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OFFICE OF THE INTEGRITY COMMISSIONER

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REPORT

OF

**THE HONOURABLE COULTER A. OSBORNE
INTEGRITY COMMISSIONER**

RE: MR. DAVE LEVAC, MEMBER FOR BRANT

**TORONTO, ONTARIO
JULY 23, 2003**

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INTEGRITY COMMISSIONER**

RE: MR. DAVID LEVAC, MEMBER FOR BRANT

[1] On May 7, 2003 Marilyn Mushinski, the Member for Scarborough Centre, filed a written complaint supported by an affidavit from Michael Conry, Executive Assistant to the Deputy Minister of Public Safety and Security. In her complaint, she alleged that David Levac, the Member for Brant, breached the provisions of the *Members' Integrity Act, 1994* by visiting the Toronto Jail (more commonly referred to as the Don Jail) with two persons who were passed off as Mr. Levac's staff. In fact one of those persons was a reporter for a Toronto newspaper. The other was a member of Mr. Levac's staff.

[2] On May 27, 2003 I received Mr. Levac's response to the complaint. It consisted of affidavits from Mr. Levac, Jane Almeida his Legislative Assistant, and Jason Hagan, his Legislative Intern. Mr. Levac's response also included written submissions from his counsel and a letter from the reporter's counsel which stated, "[A]t no time before, during or after the visit did Ms. Diebel [the reporter] hold herself out to be an employee or staff member of Mr. Levac".

[3] I received Ms. Mushinski's reply submissions on June 11, 2003.

[4] On June 13, 2003 Ms. Morrison and I interviewed Michael Conry whose affidavit was filed in support of the complaint. Mr. Conry is the Executive Assistant to the Deputy Minister of Public Safety and Security. On June 18, 2003 we interviewed Mr. Levac. On July 16, 2003, Ms. Morrison met with Mr. Levac and his counsel to review the facts

relevant to the complaint and Mr. Levac's response. Those interviews and the written material filed provide a full factual background against which I can consider the complaint. It appears to me that the essential facts relevant to the complaint are not in dispute.

The Facts

[5] Mr. Levac is the Opposition Critic for the Ministry of Public Safety and Security. As such he is understandably concerned about Ontario's jails. As part of his responsibilities from time to time he inspects custodial institutions throughout the Province.

[6] On May 6, 2002 relatively early in the working part of the day, a Toronto Star reporter, asked a media contact in the Ministry of Public Safety and Security if someone from the Toronto Star could tour the Toronto Jail. Mr. Conry's affidavit and my interview with him confirmed that the visitation sought was denied because of precautions then in place in Toronto custodial institutions due to the SARS crisis. I am satisfied that neither Mr. Levac nor his staff had any knowledge of this visitation request, or its denial.

[7] Later on the same day another Queen's Park reporter for the Toronto Star asked Mr. Levac if there was any way he or another Toronto Star reporter could get in to the Toronto Jail. According to Mr. Levac's affidavit he told the reporter, "I can only try". Mr. Levac told this reporter of his intention to visit the Toronto Jail on May 6, 2003. In any case, within a very brief time Mr. Levac agreed that a Toronto Star reporter could accompany him on his then imminent inspection of the Toronto Jail. He asked Jane Almeida, his legislative assistant, to call the jail 'to give them the usual heads up'. Mr. Levac was told that Linda Diebel, a Toronto Star reporter whom he had not met, would meet him and accompany him on his Toronto Jail inspection.

As it turned out Ms. Diebel, who had apparently just returned from Washington, met Mr. Levac in his office after question period on May 6, 2003. Before they left Queen's Park for the Toronto Jail in Mr. Levac's car Mr. Levac told Ms. Diebel that, "she may or may

not be able to enter the jail but we [Mr. Levac and Mr. Hagan] were going to attend in any event . . .” and that she should not take video or recording equipment with her.

[8] Before Mr. Levac, Jason Hagan and Ms. Diebel drove to the Toronto Jail, Ms. Almeida, further to Mr. Levac’s request to “give them a heads up” instruction, telephoned the Toronto Jail to advise that Mr. Levac “would be arriving at 4:00 p.m. that afternoon, to enter and inspect the facility, accompanied by two assistants.” Mr. Levac stated that the term of reference he used was that two ‘people’ would accompany him on his inspection. According to Ms. Almeida, the person to whom she spoke asked her to tell Mr. Levac that he would have to go through a SARS check at the jail.

Since Mr. Levac has a statutory right under section 59 of the *Ministry of Correctional Services Act* to enter and inspect any correctional institution in Ontario, the permission was granted. Although the statutory right of inspection applies only to members of the Legislative Assembly, jail administrative officials grant access to a member’s staff as a matter of courtesy. Mr. Levac was aware of this policy.

[9] Mr. Levac stated that his interest in the Toronto Jail had increased around the time he sought access to the jail as a result of a then recent Ontario Court decision in which the trial judge gave a convicted man a 3 for 1 sentencing credit for time spent in pre-trial custody in the Toronto Jail. The conventional credit for pretrial custody time is 2 for 1. As a result of this judgment, and because of media comments about conditions at the Toronto Jail, Mr. Levac decided to exercise his statutory rights and inspect the Toronto Jail.

[10] Effective March 29, 2003 the Ministry of Public Safety and Security had implemented special measures, “to assist in the containment of Severe Acute Respiratory Syndrome (SARS) in the Greater Toronto Area...”. Special measures were implemented to protect staff, the public and inmates from SARS. The restrictions were consistent with those imposed on Greater Toronto Area facilities under the jurisdiction of the Ministry of Health and Long-Term Care. The SARS special measures were set out in a Ministry

Directive which was sent to Greater Toronto Area custodial institutions and elsewhere. The Ministry did not provide members of the Legislative Assembly with the Directive. Mr. Levac said that he first became aware there was a SARS protocol in place after he entered the jail.

[11] I see no need to review the SARS restrictions in any great detail. It will suffice to say:

- Public visitation was temporarily suspended
- Lawyers requesting visits with inmates in custody were referred to the institutions General Duty Manager. If admitted, lawyers' access to their inmate clients was restricted.
- Volunteer programs and visits by volunteers were temporarily suspended.
- Specific SARS screening was introduced at all GTA custodial institutions.
- Before a transfer to another institution, inmates were screened by a health professional and if the particular circumstances warranted it, inmates could be removed from the transfer list and quarantined or hospitalized as appropriate.

[12] Mr. Levac stated that he was not aware of the SARS directive on May 6, 2003.

[13] It was in these general circumstances that Mr. Levac, Ms. Diebel and Mr. Hagan visited the Toronto Jail on May 6, 2003. Mr. Levac stated that he arranged to visit the Toronto Jail, "...to observe and learn, to get a snapshot of what is going on". Manifestly, Linda Diebel was there for business purposes. She intended to, and did, write an article on the conditions at the Toronto Jail. This article appeared in the May 7, 2003 edition of the Toronto Star. It emphasized what Ms. Diebel referred to as the deplorable conditions at the jail. No one has suggested that her description of the Toronto Jail was inaccurate.

[14] Upon their arrival SARS precautions then in place were obvious. Mr. Levac, Ms. Diebel and Mr. Hagan completed the SARS questionnaire and had their temperatures checked. Mr. Levac referred to Ms. Diebel and Mr. Hagan as Linda and Jason. He did not

disclose that Ms. Diebel was a reporter, nor did Ms. Diebel identify herself as a reporter. After completing the SARS screening process, Mr. Levac, Mr. Hagan and Ms. Diebel signed the volunteer and professional visitors sign-in sheet. Mr. Levac signed as, “M.P.P. Brant”. Mr. Hagan as, “M.P.P. Dave Levac” and Ms. Diebel as, “M.P.P. Brant party”. All three used their driver’s licences for identification purposes.

[15] In the circumstances, Toronto Jail officials understandably thought that Ms. Diebel and Mr. Hagan were members of Mr. Levac’s staff. Because of that assumption, the staff on duty at the time asked no probing questions with respect to Ms. Diebel’s or Mr. Hagan’s credentials.

[16] In the course of their Toronto Jail inspection, Ms. Diebel was invited to speak to some inmates. As it turned out, she spoke with two inmates who were in isolation cells. It is worth noting that had Ms. Diebel been properly identified for what she was – a reporter, apart from being denied access in the first place, before she would have been permitted to speak with any inmate, the inmate would have been asked to sign a Media Consent Form and jail officials would have contacted the inmates’ counsel so that he/she could be present if desired. In fairness, I should note that Ms. Diebel did not use inmates’ names in her article. Nor did she disclose any private or confidential information.

[17] From the institution’s standpoint any media tour or visitation of a correctional facility must be prearranged. Thus, had Toronto Jail administrative officials known that Ms. Diebel was a reporter she would not have been granted access to the Jail, first because her visit had not been prearranged and second because of the SARS restrictions that were then in place.

Analysis

[18] As a member of the Legislative Assembly Mr. Levac had a statutory right of entry and inspection for any purpose related to his duties and responsibilities as a member of the Legislative Assembly. I am satisfied that Mr. Levac’s purpose in touring the Toronto

Jail on May 6, 2003 was entirely consistent with his duties as an Opposition member who is his Party's Public Safety and Security critic.

[19] Mr. Levac knew that there were restrictions on media access to Ontario custodial institutions. He did not know what the specific terms of the restrictions were. Before he left his office for his Toronto Jail inspection, he knew that the Toronto Star wanted to get a reporter into that jail. He did not know that the newspaper's earlier attempts to get a reporter into the jail had been rejected. At that point two quite different interests converged. Apart from his interest in seeing the Toronto Jail for himself, Mr. Levac wanted, as his counsel put it, "...to bring to public light instances of inappropriate management of correctional institutions by the government of this Province". Thus he agreed to permit Ms. Diebel to accompany him on his May 6, 2003 Toronto Jail inspection. The Toronto Star wanted to do an article on conditions at the Toronto Jail which had recently elicited negative comments from trial judges dealing with persons who had spent pretrial custody time in that facility.

[20] As I have said, Mr. Levac's primary purpose in visiting the Toronto Jail was directly related to his position as opposition critic. In that capacity, he thought that the Toronto Star was "...a means to increase public awareness of a situation which I consider to be both shameful and the responsibility of the present government." However, I have to conclude that Mr. Levac knew that if Ms. Diebel were identified as a reporter, she would not have been granted permission to enter the Toronto Jail on May 6, 2003. For that reason, he did not (nor did Ms. Diebel or Mr. Hagan) disclose to jail administrative officials that Ms. Diebel was a reporter.

[21] Jail officials were told in advance that Mr. Levac and "2 assistants" would be at the jail at about 4:00pm on May 6, 2003. One of those persons passed off as an assistant was Ms. Diebel. That the jail officials were misled is an inescapable conclusion. Mr. Levac stated that he referred to two "people", not two "Assistants". I do not think anything turns on this. Manifestly, jail officials were led to believe that Ms. Diebel and Mr. Hagan were from Mr. Levac's office.

[22] Put plainly, Ms. Diebel gained access to the jail because she was with Mr. Levac and not identified as a reporter. In the Toronto Star May 7, 2003 article on the Toronto Jail this is made clear. Under the subheading, “How the Star got inside” there is an explanation of how Ms. Diebel came to be able to write her article:

[B]ecause she was Levac’s companion, Diebel was not identified as a Star reporter and has not used the names of inmates or prison officials.

(Emphasis added.)

[23] The situation is made worse, in my view, because of its public health dimensions. Although a member’s statutory right of entry and inspection trumped the SARS visitation restrictions, the media’s right of access to correctional institutions did not. Accordingly, as I have said, if Ms. Diebel had followed the media visitation protocol by pre-arranging her inspection of the jail, her request would have been denied because of the SARS visitation restrictions, a fact confirmed by the rejection of the Star’s visitation request earlier on May 6th.

[24] In her complaint, in addition to referring to the principles which underlie the *Members’ Integrity Act, 1994* Ms. Mushinski relies on sections 2, 3 and 4 of the Act.

They 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.
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.

(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.

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.

[25] I do not think that any of sections 2, 3 and 4 apply. Sections 2 and 4 focus on making (section 2) or influencing (section 4) a decision. Although "decision" is not defined in the Act it seems to me that it must relate to a decision that is made in the Legislative Assembly, in Cabinet or perhaps at a Committee level. Thus, although the Toronto Star's private interests may have been preferred to the interests of its competition, in my view, s.2 is not engaged because the preference in question did not arise out of a "decision" as referred to in sections 2 and 4. Section 3 is different in that it involves the improper use of information not available to the general public. The facts here do not trigger the application of section 3, in my opinion.

[26] In addition to specific offence sections in the *Members' Integrity Act, 1994* (see sections 2, 3, 4, 6, 7, 8, 10, 11, 12, 14, 15, 16, 17 and 18), the Act includes parliamentary convention as a standard against which a member's conduct is to be assessed. This is made clear by section 34(1) which provides:

34. (1) Where the Commissioner conducts an inquiry under subsection 31(1) or (2) and finds that the member has contravened any of sections 2 to 4, 6 to 8, 10 to 12 or 14 to 18, has failed to file a private disclosure statement or a statement of material change within the time provided by section 20, has failed to disclose relevant information in that statement or has contravened Ontario parliamentary convention, the Commissioner shall recommend in his or her report,
 - (a) that no penalty be imposed;
 - (b) that the member be reprimanded;
 - (c) that the member's right to sit and vote in the Assembly be suspended for a specified period or until a condition imposed by the Commissioner is fulfilled; or
 - (d) that the member's seat be declared vacant.(Emphasis added.)

[27] Section 5 of the *Members' Integrity Act, 1994* explicitly permits members to engage in activities in which members normally engage on behalf of constituents in

accordance with Ontario parliamentary convention. When used in this context parliamentary convention may provide a defense for members accused of some breach of the *Members' Integrity Act, 1994*, or otherwise.

[28] Parliamentary convention is not defined in the *Members' Integrity Act, 1994*. However, it seems to me that because a breach of parliamentary convention constitutes an offence under the *Members' Integrity Act, 1994*, parliamentary convention was intended to have some operative meaning. Otherwise the Legislature's reference to parliamentary convention would be redundant.

[29] In other Reports I have suggested that parliamentary convention refers to conduct which is generally accepted as a rule or practice in the context of norms accepted by parliamentarians. It seems to me that in drafting the *Members' Integrity Act, 1994*, the Legislature provided specific conduct based rules, as for example set out in sections 2, 3 and 4 of the Act. One benefit of this approach is certainty. However, the Legislature by its reference to the principles in the Act's preamble and by making a breach of parliamentary convention an offence under the Act moved away from a conduct based code towards a less certain code based on parliamentary convention. In the end, members have to assess their obligations under the Act by taking account of the specific rules set out in the Act and the less certain principles embraced by the undefined term, parliamentary convention.

[30] In my view what falls within the definition of parliamentary convention is informed by the preamble to the *Members' Integrity Act, 1994* and section 5 of the Act. The preamble provides in part:

It is desirable to provide greater certainty in the reconciliation of the private interests and public duties of members of the Legislative Assembly, recognizing the following principles:

...

3. Members are expected to perform their duties of office and arrange their private affairs in a manner that promotes public confidence in the integrity of each member, maintains the Assembly's dignity and justifies the respect in which society holds the Assembly and its members.

4. Members are expected to act with integrity and impartiality that will bear the closest scrutiny.

[31] As I noted earlier section 5 legitimizes members' activities if those activities are normally done on behalf of constituents in accordance with Ontario parliamentary convention. The events surrounding the Toronto Jail visit did not concern Mr. Levac's constituents directly. Thus, section 5 has no direct application. It does, however, highlight the significance of conduct in which members typically, or as section 5 puts it, "normally engage". This broad range of acceptable (or unacceptable) conduct is what parliamentary convention is all about.

[32] As I have said, there is no doubt that Mr. Levac had a statutory right to enter and inspect the Toronto Jail on May 6, 2003. His right of entry and inspection is provided by statute. There is equally no doubt that Ms. Diebel, as a reporter, did not have a right to enter and inspect the jail on May 6, 2003. Her visit had not been pre-arranged and the SARS restrictions included the suspension of visitations by the public (including the media). Without Mr. Levac's assistance, Ms. Diebel would not have been given access to the Toronto Jail. Jail officials were led to believe that Ms. Diebel was a member of Mr. Levac's staff. It was only on the basis of that erroneous assumption that Ms. Diebel was permitted to enter to inspect the jail. Mr. Levac was part of a plan to pass Ms. Diebel off as a member of his staff. I am compelled to conclude that Mr. Levac knew that the jail officials permitted Ms. Diebel to inspect the jail based on an error in fact – they thought Ms. Diebel was part of Mr. Levac's staff.

[33] When he entered the jail Mr. Levac quickly became aware of the SARS concerns at the institution. He advised me that the SARS restrictions did not raise a concern with him on May 6th. However, it seems to me that he should have realized that SARS visitation restrictions were in place and at a minimum, inquired as to what they were.

[34] In participating in this venture as he did, in my opinion, Mr. Levac did not meet the standards imposed by parliamentary convention. The ends, - exposing the conditions

at the Toronto Jail to the public through the media did not justify the means – participating in a plan designed to assist in providing a member of the media access to a correctional facility.

Conclusion

[35] Mr. Levac cooperated fully in the investigation aspects of his complaint. He made no attempt to blur or manipulate the facts. Since I view this as an error in judgment, and nothing more, I would recommend that no penalty be imposed.

DATED at Toronto this 23rd day of July, 2003.

The Honourable Coulter A. Osborne