

**INVESTIGATION RELATING TO
ALLEGED BENEFIT RECEIVED BY
HON. PETER TRYNCHY, MINISTER OF TRANSPORTATION AND UTILITIES**

December 14, 1994

ALLEGATION

This Office received a letter from Frank Bruseker, Member of the Legislative Assembly for Calgary-North West, dated November 9, 1994, requesting that this Office review the matter of the paving of the driveway at the residence of the Hon. Peter Trynchy, Minister of Transportation and Utilities. The Member alleged that the Minister may have received a benefit directly related to the performance of his responsibilities as Minister of Transportation and Utilities in contravention of the *Conflicts of Interest Act*.

FACTS

The property, on which the driveway was paved on August 27, 1994, is registered to Lorraine Trynchy, the wife of the Minister. Prior to hiring a contractor to pave the driveway, the Minister requested and received bids for the work from two companies who were working in the area on tenders awarded by the Department of Transportation and Utilities. The two companies contacted were Sandstar Corporation and Border Paving Ltd. The Minister and his wife chose the lowest bid, provided by Sandstar, and the work was carried out.

Sandstar Corporation was also the successful low bidder on the contract with the Department of Transportation and Utilities to carry out the specified paving work on Highway 22, involving approximately 29 kilometres at the north end of the highway. The Department had identified the project, among others, as a priority in February 1993. The Minister approved the priority list presented to him by the Department.

Specifically relating to Highway 22, the Minister was presented with two alternatives: to rebuild the highway to primary highway standards or to resurface the road. The Minister advised the department to proceed with a resurfacing of the road rather than the more costly rebuilding. The contract was subsequently tendered and Sandstar Corporation was the lowest bidder. All materials on this project were contractor supplied and therefore could be used by Sandstar for other projects, as they determined.

The question of when and how the driveway paving was invoiced and when and how that invoice was paid are central to this investigation.

When this office initially contacted the Minister to advise him of the investigation, he sent me a copy of

the invoice which was dated August 28, 1994, and had written upon it "paid by cheque Sept. 16/94" and "#1650." I was led to believe by this notation that the dates on the invoice and the cheque were as shown. Subsequent investigation and the Minister's subsequent admission to me show that that was not the case.

The cheque was issued by Triple T Management Ltd. Triple T is a private corporation controlled by 507466 Alberta Ltd. 507466 Alberta Ltd. is a private corporation controlled by Lorraine Trynchy.

I asked the Minister to provide us with a copy of the cancelled cheque dated September 16, 1994. He did so, but again volunteered no explanation about the date. On examining the cheque and the invoice received from Sandstar, I became concerned that Sandstar's copy of the invoice shows receipt of payment on November 1, 1994, with the cheque being deposited on November 4. The cancellation stamps on the cheque confirm that it cleared the banks on November 4.

When asked about this lapse of time between the September 16 date on the cheque and the November 4 clearance through the banks, Gene Connon, General Manager of Sandstar Corporation, stated that he personally received the cheque from the Minister at a meeting between them in Gunn, Alberta, around October 20. Mr. Connon claimed that it is not uncommon for him to hold cheques in his vehicle for a period of time before he hands them over to his office manager. He explained that this was not a significantly large cheque, that he does not deposit each cheque as it is received, and that because the customer was the Minister of Transportation, he wished to be sure that the customer was satisfied with the work performed before the cheque was cashed.

The Minister initially claimed that a cheque was written shortly after they received the invoice from Sandstar once the work was completed. The Minister claimed he placed the cheque in his briefcase and at different times attempted to arrange a lunch meeting with Gene Connon in order to deliver the cheque. A lunch meeting was not arranged as Mr. Connon was not available when the Minister called. Mr. Trynchy was asked to tour a lodge in Gunn and did so on October 28. Mr. Trynchy contacted Sandstar and advised them that he would be in Gunn on that date and arranged to meet Mr. Connon there.

Mr. Connon, at our second meeting, indicated that the amount due was set out in a hand-written note on the back of a business card which was left at the Trynchy residence at the time the driveway was inspected in early September but that Mr. Trynchy requested an invoice. An invoice was prepared, backdated to August 28, 1994, which showed the same amount as the hand-written note left earlier. Mr. Connon went to the Trynchy residence on October 21 but the Trynchys were not home. Mr. Trynchy called Sandstar the following week and the meeting in Gunn was arranged for October 28. The invoice and the cheque were exchanged between Mr. Connon and Mr. Trynchy at that meeting. The notation on the Minister's copy of the invoice about payment was therefore not made until October 28, at the earliest. The Minister owed it to the Commissioner to give an explanation about the dating of the cheque, as the document is, on its face, misleading.

In affidavit evidence submitted to this office, Mrs. Trynchy states that she backdated the cheque on October 28 and dated the cheque to correspond to the time when the paving work was completed and final sealing and touch ups were completed.

A concern for this office was the sequence of events. The Auditor General's annual report was tabled in the Legislature on Monday, October 24. The Opposition began asking questions of the Minister of Transportation and Utilities relating to highway construction on October 25. Questions were asked October 26, 27, and 31, and November 1, 2, 3, and 7.

The first mention in the House of the paving of the Minister's driveway was in a supplementary question by Adam Germain, Member for Fort McMurray, on November 1, with further questions asked on the subject by Frank Bruseker, Member for Calgary-North West, on November 2.

My concern was that the cheque dated September 16 was not cashed until November 4, three days after the issue of the paving work was raised publicly.

Given the coincidence of dates, I asked the Minister to provide the records showing the sequencing of Triple T Management's cheques. Instead, on November 29, Mr. Trynchy, at our second meeting, disclosed that the cheque to Sandstar was in fact backdated from October 28 to September 16. A copy of the invoice is attached as Appendix A, showing hand-written notification that the invoice was "paid by cheque September 16, 1994." Appendix B is a photocopy of the cheque submitted to Sandstar.

In reviewing the evidence heard and received during the course of this investigation, I became concerned about the way evidence was presented to me. I believe that attempts were made to mislead this office in the conduct of my investigation.

In weighing the evidence, I was not impressed by the admission from the Minister that the cheque had been backdated and from the contractor that the invoice was backdated. In providing us with a copy of the invoice with no explanation regarding when payment was actually made, I conclude that the Minister intended me to believe that the invoice was actually paid on the date shown on the cheque -- not an unreasonable conclusion.

The statements made to this office at different times during this investigation about the dating of the cheque contain numerous contradictions, although they concerned very recent events. This office heard from the Minister that an invoice was received, a cheque was written by Mrs. Trynchy, and that the Minister merely kept the completed cheque with him in his briefcase until he had an opportunity to meet with the contractor. I later learned from Mr. Trynchy that the cheque was in fact not made out until October 28, the date of the meeting with the contractor. From the contractor, I heard that he was not certain whether the cheque was mailed or delivered, and then that he might have picked it up when he did the final inspection of the driveway, and then that it was received by him at a meeting in Gunn. I have received copies of the cheques issued by Triple T Management around cheque number 1650 and those cheques confirm that the cheque to Sandstar Corporation was written around October 28.

Both the Minister and the contractor initially claimed that they carried the cheque with them for a period of time. Subsequently, they both stated that the invoice was presented and the cheque delivered at the meeting in Gunn, which was arranged after the contractor left a note at the Trynchy residence on October 21. Mrs. Trynchy states that the cheque her husband carried around with him was not filled out by her as Mr. Trynchy first stated to this office, but the cheque he had with him was only a blank cheque which he carried with him regularly. It was never used for this transaction.

ISSUES

It was alleged that the Minister may have breached section 7 of the *Conflicts of Interest Act* that states that

- 7(1) A Member breaches this Act if the Member or, to the knowledge of the Member, the Member's spouse or minor child accepts from a person other than the Crown a fee, gift or

other benefit that is connected directly or indirectly with the performance of the Member's office.

- (2) Subsection (1) does not apply to a fee, gift or other benefit that is accepted by the Member or the Member's spouse or minor child as an incident of protocol or of the social obligations that normally accompany the responsibilities of the Member's office if
 - (a) the total value of the fees, gifts and benefits given from the same source to the Member and the Member's spouse and minor children in any calendar year is \$200 or less, or
 - (b) the Member applies to the Ethics Commissioner
 - (i) as soon as practicable after the fee, gift or benefit is received by the Member, or
 - (ii) as soon as practicable after the Member has knowledge that the fee, gift or benefit has been accepted by the Member's spouse or minor child,and either obtains the Ethics Commissioner's approval for its retention, on any conditions the Ethics Commissioner prescribes, or, if the approval is refused, takes such steps as the Ethics Commissioner directs with respect to the disposition of the fee, gift or benefit.
- (3) The Ethics Commissioner may give an approval under subsection (2)(b) only where the Ethics Commissioner is satisfied that there is no reasonable possibility that retention of the fee, gift or other benefit will create a conflict between a private interest and the public duty of the Member.

We considered the following issues in our investigation:

- (1) Was it intended that this work be billed for by the contractor or paid for by the Minister?
- (2) If it was not intended as a gift, was the bid fair and reasonable, or did the Minister receive a benefit as a result of his public position?
- (3) Did the Minister influence decisions within the Department of Transportation and Utilities to the benefit of Sandstar Corporation? and
- (4) Was this request for an investigation frivolous and vexatious?

Issue 1: Was there ever an intention that this work be billed for by the contractor or paid for by the Minister?

With respect to this issue, I considered the possibility of three possible scenarios.

- (a) There was a bona fide contract between Sandstar Corporation and Triple T Management for the paving of the driveway.
- (b) There was no bona fide contract between Sandstar Corporation and Triple T Management, rather payment was made only as a result of the tabling of the Auditor General's report and the subsequent questioning in the Legislature.
- (c) There was a contract but the work was performed at a low value giving the Minister a benefit.

The timing of the meeting at Gunn may be viewed as an extraordinary coincidence given the events in the House. However, Mr. Trynchy did obtain two estimates for the paving work prior to the work commencing and he did speak with a local media representative to advise that individual that paving work was to take place at the Trynchy residence. Mr. Trynchy also raised the issue with his Deputy Minister.

The evidence does not support the claim that the paving of the driveway was intended as a gift to Mr. Trynchy.

Issue 2: If it was not intended as a gift, was the bid fair and reasonable, or did the Minister receive a benefit as a result of his public position?

The Liberal Opposition contacted paving companies and obtained quotations for driveway paving. The three estimates were all higher than the amount paid by the Minister for the paving of his driveway. The amount of asphalt requested by the Liberal Opposition was identical to the amount provided for the Minister. Based on my investigation, a factor which may explain the difference in pricing was the distance over which the asphalt would be hauled. The Minister sought estimates from companies that had plants nearby (one near Magnolia and the other near Gunn). The Liberals, on the other hand, requested an estimate based on a haul involving a drive of approximately one and one half-hours from Edmonton. Information obtained by this office shows that a haul rate of \$1 per tonne per 10 kilometres is standard in the paving industry.

Both the estimates obtained by the Minister and by the Opposition contain no charge for preparation work. While the companies contacted by the Liberals stressed that preparation work was essential, the Minister indicated that his driveway was hard packed and had sufficient gravel prior to the paving so that preparation work was not required. The General Manager of Sandstar Corporation, Mr. Gene Connon, believed his employees spent four to five hours at the Trynchy residence.

I contacted an individual knowledgeable regarding the paving industry and government contracts for paving and that individual revealed that none of the firms contacted by the Liberal Opposition are involved in government contracts and are small businesses in the industry. Since the firms that do business with the Alberta government have plant capacity to produce large quantities of asphalt in short periods of time, bids by those firms might be expected to be lower than the bids by the small firms contacted by the Liberals. This individual also indicated a normal rate for private paving work may be based on the formula of the current rate plus up to 100% (the current rate being \$22.00-24.00/tonne).

I received from Gene Connon copies of two invoices for work performed in the Minister's riding in

September. The two invoices were for the Town of Mayerthorpe and the County of Lac Ste. Anne and related to smaller projects than the Minister's driveway. In both cases, the invoices were based on a per tonne price of \$35.00. The price charged for the Trynchy driveway was \$40.75/tonne. The price per unit for the asphalt mix set out in the Department of Transportation contract with Sandstar relating to Highway 22 was \$21.75. My office obtained estimates from three major firms, all of whom do business with Alberta Transportation. The verbal bids from those firms varied from \$41.00/tonne to \$48.00-50.00/tonne to \$55.00/tonne. The individual who obtained these estimates suggested that the verbal bid of \$41.00/tonne was the most reasonable. I received later information that the company that provided the verbal bid of \$41.00 provided a written estimate to my consultant, showing a much higher price per tonne of approximately \$55.00-\$56.00.

Based on the wide range of price quotations reviewed, I believe the bid received by the Minister for the paving of the driveway was reasonable and no benefit in terms of pricing was received.

Issue 3: Did the Minister influence decisions within the Department of Transportation and Utilities to the benefit of Sandstar Corporation?

In its report on "Ethical Conduct in the Public Sector," the Task Force on Conflict of Interest chaired by the Hon. Michael Starr and the Hon. Mitchell Sharp, stated at pages 35-36:

We have had extensive discussions concerning the acceptance of gifts, money, and other benefits, and have noted, sometimes with consternation, the efforts made elsewhere to delineate and protect against the many different ways in which attempts may be made to suborn public office holders. The possibilities are limited only by one's imagination, and run the gamut from meals to entertainment, gifts, travel, weekends at a hunting or fishing lodge, "sweetheart" arrangements on loans and so forth.

The concept of the "discretionary transfer of economic value" encompasses, in a single expression, all of these possibilities. In this context, we are referring to the discretionary (as distinct from non-discretionary such as pension benefits or royalty payments) transfer of economic value from a private source to a public office holder. In its most offensive form, this transfer of value can constitute bribery, in which case the Criminal Code governs.

The essence of bribery, as noted by Roswell B. Perkins, is its quid pro quo aspect with the "quo" having to do with conduct in office: something of value is given in return for an express or tacit undertaking on the part of the public office holders to help bring about certain governmental action or inaction. The comprehensive bribery provisions in the Criminal Code are essential to complement an effective structure for dealing with conflict of interest problems, although the conflict of interest principle considered here addresses behaviour short of bribery. In fact, the transfer of economic value to a public office holder may involve no criminal intent, and may be done with the most laudable of motives. The obvious problem is, however, such transfers can involve a range of responses by the public office holder from gratitude to economic dependence and can jeopardize the recipient's ability thereafter to deal impartially, fairly and equally with such donors.

I hasten to point out that I am not making any allegations. The quotation is simply intended to point out

the very real danger of accepting anything of value from someone with whom the public office holder does public business.

In my investigation, I considered whether the Minister would have the opportunity to influence the decisions of the Department in any way. My discussions centred on the tender process, the claims settlement process, and the use of day labour.

I note that the Auditor General, in his 1993-94 annual report, comments on his review of the tender process used within the department at page 111. He states

At the request of the Department, I reviewed the system used to approve contracts by senior officials to determine if existing conflict of interest guidelines are being observed.

Conflict of interest guidelines for public employees provide guidance in situations where a conflict may arise between an employee's private interests and the employer's interests.

I received full access to all the information I required. My review did not disclose any evidence of any irregularities in the contract approval process or any evidence that the conflict of interest guidelines were not being observed.

Departmental guidelines set out very strict rules regarding the existing tender process, and I have received no evidence that suggests that any attempt has been made to set aside or alter the process by the Minister at any time. This fact has been confirmed by the Deputy Minister in the Transportation and Utilities department, by the Auditor General's staff, and by the outside consultant I used in my investigation on this matter.

With respect to the resolution of claims disputes, departmental guidelines establish the final authority for negotiating a settlement within the department. That final authority is the Assistant Deputy Minister of Engineering. Failure to resolve the dispute may lead to mediation which is not binding on either party. If mediation is not used or a mediated settlement is not agreed to, the contractor may pursue the matter in court. The Minister has no involvement in the claims process, although it has occurred that a contractor has sought the assistance of the Minister to resolve a claim. Mr. Al Adair, former Minister, confirmed that in such instances, his sole involvement as Minister was to bring the contractor and departmental staff together to negotiate a settlement.

My investigation also revealed that the Minister cannot realistically use his influence to confer a benefit in terms of day labour. Day labour is gradually being eliminated by the Department of Transportation and Utilities, and in recent years, the department has requested hourly rate bids from companies interested in day labour and the work is awarded to the lowest bidder in this area as it is for tender work.

Although there may be no area where the Minister can personally effect a favour on behalf of an individual contractor, I have some concerns regarding the possible perception on the part of a contractor that influence can be obtained. The perception in this case may be that a favour was given and one may be expected in return, but the reality I have found in my investigation is that the Minister was not in a position to use his influence to the benefit of any paving contractor. The Minister's deputy essentially expressed to the Minister the same concerns about perception that I have expressed.

Issue 4: Was this request for an investigation frivolous and vexatious?

At the Minister's request, I considered whether this complaint was frivolous or vexatious. I cannot find the complaint frivolous or vexatious. The Minister chose to deal with a contractor who was at the same time performing a contract for the Minister's department. The integrity of the department and public officials must not be diminished by the mixing of public and private business. It is a fundamental principle that public servants must take all necessary steps to ensure that their public responsibilities are totally separated from their private interests. In entering into a contract with a business that contracts with the Minister's department, the Minister leaves himself open to intense public scrutiny and invites questions regarding the propriety of his actions relating to the contract.

Based on the above principles, I believe that the Minister demonstrated poor judgement and inappropriate behaviour in the way he dealt with the contract with Sandstar Corporation.

My concerns regarding the appropriateness of how the contract was entered into are compounded by the almost lackadaisical fashion in which the account with Sandstar was handled. Allowing an account with a contractor to remain unpaid for a lengthy period of time leaves a perception that the parties are unconcerned about ever making or receiving payment. Had the meeting in Gunn not occurred, the account may very well have been unpaid when the matter arose in the House. It might have appeared that the paving, under those circumstances, was a gift to the Minister and it would have appeared to some to be a breach of the Act.

The Conflict of Interest Review Panel, in its February 1990 report, stated, at page 32, that one of the objectives of a conflicts of interest system

is to maintain public confidence in the integrity of the institutions of government. The maintenance of that public confidence is essential for the proper functioning of parliamentary democracy. It is therefore of fundamental importance not only that ministers and MLAs in fact conduct their offices with integrity, but also that they should appear to do so.

There is a great deal of cynicism and suspicion towards elected officials. When an elected person, particularly a Minister of the Crown, acts without common sense or uses poor judgement, he invites suspicion. This incident would never have occurred if the Minister had exercised the kind of judgement the public has a right to expect from a Minister of the Crown. The Minister should not have contracted with a company that was, at the same time, performing large paving contracts for his department. The Minister should not have allowed the account to go unpaid for such a long period of time. However, there is no rule against bad judgement in and of itself.

We find there were sufficient issues raised in this investigation for us to determine that the request for the investigation was not frivolous or vexatious.

SECTION 25(4) OF THE *CONFLICTS OF INTEREST ACT*

I have found no breach of the *Conflicts of Interest Act*; however, as some of my comments may be seen as adverse to Mr. Trynchy, I gave him an opportunity on two occasions to make additional submissions to me under section 25(4) of the Act, and he did so. I did this out of an abundance of caution even though at

no time was I proposing to find a breach of the legislation.

DECISION

On the question of whether Mr. Trynchy received a benefit, I do not find a breach of the Act as I believe the price paid for the paving of his driveway was reasonable. I am also unable to find any evidence of an attempt by the Minister to influence his department in favour of Sandstar Corporation or of Sandstar attempting to seek influence. Since the paving work was paid for and at a reasonable price, I do not find that a benefit was received.

It is essential to the integrity of the Office of the Ethics Commissioner that Members who provide information to this office in response to an investigation do so with candour and frankness. Mr. Trynchy's dealings with this office fail in this regard. The Legislative Assembly may want to consider an amendment to the *Conflicts of Interest Act* imposing a legal obligation on Members to give full and frank disclosure during an investigation by this office.

I also understand that no written guidelines exist within Executive Council concerning Ministers contracting with individuals or companies that do business with that Minister's department. I recommend that guidelines be developed for the future to reduce the public perception that such contracts involve the mixing of public responsibilities and private interests. I do note the final sentence of the oath taken by members of the Executive Council:

In general, you will be vigilant, diligent and circumspect in all your doings, touching the Queen's Majesty's affairs; all which matters and things you will faithfully observe and keep, as a good councillor ought to do, to the utmost of your power, will and discretion."

SANCTION

As no breach of the *Conflicts of Interest Act* has occurred, I recommend no sanction under the Act.