

Summary of Conclusions of the Special Prosecutor **In the Matter of Kenneth Dobell**

by Terrence Robertson, QC
Special Prosecutor

Introduction

I was appointed as an independent Special Prosecutor by the Assistant Deputy Attorney General of the Criminal Justice Branch on October 24, 2007, after the Branch received an RCMP Report to Crown Counsel on October 18, 2007.

This Summary of my conclusions in the matter of Ken Dobell, which was the subject of the Report to Crown Counsel, comprises two main sections:

A. Allegations of Offences under the Criminal Code of Canada

B. Allegation of an Offence under the Lobbyists Registration Act

The allegations relate to various contracts entered into by Mr. Dobell with the Provincial Government to be a special advisor to the premier and chief softwood lumber negotiator and with the City of Vancouver to work on social housing and creating a cultural precinct in Vancouver.

In performing my role as Special Prosecutor, I followed the Criminal Justice Branch's Charge Assessment Guidelines Policy. The policy requires me to determine:

- **First, whether there is a substantial likelihood of conviction on any possible charges, and**
- **Second, if there is a substantial likelihood, whether it is in the public interest to charge.**

My Summary contains my conclusions regarding the following aspects of Mr. Dobell's work, further delineated according to the two-part Criminal Justice Branch Charge Assessment Guidelines Policy:

A. Allegations of Offences under the Criminal Code of Canada

- 1. Social Housing Contract: Ken Dobell**
- 2. Social Housing Contract: City of Vancouver**
- 3. Cultural Precinct Project**
- 4. Chief Negotiator for Softwood Lumber Contract**
- 5. Other Provisions Under Section 121(1)**

B. Allegation of an Offence under the Lobbyists Registration Act

Background

Ken Dobell, a long-time public servant, was City Manager in Vancouver for many years. He left that position to serve as Deputy Minister to the Premier from 2001 until the end of May, 2005, when he retired. Upon his retirement, he, through his company, entered into a consultancy contract with the Province as Special Advisor to the Premier. He continued in that capacity until May 30, 2007.

In early April 2006, Mr. Dobell began work for the City of Vancouver on the "cultural precinct" project, which generally concerned the development and funding of theatres, galleries and other cultural projects in the City. Mr. Dobell's role, as set out in his contract, was to review materials, consult with stakeholders, support City and Province officials and staff working on the project, and to evaluate proposals and various aspects of the project.

In August 2006, Mr. Dobell commenced work for the City of Vancouver as an advisor to the City Manager on the issue of social housing (the provision of housing to people who are homeless/hard-to-house). Mr. Dobell's role was to formulate a funding model and business plan for social housing in the City.

I have also examined Mr. Dobell's role as Chief Negotiator Softwood Lumber for the Ministry of Forests.

Finally, I have examined the role of the City of Vancouver in relation to Mr. Dobell's activities on the City's behalf.

A. ALLEGATIONS OF OFFENCES UNDER THE CRIMINAL CODE OF CANADA

1. Social Housing Contract: Ken Dobell

Substantial Likelihood of Conviction Assessment

In relation to the above facts, the only charge against Mr. Dobell for which there is a substantial likelihood of conviction is under s. 121(1)(d) of the *Criminal Code*, and only in relation to the social housing contract.

Other subsections of 121(1) refer to a person acting as "an official." I will say more about that in a moment.

Section 121(1)(d) of the *Criminal Code* states:

121. (1) Every one commits an offence who ...
- (d) having or pretending to have influence with the government or with a minister of the government or an official, demands, accepts or offers or agrees to accept for himself or another person a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with
 - (i) anything mentioned in subparagraph (a)(iii) [Note: the transaction of business with or any matter of business relating to the government] or (iv) [Note: a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow], or
 - (ii) the appointment of any person, including himself, to an office;

As Special Advisor to the Premier, Mr. Dobell had "influence" within the meaning of the section, up until the conclusion of that contract on May 30, 2007. By design, Mr. Dobell's Special Advisor contract was intended to provide "continuity" with files he had worked on as Deputy Minister, and his statements make clear that the term "Special Advisor" was chosen specifically to indicate that he remained a person of some influence and credibility. One of the reasons he wanted the title Special Advisor in his contract was "the linkage to the Premier". Mr. Dobell recognized that people would assume that he would make recommendations to the Premier and that those recommendations would have some credibility. In his activities under the Special Advisor contract, Mr. Dobell held himself out as a person of influence with the Premier, and in fact, he had influence as required under s. 121(1)(d).

The Social Housing contract with the City of Vancouver was in part to provide cooperation, assistance to the City, and/or to exercise influence with the Province, in relation to government business, namely funding for social housing, and in particular "necessary government contributions" and the potential for a public-private partnership model. Mr. Dobell's role in the social housing project was in no way a joint venture with the Province. He met with provincial officials, including Minister Coleman, on the City's behalf.

Therefore, I conclude there is a substantial likelihood of conviction on a charge under 121(1)(d).

Public Interest Assessment

It is not in the public interest to proceed with a prosecution of Mr. Dobell under s. 121(1)(d) of the *Criminal Code* in relation to the social housing contract.

A key public interest factor in this case is public confidence in the system of government-decision making and the administration of justice. Public confidence in the integrity of inter-governmental relations is an important social goal. In my opinion, that goal is satisfied by the process and the factors outlined below.

The significant factors that militate against prosecution are:

- Mr. Dobell held an honest but mistaken belief throughout that his activities were lawful. He cooperated fully and attempted to be an "open book" in the Special Prosecution (and in the investigation by Commissioner Loukidelis), which is corroborative of his honest but mistaken belief. His dual role was not hidden from either the Province or the City, and the City received value for the work done.
- The lead RCMP investigator who conducted the investigation is of the view that Mr. Dobell had an honest belief that he was not doing anything wrong, and saw this as a case in which there was no corruption. I agree with that view.
- The likely result of conviction is an absolute discharge, as in *R. c. Cogger*, [2001] J.Q. no. 2262 in the Quebec Court of Appeal;
- Mr. Dobell is willing to waive the *Offence Act* limitation period and enter a plea of guilty for failing to register as a lobbyist under the *Lobbyists Registration Act*;
- Mr. Dobell will also repay the fees he received in relation to meetings with provincial officials pursuant to the social housing contract, which I have determined to be in the amount of \$6,950.00.

2. Social Housing Contract: City of Vancouver

Substantial Likelihood of Conviction Assessment

I have also considered whether the City of Vancouver or any of its employees can be said to have conspired with Mr. Dobell in the commission of an offence under s.121(1)(d), contrary to s. 465(1) of the *Criminal Code of Canada*, or was party to the offence under another section of the *Criminal Code*, s. 21.

I have concluded that the City does not have the requisite mens rea (guilty knowledge) for proof of conspiracy under s. 465(1) of the *Criminal Code* in this case.

Although the objective element of the offence under s.121(1)(d) can be proven (and the subjective element can be proven for Mr. Dobell himself), the subjective element cannot be proven in relation to the City.

From the City's perspective, their knowledge of Mr. Dobell's influence was very general, and in my view, limited to the fact that he had a consultancy relationship with the Province, related to the Office of the Premier. It cannot be proven beyond a reasonable doubt that the City had knowledge that would allow it to differentiate between Mr. Dobell's position as Special Advisor to the Premier, and for example, his current position as Chief Negotiator Softwood Lumber (which I have determined clothes him with no additional influence and does not meet the requirements of s.121(1)(d) for "influence").

I have also concluded that the City is not a party under s. 21(1) or (2). That provision has no application to these circumstances. It may apply in different circumstances, such as where someone assisted in the receipt of consideration for the exercise of influence, rather than applying to the person providing the consideration. If any charge was appropriate it would be under the conspiracy provision, and the offence of conspiracy cannot be made out in this case.

Public Interest Assessment

As I have concluded there is no substantial likelihood of conviction of the City of Vancouver or any of its employees in relation to Mr. Dobell's work, I do not need to progress to a consideration of the public interest component of the Criminal Justice Branch Charge Assessment Guidelines Policy.

3. Cultural Precinct Project

Substantial Likelihood of Conviction Assessment

Regarding the cultural precinct project, the requisite "cooperation, assistance or exercise of influence" cannot be proven beyond a reasonable doubt. Although Mr. Dobell was hired by the City, I do not see this as a situation where Mr. Dobell was retained to open doors or exercise influence.

I conclude there is no substantial likelihood of conviction under s. 121(1)(d) on the cultural precinct project, notwithstanding the fact that Mr. Dobell was a lobbyist for the City under that contract, on the basis of the following:

- The Province's doors were already open to the City. The Advisory Committee was established, and the seed funding of \$5 million was in place. Mr. Dobell's job was not to open the doors, but to make sure what passed through those doors kept moving forward.
- Mr. Dobell, although retained directly by the City, was viewed by all as a go-between in a joint venture between the City and the Province, a primary object of which was to obtain federal funding. This was confirmed by Jessica McDonald and Olga Ilich (then Minister of Tourism, Sport and the Arts), but is also borne out in the manner in which the project was conducted.

There is no substantial likelihood of conviction with respect to the cultural precinct contract. The requisite "cooperation, assistance or exercise of influence" cannot be proven beyond a reasonable doubt.

Public Interest Assessment

As I have concluded there is no substantial likelihood of conviction on this aspect of Mr. Dobell's work, I do not need to progress to a consideration of the public interest component of the Criminal Justice Branch Charge Assessment Guidelines Policy.

4. Chief Negotiator for Softwood Lumber Contract

Substantial Likelihood of Conviction Assessment

I have also considered whether Mr. Dobell has the requisite influence today in his present role as Chief Negotiator Softwood Lumber, contracting with the Ministry of Forests, and I have determined that he does not.

In my view, the Chief Negotiator contract isolates his role considerably more than did the Special Advisor contract. While he may be an influential lobbyist generally, I attribute that influence to his background and his skill set. The Chief Negotiator role on its own does not clothe him with any additional influence with the Premier and the Province in the manner required by the section. Simply put, while I believe that it can be proven beyond a reasonable doubt that he "had influence" as a Special Advisor to the Premier, I do not think it can be proven beyond a reasonable doubt that his current role has influence in the same sense. His contract places him in no different position than any other lobbyist.

Public Interest Assessment

As I have concluded there is no substantial likelihood of conviction regarding this aspect of Mr. Dobell's work, I do not need to progress to a consideration of the public interest component of the Criminal Justice Branch Charge Assessment Guidelines Policy.

5. Other Provisions in Section 121(1)

Substantial Likelihood of Conviction Assessment

Regarding the other subsections of 121(1) I referred to above, any possible charges reference "an official." I have considered whether Mr. Dobell's activities under either the cultural precinct contract, social housing contract or Chief Negotiator, Softwood Lumber contract contravene those subsections.

It is clear Mr. Dobell was not an employee under any of the contracts.

In addition, taking into account the circumstances of Mr. Dobell's hiring, my review of the features of Mr. Dobell's contract, the case law, and the findings of Commissioner Loukidelis regarding the local government official exclusion under the *Lobbyists Registration Act*, I have concluded that Mr. Dobell does not meet the definition of "official". As he was not an "official" the other provisions under s.121(1) of the *Criminal Code* dealing with "officials" do not apply, and the elements of charges under other provisions in s. 121(1) cannot be made out.

Therefore, I have determined that there is no substantial likelihood of conviction for charges against Mr. Dobell or against the City of Vancouver under any of the provisions of s. 121(1) that apply to an "official".

Public Interest Assessment

As I have concluded there is no substantial likelihood of conviction under any of the provisions concerning an "official", I do not need to progress to a consideration of the public interest component of the Criminal Justice Branch Charge Assessment Guidelines Policy.

**B. ALLEGATION OF AN OFFENCE UNDER THE LOBBYISTS
REGISTRATION ACT**

The limitation period under the *Offence Act*, R.S.B.C. 1996, c. 338 has already expired for the offence of failing to register as a lobbyist pursuant to s. 10 of the *Lobbyists Registration Act*, S.B.C. 2001, c. 42. But for the expiration of the limitation period, there is a substantial likelihood of conviction on this offence. Mr. Dobell has agreed to waive the limitation period and to enter a plea of guilty to this offence.