



S-16984.1

No.  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the matter of a Decision of the Conflict of Interest Commissioner on May 4, 2016  
pursuant to the *Members' Conflict of Interest Act*, RSBC 1996, c.287

BETWEEN:

DEMOCRACY WATCH

PETITIONER

AND:

BRITISH COLUMBIA CONFLICT OF INTEREST COMMISSIONER

RESPONDENT

PETITION

ON NOTICE TO:

**Conflict of Interest Commissioner**  
PO Box 9289 Stn Prov Govt  
Victoria, BC V8W 9J7

**Attorney General of British Columbia**  
PO Box 9289 Stn Prov Govt  
Victoria, BC V8W 9J7

**Christina Joan Clark**  
PO Box 9289 Stn Prov Govt  
Victoria, BC V8W 9J7

This proceeding is brought for the relief set out in Part 1 below, by Democracy Watch (petitioner).

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s)
  - (i) 2 copies of the filed response to petition, and
  - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

**Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.**

#### **Time for response to petition**

A response to petition must be filed and served on the petitioners,

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is:  800 Smithe Street Vancouver, BC
(2)	The ADDRESS FOR SERVICE of the petitioners is:  Gratl & Company Barristers and Solicitors 601-510 West Hastings Street Vancouver, BC V6B 1L8  Email address for service of the petitioners: <a href="mailto:jason@gratlandcompany.com">jason@gratlandcompany.com</a>
(3)	The names and office addresses of the petitioner's lawyers are:  Jason Gratl Gratl & Company Barristers and Solicitors 601-510 West Hastings Street Vancouver, BC V6C 1L8 Phone: (604) 694-1919

## Claim of the Petitioner

### OVERVIEW

This is a judicial review by Democracy Watch of decisions made by the British Columbia Conflict of Interest Commissioner on May 4, 2016 and August 9, 2016. Conflict of Interest Commissioner Paul Fraser's decision unreasonably concluded that it was not a real or apparent conflict of interest pursuant to s.2 of the *Members' Conflict of Interest Act* ("the Act") for the Premier to receive \$50,000 annual payments from the BC Liberal Party ("LPBC") while fundraising for the BCLP at exclusive informal events at which special access to the Premier was sold for high amounts (up to \$20,000 per person). The Commissioner's decision also unreasonably concluded that donations made to attend the events and the annual salary drawn by the Premier from the BCLP were not a personal benefit for the Premier that are indirectly connected with the performance of her duties of office as prohibited under s.7 of the Act.

### Part 1: ORDERS SOUGHT

The Petitioner seeks the following orders:

- (a) An order in the nature of *certiorari* quashing and setting aside the opinions of the Conflict Commissioner issued May 4, 2016 and August 9, 2016, and remitting the issue to a substitute decision-maker for reconsideration;
- (b) An order protecting the Petitioner from adverse costs liability in the event that this petition is dismissed; and
- (c) Such other and further relief as this Court deems appropriate and just.

### Part 2: FACTUAL BASIS

1. Christina Joan Clark, in her role as both Premier of British Columbia and leader of the BC Liberal Party, hosts small, invitation only, events where a cost of entrance is required. The cost of entrance may range anywhere from \$2,000 to \$20,000 or more per person. As an example, the Premier attended an event hosted by the Simon Fraser University Chancellor, Anne Giardini, where 9 individuals attended and the cost of entrance was \$10,000 for seven attendees and \$5,000 for the other two.
2. The Premier admits that funds raised at these events go directly to the general account of the BC Liberal Party ("LPBC") or the LPBC Westside-Kelowna Riding Association ("WKRA"). The Premier admits that she is an employee of the LPBC who receives an annual salary of \$50,000 per year from her party, which is paid from the LPBC general account. The Premier's employment duties with LPBC

include fundraising for LPBC.

3. John Paul Fraser is the son of the Conflict of Interest Commissioner, Paul Fraser, QC. John Paul Fraser has personal ties to the Premier and is a senior member in the BC Liberal Party. He is currently serving as the deputy minister for government communications and public engagement.

### Procedural History

4. On April 1, 2016, pursuant to section 19(1) of the *Act*, the Member for Vancouver – Point Grey, Mr. David Eby, requested the opinion of the British Columbia Conflict of Interest Commissioner with regards to Premier Clark’s attendance at private fundraising events.
5. On March 31, 2016, pursuant to section 19(2) of the *Act*, Mr. Duff Conacher submitted a request on behalf of Democracy Watch, asking for a declaration that donations made at such exclusive events are ‘illegal gifts’ prohibited under sub-section 7(1) of the *Act*.
6. In responding to the complaints, the Premier and her representatives made limited disclosure of documents. The Premier did not provide any sworn affidavits or documentary evidence regarding who attends these events, what is discussed at such events, how much money attendees contribute or where that money goes.
7. The Conflict of Interest Commissioner for British Columbia, Paul D.K. Fraser, Q.C., gave his opinion regarding both matters on May 4, 2016 and issued an addendum to the May 4, 2016 opinion on August 9, 2016.
8. The May 4, 2016 opinion concluded that the Premier was not in an apparent conflict of interest, or in receipt of a gift or personal benefit in contravention of the *Act*.
9. This petition seeks a judicial review of that opinion based on the following considerations.

## **PART 3: LEGAL BASIS**

### **Standard of Review**

10. The standard of review is reasonableness.

*Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII)

11. The function of judicial review is to ensure the legality, the reasonableness and the fairness of both the administrative process and its outcomes. In addition to being concerned with the existence of justification, transparency and intelligibility, a reviewing court is concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras.28 and 47

### **Reasonable Apprehension of Bias**

12. A decision may be set aside if the process leading to the issuance of the decision is marred by the reasonable apprehension of bias.

*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, 1992 CanLII 84 (SCC)

*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817

13. The test for a reasonable apprehension of bias was set out by the Supreme Court of Canada in *Committee for Justice and Liberty v. Canada (National Energy Board)*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at p 394:

what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

14. That test has been affirmed by the Supreme Court of Canada and British Columbia courts in numerous subsequent decisions.

*Wewaykum Indian Band v. Canada*, 2003 SCC 45

*R v. S (RD)*, 1997 CanLII 324 (SCC), [1997] 3 SCR 484

*Gordon v. Pielak*, 2012 BCPC 3867 (CanLII)

15. The Petitioner submits that it is more likely than not that Commissioner Fraser has a reasonable apprehension of bias which precludes him from making a fair decision.

#### **(a) Family connection with the Premier**

16. Paul Fraser's son, John Paul Fraser has personal ties to the Premier and is a senior member in the BC Liberal Party. He is currently serving as the deputy minister for government communications and public engagement. It is reasonable to suggest that the close family connection to senior members of the BC Liberal Party, including Premier Clark, is a factor indicating a reasonable apprehension of bias.

#### **(b) Previous Instance of Recusal**

17. In 2012 Liberal MLA John van Dongen launched a complaint against Premier Clark. On that instance, Commissioner Fraser recused himself from investigating and ruling on the complaint on the basis that his son's senior role in the Liberal government and ties to Clark could create the 'perception' of a conflict of interest.

The Commissioner's admission in 2012 that there was sufficient perception of bias to recuse himself from ruling on a complaint concerning the Premier is inconsistent with the Commissioner's refusal to recuse himself from ruling on the complaints made in 2016 by Mr. Eby and Democracy Watch. The Commissioner's inconsistency is neither transparent nor intelligible.

News Release, November 13, 2012, "Statement from Paul D.K. Fraser, Q.C. - Conflict of Interest Commissioner"

18. An informed person, viewing the matter in a realistic and practical manner, would conclude that someone in the position of Paul Fraser would more likely than not make an unfair decision. This conclusion is likely after considering the fact that Paul Fraser: (a) holds a close familial connection to a senior member of the BC Liberal Party; and (b) has previously recused himself in similar circumstances, acknowledging that there was potential for the perception of a conflict of interest.

#### **The Decision is Not Justified, Transparent or Intelligible**

19. The Decision is unreasonable as it is not justified, transparent or intelligible.

*Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 (CanLII)

20. In the assessment of reasonableness, "reviewing courts should ask whether 'when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision' (para. 163)." In assessing the reasonableness of the Commissioner's opinion it is imperative that we consider the "nature of the statutory task".

*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 61 (CanLII) at para 18

*Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56 (CanLII), [2011] 2 F.C.R. 221, rev'd in part 2011 SCC 57 (CanLII), [2011] 3 S.C.R. 572

21. The purpose of the *Act* was discussed at length in the *Blencoe* decision. At page 22, Commissioner Hughes stated his goal was to "reach a conclusion that [would] honour the heart and soul of [the] legislation."

*Alleged Contravention of the Members' Conflict of Interest Act by the Honourable Robin Blencoe, Minister of Municipal Affairs, Recreation and Housing* (16 August, 1993), online: [http://www.coibc.ca/down/opinion/opinion\\_blencoe\\_1993.pdf](http://www.coibc.ca/down/opinion/opinion_blencoe_1993.pdf) ("*Blencoe decision*")

22. Also at page 22, Commissioner Hughes went on to hold that the general purpose of the *Act* is to "promote public confidence in elected public officials as they conduct

public business." This sentiment was more or less repeated at page 12 of the *Harcourt* opinion. This general purpose provides guidance in assessing the reasonableness of Commissioner Fraser's decision.

*Alleged Contravention of Provisions of the Members' Conflict of Interest Act by the Honourable Michael Harcourt, Member of the Legislative Assembly for Vancouver-Mount Pleasant* (17 April, 1995), online: [http://www.coibc.ca/down/opinion/opinion\\_harcourt\\_1995.pdf](http://www.coibc.ca/down/opinion/opinion_harcourt_1995.pdf) ("*Harcourt decision*")

### Statutory Provisions

23. The relevant provisions of the *Act* are as follows:

2(1) For the purposes of this Act, a member has a conflict of interest when the member exercises an official power or performs an official duty or function in the execution of his or her office and at the same time knows that in the performance of the duty or function or in the exercise of the power there is the opportunity to further his or her private interest.

2(2) For the purposes of this Act, a member has an apparent conflict of interest if there is a reasonable perception, which a reasonably well informed person could properly have, that the member's ability to exercise an official power or perform an official duty or function must have been affected by his or her private interest.

3 A member must not exercise an official power or perform an official duty or function if the member has a conflict of interest or an apparent conflict of interest.

7(1) A member must not accept a fee, gift or personal benefit, except compensation authorized by law, that is connected directly or indirectly with the performance of his or her duties of office.

### **1. Unreasonable to conclude Premier did not have Private Interest**

24. It was unreasonable for the Commissioner to conclude that the Premier did not have a "private interest" within the meaning of s.2 of the *Act* in hosting or attending these exclusive fundraising events at an official function.

25. The Commissioner unreasonably concluded that the Premier's employment income derived from LPBC, which is secured in part by her fundraising activities, does not create a private interest sufficient to conflict with her duties to the public as Premier. This problem is manifest at page 4 of the Executive Summary of the Commissioner's May 4, 2016 decision, in the following passage:

Ultimately, Mr. Eby conceded (in his final submission) that it was

inaccurate to describe the Leader's Allowance as a "commission". In my opinion, there is no convincing evidence or information to suggest that the Leader's Allowance is determined according to the success or failure of "exclusive" fundraising events in which the Premier participates. The Premier's private interest is not advanced by any particular donor or group of donors at these events. She cannot, therefore, be in an apparent conflict of interest in relation to those donors.

26. This point is elaborated at paragraphs 47 of the Decision as follows:

[47] Mr. Eby argues that "the Premier is personally financially dependent to some extent on these large private donations coming from these private parties". In particular, Mr. Eby identified the receipt of a Premier's Allowance from the BC Liberal party as a "direct and personal" benefit which therefore constitutes a private interest. However, this benefit is paid to the Premier by the Party out of its general funds. Receipt of the allowance is not dependent upon nor attributable to any one donor or group of donors. As noted above, Mr. Eby concedes that the allowance cannot properly be described as a "commission", nor are donors able to direct funds to the Premier.

[48] To be considered an apparent conflict of interest, a reasonable person would have to conclude that the Premier's ability to carry out an official duty or function must be impaired by her receipt of the Leadership Allowance, which the Premier would receive from the Party regardless of who is in attendance at a particular fundraising event or how much they donate to the Party. ...

[50] In a nutshell, the mischief section 2 seeks to avoid is a *quid pro quo* situation; i.e. to prevent Members from using public office to return a favour to someone who has given them a private benefit, or appear to be doing so. The link between the multiple individual donations to the Party and the payment of the Allowance to the Premier out of aggregated Party funds, is in my view, far too diffuse and indirect to establish a private interest in relation to each individual donor. Based on the circumstances under consideration in this request, receipt of the Premier's Allowance does not constitute a breach of the *Act*.

27. The Commissioner clearly believed that there could only be an actual or apparent conflict if the Premier's employment income could specifically be traced to or caused by ("determined according to") a specific donation or group of donations. In the Petitioner's submission, the Premier need not receive a commission or percentage of the large donations in order for there to be an actual or apparent conflict of interest. All that is required under s.2(1) of the *Act* for a conflict to exist is that the Premier "knows that in the performance of the duty or function or in the exercise of the power there is the opportunity to further his or her private interest".

28. It is important to note that the Premier has not directly denied that that the Premier attended the fundraisers in the role of Premier. No evidence was adduced to suggest that Ms. Clark put aside her role as Premier during these fundraisers and spoke only about party issues. There was no question that her attendance at the events was "in the performance of a duty" or "in the performance of a function". The sole issue for determination by the Commissioner under s.2(1) of the *Act* was whether the Premier knew that in the performance of that function or duty there was an opportunity to further her private interest.
29. The Commissioner never considered whether the Premier knew that attendance at the events involved "an opportunity to further her private interest". It was an unreasonable error for the Commissioner to require that the Premier's interests be advanced directly by the donations or that the Premier's salary be determined by the success or failure of the fundraisers in order to establish knowledge of an opportunity to further the Premier's private interest.
30. Similarly, under s.2(2) of the *Act*, "a member has an apparent conflict of interest if there is a reasonable perception, which a reasonably well informed person could properly have, that the member's ability to exercise an official power or perform an official duty or function" is affected by his or her private interest. The Commissioner did not consider the sole issue under s.2(2) of the *Act*: whether there is a reasonable perception that the salary paid to the Premier by LPBC affected her attendance at the events.
31. In the Petitioner's submission, for the purposes of s.2 of the *Act*, the Premier knows that the events are an opportunity to further her private interest if the funds raised at these exclusive events materially contribute to LPBC's ability to pay the Premier's salary. It was unreasonable for the Commissioner to require a causal connection between the Premier's salary and specific donations.
32. The Petitioner respectfully submits that there is a conflict of interest when a material part of the Premier's salary is paid by large donors and another part of the Premier's salary is paid by the people of British Columbia.

## **2. Unreasonable to Conclude Large Donations do not create a Private Interest**

33. The Commissioner failed to distinguish the few high dollar donations that served as a barrier to entry for the Premier's events from numerous smaller anonymous donations. At paragraph 45 of his judgment, Commissioner Fraser found the facts in this case to be similar to *Harcourt* and thus applied the *Harcourt* principle that "as a general rule, campaign contributions directed to the Party do not give rise to a private interest under the *Act*."
34. The application of this principle is unreasonable given the factual distinction between the Premier's events and the event in *Harcourt*. In *Harcourt* the complaint

involved a party banquet that had a cost of \$40 per ticket. It is unreasonable to suggest that principle applies equally to a \$40 entrance ticket and a \$20,000 entrance ticket.

35. As a matter of reasonable perceptions, the higher the cost of attendance the higher the chance that a private interest will be engaged. At some point, the sheer size of a donation gives rise to an inference that the reasonable perception is that a donation is given in exchange for special access to the Premier (ie. lobbying access) or perhaps even in exchange for the future consideration, whether specific or inchoate, in the form of an exercise of the Premier's powers to benefit the donor.

### **3. Unreasonable to Conclude that Fundraising Events did not create Apparent Conflicts of Interest that affected Premier's future decisions**

36. It was unreasonable for the Commissioner to conclude that high-dollar fundraising events did not create apparent conflicts of interest that affected the Premier's future decision-making.
37. The Commissioner expressly refused to consider the actual or apparent conflict of interest arising from the size of the donation and refused to consider whether a conflict arises when large donors ingratiate themselves with the Premier. At paragraph 62, the commissioner states that "it is neither appropriate nor indeed within my capacity or authority to monitor what government decisions may be upcoming and speculate as to whether there may be a potential real or apparent conflict of interest arising for the Premier (or for any Member for that matter) based on party fundraising activities."
38. The Petitioner says that this approach unnecessarily fetters the discretion of the Commissioner and ignores relevant considerations. If large donations are consistently made by mining concerns who might stand to gain if the Province perpetuates its lax spill regulatory regime and continues not to enforce its spill regulations, for example, that is something the Commissioner must take into account. If the large donations are made by real estate developers who might benefit from lax regulation or advance notice of changes to property transfer tax rates, that is something the Commissioner must take into account.
39. The Commissioner received a request under s.19(1) of the Act from Mr. Eby to examine whether hosting and attending the exclusive, high-priced fundraising events created a private interest for the Premier because she is paid a salary paid in part by the pool of funds raised and whether there is a reasonable perception that a reasonably well informed individual could properly have concluded that these financial exchanges will affect her future exercise of power. This was an explicit request for the Commissioner to rule whether each event put the Premier in an apparent conflict of interest that prohibits her under s.3 of the Act from exercising powers or performing official duties or functions that affect the donors who attend each event. It was unreasonable for the Commissioner to respond only partially to

Mr. Eby's request and refuse to issue a ruling on this issue.

40. As part of the Commissioner's refusal to respond fully to Mr. Eby's request, it was unreasonable for the Commissioner to refuse to investigate the identity of the donors who purchased event tickets to meet with the Premier. With or without knowing the identities of the ticket purchasers, it was unreasonable for the Commissioner to conclude that the purchases and paid attendance of the Premier did not create a reasonable perception that the Premier now has a private interest that will affect her exercise of official powers or official functions.
41. It was equally unreasonable for the Commissioner to conclude that each of the four sponsors who donated \$2,500 to fundraising events held by the Premier's LPBC Westside-Kelowna Riding Association did not create a private interest for the Premier. Sponsorship of this fundraising event was analogous to the assistance provided to a member that a past Commissioner concluded in the *Blencoe* ruling was significant enough to create a private interest for the member.
42. Section 18(1) of the *Act* holds that a "member may request, by application in writing, that the commissioner give an opinion or recommendation on any matter respecting the obligations of the member under this Act." The language here, and contained throughout the *Act*, does not imply that the Commissioner may only look at past exercises of power and refuse to consider anticipated exercises of power, particularly when the exercise of power is ongoing, as it is when the power is exercised to maintain or perpetuate regulatory attitudes or frameworks.
43. The purpose of the *Act*, at the very least, intends the Commissioner to prevent any conflict of interest, rather than just respond to past conflicts.

#### **4. Unreasonable Conclusion Regarding "Personal Benefit"**

44. The Commissioner unreasonably concluded, in light of the large individual donations to LPBC that are the price of entry to exclusive events with the Premier, that the salary received by the Premier from LPBC is not a "personal benefit... that is connected directly or indirectly with the performance of his or her duties" pursuant to s.7 of the *Act*.
45. The Commissioner's reasons in concluding that the Premier did not breach s.7 are brief in the extreme:

[66] Whether or not a Member participates directly or indirectly in fundraising activities for their party, the donated money is never in the Member's possession or under their control. The funds raised at "exclusive" events are donated to the BC Liberal Party and are not accessible for the Premier's personal use. Contributions to Members' Parties are properly reported to Elections BC in accordance with the *Election Act*.

[67] What, then, is the "personal benefit" that could be subject to section 7 disclosure? As noted above, there may be a general, political benefit that accrues to the Premier by bolstering the financial capacity of the Party. However, something more direct and tangible is required to be considered a "personal benefit" i.e. something that is capable of being reported and disclosed. In my view it is inconsistent with the intent and purpose of section 7 to interpret "personal benefit" as encompassing a political benefit, whether direct or indirect.

46. The Petitioner respectfully submits that the indirect benefit received by the Premier from the purchasers of expensive entry tickets from LPBC for exclusive events with the Premier is a salary from LPBC. Attendance at LPBC fundraisers is undoubtedly not the only duty of the leader of the LPBC for which she is paid and the donations from wealthy donors attending exclusive LPBC fundraisers is undoubtedly not the only source of funds for LPBC.
47. The Petitioner says it is unreasonable to conclude that a salary is not a personal benefit. The only question is whether receipt of the personal benefit is "connected... indirectly with the performance of the Premier's duties". On this question, it is unreasonable to conclude that the high-dollar draw of the fundraisers does not arise from the Premier's political power and influence or that the Premier's salary is not paid in part for her attendance and participation at fundraising events.
48. By getting paid by the LPBC to attend fundraisers, the Premier accepted a personal benefit that is connected to her holding public office. To conclude otherwise is unreasonable.
49. The Premier breached s. 7 of the *Act* by getting paid to attend a series of events, where the events themselves traded on the Premier's power and influence. The reason why LPBC is able to charge as much for event access tickets as they did is the draw of the political influence of a Premier sitting in office. It is absurd not to recognize that the ticket price is influenced by the power or anticipated power of the office holder. A leader of an opposition party that sells high-priced event access tickets when that party is expected to win a majority of seats in the next election creates the same actual or perceived conflict of interest.

#### **The Decision is Unreasonable as to Outcome**

50. The Commissioner's decision that there was no conflict of interest under ss.2 and 7 of the *Act* was unreasonable and does not fall within a range of possible, acceptable outcomes for the reasons given above.
51. Based on the above considerations the decision ought to be quashed and set aside and the issues remitted to a delegate of the Commissioner who is not himself or herself in a conflict of interest.

## **Costs**

52. This judicial review raises issues that are of broad public importance. Even if the Petitioners are unsuccessful on this application for judicial review, the public interest will have been served, and the Petitioners ask that no costs be awarded against them.

## **Enactments and Other Grounds Replied Upon**

1. *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.
2. *Supreme Court Civil Rules*, B.C. Reg. 168/2009.
3. *Members' Conflict of Interest Act*, [RSBC 1996] c.287.
4. Such other enactments and grounds as counsel may identify.

## **Part 4: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Toby Rauch-Davis, affirmed October 24, 2016.
2. Such other materials as counsel may identify.

The petitioners estimate that the hearing of the petition will take one day.

Dated this 25<sup>th</sup> day of October, 2016.



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Jason Gratl  
Counsel for the Petitioner

**To be completed by the court only:**

Order made

in the terms requested in paragraphs ..... of Part 1 of this petition

with the following variations and additional terms:

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Date: \_\_\_\_\_

\_\_\_\_\_  
Signature of  Judge  Master