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émocratie en surveillance

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Integrity Commissioner J. David Wake
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January 16, 2019

RE: Request for ruling on Premier Ford and Cabinet's appointment of Jenni Byrne to the Ontario Energy Board

Dear Commissioner Wake:

I am writing requesting an investigation and ruling on the appointment of Jenni Byrne to the Ontario Energy Board (OEB) by Premier Doug Ford and his Cabinet ministers, as this raises questions concerning whether Premier Ford violated the *Members Integrity Act* (the "Act") by making the appointment in the decision.

Before her appointment to the OEB, Ms. Byrne was Premier Ford's Principal Secretary. Before becoming his Principal Secretary, Ms. Byrne coordinated field operations for Mr. Ford's election campaign in spring 2018, as you can see reported in this media article:

<https://www.thespec.com/news-story/8590385-ontario-race-attracts-canada-s-top-political-talent/>

and this article

<https://ipolitics.ca/2018/06/22/jenni-byrne-tapped-to-be-fords-principal-secretary-premiers-office-takes-shape/>

As you can see in this media article summarizing Premier Ford's appointment of Ms. Byrne to a two-year, \$197,000 per year, term as a member of the OEB:

<https://www.thestar.com/politics/provincial/2019/01/11/premier-doug-ford-losing-his-most-experienced-political-aide.html>

it says that Premier Ford issued a statement that said:

“Jenni has been an invaluable resource not only to me and the staff in the premier’s office, but indeed to all members of the government ...” The statement is not available on the Government of Ontario’s News Releases webpage at:

<https://news.ontario.ca/newsroom/en>.

There is no information from Premier Ford or the Government of Ontario or in this biography page of Wikipedia for Ms. Byrne,

https://en.wikipedia.org/wiki/Jenni_Byrne

that she has any experience or expertise in energy law, the Ontario energy sector or energy issues generally.

This situation raises the following factual questions:

1. Did Premier Ford and his Cabinet conduct a public, merit-based search for candidates this position?
2. Was there any consideration by someone or some entity that is independent of Premier Ford and his Cabinet of other candidates for this position?

In answering these questions, it is important to note that all Cabinet ministers and Cabinet staff serve at the pleasure of the Premier, which means they share the Premier’s appearance of bias given that they have full incentive to please the Premier in order to remain in Cabinet. As a result, a Cabinet minister or Cabinet staff person is not independent of Premier Ford.

It is also important to note that the Ontario Energy Board is a quasi-judicial administrative tribunal that makes rulings that affect the rights of Ontarians and Ontario businesses, as well as of course companies in Ontario’s energy sector. One of those companies is Hydro One, and the Government of Ontario owns 47 percent of the shares in that company, and appoints four of 10 board members, as you can see summarized in this media article:

<https://business.financialpost.com/news/fp-street/majority-of-new-hydro-one-board-will-go-to-major-shareholders>.

The OEB appointment provision is section 4.1 of the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sched. B, which you can see at:

<https://www.ontario.ca/laws/statute/98o15#BK7>.

As you know, the Preamble to the *Members’ Integrity Act* states in subsection (3) that:

“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.”

and in subsection (4) that:

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

You suggest, by quoting them under the heading “Standards of Behaviour” on the webpage:

<http://www.oico.on.ca/home/mpp-integrity/resources-for-new-mpps>

that you consider the expectations set out in the Preamble to be as enforceable as all the other rules in the *Act*, as you state at the end of that section on that webpage that:

“The Act contains further rules and statements of values that must be adhered to by all MPPs.”

Sections 2 and 4 of the *Act* state:

“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.

...

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.”

Premier Ford participation in Ms. Byrne’s appointment raises the following questions:

1. Did Premier Ford violate the Preamble rules of the *Act* by participating in the appointment of his election campaign advisor Ms. Byrne?
2. Did Premier Ford violate section 2 and/or 4 of the *Act* by either participating in or trying to influence a decision that improperly furthered another person’s private interest? (in this case, the interest of Ms. Byrne in obtaining the job of board member of the Ontario Energy Board)?

With regard question 1, given the Preamble rules set such a high standard of integrity and impartiality, Mr. Ford’s participation in the appointment of his election campaign adviser seems to clearly be a violation of the Preamble rules. The appointment was in no way an impartial decision.

With regard to question 2, the huge loophole in the *Act*, namely the definition in section 1 that says a “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...”

would not allow Premier Ford to escape scrutiny for participating in Ms. Byrne’s appointment decision because it was a specific decision, not a decision that applies generally or affects the Premier as one of a broad class of persons.

In this situation it is by definition “improper” for Premier Ford to participate in or try to influence the process that led to Ms. Byrne’s appointment. Ms. Byrne was an adviser for Premier Ford’s election campaign, and then one of his senior staff, and therefore there is a reasonable apprehension of bias on the part of Mr. Ford, and his bias would taint his participation in the appointment process and, therefore, make it clearly improper.

According to section 3 of the Government of Ontario’s Agencies and Appointments Directive:

<https://www.ontario.ca/page/agencies-and-appointments-directive#section-5>

it states in subsection 3.1 that government appointments will “reflect the diversity of the people of Ontario and the need to deliver services and decisions in a professional, ethical and competent manner.”

Democracy Watch questions very much whether Ms. Byrne’s appointment reflects the diversity of the people of Ontario, and also whether her appointment will ensure professional decisions by the Ontario Energy Board (given her lack of experience or expertise in energy law and the energy sector of Ontario generally). Democracy Watch also questions very much whether Ms. Byrne’s appointment will ensure ethical decision-making by the OEB, given that Mr. Ford’s unethical bias is the basis for her appointment.

You can see a fairly detailed framework of what a good government appointments process entails in section 4.02 of the Auditor General’s 2016 Annual Report at: http://www.auditor.on.ca/en/content/annualreports/arreports/en16/v1_402en16.pdf. As you will see, key elements of a good process include an open, transparent, merit-based appointment process. From the evidence on record, Ms. Byrne’s appointment process lacked all of these key elements.

Another possible improper aspect of the appointment of Ms. Byrne to the OEB is that it makes rulings that affect Hydro One, which is 47-percent owned by the Government of Ontario, including four of 10 board members appointed by the Government. This raises possible questions of conflicts of interest on the part of Ms. Byrne.

Section 20 of O. Reg. 382/07, which you can see at:

<https://www.ontario.ca/laws/regulation/070382>

sets out rules for former staff of ministers and requires them to refrain from assisting any public body in connection with any proceeding, negotiation or transaction they were involved in while working for the government.

Given that Premier Ford has intervened in both board and staff positions at Ontario Hydro since becoming Premier last June, again as summarized in this article:

<https://business.financialpost.com/news/fp-street/majority-of-new-hydro-one-board-will-go-to-major-shareholders>

it is possible that Ms. Byrne was involved in those negotiations and proceedings, and that the OEB was also involved in some way.

On page 8 of his February 8, 2002 ruling on the actions of then-Deputy Premier and Minister of Finance Jim Flaherty, then-Integrity Commissioner Coulter A. Osborne stated concerning the word “improperly”:

“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”).”

You can see that ruling at:

<https://www.oico.on.ca/docs/default-source/commissioner%27s-reports/re-flaherty-minister-of-finance-feb-8-2002.pdf?sfvrsn=8>

For all of the above reasons, Democracy Watch’s position is that Premier Ford’s appointment of Ms. Byrne improperly furthered Ms. Byrne’s private interests – the appointment is objectionable, unsuitable and, in the other ways detailed above, wrong.

Democracy Watch therefore requests that you issue a ruling on Premier Ford’s participation in the process of Ms. Byrne’s appointment finding Mr. Ford in violation of section 2 (and possibly also section 4) of the *Members’ Integrity Act*.

I understand that your position is that you cannot conduct an inquiry unless a Member of the Legislative Assembly or the Executive Council requests it under section 30 of the *Act*.

Democracy Watch’s position is that, given undertaking an inquiry is a discretionary action by you (under subsection 31(1) and (5) of the *Act*), and given your general enforcement power as the administrative tribunal that enforces the *Act*, and specifically under sections 23.1 and 25 of the *Act*, you therefore have discretionary power to undertake an inquiry based on the information in this letter.

Finally, given the seriousness of this situation, as it concerns the appointment of one of Premier Ford’s election campaign advisers to a quasi-judicial position which, as detailed above, is improper in several ways, Democracy Watch’s position is that you should recommend that the penalty for Premier Ford’s violation be that his seat be declared vacant.

Premier Ford’s participation in Ms. Byrne’s appointment raises concerns about violations of fundamental principles of democratic good government, including: avoiding conflicts of interest; ensuring appointments are merit-based, and; ensuring the independence of the public service.

You have an opportunity to uphold key measures in a key democratic good government law, the *Members’ Integrity Act*. Please let me know if you need any more information to act on this request as Democracy Watch is happy to provide further details.

We look forward to hearing back from you about this request, and hopefully to seeing your public ruling issued very soon.

Sincerely,

A handwritten signature in blue ink, appearing to read "Duff Conacher". The signature is fluid and cursive, with a large initial "D" and "C".

Duff Conacher, Co-founder of Democracy Watch
on behalf of the Board of Directors of Democracy Watch