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REPORT

OF

THE HONOURABLE COULTER A. OSBORNE
INTEGRITY COMMISSIONER

**RE: THE HONOURABLE ERNIE EVES, PREMIER OF
ONTARIO AND THE HONOURABLE TONY CLEMENT,
MINISTER OF HEALTH AND LONG-TERM CARE**

TORONTO, ONTARIO

August 13, 2003

**REPORT RE: THE HONOURABLE ERNIE EVES, PREMIER OF ONTARIO AND THE
HONOURABLE TONY CLEMENT, MINISTER OF HEALTH AND LONG-TERM CARE**

[1] On May 26, 2003 Howard Hampton, the Leader of the New Democratic Party and the member for Kenora-Rainy River, submitted a complaint under section 31 of the *Members' Integrity Act, 1994* in which he alleged that Ernie Eves, the Premier of Ontario (the Premier) and Tony Clement, the Minister of Health and Long-Term Care (the Minister) breached the provisions of the *Members' Integrity Act, 1994*.

[2] The complaint centers on the government's decision to use private sector financing agreements to construct and operate (in a non-clinical context) two hospitals, the William Osler Health Centre in Brampton and the Royal Ottawa Hospital in Ottawa. Mr. Hampton notes in his complaint that the use of public-private partnerships (P3s) in the two pilot projects represents a new policy in Ontario. He asserts that, "the Ministry did not consult on the issue of P3s..." and that the Conservative Party of Ontario, "...has never sought an election mandate to embark upon public-private partnerships in the health-care section". Mr. Hampton contends in paragraphs 5 and 6 of his complaint affidavit that P3s are less efficient (i.e. they cost more) than government financed projects and in paragraphs 7 and 8 that health outcomes are adversely affected by the private sector provision of health care.

[3] The above concerns about the use of P3s, which I have addressed in summary form only, represent the first part of Mr. Hampton's complaint. On this branch of his complaint he asks under section 31(2)(a) of the *Members' Integrity Act, 1994* that I exercise the powers of a Commission constituted under Parts I and II of the *Public Inquiries Act* and inquire into the P3 issue as related to hospital construction and other related issues.

[4] The second part of Mr. Hampton's complaint focuses on campaign contributions to the Premier and Minister by what Mr. Hampton refers to as partners in all three private consortia short listed for the Royal Ottawa Hospital project. Mr. Hampton's complaint also refers to contributions to the Progressive Conservative Party of Ontario by

companies involved in the tendering process for both the William Osler and Royal Ottawa Hospital projects. In his complaint affidavit Mr. Hampton expresses the belief that the Premier and Minister, "...have participated in decisions concerning the tendering processes" referable to both hospitals. This is a central element of the complaint, which alleges that the Premier and Minister, albeit indirectly, gave preferential treatment to contractors who made political contributions to them or the PC party. Mr. Hampton also submits that the decision to use the P3 financing model would necessarily result in companies which had made campaign contributions to the Premier, the Minister or the Progressive Conservative Party, to be considered for contracts referable to the two hospital projects. Mr. Hampton submits that this should be taken into account in determining whether the Premier or the Minister, or both of them, have breached sections 2 or 4 of the *Members' Integrity Act, 1994*.

[5] On this part of his complaint, which I have only attempted to summarize, Mr. Hampton states that the facts set out in his affidavit constitute reasonable and probable grounds for his belief that the Premier and Minister have contravened sections 2 and 4 of the *Members' Integrity Act, 1994*.

[6] On June 3, 2003 I advised Mr. Hampton, by letter with a copy to the Premier and the Minister, that the P3 issue was in my view a public policy issue, not an integrity or conflict issue. It is an issue to be addressed in the political domain. It is there that discussion and debate about it can and should occur. Thus, I view the P3 issue to be nothing more than part of the factual background of this complaint.

[7] On June 17, 2003 the Premier and Minister filed their responses to the complaint. On July 3, 2003 Mr. Hampton filed his reply to the responses of the Premier and Minister.

[8] As I did with Mr. Hampton's complaint, I will summarize what I view to be the core elements of the responses of the Premier and Minister.

[9] According to the Premier and the Minister, the procurement process, referable to both the William Osler Health Centre and the Royal Ottawa Hospital, was conducted throughout by the two hospital boards. These boards were assisted by their own consulting and legal teams. The boards made all decisions relating to the development of technical specifications, legal agreements, issuance of bid proposal documents, the evaluation of proposals and the selection of the successful proponent for each hospital project. The process was monitored, throughout by Fairness Commissioners, retained by each of the hospitals.

[10] The Premier's and Minister's response plainly stated that the government's role in the process consisted of two main elements. First, the government took steps to ensure that the hospital boards followed appropriate due diligence procedures so that value for money was obtained. Second, the government confirmed that the Public Hospitals Act and operational directions issued by the Ministry of Health were complied with. These were review, not decision-making functions.

[11] According to the response of the Premier and the Minister, the identity of bidders for the two hospital projects was not made known to the Premier, the Minister, or any member of Cabinet at any time during the process. Neither the Premier, the Minister, made or participated in the decisions to which Mr. Hampton refers to in his complaint affidavit. Thus, both deny that they committed any breach of section 2 or 4 of the *Members' Integrity Act, 1994*.

[12] The responses of the Premier and Minister included a memorandum summarizing the procurement and bid process at William Osler Health Centre and Royal Ottawa Health Care Group. This memorandum addresses the P3 issue, the role in the process of the hospitals, the Ministry of Health and Long-Term Care, and SuperBuild. The Premier's and Minister's responses also included a chronology outlining relevant events by date in connection with the procurement and bid process at both hospitals.

Analysis

[13] It is against this factual background that I turn to consider the issue whether the evidence establishes that either or both of the Premier and the Minister have breached sections 2 or 4 *Members' Integrity Act, 1994*. These sections provide:

2. A member of the Assembly shall not make a decision or participate in making a decision in the execution of his or her office if the member knows or reasonably should know that in the making of the decision there is an opportunity to further the member's private interest or improperly to further another person's private interest.
4. A member of the Assembly shall not use his or her office to seek to influence a decision made or to be made by another person so as to further the member's private interest or improperly to further another person's private interest.

[14] Apart from the P3 issue, which I have removed from the table for the reasons previously stated, the crux of Mr. Hampton's submission is that one or both of the Premier and Minister breached sections 2 or 4 as a result of their involvement in decisions referable to the William Osler Health Centre and the Royal Ottawa Hospital through which contributors to the Premier, the Minister and the Progressive Conservative Party of Ontario received contracts.

[15] Mr. Hampton relies upon a 1993 decision of British Columbia Ethics Commissioner Hughes (the Robin Blencoe complaint) in which he dealt with several issues, one of which was whether a B.C. Cabinet Minister could be in an apparent conflict of interest were he to involve himself in decisions affecting the private interests of persons or corporate entities which had previously assisted the Minister in a tangible way. It seems to me to be reasonably clear that the issue before Commissioner Hughes was similar, in a general sense, to the allegations that Mr. Hampton advances in that part of his complaint which concerns campaign contributions. As stated, he asserts that construction companies, which had made political contributions to the Premier or the Minister, were rewarded with contracts having to do with the construction of the two hospitals.

[16] Commissioner Hughes' concluded in the B.C. complaint, "...I am satisfied that there would be a perception of an "apparent" conflict of interest if Blencoe were to proceed to act under section 948 of the *Municipal Act*".

[17] I think that it is important to note that the British Columbia Act addresses apparent conflicts of interest. By contrast, the *Members' Integrity Act, 1994* does not include rules having to do with apparent conflicts of interest. Accordingly, under Ontario's *Members' Integrity Act, 1994* such a finding is not open to me. Moreover, in the circumstances, if it were I, I would not make that finding on the basis of the material with which I have been provided.

[18] On Tuesday, July 22, 2003 I met with the officials of the Ministry of Health and Long Term Care to satisfy myself that the separation from government influence on the two hospital projects was as it was alleged to be in the responses of the Premier and Minister. In the course of my meeting, I reviewed the process relevant to the Request for Expressions of Interest (for the William Osler Health Center), the Request for Proposals (RFPs) for both hospitals, the evaluation criteria and steps taken by each hospital to ensure that the RFP process and its outcome were fair.

[19] It is apparent that the P3 financing arrangements referable to both hospitals extend only to non-clinical services and operations. Neither the Premier nor the Minister was involved in the procurement process. I am satisfied that the government's involvement extended only to ensuring that the scope of the work (the subject matter of the two RFPs) did not extend beyond what Cabinet had approved. To that end, the Minister reviewed the output specifications (part of the RFPs) and the evaluation criteria set out in the RFPs. This, in my view, does not constitute a breach of the *Members' Integrity Act, 1994*.

[20] The involvement of ministry staff was limited to over-viewing the process in respect of both hospitals to determine whether it was appropriate to issue approvals to proceed to the next step in the prescribed process. Throughout control of the process was with the two hospitals.

[21] In paragraph 12 of his complaint Mr. Hampton alleges that the Premier and the Minister (among others) were involved in the “tendering process” referable to the two hospitals. This is not so. The hospitals were responsible for the RFPs. All pre-qualified bidders had access to the RFPs as one would expect. The ministry was involved in the RFP process only in respect of its scope, the general standards prescribed and the evaluation criteria as set out in the RFP. The Minister was not involved in the actual evaluation of proposals received in response to the two RFPs.

[22] The scale of projects such as the William Osler Health Centre and the Royal Ottawa Hospital is a government function. Manifestly, the government as the financier of the health care system (including the construction of hospitals) has to determine what the needs of a particular community are. Thus it seems to me that it is appropriate that the government not only answer the “what” question, that is, what the scale of the hospital projects should be, but also the “how” question, in this case the use of P3 financing arrangements.

[23] As I have said, each hospital appointed a process auditor or Fairness Commissioner to ensure that the entire process was fair. The government had no role whatsoever in this process. The Fairness Commissioners were involved at the RFQ stage of the process. The Fairness Commissioners certified the fairness of the process before the Cabinet undertook a value for money analysis of the projects. Finally, the Minister and government were not involved in that part of the process leading to the selection of a successful proponent for, as it is sometimes put, the preferred bid. Indeed, the hospitals alone were aware of those corporate entities that responded to the RFPs. I should add here that I am not naïve enough to think that the Minister would not have some idea of those construction companies interested in these two hospital projects. There are relatively few construction companies in Ontario, which could, either directly or through special purpose corporate entities, undertake projects as substantial as the William Osler Health Center or the Royal Ottawa Hospital.

[24] On the material before me I am satisfied that the Premier and Minister are sufficiently separated and insulated from the process through which a successful proponent for the construction of the William Osler Health Centre was selected and the process through which the successful proponent for the Royal Ottawa Hospital project will be selected that there is no breach of either section 2 or 4 of the *Members' Integrity Act, 1994*. The fact that P3s provide the financing vehicle for the two hospital projects, although a political issue, does not in my view advance Mr. Hampton's complaint on the issue whether the Premier or the Minister breached sections 2 and 4 of the *Members' Integrity Act, 1994*.

Conclusion

[25] The complaint evidence, which I did not find particularly persuasive, does not support the central allegations in the complaint. I see no breach of sections 2 or 4 of the *Members' Integrity Act, 1994*. The complaint is therefore dismissed. No further investigation is warranted.

DATED at Toronto this 13th day of August, 2003.

The Honourable Coulter A. Osborne