Round Table

Conflict of Interest Guidelines: Too Little or Too Much?

One session at the 37th Canadian Regional Conference of the Commonwealth Parliamentary Association featured a discussion of conflict of interest guidelines. The session, held on July 27, 1998 was chaired by Jocelyn Burgener MLA (Alberta). The topic was introduced by Lindy Kasperski MLA (Saskatchewan) and several members from other jurisdictions also participated. The following extracts, based on the transcript for the session, raise many interesting questions in this area.

Lindy Kasperski (Saskatchewan): Although far from an expert on this topic I will try to introduce the topic and provide some background for discussion. Let us begin with the question of definition and here I rely on a recent work by political scientists Ian Greene and David Shugarman, *Honest Politics: Seeking Integrity in Canadian Public Life*. They state:

> A conflict of interest between public and private interests occurs when a public official is in a position to use his or her public office to gain personal benefit or benefits for his or her family or party that are not available to the general public. Conflicts of interest are unacceptable in a society that values the rule of law: the law is to be applied equally to everyone except in the case of justifiable exceptions written into the law. Moreover, public officials who use their positions to provide special benefits to themselves, their families, or their political friends undermine the principle of social equality. We expect public officials — whether they are permanent or contracted public servants, elected representatives or senators — to serve the public interest. Where there is a conflict between the public interest and private, family, or party interests, the public interest should always prevail.

These are general principles and there is little consensus about exactly how these principles should apply to different and individual cases. That is where the rules of ethical politics come into play. Ethical rules represent the political system's current efforts to reconcile general principles with society's expectations about appropriate behaviour of public officials.

This study on conflict of interest goes on to outline a four-tier hierarchy of conflict-of-interest violations. At the top are conflicts involving financial benefit to a public official. These traditionally have been covered by the *Criminal Code*.

Second in the hierarchy are conflicts without direct financial benefit to elected officials. This type of conflict of interest involves influencing decisions that benefit family, friends or business associates. If public officials fail to remove themselves from the potential conflict of interest, then they can be guilty of a real conflict of interest even if they do not receive any direct financial benefit.

The third level of conflict-of-interest violation is violation of conflict of interest guidelines without a real conflict having occurred. Most conflict-of-interest codes now in Canada require public officials to make a confidential or a public disclosure of non-personal assets and liabilities. This information enables ethics counsellors and conflict-of-interest commissioners to provide specific advice about how to avoid conflicts of interest. Failure to make full disclosure is a breach of the rules even if the assets and liabilities would not result in a conflict of interest.

Fourth in this hierarchy of violations is the apparent conflict-of-interest situation. Even when all the rules have been complied with, most conflict-of-interest guidelines state that public officials have the responsibility to show publicly that they are attempting to act impartially at all times.

Recently, public sentiment seems to expect public officials to have a duty to avoid these apparent conflicts of interest. This potential conflict of interest can become a real conflict unless the public official takes action to

avoid any situation by disposing of relative assets or withdrawing from certain public duties or decisions.

Let me now give a brief background on federal and provincial conflict-of-interest rules. At the federal level the first written guidelines for cabinet ministers in this country came into effect in 1964. As of 1996 there were still no written guidelines for MPs and senators, although there has been recently considerable debate in various Commons committees, especially since 1988. These original guidelines that were developed by the Pearson government were really in effect until 1973, when public concern was raised by several allegations of conflict of interest involving federal cabinet ministers. In that year Allan MacEachen, President of the Privy Council, produced a green paper containing draft legislation designed to prevent conflicts of interest among MPs and senators, including cabinet ministers. According to this paper, all public office-holders are trustees of the public interest and if they allow their private interests to take precedence over public interests, a conflict of interest has occurred.

The recommendations of the MacEachen report focused on preventing situations in which members could derive personal financial gain from public office. However, the legislation that was recommended in this report never did materialize.

The Trudeau government used a set of written guidelines in the form of a letter to cabinet ministers which contained some specific conflict-of-interest guidelines reflecting the MacEachen report, but that was all. The guidelines provided for the disclosure of non-personal assets and the choice of either selling assets with conflict-of-interest potential or placing them in a blind trust.

In 1974 the federal government also created what is known as the OADRG – Office of Assistant Deputy Registrar General – which was created to process compliance documentation.

In 1979 the Joe Clark government broadened the guidelines to apply to spouses and dependent children of cabinet ministers. The guidelines were also made public for the first time. The application of the guidelines to spouses proved very controversial at the time and in 1980 the Trudeau government removed the applicability of the conflict-of-interest guidelines to spouses.

In 1983-84, in response to a much-publicized conflict-of-interest allegation another federal task force on ethical conduct was created, jointly chaired by Michael Starr and Mitchell Sharp. This report was one of the most comprehensive attempts at documenting a conflict-of-interest definition of its time. The report clearly stated that conflict-of-interest rules are intended to promote impartial decision-making and equality of treatment. This task force also envisaged a legislative code of ethical conduct applicable to practically all public office-holders, not just ministers. The proposed statute envisioned in the report would also create an office of public sector ethics to aid in enforcing and interpreting the code.

This report was not acted upon. The Mulroney government at the time chose instead to issue another set of conflict-of-interest guidelines which were in the form of guidelines for cabinet ministers only.

Both these Trudeau and Mulroney guidelines contained detailed rules concerning the handling of assets in order to prevent personal profit from public office and the granting of special favours to friends and associates. Neither contained, however, a definitive definition of "conflict of interest."

In response to numerous, highly public conflict-of-interest allegations in 1986 and 1987, the Mulroney government tightened up the rules surrounding blind trusts and required spouses and dependent children to again disclose their assets to the appropriate federal officer.

Since its election in 1993, the current Liberal government appears to have been moving towards the development of a comprehensive code of conduct for ministers, MPs and senators. A new ethics counsellor, Howard Wilson, replaced the ADRG office in 1994. He helped to develop a revised conflict-of-interest code for public officials which has been in effect since June 1994.

The provinces in many respects have followed a parallel course to what has been happening at the federal level. The first province to come up with legislated conflict-of-interest guidelines was Newfoundland and Labrador. In 1973 they passed an act which left enforcement duties under the control of the provincial Auditor General. That was recently changed recently and these enforcement duties were transferred to the Chief Electoral Officer of the province of Newfoundland and Labrador.

Two other provinces, notably New Brunswick in 1978 and Nova Scotia in 1987, passed conflict-of-interest legislation which became enforceable by a designated judge. In two other provinces, Manitoba in 1983 and Prince Edward Island in 1986, the respective Clerks of the Legislative Assembly were responsible for enforcement.

Conflict-of-interest legislation was further enacted in Ontario in 1987, British Columbia in 1990, Alberta in 1991 and Saskatchewan in 1994. In these four provinces the appropriate legislation is enforced by an independent conflict-of-interest commissioner or an ethics counsellor.

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Herb Dickieson: (Prince Edward Island). Many times the identification of a potential conflict of interest will come from another member of the Legislature. I wonder what should be the burden of proof placed on the person

who is making the accusation of conflict of interest? What standard should be set for that?

Presently on Prince Edward Island the investigation and review take place by members of the Legislature. What seemed to happen is that you have the lining up of forces. On one side are those with the party of the person who is being accused. On the other, people from the other parties. Possibly a more independent commissioner or someone like that might be better, more objective in terms of determining conflict of interest. Is that the way it exists in other provinces?

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Sue Olsen: (Alberta) I do not think we should have conflict-of-interest legislation that is so onerous we cannot live by it. We had an eminent persons panel review conflict-of-interest legislation in our province and in other provinces. They came up with 26 recommendations, some of which the government side has accepted. The one I do feel they should accept and would like to see accepted is the apparent conflict of interest. I think that allows us to be a little more vigilant with our own responsibilities and what we have to do. We have many instances where it may appear that there is something there or the public may view us as having done something that's inappropriate. I think the use of the word "apparent" allows us to be even more vigilant than we are.

Currently, we have a very simple issue, where I have written to a minister who gave the president of her constituency association a contract with Travel Alberta. There may be nothing wrong with that, but I have written and asked for an outline of the terms of that contract and how that contract came to be, because it is highly suspicious. It raises flags for me and for the public. For us to be seen doing an unbiased job, it would be prudent to make public now that we know what that particular contract tendered, the terms of the contract, those kinds of things. There may not be an issue, but those are things the public looks at.

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Gary Lunn, MP: My concern federally with the ethics commissioner or conflict commissioner is that it is a prime ministerial appointment. First, I think the people who have been appointed have been doing a great job, but I am curious to know what it is like in the provinces that have undertaken to have a commissioner or an adviser. Second, I believe there needs to be some process where all parties are involved in these appointments to ensure that there is complete transparency and to ensure in the public's eyes that there is complete neutrality. That is a concern I have had raised by my constituents.

We do have very credible people who are appointed, but so often in the public's eye, because it is a government appointment and even as you say — I believe there needs to be an all-party committee with a veto, so it is approved unanimously by all parties. I have had these concerns come from my constituents in Saanich-Gulf Islands.

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Speaker Ken Kowalski: (Alberta) In Alberta, an all-party committee of the Alberta Legislative Assembly undertakes a publicly advertised process to choose the ethics commissioner. It has members of all parties of the House. It is an independent committee. It reports back to the Legislative Assembly which endorses the nominee and the contract is signed by the Speaker. The person selected as the first-ever ethics commissioner in the province of Alberta is a former leader of an opposition party in the Legislative Assembly.

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Debby Carlson: (Alberta) While it is an all-party committee that selects the person and it is a national competition, once again we're dealing with the appearance of conflict here because we do not have a majority or even representation on the committee. I think the issue for debate here is, how do you get fair representation that not only satisfies all members in the Legislature but also the public?

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Ed Picco: (Northwest Territories) Policing your own is very difficult in any walk of life, and that includes politics. For example, in the Northwest Territories, in the breakwater project in my riding, where there is a limited number of contracts, I knew the scope of the project and the budget amounts before being approved in the budget. It would have been very easy for me to call a supposed blind trust partner and say, "Bring in an extra T-7 and bid X number of dollars on said project."

Also, in the Northwest Territories the conflict-of-interest filings are done by each member with an honour system. I guess that is to say that they're not being checked by a third party or an independent person. The reality is that the public at large has so much current cynicism towards politicians that not only do you have to be perceived to be clear of conflict but you also have to demonstrate it on an almost daily basis.

Allegations of conflict could be made, for example, in the Northwest Territories by anyone in the general public at large, and that could end up having X number of complaints of conflict, causing the government to be impeded in its legislative agenda. Also, since we have no

party politics, a complaint becomes non-partisan, so it is not a Conservative against a Liberal, as an example. But it can become personally based.

The optimum would be to find legislation that is not onerous enough to stop government from doing its job but is officious enough to carry on the mandate required of disclosure to the public at large so it allows the public trust to be fulfilled without hamstringing the government. I say this in all seriousness when we look at the approach being brought forward in legislation and what has been written about in the public at large over the last couple of years. For example, John Crosbie in his recent biography talks about the implementation of the blind trust policy in the federal government, which he said matter of factly did not work because the blind trust of course is only blind to the person who cannot see it, not necessarily to the person involved in it.

As politicians, we are trusted with guarding the public purse. Indeed, my friends and fellow politicians, the cynicism out there suggests in a political way that sometimes the position we are in puts us in a conflict. In our jurisdiction, that conflict is quite prevalent because of our small population number and the number of contractors that can do public work and public contracts.

When you bring up an idea or a subject like this as politicians, it can be very touchy. The reality is that unless you have an alternative solution to the problem, it is hard to debate it. I do not have a solution to the problem of how you would disclose without a third party to investigate the claims being made. When I file my conflict-of-interest guidelines and I say that my wife is holding X number of shares in a corporation in which I have a fiduciary interest, there is in actuality no one to check that. It is on an honour basis.

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Conrad Santos (Manitoba): I have to ask two interrelated questions. If conflict-of-interest rules involve the delicate balancing of the public's right to know, as is stated in the paper, and the legislators' right to privacy on the other hand, are the citizens who are the beneficiaries of all these trustees entitled to know both the basic philosophical premises of our decisions as well as the factual basis of our decisions, in an open way? That's the first question.

The second question: If citizens are so entitled, should we or should we not study and adopt the Swedish Constitution and practice of having everything open, every government decision and information open to the citizens, voters and taxpayers, including cabinet decisions, unless it can be justified by specific official secrecy legislation, subject to the circumscribed instances such as national security or common trade secrets protection?

Who will guard the guardians? I think we should divest ourselves of all interests. This might be extreme. During the tenure of office we cannot own any property, tangible or intangible. Then we should be pensioned off for life.

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Dan D'Autremont (Saskatchewan): We in Saskatchewan have an ongoing battle every year with the conflict-of-interest commissioner because of the complexity of the forms and the time it takes to fill them out. It seems that every year we have to go back and reinvent the wheel and fill out all the same forms again. It really makes you wonder whether this exercise has to be carried out in such complexity every year. Why cannot you simply indicate any changes after the first year?

When you look at the forms, how personal should they be? Do you have to indicate to the last cent how much money you have in your bank account, or how much money you may or may not have charged up on your credit cards? That is what our forms call for. I think there is a need to make these forms and these requests practical. The fact that I may have $1.97 in a bank account is not really going to influence my voting on any piece of legislation dealing with any of the five major banks.

These forms have to be done in a practical manner and in a manner that allows the members to participate in a fairly simple area. Quite a number of people have to hire accountants to deal with these forms. In a lot of cases, our conflict-of-interest form takes longer to fill out than does your income tax. It makes you wonder whether perhaps we have gone too far in the actual practical forms that we were dealing with.

The member from the Northwest Territories brought forward some interesting questions, some of the things that have been bothering me. Just where is that conflict-of-interest line? I am a farmer. Does that mean I have to abstain from all discussions and all votes dealing with agricultural issues in the province of Saskatchewan? Agriculture is the number one industry in Saskatchewan. Am I to abstain from ever discussing or voting on the issue that is of prime importance not only to my constituents but to the province as a whole? I think not. I think the expertise, whatever that might be, that I can bring to that discussion is totally relevant to the debate in the House.

There are between 60,000 and 90,000 farmers in Saskatchewan. If a piece of legislation is being brought forward that particularly points me out as a beneficiary, I certainly should step aside and it would be a conflict if I did not. But how do I direct a government program that affects 60,000 to 90,000 and benefit to a greater extent than all the other farmers do? I guess that is where you

draw the line: Do you benefit equally as the large number of others involved in the same industry?

Should teachers be excluded from voting or debating any item dealing with education? I think not. I do, though, perhaps have some questions when it comes to lawyers and loopholes.

It is important that we keep the conflict of interest as simple as possible to encourage willing participation. In Saskatchewan we have a third-party conflict-of-interest commissioner who was chosen after a process involving both of the opposition parties as well as the government. While it does not spell out in the legislation that it has to be by unanimous consent, I believe that at the end of the day it was.

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John Ningark (Northwest Territories): My question has more to do with a person who is deemed to have broken the code of ethics. I believe there are times as politicians when we have to follow public opinion, and other times you have to take your own judgement to make decisions. We are asked to make decisions at times in the House regarding what to do with a person who is deemed to have broken the law. What is the right thing to do? I would like to know from my colleagues, what is the right thing to do: ask the person in question to step down from the office or remain in the office without the portfolio? Or do we as politicians, who are elected to make decisions on behalf of the public, decide what to do with that person who is deemed to have broken the law?

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David Chomiak (Manitoba): When I studied at law school, I was struck by how often our professors would say, "When you are not clear what a statute indicates ask, what was the intention of the legislator." I often look around at my colleagues during caucus and say, "What is our intention here?" and they all look at me with bedeviled looks.

What is our intention with conflict-of-interest legislation and conflict-of-interest guidelines? In fact, that is the issue. Our intention is to somehow demonstrate to the public that we are no better and no worse and we are making the appropriate ethical decisions based on decisions they are making.

While we were having this discussion, I looked through the Manitoba guidelines, which are very stringent and which include disclosure. It is very interesting. I looked through the definition of "gift." I am quickly adding up that boat ride that was laid on yesterday, this afternoon's lunch and some of the other things. It probably would come to a value of over $250, which would mean I probably would have to disclose this based on the definition of "gift" in the Manitoba guidelines. That is part of the dilemma one falls into when one statutorily delineates what conflict of interest is, never mind a definition of what is apparent conflict of interest, which I think deals with the ethical issues and which is something we have to deal with on an individual basis.

Aside from the issue of what our intention is in dealing with conflict of interest, I think we should not lose sight of the fact that conflict-of-interest legislation is designed for disclosure. I think that deals with the issue of agriculture in Saskatchewan. The fact is, we were elected and we were required to disclose what our assets and our income are. For better or for worse, in most cases most of our electors do not know that, but we are forced to file public documents which indicate where our interests are and where they lie, and a judgement can be made based on our disclosures as to how and whether we were voting appropriately.

In dealing with conflict of interest, we must not forget the issue of disclosure, which is mandated in most legislation, that really does go a long way towards providing the public and the electorate with an idea of where we are coming from and where we are going. Disclosure should not be overlooked in terms of this discussion.

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Speaker John McKay (New Brunswick):. On the issue of the conflict of interest, we may be somewhat missing the point here. I do not think that disclosure is in itself a remedy for conflict of interest. We have some people who would not care if the whole world knew they were into the till, as long as they did not have to go to jail for it.

I think the issue here is what to do with people who are in a definite position to enhance their pocketbook as a result of their decisions, whether it is the Premier of the province or a civil servant who has access to key, sensitive, confidential information which he can use to his advantage, not necessarily while in government but when he gets out of government.

What kind of legislation do you have in place that deals with the politician who lays up treasures in heaven in anticipation of the day when he is going to get out of office and reap the benefits? We do not have any control over that in New Brunswick right now but we have to address that issue because it is a real issue. When you are in a position to enhance the prospects of certain companies and then after you are out of office they reward you by placing you on various boards of directors as appreciation for your help while you were in office, what legislation is there in place to deal with that? I think this is the issue.

We do not have this issue resolved in New Brunswick right now. We are going to deal with it. It is being re-

ferred by the Legislature to the Legislative Assembly committee, and we are very interested in what is being discussed here. But I think the nuts and bolts of this is, how do you get control of people who have a direct influence on decisions that can benefit them personally?

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Beth MacKenzie (Prince Edward Island). In 1990-96 I was employed as a registered nurse in the Queens region. I ran for office in November 1996 and was successful. It took about a year after being elected before I felt I had time and had got caught up and would like to do some on-call work. I contacted my manager.

My nurse's contract only allowed a nurse to take a leave of absence for a term of public office; that's how I was able to maintain my job for me to return to at the QEH. But now that I'm on a leave of absence, I'm not entitled to work at the Queen Elizabeth Hospital because I'm on this leave of absence. I cannot go in and do a night shift. I cannot do any on-call work. At the last minute, at 10 o'clock at night if they need someone for a night shift and they cannot reach them, if I were available to come in, I cannot be employed because I'm on a leave of absence.

The director of human resources for the Queens region even went to the Deputy Minister of Health and Social Services for direction. The deputy minister felt that I was in conflict of interest by the guidelines of our province, the fact that public perception might feel I was using my position to pick up extra work, and therefore I should think very long before I started to attempt to go back and do any nursing shifts. I can do private work or I can go to a nursing home outside of the Queens region where I live.

I feel the conflict of interest has affected me personally. Our salaries on Prince Edward Island are paid — it is looked at as a part-time job. I work more than part-time, and if you are able to pick up an additional shift, it is a little bit of extra income. Given the fact that the door has been closed, I find it very difficult to encourage other nurses to come into politics with the threat of losing your education.

As an RN, in a five-year period you must work 100 shifts. If I should decide to run for a second term in office, I will not have had my 100 shifts in as an RN, so therefore my education is obsolete. I really have given up quite a bit to come into public office, and as time goes on we will have to face a few battles and see if we can get some new directions.

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Gary Severtson (Alberta): I have some concern that maybe we are going too far if we want to limit who can sit in our legislatures and the House of Commons. I think democracy requires having all walks of life represented. Whether you own property or are a nurse or whatever, you should be able to come to the Legislature with no fear of losing the ability to earn money afterwards. I think we have to be careful that we do not go too far.

Then when we go on to perceived or apparent conflict of interest, if we went around the room, it would vary how apparent conflict of interest is perceived. It is in the eye of the beholder, and I think we have to be really careful when we get into this.

I just hope that everybody would think when we bring something up to the commission on conflict that it is real and not work for political gain, because in the end I think we bring ourselves all down by accusing conflict of interest if it is just to get political points. I think all sides are guilty of that.

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Sue Barnes, MP: I find the office of the ethics counsellor very useful to use on a confidential basis. I have no knowledge, actually, whether that is a totally confidential service. For instance, if something came up and somebody wanted access to the notes of the ethics counsellor, I do not know if those are privileged notes; it is not a solicitor-client relationship, that I'm aware of.

I was a parliamentary secretary, so every once in a while I would want to do something for a constituent but I did not know if I could do it. Whether it was a constituent who wanted me to write to a commission or a board or something or if we had a municipal election and I wanted to do something actively for someone. I used the commission like my own personal shield or defence, because the ethics counsellor never gave you anything verbally. You might discuss it verbally, but it always came back as advice in writing that you signed for.

The other thing I want to say is that a couple of years ago I had occasion to chair a committee on corruption in government for the Inter-Parliamentary Union in Romania. We were talking about corruption. One of the things, especially in developing world countries, is it was not so much the disclosure of assets on your way in, but disclosure of assets on your way out that was the primary consideration, because really the intent is to not personally gain by way of your office.

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Speaker Glenn Hagel (Saskatchewan): We are inclined at times to forget that the conflict-of-interest commissioner can provide very important political insurance for ourselves. We are inclined when talking about this to focus on the nuisance and our feelings about intrusion into our privacy, but it should also be noted that the other side

of the coin is that it can be the conflict-of-interest commissioner who provides us the protection against unfair accusations about conflict of interest.

Wise indeed is the member who, when anticipating being accused of something, heads it off by getting to the conflict-of-interest commissioner first and asking for a private written ruling on something you anticipate may be coming down the pike. As we know in this modern day and age, where public officials are accused of being in conflict of interest, the public judge us to be guilty until proven innocent. Often it is just the passage of time by which it becomes clear later on that a member was not in a conflict of interest, but the accusation itself was enough to kill their political reputation. We should be seeing the conflict-of-interest commissioner as somebody we can go to in advance to provide ourselves with political insurance.

I will just give one very quick example in my own constituency. I was involved in supporting the development of a local project that ended up having some provincial government investment that was part of making it fly. When they got to selling shares in it, they came around and asked whether I'd like to buy shares. I would have liked to but I was cautious about conflict of interest, so I went to the conflict-of-interest commissioner and said, "Can I?" He said, "Of course you can, but if you do, if you act on behalf of that interest with the provincial government, you are now in conflict of interest because you are acting in your own interest." I went back to the board of directors and said: "I can buy shares, but if I do, I cannot lobby on your behalf to the provincial government any more. Do you want me to buy shares?" They said, "For heaven's sake, no." So it left me in a very comfortable political position in my own constituency. Without the advice of the conflict-of-interest commissioner, I really would have been a loser one way or another.