

PROCESSES AT THE OFFICE OF THE CONFLICT OF INTEREST COMMISSIONER

- I am pleased to be able to join your meetings and learn from each other's experiences regardless of our respective jurisdiction.
- I previously spoke in April 2011 at your meeting about the ethical framework for provincial public servants. Today I want to focus less on substantive rules and more on processes (1) processes for gathering information and (2) promoting compliance
- Our office has now been in existence for 6 years and has dealt with over 800 matters in that time. As a result we have had opportunities to test and refine our processes. We are certainly not perfect, and continue to seek out more efficient, fair and effective ways of promoting ethical conduct.

Gathering Information

- I understand that you had a session about investigative techniques for extracting information from electronic devices. Our information gathering techniques are less high tech.
- Our office has no investigative arm – I suspect that we gather information much like you do. We research publically available data – google is our friend. We send emails and have meetings in person or via telephone.
- As I said, the tools that we use are likely not that different than those that are at your disposal. What I'd like to talk about is how you can make those tools the most effective.
- Before I get into the details I think it would be helpful to give you some brief context for the legislative scheme that I operate under.
- Under the *PSOA* – each public servant has an ethics executive that is responsible for making decisions and providing advice about the application of the conflict of interest/ political activity rules. Commissioner is ethics executive for a number of public servants including the Secretary of Cabinet as well as chairs and administrative heads of agencies.
- There is no right to appeal my decisions.
- My decisions may be subject to judicial review – however to date no application for judicial review has been commenced.

- If I make a finding that the conflict of interest rules have been contravened, disciplinary action may be taken up to and including dismissal or revocation of an appointment.

(1) Fairness

- Given this legislative scheme, and the impact of my decisions, it is imperative that my office operates in a **fair** when collecting information.
- Although as Commissioner I am not operating as a judge – it is important that our office tries to incorporate the basic principles of natural justice and procedural fairness in our processes.
- At a basic level this includes the “Right to be heard”.
- Affected public servants have to be able to communicate with me as the decision-maker and understand nature of concern.
- Things can get complicated with conflict concerns are raised by a third party – sometimes a vulnerable third party such as a subordinate. I want to encourage this type of dialogue.
- In these situations my office has to balance competing priorities - the right of the public servant to be heard with need to protect the interests of the third party.
- One way our office has handled this in the past is by assessing and restricting the type of information that we provide a public servant against whom a complaint has been made. So for example we would not forward correspondence received from third parties to a public servant but rather summarizes nature of concern.
- By continuously operating in a fair manner – we built a reputation amongst our stakeholders which has made public servant more likely to offer up relevant information.
- We have also recently assisted the Ministry in developing a form for gathering COI information which has stream lined the information gathering process. As a result we spend much less time chasing information and more time analyzing and coming up with mitigation strategies.

(2) Transparent Process

- Unlike the world many of you operate in – the public is not often aware that I am conducting an inquiry or even that I have made a particular decision.

- When my office was first established, public servants were very concerned if someone from my office contacted them. In some ways it was similar to the reaction lawyers in my day had when the Law Society called.
- This tension and mistrust was not helpful.
- In an effort to ease some of the concern my office published a series of fact-sheets that outline how the office operates.
- These fact sheets, which are available on the resources section of our website, answer questions such as:
 - Who may seek a conflict of interest determination or advice from the commissioner?
 - How is the process initiated?
 - Who will have an opportunity to provide comments to the commissioner?
 - What might the determination include?
 - Does the Commissioner's advice or determination have to be followed?
- Our office often sends these fact sheets along with requests for more information to public servants to help them understand how the information they are providing will be used.

(3) Proportionate Response

- The thing with conflicts is that they range from conduct that is picayune to criminal.
- The Act under which I operate didn't provide for much differentiation between how I was to conduct myself when I became aware of a potential conflict situation.
- In some cases, conducting a full inquiry and making a determination just didn't seem like the best response to a situation.
- So we got creative.
- We created an advice giving function – a role not specifically provided for in our enabling legislation, but consistent with the role of the Commissioner.
- What this enabled us to do was provide a more proportionate response to a situation – encouraged public servants to approach with situations they were considering BEFORE they took any actual steps.

Promoting Compliance

- I'd like to switch now to the subject of promoting compliance.
- This is a huge area to cover – indeed something that ethicists, professors and practitioners struggle with all the time. I don't purport to have any magic solutions and I understand that many of you operate in challenging environment.
- What I hope to do is to give you encouragement – to share with you 3 things that my office has done which I believe promotes compliance with both my decisions and the ethical framework I operate in. Perhaps there will be elements that you can incorporate into your practices.

(1) Be active in positioning yourself and communicating your role

- Early on I knew that I did not want the COIC to be a “gotcha agency”
- In my view that kind of organization would be contrary to the intention of the legislation.
- I saw my office as an ally for public servants. We are a resource to assist them in avoiding embarrassment, minimizing risks for their organization and helping them “get their jobs done”.
- In order to communicate this role, my office had to build relationships. We had to get our stakeholders to buy into the value of an ethics regime. This can be a difficult task – because you are a decision-maker and don't want to do anything that might compromise your independence or cause others to question your own integrity.
- Our office chose to develop relationships by taking a leadership role in education. Again, this is not a role set out in legislation – but it is consistent with the broader role of Commissioner.
- The purpose of our education sessions is to promote awareness of the rules and function of the COIC. Initially we started small and met one-on-one with every newly appointed chair of agencies. We have now expanded our role to host 4 group sessions a year for chairs, CEOs and other interested parties. In fact in September we just did our first live webcast of an orientation session.
- We are careful – we don't discuss specific matters and try to talk in general terms.
- The result of education sessions is that our stakeholders have some familiarity with our office and role, they hear our message about being an ally.

- The sessions often lead to more matters being brought to our attention.

(2) Insight into past decisions

- One of the things that stuck me when I first became Commissioner was that there was not a lot of recent, relevant case law in this area.
- It was problematic for me personally because there wasn't very much I could turn to, to help me interpret the rules or my role. I realized how difficult it made things for public servant. It's hard to follow the rules when you are not entirely sure how they apply.
- I'll give you an example – under the provincial conflict of interest rules – public servants are prohibited from accepting gift. There is a narrow exception that permits public servants to accept gift of nominal value, given as an expression of courtesy or hospitality. The Act provides no definition for the term nominal.
- One solution that our office came up with was to develop anonymized summaries of some of our decisions and publish these in our annual report. Each year we publish about 10 to 15 summaries that public servants can use to help them understand what the rules are.

(3) Identify systemic issues

- As Commissioner – I have the benefit of sitting back and being able to see what types of conflict issue come up regularly. Over time it became apparent that some areas of government have systemic issues. Often this is not the result of wrong conduct but rather the mandate of the organization.
- It seemed to make sense that my office should be involved with finding a solution to these systemic issues rather than devote resources to addressing specific matters on a one-by-one basis.
- As you might have guessed – my involvement in system issues was not specifically set out in legislation. Addressing these issues however, is something that I think is consistent with my role.
- So for example – our office assisted the LCBO in determining what types of third party sponsored travel would be appropriate. By way of background – the LCBO as the provinces distributor of alcohol would often be invited to visit wine regions seeking to increase their share of the Ontario market. It was a reasonable business decision for the LCBO to attend

these trade mission. The question became who paid. In a world of unlimited funds the LCBO would self-fund all of these trips. In reality – that wasn't possible. In the end we developed a criteria to be used to evaluate the appropriateness of third party sponsored travel.

- Similarly we assisted the OLRB with determining what type of private arbitrations their own arbitrators could engage in, during their personal time, without compromising the independence of the OLRB.

Conclusion

- Our roles are all defined – whether through statute, decisions of council or codes of conduct.
- Notwithstanding those confines – sometimes there is more wiggle room for us to do things than we might have thought.
- We can sometime benefit from looking at the “spirit” of those confines for assistance.
- It has been my experience that if you want to promote ethical conduct – get people to share information and comply with your decisions – you have to do more than just make decisions.