Legislative Assembly of Ontario

OFFICE OF THE INTEGRITY COMMISSIONER

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REPORT

OF

THE HONOURABLE COULTER A. OSBORNE
INTEGRITY COMMISSIONER

RE: THE HONOURABLE JAMES M. FLAHERTY, DEPUTY PREMIER & MINISTER OF FINANCE

TORONTO, ONTARIO
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Overview

On November 15, 2001 George S. Smitherman, the member for Toronto Centre – Rosedale, filed a complaint against the Minister of Finance (and Deputy Premier) the Honourable James M. Flaherty under s.30(1) of the *Members' Integrity Act, 1994*. For ease of reference I will refer to Mr. Smitherman as "the complainant" and to Mr. Flaherty as "the Minister".

The crux of the complaint was that within a short time of announcing a program for a one-time payment of $100.00 per child to middle and low income working families with children ('the program'), the Minister and the Chairman and Chief Executive Officer of Sears Canada Inc. (Sears) jointly participated in an announcement the essence of which was that Sears would exchange any $100.00 government cheque issued under the government's program for $110.00 worth of Sears' gift certificates. These gift certificates could be used to purchase merchandise at any Sears store in Ontario, through Sears' catalogue or its web site.

The complainant alleged that Sears received a commercial benefit of free publicity in respect of the media coverage which the announcement attracted, without a similar opportunity having been afforded to any other Ontario retail enterprise.

Against this general background the complainant submitted that the Minister by being a party to the arrangement with Sears to which I have referred above breached both s.s.2

and 4 of the *Members' Integrity Act* in that these arrangements did not provide other retailers (Sears competitors) with an equal opportunity to obtain what the complaint refers to as "free publicity".

On December 3, 2001 I received the Minister's response. In general the Minister's position is that there was nothing untoward or improper about the program or promoting a government program by involving a particular retailer (Sears) in circumstances where other retailers were encouraged to provide the same benefit to recipients of the $100.00 per child one-time grant program.

I received the complainant's reply to the Minister's submissions on December 14, 2001. It clarified the complainant's allegations against the Minister who the complainant contended misunderstood the crux of the complainant's complaint.

In his reply to the Minister's submissions the complainant described Sears as, "[A] large American company which does business in Ontario". He referred to Sears and Walmart (a retailer the Minister contended he contacted before the Sears media event on November 8, 2001) as, "large scale American based retailers who do business in Ontario..." Later he referred to the Hudson's Bay Company (which was not contacted by the Minister before November 8, 2001) as, "a Canadian institution". If these references to the lineage of Sears, Walmart and the Hudson's Bay Company were intended to suggest that by contacting two companies with American roots (Sears and Walmart) and not contacting one company with manifestly Canadian roots, (the Hudson's Bay Company), the Minister's alleged misconduct was more egregious, then I reject that submission. All of Sears, Walmart and the Bay are lawfully engaged in retailing in Ontario. Whether their corporate origins are in the United States or Canada is in my view a non-issue. Finally, I note that in the end the Hudson's Bay Company did participate in the program by extending to the public the same offer as Sears did.

In his reply the complainant also raised the "insider information" issue and s.3 of the *Members' Integrity Act*. He contended that contacting Sears about its participation in the

program before particulars of the program were made available to the general public the Minister breached s.3 of the *Members' Integrity Act*.

In his affidavit setting out the basis of his complaint, the complainant did not raise the issue of a breach of s.3 directly. Indeed, he noted, I think correctly, that announcements such as the announcement of the program have a somewhat privileged status and are not generally disclosed to an outside entity before the program particulars are disclosed in the Legislative Assembly. For reasons to follow shortly, I do not think the material discloses a breach of s. 3 of the *Members' Integrity Act*.

Sections 2, and 4 of the *Members' Integrity Act* provide:

> Conflict of interest
>
> 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. 1994, c. 38, s. 2.
>
> Insider information
>
> 3. (1) A member of the Assembly shall not use information that is obtained in his or her capacity as a member and that is not available to the general public to further or seek to further the member's private interest or improperly to further or seek to further another person's private interest.
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> (2) A member shall not communicate information described in subsection (1) to another person if the member knows or

reasonably should know that the information may be used for a purpose described in that subsection. 1994, c. 38, s. 3.

Influence

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. 1994, c. 38, s. 4.

Private interest is referred to in all of sections 2, 3 and 4. It is defined in generally negative terms in section 1 of the *Members' Integrity Act*:

"private interest" does not include an interest in a decision,

(a) that is of general application

(b) that affects a member of the Assembly as one of a broad class of persons, or

(c) that concerns the remuneration or benefits of a member or of an officer or employee of the Assembly.

I should note here that on November 8, 2001 this office was contacted by Ms. Bronwen Evans, Executive Assistant to the Minister about the propriety of the Minister participating in the announcement at a Sears store about the program involving the exchange of each $100.00 government cheque for $110.00 of Sears' merchandise. I replied to the Minister's inquiry in part as follows:

> You have advised that the Minister is making an announcement at a Sears store to the effect that Sears is offering to provide $110.00 in merchandise paid for by the one-time payment [the $100.00 per child payment] and will also be inviting other retailers to provide a similar benefit

> to consumers. In my opinion this arrangement does not contravene the *Members' Integrity Act, 1994.*

The Minister submits that, in light of my November 8, 2001 opinion letter, even if he breached s.s. 2 or 4 of the *Members' Integrity Act*, section 31(7) of the *Act* is engaged. Section 31(7) provides:

> 31(7) If the Commissioner determines that there was a contravention of the Act or of Ontario parliamentary convention but that the member was acting in accordance with the Commissioner's recommendations and had, before receiving those recommendations, disclosed to the Commissioner all the relevant facts that were known to the member, the Commissioner shall so state in the report and shall recommend that no penalty be imposed.

The complainant, in response, contends that this office did not receive all relevant information and that it is thus not open to the Minister to rely on the saving provisions of section 31(7) of the *Act*.

Analysis

For convenience I will again set out the provisions of sections 2 and 4 of the *Members' Integrity Act, 1994.*

> 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. 1994, c. 38, s. 2.

...

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. 1994, c. 38, s. 4.

The statutory definition of a private interest understandably excludes decisions that are of general application (see *Members' Integrity Act* section 1). Thus, although the program clearly preferred the interests of a segment of Ontario's society - working families with children and retailers where program beneficiaries would spend their money - it is not suggested that the program itself gives rise to a breach of either sections 2 or 4 of the *Members' Integrity Act*. Indeed the complainant acknowledges that his complaints about the program itself are political in nature and are of no direct concern to the allegations he makes against the Minister.

The Minister's submission in response in part emphasizes the program in the context of the definition of "private interest" in section 1 of the *Members' Integrity Act*. As I have said this definition excludes decisions (in this case the program decision) that are of general application. The Minister set out his position in this way:

> Reading the definition in conjunction with sections 2 and 4, it is evident that those sections specifically exclude decisions that affect a broad group of constituents and that incidently benefit individuals. This protects a member's ability to launch initiatives that have far-reaching benefits.
>
> If this was not the correct interpretation of sections 2 and 4, undesirable and illogical results could follow. For example, a government job training initiative targeting a specific industry and which benefited a particular corporation in that industry would be barred as a contravention of the *Act*.

I agree with the Minister's submissions on the private interest issue generally; however, it is not the program which is in issue, but rather the Minister's decision to arrange, and later attend, the media event at which one retailer's limited participation in the program was announced.

Although I do not think that the statutory definition of private interest, in so far as it excludes decisions that are of general application, is of any particular significance, I do not mean to suggest that the Minister's actions should be totally severed from the program for purposes of analysis. To do so would divorce the Minister's actions from the context in which they were undertaken.

Ministers are entitled to promote government programs, just as the opposition is entitled to publicly oppose them. To seek to enhance the economic value of this program by having retailers provide what amounts to a discount to customers purchasing merchandise with the program's $100.00 cheques is not, in my view, inherently objectionable. It represents a legitimate step in the promotion of the program. Whatever the political objections to the program may be (this is terrain on which I will not trespass), enhancing the purchasing power of the program's beneficiaries cannot be said to be inappropriate, as I see it.

The question, however, remains whether by involving one retailer, in this case Sears, in the program by appearing at a Sears store for the announcement of Sears' participation in the program, the Minister improperly furthered Sears' private interest. This is the crux of the complaint.

For purposes of analysis I am prepared to assume that Sears' indirect participation in the one-time payment program did further its private interest. However, as I have noted, both sections 2 and 4 of the *Members' Integrity Act* require that the furtherance of another's private interest must be improper. That is to say not any action or omission which results

in the furtherance of another's private interest will constitute a breach of either section 2 or 4.

There is no doubt that the Minister and his office were in contact with Sears' officials before the media event at a Sears store on November 8, 2001 when it was announced Sears would exchange the government $100.00 one-time payment per child cheque for $110.00 worth of Sears gift certificates. In my opinion, the question that must be confronted and answered is whether by his involvement in the Sears announcement the Minister improperly furthered Sears' private interest.

The meaning to be given to the pejorative and limiting reference, "improperly" in s.s.2 to 4 of the *Members' Integrity Act* will of course depend on the context in which the word appears in the *Act*, having regard to the provisions of the *Act* as a whole. Unless in the particular circumstances there is some reason to do otherwise, the word "improperly" should be given its plain ordinary meaning. In the statutory context in which it appears, and consistent with the general notion of what is improper, it appears to me that the qualification "improperly" is intended to convey a sense that the decision made (section 2) or influence exercised (section 4) was objectionable, unsuitable or otherwise wrong (see Black's Law Dictionary definition of "improper").

As I have said Sears involvement was a part of the promotion of the program, and at the same time worked to enhance the value of the program to recipients of the one-time payment if they chose to spend their $100.00 per child cheque at Sears. If other retailers had been excluded from participation, it might well be that the Minister's arrangement with Sears might have resulted in the Minister improperly furthering Sears' private interest. But other retailers were not excluded. On the occasion of the Sears announcement, the Minister said, "the government challenges other retailers to join with us in this initiative to help these hard-working parents with young children."

Before the Sears announcement, the Minister spoke to a representative of Walmart to explain the program and advise Walmart of the pending announcement with Sears. The

Minister informed Walmart's representative that the program was open to other retailers, to provide a similar, or perhaps even a better, benefit to consumers. As it turned out, other retailers did participate in the program by extending the same offer to program beneficiaries as Sears did.

Sears gained no monopoly advantage in the sense that the Minister made it clear from the outset that any Ontario retailer was invited to match, or perhaps exceed, the economic level of Sears' participation in the program. Sears' advantage, to the extent that there may have been one, accrued as a result of being the first retailer that was invited to participate, and did participate, in the program. I do not think that this minimal advantage can be said to have constituted something that was improper.

In the existing circumstances I would not give effect to the submission that the Minister's conduct in respect of Sears' involvement in the program constituted a breach of sections 2 or 4 of the *Members' Integrity Act*. In light of my conclusion on this substantive issue, I need not address the issue whether my opinion of November 8 provides a limited, "no penalty", protection to the Minister. (See section 31(7) of the *Members' Integrity Act*.)

The complainant also alleges that Sears received an improper advantage by being able to promote its Internet business through a link with the web site of the Ministry of Finance. This aspect of the complaint requires some brief explanation. The news release, which provided information as to how Sears gift certificates could be used, advised eligible families that they could exchange their $100.00 cheques for $110.00 worth of Sears gift certificates which could be used at Sears stores, through Sears catalogue or on-line at www.Sears.ca. Finance Ministry news releases are apparently posted on that Ministry's web site. In result, when Ministry staff included Sears' web site address in the announcement, this automatically created an on-line link with Sears' web site. When Ministry staff became aware of the unintended link, it was quickly removed.

In my opinion, what happened constitutes a mistake, which was quickly corrected. On anything resembling a realistic view of the *Members' Integrity Act* and the principles

which underlie it, this short-lived mistake does not merit any further comment. This aspect of the complaint falls within the de minimus range.

Lastly, with respect to the insider information or s.3 issue I am unable to conclude on the material before me that the Minister breached s.3 of the *Members' Integrity Act* by contacting Sears shortly before the program was announced in the Legislative Assembly. The discussion with Sears before the formal announcement of the program in the Legislative Assembly does not on its own constitute a breach of s.3. Taken at its highest, as the complainant noted in his affidavit, announcements of programs like this are not "generally" circulated to a third party before particulars of the program are disclosed to the Legislative Assembly. There is no provision in the *Legislative Assembly Act* or the Standing Orders of the Legislative Assembly prohibiting Ministerial announcements outside the Legislative Assembly. However, it is generally accepted that significant announcements should first be made in the Legislative Assembly out of respect for the institution of the Assembly.

To engage s.3 the Minister's disclosure to Sears must have been done to improperly further or seek to further Sears' private interest. There is nothing in the material to support a conclusion that the Minister sought to further Sears' private interest by seeking to involve Sears in the promotion of the program before details of the program were announced in the Legislative Assembly. I see no merit in the complainant's s.3 submission which as I earlier noted was raised for the first time in his reply to the Minister's response.

Conclusion

For these reasons, it is my opinion that the material provided, which I have attempted to carefully review, does not support the complainant's contention that the Minister

contravened sections 2, 3 or 4 of the *Members' Integrity Act*. In my view, the material does not provide sufficient grounds for further enquiry.

DATED at Toronto, this 8th day of February, 2002.

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The Honourable Coulter A. Osborne