



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

**REPORT TO THE SPEAKER
OF THE LEGISLATIVE ASSEMBLY
OF THE INVESTIGATION**

BY THE ETHICS COMMISSIONER

**INTO ALLEGATIONS INVOLVING
THE HONOURABLE THE PREMIER**

April 21, 1997

PART I: THE ALLEGATIONS

On March 3, 1997, I received a formal request from Grant Mitchell, Leader of the Alberta Liberal Party, that an investigation be conducted under section 22(3) of the *Conflicts of Interest Act* relating to a document distributed during the election campaign. Mr. Mitchell's letter indicated that the document was "prepared for the Progressive Conservative Party Campaign by the Department of Treasury on February 24, 1997." Mr. Mitchell alleged that Premier Klein was possibly in breach of sections 2, 3, and 4 of the Act with respect to the preparation and distribution of the material in question. A copy of Mr. Mitchell's letter is attached as Appendix I.

By letters dated March 3, 1997, I advised Premier Klein and Mr. Mitchell that I would conduct an investigation as requested. A news release was issued by my office on March 5, 1997, indicating that I was conducting an investigation into the allegations raised by Mr. Mitchell "relating to the preparation by Alberta Treasury of cost estimates for programs and policies proposed by the Alberta Liberal Party."

PART II: LEGISLATIVE CONTEXT

Legislative Authority for Conducting an Investigation

Section 22(1) of the *Conflicts of Interest Act* provides that any person may request that I investigate an alleged breach of the Act:

- 22(1)** Any person may request in writing that the Ethics Commissioner investigate any matter respecting an alleged breach of this Act by a Member.

Section 23 of the Act provides that I may conduct an investigation:

- 23(1)** On receiving a request under section 22 or where the Ethics Commissioner has reason to believe that a Member has acted or is acting in contravention of advice, recommendations or directions or any conditions of any approval or exemption given by the Ethics Commissioner to the Member under this Act, and on giving the Member concerned reasonable notice, the Ethics Commissioner may conduct an investigation with or without conducting an inquiry.

Terms of Reference for the Investigation

Mr. Mitchell raised possible breaches of three sections of the *Conflicts of Interest Act*.

Section 2 of the Act provides:

- 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 child.
- (2)** Where a matter for decision in which a Member has reasonable grounds to believe that the Member, the Member's minor 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 the Executive Council or the Legislative Assembly or a committee appointed by resolution of the Legislative Assembly, the Member must 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 this Act.
- (4) If a matter referred to in subsection (1) requires a decision of a Minister, the Minister may request another Minister to act in the Minister's stead in connection with the decision and the Minister to whom it is referred may act in the matter for the period of time necessary.

Section 3 of the Act provides:

- 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.

Section 4 of the Act provides:

- 4** A Member breaches this Act if the Member uses or communicates information not available to the general public that was gained by the Member in the course of carrying out the Member's office or powers to further or seek to further a private interest of the Member, a person directly associated with the Member or the Member's minor child.

PART III: THE INVESTIGATION

In conducting this investigation, I chose to have all interviews recorded and conducted under oath.

The following individuals were interviewed:

- Hon. Ralph Klein, Premier
- Hon. Jim Dinning, Provincial Treasurer
- Ms Trish Filevich, Communications Director, Alberta Treasury
- Mr. Al O'Brien, Deputy Provincial Treasurer (two interviews)
- Ms Kathryn Dawson, Director, Government Members Office
- Mr. Bob Stothart, Budget and Business Planning, Alberta Treasury
- Mr. Larry Bailer and Mr. Aaron Neumeyer, Budget and Business Planning, Alberta Treasury
- Mr. Norm Sexsmith, Budget and Business Planning, Alberta Treasury
- Mr. David Armstrong, Budget and Business Planning, Alberta Treasury

The Treasury Department officials responded promptly to my requests for interviews and cooperated with my investigation by providing me with documentation relating to the matter under investigation.

PART IV: FINDINGS OF FACT

According to the evidence presented to me, I have constructed the following chronology with respect to the preparation of the cost estimates for Liberal Party proposals.

The legislative session opened on Monday, February 10, 1997, with the *Speech from the Throne*. Later that day, the Official Opposition presented its *Speech to the Throne* at Mackay Avenue School. The following day the Provincial Treasurer gave his Budget Address and after the House adjourned that day, the writ was issued for the general election. Once the writ was issued, the Legislature was dissolved.

On Tuesday, February 18, staff in the Budget and Planning section of the Office of the Budget and Management in Alberta Treasury received an internal Treasury Department electronic mail asking analysts to prepare cost estimates of the initiatives contained in the *Speech to the Throne* presented by the Alberta Liberals on February 10. Meetings were held by the staff within the Budget and Planning section with respect to formatting and the assignment of the various initiatives to the analysts responsible for those subject areas.

On Wednesday, February 19, the Communications Director delivered a list of Liberal proposals or programs to the analysts. That document contained a more detailed listing of initiatives, policies, and proposals offered by the Alberta Liberals since the change in that party's leadership. Further meetings were held by the Treasury staff and a decision was made to change the formatting of the cost estimate document in light of the additional material provided. The source of the document provided by the Communications Director was not identified at that time.

From testimony presented to me, I understand the February 19 list of proposals was prepared by research staff within the Government Members Office (PC caucus) at the request of the Provincial Treasurer. Mr. Dinning provided that office with a file and requested that they develop a chronological listing of proposals. At Mr. Dinning's request, that document produced by the research staff was delivered February 19 directly to the Communications Director in Treasury. The file was returned to Mr. Dinning.

The Budget and Planning staff were working towards a deadline of Friday, February 21. In preparing the response, the analysts contacted employees throughout the government to assist in the production of an estimate. All analysts submitted their work to Mr. David Armstrong in Budget Planning and Integration and he produced a draft cost estimate document that afternoon for transmittal to the Communications Director. A final cost estimate document was produced on Monday, February 24.

Mr. Dinning stated that he passed the final cost estimate document on at a meeting in Calgary on Wednesday, February 26, to Rod Love, the Executive Director of the Premier's Office, and to Peter Elzinga, the Executive Director of the Progressive Conservative Party of Alberta. Mr. Dinning also included a one-page covering page that he himself produced. The cost estimate document was distributed publicly following the leaders' debate in Red Deer on Thursday, February 27, 1997.

During the time period identified above, the Deputy Provincial Treasurer was on annual vacation leave and the Treasurer's Executive Assistant was on leave of absence to work on the election campaign.

For clarification, Communications Directors, although physically situated within specific departments, are not employees of that department but are employed by the Public Affairs Bureau, which reports to the Office of the Premier.

Several Treasury staff members expressed concern that the document in question has been identified as a Treasury document. While the document was produced in Alberta Treasury, many of the figures were provided by officials in other departments and were not the professional analysis of Treasury staff. Given the short time line for producing the estimates, Treasury agreed to accept the department-generated figures in most cases but interviewees suggested to me that it would have been their preference to include some commentary or qualifications regarding the estimates provided.

PART V: FINDINGS

Preliminary Issue

There is a preliminary issue to be dealt with. The Act applies to the activities of Members of the Legislative Assembly (section 1(1)(c)):

1(1) In this Act

(c) “Member” means a Member of the Legislative Assembly and includes a Minister whether or not the Minister is a Member of the Legislative Assembly.

My investigation established that all material events took place after the Legislative Assembly was dissolved for the election. When the Legislative Assembly is dissolved by the Lieutenant Government for the purposes of a general election, there are no Members as their seats have become vacant.¹ This is implicit in section 10 of the Act which states:

10 If a person ceases to be a Member of the Legislative Assembly by reason of dissolution of the Legislature or otherwise and again becomes a Member of the Legislative Assembly by reason of being elected in the succeeding general election or by-election, as the case may be, then, for the purposes of sections 8 and 9, the person is deemed to be a Member of the Legislative Assembly during the intervening period.

The effect of this section is that only sections 8 and 9 continue to have effect on Members after dissolution and during an election.

Does this mean that, after dissolution, the Act does not apply to anyone because there are no Members for it to apply to? The answer is yes. After dissolution the Act does not apply to Members of the Legislative Assembly because they are no longer Members. However, the Act will still apply to Ministers because section 1(1)(c) also says that “Member” (for the purposes of the *Conflicts of Interest Act*) includes a Minister whether or not the Minister is a Member. So Ministers, like other Members, are no longer Members after dissolution, but the Act applies to Ministers alone because section 1(1)(c) deems Ministers to still be Members. Since the Premier is a Minister (the “first” Minister, president of Executive Council) the Act will apply. This may seem unduly complicated but it is important. I will state it another way: after the Legislative Assembly is dissolved, only Ministers and not private Members can be in breach of the Act.

¹ S.A. deSmith, *Constitutional and Administrative Law*, 5th Edition, p. 83, and J.A.G. Griffith and Michael Ryle, *Parliament, Functions, Practice and Procedures*, London, Sweet & Maxwell, 1989, p. 148.

The Role of Mr. Dinning

No allegation was made with respect to Mr. Dinning. Even if there was, while Mr. Dinning states that he instructed the analysis, I do not believe he would be in breach of the Act because he had no private interest to be furthered. The issue of whether running for election is a private interest is discussed later, but in any event, Mr. Dinning was not a candidate in this election.

The Alleged Breaches

The allegation was made that the actions of the Premier breached one or more of sections 2, 3, or 4 of the Act.

Section 2

Section 2 of the Act prevents a member from taking part in a decision which might further a private interest of the Member or a direct associate of the Member.

- 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 child.
- (2) Where a matter for decision in which a Member has reasonable grounds to believe that the Member, the Member's minor 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 the Executive Council or the Legislative Assembly or a committee appointed by resolution of the Legislative Assembly, the Member must 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 this Act.
- (4) If a matter referred to in subsection (1) requires a decision of a Minister, the Minister may request another Minister to act in the Minister's stead in connection with the decision and the Minister to whom it is referred may act in the matter for the period of time necessary.

Section 3

Section 3 of the Act prevents a Member from using his office or powers to influence a decision to be made on behalf of the Crown to further a private interest.

- 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.

Section 4

Section 4 prohibits a Member from using or communicating “insider information” to further a private interest.

- 4 A Member breaches this Act if the Member uses or communicates information not available to the general public that was gained by the Member in the course of carrying out the Member’s office or powers to further or seek to further a private interest of the Member, a person directly associated with the Member or the Member’s minor child.

“Private Interest”

The purpose of the *Conflicts of Interest Act* is to prohibit conflicts between the Member’s office and powers and the Member’s private interest. Thus, a breach of the Act occurs when a Member of the Legislative Assembly does a certain activity which activity has or might have the effect of furthering a private interest of the Member. If one of the activities is done and there is no private interest to be furthered, there is no breach of the Act. With respect to the allegations in this case, for a breach of any one of these sections to have occurred, there must be:

- (A) involvement by the Premier in either taking part in a decision (section 2), using powers to influence a decision of the Crown (section 3), or communicating information (section 4); and
- (B) the furtherance of a private interest by the Premier, a direct associate of the Premier, or a minor child of the Premier.

(A) Involvement by the Premier

Based on my interviews with Premier Klein and with various Treasury officials, I found no evidence whatsoever that the Premier participated in the decision to have the document in question produced. Mr. Dinning stated that he initiated the request. No staff member from Alberta Treasury advised me that he or she was approached by the Premier or by any member of the Premier’s staff. Within Alberta Treasury, the work was directed through the Communications Director and the staff within Budget Planning and Integration. Even though the Communications Director is an employee of a department for which the Premier was responsible, in this instance she was acting upon the instructions of the Provincial Treasurer according to the evidence presented. I received no evidence that the Premier participated in any aspect of the production of the cost estimate document.

The cost estimate document distributed by party officials following the leaders’ debate in Red Deer on February 27, 1997, was not at that time available to the public. The Premier did therefore use or communicate information not available to the public.

(B) Furthering a Private Interest

Again, in order for a breach to have occurred under any one of the sections alleged, the Member must have furthered or sought to further a “private interest.”

In order to assist me in my consideration of the “private interest” involved in this matter, I requested that Mr. Mitchell provide me with further argument on this subject. In response, Mr. Mitchell noted a number of benefits that would result from the use of Treasury staff in providing these cost estimates. With respect to re-election, Mr. Mitchell noted that there are “obvious financial and personal gains” associated with the goal of seeking re-election. Mr. Mitchell further argued that use of the public service gave more weight to the document than if it had been prepared by a political party and that in using the public service resources, the Progressive Conservative Party was able to free up its own funds for use in other aspects of the election campaign.

I believe that all of these possible benefits come down to one issue: Is the seeking of public office by election a “private interest” under the Act? The financial gains accrue because an individual gets paid as an MLA and as a Minister. The advantage of having Treasury Department figures would be that they would be more credible than other figures and therefore cause more people to believe them and vote for the Premier or his party or vote against the other parties. With respect to the last argument about Party funds, it would appear to me that the benefit in that case, if there is one, is to the Party and not to any one Member. At the same time, presumably the freed up party funds would be used for other purposes related to getting the Premier and his party elected. It all boils down to whether seeking to be elected as an MLA is furthering a “private interest.”

Section 1(1)(g) lists a number of things that do not constitute a “private interest.” That section states:

1(1) In this Act,

(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.

Section 1(1)(g)(i)(A) says that a “private interest” does not include an interest in a matter that concerns the remuneration or benefits of a Member. As a result, a Member can vote on MLA salaries and benefits without being in breach of the Act. By the same token, I believe an MLA can seek to be re-elected as an MLA and obtain that salary and those benefits without being in breach of the Act.

In a previous report of an investigation dated August 26, 1993, involving release of budget information, an excerpt from page 299 of Commissioner W.D. Parker’s report of the Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens was provided with respect to “political interests.” That excerpt reads as follows:

It should be noted that the allegations contain as an element the suggestion that Mr. Stevens' favourable treatment of Hyundai was motivated not only by considerations involving the potential political benefit that would accrue to him through having the parts plant placed in his own riding, but by his private business interests as well. **If the allegation had related only to Mr. Stevens' private political interests, I would have had grave doubts about whether, even if true, such an allegation was an allegation of conflict of interest into which I should inquire and report. This is a complex question that requires a careful assessment of the proper extent to which a minister of the Crown can act to forward his or her own partisan political ends.** I do not find it necessary, however, to deal with the question of whether such a political interest, standing alone, would be sufficient to be considered as creating a conflict. It is because this assertion is combined with the allegation that Mr. Stevens was motivated by his private business interests as well that I shall deal with it as an allegation of conflict of interest. [emphasis added]

I share Commissioner Parker's grave doubts as to whether the furtherance of political interests is the furtherance of a private interest. If political interests, especially the interest in winning an election, is 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. Every speech made, every vote cast, every decision taken must, and should, contain a consideration of how that action will be received by the voters. This fundamental and final accountability to the voter is the basis of democracy. If the consideration by a Member of how much support a speech, vote, or decision will gain him or her is a "private interest" (ie, "Will this help me get re-elected?"), the Act will operate to prevent speeches, votes, and decisions. 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.

I am therefore of the opinion that "private interests," as that term is used in the *Conflicts of Interest Act* does not include a desire for election to political office.

A March 31, 1997, editorial in the *Edmonton Journal* pointed out that there are certain decisions that are best left to the electorate. While the editorial dealt with perception of conflict of interest, it concluded that certain aspects of political behaviour have to be judged by the citizenry at the polls. How Members pursue their political interest in being re-elected is one of these, as far as the *Conflicts of Interest Act* is concerned.

All of which is respectfully submitted.

Robert C. Clark
Ethics Commissioner
April 21, 1997

GENERAL ADVICE

Section 42(1) of the Act permits me to

... give advice and recommendations of general application to Members or former Ministers or a class of Members or former Ministers on matters respecting obligations of Member and former Ministers under this Act, which may be based on the facts set out in the advice and recommendations or on any other considerations or on any other considerations the Ethics Commissioner considers appropriate.

GENERAL OBSERVATIONS REGARDING THE USE OF PUBLIC RESOURCES DURING AN ELECTION

The issues raised relating to the use of public resources during the election campaign are important ones. I believe that this situation has provided some valuable lessons about government and politics.

Separation of Government and Political Functions

Following a general election, the Lieutenant Governor appoints a Premier who can command a majority in the Legislature. The Premier then advises the Lieutenant Governor on the appointment of Ministers. The combination of the Lieutenant Governor, the Premier, and the persons appointed Ministers is called the Lieutenant Governor in Council. This is the executive branch of government. The public service or administrative branch, is directed by the executive branch or the Crown.

Government is accountable to the elected representatives in the Legislative Assembly (the legislative branch). This accountability takes two forms: the responsibility of individual Ministers for their departments and their own personal activities, and the collective responsibility of Cabinet as a whole.

1. The Neutral Public Service

Individual ministers are responsible for their departments. An obvious example is the opportunity provided in the Legislative Assembly for Members to question Ministers respecting their administrative responsibilities and to hold them accountable. To quote Andrew Heard in *Canadian Constitutional Conventions*²:

The notion of an apolitical or non-partisan civil service has been an important foundation of modern ministerial government. The traditional doctrine of individual ministerial responsibility holds that a government department is accountable to the legislature only through its minister. This has traditionally resulted in the anonymity of civil servants in parliamentary discussions. One reason for this principle is to allow civil servants to have the freedom to offer advice to the Minister without fear of public recrimination. Perhaps a more important reason for the anonymity of public servants is that it ensure the political neutrality of the permanent bureaucracy, which is a prime characteristic of the Westminster model of parliamentary government. Both

² Andrew Heard, *Canadian Constitutional Conventions*, Toronto, Oxford University Press, 1991, p. 59.

these aspects of individual responsibility have come under some pressure in recent decades.

In the past, the public service was held apolitical by two factors: (a) the political “convention” of public service neutrality to which Heard refers, and (b), in some jurisdictions, by laws which actually prohibit certain types of participation in the political process by public servants. While the laws in question are enforceable by courts, convention is only enforceable in the “court of public opinion” and at the polls. Since the *Canadian Charter of Rights and Freedoms* (1982), courts in Canada have upheld the right of association for public servants under section 2(d) of the Charter,³ thereby placing some limits on the extent to which political activities by the public service can be restricted. The convention of bureaucratic neutrality remains strong, however.⁴

Members of the public service are the officials who carry out the decisions of the government, whether based on legislation, policy or politics. Gregory Tardi writes:⁵

Because it is the duty of public servants to apply the government’s legislation and carry out policy, both of which are unavoidably linked to the government’s political program, public disagreement of public servants with the agenda of government is an extremely sensitive issue charged with partisan political undertones ... The public interest in both the actual and apparent impartiality of the public service dictates a general requirement of loyalty on the part of public servants to the Government of Canada as opposed to the political party in power.

This view was reinforced by the Supreme Court of Canada in *Re Fraser and the Public Service Staff Relations Board*⁶:

As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty is owed to the Government of Canada, and not to the political party in power at any one time. A public servant need not vote for the governing party. Nor indeed need he or she publicly espouse its policies. And indeed, in some circumstances a public servant may actively and publicly express opposition to the politics of the government. This would be appropriate if, for example, the government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of a public servant or others, or if the public servant’s criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability. But having stated these qualifications (and there may be others), it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major government policies ...

³ See for example, *Osborne v. Canada (Treasury Board)*, [1988] 87 NR 376 (FCA).

⁴ See K. Kernaghan, “Political Rights and Political Neutrality: Finding the Balancing Point,” in *Canadian Public Administration*, Vol. 29, No. 4 (Winter 1986), p. 639.

⁵ Gregory Tardi, *The Legal Framework of Government*, Toronto, Canada Law Book Inc., 1992, p. 91.

⁶ [1986], 23 DLR (4th) 122, pp. 135-6.

The common thread here is that public servants owe their loyalty to the government not to the party in power. Realistically the line between the two is not always “black and white.” The electorate chooses a majority of the Members of the Legislative Assembly, presumably on the basis of the offered policies of the party to which those people belong. Once in office, the government so elected will work to put those policies in place. A large part of that task will fall to public servants, the people who administer the laws and programs of the government. It seems important, however, that public servants not be involved, as part of their official duties, in helping any party to get into office. But I want to repeat that the use of public servants in a political way is not furthering a private interest as defined in the Act.

The case at hand emphasizes that there is a difference between working to put government policies into effect and working to bring about the election of a certain party. Once elected and asked to form the government, the party has a right to implement its policies and it has a right to expect the public service to be the instrument of that implementation.

2. Ministerial Responsibility

As stated, when the Legislative Assembly is dissolved by the Lieutenant Governor for the purposes of a general election, there is still an Assembly but it is unable to legislate because it has no Members as their seats have become vacant.⁷ On the other hand, a government (i.e. the members of Executive Council) remains in office until the Premier resigns or is dismissed by the Lieutenant Governor. If the Premier asks for and is granted a dissolution, the government remains in office throughout the election period and beyond until resignation or dismissal.⁸ During an election campaign, therefore, Ministers remain as Ministers. Of course the public service must continue to carry out the policies of the government during an election: the government continues to exist and it cannot cease functioning for a 28-day period.

Although there is no Legislative Assembly to hold the Minister publicly accountable, it is incumbent on Ministers to remain vigilant of their public responsibilities at all times. The public trust demands that public resources be used to support government initiatives and not purely political endeavours.

3. Separation of Public Responsibilities Relating to Governance from Political Functions

The issuance of the election writ marks a transition from governing to electioneering. Although Ministers are political persons throughout their terms in office, the issuance of the writ highlights the partisan aspect of their activities. Ministers continue to have public responsibilities throughout the 28-day campaign and it is incumbent upon them to separate their activities according to the role they are carrying out any particular time.

During the election period, there may be a temptation to ignore or overlook the separation of government and political functions. The short campaign period in Alberta, the shift in priorities for individuals seeking re-election, and other factors may contribute to hastily made decisions to utilize the public service for purely political initiatives.

⁷ S.A. deSmith, *Constitutional and Administrative Law*, 5th Edition, p. 83.

⁸ E.A. Forsey and G.C. Eglinton, *The Question of Confidence in Responsible Government*, p. 203.

4. Respect and Preservation of Neutrality

It is my belief that there is a need to reinforce the impartiality of the public service. During an election period, Ministers must be particularly vigilant in respecting that neutrality and must take steps to preserve it. While it may be tempting to use the professional services conveniently available to a Minister during an election campaign for partisan political purposes, that temptation must be resisted.

I strongly recommend that the Cabinet consider establishing written guidelines for use by Ministers with respect to utilization of the public service during election campaigns.