

## CONFLICT OF INTEREST IN THE PUBLIC SERVICE

Persons engaged in any sort of gainful occupation have certain functions to perform which may be said to constitute their duty. In private employment, problems of conflict of interest are dealt with according to the private law, including the law of trusts and that of agency. In the case of public employment the rules are derived from public law and from general ethical considerations.

Any external influence upon an individual involved in government at any level which tends to lead him to draw a conclusion about the matter within, or related to, his sphere of duty may be described as a conflict. Conflicts are not strictly confined to the financial interests of an individual but may involve religion, philosophy or political persuasion. That such non-pecuniary conflicts may exist is amply demonstrated by trial of the E.T.U. members.<sup>1</sup> These diverse interests, as well as the interests of those who have a vested benefit in the status quo, should be considered. However, it will be found most difficult to regulate these conflicts. There should be less difficulty in regulating personal and immediate pecuniary interests.

It is generally thought undesirable for external and improper considerations to influence an isolated decision or the formulation of policy for a rule. This will be so wherever the decision or rule is to affect citizens generally. It is both improper for the making of a rule or decision to be affected by the hope of external advantage and for the actual receipt of external advantage to affect the making of the rule or decision. It is, therefore, undesirable for the individual with the power of making decisions or rules to be placed in the position where his duty and interest appear to conflict. Thus, it may be seen that both operative and inoperative conflicts of interest are damaging. The rationale for the attempt to prevent the incidence of conflicts of interest is composite and differs according to the occupation of the individual and the situation. Nevertheless, it is generally accepted that certain benefits are usually to be found in an upright government administration. All or any of the following attributes of an uncorrupted executive and administration may be sacrificed as the result of an individual being in a conflict of interest situation:

(1) A sense of the justice and confidence which is instilled in the public may be lost. It is suggested that confidence stems from the public seeing like cases being treated in the same way and dissimilar cases being treated differently. The faith of the public in the persons occupying public office is important. If a limited number of individuals in any given institution are affected by the taint of criticism on the ground of conflict of interest, the institution may not suffer appreciably. In any case, it will depend upon the number of individuals involved and the size of the institution as to whether the individuals only, the institution, or both, will be affected.<sup>2</sup>

<sup>1</sup> In that case, *Byrne v. Foulkes & Hazell* (unreported), members of the E.T.U. trial that were held liable for conspiracy organized the Union to conform with their political persuasion. The same considerations may often apply in trials for treason, such as that of Burgess and MacClean. However, conflicts of interest usually arise from (1) gratuities, (2) outside employment, (3) personal financial interests, (4) inside information, or (5) post-employment dealings.

<sup>2</sup> The interest in 1969 of the American people in the resignation of Associate Justice Fortas from the Supreme Court of the United States and the controversy over the

(2) Public confidence may be undermined in the institution itself as a result of its being involved in conflict situations. This is the most important justification for keeping public institutions free from corruption. Any general loss of confidence in a legislative, judicial or administrative body is a major calamity.

(3) Uniformity and predictability of government actions are also generally and objectively regarded as desirable.

(4) Efficiency may be sacrificed when the devotion to duty of administrators is less than single minded.

(5) Apart from the ulterior considerations there is a widespread feeling that public office ought not to be used for private gains. This may be regarded as a separate consideration. This may be an emotion resembling jealousy on the part of the public. However, since an attack on a conflict of interest may always be attributed to worthier and more noble ideals it may be preferable not to dwell on this point.

In the aggregate, these reasons form a rationale for preventing conflict situations arising. However, this avoidance should be reconciled with the widest possible freedom of economic choice for the individuals involved. Also, since the rationale is not susceptible of precise verbal formulation the reasons may be better left in that form than reduced to a quasi-statutory form. The reasons may be said to constitute the spirit of the prohibition of conflict situations and for that reason should be regarded as paramount. Thus it would not be advantageous to interpret them restrictively.

### *The Individuals Affected*

The considerations apply to a large number of individual office-holders. Some of these are public servants and some are those of their political masters. The figures involved include all those elected to public office, whether for a specified term or not. Thus, the persons comprised within the group would include government officials, employees of the Crown (including judges), agents of Government departments, contractors, with Crown agencies, members of Parliament and peers, cabinet ministers and those of their assistants as are privy to their information and city and local government employees.

Certain considerations alter the position of certain individuals within this large group of office-holders. Different rules would tend to apply to cabinet ministers, especially those with a limited portfolio, from those which would apply to civil servants.<sup>3</sup> The limits imposed upon the office, the amount of remuneration from the office and the level on the political or civil service hierarchy are all relevant to the determination of what is permissible and what impermissible. In the

appointment of Justice Haynsworth seems to have been generally limited to these individuals. See also *R. v. Hawrelak* (1965) 53 W.W.R. 257, (1963) 76 Harv. L. Rev. 1209 and (1952) 52 Columbia L. Rev. 113.

<sup>3</sup> Political and non-political positions will clearly be affected by different considerations and might, therefore, reasonably be expected to have different enforcement agencies. Also, those responsible for a group, agency or department may find it necessary to issue supplementary instructions as a result of either particular needs or particularly sensitive decisions. Thus, it is generally felt that ministers should not hold: (a) Directorships of companies, (b) large holdings of shares which might be affected as to value decisions of government policy, (c) even modest shareholdings in companies that could be affected by decision within their immediate jurisdiction. Decisions of Committees of any body should always be preceded by a disclosure of any relevant interest on the part of the member involved. This may apply to other deliberations, formal or informal. It is difficult to envisage how a departure from the established tradition that the individual member has the moral obligation of disclosing a conflict of interest could be made to work.

end, public opinion on what is proper and what is improper is always to be the arbiter. It is thought that no one should be required to make too heavy a financial sacrifice to serve in office. Furthermore, it ought to be borne in mind that the office in some cases is limited in duration and therefore the incumbent will have to have some source of wealth in order to sustain life after termination of the office. This is peculiarly applicable to MPs and to cabinet ministers. The magnitude of salary, or size of the advantage may also be relevant to the gravity of the conflict or apparent conflict. The scope of the duty involved and the level within the organization may be enable one to make a determination about the particular office. The modern trend in the United States seems to be to regard those officials having a government salary of more than a certain amount as susceptible to a conflict of interest.<sup>4</sup> Also, it might be relevant to consider the fact that it is a motive in the payment of the salaries of some government officials, especially judges, that the payment of a large sum would tend to preclude conflicts of interest simply because the sum was large enough.

In formulating a code of ethics it should be considered whether the officials referred to above should:

1. Refrain from buying property or interest in property belonging to the public employers.
2. Sell property to the employing public authority.
3. Deal with the property of the employer in such a way as to derive any profit or advantage for himself.
4. Accept financial or other inducements to influence his judgment on the matter.
5. Enter into competition with the employer.
6. Use official information in such a way as to make a profit for himself, or,
7. Act on behalf of the public employer in a professional capacity unless paid specifically to do so.
8. Participate in transactions and deliberations the outcome of which may be a rule or decision which affects them in their personal capacity.
9. Make speculative investments in securities as to which from their special means of early or confidential information they have or may have an advantage over other people in anticipating market changes.
10. Write for the press in return for remuneration or control news media.
11. Accept an excessive gift or gratuity. The relationship between the donor and the person involved, size of the gift and the work in which the recipient is involved are all factors relevant to the determinations of what is acceptable.
12. After retirement or cessation of employment, a former employee should not enter into negotiations involving claims or contracts with the government or involving any subject matter directly

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<sup>4</sup> For example, U.S. Senators and employees of the U.S. Senate whose salary is more than \$15,000 *per annum* are required to disclose honoraria of more than \$300. The salary and the size of return are thus both considered relevant.

connected with which the former employee or member of the government was employed or performed a duty.

13. The employee should not make official decisions outside official channels.

It is usually felt that the individuals referred to should not engage in the conduct contemplated above. If the above conduct is to be proscribed in any code of ethics, the rules should be observed in the spirit and interposition of a company or other legal entity such as a trustee, nominee or agent should not affect the position.

#### *The Means of Enforcement*

The means of enforcement of any code of ethics which may be devised will pose some problems. One of these is the determination of whether enforcement should be public or private.

The competing interests are the respect for the privacy of the individual's financial affairs and the need of the public to assure itself that no conflict situations have arisen. This amounts to the striking of a balance between good taste and delicacy and the allaying of the public's fears. A compromise might always be reached by releasing a digest of appropriate information to the public.

Enforcement of the code of ethics might be undertaken by a public board or agency. This would, it is envisaged, co-exist with the power of the courts to determine certain matters. This board might be inquisitorial in nature. It may be that the inquisitorial procedure is more appropriate. The board would then be free to act without waiting for an information to be laid. Great care would have to be taken to ensure that such a board would not rival the excesses of the church during the Renaissance. Furthermore, it should be noted that, because of the prerogative powers of Parliament, the procedure may well have to be different for members of Parliament and peers of the realm.

Such a board or tribunal may be granted the power to recommend solutions only or it may be invested with the power to impose sanctions. If it were invested with the power to advise and adjudicate the former would usually only be separated from the latter by a delay. Thus the means of enforcement may be either legal or moral. The duty may be imposed on the individual involved to disclose his own interest. The board or other agency may be set up to receive such declaration. The board may then make an advisory ruling, to be followed later by some sanction if the advisory ruling remains uncomplished with.

#### *Remedies*

The sanctions that currently exist are, for the most part, directed against the person having the conflict of interest. This is presumably to act as a deterrent to him. The threat of personal sanctions operates to place the responsibility squarely on the individual involved and to encourage him to be zealous in avoiding conflicts.

It is proper for there to be different systems to regulate conflicts of interest since the conflicts themselves may be so diverse. It is envisaged that the statutory prohibitions should remain and be enforced in the specified ways. This should be supplemented by a code of ethics based on the considerations described above the breach of any of the

canons of the ethical code being attended by moral stigma and by such administrative sanctions as may be deemed necessary.

The remedies generally available to the courts and to such administrative boards as may be entrusted with the responsibility of enforcing the rules outlined above should consist of the following:

- I. *Criminal Punishment.* This comprises the whole range of punishments normally meted out by the criminal courts. The heavier sanctions exacted may include fine and imprisonment. All these penalties should be administered exclusively by the criminal courts with the usual safeguards relevant to a court hearing.<sup>5</sup>
- II. The awarding of damages is not in essence a criminal punishment although the magnitude of the award may introduce the punitive or exemplary elements. The practice of awarding triple damages in all those cases in which a tort or a breach of contract is found to have been committed against the Crown might be continued. Many of the situations discussed above will be ones in which such a tort or breach of contract has been committed.
- III. *Reprimand.* It is suggested that a reprimand from a board or committee may be appropriate in some cases.
- IV. *Removal.* The board or committee may, in some cases, recommend the termination of an appointment or contract. An incorporation of the appropriate terms in the contract, or a general clause incorporating by reference such of the ethical rules as are felt applicable, would assist in the infliction of this punishment.
- V. *Invalidation.* In those cases in which a board or committee is of the opinion that a conflict of interest operated it may recommend that the decision of the influenced individual should be invalidated. In many cases this is not possible and the tribunal will, no doubt, take into account the practicality of such course before recommending it.
- VI. *Divestment of Interest.* A sanction that might be relevant is one which is not essentially punitive. This is to look upon the conflict of interest from the side of the advantage or profit made. This approach is clearly unsuitable for apparent conflicts where no profit or benefit accrued. The proposed sanction consists of divesting the individual of his profit or advantage. It may be of

<sup>5</sup> The provisions now in existence are wide enough to cover all the more heinous forms of wrongdoing. Therefore, the statutes probably do not to be amended. The English position is that members of Parliament may be disqualified from holding that office by reason of the fact that they hold offices of profit under the Crown. These basis of the present law on the subject is the Succession to the Crown Act, 1707, which disqualifies from election persons accepting any 'new' office created since 1705. Conflict of interests in local government is recognized and provided for in Section 76 of the Local Government Act, 1933, as amended by Section 131 of the Local Government Act, 1948. These sections provide that where any member of a local authority has any pecuniary interests direct or indirect, in any contract or proposed contract or other matter, is present at a meeting of the local authority at which the contract or other matter is the subject of consideration, he shall at the meeting as soon as practical after the commencement thereof, disclose the fact, and shall not take part in the consideration or discussion of, or vote on any question with respect to, the contract or other matters. Disposition is extended by Section 95 of the Act to committee meetings as well as council meetings.

There is in most countries general statutory authority giving the courts authority to punish persons in certain conflicts situations. The Canadian position is generally covered by sections 100-103 of the Canadian Criminal Code, 1953-4 S.C. c. 51 and Sections 15 and following of the Senate and House of Commons Act, 1952 R.S.C. c. 249, as amended. There are also several Acts particular in scope which makes special provisions for certain undesirable conduct. Section 14 of the Railway Act, 1952 R.S.C. c. 234 example. The Public Service Employment Act and Bills C.—120 are examples of the further legislation. This is always in addition to such sanctions as may be described by civil law, such as the law of contracts.

use only where a clearly certain amount has been gained. Property or profits confiscated in this manner should be destined for a particular repository and it would be appropriate if this were a national fund. There are certain shortcomings inherent in this solution which limit its applicability. For example, it may be difficult in the case of a company shareholding to determine how much profit or advantage has accrued. A profit may have been derived by all the shareholders as a result of the actual or apparent use of information derived from the public office.

It may, alternatively, be recommended that an individual divest himself of particular objectionable interests.

### *Conclusion*

The above guide might be employed by any organization attempting a continuous review of conflicts of interests with the aim of avoiding situations endangering the organization. The formulation of rules is unlikely to resolve all the problems. It will be necessary for the letter and the spirit of certain principles to be observed before a solution will be achieved. The relevant principles will vary according to position and circumstance. However, to grant a suitable tribunal some discretion within defined limits would assist in preventing detrimental conflict of interest situations.

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## THE MUNICIPAL GOVERNMENT ACT, 1968 S.A. c. 68, ss. 383-389— NOTICE OF INTENTION TO COMMENCE AN ACTION IN TORT AGAINST A MUNICIPALITY

Although the time period for commencing an action in tort was standardized in 1966<sup>1</sup> there still remain several statutory provisions relating to notice of intention to commence such an action. The provisions most commonly encountered are those contained in The Municipal Government Act.<sup>2</sup>

The provisions of The Municipal Government Act<sup>3</sup> set out various time periods within which notice of an accident and its cause must be served upon the municipal secretary. It is most important that notice required to be given within the specified time period to the specified municipal official. There is a supplementary provision<sup>4</sup> in The Municipal Government Act which provides that failure to give the required notice is not a bar to an action where the person required to give notice has died or if he has a reasonable excuse for the want of notice and the municipality has not been materially prejudiced in its defence. The courts have indicated that they will strictly interpret such notice provisions and have also indicated that "reasonable excuse" has a very restricted meaning.

<sup>1</sup> S.A. 1966, c. 49.

<sup>2</sup> S.A. 1968, c. 68.

<sup>3</sup> S.A. 1968, c. 68, s.s. 383 to 389.

<sup>4</sup> S.A. 1968, c. 68, s. 389.