

QUALIFICATION AND DISQUALIFICATION OF LEGISLATORS

OPINION

INTRODUCTION

1. I am instructed to advise the Centre for Justice, who have been asked, as an independent organisation, to research and render an opinion to the Parliamentary Select Committee on Elections. My advice is sought with respect to the relationship between the Bermuda Constitution Order 1968 (“the Constitution”) and the Legislature (Qualification and Disqualification) Act 1968 (“the Act”).

THE ACT

2. Section 30 of the Constitution relates to disqualification for membership of the Senate and House of Assembly. Clause 30 provides, so far as material for present purposes:-

“(6) Subject to such exceptions and limitations as may be prescribed by the Legislature, a person shall not be qualified to be elected as a member of the House of Assembly if he has an

interest in any Government contract and has not, within seven days of his nomination as a candidate for election, disclosed the nature of the contract and his interest therein by means of a notice published in the Gazette or in a newspaper published and circulating in Bermuda.

(7) Subject to such exceptions and limitations as may be prescribed by the Legislature, a person shall not be qualified to be appointed as a Senator if he has an interest in any Government contract and has not, at least seven days before the date of his prospective appointment, disclosed the nature of the contract and his interest therein by means of a notice published in the Gazette or in a newspaper published and circulating in Bermuda.

(8) In subsections (6) and (7) of this section and subsection (1)(f) of the next following section “Government contract” means any contract made with the Government or with a department of the Government or with an officer of the Government contracting as such.”

3. It is to be noted that:-

(1) These are transparency provisions: what they require is no more, and no less, than disclosure of an interest in any Government contract: the interest itself does not disqualify; lack of disclosure does;

- (2) “Government contract” is defined, in clear terms;
- (3) The provisions apply with respect to “any” Government contract;
- (4) “Interest” is not defined;
- (5) It need be no more than “an” interest;
- (6) The Constitutional provisions are, under the Constitution itself, subject to such “exceptions and limitations” as may be prescribed by the Legislature;
- (7) Therefore, exceptions and limitations prescribed by the Legislature are capable of being in accordance with the Constitution;
- (8) Subject only to that, disclosure of an interest (at the material time) in any Government contract is mandatory;
- (9) That time would appear to be the date of the nomination as a candidate and/or the date of publication of the prescribed notice;
- (10) Disqualification, when it applies, is automatic.

4. Section 10 of the Act relates to interests in Government contracts. It provides:-

“(1) For the purposes of section 30(6) and (7) ... of the Constitution ... the following exceptions and limitations are hereby prescribed to the requirements for disclosure specified therein as qualifications for membership of the Senate or of the House of Assembly.

(2) A person shall not be deemed to have any interest in a Government contract if any interest which he has therein is not a proprietary or a financial interest in the carrying out of that contract.

(3) A person shall not be deemed to have any interest in a Government contract if the only interest which he has in such a contract is the interest of a joint stock company of which he is a shareholder unless that person either -

(a) is a director, officer or manager of that company or of some other company which controls that company and, in addition, is the beneficial owner of at least 10% of the issued capital of either of such companies aforesaid; or

- (b) he is the beneficial owner of at least 50% of the issued capital of that company, or is in a position to exercise more than 50% of the voting rights therein or is otherwise, by means of any arrangement, artifice or device, in a position to exercise directly or indirectly the effective control of that company,

and it shall be a sufficient disclosure of any interest which a person has in a Government contract by reason only of paragraph (a) or (b) for him to have disclosed, within the twelve-month period immediately preceding the acquisition of that interest, the nature and extent of his shareholding in that company by means of a notice published in the Gazette or in a newspaper published and circulating in Bermuda:

Provided that, where a person first acquired such an interest before 1 December 1979 it shall be, for the purposes of section 31(1)(f) of the Constitution [title 2 item 1], a sufficient disclosure of that interest for him to disclose on or before 29th February, 1980 by the means aforesaid the nature and extent of his shareholding in the company.

(4) A person who contracts for the supply of goods or services by or to the Government in the ordinary course of conduct of a trade, business or profession, or for the purchase, lease or use of Government property upon terms and conditions which are standard for any member of the public, shall not be deemed thereby to have any interest in a Government contract.

(5) A person shall not be deemed to have any interest in a Government contract by reason only that some person to whom he is related by consanguinity or affinity has such an interest, unless that other person holds that interest in trust for him.

(6) A person shall not be deemed to have any interest in a Government contract by reason only that he is the holder of any bond, note or marketable security issued by the Government, if the terms and conditions of issue thereof are standard terms and conditions for any member of the public holding the same.

(7) A person shall not be deemed to have an interest in a Government contract by reason only that he has contracted with the Government to sell land for road widening purposes.

(8) A person is not deemed to have an interest in a Government contract by reason only that he is the partner, agent or employee of a person who has such an interest.

(9) A member of either House of the Legislature shall not be deemed to have any interest in a Government contract by reason only that he may be entitled, whether by law or otherwise, to receive any emolument, allowance, perquisite or other payment from public funds for or in connection with the performance of his duties as such a member or as an officer of that House, or as a Minister or Junior Minister or as Opposition Leader or as a party whip.”

5. This is a comprehensive code of the exceptions from and limitations upon required disclosure for the purposes of the Constitution.

6. What is conspicuous by its absence is any responsibility or machinery for monitoring and enforcing compliance with the Constitutional requirement, as qualified by the Act. Enforcement depends upon a speedy challenge in the Supreme Court to the candidate's nomination and/or election; or the Attorney General, which is a political appointment and who is principal legal adviser to the governing political party for the time being.

ADVICE SOUGHT

7. I am asked to advise:-

- (1) Whether the provisions of the Act are inconsistent with the Constitution;
 - (2) If the Act is inconsistent with the Constitution, which prevails;
 - (3) If the Act is consistent with the Constitution, what is the legal obligation for a candidate to declare an interest in any Government contract;
 - (4) If there is a legal obligation, what the scope is of that obligation;
- and

(5) Whether there is a distinction between “insiders” and “outsiders”.

8. I am not asked to advise, and do not have the information to be able to advise, whether any candidate at the most recent elections failed to make disclosure which he should have made in accordance with the Constitution, as qualified by the Act.

THE SECOND QUESTION

9. I take the second question first. The answer is that, if the Act were inconsistent with the Constitution, the Constitution would prevail.

10. However, given that the Constitution makes provision for legislative exemptions and limitations the Constitution and the Act should be read together so as to avoid a conflict.

11. The significance of the Constitution prevailing is that the dominant provision is that there must be disclosure of an interest in any Government contract. The exemptions and limitations should be interpreted narrowly so as to detract to the minimum extent possible from the dominant requirement. Justification for any lack of transparency must be clearly demonstrated.

12. That said, to the extent that there are ambiguities in the Act, it would be appropriate to legislate promptly so as to remove them; and also to provide for by whom and how the requirements are to be policed and enforced; and that prominence is given to the requirements on the nomination paper.

THE FIRST QUESTION

13. In my opinion:-

- (1) The Act making provision for exemptions and limitations is not unconstitutional: the Constitution itself provides for precisely this to happen;
- (2) The fact that the Act may in some respects be imperfect and/or open to more than one interpretation does not make it unconstitutional: these are matters for amendment;
- (3) The gap constituted by a lack of an enforcement mechanism does not make the exemptions and limitations unconstitutional: there is a gap that needs to be filled;

- (4) Breaches of the Constitutional requirement, as qualified by the Act, even wholesale and blatant breaches, would not render the exemptions and limitations in the Act unconstitutional: what would be required would be action with respect to the breaches and with a view to preventing the recurrence of breaches;
- (5) The exceptions and limitations are not, taken as a whole, ie considering the totality of Section 10, unconstitutional.

14. What is necessary is to consider, with respect to each of subsections (2) to (9) inclusive, of Section 10 of the Act, is whether that subsection is unconstitutional.

15. I do not for my part see unconstitutionality with respect to most of these subsections. To my mind, the focus needs to be on Section 10 (2) and (4).

16. I do not, however, conclude that either Section 10(2) or Section 10(4) of the Act, properly, that is restrictively, interpreted, is unconstitutional.

THIRD QUESTION

17. The legal obligation for a candidate to declare an interest in a Government contract is that he or she must do so under the Constitution unless they come clearly within one of the exceptions in Section 10 of the Act.

FOURTH QUESTION

18. The obligation is just that. When disclosure is required it is mandatory. The sanction of disqualification for non-disclosure is automatic. Prima facie if there is an interest in any Government contract due disclosure must be made.

19. The obligation does not apply only if the situation comes four square within one or more of the Section 10 exceptions.

FIFTH QUESTION

20. There is no distinction between so-called “insiders” and so-called “outsiders”. No such distinction is made by the Act.

21. So, pursuant to Section 10(2) of the Act, disclosure must be made by a candidate, if he or she:-

- (1) Is a director, officer, manager AND is the beneficial owner of 10% of the company's issued capital;
- (2) Is the beneficial owner of more than 50% of the company's issued capital;
- (3) Can exercise more than 50% of the voting rights therein; or
- (4) Can directly or indirectly control the company.

22. On 5 July 2013, in the House of Assembly, the Finance Minister, the Hon. E.T. (Bob) Richards described (Column 1695) the Act as “a rather obscure piece of legislation” that basically refines what a Member's interests are. This is, with respect, not quite right.

23. First, the Act does not refine what a Member's interests are. What the Act does do is to refine the circumstances in which an interest has to be disclosed. A Member is of course at liberty to disclose an interest that does not necessarily have to be disclosed. In a case of any doubt, this will be a prudent and responsible course to adopt.

24. Second, I do not find Section 10 of the Act “obscure”. However, to any extent that it might be “obscure”:-

- (1) The obscurity should be removed by amending legislation;
- (2) Meanwhile, the Constitution is not “obscure” and the Constitution cannot be diminished by any “obscure” legislative provision; and
- (3) No Member should rely on the Act save to the extent that it is not “obscure”.

25. The Minister continued (Column 1696) that the Act:-

“lists all these exceptions except for one thing”.

26. That “one thing” appears to be an exception for when the candidate is not an “insider”.

27. I regret that this is fundamentally wrong. The Act lists all the exceptions. There are no others. And they are exceptions. Unless one of the listed exceptions applies, the Constitution mandates disclosure. There is simply no additional, or further, exception, whether by reference to some concept of “outsider” or otherwise.

CONCLUSION

28. It is somewhat disturbing that there seem to be basic misconceptions at a very senior level. Founded perhaps on such misconceptions, there may well have been breaches of the Constitutional requirement, with respect to which no action has been taken.

29. It is evident that all is not well. The Act needs to be clearly understood, any appropriate amendments made, and an enforcement mechanism added.

30. Nonetheless the Act is not I believe inconsistent with the Constitution. However, it is undoubtedly the Constitutional provision that is paramount, and is the framework within which the provisions of the Act must be considered.

11 King's Bench Walk
Temple EC4Y 7EQ

JAMES GOUDIE QC
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goudie@11kbw.com

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Venous Memari
Centre for Justice
Hamilton
Bermuda