

**YUKON
CONFLICT OF INTEREST COMMISSION**

**ANNUAL REPORT
TO THE LEGISLATIVE ASSEMBLY
FOR THE PERIOD FROM 1 APRIL 2004 TO 31 MARCH 2005**

**David Phillip Jones, Q.C.
Commissioner
26 May 2005**

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ANNUAL REPORT

**to the Legislative Assembly
for the period from 1 April 2004 to 31 March 2005**

This is my third Annual Report as a member of the Conflict of Interest Commission, and covers the period from 1 April 2004 to 31 March 2005.

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 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 2004 TO 31 MARCH 2005

(1) Annual visit to Whitehorse in April 2004

As in previous years, I travelled to Whitehorse in April 2004 to meet with Members and Ministers prior to the April 30th deadline for filing their annual statements. Although the *Act* does not require Members or Ministers to meet with me on an annual basis (unlike the legislation in some other jurisdictions), my predecessor and I have made ourselves available shortly prior to the filing deadline in order to be able to provide any assistance or guidance to Members or Ministers before filing their annual statements. While not all Members or Ministers have availed themselves of the opportunity to meet with me, most have. I believe such meetings provide both assistance and a level of comfort to all involved.

During my trip to Whitehorse in April 2004, I also took the opportunity to meet with the several Deputy Heads about their personal situations, as well as about the role of Deputy Heads in helping their Ministers avoid any real or apparent conflict of interest (including the system of having one or more alternate Ministers in place to deal with any matters with respect to which the Minister is prevented from being involved due to a real or apparent conflict of interest). In my experience, this latter role for Deputy Heads has been very helpful in avoiding a number of possible conflicts of interest.

I also met with a number of Cabinet and Caucus employees during my visit to Whitehorse in April 2004.

I made a similar trip to Whitehorse in April 2005, and I expect to continue with this practice.

(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. As discussed in the next section, such a waiver was provided in one instance during the period covered by this report.

(3) Mr. Kenyon's disclosure of advice provided to him in early 2005

In the course of the period under review, there was a very public controversy about the appropriateness of actions and representations by Mr. Kenyon (Minister of Economic Development, Minister responsible for the Yukon Liquor Corporation and the Yukon Housing Corporation, and Member for Porter Creek North) on behalf of a constituent who had worked in his veterinary clinic about the Minister of Education's initial decision not to make available the financial support which Yukon previously provided to the Western College of Veterinary Medicine in order to make places available for Yukon residents.

In January 2005, Mr. Kenyon and Premier Fentie publicly announced that Mr. Kenyon would be referring the matter to me for my advice about whether his actions and representations constituted a conflict of interest, and that Mr. Kenyon would make my advice public.

In addition to the request for advice from Mr. Kenyon with accompanying material, I received considerable documentation from other Members of the Legislative Assembly (including newspaper articles as well as material which had been received in response to requests under the *Access to Information and Protection of Privacy Act*). I travelled to Whitehorse in late January 2005 to interview Mr. Kenyon and others. I am satisfied that I had all available and necessary information in order to provide my opinion about the

conflict of interest concerns about Mr. Kenyon's situation, and that nothing would have been gained if this matter had been the subject of a formal complaint by another Member that would have provided me with the powers of a commission of inquiry under the *Public Inquiries Act*.

On 23 February 2005, I provided my detailed written letter of advice to Mr. Kenyon that his actions and representations did not constitute a conflict of interest under the *Conflict of Interest (Members and Ministers) Act*. Mr. Kenyon subsequently released my letter to the public, and thereby waived the confidentiality provided by Section 24.

In stating my conclusion about the absence of a conflict of interest, I explicitly noted that I was making no comment about the following matters which do not lie within the jurisdiction of the Conflict of Interest Commission:

- The merits of the Department of Education's decisions (a) in March 2003 to terminate the funding arrangement with the Western College of Veterinary Medicine; (b) not to provide funding for the position at the WCVM for the student who apparently applied for admission in 2003; (c) not to provide funding for the position at the WCVM for the student who was Mr. Kenyon's employee who applied for admission in 2004; (d) to reverse its decision about the 2004 student; or (e) about whether anything ought now to be done about the 2003 applicant.
- The appropriateness of Mr. Kenyon's comments about members of the public service (for which he subsequently publicly apologized).

Mr. Kenyon later asked me to provide him with information about the cost of my involvement in this matter, as he had undertaken to the Legislative Assembly that he would provide this information to it. To my knowledge, this is the first time that the Conflicts Commissioner has ever received such a request. The confidentiality provisions in section 24 would prevent the Conflicts Commissioner from responding to such a request from anyone other than the Member or Minister (because such a response would necessarily disclose that a request for advice had been made, which is confidential). However, in this case the request came from the very Member who had asked for the advice. After consideration I came to the conclusion that it was appropriate in this case for me to disclose this information for tabling in the Legislative Assembly (17 May 2005). This decision should not be taken as a precedent that would necessarily apply in any future case.

(4) No complaints or investigations

As noted in Part A above, 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(d) 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.

I am pleased to report that there were no complaints and no investigations during the reporting period.

(5) Meeting of the Canadian Conflict of Interest Network

In September 2004, I attended the annual meeting of the Canadian Conflict of Interest Network (“CCOIN”) in Halifax, Nova Scotia.

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.

C. RE-APPOINTMENT

On 28 April 2005, the Legislative Assembly voted to re-appoint me to the Conflict of Interest Commission for a further three-year term to 13 May 2008. I am honoured at the confidence the Members have expressed in me.

D. OBSERVATIONS ABOUT THE LEGISLATION

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).

Nevertheless, concepts about what constitute a conflict of interest do evolve over time. The Yukon legislation is now ten years old—having been originally enacted in 1995 and amended in 1999 to cover Deputy Heads and Cabinet and Caucus Employees. A number of other jurisdictions (Alberta and Nunavut, for example) require their legislators to review their conflicts legislation at regular periodic intervals in order to make certain that it continues to meet their needs. Yukon legislation does not provide for such an automatic periodic review. In my respectful opinion, this is something which the Legislative Assembly should consider at some point in the not too distant future.

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 conflicts of interest régimes elsewhere). Nevertheless, the 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.

E. ACKNOWLEDGMENTS

I would again like to publicly thank the Clerk of the Legislative Assembly, Patrick Michael, and his assistant, Sue Macdonald, 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.

F. CONTACT INFORMATION

I can be contacted as follows:

David Phillip Jones, Q.C.
300 Noble Building
8540 - 109 Street N.W.
Edmonton, Alberta
T6G 1E6

Phone: (780) 433-9000
Fax: (780) 433-9780
Email: dpjones@sagecounsel.com

All of which is respectfully submitted this 26th day of May 2005 by:

David Phillip Jones, Q.C.
Conflict of Interest Commissioner