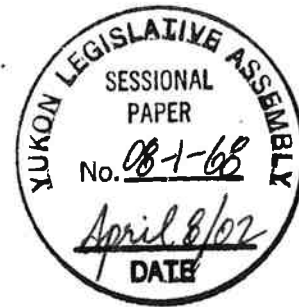




YUKON LEGISLATIVE ASSEMBLY
Conflict of Interest Commission
DAVID PHILLIP JONES, Q.C.



8 April 2008

Our File No. 3977

BY FAX TO (867) 393-6252

The Hon. Dennis Fentie, Premier
Yukon Legislative Assembly
Box 2703
Whitehorse, Yukon
Y1A 2C6

Dear Premier Fentie:

Re: Request for advice concerning alleged conflicts of interest by two Cabinet Ministers during the *Liquor Act* review

I am writing in response to your letter dated 1 April 2008 requesting my advice about the following:

I am writing to seek your ruling regarding an allegation of conflict of interest against Minister Jim Kenyon, made by Mr. Inverarity and Mr. Mitchell of the Official Opposition in the Yukon Legislative Assembly on March 31, 2008.

The allegation is that two Cabinet Ministers who had interest in hotels were part of the Liquor Act review. I am including copies of the relevant sections of Hansard of March 27th and March 31st, 2008, for your information. In addition, I am enclosing a copy of a media transcript that pertains to this issue for your review.

Would you please review this information and provide me with a formal ruling regarding this allegation. I would be pleased to provide you with any additional information you may require regarding this matter.

Statutory authority to provide advice

Your request for advice falls within section 17(b) of the *Conflict of Interest (Members and Ministers) Act*:

... 2

17. There shall be a Conflict of Interest Commission to be appointed by and be accountable to the Legislative Assembly, and the commission shall ...
 - (b) advise the Government Leader, at that official's request, about whether or not a Minister or former Minister is or would be in a conflict of interest....

The nature of the allegation

Although your letter initially refers to an allegation of conflict of interest against Minister Jim Kenyon, on reflection it is apparent that Mr. Kenyon's remarks do not give rise to any allegation that *he* might be the one in a conflict of interest.

Rather, the alleged conflict of interest is that two other Ministers (Mr. Lang and Mr. Jenkins) who owned hotels with liquor licences, *while they were Ministers*, were involved in discussions with Mr. Kenyon while Mr. Kenyon was the Minister responsible for the *Liquor Act*, about possible amendments to that legislation.

The concept of a "conflict of interest" under the Conflict of Interest (Members and Ministers) Act

If the alleged discussion took place while Mr. Lang and Mr. Jenkins were Ministers, it would give rise to the possibility of a conflict of interest under section 2 of the *Conflict of Interest (Members and Ministers) Act*, which provides as follows:

- 2(1) A Member or a Minister is in conflict of interest if the Member or Minister
 - (a) makes a decision in the execution of office;
 - (b) participates in the making of a decision in the Legislative Assembly or in Cabinet;
 - (c) makes representations to another Member or Minister about what decision that Member or Minister should make;
 - (d) discharges any other official function in the exercise of office

and at the same time knows or ought to know that in the decision or function there is the opportunity, or the reasonable appearance of an opportunity, for the member or Minister to further their own private interest.

[Emphasis added.]

Similar prohibitions are contained in sections 1, 3 and 5 of the *Executive Council of Yukon Code of Ethics*, Schedule B to Order-in-Council 1981/85.

However, these provisions would not apply if the alleged discussions took place before Mr. Lang and Mr. Jenkins (and Mr. Kenyon) became Ministers on 30 November 2002 as a result of the election on 4 November 2002¹—in that case, there would be no conflict of interest.

The source of the allegation

The allegation that there is a conflict of interest arises out of a statement made in the Legislative Assembly on Thursday, 27 March 2008, by the Hon. Jim Kenyon, the Minister responsible for Bill No. 46.

Mr. Kenyon was responding to a question from Mr. Inverarity which contained the following preface:

Mr. Inverarity: Mr. Speaker, in October of 2002, the Yukon Party declared as part of its election campaign that it did not support the introduction of new types of licences to the liquor market. In a letter to the B.C. & Yukon Hotels Association, the Leader of the Yukon Party rejected the idea of neighbourhood pubs because it would be unfair to existing liquor licensees who had to build hotels and motel rooms as a condition of their licence. At the time, two government ministers owned hotels.

[Emphasis added.]

There is no doubt that this question refers to the period prior to the October 2002 election, and that the underlined words are meant to refer to Archie Lang and Peter Jenkins.

The underlined words in Mr. Inverarity's question are inaccurate in referring to Mr. Lang and Mr. Jenkins as "government ministers" prior to the November 2002

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1. Mr. Jenkins was a Member prior to the election on 4 November 2002. Any discussion he might have had with Mr. Kenyon prior to that election would not constitute a conflict of interest because Mr. Kenyon was not either a Member or a Minister and had no authority at that time to make any decision about the *Liquor Act*. Mr. Jenkins was a Minister from 30 November 2002 until December 2005, when he resigned as a Minister and as a member of the Yukon Party caucus. He stayed a Member until the next election, which took place on 20 October 2006, when he did not stand for re-election.

election. Prior to the November 2002, the Liberal Party was the Government, and the Yukon Party was in Opposition. Although Mr. Jenkins had been a Member of the Legislative Assembly prior to the election, he was an opposition member. Neither Mr. Lang nor Mr. Kenyon was a Member. None of the three was a Minister. So the two hotel owners in question, Archie Lang and Peter Jenkins, were not "government ministers" at that time.

In his response to Mr. Inverarity's question, Mr. Kenyon referred to "two ministers who owned hotels":

Hon. Mr. Kenyon: For the record, there were two ministers who owned hotels. I spoke at length with both of them and both had no objections to continuing to review the act and look at the good work of the consultation of 2001 and that the act be amended.... [W]e did, over time, come up with a proposal that was acceptable to many others. As I say, I have spoken with our two ministers who owned hotels and many other people who have owned hotels, and to their credit, not one had a concern about changing this legislation....

[Emphasis added.]

The uncertainty about when the discussions took place

Unfortunately, Mr. Kenyon's response creates an uncertainty about when the discussions in question took place (and, as indicated above, the timing of the discussions has important consequences about whether a conflict of interest might have existed):

- On the one hand, Mr. Kenyon's reference to "two ministers who owned hotels" picks up on the inaccuracy in Mr. Inverarity's question which referred to the campaign prior to the November 2002 election—when Mr. Lang and Mr. Jenkins were not cabinet ministers.

In a subsequent statement in the Legislative Assembly on Monday, 31 March 2008, Mr. Kenyon stated unequivocally that the discussions in question had taken place prior to the November 2002 election (at which time Messrs. Lang and Jenkins were not Ministers):

Hon. Mr. Kenyon: The question asked last week by the Member for Porter Creek South clearly stated his time frame of

October 2002 and referred to our election campaign. He also referred to the two members as ministers. The discussions did occur in that time frame and during the consultations by the government of the day in 2001.

I would remind the member that we were not elected at that time. We weren't members of this House; we weren't ministers. The discussions occurred during the development of our platform, and actually only occurred because I had a personal interest in the *Liquor Act*. It has been a matter of great interest to my constituents in Porter Creek North.

Once elected and taking government, no minister or member who is in a conflict of interest has participated in any discussions on that matter.

- On the other hand, if Mr. Kenyon had been referring to discussions which took place after Mr. Lang and Mr. Jenkins became "ministers", those discussion would have had to have taken place after the November 2002 election.

On the same day that Mr. Kenyon made his original response in the Legislative Assembly (27 March 2008), he was asked by a reporter² "When did you speak to the Ministers?". He is quoted as responding:

Minister Kenyon: That goes back to when I first inherited the portfolio and we started looking at it. The main reason why nothing could be done, at that point, in my mind, was the fact that we had done nothing about the overall drinking problem. But the criticism was levied by the opposition that we were dragging our feet because of Archie and Peter owning hotels. So I asked them and I asked Craig Tuton, I asked others in town, is there any objection? And not one person objected. It had nothing to do with the hotels. It had to do with the fact that we didn't have adequate programs for dealing with problem drinking.

Mr. Kenyon became Minister responsible for the Liquor Corporation on 12 July 2004. Accordingly, if his reference to "when I first

2. Dan Jones from CHON-FM.

inherited the portfolio" is taken literally and refers to the date when he became the responsible Minister (12 July 2004), then one might conclude that the alleged discussions would have taken place after Mr. Lang and Mr. Jenkins were Cabinet Ministers. Some of Mr. Kenyon's other statements to the media might be interpreted in the same way.

My investigation

As requested, I have conducted an investigation into the allegation. My investigation has included interviewing Minister Kenyon, Minister Lang, and Mr. Jenkins. I have spoken with Mr. Inverarity (who has subsequently made a substantially similar formal complaint against Minister Lang), and have reviewed the various materials provided to me by Mr. Inverarity (including copies of correspondence from October 2002 between the British Columbia & Yukon Hotels' Association and the Yukon Party about the latter's policy on the then-Liberal Government's proposed changes to the liquor legislation, as well as recordings and transcripts of various recent media interviews with Mr. Kenyon). I have reviewed the relevant extracts from *Hansard*.

(a) Mr. Lang

Mr. Lang is categorical and adamant that he has had no involvement whatever about any aspect of the liquor legislation since he was elected in the November 2002 election and shortly thereafter became a Minister.

Mr. Lang notes that he met with me after the November 2002 election immediately prior to his becoming a Minister, at which time I pointed out his ownership of a hotel would create a conflict of interest for him which would prevent him from being involved in any discussions about the liquor legislation. Mr. Lang has confirmed both orally and in writing to me that he has invariably followed my advice, and has regularly, routinely and without exception excused himself from cabinet and caucus and all government discussions whenever anything related to the liquor legislation has been raised.

In particular, Mr. Lang denies having been involved in any way in the recent review of the liquor legislation prior to the introduction of Bill 46, and also specifically denies having any discussions about this matter with Mr. Kenyon since

the latter became the responsible Minister in July 2004 or with anyone else in the Yukon government.

Mr. Lang acknowledges that he took part in various discussions prior to the November 2002 election about the proposals which the then-Liberal Government had made about amending the liquor legislation, and about what should be the Yukon Party's policy on that topic. However, Mr. Lang is very clear that he has not been involved in any way in any such discussions since he became a Member and a Minister after the November 2002 election.

(b) Mr. Jenkins

Mr. Jenkins is also categorical and adamant that he had no involvement in any discussions about the liquor legislation while he was a Minister (November 2002 to December 2005) or thereafter until he ceased to be a Member at the October 2006 election.

Mr. Jenkins confirmed that he knew that his ownership of a hotel would prevent him from having any involvement in the liquor legislation while he was in the government, and that he and I discussed this when I met with him after the November 2002 election (prior to his becoming a Minister). He states that he routinely and invariably excused himself from any discussions or decisions related to that legislation.

Mr. Jenkins states that he has had no discussions with Mr. Kenyon during the recent review of the liquor legislation that led up to Bill 46.

Mr. Jenkins does recall having a discussion with Mr. Kenyon prior to the November 2002 election, prior to Mr. Kenyon's election, when Mr. Kenyon was visiting Dawson in the course of his veterinarian practice.

(c) Mr. Kenyon

Mr. Kenyon states that, although his initial response to Mr. Inverarity's question on Thursday, 27 March 2008, tracked Mr. Inverarity reference to "government ministers", he was intending to refer to discussions which had taken place prior to the November 2002 election. These discussions related to the Yukon's Party's reaction to the then-Liberal Government's proposed amendments to the liquor

legislation. Mr. Kenyon clarified which discussion he was referring to when he made his subsequent statement in the Legislative Assembly on Monday, 31 March 2008.

When asked to explain his reference in the media interview with Dan Jones about "... when I first inherited the portfolio", Mr. Kenyon stated that the interview took place in a scrum outside the Legislative Assembly after his original remarks on Thursday, 27 March 2008. It was not a prepared interview. Although he used the word "I", he says he was not referring to his becoming the responsible Minister in July 2004. He meant to refer to the discussions prior to the November 2002 election, prior to the Yukon Party becoming the Government. He reiterated that he had clarified this in his subsequent statement in the Legislative Assembly on Monday, 31 March 2008.

When asked whether he had at any point since the November 2002 election had any discussions with either Mr. Lang or Mr. Jenkins about the liquor legislation or possible amendments thereto, Mr. Kenyon stated "No, none whatsoever".

(d) Mr. Inverarity

Mr. Inverarity spoke with me at some length about this matter. He provided me with recordings of the entire interview which Mr. Kenyon had with the reporter, Dan Jones, in addition to the transcript of the portion which was broadcast.

Apart from these sources, Mr. Inverarity did not have any evidence that Mr. Jenkins or Mr. Lang, while Ministers, made any representations about the liquor legislation or Bill 46 or any other potential changes to the liquor legislation, either to Mr. Kenyon or to any other governmental official.

Decision

As a result of my investigation, I have come to the conclusion that there is no evidence that Mr. Lang or Mr. Jenkins, while Ministers, made any representations about the liquor legislation, or Bill 46, or any other potential changes to the liquor legislation.

Accordingly, there is no evidence that either Mr. Lang or Mr. Jenkins have been in a conflict of interest.

Mr. Kenyon

As noted above, Mr. Kenyon's statements do not demonstrate or create a conflict of interest for him.

It obviously would have been preferable if Mr. Kenyon had not repeated Mr. Inverarity's reference to "government ministers" when responding to Mr. Inverarity's question on Thursday, 28 March 2008. Similarly, it would have been preferable if Mr. Kenyon had been clearer in his response to Dan Jones's question during the subsequent media scrum about the time frame to which Mr. Kenyon intended to refer. I accept Mr. Kenyon's clarification in his statement in *Hansard* on Monday, 31 March 2008, and there is no credible evidence to the contrary.

Notwithstanding the confusion caused by Mr. Kenyon's comments, I am satisfied that neither Mr. Lang nor Mr. Jenkins have been involved in any discussions about the liquor legislation with Mr. Kenyon or any other governmental official since they became Ministers after the November 2002 election.

Confidentiality of this Advice

Under section 24 of the Act, this advice is confidential. You may, of course, disclose this letter as you see fit. For my part, I will only disclose it if you consent in writing to my disclosing it, or if you or one of the Ministers in question represents that you or they are acting in accordance with advice from me and a Member asks me to disclose the request and my advice.

In the present case, I understand that you have undertaken to make my advice on this matter public. I would appreciate being advised when that occurs.

Yours sincerely,



DAVID PHILLIP JONES, Q.C.
Conflict of Interest Commissioner