MEMBERS' CONFLICT OF INTEREST ACT

Recommendations for Amendments

Submission to the Standing Committee on Parliamentary Reform, Ethical Conduct, Standing Orders and Private Bills

Office of the Conflict of Interest Commissioner

July 30, 2012

Contents

Overview

In my previous submissions to the Committee, I presented an overview of the issues, topics and trends in British Columbia and across the country and identified several key areas where the *Members' Conflict of Interest Act* could be revised. I included a great deal of comparative background material and supporting documentation for the committee's reference.

This document contains our recommendations for amendments to the *Act*. In some instances I have recommended specific wording, but in most others I have outlined the key features that I believe should be included in a particular topic area (e.g. post-employment). Our Office is prepared to participate in the drafting process with legislative counsel on any proposed amendments, if requested.

I hope that the Committee will find these recommendations useful and of assistance in informing your discussions. Thank you for the opportunity to engage on these very important issues.

PART 1 – SCOPE OF THE ACT

1. Ethics and Integrity

Recommendation:

That an ethics and integrity dimension be formally recorded in the *Act,* so that it will be reframed to extend beyond pure "conflict of interest" issues. The *Act* should be amended as follows:

- Articulate the ethical standards which members are expected to meet in an enforceable provision;
- Add a purpose clause that affirms members' commitment to integrity and ethical conduct;
- Rename the *Act* to reflect the enhanced focus on ethics and integrity; and
- Change the Commissioner's title accordingly (e.g. *Members' Ethics and Conflict of Interest Act/*Ethics and Conflict of Interest Commissioner)

Most jurisdictions in Canada now include members' integrity and ethical behavior in some manner or another in their legislation. British Columbia is one of the few jurisdictions which does not. This is an opportune moment for British Columbia to keep pace with current developments and indeed, move into the forefront in responsible governance.

As it stands, there is no recourse when a member's conduct is ethically questionable but does not breach an existing provision in the *Act*. As noted by former Commissioner Ted Hughes, "conflict of interest is a matter of ethics, but not all matters of ethics relate to conflict of interest".[1] This gap should be bridged, so that the commissioner is able to respond in the event that matters beyond pure conflict of interest concerns arise. Although such situations are likely to be rare, it does not serve the public interest if the commissioner and the Legislative Assembly are unable to respond appropriately when they *do* arise.

[1] Annual Report 1995-96 at p. 8.

An enforceable provision, such as the following, based on section 75 of the Northwest Territories *Legislative Assembly and Executive Council Act*, would close this gap:

> **Obligations of members**
>
> **x.** Each member shall
>
> (a) perform his or her duties of office with honesty and arrange his or her private affairs in such a way as to maintain and enhance public confidence and trust in the integrity and ethical conduct of the member;
>
> (b) arrange his or her private affairs and act generally to prevent any conflict of interest from arising; and
>
> (c) make all reasonable efforts to resolve any conflict of interest that may arise in favour of the public interest.

A recent decision from the Northwest Territories illustrates that such provisions can be interpreted in a reasonable and practical manner. In the 2009 Roland decision[2], the Conflict of Interest Commissioner for the Northwest Territories considered whether the Premier had violated s. 75(a) of the *Legislative Assembly and Executive Council Act* (comparable to paragraph (a), above). The Premier had commenced an intimate relationship with the Principal Clerk of Committees, whose role included coordinating activities for all Committees of the Legislative Assembly and attending public and *in camera* meetings of those Committees. The issue under consideration was <u>not</u> the relationship itself, but rather whether the Premier violated s. 75(a) by failing to advise the Legislative Assembly of the relationship in a timely manner, given that confidential information relating to the Premier was discussed by Committees during the period when the relationship was unknown to the Committee members.

Conflict of Interest Commissioner Gerald Gerrand offered this interpretation of s. 75(a):

> I have concluded that the mischief which section 75(a) seeks to avoid is not limited to improper financial manipulations, but includes conduct of an ethical nature if that conduct impairs the public confidence and trust in the integrity, objectivity or impartiality of the member….<u>The Act is not intended as a code for moral conduct</u>. In my view, <u>there must be a nexus between the conduct in question and the Member's obligations to the Legislative Assembly and its proper functioning</u>. (at pp. 9-10; emphasis added)

I respectfully agree with these comments.

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[2]Gerald Gerrand, Q.C., Conflict of Interest Commissioner for the Northwest Territories, Report Respecting Alleged Breach by Premier Floyd Roland of Section 75 of the *Legislative Assembly and Executive Council Act*, February 16, 2009. Available online at http://www.assembly.gov.nt.ca/_live/documents/content/09-04-15%20COIC%20Report.pdf

Purpose clauses in legislation dealing with conduct serve a useful function by expressing shared values as well as providing context for interpretation. The association of elected officials with ethics and integrity rather than "conflict of interest" also has a positive benefit. However, the practical impact of such statements is greatly diminished without some kind of enforcement mechanism and a way to hold members accountable.

Accordingly, in my view the *Act* should be amended to include a purpose clause as well as a substantive ethics provision. The following example of a purpose clause is provided for the Committee's consideration:

Purpose

x. The purpose of this Act is to

(a) maintain and enhance public confidence and trust in the integrity and ethical conduct of members; and

(b) demonstrate that members are held to standards of integrity and ethical conduct that place the public interest ahead of their private interests and provide a transparent system by which the public may judge this to be the case.

It follows that the name of the *Act* and the commissioner's title should similarly be updated to reflect the more positive focus on ethics and integrity generally. One option is to rename the *Act* the *Members' Ethics and Conflict of Interest Act,* and correspondingly, designate the commissioner as the "Ethics and Conflict of Interest Commissioner".

In conclusion, it is important for members of the Legislative Assembly not only to articulate standards of conduct, but to have a mechanism to hold members accountable to those standards. The recommended changes would enhance the ethical dimensions of the *Act* and reaffirm members' ongoing commitment to serve the public honourably. The proposed changes to the *Act* are sufficiently clear to "permit those who are being regulated to know with certainty what they are and are not allowed to do".[3]

[3] See 1999 Report of this Committee, at pp. 21-22.

2. Plenary Jurisdiction

Recommendation

That the *Act* **not** be amended to allow the commissioner the ability to investigate potential contraventions of the *Act* on his or her own initiative.

The current *Act* is a request driven process, which is initiated by either members, members of the public, the Legislative Assembly or the Executive Council. In the majority of jurisdictions in Canada, commissioners may also initiate an investigation if they have reason to believe that a member has contravened the *Act*. However, I do not believe that this additional capacity is necessary in British Columbia for the following reasons.

A significant difference between our province and most other jurisdictions (Alberta, New Brunswick, Nunavut and NWT are the exceptions) is that in British Columbia, members of the public can and do request the commissioner's opinion on members' compliance with the *Act*. Accordingly, this makes it more likely that issues are brought to our attention. I have no reason to believe, given our concerned citizenry and active media, that legitimate questions of members' compliance with the *Act* are not being brought to the commissioner's attention through the existing access provisions of the *Act.*

More importantly, I believe that it is preferable for the commissioner's advisory and investigative roles to remain separate and distinct. In my opinion one of the reasons there have been so few formal Inquiries conducted under the *Act* is due to the long-standing focus of the Office on awareness and prevention. Members are generally comfortable consulting freely with the commissioner, in large part because they can rely on the absolute confidentiality of these discussions. This level of confidence might be somewhat diminished if members feel there is a danger that the commissioner could be seen to be wearing both "hats" at the same time.

3. Potential Application of the *Act* to Unelected "Public Office Holders"

Recommendation

That the Committee consider whether the *Act* should be amended to include jurisdiction over unelected "public office holders".

Because senior officials, such as Deputy Ministers and ministerial advisers, are privy to confidential information and may potentially exert influence over policy decisions and legislative initiatives, other jurisdictions have chosen to make them subject to similar rules and oversight as members and ministers. The range of officials covered by conflict of interest/ethics legislation varies greatly across the country, as described in our submission to the Committee of May 2, 2012 (see pages 10 to 13 of the presentation).

The federal legislation is the most comprehensive in the country and contains extensive rules applicable to a very broad range of unelected individuals, who are conveniently referred to as "Public Office Holders". They include deputy ministers, members of ministerial staff, and ministerial advisers, who are subject to a form of conflict of interest reporting rules, disclosure requirements and post-employment restrictions.

As this Committee has heard, in British Columbia all persons and organizations covered by the *Public Service Act* are subject to "Standards of Conduct" as a condition of employment. Currently the "Policy Statement" that accompanies the Standards describes Conflicts of Interest and the surrounding process as follows:

> A conflict of interest occurs when an employee's private affairs or financial interests are in conflict, or could result in a perception of conflict, with the employee's duties or responsibilities in such a way that:
>
> - the employee's ability to act in the public interest could be impaired; or
> - the employee's actions or conduct could undermine or compromise:
>   - the public's confidence in the employee's ability to discharge work responsibilities; or
>   - the trust that the public places in the BC Public Service.
>
> While the government recognizes the right of BC Public Service employees to be involved in activities as citizens of the community, conflict must not exist between employee's private interests and the discharge of their BC Public Service duties. Upon appointment to the BC Public Service, employees must arrange their private affairs in a manner that will prevent conflicts of interest, or the perception of conflicts of interest, from arising.

> Employees who find themselves in an actual, perceived, or potential conflict of interest must disclose the matter to their supervisor, manager, or ethics advisor.

The existing and/or contractual arrangements that exist between the government and ministerial assistants and advisors in British Columbia who are not covered by these Standards of Conduct are unknown to our Office.

In the rest of Canada, only Alberta, Manitoba and Ontario have some conflict of interest rules and restrictions covering ministerial staff. They are described in pages 10 to 13 of our May 2 submission and are very modest in comparison with the federal legislation. While Alberta and Ontario have provisions that relate to ministers and political staff, it is significant that only Manitoba has provisions that relate to "senior public servants" such as deputy and assistant deputy ministers.

Expanding the reach of our *Act* to include senior public servants and/or unelected persons has important public policy implications. We have not thought it appropriate for our Office to initiate consultation with those who would be affected.

I can, however, advise the Committee that our Office's existing practices and procedures could accommodate an expansion of our mandate to include disclosure and rules affecting senior government public servants and ministerial assistants.

4. Municipal Officials

Recommendation

That the *Act* **not** be amended to include jurisdiction over municipal officials.

The issue of whether municipal officials should be covered by the *Act* has been raised in several written and oral submissions before the Committee. The issue has also been raised several times over the last 21 years, by former Commissioners and the Union of British Columbia Municipalities (UBCM).

Having reviewed all of the materials that document the opposing views that have been expressed over the years, I am satisfied that for both principled and practical reasons, the *Act* should not be amended to include jurisdiction over municipal officials.

The existing conflict of interest provisions in the *Community Charter* are comprehensive and, so far as I can tell, adequate. The UBCM has made it very clear in their policy papers that it is difficult to apply the *Act* to local governments because the context is inappropriate.[4]

[4] See for example "Recommendations for Reform of B.C. Local Government Conflict of Interest Legislation: Policy Paper" (1996) Available online at

There are several thousand locally elected and appointed council and board members throughout the province. Of course, the size of the different cities and municipalities various enormously. The issues they face are disparate and need to be assessed with a genuine knowledge of location conditions and circumstances in mind. It is not unreasonable to expect that in the number of requests for opinions on particular conflict of interest issues in the course of a year would be enormous and well beyond the capacity of our office to process and respond to without a very significant increase in staff and resources. Even then, I am not convinced that from a central location we could deliver our services in a timely and effective fashion.

5. Post Employment Matters (s. 8)

Recommendation

That the *Act* be amended to include binding post-employment rules.

The current post-employment rules are out of date and should be updated to meet modern standards and realities. Rather than suggest specific wording, I have set out the features that I believe should be incorporated into the *Act* in some fashion.

1. Applicability

Post-employment rules should continue to apply, at a minimum, to Ministers and former Ministers. The Committee should consider whether the rules should continue to apply to Parliamentary Secretaries.

If the *Act* is extended to cover other public office holders (see Topic 3, above) those individuals should also be subject to post-employment rules. For simplicity, the following recommendations will refer to "public office holders" rather than repeating "Minister, former Minister, Parliamentary Secretary, former Parliamentary Secretary" etc.

The current "cooling-off" period should remain at two years for Ministers. A shorter period may be appropriate for parliamentary secretaries or other public office holders.

2. Restrictions

The rules should contain restrictions against former public office holders' post-employment activities with persons or entities with whom they have had "significant official dealings". This term should be defined, for example as is in s. 30(5) of Newfoundland's *House of Assembly Act,* as "substantial involvement over a period of time of the former minister personally".

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http://www.ubcm.ca/assets/Library/Policy~Topics/Policy~Papers/1996/Recommendations%20for%20Reform%20of%20Local%20Government%20Conflict%20of%20Interest%20Legislation%201996.pdf

Another option is to consider restrictions based on broadly worded principles, as in the United Kingdom. For example, in determining whether a proposed appointment is appropriate, consideration is given to whether the former Minister has been "in a position which could lay him or her open to the suggestion that the appointment was in some way a reward for past favours". Attached as a separate PDF document are the "Business Appointment Rules for Former Ministers" currently in force in the United Kingdom. They could be adapted for use in British Columbia by giving to the Commissioner the relevant powers that are vested in the Committee in the UK. [5]

3. Definition of "employment"

"Employment" should be defined as "any form of outside employment or business relationship involving the provision of services by the [public office holder, former public office etc.] as the case may be, including, but not limited to, services as an officer, director, employee, agent, lawyer, consultant, contractor, partner or trustee".

4. Early Disclosure

As disclosure provisions are meant to limit the prospect of public office holders seeking to ingratiate themselves with prospective employers, disclosure of the identities of entities with whom a public office holder is seeking, negotiating, or has been offered employment should be required (i.e. not just disclosure of "firm offers" of employment).

5. Mandatory Disclosure

Disclosure of post-employment activities should be mandatory and failure to disclose should be an offence.

Public office holders should be required to inform the commissioner about their planned departure from office and meet with the commissioner to review and acknowledge their understanding of their post-employment obligations. To facilitate this discussion, an exit interview should be required within 30 days (or other reasonable timeframe) of a public office holder leaving office. Application forms, similar to those used in the UK, could be developed to clarify the requirements and facilitate administration.[6]

Given the reality of mobility and the extent of the integrated global economy, post-employment provisions should extend to actions taken by former public office holders whether those actions occur in Canada or elsewhere.

[5] Also available online at http://acoba.independent.gov.uk/media/25664/business%20appointment%20rules%20for%20former%20ministers%202011%20-%20website.pdf

[6] Available online at http://acoba.independent.gov.uk/former_ministers/rules_and_guidance_ministers.aspx

6. Monitoring

A proactive rather than reactive model of monitoring compliance with post-employment rules should be adopted, similar to that which exists in the United Kingdom. The following features should be included:

- Public office holders must disclose to the commissioner the nature of any post-office employment prior to taking up that employment.
- Before commencing the employment, public office holders must receive advice from the commissioner on the appropriateness of the position with their post-employment obligations. In deciding whether and under what circumstances to take up this employment, they are expected to abide by the commissioner's advice.
- The commissioner should be permitted to disclose publicly the advice given to the current or former public office holder, if that person takes up the employment in question.
- The obligations on current and former public office holders to disclose the employment, obtain advice, disclose the advice, and abide by this advice should exist throughout the cooling-off period and should be triggered for each new employment.
- Current or former public office holders should be able to request that the commissioner reconsider prior advice given to take into account new facts or developments that the current or former public office holder believes should be before him or her.

PART 2 – GENERAL MATTERS

6. Private Interests (s. 2)

Recommendation

That the *Act* be amended to include a prohibition against a member improperly furthering the private interest of another person or entity.

It is clear that it is inappropriate for members to improperly further the private interests of others. Subsections 2(1) and (2) should be revised as follows :

Conflict of Interest

2(1) For the purposes of this Act, a member has a conflict of interest when the member exercises an official power or performs an official duty or function in the execution of his or her office and at the same time knows that in the performance of the duty or function or in the exercise of the power there is the opportunity to further his or her private interest **or to improperly further another person's or entity's private interest.**

(2) for the purposes of this Act, a member has an apparent conflict of interest if there is a reasonable perception, which a reasonably well informed person could properly have, that the member's ability to exercise an official power or perform an official duty must have been affected by his or her private interest **or those of another person or entity.**

7. Insider Information (s. 4)

Recommendation

That the *Act* be amended to include a prohibition against a member using and communicating insider information to improperly further the private interest of another person or entity.

British Columbia is one of the only jurisdictions in Canada that does not include a prohibition against a member using insider information to benefit someone other than themselves.

Section 4 should be amended as follows:

Current:

> **4** A member must not use information that is gained in the execution of his or her office and is not available to the general public to further or seek to further the member's private interest.

Recommended: [based on Canada]

> **4**(1) A member shall not use information obtained in his or her position as a member that is not available to the public to further the member's private interests or to improperly further another person's or entity's private interests.
>
> (2) A member shall not communicate information referred to in subsection (1) to another person if the member knows, or ought to know, that the information may be used to further the member's private interests or to improperly further another person's or entity's private interests.

8. Influence (s. 5)

Recommendation

That the *Act* be amended to include a prohibition against a member using his or her office to influence or attempt to influence a decision to improperly further the private interest of another person or entity.

Section 5 should be amended in a similar fashion to sections 2 and 4, as follows:

Current section:

> **5** A member must not use his or her office to seek to influence a decision, to be made by another person, to further the member's private interest.

Recommended:

> **5** When carrying out the duties of office, a member must not use his or her position to influence or attempt to influence another person's decision so as to further the member's private interests, or to improperly further another person's or entity's private interests.

9. Procedure on Conflict of Interest (s. 10)

Recommendation

That the *Act* be amended to include a prohibition against a member attempting to influence a matter that is the subject of a conflict of interest.

To clarify that the obligation of members to avoid a conflict of interest extends beyond their formal participation in the decision making process, s. 10(1) should be amended by adding paragraph (c) as set out below:

10 (1) A member who has reasonable grounds to believe that he or she has a conflict of interest in a matter that is before the Legislative Assembly or the Executive Council, or a committee of either of them, must, if present at a meeting considering the matter,

(a) disclose the general nature of the conflict of interest, and

(b) withdraw from the meeting without voting or participating in the consideration of the matter; and

(c) refrain at all times from attempting to influence the matter.

10. Evasion

Recommendation

That the *Act* be amended to include a provision prohibiting members from taking actions that are intended to evade or circumvent their obligations under the *Act*.

The purpose of including this amendment is to discourage the creation of "smoke and mirrors" activities intended to create a false or misleading appearance of compliance with the *Act*. Accordingly the following provision should be included in the *Act*:

x. A member must not take any action that has as its purpose the circumvention of his or her obligations under this Act.

11. Gifts and Benefits (s. 7)

Recommendation

That the gifts and benefits provisions of the *Act* be amended by:

- Adding a definition of "gift or personal benefit";
- Including family members in the prohibition; and
- Allowing 30 days for members to disclose receipt of fees, gifts or personal benefits.

The threshold for disclosing gifts ($250) should remain unchanged.

(a) Add definition

As the term "gift or personal benefit" is not defined in the *Act*, the following definition should be considered:

"gift or personal benefit" means

(a) an amount of money if there is no obligation to repay it; and
(b) hospitality, entertainment, service, property, including the use of property, that is provided without charge or at less than its commercial value

but does not include a gift or personal benefit

(c) received from a riding association or political party;
(d) received in the context of a purely private relationship; or
(e) that is of such a nature that it could not reasonably be regarded as likely to influence the member in the performance of the member's duties

For the Committee's consideration, additional exemptions and alternative wording is provided below, which could be part of the above definition or added as a new subsection to s. 7:

- food, lodging, transportation and entertainment provided by provincial, regional and local governments or political subdivisions of them, by the Federal government or by a foreign government within a foreign country, or by a conference, seminar or event organizer where the member is either speaking or attending in an official capacity;
- tokens exchanged as part of protocol;
- the normal presentation of gifts to persons participating in public functions;
- the normal exchange of gifts between friends

(b) Gifts and benefits given to member's family

Our Office has typically interpreted certain gifts or benefits given to a member's spouse or children as amounting to a gift given to the member indirectly. This should be made explicit by amending s. 7(1) as follows:

> **7**(1) A member **and his or her spouse and dependent children** must not accept a fee, gift or personal benefit, except compensation authorized by law, that is connected directly or indirectly with the performance of **the member's** duties of office.

(c) Timeframe to disclose receipt of gifts and benefits

In practice the Office has allowed 30 days for members to disclose any gifts and benefits received, given that immediate disclosure may not be possible or reasonable. Subsection 7(3) should be amended accordingly.

(d) Threshold for disclosing gifts and benefits

The threshold for disclosing gifts and benefits should remain at $250. This amount is within the range of most other jurisdictions in Canada and is an appropriate amount. [7]

12. Carrying on a Business or Profession – Maintaining Professional Qualifications (s. 9)

Recommendation

That the *Act* be amended so that activities required in order for a member of Executive Council to maintain his or her professional qualifications does not constitute "carrying on a business".

In order to avoid unnecessary damage to a member's professional standing, s. 9 should be amended as follows:

[7] Note that the federal Conflict of Interest and Ethics Commissioner recently recommended that the threshold for disclosure under the *Conflict of Interest Code for Members of the House of Commons* be lowered from $500 to $30. See the Commissioner's Submission to the Standing Committee on procedure and House Affairs (May 31, 2012) at p. 9. Available online at http://ciec-ccie.gc.ca/resources/Files/English/Public%20Reports/Five-Year%20Review%20Code.pdf

Current:

9(5) For the purposes of this section, the management of routine personal financial interests does not constitute carrying on a business.

Recommended:

9(5) For the purposes of this section,

(a) the management of routine personal financial interests does not constitute carrying on a business; and

(b) maintaining qualifications in a profession, trade, or occupation as required by the licensing body of that profession, trade, or occupation does not constitute carrying on a business or engaging in employment or in the practice of a profession.

PART 3 – DISCLOSURE MATTERS

13. Commissioner's Discretion – Consistency between the *Act* and Regulations

Recommendation

That the *Act* be amended to include wording which makes it clear that the commissioner has discretion to exclude certain assets, liabilities or financial interests (e.g. assets/liabilities under a certain threshold) from disclosure obligations.

Under s. 16(2) of the *Act*, the disclosure statement "must contain a statement of the nature of the assets, liabilities and financial interests of a member, the member's spouse and minor children, and private corporations controlled by any of them…"

In 2010, the disclosure forms which had been in use since 1998 were amended to be more up to date and user-friendly. One of the changes made was to exclude certain assets, liabilities and financial interests from disclosure, such as children's student loans. In early 2012, further amendments were made to the forms, primarily to provide greater clarity.

For greater consistency, the *Act* should be amended to expressly authorize the commissioner to exclude certain assets, liabilities and financial interests from disclosure requirements.

14. Manner of Disclosure (s. 16)

Recommendation

That the *Act* be amended to allow the commissioner to direct the manner of disclosure to allow for mandatory electronic filing.

Our Office is currently in the process of replacing the current paper-based disclosure system with an electronic one. Electronic filing should be mandatory so that the benefits of the new system can be maximized.

The wording of s. 16(1) of the *Act* should be amended, as indicated in bold, to give the commissioner explicit authority to direct the manner of disclosure:

16(1) Every member must, within 60 days of being elected, and after that annually, file with the commissioner a confidential disclosure statement in the form **and in the manner** prescribed by the regulations.

15. End of Term Declaration/Exit Disclosure Statement

Recommendation

That the *Act* be amended to include a requirement for members who resign from office before their term is over, as well as those who are not re-elected, to submit an end of term declaration or "exit" disclosure statement.

As the current disclosure provisions only apply to sitting members, members who resign before their term is completed or are not re-elected are not required to disclose their financial interests for the period between their last disclosure and the date they leave Office. Depending on the timing of a member's departure, their disclosure statement(s) could be several months out of date. An "exit" disclosure statement would ensure the transparency of members' financial interests for the entire time that they are elected officials.

This does not have to be an onerous process for members. For example, departing members could be required to simply sign a Declaration stating that they have reviewed their most recent Confidential Disclosure Statement and they confirm that it is still accurate; or if there are material changes that they have not reported, they must file a Statement of Material Change. Members should be required to submit either the Declaration or the Statement of Material Change within 60 days of leaving office. I further recommend that members' compliance with this requirement be publicly reported, perhaps as a notation on their most recent Public Disclosure Statement.

16. Online Access to Public Disclosure Statements (s. 17(3))

Recommendation

That the *Act* be amended to require public disclosure statements to be posted online.

Currently completed public disclosure statements are sent to the Clerk of the House, where they are available for public inspection. Online access would increase openness and transparency.

Current

17(3) The commissioner must, as soon as is practicable, file the public disclosure statement with the Clerk of the Legislative Assembly who must

(a) make the statement available to any person for inspection without charge and during normal business hours, and
(b) provide a copy of the statement on payment of a reasonable copying charge.

Recommended

17(3) The commissioner shall make the public disclosure statement readily accessible to the public by ensuring that the public disclosure statement is published on the Office of the Commissioner's website and by any other means that the commissioner considers appropriate.

PART 5 – INVESTIGATION AND INQUIRY MATTERS

17. Preliminary/Investigation Stage (s. 21)

Recommendation

That the *Act* be amended to include an option for the commissioner to conduct a preliminary review or investigation before proceeding to the inquiry stage.

The formal process contemplated by the *Act* is that the commissioner may conduct a formal "inquiry" with the power to order production of documentary records and to summons individuals to attend and have their evidence taken under oath. In the 20 years that the Office has been in existence, very few formal inquiries have been conducted. Typically, information is gathered informally by the commissioner. If the commissioner encounters difficulty in obtaining information or other circumstances warrant it, it may become necessary to conduct a formal inquiry. Section 21 should be revised as follows to allow for an investigation stage:

> **21**(1) On receiving a request under section 19, and on giving the member concerned reasonable notice, the commissioner may conduct **a preliminary review or investigation before deciding whether to conduct** an inquiry **under section 21**.

18. Confidentiality/Applicability of FOIPPA

Recommendation

That the *Act* be amended to include a section stipulating that information brought to the commissioner's office must remain confidential, and clarify the relationship between the *Act* and *FOIPPA*.

It is not clear under *Freedom of Information and Protection of Privacy Act (FOIPPA)* what the status of the Conflict of Interest Commissioner is and whether s/he is subject to *FOIPPA*. The Conflict of Interest Commissioner is designated under s. 14 of the *Act* as an Officer of the Legislative Assembly, and accordingly the records of the Office are protected by legislative privilege. However the commissioner is included in the list of Officers of the Legislature in Schedule 1 of *FOIPPA*. *FOIPPA* should be amended to rectify this discrepancy.

The *Act* should also be amended to include a provision similar to s. 29 of Ontario's Act:

x(1) Information disclosed to the Commissioner under this Act is confidential and shall not be disclosed to any person, except,

(a) by the member, or with his or her consent;
(b) in a criminal proceeding, as required by law; or
(c) otherwise in accordance with this Act.

(2) Subsection (1) prevails over the *Freedom of Information and Protection of Privacy Act,* [RSBC 1996] Chapter 165.

19. Release of Opinions to Members of the Public

Recommendation

That the *Act* be amended to clarify how, and under what conditions, opinions provided to members of the public will be released.

The *Act* is silent on how opinions requested by the public under s. 19(2) are to be released. The practice of the commissioner has been to treat requests from the public as confidential if the matter does not proceed past the preliminary stage. However, the person requesting the opinion is advised that if they make public reference to the opinion, the commissioner considers confidentiality to have been waived and reserves the right to post the opinion on the COI website in its entirety upon providing notice to both parties. The *Act* should be amended to reflect this practice.

20. Suspension of Inquiry

Recommendation

That the *Act* be amended to require the suspension of an investigation or inquiry in the event that the same matter is the subject of a criminal or other investigation.

In order to avoid compromising ongoing criminal or quasi-criminal investigations, and to safeguard the rights of the parties to a fair trial, the *Act* should require that the commissioner suspend an investigation/inquiry if the same matter is the subject of a criminal investigation.

A provision such as the following should be included in the *Act:*

x If the commissioner, when conducting either an investigation or inquiry under the Act, discovers that the subject matter is being investigated by police or that a charge has been laid, the commissioner shall suspend the investigation or inquiry until the police investigation or charge has been finally disposed of, and shall report the suspension to the Speaker.

21. Penalties (s. 22)

Recommendation

That the *Act* be amended to increase the maximum fine the commissioner can recommend from $5,000 to $20,000.

In my opinion, the possible imposition of a $5,000 fine for breaching the *Act* is not an appropriate ceiling for breaching the *Act*, and does not reflect the seriousness with which such egregious breaches should be viewed. A more appropriate maximum would be $20,000. That amount is the middle of the range of maximum penalties in other Canadian jurisdictions.

22. Protection of Commissioner (s. 23)

Recommendation

That the *Act* be amended to expand the scope of protection to former commissioners, current and former employees, and those who provide information to the commissioner.

Certain individuals other than the current commissioner should be included in the scope of protection provided under s. 23, as set out below:

Current

23 No action of any kind lies against the commissioner for anything he or she does under this Act.

Recommended

23(1) No action of any kind lies against the commissioner, any former commissioner or any other person who is or was employed or engaged by the Office of the Commissioner for anything done in good faith under this Act.

(2) No action of any kind lies against a person who in good faith provides information or gives evidence to the commissioner or to a person employed or engaged by the Office of the Commissioner.

23. Compellability

Recommendation

That the *Act* be amended to include a provision stipulating that the commissioner is not a compellable witness in civil proceedings.

To further protect the integrity of the commissioner's work, the *Act* should include the following provision:

x(1) The commissioner is neither competent nor compellable to:

(a) give evidence in any civil proceeding concerning any information that comes to the knowledge of the commissioner in the exercise of the powers, performance of the duties of carrying out of the functions of the commissioner pursuant to this Act; or

(b) produce any files, papers, information, reports, correspondence or other documents relating to the business or activities of the commissioner.

(2) Subsection (1) applies, with any necessary modifications, to any former commissioner and current or former staff of the commissioner.

24. Legal Fees/Costs

Recommendation

That the *Act* be amended to allow the commissioner to recommend that a person who was the subject of an investigation or inquiry under the *Act* be reimbursed in an amount approved by the commissioner for his or her legal costs in respect of such investigation or inquiry.

Given that an Inquiry under the *Act* is likely to result in the member having to retain legal counsel, the following provision should be included in the *Act*:

x(1) Where the commissioner considers it appropriate in the circumstances, he or she may recommend that the member be reimbursed out of the consolidated revenue fund, in an amount approved by the commissioner, for his or her legal expenses incurred in respect of an investigation or Inquiry.

25. Investigations/Inquiries Concerning Former Members

Recommendation

That the *Act* be amended to allow the commissioner to continue an investigation or inquiry after a member ceases to be a member, and to commence an investigation or Inquiry of a former member within one year of the member leaving office.

(a) Ability to continue an investigation/inquiry after a member ceases to hold Office

In the case of continuing an investigation or inquiry, it is in the public interest that a member not be able to "resign out" of his or her accountability. It is also in the former member's interest to have an opportunity to be exonerated. The *Act* should be amended so that the commissioner may continue an investigation or inquiry after a member has ceased to hold Office, *if* either the complainant or the member requests its continuance.

(b) Ability to commence an investigation after a member ceases to hold Office

Similarly, the Committee may wish to consider whether it is in the public interest to commence an examination into the conduct of a former member, if allegations only come to light after the member leaves office. Again, the rationale is that members should not be able to avoid accountability by simply resigning or being defeated in an election before an investigation takes place. However it would be reasonable to impose a time limit of one year (or other appropriate time period) for allegations to be brought forward.

PART 6 – MISCELLANEOUS

26. Definitions

Recommendation

The following definitions should be added to the *Act:*

- Dependent child
- Gift or personal benefit

and the following definitions revised:

- Private interest
- Private corporation

"dependent child" means a child of a member or his or her spouse who has not reached the age of 18 years or who has reached that age but is primarily dependent on the member or the member's spouse for financial support;

"gift or personal benefit" – see page 13

Current**:**

"private interest" does not include an interest in a decision that

(a) applies to the general public,
(b) affects a member as one of a broad class of electors, or
(c) concerns the remuneration or benefits of a member or of an officer or employee of the Legislative Assembly;

Recommended:

"private interest" includes any pecuniary or non-pecuniary interest that directly or indirectly confers a real and tangible personal benefit on a person, regardless of whether the benefit is conferred before or after a decision, but does not include an interest in a decision that

(a) applies to the general public,
(b) affects a member as one of a broad class of persons**,**
(c) concerns the remuneration or benefits of a member or of an officer or employee of the Legislative Assembly, or
(d) where the interest is so insignificant in its nature that a decision affecting the interest cannot reasonably be regarded as likely to influence the member.

Current:

"private corporation" means a corporation, all of whose issued and outstanding securities are subject to restrictions on transfer and are beneficially owned directly or indirectly by more than 50 persons;

Recommended:

"private corporation" means a corporation none of whose shares are publicly traded securities.

27. Terms, Appointment and Reappointment of the Commissioner (s. 14)

The following recommendations are intended to update the provisions relating to the terms, appointment and reappointment of the commissioner.

a. Appointment process

> ***Recommendation***
>
> That the *Act* be amended to require that the appointment of the commissioner require the unanimous recommendation of the Special Committee to Appoint a Conflict of Interest Commissioner (rather than a majority committee decision), followed by the existing requirement of ratification by two-thirds of the Legislative Assembly.

The following sub-section should be added to section 14:

> **14**(x) The Legislative Assembly must not recommend a person to be appointed commissioner unless a special committee of the Legislative Assembly has unanimously recommended to the Legislative Assembly that the person be appointed.

b. Reappointment process/Commissioner's term

> ***Recommendation***
>
> That the *Act* be amended to include provisions setting out the reappointment process. The term should remain as a five year renewable term.

The current five year term with the option of renewal is consistent with other jurisdictions and is appropriate. However, to improve the efficiency of the reappointment process, the following provision should be added to section 14:

> **14** (x) The Legislative Assembly must not appoint a commissioner for a further term unless
>
> (a) the commissioner notifies the committee at least 6 months before the end of the previous term that he or she wishes to be considered for reappointment, and
>
> (b) the committee unanimously recommends the reappointment within 60 days of being notified by the commissioner under paragraph (a).

A comparable provision is found in section 2 of the *Auditor General Act.*

c. Suspension/Removal Process

Recommendation

That the *Act* be amended so that so that two-thirds rather than a simple majority of the Legislative Assembly is required to remove the commissioner.

Current

> **14**(4) The commissioner may be removed or suspended before the end of the term of office by the Lieutenant Governor in Council for cause on the recommendation of the Legislative Assembly.

Recommended

> **14**(x) The commissioner may be removed or suspended before the end of the term of office by a resolution of the Legislative Assembly supported by at least two-thirds of the members present and voting.

d. Remuneration

Recommendation

That the *Act* be amended to so that the commissioner's compensation is linked to that of the Chief Judge of the Provincial Court in the same manner as the Auditor General.

As the commissioner's appearance of independence may be impaired by the present wording of s. 14(5), that subsection should be amended as set out below:

Current

14(5) The commissioner must be paid compensation as may be set by the Lieutenant Governor in Council.

Recommended

14(x) The commissioner must be paid out of the consolidated revenue fund a salary equal to that of the chief judge of the Provincial Court of British Columbia.

e. Ad hoc Commissioner

> ***Recommendation***
>
> That the *Act* be amended to allow for an *ad hoc* commissioner to be appointed in the event that the commissioner himself or herself is in a conflict.

14(x) If, in a specific case, the commissioner finds that he or she cannot act in particular because of a conflict of interest situation or because his or her impartiality could be questioned, the commissioner, after consulting with the Leaders of the authorized parties that are represented in the Legislative Assembly, may refer the case to an ad hoc commissioner to be appointed for that limited purpose.

28. Contracts with the Government

> ***Recommendation***
>
> That the *Act* be amended to remove references to s. 25 of the *Constitution Act* and instead include provisions setting out the restrictions on members' contracts with the government.

Sections 25 to 27 of the *Constitution Act,* which proscribe the Members' remuneration from government for the provision of goods, services and work and lists exceptions and the procedure for applying the prohibition, applied to Members prior to the adoption of the *Act.* These provisions are still applicable to Members by virtue of section 19 of the *Act,* which allows allegations of a breach of section 25 of the *Constitution Act* to be reviewed by the Commissioner.

For greater clarity, reference to the *Constitution Act* should be removed and instead the rules relating to contracts with the government should be set out in the *Act.* For example, provisions similar to s. 9 of New Brunswick's *Members' Conflict of Interest Act* could be adopted:

9(1) No member shall be a party to a contract with the Crown under which the member receives a benefit.

(2) No member shall have an interest in a partnership or private corporation or be the officer or director of a corporation that is a party to a contract with the Crown under which the partnership or corporation receives a benefit.

(3) Subsections (1) and (2) do not apply to a contract that existed before the member's election to the Assembly, or before the member's appointment to the Executive Council if the member is not elected to the Assembly, but do apply to its renewal or extension.

(4) Subsection (2) does not apply if the Commissioner is of the opinion that the interest or position of the member will not create a conflict between the member's private interests and public duty.

(5) Subsection (2) does not apply if the member has entrusted his or her interest in the partnership or corporation to one or more trustees in a blind trust.

(6) Subsection (1) does not prohibit a member from receiving benefits under any Act that provides for retirement benefits funded wholly or in part by the Province of New Brunswick.

(7) Subsection (2) does not apply until the first anniversary of the acquisition if the member's interest in the partnership or corporation was acquired by inheritance.

29. Periodic Review of the Act

Recommendation

That the *Act* be amended to require a mandatory review every seven years.

A regularly scheduled review of the *Act* would help to ensure that the legislative framework stays up to date and responsive to emerging issues. Seven years provides a reasonable timeframe for this review to occur.

x(1) Within seven years from the day this section comes into force, and every seven years after that, the Legislative Assembly shall commence a review of this Act.

30. Retention and Destruction of Documents

Recommendation

That the *Act* be amended to include a provision that sets out the retention and destruction periods for documents related to Members.

In 2002, the Select Standing Committee on Finance and Government Services, in their December 2002 Report entitled *Financial Review of the Independent Offices of the Legislative Assembly*,[8] recommended

> *"That the private and confidential Member's Disclosure Statement received by the Conflict of Interest Commissioner be retained for a period of five years following the vacating of a Member's seat, and can then be disposed of, unless the affairs of the former MLA are under review by the Commissioner or some other public authority, in which case such records shall be retained until the completion of said review."*
>
> *"This procedure would also be in line with current practice in other Canadian jurisdictions."*

In the absence of a formal amendment, our Office has adopted the Committee's recommendations in policy and practice. This procedure should be formalized in the *Act.*

[8] Report available online at http://www.leg.bc.ca/cmt/37thparl/session-3/fgs/reports/Rpt-FGS-StatOfficers-Final.htm