



**OFFICE OF THE ETHICS COMMISSIONER
PROVINCE OF ALBERTA**

Report

of the Investigation

by

**Hon. Marguerite Trussler, Q.C.,
Ethics Commissioner**

into allegations involving

**Premier Jim Prentice, Member for Calgary-Foothills,
Minister Stephen Mandel, Member for Edmonton-Whitemud, and
Mr. Mike Ellis, Member for Calgary-West**

December 12, 2014

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Introduction

I received a complaint dated October 17, 2014 from Ms. Danielle Smith, Member of the Legislative Assembly for Highwood and Leader of the Official Opposition, concerning actions of certain Members during the recent by-elections. I requested specific details naming the Members and the incidents involved. A letter dated October 25th was received detailing incidents relating to Premier Prentice, Minister Dirks and Minister Mandel. A reference was also made to PC candidate for Calgary West, Mike Ellis. A second letter of complaint was received from Ms. Rachel Notley, Member of the Legislative Assembly and Leader of the New Democratic Party, on November 5, 2014. While general in nature, the allegations were basically the same.

I have decided to deal with the allegations against Premier Prentice, Minister Mandel and Member Ellis in this decision. The allegations against Minister Dirks will be dealt with in a separate decision, because there is an additional complaint against him and the issues are more complex.

The allegations set out in Ms. Smith's letters are as follows:

1. On October 1, Premier Jim Prentice announced that he was appointing a person with a high public profile in the riding of Calgary-Elbow to be the Executive Director of his Southern Alberta office. It is believed that Mr. Dirks, the candidate for the governing party in Calgary Elbow was present at this announcement.
2. On October 7, Premier Prentice had a well-publicized last minute event with the Mayors of Edmonton and Calgary signing a "Framework Agreement" on City Charters, an issue of considerable interest to voters in Calgary and Edmonton where by-elections were taking place. It is alleged that Mr. Dirks was present.
3. On October 8, Premier Prentice and fellow candidate Mr. Dirks led an announcement in Calgary on building schools that was also attended by Minister Manmeet Bhullar.
4. On October 14, Ministers Stephen Mandel (PC candidate in Edmonton-Whitemud) and Jeff Johnson joined Premier Prentice in announcing the "2014 Continuing Care Capacity Plan". This well publicized announcement took place in the same city where Mr. Mandel was seeking a seat.

5. On October 20, Premier Prentice publicized a seniors funding announcement in Calgary and Mr. Mandel was featured in an AHS photo op publicizing flu shots in Edmonton.
6. Mr. Ellis is believed to have attended most or all of the Calgary announcements highlighting the partisan nature of these announcements.
7. The five members who took part in these five announcements used government resources to publicize initiatives featuring by-election candidates and to further their political interests.
8. The above activities contravene the preamble, Sections 2(1), 2(2), 2(3) and 3 of the Conflicts of Interest Act, namely that the members furthered their own private interests by using government resources to further their election campaigns.

Scope and Authority Under the Act

Before dealing with the specifics of this complaint, it is instructive to review the Conflicts of Interest Act and the role and powers of the Ethics Commissioner. The office of the Ethics Commissioner is created by the Conflicts of Interest Act. The Act sets out the obligations of Members and Ministers, as well as the parameters of the jurisdiction of the Ethics Commissioner. The Ethics Commissioner has no power beyond that given in the provisions of the Act. Notwithstanding some broad reaching philosophical provisions in the preamble to the Act, the scope of the Act is narrow in that it only deals with the financial ethics of Members. The object of the Act is to make sure no Member or his or her family obtains a financial benefit as a result of being a Member through such things as insider knowledge, influence and inappropriate gifts, to name a few examples. The Act does not deal with moral integrity.

Therefore in considering the complaints I am restricted to considering whether Premier Prentice, Minister Mandel and Member Ellis furthered a private interest as set out in the Preamble, and sections 2 and 3 of the Act.

The authority for conducting an investigation is found under part 5 of the Act. The sections relevant for the purposes of this investigation are as follows:

s.24 (1) Any person may request, in writing, that the Ethics Commissioner investigate any matter respecting an alleged breach of this Act by a Member, former Minister or former political staff member.

(2) A request under subsection (1) must be signed by the person making it and must identify the person to the satisfaction of the Ethics Commissioner.

s. 25 (1) On receiving a request under section 24 ...the Ethics Commissioner may conduct an investigation with or without an inquiry.

(1.1) A Member, former Minister or former political staff member shall co-operate with an investigation under this section.

(4) The Ethics Commissioner may refuse to investigate or may cease to investigate an alleged breach under this Act if the Ethics Commissioner is of the opinion that

(a) the request is frivolous or vexatious or was not made in good faith, or

(b) there are no or insufficient grounds to warrant an investigation or the continuation of an investigation.

(7) Where the request is made under section 24(1), (3) or (4), the Ethics Commissioner shall report the Ethics Commissioner's findings to the Speaker of the Legislative Assembly.

(8) The Ethics Commissioner may, before reporting the Ethics Commissioner's findings to the Speaker of the Legislative Assembly under subsection (7), provide a copy of the report

(a) to the Member, former Minister or former political staff member against whom the allegation was made, and

...

(10) If the Ethics Commissioner is of the opinion

(a) that a request made by a Member under section 24(1) was frivolous or vexatious or was not made in good faith, or

(b) ...

the Ethics Commissioner may state that in a report to the Speaker of the Legislative Assembly.

Investigative Process

When I received the first letter of complaint, a letter was sent in reply indicating it was necessary to provide names of members and details of the incidents that the Member wanted investigated. When I received that letter of clarification, Premier Prentice, Minister Mandel and Mr. Ellis were notified of the allegations and that an investigation was to take place. I subsequently also notified Premier Prentice and Minister Mandel when the second complaint was received from Ms. Notley. It is not necessary for an investigation to take place into every complaint received, but given the public interest shown in the allegations it was felt that one should take place.

The complainants, Ms. Smith and Ms. Notley, were asked to attend my office to detail the complaints and to add anything by way of detail to what had been set out in the three letters. The Premier, Minister Mandel and Mr. Ellis were invited to make an appointment to answer the allegations. Mr. Ellis responded to the complaints with a written response which was regarded as sufficient and I advised him that attendance at my office was not necessary.

The following people were interviewed in person and their conversations were taped on a confidential basis:

Ms. Danielle Smith, Leader of the Official Opposition
Ms. Rachel Notley, Leader of the New Democratic Party
Hon. Stephen Mandel, Minister of Health
Hon. Jim Prentice, Premier of Alberta

As well, the Deputy Minister of Education, Gene Williams, was interviewed in person and I conducted a telephone interview with Ms. Emma May, Minister Diana McQueen and Edmonton Mayor Don Iveson.

Findings

1. Jurisdiction with respect to the complaint against Mr. Ellis

At the time the incidents took place Mr. Ellis was not a Member of the Legislative Assembly. As a result I have no jurisdiction over him as of the date of the allegations. Furthermore, I have no evidence that even if he were a Member, he had breached the Act. The complaint against Mr. Ellis is without merit.

2. Private interest

The major issue is whether Premier Prentice and Minister Mandel used government resources and made policy decisions during the by-election in which they were running, thereby contravening the preamble and sections 2(1), 2(2), 2(3) and 3 of the Conflicts of Interest Act.

The preamble to the Conflict of Interests Act reads:

WHEREAS the ethical conduct of elected officials is expected in democracies;

WHEREAS Members of the Legislative Assembly can serve Albertans most effectively if they come from a spectrum of occupations and continue to participate actively in the community;

WHEREAS Members of the Legislative Assembly are expected to perform their duties of office and arrange their private affairs in a manner that promotes public confidence and trust in the integrity of each Member, that maintains the Assembly's dignity and that justifies the respect in which society holds the Assembly and its Members; and

WHEREAS Members of the Legislative Assembly, in reconciling their duties of office and their private interests, are expected to act with integrity and impartiality;

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

The relevant sections are:

s.2 (1) A Member breaches this Act if the Member takes part in a decision in the course of carrying out the Member's office or powers knowing that the decision might further a private interest of the Member, a person directly associated with the Member or the Member's minor or adult child.

(2) Where a matter for decision in which a Member has reasonable grounds to believe that the Member, the Member's spouse, the Member's minor or adult child or a person directly associated with the Member has a private interest is before a meeting of the Executive Council or a Committee of Executive Council or the Legislative Assembly or a committee appointed by resolution of the Legislative Assembly, the Member must, if present at the meeting, declare that interest and must withdraw from the meeting without voting on or participating in the consideration of the matter.

(3) A Member who fails to comply with subsection (2) breaches the Act.

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

associated with the Member or the Member's minor child or to improperly further another person's private interest.

A private interest is defined in the Act in section 1 (g):

"private interest" does not include the following:

- (i) An interest in a matter*
 - (A) that is of general application,*
 - (B) that affects a person as one of a broad class of the public, or*
 - (C) that concerns the remuneration and benefits of a Member*
- (ii) an interest that is trivial;*
- (iii) an interest of a Member relating to publicly-traded securities in the Member's blind trust;*

The preamble is general in nature and as a principle of statutory interpretation it can only be used to assist in interpreting the financial provisions of the Act. By itself it has no legislative authority.

The questions of what is a private interest as set out in s. 2 of the Act as opposed to a political interest has already been considered by other Ethics Commissioners. Commissioner Robert Clark dealt with the issue in a decision dated April 21, 1997 into allegation involving the then Premier. The facts in that case involved the use of a document prepared by Alberta Treasury during an election campaign. He thoroughly canvassed the question whether the seeking of public office by election is a "private interest" under the Act.

He stated:

...If political interests, especially the interest in winning an election, is the furtherance of a "private interest", practically everything a Member does could be a breach of the Act because almost every activity undertaken by an elected official contains an element of seeking popular support and the possibility of receiving that support in a re-election bid... I do not believe that the Legislature intended the Conflicts of Interest Act and the Ethics Commissioner to prevent Members from doing those things which they believe will maximize their public acceptance and hence their chances of being re-elected.

Commissioner Clark had previously commented on the issue of political interest and the Conflicts of Interest Act in a decision dated August 26, 1993 involving then Minister Kenneth Kowalski.

Where the Office of the Ethics Commissioner receives an allegation of this type, now or in the future, it is my view that in order to constitute a conflict of interest under the Conflicts of Interest Act, the allegation must contain more than an allegation of the furtherance of political interests – a clear private interest relating specifically and directly to the Member, ... must be demonstrable. A political interest alone, if it exists, is not sufficient for a finding of a breach of the Conflicts of Interest Act.

In a decision dated April 29, 2010, Federal Conflict of Interest and Ethics Commissioner Mary Dawson also thoroughly canvassed this issue. She stated:

In brief, the scheme of the Act, which is focused on preventing conflicts of interest, provides for a set of rules focused mainly in a narrow category of largely pecuniary interests, including the value of a person's assets or liabilities, the acquisition of a financial interest, becoming a director or officer in certain types of organizations or the increase in a person's income. In my view, the situations described in the Act do not extend to cover the types of interests cited in the allegations raised in the requests under consideration. The allegations relate to actions that could result in partisan political advantage. Nowhere in the Act is there a suggestion that the expression "private interest" would cover partisan political gain or advantage.

One could make the argument that a Member would have a private pecuniary interest in re-election because securing a seat in the House of Commons comes with a comfortable salary and benefits. Following this argument to its logical conclusion, however, would imply that any actions undertaken by a Member aimed at enhancing his or her image with constituents could be construed as furthering a private interest, and therefore contravene the Act. This cannot be the intent of the Act.

The interests of all Members, including those who are subject to the Act as public office holders, in participating in funding announcements are fundamentally political in nature. They are focused on attempting to raise their public profile by associating themselves and their party with initiatives that their party has put forward as the governing party, and that they believe will be viewed favourably by

their constituents. These interests would not arise from purely personal considerations outside of their role as public office holders.

The decision that is most instructive is one by Commissioner Paul Fraser from British Columbia involving Premier Christy Clark at a time when she was already Premier but was running in a by-election to obtain a seat in the British Columbia Legislative Assembly.

In addressing your request, I have to consider the threshold question of whether seeking to be elected as an MLA amounts to a person improperly furthering a "private interest". Nowhere in the Act is there a suggestion that the expression "private interest" would cover or extend to partisan political gain or advantage. I suppose an argument could be mounted that because Members receive a salary and other benefits seeking election amounts to furthering a private interest. However, following the argument to its logical conclusion would imply that any or all of the actions of a Member to seek popular support for re-election would also be a furtherance of a private interest and a contravention of the Act. In my opinion, such conclusion is against both the spirit, intent and, indeed, the letter of the Act.

While I am not bound by the decisions of Commissioners Clark, Dawson and Fraser, they are persuasive and should be carefully considered. Having done so, I have come to the conclusion that the decisions are correct and that the same principles apply in the case of Premier Prentice and Minister Mandel. Seeking election is not a private interest but a political interest. A political interest is not a furtherance of a private interest. There is nothing in the Act that would prevent a Member from doing things that will enhance his or her chances of being elected.

3. Public Policy Announcements During Elections Using Government Resources

There is a parliamentary convention that once parliament has been dissolved and an election has been called that the government is restricted with respect to making and implementing new policy. The Government is restricted to routine business. One of the major reasons for the convention is that there is always the possibility that the government will not be re-elected and the new government will not want to pursue the policy decisions taken. During a general election the Government is restricted to campaign promises.

In 2008, a Canadian Government document was prepared on Guidelines on the Conduct of Ministers, Secretaries of State, Exempt Staff and Public Servants During an Election. It summarizes the convention by stating:

By constitutional convention, the government acts with restraint during an election, confining itself to necessary public business (either routine or urgent). As always, public resources must not be used for partisan advantage. Hence, the distinction between official government business and partisan political activities must be strictly observed: only the former may be supported by departmental resources and the work of public servants.

Peter Hogg in his 5th Edition of Constitutional Law in Canada had the following to say commencing at p. 9:

... A ministry does not come to an end when Parliament is dissolved for an election...

When a government (ministry) remains in office following a dissolution of Parliament, ... there is a risk that the government will lose the ensuing election and will not command a majority in the House of Commons of the next Parliament. The period from the dissolution of one Parliament through the election campaign and the election, until the summoning of the new Parliament, is often a long time...During this period, the government retains its full panoply of legal powers..., and of course, it has to continue to govern the country. However, by convention, it is expected to behave as a caretaker and to restrain the exercise of its legal authority. This "caretaker convention" was clarified in 2008, when the Privy Council Office of the Government of Canada issued guidelines in writing for decisions by federal ministers and senior officials in the federal public service. For the caretaker period, the guidelines stipulate that "in matters of policy, expenditure and appointments" the government should restrict itself "to activity that is: (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 upon by the Opposition...

...A similar caretaker convention applies to the governments of the provinces and territories. Like other conventions the caretaker convention is observed because it is well understood to be the only appropriate behaviour; there is no legal sanction for a breach. But obviously a clear breach would attract severe criticism and be politically damaging to the offending party.

This convention applies as well to provincial elections. However, the Convention does not apply to by-elections. In this case, a general election was not called. Four by-elections were called.

Even if the Government had lost all four by-elections, the Government would have remained in power. If the government has no chance of being defeated in a by-election then there is nothing to stop the government making and announcing policy decisions as usual and it may use government resources to announce those policies. The Provinces of Saskatchewan and Manitoba¹ have enacted legislation to restrict this sort of activity. However, the Province of Alberta does not have such legislation and, therefore, there are no restrictions during by-elections.

What somewhat complicates the matter before me is that the Premier and Minister Mandel were running in the by-election and allegedly using government resources to make announcements. Notwithstanding the Premier had not been elected, he was Premier of the Province and Minister Mandel was Minister of Health and the government was acting on policy matters that were important to Albertans.

However, this point was considered by Commissioner Paul Fraser in the Christy Clark matter.

I have carefully reviewed the material you referred to in your request. I cannot find anything in either written or electronic form that would support the suggestion government resources were used, in whole or in part, to promote the Premier's by-election campaign. The announcements that were made are general in nature and contain no references to the by-election or the Premier's campaign.

It must be acknowledged that the Premier's only sworn responsibility at the moment is to carry out her duties as the Premier and the head of the government. The fact that she is, at the same time, seeking election to the Legislative Assembly does not and should not prohibit her from carrying on her duties as Premier, including making public interest announcements and attending events recording government policy and actions.

¹ Saskatchewan: The Election Act, SS 1996, cE-6.01, Manitoba: The Elections Finances Act, CCSM, c E27

It is useful to look at each of the allegations.

1. Announcement of Executive Director of Southern Office - The announcement of Ms. May as the Executive Director of the Southern Office of the Premier was not a policy decision. It was an administrative function to fill a vacant role. The decision was announced at McDougall Centre in Calgary where the office of the Executive Director of the Southern Office is located. The facility for press announcements at the office is a permanent facility and all it takes is someone to activate the equipment. The cost of doing so is negligible.
2. The signing of the City Charters Framework Agreement - The discussion about a charter for the cities was under discussion for over 2 years. The Premier met with the Mayors of Edmonton and Calgary right after the leadership vote. Both mayors expressed some frustration at the length of time it was taking to reach an agreement and wanted it concluded as soon as possible. This issue was a priority set out in the mandate letter received by the Minister of Municipal Affairs from the Premier in mid-September, 2014. The responsible Minister was involved in the negotiations. The agreement was not new policy but part of an ongoing process. The announcement was made at the City Hall in Calgary using its facilities. There is no legislation, convention or other legal principle that prohibits the making of this announcement of the culmination of ongoing work during a by-election.
3. Schools announcement - The announcement was the third part of an ongoing process. The announcement was for 55 new schools and 30 modernizations. I was advised that approximately 230 new builds or renovations are in process. The growth in the population is such that there is considerable pressure to construct schools. This matter appeared to be sufficiently urgent that, even if there were a general election, making an announcement may not have contravened the convention. In any event, it was a cabinet decision made during a by-election and there is nothing to prevent it being announced. The announcement was made in the press theatre at McDougall Centre.
4. Continuing care - The issue of wait times for continuing care creating a backlog in active care treatment beds is an urgent issue. The problem has clearly been in the public domain for some time. The Premier, Minister Mandel, Minister Johnson and the CEO of Alberta Health Services were present at the announcement made at the Royal Alexandra Hospital in Edmonton. The announcement was that a number of beds would be opened to meet the urgent need. These beds had been in the process of being opened or capacity was found within the existing

system. This issue was part of the mandate letters of Ministers Mandel and Johnson. Again, there is no legislation that prevents this announcement being made.

5. Seniors funding - This announcement was made in Calgary at a seniors' facility. It was the announcement of a cabinet decision to put to RFP the development by the community of 1500 continuing care spaces.

None of these announcements were forbidden by any convention or legislation. They were ongoing government policy matters, except the first one which was an administrative decision. There is no suggestion that they were made as part of the Premier's or the Minister Mandel's campaign. As the Convention about policy announcements does not apply to a by-election and, in fact, some of the announcements dealt with ongoing or urgent matters, making these announcements using government resources, albeit minimal, is not a contravention of the Conflicts of Interest Act.

Conclusions

Therefore the complaints against Premier Prentice and Minister Mandel are dismissed. As previously stated, I have no jurisdiction with respect to Mr. Ellis.

Sanctions

As the complaints against Premier Prentice, Minister Mandel and Mr. Ellis having been dismissed, no sanctions are warranted.



Hon, Marguerite Trussler, Q.C.
Ethics Commissioner