

**YUKON
CONFLICT OF INTEREST COMMISSION**

**ANNUAL REPORT
TO THE LEGISLATIVE ASSEMBLY
FOR THE PERIOD FROM 1 APRIL 2007 TO 31 MARCH 2008**

**David Phillip Jones, Q.C.
Commissioner
30 June 2008**

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ANNUAL REPORT

**to the Legislative Assembly
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This is my sixth Annual Report as a member of the Conflict of Interest Commission, and covers the period from 1 April 2007 to 31 March 2008.

A. JURISDICTION OF THE COMMISSION

The Conflict of Interest Commission receives its authority under the following provisions:

- Section 7 of the *Legislative Assembly Act* requires Members of the Legislative Assembly to make full public disclosure of their private interests (including the private interests of their immediate families). To facilitate discharging this obligation, Members are required to file a disclosure statement on or before April 30th each year with the Clerk of the Legislative Assembly, and to keep that disclosure statement up to date. I receive and review copies of the disclosure statements as filed, and the disclosure statements are available in the Clerk's office for public inspection.
- The *Conflict of Interest (Members and Ministers) Act* (the "Act") defines what constitutes a conflict of interest; prohibits Members and Ministers from discharging any official function where there is an opportunity—or the reasonable appearance of an opportunity—for the Member or Minister to further his or her own private interest; defines and prohibits an abuse of office; regulates allowable fees, gifts and benefits; requires a copy of Members' and Ministers' disclosure statements to be provided to the Conflicts Commissioner; prohibits a Member or Minister from being involved in any matter in which he or she has a conflict of interest; prohibits Ministers from certain business and employment activities; prohibits former Ministers from accepting contracts with the Government for a six-month period after leaving office; permits the Premier to

make rules about conflicts of interest for Ministers (which section 15 identifies as those contained in the following bullet, until replaced); permits those covered by the legislative scheme to seek advice (which is usually confidential) from the Conflicts Commissioner about whether they are or would be in conflict of interest; prescribes what is to occur if a Member or Minister is in conflict of interest; provides for complaints by a Member against another Member or Minister, and authorizes the Conflicts Commissioner to investigate such complaints to determine whether a conflict of interest has occurred and if so thereafter to make recommendations to the Legislative Assembly about what action (if any) is to be taken in those circumstances; and, whenever a formal complaint has been made, requires the Conflicts Commissioner to determine whether there was a reasonable basis for the Member to have made such a complaint, and if not authorizes the Legislative Assembly to take certain action against the Member making such a complaint.

- The rules of conduct for Ministers, as identified in section 15(1) of the *Conflict of Interest (Members and Ministers) Act*, namely:
 - Schedule B to Order-in-Council 1981/85 contains the Code of Ethics for members of the Executive Council.
 - The *Executive Council Code of Conduct Regarding Conflict of Interest* tabled in the Legislative Assembly on April 6, 1981, which prohibits Ministers and the direct members of their families from entering into certain contracts with the Yukon Government; restricts their purchasing land from or selling land to the Yukon Government; and requires Ministers to file a separate ministerial disclosure statement with the Clerk of the Legislative Assembly.
 - The *Ministerial Gift Policy* established by Cabinet to take effect on October 19, 1994.

The *Act* contemplates that these rules may be superseded and new rules filed with the Conflict of Interest Commission, but this has not occurred to date.

- Part 13 of the *Public Service Act* permits Cabinet to make rules dealing with conflicts of interest for Deputy Heads, which section 214(7) prescribes to be the following (until superseded):
 - The *Conflict of Interest Policy*, Policy 3.39 in the General Administration Manual, made October 27, 1994.

- The *Directive on Post-Employment Restrictions*, Policy 1.14 in the General Administration Manual, made April 1, 1996.

To date, no other rules have been made and filed with the Conflict of Interest Commission with respect to Deputy Heads.

- Part 4 of the *Cabinet and Caucus Employees Act* prohibits these employees from discharging any function where there is an opportunity—or the reasonable appearance of an opportunity—for the employee to further his or her own private interest; prohibits certain business and employment activities; provides for advice from the Conflict of Interest Commission; provides for party leaders to make rules of conduct.

To date, no rules of conduct have been filed with the Conflict of Interest Commission. Accordingly, section 19 of the *Cabinet and Caucus Employees Act* provides that the only applicable rules are:

- For cabinet employees, the *Directive on Post-Employment Restrictions*, Policy 1.14 in the General Administration Manual, made April 1, 1996.

B. ACTIVITIES DURING THE PERIOD FROM 1 APRIL 2007 TO 31 MARCH 2008

(1) Filing of Annual Disclosure Statements

All of the requisite disclosure statements were filed on time with the Clerk, and copies were provided by the Clerk's office to me.

(2) Advice during the year

Throughout the year under review, various Members and Ministers sought my advice about whether a particular matter would or would not constitute a real or apparent conflict of interest, and if so what steps needed to be taken to avoid such a conflict.

Except as provided in section 24 of the *Act*, the Conflict of Interest Commission must keep confidential both the fact that anyone has made a request for advice, as well as the resulting advice.

Section 24 provides only two exceptions to the Commission's obligation of confidentiality:

- (a) if the Member or Minister consents in writing to the disclosure of the advice or the fact that the Member or Minister asked for advice; and

- (b) if the Member or Minister represents that he or she has acted in accordance with this advice, and any other Member asks the Commission to disclose the request and the advice given.

The right to confidentiality belongs to the Member or Minister seeking the advice, and can be waived by the Member or Minister explicitly or by representing that he or she has acted in accordance with my advice. Apart from these two exceptions, I am not able to breach the Member or Minister's statutory right to confidentiality.

Notwithstanding this statutory confidentiality provision, I have from time to time received inquiries from other Members, the press and others about whether I have provided any advice to a certain Member and if so what was the content of that advice. Given the wording of section 24, I am bound not to reply to these inquiries, although I have tried to explain the confidentiality provision to those who have contacted me.

(3) Requests by the Government Leader for Advice

In addition to permitting Members to request *advice* about whether his or her own situation would or would not constitute a conflict of interest, section 17(b) of the *Act* permits the Premier to request the Conflicts Commission to provide advice about whether a Minister or former Minister is or would be in a conflict of interest. This advice is normally private, but on a number of occasions the Premier has publicly stated that he has requested such advice and has undertaken to make the advice public.

As discussed in Part C below, a request for this type of advice occurred towards the end of the period covered by this report.

(4) Complaints by a Member

Section 17(b) of the *Act* permits a Member (not a member of the public) to make a *complaint* to the Commission that another Member or Minister is or was in a conflict of interest.

The Commission is required to investigate such a complaint, and has the powers and privileges of a board of inquiry under the *Public Inquiries Act* in conducting such an investigation (including the obligation to inform the Member or Minister of the particulars of the complaint, and to give the affected person reasonable opportunity to make representations in response thereto).

Under section 23, the Commission must report its finding to the Legislative Assembly about whether the Member or Minister is or was in conflict of interest with respect to the matter raised in the complaint. If the Commission finds that there is or was a conflict of interest, the Commission must provide its recommendation to the Legislative Assembly about what action the latter should take (section 23). The actions which the Legislative Assembly may

take are: (a) stipulating how the Member or Minister is to remove the conflict; and (b) suspending the Member or Minister from sitting in the Assembly or any committee thereof.

At the end of its investigation into a complaint, the Commission must also make a determination about whether the complaining Member had reasonable grounds for making the complaint (section 23(6)), and report that determination to the Legislative Assembly. In an appropriate case, the Legislative Assembly may find the complaining Member in contempt of the Assembly and suspend the complaining Member from sitting in the Assembly or any committee thereof.

As will be appreciated, the making of a formal complaint is a serious matter, which puts into play a formal and potentially costly investigation process, and which may result in serious and public consequences to either the Member or Minister complained against or the Member making the complaint. Accordingly, Members and Ministers are well advised to take considerable care to arrange their affairs so as to avoid a conflict of interest (“an ounce of prevention is worth a ton of cure”); and Members will think carefully before making a formal complaint against another Member or Minister.

As indicated in Part C below, towards the end of the period covered by this Report, a Member did make a complaint about a Minister.

(5) Deputy Heads, Cabinet Staff and Caucus Staff

Part of my duties involve Deputy Heads of Departments, Cabinet Staff, and Caucus Staff. Throughout the year, I received various inquiries from these groups of persons, and provided advice to them.

(6) Meeting of the Canadian Conflict of Interest Network

In September 2007, I attended the annual meeting of the Canadian Conflict of Interest Network (“CCOIN”) in Ottawa.

CCOIN brings together all of the federal, provincial and territorial conflict of interest commissioners. The annual meeting provides an excellent opportunity to meet the other commissioners, to learn how other jurisdictions are dealing with common and emerging issues, and builds relationships that are regularly used to help individual commissioners address issues which arise in their respective jurisdictions. In short, CCOIN is a very important organization for sharing knowledge and mutual support among the Canadian conflict of interest commissioners.

CCOIN is meeting in Quebec City in September 2008. I have invited the members to meet in Whitehorse in September 2009.

C. THE ISSUE RAISED BY COMMENTS MADE BY MINISTER KENYON

In March 2008, in the course of debate in the Assembly about proposed amendments to the *Liquor Act*, Minister Kenyon made some remarks that could have been interpreted to mean that a Minister (Archie Lang) and a former Minister (Peter Jenkins)—*while Members*—had been consulted about the proposed amendments. Because Mr. Lang and Mr. Jenkins had financial interests in hotels with liquor licences, it would have been a conflict of interest for them *while Members* to participate in any such discussions.

In early April 2008 (shortly after the period covered by this Report), Premier Fentie publicly asked for my advice under section 17(b) of the *Act* about whether either Mr. Lang or Mr. Jenkins was or had been in conflict of interest, and Premier Fentie made a public commitment to table my response in the Legislative Assembly.

Shortly thereafter, Mr. Don Inverarity, MLA made a complaint under section 17(d) of the *Act* alleging that Mr. Lang was in a conflict of interest as a result of the supposed discussions.

As a result of my investigations, I was satisfied that the discussions in question took place prior to the November 2002 election. Prior to that election, the Liberal Party was the Government, and the Yukon Party was in opposition. Although Mr. Jenkins had been a Member of the Legislative Assembly prior to the election, he was an opposition member. Neither Mr. Lang nor Mr. Kenyon was a Member. None of the three was a Minister. Discussions which took place in this time frame could not constitute a conflict of interest.

In addition, I was satisfied that there was no evidence that either Mr. Lang or Mr. Jenkins had been involved in any discussions whatsoever about proposed amendments to the *Liquor Act* at any point after they became Ministers. (Mr. Jenkins resigned as a Minister in December 2005, and did not stand for re-election in the October 2006 election.) Accordingly, there was no evidence of any conflict of interest.

I provided this advice to Premier Fentie in writing on 8 April 2008, and he tabled my advice in the Assembly.

On the same date, and for the same reasons, I dismissed Mr. Inverarity's complaint against Mr. Lang. However, I concluded under section 23 that it had been reasonable for Mr. Inverarity to have made his complaint because there might have been some doubt about whether the request for advice from Premier Fentie was broad enough to cover all of the issues.

I am pleased to note that my reports ended the matter, and I am grateful to the Members

for recognizing the importance of avoiding politicizing my office in the course of this matter being dealt with.

D. OBSERVATIONS ABOUT THE LEGISLATION

As I have mentioned in previous reports, it is important to remember that not all concerns about the appropriateness of a Member or Minister's actions constitute a conflict of interest (either as defined in the Yukon legislation, or more generally at law or in parliamentary practice).

The Yukon legislation is now thirteen years old—having been originally enacted in 1995 and amended in 1999 to cover Deputy Heads and Cabinet and Caucus Employees. Concepts about what constitutes a conflict of interest do evolve over time. For example, more recent versions of corresponding legislation in some other jurisdictions provide protection for whistleblowers and create a system for registering lobbyists.

In addition to these two broader areas which are related to conflicts of interest, some possible areas which might be clarified include:

- A definition of what a “private interest” does not include—perhaps along the lines of the definition in Nunavut's *Integrity Act*, which excludes anything of general application to the public, or that affects a person as one of a broad class of persons, or concerns the remuneration or benefits of a Member, officer or employee of the Legislative Assembly.
- How far public disclosure has to be made by a shareholder in a private corporation with respect to the ownership and affairs of its subsidiaries or affiliates.
- Whether there should be an obligation to meet at least annually with the Commissioner.
- Whether there should be special provision in the legislation for a Special Commissioner for cases where the Commissioner cannot act, and for an Acting Commissioner.
- Whether there should be the ability for the Commissioner to refuse to investigate a complaint which is frivolous or vexatious.
- What should be the policy for archiving or destroying the Commission's records.

- Whether there should be provision for paying the costs incurred by Members or Ministers in complying with the Act (such as establishing a blind trust).
- Whether there should be provision for paying costs by or to Members or Ministers as a result of complaints.
- Whether there should be a statutory requirement for periodic reviews of the legislation.

In my respectful opinion, these are issues which the Legislative Assembly should consider at some point in the not too distant future to ensure that the concepts in the legislation correspond to the current expectations of both the Members and the public.

When it decides to review the legislation, the Legislative Assembly may choose to ask for input from myself and others who serve (or have served) as conflicts commissioners elsewhere in Canada, or who otherwise have knowledge which might be helpful (such as counsel or Members of other legislative bodies who have been involved in the development and operation of conflict-of-interest régimes elsewhere).

Nevertheless, the ultimate responsibility for deciding the content of the Yukon conflicts legislation must always remain with the House itself, because it has final authority for the behaviour of its Members.

D. RE-APPOINTMENT

I was appointed to the Commission in May 2002 for a three year term, which was renewed in 2005, and was renewed for a further three-year term in May 2008. I appreciate the Members' confidence in me.

E. ACKNOWLEDGMENTS

I would again like to publicly thank the Clerk of the Legislative Assembly, Dr. Floyd McCormick; and his assistants, Sue Macdonald and Helen Fitzsimmons for their very able, willing, effective and cheerful assistance to me—and to Members, Ministers, Deputy Heads, cabinet and caucus employees—in the administration of the conflict of interest legislation.

For the system to work well, it is important for everyone involved to keep the guiding principle in mind—namely, that Members, Ministers, Deputy Heads, cabinet and caucus employees must always put the public good above their own private interests, and be seen to do so.

E. CONTACT INFORMATION

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All of which is respectfully submitted this 30th day of June 2008 by:

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Conflict of Interest Commissioner