



Northwest
Territories Legislative Assembly
Conflict of Interest Commission

May 27, 1998

Honourable Sam Gargan
Speaker of the Legislative Assembly
Legislative Assembly Building
Government of the Northwest Territories
Yellowknife, Northwest Territories

Dear Mr. Speaker:

In accordance with the requirements of Part III of the Legislative Assembly and Executive Council Act, I am submitting the annual report of the Conflict of Interest Commissioner. The report covers the period from April 1, 1997 to March 31, 1998.

Please convey my thanks and appreciation to all Members and staff of the Assembly for their cooperation and support.

Thank you for your assistance through the year.

Yours truly,

Anne Crawford
Conflict of Interest Commissioner



Northwest Territories
Conflict of Interest Commissioner

ANNUAL REPORT

April 1, 1997 to March 31, 1998

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COMMISSIONER'S REMARKS

This report represents the first complete year of work since my appointment to a 4 year term as Conflict of Interest Commissioner in February, 1997. During this year there has been only one complaint to deal with and it remains in process at the time of filing this report. As a result, the greatest part of my work has been in providing formal and informal opinions to members on conflicts issues.

Since the amendments of 1994 it has been possible for a Member to seek the advice of the Commissioner and to receive, under s.79.2, a binding opinion as to the conflicts issues raised by a proposed action or economic activity.

Under this provision Members and Ministers have asked both the current Commissioner and past the Chief Commissioner for advice as to the appropriate safeguards to be taken in particular situations.

If the facts of a situation are thoroughly and truthfully laid out, then the Member is entitled to rely on the advice received from the Commissioner in arranging personal affairs. When there is a substantial change in the Member's affairs, Minister's portfolios or an election intervenes, then a new opinion is required.

In the case of a Minister an opinion may also be specific to a particular Ministry and may change depending on the portfolios held. Indeed there may be portfolios which are simply incompatible with certain financial holdings and a decision would have to be made whether the holding or the portfolio is the most important.

The Commissioner is in a position to advise and instruct as to the appropriate arrangements which will meet the Conflicts requirements. The legislation does not set out the methods or means which the Commissioner is entitled to use or recommend. The discretion and judgment of the Commissioner are the primary factors in making these decisions. The solutions crafted for each Member will reflect the Commissioner's understanding of public concern and acceptance in this jurisdiction, and the likelihood and extent of risk of conflict.

The nature of opinions and the methods used by Conflicts Commissioners are still evolving and new situations continue to arise. Conflicts Commissioners from across Canada meet to exchange information and advice on successful and unsuccessful approaches to problems at hand, and the support between Commissioner is an important component in bringing accumulated experience and knowledge to bear on conflicts issues.

The Act places a premium on confidentiality, preserving for Members important elements of personal privacy. This can be seen in the extensive sections describing what is confidential and requiring officials to adhere to high levels of confidentiality.

In preparing my report this requirement of confidentiality must be observed. While taking care to insure that personal identities are not revealed there is a need for and a value in disclosure of the general circumstances of decisions and opinions given. This is valuable both for other members who may face similar issues and for the public who are entitled to have a general knowledge of the affairs and actions of their elected representatives, and the standards set.

Members consistently want to have certainty and a standard to measure their conduct and concerns against. The public wants to know the nature of the work going on and the opinions given. In an attempt to meet the public need for knowledge while preserving the member's rights to privacy I have set out three Appendices to this report.

In Appendix "A" are reproduced a number of General Guidelines which were produced because so many members shared the same concern regarding appropriate questioning and the issue of voting at budget time. This Appendix contains the actual text of the materials given to Members who have requested this. It is not an opinion under the Act, but a general guideline.

In Appendix "B" are a number of examples of issues raised by Members and the resulting opinions given by the Commissioner in the past year. These opinions have been altered to a greater or lesser degree in order to convey the nature of the issue while protecting the confidentiality of the Member, consistent with the requirements of s. 79.02 of the Act.

In Appendix "C" is a discussion of the issue of Blind and Management Trusts, which have been the subject of a number of inquiries to this office and which are in a transition in terms of the public perception of the effectiveness of these tools.

STATUTORY REPORTING

The *Legislative Assembly and Executive Council Act* requires the Commissioner to submit an annual report which includes the following categories of information:

A. Filing of Disclosure Statements

Under section 77(1) of the *Legislative Assembly and Executive Council Act*, every Member is required to file a disclosure statement before the deadline set in section 77. For the current year, the deadline for most Members falls on January 30, 1998.

(1). Late filing and failure to file

FAILURE TO FILE ON A TIMELY BASIS

Section 79.3(1)a(i) requires the Commissioner to identify those Members who had not filed a disclosure statement within 45 days of the filing deadline, or who obtained an extension of time to file after the 45 day period.

The following Member did not file a disclosure statement within 45 days of the filing deadline and has not yet filed:

Mr. Tommy Enuaraq, Member for Baffin Central

FAILURE TO FILE

Section 79.3(1)c(ii) requires the Commissioner to identify any Member who failed to file a disclosure statement before the annual report was submitted.

As of this report, the following Member has not filed a disclosure statement:

Mr. Tommy Enuaraq, Member for Baffin Central

(2) Requests for Extensions

The following Members obtained an extension and have filed within the time extension granted:

Mr. Stephen Kakfwi, Member for Sahtu
 Mr. Don Morin, Member for Tu Nedhe
 Mr. Charles Dent, Member for Yellowknife Frame Lake

The Members listed have been careful and responsible in complying with the requirements for timely filing and for receiving extensions.

I would note, as I have noted in my 1996-97 report, that there is a distinct injustice in being required to report the names of these Members who have reasonably and properly applied for an extension and have met that deadline as required.

It is particularly ironic because at the same time, Members who missed the deadline and filed within the 45 days grace granted by the provisions of s. 79.3(1)a(i) need not be reported here.

B. Contract Approvals

(1). Authorization to enter a contract

Section 79.3(1)b(i) requires the Commissioner to identify any Member or former Member who was given authorization to accept a contract under s.75.1(3).

The following Members were given authorization by the Commissioner to accept a contract:

None

(2). Description of contract

Section 79.3(1)b(ii) requires the Commissioner to describe the nature of any contract which was authorized by the Commissioner and the conditions imposed.

The following contracts were authorized by the Commissioner and the following conditions were imposed:

None

C. Other Extensions

Section 79.3(1)c requires the Commissioner to identify any Member who obtains an extension of time for any other matter under s.79.1.

The following Members obtained an extension of time for other matters under s.79.1:

None

1997-98 ACTIVITIES

A. Conflict of Interest Complaints

(1). Pending matters

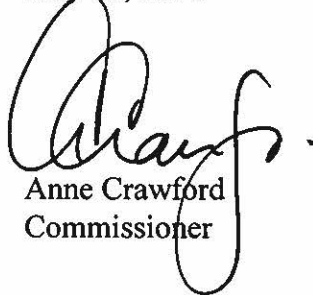
A conflict of interest complaint was filed by Mrs. Jane Groenewegen, Member for Hay River, on February 16, 1998, against the Honourable Don Morin, Member for Tu Nedhe.

At the time of filing of this report, some preliminary issues have been dealt with, but the initial determination under section 81(2) of the *Legislative Assembly and Executive Council Act* has not been completed.

Under section 79.2 of the *Legislative Assembly and Executive Council Act* a Member may request that the Commissioner give written advice and recommendations on any matter respecting obligations of the Member under this Part.

Eight such requests were made over the last year and advice was provided by the Commissioner on all occasions. One additional request was made and withdrawn.

May 27, 1998



Anne Crawford
Commissioner

COMMISSIONER'S GUIDELINES

APPENDIX "A"

GUIDELINE 1: VOTING ON BUDGET ITEMS

GUIDELINE 2: QUESTIONS IN THE HOUSE

February 12, 1998

TO ALL MEMBERS OF THE LEGISLATIVE ASSEMBLY
Through the Office of the Clerk of the Assembly

RE: SCOPE OF ACTIVITIES IN THE LEGISLATIVE ASSEMBLY

I have received a number of requests from members for section 79.2(1) opinions on the issue of the permissible scope of activity for Ordinary Members in the Legislative Assembly in relation to:

1. **Asking questions in the Assembly** on an issue where the Member has business or personal interests similar in nature to the subject matter of the question (i.e. questions on the leasing of premises by a member who has a controlled corporation who leases space to government; questions on outfitter licensing by a member with an outfitter license)
2. **Voting in the Assembly** on budget matters where the Member has an interest in the relevant funds (i.e. a spouse works for a department or agency, a controlled corporation contracts to a department or agency);

In responding to these questions it became clear that the issues were of interest to other members, and that an expression of the perspective of the Commissioner could be of value to other Members.

It is an Ordinary Member's privilege and responsibility to attend and participate in the business of the Assembly. Question Period is an integral part of that business. The Budget process is another. Any restrictions on this participation should be drawn as narrowly as possible, while still respecting the rules relating to conflicts. The presumption should always be in favour of *public* debate, taking into account that when a Member is required to withdraw from debate or voting or refrain from asking questions in the Assembly, the Member's constituents go unrepresented.

The enclosed are intended as guides for Ordinary Members. It is not always practical in the course of debate to seek a binding opinion of the Commissioner, and the enclosed should serve as a guide under such circumstances.

As always, in the event that a Member wishes the re-assurance of receiving a binding opinion under s.79.2(1), the member involved must submit their question in writing.

Anne Crawford
Conflict of Interest Commissioner

ISSUE 1: ASKING QUESTIONS IN THE ASSEMBLY

The soliciting of information through the use of Questions for constituents individually, for interest groups or as part of the governance of the territory generally is part of a Member's duties and is protected by s. 87 of the Act.

It would take very unusual circumstances for the activities of a Member in putting questions in the open assembly to be considered a conflict of interest. The information sought would need to relate to the business or personal interests of the member and the possession of that information would then need to constitute some form of *competitive or relative advantage* for the member over others in the public.

Because questions and answers are both very much a part of the public record, the information obtained by the Member would be available to anyone interested. As a result, it would be difficult to have the element of advantage arise.

A conflict could arise when the information obtained would provide to the Member some form of competitive or relative advantage for the Member over others in the public.

QUESTIONS RELATED TO MEMBER INTERESTS

If a Member chooses to ask questions in the Assembly which are related to his or her own business interests or those of competitors (unless at the request of such competitors), or of interests in the immediate field of enterprise in which the Member is engaged, this could create a perception of conflict.

The context of the questions would be very important, as would the value of the information to the Member's enterprise in comparison to its value to other enterprises or the public at large.

Under normal circumstances the existing rules relating to the release of tender or other confidential information would result in a Minister declining to provide specific numbers or other information of a nature which would create competitive advantages.

If for some reason the Minister did release information which created a competitive advantage, the Member would then have to apply or act on the

information in a manner which was to his or her advantage to constitute an actual conflict.

PRACTICAL GUIDELINES

Where a member has a related business interests I would suggest caution in asking questions as they relate to:

- 1 Projects on which the member's business has tendered or is likely to tender, taking into account its usual location of activity and project size;
- 2 Plans by any department or agency, currently a customer of the member's business to maintain, expand or reduce those activities;
3. Information on competing companies historically active in the Members' location and field of business;

Where a family member has a related employment interest I would suggest caution in asking questions as they relate to:

1. Individual performance, evaluation or discipline or authority of the family member, co-workers or supervisors;
- 2 Plans by the employing or funding department or agency to maintain, expand or reduce activities related to the family member's employment;

The guidelines are used to define the area of risk. Questions in these areas will not necessarily constitute a conflict. Where the interest of the Member exists but is not significant in relation to "the ordinary and proper representation of members of the public" as provided in s. 87, the public policy value of the question would outweigh the element of conflict.

As a example, a government decision to shut down a particular school would be of broad general interest for the Member representing that riding. The closure would be a legitimate topic of questioning by that Member even if her husband were employed at the school.

As a second example, where there was an allegation that sub-standard building materials and sloppy inspections had led to fire-related deaths in recently constructed public housing in a community, a Ordinary Member would want to

pursue the issue in the Assembly. This line of questioning would be legitimate even if the Member's company had been an unsuccessful bidder for that or a similar housing contract.

Finally, there is an exemption in the Act from conflict in the event that a benefit or interest is "as one of a broad class of persons'. A Member is entitled to question the "bilingual bonus" for employees, even if his wife receives the bonus; can raise the criteria for issuing a GHJ, even if she holds such a license; and could express concerns about a generally available electrical power subsidy, even if her business benefits from the subsidy.

LIMITATION

The guidelines provided are designed in relation to questions asked in the Assembly. Questions ask of Ministers in private, by letter or other non-public means will be subjected to a more strenuous test and would not benefit from the same presumption that they are intended for public benefit. This is for the simple reason that the question and answer would not automatically be available to the public at large.

ISSUE 2: VOTING ON BUDGET ITEMS

In the Northwest Territories the Assembly and its committees engage in the budget process at a level of detail well beyond that experienced elsewhere in Canada. Government in the Northwest Territories constitutes a much larger player in the daily workings of the community than it does elsewhere in Canada.

This combination of facts results in Members and their families having a considerable number of points of contact with government expenditures. The Legislative Assembly and Executive Council Act in s. 69(1) requires that a Member who has a conflict of interest must declare that interest and withdraw from the meeting without voting or participating in the discussions. However the Act also exempts interest which are "remote or insignificant" (s. 66(2)d) or benefit the Member only as "one of a broad class of persons" (s. 66(2)a).

Given the diversity of relationships with government, and the broadly worded exemptions, Members with the best intention of avoiding conflict can still have difficulty deciding when a conflict is sufficient to require the Member to act under s. 69(1).

IDENTIFYING RISK OF CONFLICT

The following guidelines can be of use to Members in determining their responsibilities.

A Member should recognize the risk of conflict:

1. Where a budget item identifies funds for a purpose which benefits a Member including:
 - (i) contribution funds for an organization employing a Member's spouse or child;

- (ii) contract funds related to a contract with a controlled company including O&M or salary funds necessary to support that contract (ie salary and operations for employees using space leased by the controlled company to the GNWT) ;
 - (iii) capital or contract funds identified as being for a purpose within a controlled company's usual scope of work; items which the company might reasonably be expected to tender on;
2. Where a spouse or child is a government employee
- (i) any budget item managed or controlled by the spouse or child including items where the spouse or child ordinarily has contract or spending authority over funds voted;
 - (ii) any item, including any capital item, voted for the employing department if the spouse or child is employed at the equivalent of the Director level or higher;
 - (iii) salary and O&M funding for the region, division, institution, project or similar budget item from which a spouse or child is paid.

VOTING ON MORE REMOTE ITEMS

The budget process involves many different layers or levels of budget, with a large number of detailed items being consolidated into a smaller and smaller number of more and more general categories until a vote is called on the budget as a whole.

At a certain point the item causing the original conflict is no longer significant. It has been consolidated with items of greater value and more varied purpose. However, the cautious member would want to be certain at exactly what point the original item of conflict no longer "contaminates" the enlarged budget item.

Based on the definition in the Act which sets a controlling interest of a corporation at 10%, the legislation can be read to suggest a general rule based on 10%:

The first time the item is voted on, no matter what portion of the item generates the conflict, the member should declare the conflict.

EXAMPLE 1: The member's spouse is employed part-time by a society who operates the local elders home under a contribution agreement.

The member should declare and refrain from voting on the relevant budget item, even if the spouse's salary and funds controlled by the spouse amount to only \$25,000 out of a \$500,000 contribution (4%).

When a conflict generating item is included in a more general vote, the Member should declare the conflict until the value of the consolidated amount is more than 10 times the value of the original conflict-generating item.

EXAMPLE 2: The member's spouse is the manager of the local elder's home and controls the \$500,000 budget.

The Member should declare the conflict and refrain from voting until the consolidated category reaches a value of \$5,000,000.

COMMISSIONER'S OPINIONS

APPENDIX "B"

(2). Summary of Opinions Given

The following is a representative sampling of the opinions rendered by the Commissioner in the past year. While they do not cover all situations raised, they can be used to alert Members and staff to the wide range of problems which may require advice and opinions.

Substantial detail has been eliminated to ensure anonymity. It is important to note that differences in detail could mean that additional requirements or a different opinion altogether would be rendered. Certainty would require that each case be submitted to the Commissioner. These examples *should not* be taken as blanket judgments for all similar situations.

Request #1

Issue:

An Ordinary Member wants to apply to the NWT Housing Corporation under a home ownership program for new home financing.

Opinion:

In providing this opinion, the following sections of the *Act* were referred to:

1. generally a contract between a member or his or her spouse and the NWT HC would be prohibited under s.71 as being a contract with the Government of the Northwest Territories or with a department of government;

BUT

2. the transaction described is exempt from this prohibition by reason of s. 75(1) of the Act which provides that s. 71 to 73 do not apply where the contract relates to:

"any service, commodity, subsidy, loan or other benefit that the member or the spouse of the member....is entitled to receive as one of a broad class of persons"

Under normal circumstances, the *Act* does not allow a Member to hold private contracts with the Government of the Northwest Territories or its agencies. However, Members *are* allowed to participate in government programs and

services which are generally available to the public. This includes, of course, services such as health care and hunting licenses, but also programs such as the N.W.T.H.C. home ownership plans which are generally available to any resident of the Northwest Territories.

In the opinion of the Commissioner, the Member could participate in the program without a conflict of interest providing that the application to the N.W.T.H.C. and its decision to finance this construction were made on the same basis and in the same manner as would hold for any other person in the same circumstances and his participation would not preclude another person from participating,

Request #2

Issue:

A legal action has been taken involving a Member relating to their legislative duties. The Member is considering soliciting funds from the public for a Legal Expense Fund.

Opinion:

Some of the points considered in this opinion were:

- The *Act* in s.76(1) prohibits Members from receiving gifts while in office. In the request, the Member wants to not only receive gifts from the public, but also to solicit them.
- Members have the right and responsibility to raise matters of concern to constituents. As such, they are sometimes the subject of controversy and face an increased possibility of suit. This is balanced by the immunity offered by the Assembly.
- Restricting the means of a Member to mount a defense could cause Members to refrain from carrying out their public duties in future for fear of legal action. This would be unhealthy for the legislative process.
- In cases of public controversy, members of the public may wish to participate in the issue by contributions to the cost of the action. Prohibiting a member from receiving funds would also prohibit members of the public from contributing.
- The law both controls and allows solicitation of funds by Members for specific purposes, in particular, election campaigns.
- The Member should not be worse off in defending a legal action than an ordinary citizen.

The Member was allowed to solicit funds for a legal defense fund under terms specified by the *Elections Act* of the Northwest Territories, and adapted for this circumstance by the Commissioner.

Request #3

Issue:

An Ordinary Member holds shares in a publicly traded company which has significant holdings and activity within the Northwest Territories.

Opinion:

There are multiple opportunities for conflict of interest in this situation. The Member may affect share prices through statements both inside and outside the Legislative Assembly. The Member may be privy to privileged information which would harm or benefit the company or to information which would cause the Member to change their holdings in the company. The Member may find themselves restraining criticism of the company because of self-interest.

While there are circumstances under which such stocks could be held, the Commissioner would consider each case separately, applying conditions or recommending against ownership as determined by the particulars of the situation.

APPENDIX "C" BLIND AND MANAGEMENT TRUSTS

Conflict of Interest legislation is of fairly recent original in Canada, having a history of 10 to 15 years in most Canadian jurisdictions. The Northwest Territories has had legislation for only 5 years and is experiencing a very similar evolution in dealing with Member's business interests as has been seen elsewhere. Fortunately, we have the experience of other Canadian jurisdictions to draw on in developing an effective system.

The issue of Blind Trusts and their effectiveness has been the subject of substantial discussion and review in the Northwest Territories and elsewhere in Canada, and there has been a general evolution of opinion as to their value and effectiveness.

Each situation is individual and will be reviewed individually by the Commissioner but, in general terms, the nature of the trust favoured to hold Members' assets depends on the nature of the assets. The following can be taken as guidelines:

MEMBER HOLDINGS OF PUBLICLY TRADED SHARES

Where a Member owns shares in publicly traded corporations - investment, RRSP or other holdings - which are susceptible to conflict, there are a number of options.

When shares are publicly traded, they can be reasonably easily disposed of by sale. Assets can be transferred to investment alternatives which are selected to avoid risk of conflict including investments in corporations active only outside of the Northwest Territories or Canada, or in federal or bank bonds or similar instruments.

In the alternative, a blind trust can be created, into which assets can be transferred, and which will allow a Trustee, at arm's length from the Member, to buy, sell and manage investment decisions, while reporting to the Member only information on the values of holdings and not the identity of individual investments.

Trustees can be instructed as to the nature of investments desired and the level of acceptable risk, but not as to specific trades or purchases. Trustees can be replaced with the permission of the Commissioner if the Member is not content with the progress of holdings.

This is the truly blind trust. The Member does not know the holdings and the Trustee is free to manage the assets; to dispose of or acquire investments without the Member's knowledge. After a period of political activity ends the Member can take back control of the assets.

REAL ESTATE AND PRIVATE CORPORATIONS

Members with real estate investments in the Northwest Territories or with shares in privately held corporations active in the Northwest Territories have a particular problem. These assets are not easy to dispose of, and there are frequently tax consequences of a sale.

A private corporation often represents the accumulated value of many years of financial endeavour. These efforts and returns are generally re-invested in the company rather than being taken out as profits. A small corporation relies heavily on the skills and talents of its principal shareholders, which are frequently the

Member and his or her spouse. Ordinary Members will find that alternate sources of financing and access to government programs are limited, although the restrictions are less severe than Ministers face.

Aside from the time commitments to office, Ministers are prohibited from being a Director of a private corporation or from carrying on business and so are not in a position to participate in regular management of a business or assets. The Act is also clear that a Minister may not permit his or her Departments to enter into contracts with "controlled corporations" as defined in the Act.

It is particularly difficult for a corporation in this jurisdiction to avoid contractual dealings with particular government departments because of the pervasiveness of government. Although this report asks that the Commissioner be given discretion to allow some such contracts when they are in the public interest, this is not currently the case.

In the case of private holdings, where the Member has a particular attachment to the property and an enduring business knowledge and relationship with the property, it is increasingly clear in the Canadian context that a blind trust is not an appropriate or effective instrument to prevent conflicts from arising.

An instructive example from the past is that of the findings from the inquiry into the activities of the Federal Minister, Mr. Sinclair Stevens who had the shares of his privately held corporation placed in a blind trust. At the same time his wife retained her shares, which were not placed in any sort of trust. By the time the issue of a conflict was raised, the Minister's business interests were found to have influenced the Minister's activities in office, notwithstanding that they had been in a blind trust during his time in office.

THE MANAGEMENT TRUST

In response to the growing concern over the lack of effectiveness of Blind Trusts, Conflict and Ethics Commissioners in Canada have developed the Management Trust.

A Management Trust attempts to clarify rather than hide private holdings of the Member. The elements of the Management Trust are Public Disclosure and Management Guidelines. In a Management Trust the Member makes a through disclosure of private holdings, to the degree deemed necessary by the Commissioner, and publicly accepts a set of conflicts rules which match his or her holdings and the requirements of the offices held.

In this manner the conflicts issue is clearly defined and circumscribed and the public are aware of the rules the Member is operating under. The public can call the Member to task in the event of a perceived violation and can debate the adequacy for the rules set by the Commissioner. The Member can defend any actions taken based on a known set of rules, specific to his or her situation. This is the opposite of the Blind Trust where both the holdings and the rules of the trust are obscured, and Members find it difficult to defend actions when the basis of their trust is not public.

