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## Commissioner Trussler Should Recommend Sanctions Against Premier Smith

**By:** Nigel Bankes and Jennifer Koshan

**Matter Commented On:** *Conflicts of Interest Act*, [RSA 2000, c C-23](#) and the [Report on Allegations involving Premier Danielle Smith](#)

In her [report](#) of May 17, 2023, Ethics Commissioner Marguerite Trussler concluded that Premier Danielle Smith had violated section 3 of the *Conflicts of Interest Act*, [RSA 2000, c C-23](#), when she contacted the Minister of Justice and Attorney General within hours of taking a call from Artur Pawlowski, where she discussed the criminal charges he was facing. However, the Commissioner went on to note that at that point she was making no recommendations “with respect to sanctions against the Premier for consideration of the Legislative Assembly of Alberta” but that she reserved “the right to make recommendations once the Legislative Assembly is back in session” (at 16). Commissioner Trussler also made two additional recommendations. The first was that “[a]ll new Members of the Legislative Assembly of Alberta attend mandatory training upon election about the structure of Canadian government and the roles of the three branches of government” (at 16). The second was that the Legislative Assembly “consider whether to amend the *Conflicts of Interest Act* to provide for a stay on any ongoing investigation from the time that the writ drops for an election until the election results are certified” (at 16).

The purpose of this post is to examine the provisions of the *Conflicts of Interest Act* dealing with the matter of sanctions. It is a follow-up to our earlier post on the Commissioner’s report that we published (with Martin Olszynski) during the election period: “[Ethics Commissioner Confirms that Premier Danielle Smith Breached the \*Conflicts of Interest Act\* – and a Fundamental Principle of Our Democracy](#)”.

The Act deals with the question of sanctions in sections 27 – 29. Section 27(1) prescribes the contents of a Commissioner’s report in respect of the alleged breach of the Act. It notes that the report must concisely set out the facts relating to the alleged breach, the Commissioner’s findings as to any breach or contravention and the nature of such, and “the Ethics Commissioner’s recommendation for the sanction, if any, that the Legislative Assembly may impose on a Member for a breach” as well as any other recommendations.

Subsection 27(2) provides an exhaustive statement of the scope of the Commissioner’s discretion with respect to the matter of sanctions:

- (2) The Ethics Commissioner may recommend any one of the following sanctions:
  - (a) that the Member be reprimanded;

- (b) that a penalty be imposed on the Member in an amount recommended by the Ethics Commissioner;
- (c) that the Member's right to sit and vote in the Legislative Assembly be suspended for a stated period or until the fulfilment of a condition;
- (d) that the Member be expelled from membership of the Legislative Assembly,

*and may also recommend the alternative of a lesser sanction or no sanction if the Member carries out recommendations in the report for the rectification of the breach.*  
(emphasis added)

Subsection 27(3) expressly states that the “Commissioner may recommend that no sanction be imposed” where the Commissioner “is of the opinion that the breach was trivial, inadvertent or committed in good faith”.

In the case of Premier Smith, the Commissioner did not provide recommendations on sanctions with her original report, but she clearly reserved the right to do so. It can be inferred from the balance of her report (and in particular the Commissioner's recommendations with respect to changing the law so as to preclude the release of a report during the election cycle) that she felt constrained in making a recommendation on sanctions while the Alberta election was in progress. But it is also important to note that the Commissioner did not make any recommendations with respect to the rectification of the breach that she had found. To be clear, we do not think that the Commissioner's recommendation as to mandatory training for all new Members can be read as a recommendation with respect to remediation by the Premier with respect to her breach of the Act.

Where a complaint under the Act is initiated by a member of the public, a member of the legislature, or the legislature itself, the Commissioner must deliver her report to the Speaker of the Legislature (at section 25(12)), who shall lay the report before the Legislative Assembly if it is sitting (at section 28(1)). But if the Assembly is not sitting, the Speaker must make copies of the report available to the public (which is what happened in this case) with the report to be laid before the Assembly “within 15 days of the commencement of the next sitting” (at subsections 28(1) & (2)). Subsection 3 instructs what happens next:

If in the report from the Ethics Commissioner the Ethics Commissioner has found that a Member or former Minister has breached this Act and the Ethics Commissioner has recommended a sanction, the Legislative Assembly shall debate and vote on the report within 15 days after the tabling of the report, or any other period that is determined by a resolution of the Legislative Assembly.

The drafting of subsection 28(3) is curious. The conditional “if” which prefaces the subsection, suggests that a debate and vote is only required *if* there is finding of a breach *and* a recommended sanction. Since the Commissioner's report on Premier Smith as presently drafted only fulfills one of the two conditions, there is a risk that this important report may escape public debate in the Legislature and that Members of the Legislative Assembly may escape voting on the matter. This alone means that there is a strong public interest in ensuring that the Commissioner fulfills the second pre-condition by making a recommendation on sanction by the necessary time.

Section 29 deals with the powers of the Legislative Assembly. This section makes it clear that it is the Assembly itself that is in the driver's seat insofar as it provides that the Assembly "may accept or reject the findings of the Ethics Commissioner or make its own findings" including with respect to the question of whether there was a breach of the Act. Furthermore, if the Assembly finds a breach, it may impose the sanction recommended by the Commissioner or any other sanction that the Commissioner has the power to recommend, or impose no sanction. In *McIver v Alberta (Ethics Commissioner)*, [2018 ABQB 240 \(CanLII\) \(which involved current Minister for Municipal Affairs Ric McIver\)](#), Justice Janice Ashcroft confirmed that it is the Legislature that is the ultimate decision-maker with respect to such matters (at paras 21 – 27).

And therein lies the balance between the quasi-judicial function of the Commissioner, who must act in accordance with the rules of natural justice and administrative process, and the political process of the Legislature. As the Act is structured, both the Commissioner and Legislature have a role to play, and both must do their part if the goals of the Act are to be achieved. The preamble to the Act lays out some relevant purposes, including the following:

WHEREAS the ethical conduct of elected officials is expected in democracies;

...

WHEREAS Members of the Legislative Assembly are expected to perform their duties of office and arrange their private affairs in a manner that promotes public confidence and trust in the integrity of each Member, that maintains the Assembly's dignity and that justifies the respect in which society holds the Assembly and its Members;

WHEREAS Members of the Legislative Assembly, in reconciling their duties of office and their private interests, are expected to act with integrity and impartiality;

WHEREAS Ministers and their staff must avoid conduct that violates the public trust or creates an appearance of impropriety;

.. and

WHEREAS the adoption of clear and consistent conflict of interest rules, post-employment restrictions and reporting duties will promote these aims...

In particular, it might be said that the reports of the Commissioner play a part in establishing clear rules and expectations for Members of the Legislative Assembly and that the Commissioner's recommendations with respect to sanctions are part of that process. This too supports the idea that the Commissioner should provide her quasi-judicial assessment of an appropriate sanction or range of sanctions before her report on Premier Smith enters the more political process of the Legislature.

While the Act does not expressly state the time by which the Commissioner must provide her recommendation on sanctions, the necessary date can be inferred from the timetable specified in section 28. As noted above, this timetable contemplates that the Commissioner's report must be tabled in the Legislature within 15 days of the commencement of the fall 2023 sitting, with debate to commence within 15 days after tabling. It follows that the Commissioner should provide her

recommendations by the time that the Legislature resumes, or at the latest by the date on which the report is tabled.

We have already suggested that the drafting of section 28(3) makes it especially important that the Commissioner exercise her reserved right to make a recommendation on sanction, and we have also suggested that the Commissioner should provide her recommendations in order to fully discharge the quasi-judicial elements of this bifurcated process. The Commissioner's report in the Smith matter provides yet one more reason why Commissioner Trussler should exercise her power to make recommendations with respect to a sanction. We refer here to the Commissioner's observations as to the unconstitutionally improper nature of the Premier's activities, and the Commissioner's finding as to the Premier's knowledge that contacting the Attorney General was improper. Both conclusions speak to the seriousness of the Premier's breach of section 3 in this case. This is not a case in which the Commissioner should shirk her power to provide recommendations as to an appropriate sanction for such a serious breach of the Act and constitutional norms. We quoted some of these remarks in our earlier post, but they deserve repeating here:

Members of the Legislative Assembly (particularly, members of Executive Council) and Deputy Ministers and other public servants, with the exception of members of the Crown Prosecution Service, should not speak with any accused person (or his or her representative) about any ongoing criminal matter before the Courts. *The legal system is an independent arm of government and neither the Legislative branch of Government nor the Executive branch of Government should interfere or appear to interfere with the Judicial branch of Government. To do so is to endanger the independence of the judicial system. This principle is a fundamental pillar of our democracy.* The Premier breached this principle by discussing the accused's case with him. If a Member of the Legislative Assembly or Public Service inadvertently finds themselves in such a situation, the Member or public servant must terminate the discussion forthwith. (at 14, emphasis added)

It is instructive to examine the past practice of the Commissioner in making recommendations with respect to sanction. Commissioner Trussler has made sanction recommendations in two previous matters involving MLAs ([McIver](#) and [Singh](#)). In both cases she recommended an apology. Interestingly, an apology is not one of the sanctions explicitly mentioned in subsection 27(2) clauses (a) to (d), which suggests it is a "lesser sanction" contemplated in the final words of that subsection. In the case of MLA McIver, Commissioner Trussler also recommended a fine of \$500. She explained the nominal nature of this fine on the basis of "the small size of [his wife's economic] interest and the probability Mr. McIver was more interested in scoring political points than worried about his wife's business ..." (at 7).

Previous Commissioners seem to have been less inclined to make recommendations on sanction, but that may be because, for the most part, the Commissioner at the time considered the breach in question to have been trivial, made in good faith, or inadvertent. One much more serious case was a 2002 report on a failure to disclose assets, liabilities, and income involving [Robert Fischer, MLA](#). In that case, Commissioner Clark declined to offer a recommendation on sanction since the Member had already resigned his seat in anticipation of the Commissioner's report. But for that resignation, it seems fairly clear that a recommendation would have been forthcoming because in

the Commissioner's view, the breaches "would warrant a serious sanction under the Act because such failures undermine the integrity of the system" (at 8).

This brief summary suggests the following conclusions. First, Commissioner Trussler has provided her recommendations on sanction in each of the two previous MLA cases in which she has been involved. Second, recommendations have not been made by previous Commissioners in cases that were not serious. Third, a recommendation on sanction would have been made in one serious case but for the fact that the MLA in question had already resigned. In Premier Smith's case, the breach of the Act was both serious and deliberate. It is therefore a case in which the Commissioner would normally be expected to make a recommendation as to sanction, but for the report having been released during the provincial election period.

Finally, it is important that we address the possible contention that Commissioner Trussler is already too late to make a recommendation as to sanction because Premier Smith has already made an apology in the Legislative Assembly, or that there is no point in her doing so in light of the apology. This is perhaps the view of Premier Smith's new Attorney General, [MLA Mickey Amery, who is on record as stating that the matter is now closed](#). It is our view that this cannot be the case given the context in which Premier Smith offered her apology.

The Legislative Assembly was called into session on June 20, 2023 following the election, as is the custom, for the sole purpose of electing a speaker, deputy speakers and committee chairs. The Assembly accomplished those tasks, but in the course of speaking to a nomination for the role of Deputy Speaker, Premier Smith interrupted herself to address the report of the Ethics Commissioner as follows:

Ms Smith: I am honoured to rise today and nominate a member of this Assembly for the role of Deputy Speaker. Before I do, however, I'd like to take a moment to address the Ethics Commissioner report from last month. Although I had no ill intent, the Ethics Commissioner found it was improper for me to contact the Minister of Justice in the way I did, and I apologize to all members of the Assembly and to all Albertans for the error.

I've asked my Minister of Justice to develop guidelines for an appropriate way to receive his legal advice on various legal matters, and I look forward to receiving that advice. Further, in her report the Ethics Commissioner provided recommendations, which I accept, including that of mandatory training for MLAs regarding the structure of Canadian government and the roles of the three branches of government. I have directed our government's Justice minister to organize this training for MLAs as well. ([Hansard](#) at 3)

Apart altogether from the content of the apology – which downplays Premier Smith's knowledge that it was illegal for her to contact her Attorney General to influence an ongoing case – the crucial point for present purposes is simply that this cannot be the end of the matter. The Commissioner's report has yet to be tabled in the Legislature and neither the report, nor the Premier's apology was on the agenda for the business of the Assembly on June 20. Since the matter is still open, it is accordingly our view that Commissioner Trussler still has the opportunity to make recommendations on sanction for consideration by the Assembly. Indeed, we would go further and argue that in spite of Premier Smith's apology, it is crucially important for the Commissioner to

recommend a sanction so that this matter can be subject to debate and vote in the Legislature. This is particularly important in light of the Commissioner’s findings that Premier Smith’s conduct breached constitutional norms.

What sanctions would be appropriate in light of similar breaches?

In our view, this matter is more serious than that involving MLA McIver because of the serious and deliberate nature of Premier Smith’s actions and her violation of not just the Act, but constitutional norms. We believe that a sanction that goes beyond an apology is warranted in Premier Smith’s case, for example a reprimand or a suspension to signify the gravity of the offence.

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This post may be cited as: Nigel Bankes and Jennifer Koshan, “Commissioner Trussler Should Recommend Sanctions Against Premier Smith” (30 June 2023), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2023/06/Blog\\_NB\\_JK\\_Trussler\\_Sanction.pdf](http://ablawg.ca/wp-content/uploads/2023/06/Blog_NB_JK_Trussler_Sanction.pdf)

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