

The Ball Report

made under the
House of Assembly Act



June 27, 2018

Bruce Chaulk
Commissioner for Legislative Standards

EXECUTIVE SUMMARY

This report deals with a request by Premier Dwight Ball to review the circumstances around the participation of one of his companies in the Affordable Housing Program administered by Newfoundland and Labrador Housing Corporation.

It is the second request this Office has received related to this issue. On May 26, 2016 Commissioner Victor Powers issued an opinion which held that Premier Ball was not in a conflict of interest by virtue of s.32.(3)(b) of the *House of Assembly Act*.

As will be seen in this report, a new opinion should not be undertaken by the Commissioner unless there is new information available that was not before Commissioner Powers in rendering his opinion that is significant enough to change the initial opinion. In carrying out my review, there was additional evidence that was not provided to Commissioner Powers that does not change his conclusion but provides additional details regarding the matter that is worthy of additional commentary and discussion. This evidence included the project business plan and a detailed cost benefit analysis provided by Jade Holdings Ltd.

It was clearly apparent after reviewing the financial information that the subsidy provided to Jade Holdings Ltd. is a subsidy attributable to the tenants who would not otherwise be able to afford to reside in the new housing development but for the subsidy. The tenants are paying rent in accordance with the schedule established by Newfoundland and Labrador Housing Corporation and market rents in the same geographic area are 36% higher. Without the subsidy, the rent charged is not financially feasible.

With respect to clause 13.1 of the Contribution Agreement, it was determined that this issue was not brought to the attention of Jade Holdings Ltd. in the initial Request for Proposal or the subsequent conditional approval. It was not until significant monies had been spent and the project was complete that clause 13.1 was brought to the attention of the proponent. It is explicitly contemplated in the legislation that there will be situations in which a member can enter into an agreement with the province.

Commissioner Powers determined that Premier Ball was not in conflict by virtue of s.32(3)(b). The additional evidence provided to me supports the view that there was no violation of s.32 by the member. Furthermore, when clause 13.1 is viewed in light of 32(3)(b) it cannot be concluded that the actions of Premier Ball ran afoul of the spirit and intent of s.32 of the *House of Assembly Act*.

INTRODUCTION

On February 27, 2018, Dwight Ball, Premier (MHA, Humber – Gros Morne), by way of email to the Commissioner’s Office, requested the Commissioner investigate the matter of an alleged conflict of interest by a Corporation owned by the Premier.

In the email, the Premier indicated that questions had risen in the House of Assembly related to Jade Holding’s Ltd. involvement in the Affordable Housing program administered by Newfoundland and Labrador Housing Corporation (“NLHC”).

As was noted by the Premier, he had contacted the previous Commissioner, Mr. Victor Powers, in February 2016, requesting an opinion on that same issue.

On May 26, 2016, Commissioner Powers issued an opinion in which he concluded that Premier Ball was not in a conflict of interest by virtue of s.32(3)(b) of the *House of Assembly Act*. This opinion was privileged by operation of s.40 (3) of the *House of Assembly Act*.

BACKGROUND

NLHC issued a Request for Proposals (“RFP”) for Private Sector Affordable Housing with an application deadline of September 22, 2014. The purpose of the affordable housing program is to assist in the creation of modest affordable rental housing which will benefit as many low income households as possible.

Jade Holdings Ltd. responded to the RFP which was received by NLHC on September 22, 2014. In the proposal it indicated that Dwight Ball was the proponent.

Dwight Ball had been elected to the House of Assembly on October 11, 2011 and was a member of the opposition at the time Jade Holdings Ltd. responded to the RFP.

Conditional approval was given by Progressive Conservative Minister Clyde Jackman on February 23, 2015.

On November 30, 2015 Dwight Ball was re-elected to the House of Assembly and became Premier.

The contribution agreement was signed on July 22, 2016.

Premier Ball’s holdings are held in a blind trust approved by the Commissioner.

INITIAL OPINION

In the May 26, 2016 opinion issued by Commissioner Powers, he addressed two specific issues, the first was the interpretation of s.32 (1) of the *House of Assembly Act* and the second was Clause 13.1 of the Provincial Contribution Agreement. With respect to the conflict of interest provisions, it was Commissioner Power’s opinion that Premier Ball was not in violation of s.32(1) of the *House of Assembly Act* by virtue of the exception provided by s.32(3)(b). The relevant portions of his analysis are as follows:

The starting point for this analysis is s.32 of the House of Assembly Act, R.S.N.L 1990 c. H-10. This section reads as follows:

32. (1) A member shall not knowingly, directly or indirectly, be a party to a contract with the government of the province under which the public money of the province is paid and under which the member receives a benefit.
- (2) Subsection (1) does not apply to a member solely on the ground that a party to a contract with the government of the province is a corporation or partnership in which the member or the member's family has a shareholding or interest, if
- (a) the shareholding or interest is 10% or less;
 - (b) the commissioner is of the opinion that the shareholding or interest is insufficient to interfere with the member's public duties; or
 - (c) the shareholding or interest has been placed in a trust that the commissioner is satisfied will prevent the member exercising authority or control over the affairs of the corporation or partnership and will ensure the member will not receive a payment derived directly from the contract.
- (3) This section does not apply to
- (a) a contract that existed before the member became a member, or an extension of such a contract according to its terms;
 - (b) a contract awarded by public tender under which no special preference or treatment was given because of the member or the member's family having an interest in it;
 - (c) a contract that, either alone or in combination with all contracts with the government of the province in the same calendar year, in which the member or the member's family has an interest, has a value of less than \$10,000;
 - (d) a contract for goods or services made in an emergency;
 - (e) a contract for goods or services provided in a case where no other person is qualified and available to provide the goods or services;
 - (f) the completion of a contract that devolves by descent, limitation or marriage, or as devisee, legatee, executor or administrator, where less than 12 months have elapsed after the devolution;
 - (g) a benefit received or transaction entered into
 - (i) by a member or the member's family under an Act,
 - (ii) under which the member or the member's family is entitled, upon fulfilling the conditions specified in or under the Act, to receive the benefit or enter into the transaction on terms in common with the general public or a defined class of the public to which the member belongs, and

- (iii) where the benefit or transaction is not subject to the exercise of discretion by a person;
- (h) a contract under which one of the member's family becomes an employee of or an independent contractor for personal services to the government of the province where the contract is awarded in the manner provided by law; or
- (i) the reimbursement of expenses incurred by the member or the member's family while on the business of the government of the province.

Commissioner Powers continued in his report to conclude as follows:

Based upon my review of the matter I am of the opinion that s.32 (3) (b) applies to the contract at issue. This section reads as follows:

32(3)(b): This section does not apply to a contract awarded by public tender under which no special preference or treatment was given because of the member or the member's family having an interest in it;

The contract at issue arose out of proposal call by NLHC. The Public Tender Act explicitly authorizes the head of a government funded body to carry out a request for proposals, as prescribe by the regulations. There is explicit statutory authority in s. 3(2)(j) to carry out such a process. According to s.12(1)(c) the Lieutenant Governor in Council may make regulations for the purpose of paragraph 3(2)(j).

The Public Tender Regulations NLR 103/98 addresses requests for proposals. Section 9 of the regulations reads as follows:

9. (1) *Where the carrying out of a request for proposals has been authorized under paragraph 3(2)(j) of the Act, it shall be carried out as provided for in this section.*
- (2) *Section 8 of the Act and sections 3 and 8 of these regulations shall, with the necessary changes, apply to a request for proposals.*
- (3) *Each request for proposals shall clearly state the work or acquisition requirement, or the problem to be addressed by the proponent.*
- (4) *Each request for proposals shall express the criteria, in addition to price, to be used in evaluating proposals and the methods to be used in weighing and evaluation of that criteria and no criterion shall be used that is not expressed in the request for proposals.*
- (5) *Where a request for proposals is carried out, a government funded body may, in the course of an evaluation, request and consider additional information from a proponent.*
- (6) *A government funded body may negotiate a detailed contract with the proponent whose proposal ranks highest following the evaluation process, but the resultant contract shall contain substantially the terms of the proposal and, where contract terms cannot be agreed upon, the government funded body may reject that proposal and negotiate with successive proponents in order of evaluation ranking.*

pursuant to regulation 9(2), Section 8 of the Act and sections 3 and 8 of the regulations shall, with necessary

changes, apply to a request for proposals.

Regulation 3(2) reads as follows:

3(2) A call for tender shall include the following:

- (a) a brief description of the public work to be executed, the goods or services to be acquired or the space to be leased and the location of the execution, acquisition or space;*
- (b) the place where a person may obtain information and documents necessary to tender;*
- (c) the conditions for obtaining the documents to tender;*
- (d) the place where the tenders are to be sent;*
- (e) the date and time limit for submitting tenders; and*
- (f) the time and place of the opening of the tenders.*

In interpreting s.32 of the House of Assembly Act it is necessary to reconcile the language used in the enactment with the broader objects of the legislation to determine what the section was meant to achieve or what mischief the enactment was meant to prevent. It is clear that the purpose of s.32 (1) is to prevent a member from contracting with government and obtaining a benefit as a result of holding public office. This prohibition however is subject to certain exceptions enumerated in s.32(3) that authorize government to contract to obtain the best value it can for goods and services. For example, these contracts can be for goods and services in an emergency, for goods and services which no other person is qualified and available to provide, or as in the present case, a contract awarded pursuant to the Public Tender Act when no special preference is given to the member. The common theme running through many of these exceptions is that a contract between a member and government will be acceptable if the government is obtaining the best value for the goods and services it obtains and no special treatment or preference is being given to the member.

With the foregoing comments in mind, when one reviews the legislation it is clear that a contract awarded by a government funded body following a request for proposals is a contract awarded pursuant to the Public Tendering Act, and the necessary legislative checks and balances to ensure proper government procurement have been established to ensure that government obtains the best possible value for its project. In the present scenario Jade Holdings Ltd. submitted a proposal to NLHC which was then evaluated according to detailed and specific criteria set out in the proposal call. The proposal submitted by Jade Holdings Ltd. was the only proposal submitted at the time to NLHC for the construction of affordable housing in the Deer Lake area and there is no evidence that the member or the member's family received any special preference in the process. It is also noteworthy that at the time the proposal was accepted Premier Ball was a member of the opposition and not a member of the sitting government. Furthermore, once the proposal was accepted the funding Jade Holdings Ltd. was to receive was controlled by NLHC and if Jade Holdings Ltd. wanted to secure its funding it had to abide by the conditions set out in the Provincial Contribution Agreement.

In light of the foregoing, it is my opinion that s.32 (3)(b) of the House of Assembly Act applies and Premier Ball was not in violation of s.32(1) of the House of Assembly Act.

With respect to Clause 13.1 of the Provincial Contribution Agreement Commissioner Powers wrote:

This restriction does not appear to have been included in the Request for Proposals but does appear in the Provincial Contribution Agreement. My advice and opinion in this matter is limited to determining whether the member has violated the House of Assembly Act or the Code of Conduct. Whether or not this clause impacts upon the validity of the contract is a matter for the parties to the contract to determine. My role as Commissioner is to review the matter and determine if the member is in violation of his statutory obligations. The enforceability of a contract between those parties is a matter to be determined by those parties.

DETERMINATION OF WHETHER A RE-INVESTIGATION WAS WARRANTED

The current request of Premier Ball for a further opinion related to Jade Holdings Ltd.'s involvement in the Affordable Housing program administered by NLHC raises procedural concerns. As noted above, my predecessor, Commissioner Powers, provided an opinion on this issue on May 26, 2016 in which this issue was addressed and an opinion was provided. Therefore, it was necessary for me to consider whether it was appropriate for me to provide a second opinion on the same subject matter.

Guidance with respect to the appropriateness of conducting a second review/investigation and providing a subsequent opinion is found in the "Report on the Independent Review Conducted by The Honourable Frank Iacobucci". This report arose out of a request by the Government of Alberta that former Supreme Court of Canada Justice Iacobucci review and provide advice in connection with information that may have been unavailable to Alberta's former Ethics Commissioner when he conducted a review of the conduct of former Alberta Premier Alison Redford. At paragraph 7 of his report Justice Iacobucci states the following:

It is important to state at the outset that my review was not – in substance or process- a further investigation into the allegations of conflict of interest considered by the Ethics Commissioner. Nor should my review be taken as a criticism in any way of the Ethics Commissioner's investigation or report.

In his report, Justice Iacobucci identified information that was not available to the Ethics Commissioner who conducted the initial investigation and recommended that the best course of action was to refer the matter back to the current Ethics Commissioner to determine whether re-investigation is warranted. It is noteworthy, that in the Alberta context the legislation specifically included a statutory provision which sets out when a re-investigation may occur. Section 25(9) states as follows:

25(9) The Ethics Commissioner may re-investigate an alleged breach or contravention in respect of which the Ethics Commissioner's findings have already been reported under this section only if, in the Ethics Commissioner's opinion, there are new facts that on their face might change the original findings.

There is no statutory provision in Newfoundland & Labrador explicitly authorizing the Commissioner to conduct a second review or investigation of a matter that has already been decided by the Commissioner. In my opinion, given the issues of estoppel and res judicata, it is necessary that new information that was not before the Commissioner in rendering his opinion is required before that opinion can be re-examined. This approach is in keeping with the manner courts address matters that have been previously decided and is in keeping with the approach adopted by Justice Iacobucci. Therefore, a re-investigation cannot be undertaken unless there is sufficient additional evidence that was not available when the first opinion by Commissioner Powers was completed on May 24, 2016.

To ensure that I had all of the available information, I contacted the relevant parties and asked that they provide me with all information they had in their possession related to this particular matter. After I had reviewed the documentation, I

conducted in person interviews with officials from NLHC and the Trustee for Dwight Ball.

Based on the information available to Commissioner Powers, and the information made available to me, I did not find sufficient new information that might have resulted in a change in the ultimate conclusion of Commissioner Powers that the member was not in a conflict of interest. However, new evidence was provided which included a project business plan and a detailed cost benefit analysis which requires further comment and discussion.

With respect to the benefit analysis completed by Commissioner Powers, there was a significant amount of financial information that had not been made available to him. In his analysis Commissioner Powers indicated that the benefit was attributable to Jade Holdings Ltd. However, based on the financial information that was provided, it is clear that the payment is attributable to the tenants as a rent subsidy. In accordance with the Mortgage documents between Jade Holdings Ltd. and NLHC, NLHC have prescribed the maximum monthly rental rates for this particular geographic location to be \$650 per month for a two bedroom unit. The market value rents for comparable properties in the same geographic area are \$885 per month. This represents market value rents that are 36% higher than the rates set by NLHC. Given this fact, it is obvious that the benefit is directly attributable to the tenant who would otherwise be unable to reside in the new housing units without this assistance. Without the subsidy, Jade Holdings Ltd. would not be able to provide subsidized rent to these tenants and the project would not have been financially feasible.

With respect to clause 13.1 and the attention that it has received in Commissioner Powers' opinion, I believe that this particular issue warrants further discussion.

Clause 13.1 states:

13.1 No member of:

- (a) The house of Commons or Senate of Canada; or
- (b) The House of Assembly of Newfoundland and Labrador; or
- (c) The Municipal Council or governing body of any Municipal Agency, Board or Commission, shall be admitted to any share of any contract, agreement or commission made pursuant to this Agreement or to any benefit arising therefrom, including, without limitation, any Contract, Agreement or Commission arising from or related to the Development.

As noted by Commissioner Powers, this clause did not appear to be included in the RFP issued by the NLHC in 2014.

In order to determine when this particular clause was brought to the attention of the proponent, I reviewed all of the available documentation that had been provided by NLHC. There was no reference of this particular condition in the original RFP, nor was it identified in the February 23, 2015 conditional approval letter. (It should be noted that the conditional approval letter listed all of the conditions that had to be met before the funding could be provided.) It was not until all of the conditions were met and the Provincial Contribution Agreement was presented to Jade Holdings Ltd. that this condition was put forward by NLHC. To introduce this condition at the end of the process, after construction had been completed and significant funds had already been expended, is inequitable and likely unenforceable in law. Practically speaking, given the significant costs that a proponent incurs in any construction development it would be prudent for NLHC to bring clauses such as 13.1 to the attention of any proponents in the initial RFP, rather than provide it at the end of the process.

Notwithstanding that this contractual condition was introduced at the very end of the process, with no advance

knowledge, the condition itself is not inconsistent with the wording of the legislation. Section 32(1) of the *House of Assembly Act* states:

32. (1) A member shall not knowingly, directly or indirectly, be a party to a contract with the government of the province under which the public money of the province is paid and under which the member receives a benefit.

However, in determining if a member is in a conflict of interest, s.32(1) and the contractual condition must be read in conjunction with the statutory exception in s.32(3)(b) which states:

32(3)(b): This section does not apply to a contract awarded by public tender under which no special preference or treatment was given because of the member or the member's family having an interest in it;

It is explicitly contemplated in the legislation that there will be situations in which a member can enter into an agreement with the province. Commissioner Powers determined that Premier Ball was not in conflict by virtue of s.32(3)(b). When viewed in isolation clause 13.1 establishes a prohibition against a member benefitting from a contract. However, in examining whether or not the member is in a conflict of interest the contractual provision must be examined in context and in light of the statutory provisions which govern the conduct of members. When s.13.1 is viewed in light of s.32(3)(b) it cannot be concluded that the actions of the member ran afoul of the spirit and intent of s.32 of the *House of Assembly Act* as this process was at all times transparent and subject to the provisions of the *Public Tender Act*. Additionally, there is no evidence that the member received special treatment or preference from the previous government when the proposal was accepted.