opposed issuing the Project license having purportedly just learned this information from Ms. Gerrard. For the reasons already articulated, I do not accept this evidence.

251. At **6:52 p.m.**, Mr. Wharton called Mr. Cullen. The phone records show that the call only lasted one minute and that Mr. Cullen was on the phone with Ms. Stefanson at that time. Even

so, Mr. Wharton said that it was during this call that Mr. Cullen told him for the first time about the NDP's opposition to issuing the Project license. According to Mr. Wharton, Mr. Cullen said, "Wab said no, and the Premier [Ms. Stefanson] said, okay, we are not pursuing it". Mr. Wharton said it was at this point that it was determined not to pursue the section 11.1 option.

252. Mr. Cullen did not recall the purported phone call with Mr. Wharton.

253. It is clear from the phone records that, although Mr. Wharton attempted to call Mr. Cullen, the call was not successful. I find that this alleged conversation between Mr. Wharton and Mr. Cullen did not occur.

254. In any event, for reasons I have already set out, I do not accept that Mr. Wharton only learned of the NDP's opposition to the Project license at 6:52 p.m. on October 12, 2023 after he had already made his calls to Mr. Klein and Ms. Squires. The evidence is clear that Mr. Wharton was aware of the incoming NDP government's opposition to issuing the license during the transition period before he made these calls. There would have been no need for his calls if the NDP had agreed that the license could be issued during the transition period.

255. At **6:53 p.m.**, Mr. Wharton called Mr. Johnson. Mr. Wharton said he told Mr. Johnson about the NDP's opposition to issuing the Project license during the transition and that they therefore could not move forward. Mr. Wharton also said he informed Mr. Johnson that he had talked to Ms. Squires and that she had declined to issue the Project license under section 11.1. I have no doubt that Mr. Wharton told Mr. Johnson about these events since he had previously updated Mr. Johnson on his phone call with Mr. Klein and continued to keep him in the loop.

256. At **6:54 p.m.**, Mr. Wharton called Ms. Gerrard. According to Mr. Wharton, he acknowledged to Ms. Gerrard that they were not pursuing the section 11.1 option.

257. For her part, Ms. Gerrard said that she told Mr. Wharton that Ms. Stefanson opposed exercising the section 11.1 option and that Ms. Stefanson had given her clear instructions not to issue the Project license.

258. At **7:33 p.m**., Ms. Walls, who had been told about the plan to exercise section 11.1 by Mr. Wharton, texted Mr. Rosner: "*Lots of movement tonight-can I get 2 minutes?*". At **10:33 p.m**., she texted him again asking to "chat". Mr. Rosner did not respond to either message.

259. Ms. Stefanson called Ms. Gerrard once more at **9:23 p.m**. and they spoke for approximately 43 minutes. Ms. Stefanson said the phone call was personal in nature and more of a "catch-up" as the two had not had the opportunity to connect in a meaningful way after the election loss. Ms. Stefanson's evidence was corroborated by Ms. Gerrard.

260. After she got off the phone with Ms. Gerrard, Ms. Stefanson texted Kelvin Goertzen and Ron Schuler at **10:12 p.m.** Mr. Goertzen was a member of Ms. Stefanson's Cabinet, and both were trusted advisors of Ms. Stefanson.

> "*Hi guys. Sorry to bother you but a very serious issue just came across my desk today where Jeff Wharton tried to ram through sio silica permit using ministerial authority. I have diffused [sic] everything. But we need to chat. Derek was involved and I'm not sure I can trust him moving forward. If you have time to talk tonight I am up for another 20 mins. Otherwise we can chat tomorrow thx h"*.

261. In her interview, Ms. Stefanson explained that she was angry with Mr. Wharton for attempting to use the section 11.1 option. She said she felt he was attempting to do so behind her back. Regarding the phrase "*I have diffused everything*", she said she was referring to her instruction to Ms. Gerrard in their 6:26 p.m. phone conversation not to allow the Project license to be issued under section 11.1. She explained that her reference to "Derek" was to Mr. Johnson; her comment related to his friendship with Mr. Wharton and his future role in her caucus.

262. Shortly after sending the text message, Ms. Stefanson called Mr. Schuler and added Mr. Goertzen to the call, and they talked for over an hour. Ms. Stefanson said that, while the phone call was a "quick conversation" to update Mr. Schuler and Mr. Goertzen on what had transpired, they mostly talked about the transition between governments and her own political future.

263. Mr. Goertzen said he got the sense from the call that Ms. Stefanson was "surprised" by what Mr. Wharton had done and that she was upset because things were "being done behind her back". He said she wanted Mr. Goertzen and Mr. Schuler's "take" on the situation and whether they had heard anything from anybody else. He also said she was concerned that Mr. Wharton might try to raise the issue at the upcoming final Cabinet meeting; she wanted Mr. Schuler and Mr. Goertzen to be aware of what was going on and their assurance that they weren't going to support the issuance of the license if it was raised at Cabinet.

264. While I cannot speak to Ms. Stefanson's intentions in sending the text message to her colleagues, I find that its contents and her subsequent explanation about it are not consistent with her conduct that preceded this message. Specifically, they are not consistent with the fact that she and Mr. Cullen had had a discussion on October 10 about sharing the section 11.1 option with Mr. Wharton. I also note that, at the time of Ms. Stefanson's text message, the plan to use the section 11.1 option had failed and that Mr. Klein had expressed considerable upset in response to Mr. Wharton's request.

(m) After October 12, 2023

265. Mr. Cullen continued to communicate about the Project license with Mr. Filmon and others after October 12. However, no further attempts were made to approve the Project license, either by him or any of the other respondents.

VI. Issues and Relevant Provisions of the Act

266. The purpose of this inquiry is to determine whether the conduct of each of the four respondents constituted a breach of any of sections 2, 3, 4 and 5 of the Act.

267. Section 4 relates to the use of confidential insider information. It reads as follows:

> **Insider information**
>
> 4 A member must not use or communicate information that is obtained in their position as a member and that is not available to the public to further or seek to further the member's private interests or those of their family or to improperly further or seek to further another person's private interests.

268. Section 3 prohibits members from making decisions when they are in a conflict of interest:

> **Decision-making**
>
> 3 A member must not make a decision or participate in making a decision related to the exercise of an official power, duty or function if the member knows or reasonably should know that, in making the decision, the member would be in a conflict of interest.

269. In order for this section to apply, two elements must be proven. First, the member must have made a decision or participated in making a decision in their official capacity. Second, the member must have known, or reasonably should have known that, in making the decision, they would be in a "conflict of interest".

270. Section 3 must be read together with section 2. Section 2 defines "conflict of interest":

> **Conflict of interest**
>
> 2 For the purpose of this Act, a member is in a conflict of interest when the member exercises an official power, duty or function that provides an opportunity to further their private interests or those of their family or to improperly further another person's private interests.

271. Taken together, sections 2 and 3 prohibit a member from making, or participating in making, a decision in their official capacity where they know or reasonably should know that there is an opportunity to further their private interests or those of their family or to improperly further the private interests of another person. It is important to note that, in order to engage sections 2 and 3, it is not necessary that a private interest actually be furthered. The conflict occurs when there is an opportunity to further a private interest. When such an opportunity exists, the Act says the member must recuse themselves and avoid any participation in that decision: s. 16(1).

272. Section 5 prohibits a member from using their position to seek to influence someone else's decision that will further their private interests or those of their family or improperly further the private interests of another person.

> **Influence**
>
> 5 A member must not use their position to seek to influence a decision of another person so as to further the member's private interests or those of their family or to improperly further another person's private interests.

273. In order for this section to apply, a member must have used their position to attempt to influence someone else's decision. The purpose, or one of the purposes, of the attempt to influence must have been to further their private interests or the private interests of their family or improperly further the private interests of another person. The essence of this element is the attempt to influence a decision; it does not matter whether or not that attempt was successful.

274. Although these provisions hinge on the existence of a "private Interest", the Act does not define this term. It only indicates what is not a private interest (s.1(1)):

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

or an interest that is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.

275. For the purposes of this report, it is not necessary to consider the full extent of the meaning of "private interest". It suffices to note that "private interest" certainly includes a pecuniary interest, that is, where there is the possibility of financial gain.

276. In considering these sections of the Act, I will rely on the findings of fact that I made with respect to the evidence that I received in the course of my investigation. I will also consider the arguments put forward to me in the written representations submitted by the respondents, both after I gave them notice of the request for an inquiry and after I sent them my preliminary conclusions.

VII. Analysis

a. Section 4

277. Section 4 can be disposed of quickly. In the course of my investigation, I found no evidence that any of the respondents used or communicated information that was not available to the public to further or seek to further anyone's private interests.

278. I therefore find that none of the respondents acted in breach of Section 4.

b. Sections 2, 3 and 5

279. The elements of these sections are similar and I will therefore deal with them together.

i. Act in an official capacity or use their position to influence

280. Sections 2, 3 and 5 require that some action be taken. The member must have made a decision or must have done something in their official capacity to try to influence someone else's decision.

Derek Johnson

281. Mr. Johnson was clearly interested in the Project license being issued and he was clearly kept well informed by Mr. Wharton. He knew of Mr. Wharton's plans to call Mr. Klein and Ms. Squires and took part in a call with a lobbyist for Sio Silica during the transition period. Given his admitted understanding of the caretaker convention, it would have been desirable if he had counselled Mr. Wharton not to call Mr. Klein and Ms. Squires. However, he was not under a duty to do so. Further, I found no evidence that he took any specific official actions. I therefore find that Mr. Johnson did not make a decision or participate in making a decision in his official capacity nor did he seek to influence another person's decision.

282. I therefore conclude that he did not breach the Act. This finding concludes my consideration of the complaint concerning Mr. Johnson.

Heather Stefanson, Cliff Cullen and Jeff Wharton

283. On the other hand, there is no question that the first element of sections 2, 3 and 5 has been proven with respect to Ms. Stefanson, Mr. Cullen and Mr. Wharton. Each made a decision in their official capacities to pursue, or allow to be pursued, the section 11.1 option. This decision inevitably involved an attempt to use their positions to influence the decision of another person, initially Mr. Klein and then Ms. Squires (I cannot determine if Ms. Stefanson knew that Ms. Squires would also be contacted, but her prior knowledge of the call to Mr. Wharton is sufficient to satisfy the first element).

284. This finding takes us to a series of questions that will determine whether the second element of sections 2, 3 and 5 has been proven. If so, the actions of these respondents breached the Act:

1. **Own or family's private interests?** Did the actions of Ms. Stefanson, Mr. Cullen and Mr. Wharton knowingly provide an opportunity to further their own private interests or those of their family?
2. **Another's interests?** Did their actions knowingly provide an opportunity to further the private interests of another person?

3. **Improper?** If the answer to question 2 is yes, would the private interests of the other person have been furthered "improperly"?

ii. "Further their own private interests or those of their family"

285. I will begin with a consideration of the first question. Did the actions of Ms. Stefanson, Mr. Cullen and Mr. Wharton knowingly provide an opportunity to further their own private interests or those of their family?

286. Each respondent stated under oath that they did not have any financial or personal connections with Sio Silica, RCT Solutions or Pyrophyte nor did any member of their family have any such connections.

287. Each respondent stated that no one acting on behalf of Sio Silica, RCT Solutions or Pyrophyte ever offered them any kind of employment or other opportunity, such as, for example, a position on a board of directors.

288. Each respondent stated that they were not aware of any financial or personal links between Sio Silica and any other respondent or member of their family, nor were they aware of any such links with RCT Solutions or Pyrophyte.

289. I found no evidence to the contrary and accept these assertions. I therefore find that none of the respondents sought to further their own private interests or the private interests of their family members or had an opportunity to do so.

290. In other words, I found no evidence that any of the respondents were trying to gain a financial benefit for themselves or for any member of their family.

iii. "Further another person's private interests"

291. The next question then is whether the actions of Ms. Stefanson, Mr. Cullen and Mr. Wharton knowingly provided an opportunity to further the private interests of another person.

292. The answer is clearly yes. It is obvious that the actions of Ms. Stefanson, Mr. Cullen and Mr. Wharton provided an opportunity to further the private interests of Sio Silica and, by extension, those of RCT Solutions. Their clear intention was to allow those two companies to proceed with their business plans.

293. However, this, by itself, would not constitute a breach of the Act. It is commonplace for members of the Legislative Assembly, and especially Cabinet ministers, to take actions that further the interests of others. It is precisely what we expect members and governments to do. For example, members advocate for or vote on laws that will further the interests of others. Members vote on changes to tax rates and credits that will further the interests of some taxpayers. Governments give grants that further the interests of the recipients. This is normal behaviour; members are elected to make decisions, and their decisions will inevitably further the interests of some people (and sometimes disadvantage others). However, members must not take any of these actions if they are "improper".

294. This then is the final question that I must address. Given that the actions of Ms. Stefanson, Mr. Cullen and Mr. Wharton provided the opportunity to further the private interests of another person, were those actions "improper" within the meaning of the Act?

iv. "Improperly further"

295. The Act does not define the types of circumstances in which a member would be considered to "improperly" further the private interests of another person. This determination must therefore be made on a case-by-case basis, having regard to all the circumstances. The determination must also begin with the ordinary meaning of the word, which is: "not in accordance with accepted rules or standards".

296. The meaning of the word "improper" was considered by the federal Conflict of Interest and Ethics Commissioner in the *Trudeau II Report*, in the context of the SNC-Lavalin affair, under analogous provisions of the federal *Conflict of Interest Act*:

> [297] In addition to section 9, the phrase "to improperly further another person's private interests" is used in two other provisions of the Act dealing with substantive rules: section 4, which establishes the general test for conflicts of interest, and section 8, which deals with insider information.
>
> [298] In its plain and ordinary meaning, the word "improper" is synonymous with incorrect, unsuitable or irregular. This is consistent with the French-language equivalent in the Act ("favoriser de façon irrégulière"). Other definitions provide that the term is synonymous with fraudulent or otherwise wrongful. As these definitions illustrate, improprieties lie on a spectrum, ranging from irregularity through inadvertence to willful fraud. For the purposes of the Act, I am concerned with improprieties that fall short of criminal activity (see, for instance, the Carson Report).
>
> ….
>
> [301] The common thread connecting the examples of impropriety in past examination reports and each use of the term "improper" in the Act is whether a public office holder used their office to commit a serious or fundamental error. Mere technical irregularities will likely not rise to the level of an improper furthering of private interests. **In my view, an impropriety under the Act occurs when a public office holder exercises an official power, duty or function that goes against the public interest, either by acting outside the scope of his or her statutory authority, or contrary to a rule, a convention or an established process.** [7](emphasis added)

297. The importance of conventions, and their relationship to Canada's written constitution, is aptly summarized by the Honourable Malcolm Rowe and Nicolas Déplanche in their paper titled *Canada's Unwritten Constitutional Order: Conventions and Structural Analysis*:

> In Peter Hogg's words, constitutional conventions are simply, "rules of the constitution that are not enforced by law courts". Although accurate, this definition requires additional comment. A British Scholar, Geffrey Marshall, proposed a more complete definition: conventions are "binding rules of constitutional behaviour which are considered to be binding by and upon those who operate the Constitution, but which are not enforced by the presiding officers in the House of Parliament". Andrew Heard wrote that conventions are defined in relation to the written law; they are "obligations upon political actors to act in a way other than what the formal law prescribes or allows".
>
> In our view, these definitions highlight three fundamental characteristics of constitutional conventions. The first one relates to their normative nature. **Conventions are binding rules of political behaviour, not mere usages from which political actors are free to derogate. The second characteristic relates to the source of this normative power: conventions are obligatory because they have been recognized as such by those to whom they apply. Third is the way they are sanctioned. Being political in nature, conventions are not enforceable**

[7] Canada, Office of the Conflict of Interest and Ethics Commissioner, *Trudeau II Report*, (Ottawa: Office of the Conflict of Interest and Ethics Commissioner, 2019) at paras 297-301

by courts. A breach of a constitutional convention creates a deficit in legitimacy, not legality, which is sanctioned ultimately in the political arena.[8] (emphasis added)

298. In its decision in the patriation of the Constitution reference, the Supreme Court of Canda discussed the meaning and significance of constitutional conventions:

> We respectfully adopt the definition of a convention given by the learned Chief Justice of Manitoba, Freedman C.J.M., in the Manitoba Reference, supra, at pp. 13-14:
>
> > What is a constitutional convention? There is a fairly lengthy literature on the subject. Although there may be shades of difference among the constitutional lawyers, political scientists, and Judges who have contributed to that literature, the essential features of a convention may be set forth with some degree of confidence. Thus there is general agreement that a convention occupies a position somewhere in between a usage or custom on the one hand and a constitutional law on the other. There is general agreement that if one sought to fix that position with greater precision he would place convention nearer to law than to usage or custom. There is also general agreement that "a convention is a rule which is regarded as obligatory by the officials to whom it applies". Hogg, Constitutional Law of Canada (1977), p. 9. There is, if not general agreement, at least weighty authority, that the sanction for breach of a convention will be political rather than legal.
>
> It should be borne in mind however that, while they are not laws, some conventions may be more important than some laws. Their importance depends on that of the value or principle which they are meant to safeguard. Also they form an integral part of the constitution and of the constitutional system. They come within the meaning of the word "Constitution" in the preamble of the British North America Act, 1867:
>
> > Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united ... with a Constitution similar in Principle to that of the United Kingdom:
>
> That is why it is perfectly appropriate to say that to violate a convention is to do something which is unconstitutional although it entails no direct legal consequence. But the words "constitutional" and "unconstitutional" may also be used in a strict legal sense, for instance with respect to a statute which is found ultra vires or unconstitutional. The foregoing may perhaps be summarized in an equation: constitutional conventions plus constitutional law equal the total constitution of the country.[9]

---

[8] Malcolm Rowe and Nicolas Déplanche, *Canada's Unwritten Constitutional Order: Conventions and Structural Analysis*, 2020 98-3 *Canadian Bar Review* 431 at 433, 2020 CanLIIDocs 3304, https://canlii.ca/t/t07f.

[9] Re: Resolution to amend the Constitution, 1981 CanLII 25 (SCC), [1981] 1 SCR 753 at 883-884, <https://canlii.ca/t/1mjlc>.

299. In *Beyond the Writ: The Expansion of the Caretaker Convention in the Twenty-First Century*, authors David M. Brock and J.W.J. Bowden note that the *Patriation Reference* provides the most authoritative statement on the caretaker convention, where the Supreme Court of Canada identified it as being a fundamental convention of Canadian government:

> Perhaps the most authoritative statement of this convention in Canada is found in Re: Resolution to amend the Constitution, more commonly known as the Patriation Reference, decided by the Supreme Court of Canada in 1981. After clarifying the nature of constitutional conventions in the United Kingdom and Canada, the Court denoted a "fundamental convention" of Canadian government as being the following:
>
> > **[I]f after a general election where the opposition obtained the majority at the polls the government refused to resign and clung to office, it would thereby commit a fundamental breach of convention, one so serious indeed that it could be regarded as tantamount to a coup d'état ... for at law the government is in office by the pleasure of the Crown although by convention it is there by the will of the people.**[10] (emphasis added)

300. The following statement by the Supreme Court demonstrates the importance of the caretaker convention:

> The main purpose of constitutional conventions is to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period. For example, the constitutional value which is the pivot of the conventions stated above and relating to responsible government is the democratic principle: **the powers of the state must be exercised in accordance with the wishes of the electorate** . . .[11] (emphasis added)

301. The caretaker convention stands at the very core of our democracy. The legitimacy of a government depends on the support of the electorate, expressed in elections. A government that loses an election has lost the confidence of the people and has lost the legitimacy to do anything beyond maintaining the status quo until the new government can take office. The

[10] David M Brock and JWJ Bowden, *Beyond the Writ: The Expansion of the Caretaker Convention in the Twenty-First Century*, 2024 87-1 Saskatchewan Law Review 1, 2024 CanLIIDocs 892 at 6.
[11] Re: Resolution to amend the Constitution, 1981 CanLII 25 (SCC), [1981] 1 SCR 753 at 880, <https://canlii.ca/t/1mjlc>.

exercise of power by an outgoing government to make significant decisions except in the most exceptional circumstances is a serious affront to our democratic institutions and to voters.

302. I therefore conclude that the breach of a constitutional convention, in this case, the caretaker convention, is "improper" within the meaning of the Act.

303. At the beginning of this report, I provided a brief overview of the caretaker convention. I noted that a presentation about the caretaker convention was made to Cabinet before the election was called. I noted that all of the respondents acknowledged seeing this presentation; they all said that they knew and understood what it meant and required. They all accepted that it was in force in Manitoba between the calling of the election on September 5, 2023 and the swearing in of the new government on October 18, 2023.

304. While they were bound by the caretaker convention, members of the outgoing government had to avoid making significant decisions, taking significant actions, or committing to major expenditures. As described earlier, government activity while the convention is in force should be restricted to matters that are:

a. routine, or
b. non-controversial, or
c. urgent and in the public interest, or
d. reversible by a new government without undue cost or disruption, or
e. agreed to by opposition parties (in those cases where consultation is appropriate).[12]

305. This mirrors the advice set out in the presentation about the caretaker convention that the Clerk's Office provided to Cabinet before the 2023 election.

[12] Guidelines on the conduct of Ministers, Ministers of State, exempt staff and public servants during an election - Canada.ca (Government of Canada, Privy Council Office, August 2021)

306. The Project license for Sio Silica had not been issued at the onset of the caretaker period. If approval of the license fell into one of these categories, it might have been permissible to issue the license during the caretaker period. Did any of the exceptions apply?

307. **Routine or non-controversial?** There is no evidence supporting the argument that approval of the Project license was a routine or non-controversial administrative matter. On the contrary, it was frequently discussed in the media and attracted significant public comment and scrutiny. There were strong views favouring the economic benefits of the Project but there were equally strong views arguing that the Project would have serious negative effects on the environment. All of the respondents were aware, or should have been aware, that the Project license was not routine and was controversial. Indeed, in her response to my preliminary conclusions, Ms. Stefanson acknowledged that the Sio Silica Project was controversial. It is clear therefore that this exception did not apply.

308. **Urgent?** Mr. Cullen told me that he understood there was some urgency with respect to the approval of the Project License that, in part, explained the outgoing government's motivation in seeking approval prior to the change of government. In her response, Ms. Stefanson alleged that Sio Silica had advised the government that their financing was at risk if the Project license was not issued promptly. Despite these claims, based on the evidence before me, I found that, if any timelines for approval were communicated to the respondents, the earliest would have been the end of 2023 and that this timeline was known to Mr. Cullen and Mr. Wharton and was almost certainly communicated to Ms. Stefanson. As such, I do not find that the Project license was a matter of immediate urgency that justified an exception to the caretaker convention.

309. **Reversible?** The approval of the Project license would have set into motion the financing and construction of a large-scale mining and processing facility. It would only have been reversible at significant cost and disruption, if it was reversible at all, and it certainly would have bound the freedom of decision-making of the incoming government. Again, I have no difficulty finding that this exception is not applicable to the present matter.

310. **Agreed to?** I found that the incoming NDP government made it clear that it opposed approval of the Project license during the transition period. The evidence shows that, before Mr. Wharton asked Mr. Klein to approve the license, Ms. Stefanson, Mr. Cullen and Mr. Wharton were aware of the NDP's position; none of them believed that the incoming government had approved the license being issued.

311. If the NDP had been amenable to having the license issued during the transition period, approval could have been done in the usual way, that is, it could have been issued by the Director of the Environmental Appeals Branch. There would have been no need to resort to using section 11.1 ministerial approval. The very fact that options were being sought to approve the license without the Director's involvement demonstrates the knowledge of Mr. Cullen, Mr. Wharton and Ms. Stefanson that the NDP was not amenable to the outgoing government approving the license during the transition period. I therefore find that the final exception to the caretaker convention is not applicable.

312. In the circumstances, I find that none of the enumerated exemptions to the caretaker convention apply. The approval of the Project license was therefore not a government activity that was permissible during the caretaker period and the efforts taken by Ms. Stefanson, Mr. Cullen and Mr. Wharton were done in breach of their obligations under that convention. They were therefore improper within the meaning of the Act.

313. As such, I find that Ms. Stefanson, Mr. Cullen and Mr. Wharton breached sections 2, 3 and 5 of the Act.

c. Written Representations

314. As noted previously, when I provided each respondent with written notification that I had received a request for an inquiry into their conduct, I offered them an opportunity to provide written representations and each did so.

315. As required by the Act (and fairness), I also provided my preliminary conclusions at the end of my investigation to each of Ms. Stefanson, Mr. Cullen and Mr. Wharton. I indicated that I was likely to make adverse findings against them; I provided them with the particulars of those findings and offered them the opportunity to respond. Each provided me with written representations.

316. I carefully considered their representations before reaching the conclusions and recommendations set out in this report. In this section, I will set out the arguments that they made and explain why, for the most part, I did not accept them.

i. Heather Stefanson

317. Ms. Stefanson argued, with respect to her conduct overall, that an issue arose relating to the Sio Silica license that required her to exercise her authority as Premier and that her overriding direction was that if, after the NDP transition team was fully briefed, they said that they did not want the Project license to be issued before the new government was sworn in, no license would be issued by her government. She said this direction was based on her knowledge of the caretaker convention.

318. She further submitted that my preliminary conclusions disregarded her evidence that she gave that direction to the Clerk of the Executive Council and that, as a result, no license was issued.

319. She acknowledged that the Sio Silica Project was controversial but went on to state that "nonetheless, the proposed extraction of the sand and its ultimate use in the manufacture of solar panels in Manitoba had the realistic potential of being an extremely important economic development project for Manitoba". She submitted that Sio Silica was advising the government that the financing of the project was at serious risk if the license was not issued promptly and that this was precisely the type of situation in which an incumbent government must retain its responsibility to govern.

320. She also submitted that no license was issued and, therefore, the decision with respect to whether to issue a license was left to the NDP government after it was sworn in.

321. Ms. Stefanson also submitted that, because the caretaker convention is simply a convention, not a law or a regulation, it is not a prosecutorial instrument nor a code that can give rise to liabilities, punishments or penalties. She said that it is simply a useful statement of general principles. Accordingly, she submitted that I have no authority or jurisdiction to make findings or recommendations with respect to sanctions for any alleged breaches of the caretaker convention.

322. Finally, Ms. Stefanson argued that the manner in which this inquiry was conducted was not fair because she was not provided with an opportunity to respond to all the evidence.

323. I will address each of these arguments in turn.

324. First, respectfully, the facts I learned in this investigation simply do not support the assertions made by Ms. Stefanson.

325. By her own admission, Ms. Stefanson's recollection of what happened after the election was very poor. It is true that, during her interview, the only thing she repeatedly said she could remember was that she had made it clear that the decision to approve the Project license depended on whether the NDP favoured it and that it needed to be taken to the transition team. However, she never provided clear or cogent evidence as to when she gave that direction nor when she learned the answer to that question. She says that she gave a direction to Ms. Gerrard, the then Clerk of the Executive Council, that her government would not be issuing the Project license. However, the only conversation that my investigation learned of in which that direction could have been given was at 6:26 p.m. on October 12 – after Mr. Wharton had made the calls to Mr. Klein and Ms. Squires. Furthermore, Ms. Stefanson did not make that phone call; Ms. Gerrard called her.

326. The totality of the evidence I have accepted shows that Ms. Stefanson knew not later than October 10 that the NDP did not support issuing the license during the transition period; Mr. Cullen told her this in his phone conversation with her that day. During that conversation, Ms. Stefanson and Mr. Cullen agreed that he would discuss the section 11.1 option with Mr. Wharton. At that point, however, there would have been no reason to discuss any options because there was no decision for the outgoing government to legitimately make. Ms. Stefanson should have put an end to any consideration of options relating to issuing the license and any furtherance of the section 11.1 option and she failed in her duty to do so.

327. As I have said, none of the exceptions to the caretaker convention applied here. By her own admission, the Project was controversial. The evidence shows that, contrary to her assertion, the Project did not have an urgency that required a decision to be made within the transition period; furthermore, her assertion of urgency is at odds with her repeated insistence that the decision was the incoming government's to make. I accept that Ms. Stefanson believed that the Project offered major economic benefits to Manitoba. That however does not justify a breach of the caretaker convention.

328. I also do not accept Ms. Stefanson's argument that she did not breach the caretaker convention because no license was in fact issued. Her efforts to have the Project license issued during the transition period were themselves a breach of the caretaker convention. They created an opportunity to improperly further the interests of Sio Silica and potentially RCT Solutions and involved an attempt to influence the decision of Mr. Klein. The fact that her efforts were unsuccessful does not change that finding.

329. Ms. Stefanson dismisses the caretaker convention as merely a useful statement of general principles. I emphatically disagree and find it disappointing that she would give it such little weight. As I have already discussed and as the Supreme Court of Canada has made clear, the caretaker convention is a binding constitutional principle that is fundamental to the respect for the will of the voters that is the basis of our democracy.

330. Ms. Stefanson notes that the caretaker convention is not a law or regulation. The implication of this statement is that only a breach of a law or regulation can be "improper" within the meaning of the Act. This would mean that "improper" should be interpreted to mean "illegal". This is far too narrow an interpretation and is clearly not the intent of the Legislature.

331. Ms. Stefanson further argues that it is beyond my jurisdiction as Ethics Commissioner to interpret the caretaker convention or to apply penalties to its breach. It is correct that a breach of a convention cannot be directly enforced by the courts. However,

> . . . although they cannot order political actors to follow a constitutional convention, courts can declare whether a convention exists and whether it has been breached. In so doing, the court would not be not (sic) speaking as to the legality of a political decision; rather, it would be speaking as to what we would call constitutional legitimacy.[13]

332. In making my findings and recommendations, I am not enforcing the caretaker convention nor am I applying penalties for its breach. Rather, I am interpreting the meaning of the word "improperly" in the Act. In interpreting that word, I must have regard to the accepted standards of conduct that should have been expected of a member of the Legislative Assembly and of a Premier. I have concluded that Ms. Stefanson's conduct fell well below accepted standards and was "improper" because it breached a constitutional convention: the caretaker convention. That breach provides the basis for the finding that she acted "improperly", and it is this interpretation of that word in the Act that provides the basis for recommending a penalty. The fact that Ms. Stefanson disagrees with my interpretation does not deprive me of my jurisdiction to make such findings and recommendations.

333. Finally, I disagree with Ms. Stefanson's submission that my investigation's process has been unfair. As outlined earlier in the process section of this report, I have scrupulously shared

[13] Malcolm Rowe and Nicolas Déplanche, *Canada's Unwritten Constitutional Order: Conventions and Structural Analysis*, 2020 98-3 *Canadian Bar Review* 431 at 444, 2020 CanLIIDocs 3304, https://canlii.ca/t/t07f.

all relevant evidence with the respondents and given them a fair and informed opportunity to respond.

ii. Heather Stefanson – additional representations

334. On April 30, 2025, counsel for Ms. Stefanson indicated that he wished to make further representations on her behalf. In the interests of fairness, I agreed to accept her further representations in writing, and they were submitted on May 6, 2025, the deadline that I imposed.

335. The additional representations reiterated the argument that the caretaker convention is merely a useful statement of general principles and:

> does not displace a government's responsibility to continue to govern. It should not be used to make "after the fact" judgments about an outgoing government's assessments of what actions may be required to properly serve the public interest prior to a new government being sworn in.

336. As I have already said, I find these comments about the caretaker convention to be surprising in light of Ms. Stefanson's repeated evidence that she insisted – because of the caretaker convention – that no Project license be issued without the consent of the NDP. Her testimony before me emphasized that the caretaker convention applied. Her written representations suggest a contrary position.

337. The additional representations went on to say that Ms. Stefanson had obtained a legal opinion from the former managing partner of a major Toronto-based law firm:

> with respect to whether any of your potential findings would impact Ms. Stefanson's capacity to serve as a director of any publicly traded Canadian companies. He opined that they would not and also offered the opinion that the Caretaker Convention has no relevance to any determinations under the Conflict of Interest (Members and Ministers) Act."

338. The letter concluded with the following comment:

> If you believe you have the authority to undertake an investigation related to the Caretaker Convention and to report your findings to the Legislative Assembly, you nonetheless should refrain from making recommendations as to penalties to be imposed on a former premier because doing so exceeds the limits of your authority. Not only is doing so inherently problematic, it also carries with it the risk of politicizing and weaponizing the Caretaker Convention for potential abuse by future incoming governments against their predecessors.

339. I acknowledge and respect the credentials of the lawyer who has provided Ms. Stefanson with his opinion on the application of the caretaker convention to the Act. However, no reasons for his opinion were shared with me and I respectfully disagree with his conclusion. As I have already said, the Act prohibits "improperly" furthering the private interests of third parties. I must interpret the meaning of "improperly" and I have concluded that the breach of a constitutional principle, especially one as important as the caretaker convention, clearly falls within the meaning of that word.

340. Ms. Stefanson argues that I should recommend no penalty; indeed, she suggests without explanation that I have no jurisdiction to recommend a penalty. However, as I have already said, the Act determines my jurisdiction and it clearly empowers the Ethics Commissioner to recommend a penalty in appropriate cases.

341. Ms. Stefanson's final comment suggests that the decision that a penalty is appropriate opens the door to abuse of the Act in the future. It may be that spurious complaints will be filed in the future but that is why complaints under the Act are considered by an independent, non-partisan Ethics Commissioner and why the Commissioner can find that a complaint was made without a reasonable basis.[14] The possibility that complaints may be submitted in the future is

[14] *The Conflict of Interest (Members and Ministers) Act*, C.C.S.M. c. C171, s. 48(1) provides: "If the commissioner is of the opinion that the member making a request did not have reasonable grounds for making it, the commissioner must report that opinion to the Speaker." In that case, the Assembly can find that member in contempt by a 2/3 vote.

not the "weaponization" of the Act; it is the Act operating as the Legislature intended, for the protection of all Manitobans.

iii. Cliff Cullen

342. Mr. Cullen's main submission was that he did not take any steps to pressure anyone to issue the license and did not himself issue the license; rather, he simply sought information.

343. He argued that governing with restraint cannot mean governing without being informed; merely seeking information did not in any way bind the decision-making of an incoming government. He said that it is a minister's duty to be informed; he requested information and shared it with Cabinet colleagues who were asking for it. He argued that many of the discussions were simply seeking clarification of process which, he believed, was a responsible approach.

344. He argued that to interpret his actions in seeking information as a conflict of interest and an attempt to further someone's interests would effectively mean that any member of government, and particularly Cabinet ministers, would be in a conflict of interest by simply going about daily government business.

345. He further submitted that he never sought to influence anyone during the caretaker period.

346. In his written submission, Mr. Cullen characterized his actions as follows. He said that the report from the Clean Environment Commission regarding Sio Silica's application for a Project license had been under consideration within government for some time before the writ of election was issued on September 5, 2023. It was his understanding that the decision had been made to issue a license and that a draft license had been provided to Sio Silica. In his view, therefore, the Project license would be approved and signed by the Director of the Environmental Approvals Branch. He went on to confirm that, following the election, Mr. Klos informed him that the Department would not proceed with the license and that he then contacted the Clerk, Ms. Gerrard, to see why there had been a change in approach.

347. He said that, when he contacted Ms. Gerrard, he was again simply looking for information about the processes by which a license could be issued and confirmed that Ms. Gerrard provided him with information about section 11.1 of *The Environment Act* by email on October 10, 2023.

348. He said that he did not recall having a discussion on October 10, 2023 with Ms. Stefanson regarding Sio Silica and that he could not even say that he would have known about the incoming NDP's position with respect to issuing a license to Sio Silica when he talked with her on October 10, 2023.

349. He reiterated that sharing the information Ms. Gerrard provided to him about section 11.1 with Mr. Wharton was simply that – sharing information. He said that he had no intention for Mr. Wharton to act upon the information to have the Project license issued during the transition period. Although he shared the information with Mr. Wharton, he did not direct him to approve the license or to seek approval of the license from Minister Klein.

350. Since no license was issued to Sio Silica in any event, he submitted that no one's interests were furthered.

351. Finally, Mr. Cullen submitted that, although the caretaker convention is important, because it is not a piece of legislation and is not set out in the Act, it cannot be relied upon as the basis for finding the Act has been breached.

352. I agree with Mr. Cullen's argument that there is usually nothing wrong with a minister asking for options. However, ministers generally seek options because they wish to choose one; they wish to make a decision. In this case, there was no decision to be made by Mr. Cullen's government; the voters had made it clear that they had entrusted decision-making to a new government. Furthermore, his submission that his actions stopped at seeking information and options flies in the face of the evidence that I received, including Mr. Cullen's own testimony, and I find it is truly astonishing.

353. Mr. Cullen clearly put considerable pressure on the public service to assist with the plan to approve the Project license during the transition period. This placed senior officials in a very difficult position, almost forcing them to choose between their duty of loyalty and their duty of ethical behaviour.

354. Mr. Cullen sought options because he knew the incoming NDP government did not agree with his outgoing government issuing the license to Sio Silica and he was looking for a way to circumvent that. Once he knew there was a way, he did not share the section 11.1 option with Mr. Wharton as a "courtesy", as he suggested to me in his interview. He shared it with the clear intention that Mr. Wharton would act on it.

355. The version of events that Mr. Cullen put forward in his written response to my preliminary conclusions is at odds with the evidence he gave me under oath when he was interviewed. Of crucial importance, Mr. Cullen's sworn testimony, which I accepted, was that, after he received Ms. Gerrard's email setting out the section 11.1 process, he called Ms. Stefanson on October 10 to tell her that the incoming NDP government was opposed to issuing the Project license; he informed her about the section 11.1 option and told her that he was going to share that information with Mr. Wharton.

356. Like Ms. Stefanson, Mr. Cullen argued that, since the Project license was not in fact issued, his decision to call Mr. Wharton, and Mr. Wharton's subsequent calls to Mr. Klein and Ms. Squires, did not contravene the Act because no one's interests were actually furthered. However, as I have already said, the Act is breached if a decision provides an <u>opportunity</u> to further another person's private interests. Mr. Cullen's actions clearly created an opportunity to improperly further the private interests of Sio Silica and RCT Solutions in breach of the caretaker convention.

357. In his submission, Mr. Cullen said: "Had I decided or participated in a decision to act pursuant to the authority of s. 11.1 of The Environment Act, there may have been a basis to find a conflict of interest. But that did not transpire." Respectfully, that is exactly what transpired.

358. Finally, I do not accept Mr. Cullen's submission that I have no authority to find that a breach of the caretaker convention constitutes a breach of the Act. As I said in response to Ms. Stefanson's similar argument, it is precisely my authority and duty to determine whether he acted "improperly". By breaching the caretaker convention, he acted "improperly" and, in so doing, breached the Act.

iv. Jeff Wharton

359. The main argument made by Mr. Wharton is that he acted in good faith, relying on the assurances of others that his actions were appropriate.

360. Mr. Wharton emphasized that his conduct was at all times in furtherance of the interests of Manitoba and Manitobans by seeking to advance what he regarded as an important economic development that would create thousands of jobs within the province.

361. He submitted that it was his honest and reasonable belief that all the steps necessary for the issuance of the license had been taken and that approval of the license had already been directed. He said he believed therefore that the Director had nothing to do and no discretion but to issue the license, noting that a draft license had already been sent to Sio Silica.

362. He submitted that, although he knew about the caretaker convention, he believed it did not apply in this situation for two reasons. First, he submitted the circumstances involved "the finalization of a decision that had already been made, had been communicated and conceivably could have been enforceable by Sio Silica"; second, the caretaker convention is not legislation nor dealt with in any "literature that is readily available to any person". He submitted that the fact that the caretaker convention required "dozens of slides, PowerPoint presentations and specific training by the presenter indicates that it is not a simple concept."

363. Mr. Wharton also submitted that he was primarily relying on the advice he received from his colleagues and staff. In particular, he said that he accepted the advice and directions that he received from the Premier and Deputy Premier of Manitoba – Ms. Stefanson and Mr. Cullen – and

that he would not have undertaken a course of conduct that he believed was illegal or improper. He said that he had a reasonable and honest belief that the Premier and the Deputy Premier would not direct him to do something that was improper or constituted a breach of any law or convention. He said he believed they would have obtained the information and advice necessary to proceed with this course of conduct.

364. Mr. Wharton also pointed out that he was not privy to the email sent by the Clerk of the Executive Council, Ms. Gerrard, to Mr. Klos that said that using the section 11.1 procedure would be a breach of the caretaker convention. He emphasized that he was not copied on any of the email correspondence to or from Ms. Gerrard. He submitted that, if he had received the information Ms. Gerrard sent to Mr. Klos on October 12, 2023, he would not have proceeded in the way that he did.

365. Furthermore, Mr. Wharton said that, once he learned from Mr. Cullen that the NDP did not support issuing the license during the transition period, he ceased his efforts.

366. Like Ms. Stefanson and Mr. Cullen, Mr. Wharton also submitted that the Act makes no reference to compliance with the caretaker convention nor is non-compliance defined in the Act as a type of improper conduct. He argued that the caretaker convention is neither a statute nor a law but rather is a "self-imposed political restraint upon certain actions which can or cannot be taken by politicians or certain administrators during a proscribed time. . . Politicians can disregard the convention and the only method of censure is by the public via election."

367. In my view, the evidence does not support Mr. Wharton's factual arguments. His suggestion that a decision to issue the license had already been made (and that this was demonstrated by the fact that a draft license had been sent to Sio Silica) is not correct. It may well be that sending the draft license was an indication that a final license was forthcoming, but that decision and that step had not been taken. The fact that Mr. Wharton was seeking a decision on the Project license from Mr. Klein is a clear indication that he knew there was still a decision to be made.

368. As I have found, Mr. Wharton was aware of the NDP's opposition to issuing the Project license during the transition period before he called Mr. Klein and Ms. Squires. If the incoming NDP government had agreed, there would have been no need to ask a minister to step into the shoes of the Director to issue the license; there would have been no reason for the Director not to issue the license herself. Furthermore, there is no evidence that Mr. Wharton ever asked for or received confirmation that the incoming government approved of the license being issued during the transition period. Only that knowledge would have justified the calls that he made and only that knowledge would have supported an exception to the convention.

369. In his written submission, Mr. Wharton denied that the steps he took or was directed to take indicated that anyone had intended to defeat the intent of the caretaker convention. He submitted that all "of the research which was presented and which had been directed through Mr. Klein's office was for the purpose of solving the problem of who would sign the license".

370. Of course, the only "problem" to be solved was that the incoming NDP government was opposed to having the license issued during the transition period and was therefore a matter that the outgoing PC government no longer had a mandate to address.

371. Mr. Wharton's submission that he was not aware of Ms. Gerrard's advice that relying on the section 11.1 option would contravene the caretaker convention is not supported by the evidence. I have accepted Ms. Gerrard's evidence that, sometime between October 10 and the evening of October 12 when Mr. Wharton called Mr. Klein and Ms. Squires, Ms. Gerrard was called to his office where she told him, Mr. Cullen and Mr. Johnson that their desire to have the Project license approved during the transition period despite the opposition of the NDP would contravene the caretaker convention.

372. Mr. Wharton's submission that he took no further steps once he found out from Mr. Cullen that the NDP was not in agreement is similarly not supported by the evidence I received in this inquiry. Mr. Wharton had already been told of the NDP's opposition by his deputy minister, after the transition team meeting on October 6. Even if this were not so, Mr. Cullen told Mr.

Wharton of the NDP's opposition when he called to give him the information about the section 11.1 option; that call was made at 1:01 p.m. on October 12, well before Mr. Wharton's calls to Mr. Klein and Ms. Squires.

373. As will be clear by now, I do not agree with Mr. Wharton's position on the enforceability of the caretaker convention. It is true that the caretaker convention is not set out in legislation. That is the whole point of a convention; it is an unwritten practice that is a binding rule of political behaviour.

374. Furthermore, it cannot be said that the caretaker convention is not available to be read by the public. As already demonstrated in this report, it is described and discussed in many sources available to anyone with access to a library or the internet. More importantly, all ministers, including Mr. Wharton, were provided with a PowerPoint presentation prior to the Provincial general election that described the convention's requirements. Mr. Wharton acknowledged in the testimony he gave during his interview that he saw and understood that presentation.

375. I would add that, contrary to his comments about its complexity, it did not take "dozens of slides, PowerPoint presentations and specific training by the presenter" to understand the caretaker convention. The gist of the convention was set out in the single slide reproduced earlier in this report. The concept that a government must have legitimacy to govern – the confidence of the people – is not complicated.

376. I accept Mr. Wharton's submission that he assumed the information that Mr. Cullen gave him about using the section 11.1 option had been vetted through the "proper channels". I accept that he believed that Mr. Cullen was speaking to him with the backing of the Premier, Ms. Stefanson. Even so, this does not excuse his actions; he should have been less credulous.

VIII. Recommendations Respecting Penalty

377. The Act's fundamental purpose is to promote the confidence of the public in the members of the Legislative Assembly and in our democratic institutions. As Ethics Commissioner, I strive to educate members and help them meet their obligations under the Act. My priority is to encourage and facilitate compliance, rather than to punish. This is especially so since the Act is still quite new. However, the Act recognizes that sometimes sanctions are necessary.

378. The Act provides that, if I determine that a member has contravened the Act, I can recommend that the Assembly impose a penalty. Alternatively, I can recommend that no penalty be imposed (and, in some circumstances, I must recommend that).

379. Although I can recommend a penalty, the ultimate decision rests with the Legislative Assembly. It must vote to accept or reject my recommendations. Its decision is final and conclusive.

> **Powers of Assembly**
>
> 51(2) The Assembly may order the penalty recommended by the commissioner, as set out in the commissioner's report, be imposed, or may reject the recommendation, but the Assembly must not further inquire into the matter or impose a penalty other than the one recommended by the commissioner.
>
> **Decision is final**
>
> 51(3) The Assembly's decision is final and conclusive.

380. Section 50(1) sets out the penalties that I am empowered to recommend:

> **Commissioner's recommendations in case of contravention**
>
> 50(1) If, after conducting an inquiry, the commissioner is of the opinion that the member has contravened this Act, the commissioner may recommend the following penalty be imposed on a member:
>
> (a) the member be reprimanded;
>
> (b) the member be fined an amount not exceeding $50,000;

(c) the member's right to sit and vote in the Assembly be suspended for a specified period or until the fulfilment of a condition imposed by the commissioner;

(d) the member's seat be declared vacant.

381. This section is somewhat ambiguous, in that it does not have the word “and” or “or” at the end of clause (c). The inclusion of one of those words would more clearly indicate whether I can recommend more than one of the listed penalties (“and”) or can recommend only one of the listed penalties (“or”).

382. I note that the similar provision in the Ontario legislation uses the word “or”.[15] I also note that the section says that I can recommend the “following penalty” – in the singular. I therefore conclude that I can only recommend one of the four penalties in respect of each respondent.

383. In my view, the penalties are listed in ascending order of severity. The least serious contravention should be penalized with a reprimand. The most serious contravention should result in the member’s seat being vacated.

384. Subsection 50(2) sets out the circumstances in which I must recommend that no penalty be imposed. That subsection deals with situations where the member had relied on the advice of the Ethics Commissioner after disclosing to the Commissioner all relevant facts that were known to the member. It is not applicable here.

385. Section 50(3) gives the Commissioner the discretion to recommend that no penalty be imposed in the following circumstances:

Recommendations re no penalty

50(3) The commissioner may recommend that no penalty be imposed if the commissioner is of the opinion that

[15] *Members’ Integrity Act, 1994*, S,O. 1994, c.38, s. 34(1).

> (a) a contravention occurred even though the member took all reasonable measures to prevent it; or
>
> (b) a contravention occurred that was trivial or that was committed through inadvertence or an error of judgment made in good faith.

386. Based on the evidence outlined in this report, I find that this subsection does not apply to the conduct of Ms. Stefanson, Mr. Cullen or Mr. Wharton. No reasonable steps were taken to prevent the contravention, and the contravention was not committed through inadvertence; in fact, the opposite is true. The contravention was an affront to an essential principle of democracy and cannot be described as trivial. The contravention may have been an error of judgment but the knowledge of the three respondents of the caretaker convention prevents me from considering any error of judgment to have been made in good faith, as do the several warnings that Mr. Cullen and Mr. Wharton received from the public service that their actions would breach the convention.

387. I will therefore proceed to a consideration of the appropriate penalties that I should recommend to the Legislative Assembly. In doing so, I will be guided by the following factors regarding sanctions that are commonly considered in regulatory, administrative, civil and criminal matters:

- the need to denounce the wrongful conduct;
- the need to deter similar conduct in the future by the member or by other members:
- the harm that was caused by the contravention;
- the extent of a personal benefit to the member;
- the level of knowledge and experience of the member;
- the degree of responsibility for the contravention;
- the extent to which the member accepted responsibility and was remorseful; and
- the extent to which the member was cooperative in the investigation.

388. In considering the harm caused by the contravention, I recognize that the Project license was not in fact approved and so the freedom of the incoming government to make the decision

was not impaired. However, the true harm here was to public confidence in our democratic processes and institutions and I must give that appropriate weight.

389. Taking these factors into consideration, I recommend to the Legislative Assembly that the conduct of Ms. Stefanson, Mr. Cullen and Mr. Wharton be sanctioned by the imposition of penalties as outlined below.

a. Heather Stefanson

390. I have found no evidence that Ms. Stefanson would have received a financial benefit if the efforts to approve the Project license had been successful. Even so, as I have already commented, those efforts could have resulted in a decision with permanent and significant consequences. More importantly, those efforts lacked ethical and constitutional legitimacy. I found her repeated dismissal of the caretaker convention in her written representations to me – a convention that is central to respect for the wishes of voters – to be disheartening.

391. Ms. Stefanson acknowledged that she was in regular communication with Mr. Cullen during the transition period. Despite her denials, she was aware that the incoming NDP government did not agree that her outgoing government should approve the Project license. She and Mr. Cullen agreed to look for options to have the license approved anyway and agreed to share the section 11.1 option with Mr. Wharton. Their intention was clearly that he act on the option. Ms. Stefanson was aware of the caretaker convention and knew or should have known that the attempts to use the section 11.1 procedure to approve the Project license were contrary to that convention.

392. Ms. Stefanson cooperated with my investigation and she and her counsel went to considerable effort to provide me with documents in her possession and phone records. I am especially grateful for her cooperation in my efforts to obtain documents that the Clerk of the Executive Council had initially redacted on the basis of solicitor-client privilege. Her cooperation is a mitigating factor.

393. I also acknowledge and appreciate Ms. Stefanson's many years of public service. Having said that, her years of experience should have made her aware of the importance of respecting the judgment of the voters and should have prompted her to take timely steps to put an end to the efforts to get around the incoming government's opposition to the issuance of the Project license during the transition period.

394. Despite the roles of Mr. Cullen and Mr. Wharton, final accountability must rest with the Premier. In her interview, Ms. Stefanson acknowledged that, as Premier, she had a responsibility to ensure that ministers in her government complied with their ethical obligations and to address any member's misconduct that came to her attention. I agree. She had a higher leadership responsibility that she failed to meet.

395. Ms. Stefanson is no longer a member of the Legislative Assembly and so only two of the four penalties listed in section 50(1) are available to me for recommendation: a reprimand or a fine. In my view, a reprimand would not sufficiently recognize the gravity of Ms. Stefanson's actions and her degree of responsibility and would not provide sufficient denunciation of her actions.

396. The Act allows me to recommend a fine up to $50,000. The maximum fine should be reserved for the worst imaginable contravention; this case is serious but does not reach that threshold.

397. Having regard to all of the circumstances, I am of the view that a fine of $18,000 should be imposed on Ms. Stefanson.

b. Cliff Cullen

398. Like Ms. Stefanson, Mr. Cullen was aware of the caretaker convention and knew that the Project license should not be approved during the transition period without the consent of the incoming government. Mr. Cullen, together with Ms. Stefanson, looked for options to approve the

Project license. He then pursued the section 11.1 option, despite his knowledge that the incoming government did not consent and despite the several warnings that he received that his actions would breach the caretaker convention.

399. In his written submission, Mr. Cullen noted his many years of public service, and I agree that they deserve positive consideration. On the other hand, as I just commented, his years of experience should have alerted him that his efforts to exercise the powers of government after losing the confidence of voters were serious and improper.

400. Mr. Cullen cooperated with my investigation and was interviewed twice. The absence of any personal financial benefit is also a mitigating factor.

401. Mr. Cullen is also no longer a member of the Legislative Assembly and so only two of the four penalties listed in section 50(1) are available to me for recommendation: a reprimand or a fine. For the same reasons given for Ms. Stefanson, a reprimand would not be an adequate penalty.

402. Having regard to all of the circumstances, I am of the view that a fine of $12,000 should be imposed on Mr. Cullen.

c. Jeff Wharton

403. Mr. Wharton acknowledged that he made the phone calls to Mr. Klein and to Ms. Squires. He knew or ought to have known that the calls would breach the caretaker convention, but he said in his submission to me that he relied on Mr. Cullen's advice that the calls were permissible. Mr. Wharton submits that this should be a mitigating factor in considering an appropriate penalty. I do not agree. He had an obligation – and the knowledge – to make an independent assessment of the propriety of the proposed calls and he failed to do so.

404. Like the other respondents, Mr. Wharton was cooperative in my investigation. Like the other respondents, I also acknowledge his years of public service but add that with those years of experience comes the expectation that he should have known better. I also accept that Mr. Wharton received no financial benefit from his actions.

405. In his written representations, Mr. Wharton argued that he made an error of judgment in good faith and he expressed a measure of remorse. As stated by his counsel: "Mr. Wharton is prepared to make a public apology regarding his error of judgement. Further he is prepared to assist in any further education or training regarding the Caretaker Convention so that future members know how important it is to get advice and not just proceed on someone elses (sic) interpretation". I have accepted Mr. Wharton's expression of remorse as a mitigating factor in determining the appropriate penalty.

406. The Act does not allow me to require Mr. Wharton to make a public apology or to assist in the training of other members. Even so, I hope that Mr. Wharton follows through on his offer. However, as previously stated, while he may have made an error of judgment, the facts that I have found do not allow me to conclude that it was in good faith and that no penalty should be imposed.

407. In my view, a reprimand would not be an adequate penalty. I also believe that a period of suspension as a member – or, worse, vacating his seat – would be an excessive penalty. His conduct merits a fine that is somewhat less than the ones recommended for Ms. Stefanson and Mr. Cullen.

408. Having regard to all the circumstances, I am of the view that a fine of $10,000 should be imposed on Mr. Wharton.

IX. Conclusion

409. For the reasons given above, I submit the following findings and recommendations to the Legislative Assembly in respect of each of the respondents:

a) Heather Stefanson breached the Act and should be fined in the amount of $18,000.

b) Cliff Cullen breached the Act and should be fined in the amount of $12,000.

c) Jeff Wharton breached the Act and should be fined in the amount of $10,000.

d) Derek Johnson did not breach the Act.

Dated this 21st day of May, 2025

"Original signed by
Jeffrey Schnoor, K.C."

Jeffrey Schnoor, K.C.
Ethics Commissioner