



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

Report

of the Investigation

by

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

**into allegations involving
Education Minister Gordon Dirks**

January 6, 2015

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I received three letters requesting an investigation with respect to alleged behaviour of Minister Gordon Dirks during the recent by-election that took place from September 29th to October 27th. At that time Minister Dirks was a Minister of the Crown, but was not yet an elected member of the Legislative Assembly, and was a candidate in the by-election. The letters requesting an investigation came from Ms. Danielle Smith, then Leader of the Official Opposition, Mr. Greg Clark, the Alberta Party leader and a candidate who ran against Minister Dirks and Ms. Rachel Notley, Leader of the Alberta New Democratic Party.

Complaints

1. One of the complaints referred to specifically by Ms. Smith and more generally by Ms. Notley was that “on October 8, Premier Prentice and fellow candidate Mr. Dirks led an announcement in Calgary on building schools” and this announcement “used government resources to publicize initiatives featuring by-election candidates and to further their political interest” and thus their private interests contrary to the Conflicts of Interest Act.
2. The second complaint raised by Ms. Smith was specific to Minister Dirks alone. It was alleged that Minister Dirks participated in sod-turning events for schools in instances where construction contracts were not in place.
3. The third allegation, raised by all three letters, is that Minister Dirks used his campaign website to announce the approval of two modular classrooms for a school in his constituency in order to win votes in the by-election in which he was running.

Scope of Authority Under the Act

Before dealing with the specifics of this complaint, it is helpful 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. 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. It should be noted that a Minister is a member pursuant to s.1(1)(c) of the Act even if the Minister is not a member of the Legislative Assembly.

Therefore in considering the complaints I am restricted to considering whether Minister Dirks 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 Ethic's 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.

Investigation Process

When I received the complaints, I advised Minister Dirks of the allegations. The complainants were asked to attend my office to discuss the complaints and to add anything by way of detail to what had been set out in the letters.

The following people, some with legal counsel and other advisors, were interviewed in person and their conversations were taped on a confidential basis:

Ms. Danielle Smith, then Leader of the Official Opposition
Ms. Rachel Notley, Leader of the Alberta New Democrat Party
Mr. Greg Clark, Leader of the Alberta Party
Mr. Gordon Dirks, Education Minister

As well, Acting Deputy Minister of Education Gene Williams was interviewed in person and I conducted telephone interviews with the Chair of the Calgary Board of Education, Joy Bowen-Eyre, and, the Chair of the Rocky View School District, Colleen Munro.

Relevant Legislation

The major issue is whether Minister Dirks used government resources and made decisions furthering his private interest during the by-election, 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.

Complaints and Investigation of Fact

1. Complaint One

For the reason cited in my decision dated December 12, 2014 relating to Premier Prentice and Minister Mandel, the first complaint, relating to the announcement on building schools, is dismissed.

2. Complaint Two

Education Ministers are routinely invited to “sod-turnings” for new schools. These events are planned by local school boards and the Minister is traditionally invited to attend for ceremonial purposes. The practice is for the Minister to attend when available. Minister Dirks attended sod-turnings during the by-election and has continued to do so since the by-election. It is part of his role as Minister of Education and was not connected to the by-election. They are not set up by the Minister or his department and government resources are not used beyond the inconsequential expense of the Minister and his staff attending.

Using the same reasoning as my decision dated December 12, 2014, the second complaint is dismissed.

3. Complaint Three

This request for an investigation centred around a letter authored by Minister Dirks on his campaign website and a comment made by Minister Dirk’s campaign manager.

The letter dated October 22, 2014 and entitled “An Open Letter from Gordon Dirks to the Parents of Elbow Park, William Reid and Earl Grey Schools” reads as follows:

Dear Parents,

Thank you for sharing your concerns with me regarding the future of your schools. As the Progressive Conservative Candidate for Calgary-Elbow in this by-election, I have pledged to be an advocate and champion for your communities.

One of my highest priorities as Minister of Education is to ensure that all Alberta children receive the very best education in classrooms with appropriate enrolment, which are safe, respectful and caring learning environments for each student. It’s also very important to me that parents have certainty regarding the future of their schools.

Parents and residents of Elbow Park School have asked me if your flood-damaged school will be brought to life. I am committed to ensuring that this magnificent, historic, inner-city school will be rebuilt. I have seen the exciting plans for the new Elbow Park School. Funding is in place and Elbow Park School will be rebuilt to accommodate up to

250 students. It will be a superb learning environment for the generations to come. In the near future, the CBE will contract with a General Manager for the construction project.

Parents and residents of Earl Grey School have asked me if the temporary Elbow Park School presently housed in modular classrooms adjacent to Earl Grey School, will be dismantled once Elbow Park School is rebuilt. The answer is "yes". The space presently used for Elbow Park School will be returned to its previous playground purpose.

Parents of William Reid School have asked me if additional modular classrooms will be added to William Reid to accommodate student growth and ensure the school will continue to include Kindergarten through Grade 4 into the future. The Department of Education recently received the CBE's latest request for new modular classrooms, which included more learning space for William Reid School. Given the school's burgeoning enrolment, two modular classrooms have been approved for William Reid School and should be in place for the 2015-16 school year.

Calgary-Elbow needs an MLA who will be a strong advocate for our children. I pledge to work effectively with my PC Cabinet and Caucus colleagues on your behalf.

This letter was said to have been posted on October 24th during the by-election.

The part of the complaint arising out of comments made by his campaign manager were reported in an article in Metro News Calgary by Jeremy Nolais:

Dirks was out door-knocking Friday afternoon and unavailable for an interview, according to campaign manager Alan Hallman. Hallman agreed that only the William Reid modular had been approved, but said that the decision came as a result of opposition parties "cranking up a whole bunch of parents during a byelection to politically motivate them".

"The Minister, he's going to look after Calgary-Elbow, (and) made a stand," Hallman said. "He was worried about these parents and what the opposition was making this into and he made a decision."

On October 23, 2014, Minister Dirks wrote to the Chair of the Calgary Board of Education. The letter reads as follows:

Dear Ms. Bowen-Eyre:

In anticipation of your request for modular units in the annual Modular Classroom Program, and in acknowledgement of the extensive planning requirements for the installation of modular units within your jurisdiction, I would like to provide you some assurance regarding the evaluation of your modular request.

The dead line for these requests is November 3, 2014, after which time my staff will begin the process of evaluating the requests from across the province. As in

previous years, the criteria used for evaluating the provincial requests for modular classrooms are as follows:

- 1) Health & Safety - Modular classrooms that will be used to address health and safety concerns for students will be given the highest priority when evaluating the requests for modular classrooms.*
- 2) Utilization - Following health and safety concerns, the highest priority will be given to those facilities across the province which demonstrates the highest utilization, based on the Alberta Education Area Capacity and Utilization Report.*
- 3) Other Considerations - Following the most urgent utilization needs, other factors, such as board prioritization and evergreening requirements, will be considered in the approval of modular units.*

Your board's two requests with the highest utilization rates, for two modular units at Cranston School and two modular units at William Reid School, are highly supported. Along with these two schools, all your jurisdiction's other priorities will be evaluated based on the criteria noted above, with many standing a good chance of receiving approval.

Letters with formal approval will be issued following the evaluation exercise that will be completed by Education staff in Capital Planning. Your board should receive the approval letter by late 2014 or early 2015.

I trust this letter will provide you with some confidence and allow you to begin some of the planning requirements that will allow you to act quickly in placing your modular classroom order once the approval letters have been received. This should provide sufficient time to have the units located at the facilities with the highest utilization demands installed by the start of the 2015/16 school year.

I look forward to work together to address student accommodation needs in Calgary.

I am advised that the government usually sets aside approximately \$50 million each year for modular classrooms. It asks school boards to submit requests. The major criteria in evaluating requests are health and safety, and enrollment. The Department of Education receives three to four times the number of requests each year compared with the number of modular classrooms available. A request will not be considered unless the school is at 100% capacity. A list is compiled by the Department and is sent to the Minister for approval. The Deputy Minister notifies the school boards which have been successful. The date for submissions this year was early November.

Some modular classrooms are held back from the process for emergent needs. Such needs could be an enrollment far greater than expected. This past year approximately 50 emergency modular classrooms were approved by the Department and then the

Minister because of enrollment. There are two ways to ask for a modular classroom – directly through the Minister or through the standard process. All requests come to the Department for evaluation.

The Chair of the Calgary Board of Education, Joyce Bowen-Eyre, advised that over 40 Calgary schools applied to the Board for modular classrooms. The Board has its own evaluation process and prepared a list comprising 28 modular classrooms over 11 schools. This list was made public on October 14th and was submitted to Alberta Education on October 22nd. William Reid School was 7th in priority on the list. She indicated that Alberta Education does not necessarily follow the Calgary Board of Education list of priorities.

Ms. Bowen-Eyre was present for the October 8th announcement about the phase three building of schools. At that point Minister Dirks indicated to her that he was receiving calls about modular classrooms for William Reid. He asked her if they were needed and she replied that they were. On October 10th Minister Dirks called her and indicated he was still getting pressure. He asked if William Reid was on Calgary Board of Education's list for this year and she replied that she did not know. The list was subsequently approved on October 14th by Calgary Board of Education.

On October 18th Ms. Bowen-Eyre received another call from the Minister about modular classrooms. He said she would be getting a letter about approval of two modular classrooms for William Reid and a few other schools she did not remember. On October 22nd the Calgary Board of Education request for modular classrooms was submitted to Alberta Education. On October 23rd she received from the Minister the letter cited earlier in this decision. On October 24th she was contacted by a William Reid parents group which indicated they had confirmation they were getting modular classrooms.

It is interesting to note that the letter did not say that the modular classrooms for William Reid and Cranston were approved, but only that they were highly supported.

These two Calgary schools were not the only schools given prior approval. Modular classrooms for Lake View School in Chestermere were also approved.

On October 6, 2014 during the by-election the MLA for Chestermere-Rocky View, Bruce McAllister, then a member of the Wildrose party sent a letter to Minister Dirks. In that letter he urgently advocated for modular classrooms at the East Lake School in Chestermere where his daughter attends. Part of the letter reads:

Can East Lake School - and indeed any other school - expect progress to be made earlier than next year? What changes will be made to ensure that the province can catch up to growth and properly accommodate the students of this province? Our provincial government must be able to react to crises like these, and the success of our education

system depends on the ability of the province to provide our kids with an appropriate learning environment. The current situation is unacceptable.

I appreciate your attention to this important matter, and look forward to your response.

Colleen Munro, Chair of the Rocky View School Board indicated they had made an emergent request for modular classrooms for East Lake School in Chestermere on October 2nd. A request had been made in November 2013 but had not been granted. When the school opened in September 2014 the enrollment was far greater than anticipated so the request was renewed. She spoke to the Minister on October 6th about the need at East Lake. She found out the request had been granted at the time of the October 8th infrastructure announcement.

Minister Dirk's position is that he approved the two modular classrooms for the common good as William Reid School had significant challenges. Grades 5 and 6 were already being transported to other schools and there was concern about not having enough room for grade 4.

There was funding in the budget for these expenditures and William Reid was not the only approval he had given since becoming Minister.

Approving modular classrooms included both a yearly submission from school boards and ad hoc decisions during the year. He makes the decisions based on advice from Alberta Education but states that it is his responsibility to decide priorities. In the case of William Reid he had spoken to the Calgary Board of Education chair prior to making the decision. He ascertained that the school was on the list of priorities. He advised the chair once he had made the decision.

He indicated that the criteria he used were a pressing public need, available funds and the school being on the Calgary Board of Education approved list. He also stated that he did not know if the campaign manager was correctly quoted. He advised me in the interview that he did not tell him what to say.

Decision – Complaint Three

As set out in my earlier decision dated December 12, 2014, concerning Premier Prentice, Minister Mandel and Mr. Ellis, the prevailing view is quite clear that running for office is not a private interest. It is not often that a cabinet minister is in the position of being both a Minister and running for office during a by-election and this situation does raise difficulties with respect to on-going, routine government work during an election.

In this case the three approvals that were given during the election period and outside the normal approval process appear to have been done for purely political reasons.

While these schools meet the criteria for portable classrooms they could have been dealt with at the same time as the others which were submitted by the November deadline.

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.

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.

In this case, the Minister's decision was clearly not a broad policy one, but was directly related to by-election issues in his constituency. The question is whether the political interest of running for office can ever cross the line and become a private interest.

Were the actions of Minister Dirks in approving the modular classrooms in his constituency only a matter of blatant political opportunism and his ability to use government resources to quell a political issue or did they go so far as to become a private interest?

I have reluctantly come to the conclusion that running for office is always a political interest and that at no time does it become a private interest. The decision of

Commissioner Fraser while suggesting the line could be crossed did not decide if it had been. He did not have to do so on the facts of his complaint. I am of the belief, after careful consideration, that it would be impossible to define when a political interest becomes a private interest in this context.

However, having found that Minister Dirks did not violate the letter of the Act does not mean that his actions with respect to modular classrooms at William Reid School were appropriate. If I had been asked advice on this matter during the campaign, I would have advised the Minister not to make decisions and act on specific issues in his constituency during the by-election. This issue was not one of general policy or ongoing work. It was a specific political issue that he used his office to resolve in his favour. His actions, while not contrary to the Legislation, created an unfortunate perception. I would have advised him to leave this decision, if it were an emergency, to a substitute Minister or, otherwise, to deal with the problem after the election.

Conclusions

As the complaints do not fit within the wording of the Act, they are dismissed.

Sanctions

No sanction is recommended given that the complaints have been dismissed.

A handwritten signature in blue ink, appearing to read 'Marguerite Trussler', is written over a horizontal line.

Hon. Marguerite Trussler, Q.C.