Toronto Computer Leasing Inquiry

Research Paper

CONFLICT OF INTEREST

Volume 1: Comparative Overview

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Executive Summary

Part 1: Introduction

Volume 1 is a comparative overview of conflict of interest policies in public and private sectors workplaces, including the following:

- An overview of definitions of conflict of interest.
- A survey of different approaches to mandating conflict of interest requirements in the public sector, including the Canadian and U.S. federal governments, various Canadian provinces and U.S. states, as well as selected Canadian and U.S. municipalities.
- A survey of different approaches to mandating conflict of interest requirements in the private sector.
- An overview of common compliance provisions.
- An assessment of the effectiveness of conflict of interest policies, including best practices related to institutionalizing ethical behaviour in organizational culture.

Volume 1 is based on reviews of more than 1,500 pages of documents and interviewing 27 individuals including current and former municipal and other government officials, as well as research, academics and other experts. Building on this foundation, Volume 2 will focus on policies currently in place for the City of Toronto, specific conflict of interest-related issues and/or challenges faced by the City, and recommendations for potential changes to current policies and practices.

Part 2: Origins and Definitions

Origins

Over the past 35 years, there has been an evolution of ethics rules, often layered one over the other in response to scandals. Conflict of interest rules have been part of this movement in both the public and private sectors. The research shows that there is a generally common approach to how the categories of conflict are defined. There is however, considerable variation in terms of how these rules are mandated across North America, including:

- Legislation for elected officials, often with separate statutes applying to different branches of government.
- Regulations that provide authority to an independent body or arm of government to enforce conflict of interest rules.
- Administrative policy, directives, and/or guidelines.
- As part of a broader set of policies and standards that establish organizational values and overall direction for ethical behaviour, commonly known as “codes of conduct”.

Definitions

In the public sector, the provisions of conflict of interest policies generally attempt to ensure that elected officials and employees do not benefit personally beyond what would be normally be considered a regular benefit of the job. In the private sector, the rules are very similar, although the emphasis is on the interests of the corporation and commercial matters as opposed to the public interest. Policies typically include rules related to the use of insider information, trading information with competitors, or use of company property.

Clarifying Conflict

Conflict of interest is generally thought of as any situation involving hidden "self-dealing", "related-party transactions", "non-arms length relationships", or "serving two masters" that results in gain to one party at the expense of another. In the public sector, particularly in relation to elected officials, there have been attempts made to define conflict even more precisely. With respect to employees, broad principles are more likely to be offered than specifying when a conflict could arise. This approach does not attempt to qualify every eventuality that may surface, but rather puts the onus on the employee to determine the ethics of the situation.

Clarifying Interests

In the public sector, most rules are tailored to the setting so that conflicts that occur are more easily recognizable. Definitions often describe situations where direct or indirect benefits are prohibited. Regardless of the setting, however, the organization, or the target audience, the categories used to define interest were generally consistent, e.g. financial interests, gifts and honouraria, and outside employments interests.

Part 3: Mandating Conflict of Interest Policies - The Public Sector

Regulation in some form, whether through legislation or administrative guidelines, has been the typical response to shaping conflict of interest rules in the public sector. Two approaches have been taken in Canada and the U.S.:

- Legislated and non-legislated standards to govern the conduct of elected officials.

- The use of policies, guidelines, directives or other measures to govern public sector employees.

Government of Canada

Elected Officials

There is no single piece of overarching legislation that applies to all elected officials. The *Parliament of Canada Act* is the key piece of legislation that prohibits Senators and members of the House of Commons from engaging in activities that might create a conflict of interest. The Ethics Counsellor administers the Code with respect to Cabinet Ministers including ensuring that the appropriate disclosure of personal interests is made.

The Code sets out a two-pronged approach to disclosure that includes confidential disclosure to the Ethics Counsellor of all assets and contingent liabilities and public disclosure of declarable assets. These requirements do not apply to Senators or members of the House of Commons. In the fall of 2003, federal proposals to make the office of the Ethics Counsellor more independent and to encompass both Senator and MPs under its authority were rejected by the Senate, particularly in relation to financial disclosure.

Public Servants

The federal government's rules for public servants are captured in the document *Values and Ethics Code for the Public Service* – one of the most thorough documents reviewed for this report. The *Code* emphasizes the values of the public service and how these values should be used to guide behaviour. The *Code* includes examples of specific conflict situations and requires public servants to report confidentially all outside activities assets, and direct and contingent liabilities that might give rise to a conflict of interest. The *Code* also

allows individual departments to customize requirements to meet their particular needs.

U.S. Federal Government

Disclosure

Disclosure of personal interests has been the focus of many public integrity initiatives in the U.S. since the late 1970's as a way to achieve greater accountability on the part of elected officials. The current approach to financial disclosure is seen in the U.S. as the basic tool for identifying real, perceived, or potential conflicts of interest and working out how to manage these conflicts.

Most often, financial disclosure statements reflect an individual's personal financial information for the previous calendar year. Along with personal information, individuals must disclose certain types of investments, sources of income, businesses, etc. in which the filer is an officer or board member, sources of gifts, real estate investments, and creditors and debtors. Some filers are also required to disclose sources of travel expenses, and certain sources of meals, food, and beverages, incurred in connection with official duties.

In the U.S., most of the rules at the federal, state, and municipal level require public disclosure of interests on a regular basis, with reports needed to be available to anyone wishing to review them. At the federal and state level, financial disclosure statements are posted on government websites.

Elected Officials

Detailed rules to govern the conduct of government officials in both the Executive and Legislative Branches have been developed. In 1995, both the House and

Senate adopted specific gifts rules for members and staff based on the existing *Standards of Conduct for the Executive Branch*, including guidance on gifts, conflicting financial interests, impartiality, seeking employment, misuse of position and outside activities.

Separate legal requirements apply to, and are independently administered and enforced by the Senate and House of Representatives through standing committees. In the Judicial Branch, ethics matters such as the financial disclosure system are administered by the Judicial Conference of the United States.

Public Servants

The U.S. federal government uses regulation in the form of Executive Orders to define conflict of interest policies for public servants. These policies are most often expressed in codes of conduct. These are administered by the Office of Government Ethics.

The current *Ethical Conduct for Employees of the Executive Branch* policy applies to all officers and employees in Executive Branch agencies and departments. This policy is intended to establish a standard for employees throughout the Executive Branch. At the same time, individual departments and agencies may supplement these standards with additional requirements that are tailored to meet agency/department-specific needs. Areas addressed in supplemental department/agency standards include prohibited financial interests, prohibited outside activities, and prior approval of outside activities.

Each Executive Branch department or agency is required to maintain a program of ethics training to ensure that all of its employees are aware of the requirements of the conflict of interest laws and the standards of conduct. Many

agencies also provide ethics briefings to employees who are leaving government service.

Canadian Provinces

All Canadian provinces have put in place some form of conflict of interest legislation. As part of ensuring compliance, each province has established an independent oversight body – known variously as Conflict of Interest Commissioners, Integrity Commissioners, and Ethics Commissioners – with responsibility for reviewing ethics issues for MPP/MLAs depending on the legislation in force. There is general consistency in terms of the role and function of the ethics oversight authority and in the categories/definitions included to describe conflict.

In a number of provinces, the rules for the receipt of gifts by MPPs are very specific in terms of the primary focus being on financial gain and the monetary value of the gain, including gifts. In some provinces, the principles and rules that have been developed for elected officials have been used as a prototype to set similar standards for public servants, e.g. Alberta and British Columbia. While most provinces have chosen to embed their conflict of interest rules for public servants in policies, directives, and guidelines, as opposed to legislation, Nova Scotia uses the *Members and Public Employees Disclosure Act* as the vehicle by which conflict of interest rules for both members and public servants are expressed.

Ontario has not established a code of conduct for its public servants. Its *Rules of Conduct for Public Servants* are specified under the *Public Service Act* and accompanying Regulation 435/97 and complemented by policy directives.

U.S. States

Most U.S. states express their conflict of interest rules in legislation. These statutes usually apply to both members of the legislature and the public service. This is consistent with the greater emphasis in U.S. public administration on statute-based administrative policy. Unlike Canadian jurisdictions, many states require disclosure of personal interests for public servants who earn over a certain threshold. In part, this reflects the fact that in most U.S. jurisdictions, the top two layers of the public service are political appointees who are required to resign automatically when the administration changes.

Most U.S. jurisdictions have established arms-length ethics boards or commissions. Thirty-nine states have established two oversight bodies – a legislative committee and an arms-length commission as part of ensuring that there will be independent, external monitoring of ethical conduct in government. In the eleven states that do not have a separate ethics commission or board, oversight is through other state agencies such as the Office of the Secretary of State or Attorney General.

In terms of the incidence of conflict at the state level, the research indicates that 41 out of the 50 legislatures are run by part time elected officials who meet only a few months each year and draw salaries that average about $18,000 annually. This compares with those states that had full-time officials with average annual salaries of $57,000. Researchers concluded that conflict of interest was inevitable in states where elected officials were making such a small salary, since they needed to find income from other sources. They also found that when not in session, elected officials often had no choice but to follow careers that were regulated by the states.

Canadian Municipalities

All Canadian provinces have legislation in some form that governs conflict of interest matters respecting members of municipal councils. This can be part of more general legislation governing municipalities or a separate statute dealing specifically with conflict of interest. Municipal conflict of interest legislation in Ontario, Nova Scotia, Manitoba, and Alberta is focused solely on elected officials rather than municipal staff. This legislation serves as a backdrop for more individualized by-laws and codes of conduct that are developed locally and tailored by the municipality in response to local issues and needs.

There are differences between and among provinces in terms of the detail of the various definitions provided in provincial legislation. In some provinces, the definitions are provided at a high level. In others, the definitions and practical description of potential conflicts are much more detailed and in some cases, such as Nova Scotia, quite specific.

U.S. Municipalities

Many states have overarching legislation that sets the standard for conflict of interest policy in municipalities. Often there is some type of financial disclosure legislation that requires certain individuals, officials and candidates for elected office to file statements of financial interests. In states that do not have legislation in place that specifically speaks to conflict of interest, there is usually some generic statute that requires the municipality to develop their own local conflict of interest policies. As part of these internal policies, most municipal organizations provide scenarios for their employees to help them to understand the rationale behind the rules and include provisions dealing with former employees.

Part 4: Mandating Conflict of Interest – the Private Sector

Conflict of interest policy is usually conveyed in the private sector as policy documents in the form of codes of conduct. A review of a number of corporate codes indicates that there is great variance in the way these statements are drafted. However, these codes generally contain elements that are similar to public sector codes, e.g. broad statements of principle that the organization attempts to advance for its employees, and definitions of conflict of interest as a means of providing the context in which employees will make decisions about ethical behaviour.

Many private sector codes use a case study approach as a way to illustrate examples of conflict of interest situations and as a way to help employees understand the meaning and intent behind the rules. This typically includes posing questions for employees to help them to distinguish what might be a conflict in certain situations. Many corporations also rely on committees or task forces to oversee the ethics initiatives in the organization, lend legitimacy to the ethics agenda, and communicate the organization's commitment to employees.

Part 5: Achieving Compliance

Public Sector

At the federal and provincial level, the most common approach to ensuring compliance with conflict of interest legislation or codes of conduct is usually through the establishment of an ethics or integrity commissioner. In most cases, these bodies review and adjudicate on conflict cases, recommend how conflicts

should be resolved, provide ongoing guidance, and ensure consistent application of the rules. At the federal level in Canada, the Ethics Counsellor reports to the Prime Minister and currently focuses on advice to members of Cabinet. The provinces have created commissioners who are officers of the legislature, usually with significant investigatory powers, who are designated to provide advice to both Cabinet members and members of the legislature.

Codes of conduct for public servants emphasize disclosure at the time a real or apparent conflict arises as the first step in the process, with a view to allowing the employer to participate in the decision as to which interests may lead to conflicts (and, as suggested in the research, providing some level of protection for the employee if s/he has made an honest error in judgment). While the ultimate responsibility rests with the employee to identify a possible or real conflict, management most often provides opportunities to disclose the interest and discuss possible lines of action. Designated parties will review disclosure forms to determine if there is a conflict of interest and advise employees of appropriate actions.

Private Sector

Codes of conduct for the private sector also emphasize disclosure of potential or real areas of conflict to management as the first step. How supervisors then deal with the disclosures varies somewhat from organization to organization. Most often, there is a committee or department where employees are instructed to discuss confidential matters of conflict. Monitoring of employee compliance with the conflict of interest regulations is also commonly seen as a direct line management responsibility, in addition to or instead of ethics advisors.

In cases where a real conflict exists, common organizational responses range from counselling, oral/written warnings, formal reprimands, suspensions with or without pay, and dismissal. However, the universally preferred approach is to

encourage awareness of employer concerns regarding conflict of interest situations and provide strategies to assist employees to avoid conflict situations.

Part 6: Ensuring Effectiveness

Do Conflict of Interest Rules Work?

Few if any empirical studies prove a correlation between ethics regulation and the behaviour of public officials and trust in government. The research, however, strongly supports the notion that conflict of interest rules, whether set out in legislation or in policy, are an important part of creating an ethical environment because they provide guidelines for ethical behaviour.

Yet, the proliferation of ethics laws has not translated into a high level of public trust. Studies have found a steady decline in confidence from more than 60 percent in the early 1960s to less than 30 percent by the year 2000. At the same time, experts generally suggest that the bulk of elected and non-elected public officials in fact do act ethically but that efforts to "over-regulate" with increasing levels of detail usually become progressively less effective and can actually damage public confidence.

Experts emphasize that having clear guidelines that shape organizational culture are essential because they provide a frame of reference that has an impact on behaviour. Consistent with this emphasis on shaping behaviour, the process of developing codes of conduct and conflict of interest rules and making them part of every aspect of the organization's culture, is as important as the content of the rules themselves.

Institutionalizing Ethical Behaviour

The importance of culture and values for guiding employee behaviour is strongly emphasized in the research. A key starting point is that the entire organization must agree on the importance of ethical behaviour, and, more importantly, there must be a collective standard for the entire organization to follow. It is also clear that successful institutionalization takes place over years rather than weeks or months. This typically requires a sustained effort to ensure that that ethics and standards of ethical behaviour are clearly and formally made part of every aspect of the organization.

Key best practice components from the research include:

- *Ensuring Management Commitment to the Ethics Process:* The literature stresses that management needs to be a visible example in demonstrating the organization's belief in ethical behaviour. This includes guiding the process of developing, ongoing communication, the creation of ethics "champions", as well as demonstrating clear and explicit consequences for unethical behaviour.
- *Articulating the Organization's Values:* The research confirms that it is essential to communicate the core values of the organization so that employees understand what is fundamentally important to the organization. This process of reflection and dialogue is seen as one of the most important aspects of creating an ethical organization and is a key to successful implementation.
- *Organizational Analysis:* Experts emphasize a thorough analysis of the culture and/or ethical climate of the organization against the desired values/guiding principles. The purpose of this review is to determine organizational readiness, i.e. the extent to which current policies, culture, behaviour, structures, etc. are aligned or not aligned with the new vision of the future.

- *Training:* Ongoing training emerges as a key component of institutionalizing ethics in the workplace. Training typically also involves statements from senior management emphasizing ethical business practices, discussions of the corporate code of ethics, case studies, commendations, or other public acknowledgement of good ethical behaviour by employees).
- *Follow-up:* Follow-up refers to monitoring change, evaluating the results, and ultimately determining whether institutionalization of the desired behaviour has taken place within an organization.

Part 7: Conclusion

In the present day, most organizations have some form of conflict of interest policy, although varying in complexity and comprehensiveness. A central conclusion from the research is that there is a basic or common approach across all of these jurisdictions with respect to how the categories of conflict and specific instances of conflict are defined. In generally consistent terms, they describe the values of the organization and set the tone for ethical behaviour. There is, however, considerable variation in terms of how these rules are mandated.

With respect to municipalities, most Canadian provinces and many U.S. states have legislation in some form that governs conflict of interest matters respecting members of municipal councils, as part of more general legislation or as a separate statute dealing specifically with municipal conflict of interest. In general, governing legislation sets out the requirement that municipalities have conflict of interest policies in place. Some jurisdictions go further to provide more explicit direction, particularly in the U.S. where state legislation is often highly detailed in terms of municipal requirements. Municipalities in the U.S. and Canada do not generally use arm-length oversight bodies.

The research confirms that conflict of interest policies and codes can be effective but not as standalone measures. The importance of culture and values for guiding employee behaviour emerges from the research as paramount. Rather than emphasizing specific policies or statutes, successful organizations are recognizing the importance of developing a "framework of ideals that influence individual behaviour and characterize an organization".

As such, the real determinant of success is effective implementation. Consistent with Change Management theory, the research emphasizes that the process of developing codes of conduct and conflict of interest rules and making them part of every aspect of the organization's culture, is as important as the content of the rules themselves. The requirements for sustained institutionalization of desired behaviours are well documented in the research.

The notion of *practical/real-world* examples emerges from the research as a dominant best practice. This includes providing individuals with interpretative information as well ongoing opportunities to discuss issues, concerns, and examples. Compliance and enforcement efforts also emerge as an important best practices area. As posed by experts, the central question and test of effectiveness in this area is whether there is a willingness to consistently hold people accountable for their actions. Finally, the research is also clear that even in a best practices organization, successful institutionalization cannot be achieved overnight. Often it takes place over years rather than weeks or months.

Part 1

Introduction

"Ethics. It's the defining issue for today's organizations. Governments, companies, professional firms and individuals alike are being held increasingly accountable for their actions, as demand grows for higher standards of corporate social responsibility. Today we are judged not only on the financial performance of our organizations, but also on whether we are good corporate citizens. And at the heart of corporate citizenship is organizational ethics." (Canadian Centre for Ethics and Corporate Policy)

Focus and Structure

Volume 1 is the first of two research reports on conflict of interest. It is a comparative overview of conflict of interest policies in both public and private sector workplaces, including the following sections:

- An overview of definitions of conflict of interest.
- A survey of different approaches to conflict of interest in the public and private sectors, including the Canadian and U.S. federal governments, various Canadian provinces and U.S. states, as well as selected Canadian and U.S. municipalities.
- A summary of conflict of interest approaches and practices in the private sector.
- An overview of approaches to compliance and enforcement related to conflict of interest policies.

- An assessment of the effectiveness of conflict of interest policies, including best practices related to institutionalizing ethical behaviour in organizational culture.

Volume 1 focuses primarily on the ethical issues associated with conflict of interest that can be dealt with through employment policies and sanctions. It does not attempt to address matters that would be considered offences under the *Criminal Code* (e.g. bribery, fraud).

Building on this foundation, Volume 2 will focus on policies currently in place for the City of Toronto, specific conflict of interest-related issues and/or challenges faced by the City, and recommendations for potential changes to current policies and practices.

Research Approach

The preparation of Volume 1 included reviewing over 1,500 pages of documents and interviewing 27 individuals including current and former municipal and other government officials, as well as researchers, academics and other experts.

Documentary resources focused on publicly available material (either in print or electronic format), including legislation, government and private sector reports and research/policy documents, academic and other expert analysis/writings, opinion pieces, etc.

Part 2
Origins and Definitions

Origins

According to historians, the 1970's marked the beginning of an era of heightened public concern about and interest in ethics in government in both Canada and the U.S. This included growing pressure on government for ethics-related legislation and programs, including conflict of interest rules, campaign financing, and lobbyist registration. Prior to the 1970's, ethical issues did not feature as prominently on the public landscape. This is not to say that ethics related issues did not exist, but rather that public awareness and concern were not as acute.

During the 1970's, the Watergate scandal is noted as representing a major watershed in the U.S. ethics debate. Academics have suggested that in the wake of this scandal, the American public began to assume and accept as a given that there were problems with government. In light of increasing public pressure, the response of many legislatures was to put even further emphasis on ethics regulations, including conflict of interest polices and codes of conduct in order "to be seen to be" addressing the issues.

Some academics note that the move towards more ethical policies and practices was also, in part, a response to what has been described as the general revitalization of state legislatures during the 1970's and 80's. This revitalization has been characterized as a form of "professionalization" as part of which legislators increased the time spent on their tasks, established or expanded their staffs, streamlined procedures, enlarged their facilities, and put more focus on their ethics, including finances (e.g. campaign finances, gifts, etc.) and conflicts of interest. As part of this general development, legislators across North America took steps to codify more precisely what was meant by honest public service

and, in some cases, to create agencies to interpret and enforce these new ethics laws. In the early 1970's, the Canadian federal government first put forward a package of ethics rules that applied to both elected officials and public servants.

Over the past 35 years, there has been an evolution of ethics rules, often layered one over the other usually in response to scandals. Conflict of interest rules have been part of that movement in both the public and private sectors. The research shows that there is a surprisingly common approach to how the categories of conflict are defined. There is, however, considerable variation in terms of how these rules are mandated across North America, including:

- Legislation for elected officials, often with separate statutes applying to different branches of government.
- Regulations that provide authority to an independent body or arm of government to enforce conflict of interest rules.
- Administrative policies, directives, and/or guidelines.
- As part of a broader set of policies and standards that establish organizational values and the overall context for ethical behaviour, commonly known as "codes of conduct".

The latter are generally broader than conflict of interest policies, most often describing the values of the organization and setting the tone for ethical behaviour. Codes of conduct typically include practical descriptions of what would be considered unethical behaviour or situations of conflict.

The code of conduct model of establishing organizational ethics has gained popularity in the public sector over the last fifteen years. In Canada, codes of conduct are in place federally and in many provinces and municipalities. The private sector experience with codes of conduct generally predates that of the public sector. A handbook on ethics and codes of conduct for the private sector that was encountered during the research for this paper was published in 1924.

Some of the larger U.S. corporations have had codes in place since the turn of the century.

Regardless of how conflict of interest rules are mandated, it is clear that in recent years, and particularly in response to major scandals, governments and businesses are placing greater emphasis on creating formal policy statements that define integrity for employees. These policies usually include principles that lay out organizational values and aim to clarify the kind of ethical behaviour expected of everyone in the organization. The challenge appears, however, to be to define conflict of interest in such a way that it anticipates all of the foreseen and unforeseen situations that may arise. In general, this is recognized as not being possible on a practical level and therefore many of the definitions for conflict of interest have been expanded to include not only rules that guard against unethical behaviour, but also guiding principles intended to encourage high standards of ethical behaviour generally.

Definitions

When one assesses conflict of interest rules, no matter what the target audience or how they are mandated and enforced, the fundamental principle is integrity. This is typically defined as making sure someone being paid to do a job is not personally benefiting from actions taken on the job.

A review of a number of public sector and corporate websites indicates that many organizations have some form of conflict of interest policy, although varying in complexity and comprehensiveness. In the public sector, the provisions generally attempt to ensure that elected officials and employees do not benefit personally beyond what would be normally considered a regular benefit of the job. For example, the U.S. rules for federal employees state that public service is

a "public trust requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain".

In the private sector, the rules are very similar, although with the emphasis necessarily being on the interests of the corporation and commercial matters, as opposed to the public interest. Policies typically include rules related to the use of insider information, trading information with competitors, or use of company property.

This distinction aside, most of the definitions appear to have the same intent regardless of their origins. For example:

- *"Conflict of interest means that the decisions made and/or the actions taken by an employee in the course of the exercise of his or her Corporate duties are or may be affected, or could be seen by another party to be affected by: the employee's personal, financial or business interests; or the personal, financial or business interests of relatives, friends or associates of the employee".* (City of Mississauga, Employee Conduct Policy and Procedure)
- *"Conflict of Interest is…any situation where an individual's private interests may be incompatible or in conflict with their public service responsibilities".* (Conflict of Interest and Post-Service Directive for Public Servants – Ontario)
- *An employee will be considered to have a conflict of interest where he or she or a member of his or her family has a direct or indirect financial interest in a contract or proposed contract with the City, and where the employee could influence the decision made by the City with respect to the contract. A conflict exists where the employee could directly influence the decision made in the course of performing his job duties, and also where he could indirectly influence the decision through exerting personal*

influence over the decision-maker (Corporation of the City of Burlington, Code of Conduct, Policies and Procedures)

- *"A conflict of interest occurs when personal interests interfere with your ability to exercise your judgment objectively or to do your job in a way that is certain to be in the best interests of our company".* (ITT Industries)

Clarifying Conflict

As suggested in the literature, conflicts of interest in and of themselves are not exceptional or unusual occurrences. People have interests of all sorts and it is seen as unrealistic and unacceptable to expect that simply because someone is a public office holder they could not have outside interests. The dilemma occurs when conflicts of interest are either acted upon or disregarded in situations in which the interest may affect or appear to affect both the process of decision-making and decisions themselves. To put it another way, the interest is only a problem if a person uses her/his position to further a personal interest.

Although it is a daunting task to try to define every instance where a conflict could arise, attempts have been made to clarify the definition. Conflict of interest is generally thought of as any situation involving hidden "self-dealing", "related-party transactions", "non-arms length relationships", or "serving two masters" that results in gain to one party at the expense of another. Simmons (1999) developed a definition of conflict of interest for use in private sector organizations, although it has broader application:

> *"The convergence between an individual's private interests, obligations, relationships and his and his or her professional obligations to the organization:*

- *Such that an independent observer might reasonably question the motive, actions and outcomes regarding decisions made or actions taken by the individual, as a director, officer or employee.*
- *Such that an independent observer might reasonably question the motive, actions and outcomes regarding decisions made or actions taken by the individual, the individual's immediate family; or a third party or organization in which the individual or the individual's immediate family has a business interest or association, receives any "thing of value" as a result of decisions made or actions taken by the individual as a director, officer or employee of the organization."*

What Are "Things of Value"?

Simmons (1999) also developed a definition of "things of value", again for use in the private sector, but also with potential broader applicability:

> *"Things of value" usually implies financial gain to an individual. This could mean:*
>
> - *Additional salaries, commissions, finder fees, bonuses, or promotions (other than those received as an employee of the organization).*
> - *Receipt of automobiles, boats, or any gifts other than those of nominal value; receipt of paid vacations and trips.*
> - *Payment of credit card bills or of any other personal expenses.*
> - *Receipt of stocks, bonds, annuities or other investments; insurance policies paid for by a third party.*
> - *An offer or promise of employment; realization of business profits or increased business value.*
> - *Realization of an unfair competitive advantage.*

- *Any other means of compensation or reward other than those provided by the organization to its directors, officers and employees."*

In the public sector, particularly in relation to elected officials, there have been attempts made define conflict even more precisely. As part of his role as Inquiry Judge overseeing the proceedings related to conflict of interest charges against Sinclair Stevens, Justice W.D. Parker defined conflict of interest in three ways: real, potential and inherent conflicts:

- A real conflict is a "…situation in which a Minister of the Crown has knowledge of a private economic interest that is sufficient to influence the exercise of his or her public duties and responsibilities".
- A potential conflict is a where a Minister "…finds himself or herself in a situation in which the existence of some private economic interest could influence the exercise of his or her public duties or responsibilities ... provided that he or she has not yet exercised such duty or responsibility." A potential conflict becomes a real conflict where the Minister does not dispose of relevant assets or withdraw from certain public duties or decisions.
- An apparent conflict is a "…situation that exists when there is a reasonable apprehension, which reasonably well-informed persons could properly have, that a conflict of interest exists, even if, in fact, ther*e is neither a potential nor a real conflict".*

The literature indicates that further attempts to refine the conflict definition were undertaken by the federal government in its Conflict of Interest Rules for Federal Legislators. These rules specify three types of conflict:

- *Inherent conflict* – Where a conflict arises that is unavoidable. For example, a MP cannot avoid being in a conflict when he is dealing with legislation that could impact him in a general way. There would be no one

to legislate if all public officials declared a conflict because they would be affected by national policy.

- *Representative conflict* – Where a conflict arises when, for example a MP has a personal interest in representing her/his constituency in matters that are important to that constituency (e.g. farming, fishing, and resource development).
- *Conflicts of Interest* – Where an avoidable conflict arises that created real or perceived personal economic gain that substantially affected the independence of the legislator.

In some cases, broad principles are offered to the employee rather than specifying when a conflict could arise. This approach does attempt to qualify every eventuality, but rather puts the onus on the employee to determine the appropriate course of action. As Motorola puts it: *"If you wouldn't want your action to appear in the media, it's probably not the right thing to do".*

Clarifying Interests

Conflict of interest rules are generally seen as a vehicle to help people to scrutinize aspects of their lives to assess where personal interests could result in a conflict. In the public sector, most rules are tailored to the setting as a way to narrow the scope for elected officials or employees so that conflicts are easily identified. Definitions often describe situations where direct or indirect benefits are prohibited.

"Interests" are usually described as personal interests of the individual that might affect her/his ability to carry out the job as impartially as possible. An employee's personal interest could, for example, be considered to be in conflict where the interest "...would be likely to affect adversely the judgment of an employee and

his loyalty to his employer or which the employee might be tempted to prefer to the interests of the employer". *(Revenue Canada, 1987)*

Direct benefit is usually qualified as being of a financial nature. For example, the *Parliament of Canada Act* specifies that "…receiving outside compensation for services on any matter before the House, the Senate or their committees is prohibited". *Indirect benefit* typically involves relationships and who might benefit from the relationship someone has with someone else. For example, the Ontario *Municipal Conflict of Interest Act* specifies that a "…member of municipal council might benefit indirectly on some matters if a family member has a controlling interest in a corporation or is a shareholder".

In carrying out the research for this report, conflict of interest rules for over 100 public and private sector organizations were reviewed. It became obvious quite early in this review that regardless of the setting, the organization, or the target audience, the categories used to define interest were generally consistent:

- Financial Interests – e.g. investments, controlling interests in corporations, shareholder interests, etc.
- Gifts and Honouraria – e.g. receipt of gifts, travel expenses, entertainment etc.
- Outside Employments Interests – e.g. volunteer positions, political involvement, board involvement on a board of directors etc.
- Family Interests – i.e. any of the above categories affecting spouses, children, extended family.

Part 3

Mandating Conflict of Interest Policies: The Public Sector

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."
(James Madison)

Recently, and particularly in the wake of several notable scandals, considerable attention has been paid to ethical issues in the public and private sectors. As noted earlier, organizations are spending more time and effort than ever before trying to create and embed ethical operating values in their workplaces. This has been accomplished in many organizations by putting forward packages of policies, practices, and structures as a way to guide and shape the culture of the organization. This includes requirements that are written in a way that provides practical assistance to elected officials and employees in recognizing where they find themselves in conflict situations.

Conflict of interest policies in the public sector are designed to protect the public interest and to prevent the use of public office for personal gain. It is widely recognized that public officials have a greater responsibility to uphold ethical standards to protect the "public interest". This means that if the public interest is to be protected, the public official must be able to carry out her/his job responsibilities in as ethical a manner as possible. However, it also means that the public must be able to trust that the activities of government are being carried

out in a way that situations of conflict of interest are avoided at all costs. As suggested in a 2001 article in the International Journal of Public Administration:

- *"Serving the public implies a fiduciary undertaking, which places high responsibility on the part of public servants. The public officials are entrusted with power because of the belief that he or she possesses the personal integrity and professional competence to safeguard the public affairs and to promote the public good." (Strategy for Formulation and Implementation of Codes of Ethics in Public Sector Organizations, Rivka Grudstein-Amado, 2001)*

The two most common approaches to mandating conflict of interest policies in Canada and the U.S. have been:

- Legislated and non-legislated standards to govern the conduct of Elected Officials.
- The use of policies, guidelines, directives or other measures to govern public sector employees.

Government of Canada

Elected Officials

Although many attempts have been made to legislate conflict of interest rules for all Members of Parliament, there is no single overarching piece of legislation that applies to all elected officials. This is not to say that there are no rules related to conflict of interest. They exist in two Acts - the *Parliament of Canada Act* and the *Canada Elections Act* – as well as in the Standing Orders of the House of Commons and Rules of the Senate.

The *Parliament of Canada Act* is the key piece of legislation that prohibits Senators and members of the House of Commons from engaging in activities that might create a conflict of interest. Some of the major prohibitions include:

- Providing that a Senator or member of the House of Commons cannot benefit personally from a government contract (Senators are fined $200/per day for every day they are in contravention of this rule).
- Receiving outside compensation for services on any matter before the House, the Senate or their committees (Senators can be fined up to $4,000 if they accept the compensation and if found guilty, the person who offered the compensation faces potential imprisonment).
- Providing that any person holding a government contract or agreement, directly or indirectly would be ineligible to become a member of the House of Commons or Senator. (Note: there is an exception for members who may be shareholders of incorporated companies that have government contracts that have nothing to do with the building of a pubic work).

There is currently no requirement for members to disclose their financial interests through legislation. However, Standing Order 21 of the House of Commons specifies that members are not entitled to vote on questions in which they have direct interests – this is the only requirement that could capture the interests members might have outside of Parliament.

Standing Order 22 also requires members to register all visits that they make outside Canada on government business. Where travel costs are not paid for by the member, the name of the person or group who pays for such travel must be disclosed, with the information maintained in a public registry by the Clerk of the House. There are no comparable provisions for Senators.

Some critics have suggested that Parliament should enact more stringent rules covering conflict of interest. Others are concerned that this move would

dissuade people from running for public office. The difficulty of striking a balance, while also protecting the privacy interests of elected officials, may explain why, since 1978 eight federal bills related to conflict of interest have been introduced and not one has received Royal Assent.

In May 2002, the federal government introduced legislation covering a new set of ethics relates initiatives. The following is a summary of the major elements:

- The creation of a more independent Ethics Commissioner, with an expended role to oversee both Cabinet Ministers and Members of Parliament and reporting directly to Parliament (as compared to the current Ethics Counsellor who reports directly to the Prime Minister and focuses on Cabinet Ministers).
- The creation of a Senate Ethics Officer who, under the direction of the Ethics Commissioner, would administer a Code of Conduct for the Senate and would be required to table an annual report in the Senate.
- A Code of Conduct to be established for both Members of Parliament and Senators.
- The release of the Guide for Ministers and Secretaries of State, which had not previously been publicly available.
- Revised rules for Ministers and Crown corporations, and guidelines to govern ministerial fundraising for personal political purposes.

Enabling legislation on the above proposals was passed by the House of Commons in 2003, but rejected by the Senate, particularly in relation to financial disclosure and the notion that the same Ethics Commissioner would have responsibility for both the House of Commons and the Senate. In light of the recent change in federal Liberal Party leadership, the federal government is reported to be reviewing its options.

Conflict of Interest and Post-Employment Code for Public Office Holders

As noted in the previous section, the key piece of federal legislation that speaks to conflict of interest rules for members of the House of Commons is the *Parliament of Canada Act*. This legislation does not require disclosure of personal interests by Cabinet Ministers, Parliamentary Secretaries, ministerial staff and other senior officials (e.g. full-time Order-in-Council or ministerial appointees such as Deputy Ministers, heads of Crown corporations and members of federal tribunals). However, this information is captured through mandated provisions under the *Conflict of Interest and Post–Employments Code for Public Office Holders* that require the aforementioned public officials to disclose this information. In fact, the primary focus of the Code is on the requirements and compliance measures for disclosure.

Disclosure

Under the general direction of the Clerk of the Privy Council, the Ethics Counsellor is charged with the administration of the Code and ensuring that the appropriate disclosure of personal interests is made. In some cases, this is accomplished through a confidential disclosure, and in other case through a public disclosure, i.e. a publicly accessible registry is maintained by the Ethics Counsellor.)

The Code sets out a two-pronged approach to disclosure that includes:

- Confidential disclosure to the Ethics Counsellor of all assets and contingent liabilities. In the case of Ministers, Parliamentary Secretaries, and Secretaries of State, spouses and dependent children must also disclose assets and liabilities. Confidential disclosure is also expected with respect to "outside activities" that public office holders were engaged in during the two year period before they assumed their official duties (e.g.

philanthropic or charitable activities, involvement as a trustee, executor or power of attorney).

- Public disclosure of declarable assets (e.g. assets that could be directly or indirectly affected as to the value by government decisions or policy) or gifts or hospitality with a value of $200 or more (other than a gift, hospitality or other benefit from a family member or close personal friend).

The Code also includes ten statements of principle that are intended to guide public office holders in making decisions. These principles define ethical behaviour at a high level in relation to upholding high ethical standards, public scrutiny, decision-making, private interests, public interests, gifts and benefits, preferential treatment, insider information, government property, and post employment.

It is important to note that this Code does not apply to Senators and it does not apply generally to all members of the House of Commons. As noted earlier, there have been many attempts to establish better disclosure rules for this broader group of public officials, but to date there has not been full support to move in this direction.

Oversight

One of the biggest criticisms of the Canadian federal approach to oversight is that the Ethics Counsellor reports to the Prime Minister rather than Parliament. Critics of this approach suggest that the Office of the Ethics Counsellor is inherently flawed since there are no checks and balances beyond a confidential report to the Prime Minister. As noted earlier, the federal government recently, (but to date, unsuccessfully) proposed the appointment of a more independent (i.e. direct reporting to Parliament) Ethics Commissioner. This position would be given full investigative powers, in effect making the post similar to the federal Auditor General.

Public Servants

Values and Ethics Code for the Public Service

In 1973, *Guidelines Concerning Conflict of Interest Situations for Public Servants* were issued by the then Treasury Board Secretariat. These guidelines were followed by another set of rules approved in 1985 called *Conflict of Interest and Post-Employment Code for Public Servants.* As of September, 2003 an enhanced set of guidelines were released called the *Values and Ethics Code for the Public Service*.

The Code begins by describing in explicit fashion, the values of the public service and how these values should be used to guide behaviour. These values include:

- *Democratic Values: Helping Ministers, under law, to serve the public interest.*
    - *Public servants shall give honest and impartial advice and make all information relevant to a decision available to Ministers.*
    - *Public servants shall loyally implement ministerial decisions, lawfully taken.*
    - *Public servants shall support both individual and collective ministerial accountability and provide Parliament and Canadians with information on the results of their work.*

- *Professional Values: Serving with competence, excellence, efficiency, objectivity and impartiality.*
    - *Public servants must work within the laws of Canada and maintain the tradition of the political neutrality of the Public Service.*

    - *Public servants shall endeavour to ensure the proper, effective and efficient use of public money.*
    - *In the Public Service, how ends are achieved should be as important as the achievements themselves.*
    - *Public servants should constantly renew their commitment to serve Canadians by continually improving the quality of service, by adapting to changing needs through innovation, and by improving the efficiency and effectiveness of government programs and services offered in both official languages.*
    - *Public servants should also strive to ensure that the value of transparency in government is upheld while respecting their duties of confidentiality under the law.*

- *Ethical Values: Acting at all times in such a way as to uphold the public trust.*
    - *Public servants shall perform their duties and arrange their private affairs so that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced.*
    - *Public servants shall act at all times in a manner that will bear the closest public scrutiny; an obligation that is not fully discharged by simply acting within the law.*
    - *Public servants, in fulfilling their official duties and responsibilities, shall make decisions in the public interest.*
    - *If a conflict should arise between the private interests and the official duties of a public servant, the conflict shall be resolved in favour of the public interest.*

- *People Values: Demonstrating respect, fairness and courtesy in their dealings with both citizens and fellow public servants.*

- *Respect for human dignity and the value of every person should always inspire the exercise of authority and responsibility.*
- *People values should reinforce the wider range of Public Service values. Those who are treated with fairness and civility will be motivated to display these values in their own conduct.*
- *Public Service organizations should be led through participation, openness and communication and with respect for diversity and for the official languages of Canada.*
- *Appointment decisions in the Public Service shall be based on merit.*
- *Public Service values should play a key role in recruitment, evaluation and promotion.*

This 2003 *Values and Ethics Code for the Public Service Code* is one of the most thorough documents reviewed for this report. Written in more practical language, compared to the *Conflict of Interest and Post-Employment Code for Public Office Holders,* the Code:

- Lays out clear rules about conflict of interest situations as they may arise in relation to assets, outside employment or activities, gifts, hospitality and other benefits, solicitation, avoidance of preferential treatment, and post-employment measures. Signing the Code is a condition of employment.
- Requires public servants, at the time a real or apparent conflict arises, to report all related outside activities, assets, and direct and contingent liabilities. A confidential report must be made to a supervisor or deputy head. It is the responsibility of the supervisor or deputy head to try to achieve mutual agreement with the public servant about how to handle the conflict. If there is a breach in the code, the "Public Service Integrity Officer" will receive a report and will review disclosures and can assist the supervisor or deputy head to make recommendations for resolution.

- Clarifies that in most cases, once the public servant has made a confidential report (re assets, receipt of gifts, hospitality or other benefits, or participation in any outside employment or activities that could give rise to a conflict of interest) no further action is required. However, the Code also speaks to instances where it may be necessary for the public servant to "avoid or withdraw from activities or situations that would place the public servant in real, potential or apparent conflict of interest or having an asset sold at arm's length where continued ownership would constitute a real, apparent or potential conflict of interest with the public servant's official duties".

A noteworthy feature of the Code is the obligations it places on supervisors or Deputy Heads to "encourage and maintain an ongoing dialogue on public service values and ethics within their organizations, in a manner that is relevant to the specific issues and challenges encountered by their organizations". In addition, the Code empowers deputy heads to add compliance measures beyond those specified to reflect their department's particular responsibilities or the statutes governing its operations.

U.S. Federal Government

A general conclusion from this interjurisdictional comparison is that public policy in the U.S., including administrative policy, is much more likely to be expressed in legislation than is the case in Canadian jurisdictions, including conflict of interest policies.

In the U.S. there is a wide range of ethics related statutes, oversight agencies, and related initiatives that have been put in place as part of efforts to manage conflict of interest. The result, as described by experts, is "not a clear system of rules, but an inconsistent and confusing patchwork. The result is a Byzantine

array of complex public integrity rules and regulations that vary tremendously" (Witt, 1998).

Disclosure

Much of what is in place in the U.S. focuses on disclosure and rules to guide the conduct of elected officials. Disclosure of personal interests has been the focus of many public integrity initiatives in the U.S. since the late 1970's as a way to achieve greater accountability on the part of elected officials. A public financial disclosure system for the three branches of the U.S. federal government was established by law in 1978. More recent changes were made in the 1989 *Ethics Reform Act*.

The current approach to financial disclosure, based on the principle of transparency, is seen in the U.S. as the basic tool for identifying real, perceived, or potential conflicts of interest and working out how to manage these conflicts. The financial disclosure requirements were established to remind public officials of financial interests that may conflict with their duties, and to assist the public in monitoring potential areas of conflicts of interest of public officials.

Most often, financial disclosure statements reflect an individual's personal financial information for the previous calendar year. Along with personal information, individuals must disclose certain types of investments, sources of income, businesses, etc. in which the filer is an officer or board member, sources of gifts, real estate investments, and creditors and debtors. Some filers are also required to disclose sources of travel expenses, and certain sources of meals, food, and beverages, incurred in connection with official duties.

The *Ethics Reform Act* of 1989 is also seen as an important statute as it expanded the rules on post-employment for members of the House of Representatives and staff when they left government and the receipt of gifts.

The Act is specific on the conflict of interest rules around remuneration. For example, officials shall not:

- Receive outside earned income in excess of 15 percent of annual salary.
- Receive compensation from the practice of a profession that involves a fiduciary relationship or allow the use of their names by a firm or entity providing such services.
- Receive compensation for service as an officer or board member on any association, corporation or other entity, and receive compensation for teaching without prior notification and approval of the appropriate ethics office.

The *Federal Elections Campaign Act* also has strict rules related to disclosure of personal interests in addition to specifying limits on contributions by individuals, political parties, and political action committees.

One of the biggest differences between the U.S. and Canadian approaches to disclosure of private interests relates to how and when the disclosure is made. In the U.S., most of the rules at the federal, state, and municipal level require public disclosure of interests on a regular basis (e.g. before starting a term of office, before elections, following elections, on a regular reporting schedule – e.g. quarterly, semi-annually, or annually). The emphasis here is on "public" disclosure meaning that reports are available to anyone wishing to review them. At the federal and state level, financial disclosure statements are posted on websites, similar to how lobbyist information is posted.

In Canada, the trend appears to be more towards confidential disclosure of interests to an independent body in some cases and public reporting of declarable assets in other cases. The information gathered through disclosure is not as easily accessible in Canada, with very little posted on public websites as is done in the U.S. Disclosure is discussed further in this report under Part 5 – Complying with Codes.

Elected Officials

Detailed rules to govern the conduct of government officials in both the Executive and Legislative Branches have also been developed. *Standards of Conduct* for the Executive Branch provide guidance on such questions as gifts, conflicting financial interests, impartiality, seeking employment, misuse of position and outside activities. In 1995, both the House and Senate adopted similarly specific gift rules for members and staff.

Oversight

One ongoing development in the U.S. has been the establishment of new offices or agencies to promote ethics and financial integrity. These offices and agencies include bodies such as the Federal Elections Commission, the Office of Government Ethics, the Merit Systems Protection Board, and the Office of Special Counsel. Since their establishment, many of these agencies have subsequently been strengthened and/or given enhanced authority.

In a number of areas, separate legal requirements apply to, and are independently administered by each branch of government. In the Legislative Branch, for example, the Senate and House of Representatives have established their own rules of conduct. In the Senate, these are administered by the Select Committee on Ethics. In the House, administration is the responsibility of the

Committee on Standards of Conduct. In the Judicial Branch, ethics matters such as the financial disclosure system are administered by the Judicial Conference of the United States.

Public Servants

The U.S. federal government uses Executive Orders to define conflict of interest policies for public servants. These policies a have generally been incorporated in into codes of conduct.

John F. Kennedy was the first president to issue an Executive Order to "Provide a guide on Ethical Standards to Government Officials". Since then there have been several iterations with each version attempting to refine and clarify potential conflicts and to more comprehensively define the conduct expected of public officials.

In April 1989, President Bush issued Executive Order 12674, *Principles of Ethical Conduct for Government Officers and Employees*. At that time, the Office of Government Ethics was directed to establish a clear and comprehensive set of Executive Branch standards of conduct that were "reasonable and enforceable" to help to clarify conflict of interest rules relating to gifts, conflicting financial interests, impartiality, seeking employment, misuse of position and outside activities.

The result was a new governing policy entitled *Standards of Ethical Conduct for Employees of the Executive Branch.* This policy applied to all officers and employees in Executive Branch agencies and departments and contained general principles intended to guide the conduct of federal employees. The policy was administered by the Office of Government Ethics. In 1995, the Office released a new policy entitled *Ethical Conduct for Employees of the Executive*

Branch that further refined the previous rules and included additional financial disclosure requirements. The document laid out fourteen rules for federal employees as follows:

1. *Public service is a public trust requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain.*
2. *Employees shall not hold financial interests that conflict with the conscientious performance of duty.*
3. *Employees shall not engage in financial transactions using non-public government information or allow the improper use of such information to further any private interest.*
4. *An employee shall not, except pursuant to such reasonable exceptions as are provided by regulation, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or non-performance of the employee's duties.*
5. *Employees shall put forth honest effort in the performance of their duties.*
6. *Employees shall make no unauthorized commitments or promises of any kind purporting to bind the government.*
7. *Employees shall not use public office for private gain.*
8. *Employees shall act impartially and not give preferential treatment to any private organization or individual.*
9. *Employees shall protect and conserve federal property and shall not use it for other than authorized activities.*
10. *Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official government duties and responsibilities.*

11. *Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.*
12. *Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those such as federal, state, or local taxes-that are imposed by law.*
13. *Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans, regardless of race, color, religion, sex, national origin, age, or handicap.*
14. *Employees shall endeavour to avoid any actions creating the appearance that they are violating the law or the ethical standards promulgated pursuant to this order.*

The above requirements are enforced through the regular disciplinary process and are intended to establish a standard for employees throughout the Executive Branch. At the same time, individual departments and agencies may supplement these standards with additional requirements that are tailored to meet agency/department-specific needs. Areas addressed in supplemental department/agency standards include prohibited financial interests, prohibited outside activities, and prior approval of outside activities.

Each Executive Branch department or agency is required to maintain a program of ethics training to ensure that all of its employees are aware of the requirements of the conflict of interest laws and the standards of conduct. Agencies are required to provide one hour of ethics training for all new agency employees to acquaint them with the ethical obligations of public service. In addition, certain covered employees are required to receive one hour of ethics training annually.

Finally, although not required by Executive Order, many agencies provide ethics briefings to employees who are leaving Government service, particularly with respect to their obligations under the post-employment laws.

Canadian Provincial Governments

Standards for Elected Officials

All Canadian provinces have established some form of conflict of interest legislation that regulates the actions of elected officials. To ensure that there is compliance, every province has established an independent oversight body – known variously as Conflict of Interest Commissioners, Integrity Commissioners, and Ethics Commissioners – with responsibility for reviewing ethics issues for MPP/MLAs depending on the legislation in force.

A review of provincial legislation highlights the following commonalities in terms of the role and function of the ethics oversight authority:

- Commissioners act as advisors to elected officials to assist them in understanding their obligations and to provide advice with respect to real or potential areas of conflict.
- Elected officials are generally required to meet with Commissioners on a prescribed basis to review the disclosure of the individual's interests and general obligations imposed the legislation.
- Commissioners have the authority to undertake inquiries into alleged contraventions and carry out investigations where required.

- Commissioners are required to make reports to their Legislatures and where there is substance to the allegations, to make recommendations for further action.

The key difference between the federal Ethics Counsellor and the provincially mandated ethics Commissioners is that the provinces have established systems of oversight that are independent of the Premier/Executive and are expected to report to the legislature. Other similarites of provincial Acts include the categories included to describe conflict, e.g.:

- Not using one's position to further one's private interest.
- Not accepting fees or gifts that are connected in any way to his or her duties of the job.
- Not being party to a contract with the government under which the MPP/MLA receives a benefit.
- Not having an interest in a partnership or in a private company that has a contract with the government.
- Not using insider information to further one's private interest.
- Not having worked for the government for a certain period of time (i.e. one year, eighteen months, two years, etc.) before private employment with the government can begin again.

Ontario, through its *Members Integrity Act*, has an additional conflict rule dealing with travel points. If an MPP receives promotional awards or points from airlines, hotels etc. as a result of travel that was reimbursed by the government, the MPP is not allowed to access these points for personal use.

In many provinces, the rules for the receipt of gifts by MPPs are very specific in terms of the monetary value of any gains. For example, in the *Manitoba Legislative Assembly and Executive Council Conflict of Interest Act*, the value of

the private interest or liability must be $250 or more to create a conflict (reduced in 2003 from $500 cap previously in place). Other provinces such as Saskatchewan and New Brunswick have set limits of $250 and $200 respectively on the value of gifts received. Saskatchewan also stipulates that “any fees, gifts or personal benefits received from the same source in a twelve-month period” must be disclosed. Prince Edward Island has set its limit at a $500 value.

In provinces that have specified a “gift threshold” or “gift tip off” amount, there is usually a requirement that a gift over a certain value is to be reported within a certain timeframe and must be disclosed to the appropriate oversight body. In Ontario for example, any item over $200 must be reported through a disclosure statement to the provincial Integrity Commissioner within thirty days. The statement must include a narrative description of the nature of the gift or benefit, its source and the circumstances under which it was given and accepted.

Standards for Public Servants

In some provinces, the principles and rules that have been developed for elected officials have been used as a prototype to set similar standards for public servants. Alberta was a forerunner in this area, through its *Code of Conduct and Ethics for the Public Service*. British Columbia has a similar code in place in its *Standards of Conduct Guidelines for Public Servants*. Both of these codes speak to the responsibilities of the employee, not only as an individual hired to carry out a particular job, but also as someone hired to protect the public interest.

While most provinces have chosen to express their conflict of interest rules in policies, directives, and guidelines, as opposed to legislation, Nova Scotia uses the *Members and Public Employees Disclosure Act* as the vehicle by which conflict of interest rules for both members and public servants are expressed. The Act requires detailed disclosure of interests by members but does not ask

the same of public servants. However, the “designated person” (i.e. Conflict of Interest Commissioner) does have the investigatory power to look into matters of possible contravention for both elected officials and public servants.

In some provinces, conflict of interest policy is defined by specifying exemptions that would not pose a conflict. For example, the *Nova Scotia Members and Public Employees Disclosure Act* exempts any benefit that one would receive that:

- Is of general public application.
- Affects a member as one of a broad class of persons.
- Concerns the remuneration, allowances and benefits of a member as a member.
- Is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.

Ontario has not opted to establish a formal code of conduct for its public servants. Instead, its *Rules of Conduct for Public Servants* are specified under the *Public Service Act* and accompanying Regulation 435/97. Complementing these statutory provisions is a Management Board Secretariat directive (Conflict of Interest and Post-Service Directive, 2000) that, in more plain language, sets out clear rules of conduct for conflict of interest and post-service practices that apply to public servants. These rules speak to conflicts as they may arise for the public servant as s/he carries out her/his job and conflicts as they may arise because of familial ties. Ontario has also added rules specifically for senior public servants who are working on matters related to the Ontario SuperBuild Corporation or privatization issues.

As in other jurisdictions, the principles included in the Ontario Management Board Secretariat directive include:

- *Ethical Standards* - Public servants must act honestly and uphold the highest ethical standards. This will maintain and enhance public confidence and trust in the integrity, objectivity and impartiality of government.
- *Public Scrutiny* - Public servants are obligated to perform their official duties and conduct themselves in a manner that will bear the closest public scrutiny. Public servants cannot fulfill this obligation simply by acting within the law.
- *Private Interests* - Public servants shall not have private interests, other than those permitted pursuant to this directive, laws or statutes that would be affected particularly or significantly by government actions in which those public servants participate.
- *Public Interests* - When appointed to office, and thereafter, public servants must arrange their private interests to prevent real or potential conflicts of interest. If a conflict does arise between the private interests of a public servant and the official duties and responsibilities of that individual, the conflict shall be resolved in favour of the public interest.

In terms of gifts, hospitality and other benefits, Ontario has specified that:

- Public servants must refuse gifts, hospitality or other benefits that could influence their judgment and performance of official duties. Public servants must not accept, directly or indirectly, any gifts, hospitality or other benefits from:
    - Persons, groups or organizations dealing with the government.
    - Clients or other persons to whom they provide services in the course of their work as public servants.

There is, however, a general exception that allows for the acceptance of modest gifts and hospitality that in certain situations requiring individual judgement, including gifts and hospitality that is:

- Associated with their official duties and responsibilities if such gifts, hospitality or other benefits are appropriate, a common expression of courtesy or within the normal standards of hospitality.
- Would not cause suspicion about the objectivity and impartiality of the public servant.
- Would not compromise the integrity of the government.

By way of example, Ontario's conflict of interest rules also include a number of additional and generally common requirements:

- Switching Sides: A public servant who has advised the government on a specific proceeding, transaction, negotiation or case shall not upon ceasing employment with the Crown act for or on behalf of any person, commercial entity, association or union in connection with that specific proceeding, transaction, negotiation or case to which the government is a party.
- Outside Activities: A public servant shall not engage in any outside work or business undertaking that is likely to result in a conflict of interest (e.g. interference with the individual's ability to perform his or her duties and responsibilities, an advantage is derived from his or her employment as a public servant where the outside work would constitute full-time employment, where the work might influence or affect the employee's ability to carry out of her or his duties as a public servant, or that involves the use of government premises, equipment or supplies.
- Prohibited Use of Position: Public servants shall not use, or seek to use, their positions or employment to gain direct or indirect benefit for themselves or their spouses, same sex partner or children (e.g. solicit or

accept favours or economic benefits from any individuals, organizations or entities known to be seeking business or contracts with the government, or favour any person, organization or business entity.

- Confidential Information: Public servants shall not disclose any confidential information about any Crown undertaking, acquired in performing of duties for the Crown, to any person or organization not authorized by law or by the Crown to have such information (e.g. benefit directly or indirectly in return for or in consideration for revealing confidential information, or use confidential information in any private undertaking in which they are involved).
- Avoidance of Preferential Treatment: A public servant shall not grant preferential treatment in relation to any official matter to any person, organization, family member or friend, or to any organization in which the public servant, family member or friend has an interest. The public servant must avoid being obligated, or seeming to be obligated, to any person or organization that might profit from special consideration (e.g. offer assistance in dealing with the government to any individual or entity where such assistance is outside the official role of the public servant).
- Procurement: A public servant shall not help any outside entities or organizations in any transactions or dealings in a way that gives confidential information associated with a transaction to any outside entity or organization.
- Political Activity: A public servant shall not engage in political activity at work and must not associate their positions with political activity. A general prohibition in the Ontario Public Service Act warns against engaging in political activity that would place the employee in a position of conflict of interest.
- Taking Improper Advantage of Past Office: A public servant shall not allow prospects of outside employment to create a real or potential conflict of interest (e.g. seek preferential treatment or privileged access to

government after leaving public service, take personal advantage of information obtained through official duties and responsibilities that is not available to the public, use public office to unfair advantage in gaining opportunities for outside employment.

U.S. State Governments

Standards for Elected Officials and Public Servants

While Canadian provinces have generally conveyed their conflict of interest rules through policy directives, most U.S. states express their conflict of interest rules in legislation. These statutes often apply to both members of the legislature and the public service. As noted earlier, this is consistent with the greater emphasis in U.S. public administration on statute-based administrative policy.

South Carolina's State Ethics Commission provides a generic conflict of interest definition that is typical of most states:

- *"No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated.*

Similarly, Michigan has a fairly typical conflict of interest policy that applies to both elected officials and public servants. It states:

- *A public officer or employee shall not divulge to an unauthorized person, confidential information acquired in the course of employment in advance of the time prescribed for its authorized release to the public.*

- *A public officer or employee shall not represent his or her personal opinion as that of an agency.*
- *A public officer or employee shall use personnel resources, property, and funds under the officer or employee's official care and control judiciously and solely in accordance with prescribed constitutional, statutory, and regulatory procedures and not for personal gain or benefit.*
- *A public officer or employee shall not solicit or accept a gift or loan of money, goods, services, or other thing of value for the benefit of a person or organization, other than the state, which tends to influence the manner in which the public officer or employee or another public officer or employee performs official duties.*
- *A public officer or employee shall not engage in a business transaction in which the public officer or employee may profit from his or her official position or authority or benefit financially from confidential information which the public officer or employee has obtained or may obtain by reason of that position or authority.*
- *A public officer or employee shall not engage in or accept employment or render services for a private or public interest when that employment or service is incompatible or in conflict with the discharge of the officer or employee's official duties or when that employment may tend to impair his or her independence of judgment or action in the performance of official duties.*
- *A public officer or employee shall not participate in the negotiation or execution of contracts, making of loans, granting of subsidies, fixing of rates, issuance of permits or certificates, or other regulation or supervision relating to a business entity in which the public officer or employee has a financial or personal interest.*

Many states require disclosure of personal interests for public servants who earn over a certain threshold. Alabama is one of the states to require such disclosure,

i.e. a yearly filing for elected officials or public servants at the federal, state or municipal level who earn more than $50,000/year. Alabama requires that:

- *A statement of economic interests shall be completed and filed in accordance with this chapter with the commission no later than April 30 of each year covering the period of the preceding calendar year by each of the following:*
    - *All elected public officials at the state, county, or municipal level of government or their instrumentalities.*
    - *Any person appointed as a public official and any person employed as a public employee at the state, county or municipal level of government or their instrumentalities who occupies a position whose base pay is fifty thousand dollars ($50,000) or more annually.*

Oversight

A study conducted by the Washington-based Centre for Public Integrity in 2000 and 2001 revealed that all 50 states had conflict of interest rules focusing on ethical conduct, personal financial disclosure and campaign finance disclosure. As already demonstrated, how these rules are mandated varies from state to state. As also demonstrated, however, there is a high degree of consistency between and among the states with respect to the categories of conflict of interest.

Similar consistency exists with respect to oversight. Most U.S. jurisdictions have established arms-length ethics boards or commissions. In fact, 39 states have established two oversight bodies – a legislative committee and an arms-length commission as part of ensuring that there will be independent, external monitoring of ethical conduct in government.

The table on the following page, prepared by the Center for Ethics in Government provides more detail with respect to the key differences in approaches between legislative ethics committees and arms-length ethics commissions/boards.

According to the Washington-based Center for Ethics in Government, many states have two entities to address the same issue of legislative ethics because “the public tends to question the validity of a government who regulates their own ethical conduct”.

In the eleven states that do not have a separate ethics commission (Arizona, Colorado, Idaho, New Hampshire, New Mexico, North Dakota, South Dakota, Utah, Vermont, Virginia and Wyoming) external oversight is through other state agencies such as the Office of the Secretary of State or Attorney General.

Ethics Committees	**Ethics Commissions**
Members are State Legislators	Members are citizens or public officials appointed by governor or other leaders. Twenty-four states forbid public officials from serving on ethics commissions.
Internal oversight	External oversight
Legislative Branch; Can be a joint committee, or each chamber within the legislature can have its own.	Executive Branch
Duties can include: • Consider their colleagues' violations of ethics statutes • Administering state ethics laws in states without committees • Authoring chambers codes of ethics.	Duties can include: • adopting regulations pertaining to state's ethics laws, providing ethics training, • investigating ethics complaints and determining penalties or issuing advisory opinions • Receiving financial disclosure and lobbyist reporting statements.
Jurisdiction includes only the legislature.	Jurisdiction sometimes includes the legislature, often includes other branches of state government.
Present in some form in all 50 states.	Present in some form in 39 states, having jurisdiction over the legislative branch in 33. (Commissions in Illinois, Indiana, New York, Michigan, Ohio, and North Carolina do not have authority over legislators.)

Potential for Conflicts to Arise

Another key difference between the U.S. states and Canadian provinces is highlighted by a study undertaken in 2000 by the Centre for Public Integrity on the financial interests of elected officials. The study looked at the "natural occurrence of conflicts" for state legislators based on financial disclosure reports from the 47 states where elected officials are required to disclose income, assets and other information about their personal and family finances. They found that 41 out of the 50 legislatures are run by part time elected officials who meet only a few months each year and draw salaries that average about $18,000 annually. This compares with those states that had full-time officials with average annual salaries of $57,000. The researchers concluded that conflict of interest was inevitable in states where elected officials were making such small salaries, since they needed to find income from other sources. They also found that when not in session, elected officials often had no choice but to follow careers that were regulated by the states.

According to an analysis of financial disclosure reports filed in 1999 by 5,716 state legislators, the Centre for Public Integrity found that:

- More than one in five sat on a legislative committee that regulated their professional or business interest.
- At least 18 percent had financial ties to businesses or organizations that lobby state government.
- One in four received income from a government agency other than the state legislature, in many cases working for agencies the legislature funds.

Despite the overwhelming number of real and potential conflicts of interest, the Center has argued that the real numbers in all likelihood are actually much higher

since the Center's analysis only takes into account those states that require disclosure.

The Centers' study could be taken to mean that Canadian jurisdictions with full-time legislators (federal government, provinces, and larger municipalities) would have a lower incidence of real or perceived conflicts.

Canadian Municipal Governments

Most Canadian provinces have legislation in some form that governs conflict of interest matters for members of municipal council. This can be part of more general legislation governing municipalities or a separate statute dealing specifically with conflict of interest.

Municipal conflict of interest legislation in Ontario, Nova Scotia, Manitoba, and Alberta is focused solely on elected officials rather than municipal staff. Most often, the purpose of this legislation is to convey the rules about disclosure of personal interests. This legislation serves as a backdrop for more individualized by-laws and codes of conduct that are developed locally and tailored by the municipality in response to local issues and needs.

Ontario's experience is reflective of other Canadian local jurisdictions in this regard. The *Municipal Conflict of Interest Act* is an overarching piece of legislation that sets out conflict of interest and disclosure of personal interests requirements for municipalities. Many municipalities have taken that legislation one step further by creating more detailed conflict of interest rules (approaches in place for Mississauga, Burlington, and Ottawa will be discussed in the following section).

While legislation guiding municipal conflict of interest exists in Ontario, there have been some criticisms of the definitions. One of the criticisms is that the Act does not provide a clear definition of what is meant by a “financial interest”. There are definitions for indirect interests – e.g. if the council member is a shareholder of a company in a matter before council or pecuniary interests – e.g. the interests of a family member. However, the Act does not specify what constitutes a conflict or a direct pecuniary interest. As described in a 1990 Ministry of Municipal Affairs discussion paper, there has been some concern that “financial involvement may occur in a significant way and with significant potential for personal gain outside of the restrictions of the Act. A member may have some financial opportunity or obligation or shares in a business interest that are involved in a council decision and not be required to declare a conflict.”

Other provinces offer more explicit definitions. Saskatchewan defines pecuniary interest as “financial profit from a decision of council”. New Brunswick makes clear that a conflict of interest exists if an “interest in a matter” before council would be of “financial benefit”. The acceptance of gifts, gratuities or other benefits, as well as the use of insider information for position or gain is also prohibited. Manitoba specifies that a direct pecuniary interest includes “a fee, commission, or other compensation paid for representing interests of another person, corporation, partnership, or organization”.

Nova Scotia’s *Act to Prevent Conflict of Interest in the Conduct of Municipal Government* lays out very specific rules related to pecuniary and indirect interest for members of council, by way of exemption – that is to say, it is aimed at detailing those instances where the Act does not apply. For example:

- *“The Act does not apply to any interest in any matter that a member may have:*
    - *As an elector.*

- *By reason of being entitled to receive any service, commodity or other benefit offered by the municipality or local board in like matter and subject to the like conditions as are applicable to persons who are not members.*
- *By reason of purchasing or owning a debenture or other security issued by the municipality or local board.*
- *By reason of having made a deposit with the municipality or local board, the whole or part of which is or may be returnable to the member in like manner as such a deposit is or may be returnable to other electors.*
- *By reason of being eligible for election or appointment to fill a vacancy, office or position in the council or local board where the council or local board is empowered or required by any general or special Act to fill such vacancy, office or position.*
- *By reason of being eligible for appointment, or having been appointed, by the council to a local board.*
- *By reason only of being a director or senior officer of a corporation.*
- *By reason of having been appointed by the council or local board to a board, committee or other body.*
- *With respect to any allowance, honorarium, remuneration, salary or benefit to which the member is or may be entitled by reason of being a member or by reason of having been appointed, by the council or local board, to a local board or other board, committee or other body.*
- *By reason of having a pecuniary interest that is an interest in common with electors generally.*

- *By reason only of an interest that is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member."*

The legislation also requires that in instances where a council member has contravened the Act and has received personal financial gain, a judge can fine the member no more than $25,000 (if the member does not pay the fine, s/he would face imprisonment of up to twelve months).

Disclosure and Withdrawal

New Brunswick, Manitoba, and Quebec require mandatory disclosure statements. Alberta, Newfoundland, and Saskatchewan allow councils to decide if members should complete a disclosure statement. Manitoba, New Brunswick, Alberta, and Nova Scotia require their members to withdraw from public as well as "in camera" sessions.

Under the Ontario legislation a member is required to orally declare and describe a financial interest in a matter before the council or the local board, and withdraw from the decision making process. In withdrawing from the process, the member is prohibited from trying to influence the process before, during or after a meeting of the council or board, but the legislation is unclear about how long before the meeting and whether discussions with municipal staff would constitute trying to influence the process. The member must also leave the meeting room if the session is in camera. There are, however, no guidelines given with respect to the form and extent of disclosure. Therefore it is left up to Councils or individual Councillors to decide whether disclosure is required or not.

Alberta provides thorough guidelines for its members as a way to explain the *Municipal Government Act*. Included are descriptive guidelines intended to assist the member understand how he should disclose situations of conflict:

Alberta Example 1

"… you may not take part in the decision-making on any matter in which you have a pecuniary interest. The legislation attempts to ensure that you are not discriminated either for or against by virtue of your membership on the council.

If you have a pecuniary interest:

- *you are to disclose that you have an interest and its general nature*
- *you are to abstain from any discussion of the matter and from voting*
- *you are to leave the room until the matter has been dealt with, and*
- *you should make sure that your abstention is recorded in the minutes.*

For example, you might say "Mr. Mayor, I am abstaining on this matter because I am a shareholder in the company. I am leaving the room and I ask that my abstention be recorded." If the matter is the payment of an account for an expenditure which has already been committed (for example, payment for gas for town vehicles which were filled up at the service station where you work), you must abstain but you don't have to leave the room.

In this case, if accounts are presented to your council for approval of payment, you would ask to have Cheque No. 123 excepted from the general approval motion. You can vote on the remainder of the list and then when Cheque No. 123 is considered, you might say, "Madam Reeve, I am abstaining from this matter because I am an employee of the service. I ask that my abstention be recorded in the minutes."

If the matter is one in which you, as an elector or property owner, have a right to be heard by council (for example, a land use bylaw amendment, lane or street closure, etc.), you are to disclose your interest and abstain but you may remain in the room to be heard by the council in the same manner as any person who is not a member of the council. In this case, you should follow the procedure required of any other person to be placed on the list of delegations to be heard by the council. When the matter comes up for hearing, you might say "Madam Mayor, I am abstaining from this matter because I own the property affected. I ask that my abstention be recorded."

You should then leave the council table and go to the area where the public sits. The mayor should call you to make your presentation in the same manner as any other person. You should state your case, answer any questions that may be posed to you and then be seated for the remainder of the public hearing.

When the council debates the matter it would be advisable to leave the room during the decision-making process.

Alberta Example 2

Although there is no prohibition on doing business with the municipality when you are a member of the council, every contract or agreement with the municipality in which you have an interest must be approved by council (section 173). So, if your council has delegated purchasing authority to the administration, it is important that those officials know of any business interests that you have and that you make sure the council approves of any contract with your business. You cannot raise the matter

in council but, if you submit a bid or offer, you can note that the matter must receive council approval. If it doesn't, you may be disqualified and the contract has no force or effect.

Of the provinces and states reviewed for this report, Manitoba's *Municipal Council Conflict of Interest Act* has one of the most specific disclosure requirements for council members. The Act specifies that detailed financial statements of assets and interests are to be disclosed *"... not later than the last day in November of each year, and in the case of The City of Winnipeg, not later than the fourth Wednesday in November of each year…*" Financial disclosure includes:

- *All land in the municipality in or in respect of which the councillor or any of his dependants has any estate or interest, including any leasehold estate and any mortgage, license, or interest under a sale or option agreement, but excluding principal residence property.*
- *Where the councillor or any of his dependants holds a beneficial interest in, or a share warrant or purchase option in respect of, 5 percent or more of the value of the issued capital stock of a corporation, all estates and interests in or in respect of land in the municipality held by that corporation or by a subsidiary of that corporation.*
- *The name of every corporation, and every subsidiary of every corporation, in which the councillor or any of his dependants holds a beneficial interest in 5 percent or more of the value of the issued capital stock, or holds a share warrant or purchase option in respect of 5 percent or more of the value of the issued capital stock.*
- *The name of every person, corporation, subsidiary of a corporation, partnership, or organization which remunerates the councillor or any of his dependants for services performed as an officer, director, manager, proprietor, partner or employee.*

- *Bonds and debentures held by the councillor or any of his dependants, excluding bonds issued by the Government of Canada, by the government of any province of Canada, or by any municipality in Canada, and also excluding Treasury Bills;*
- *Holdings of the councillor or any of his dependants in investment funds, mutual funds, investment trusts, or similar securities, excluding Retirement Savings Plans, Home Ownership Savings Plans, accounts and term deposits held in banks, credit unions, or other financial institutions, pension plans, and insurance policies.*
- *Any interest in property in the municipality to which the councillor or any of his dependants is entitled in expectancy under any trust, and any interest in property in the municipality over which the councillor or any of his dependants has a general power of appointment as executor of a will, administrator of an estate, or trustee under a deed of trust.*
- *The nature and the identity of the donor, of every gift given to the councillor or any of his dependants at any time after the coming into force of this Act.*

Ontario Examples

Using provincial legislation as the backdrop for rules to guide the behaviour of elected officials, many municipalities have applied the same principles to employees. These rules are usually found in municipal policies or codes of conduct. A review of rules set out by a number of municipalities in Ontario did not reveal any requirements for mandatory financial disclosure by municipal employees. For elected officials, the usual approach is for the official to withdraw from Council discussions of a matter that poses a conflict.

Mississauga, for example, has developed two policies that speak to the city's conflict of interest policy.

- The first is a "Standard of Behaviour" that defines unacceptable behaviour both on and off duty. The first example of unacceptable behaviour noted is "the failure to disclose a conflict of interest" (other examples include: theft, fraud, unlawful harassment of an individual, excessive absenteeism or lateness, possession or working under the influence of alcohol or illegal drugs, misrepresentation or falsification of employee records etc…).
- The second is the conflict of interest policy which defines conflict of interest in the following terms:
    - *… that the decisions made and /or the actions taken by an employee in the course of the exercise of her/his duties are or may be affected, or could be seen by another party to be affected by:*
        - *The employee's personal, financial or business interests.*
        - *The personal, financial or business interests of relatives, friends or associates of the employee.*
    - *Situations which might result in a conflict of interest include, but are not limited to:*
        - *Engaging in outside employment.*
        - *Having access to confidential information or other City property.*
        - *Accepting favours or gratuities from those doing business with the City.*

One of the differentiating aspects of conflict of interest rules developed by municipalities is how compliance and enforcement is handled. Unlike the steps

that have been taken at the Canada and U.S. federal and provincial/state levels, there are typically no "independent ethics authorities" or "oversight agencies" to address matters of compliance and enforcement. In many ways, the municipal approach to this is quite similar to the approach taken in the private sector – that is, if there is a breach of conflict, disciplinary action will be imposed by supervisory/management staff or, in the case of elected officials, by Council itself.

In Mississauga for example, management will:

- "…consider the circumstances under which the behaviour occurred, the level of responsibility of the employee, and whether the employee should have known that the behaviour was not acceptable when determining appropriate disciplinary action."

Disciplinary action may be progressive (verbal warning, followed by written warning, followed by suspension and possible dismissal) or, where the conduct is more serious, it may take the form of immediate suspension from or termination of employment.

The City of Burlington has developed a Code of Conduct to guide the behaviour of its employees. It begins with a preamble:

- *Employees of the Corporation of the City of Burlington are expected to adhere to the highest standards of personal and professional competence, integrity and impartiality. Where members of staff are requested to perform functions that are outside their area of specific competence, they are obliged to indicate the extent of their limitations*.

The Code is used as a way to convey very specifics rules that apply to potential conflicts including, for example, rules that apply to the receipt of gifts and golf games. The following example provides a sense of the level of specificity:

Gifts: *In order to preserve the image and integrity of the City of Burlington, business gifts should be discouraged; however, the City recognizes that moderate hospitality is an accepted courtesy of a business relationship. Recipients should not allow themselves to reach a position whereby they might be or might be deemed by others to have been influenced in making a business decision as a consequence of accepting such hospitality. The frequency and scale of hospitality accepted or offered by the City should not be greater that the employee's Department Head would allow to be claimed on an expense account if it were charged to the City. Where gifts are accepted, their acceptance must constitute a benefit to the Corporation or be of nominal value and publicly acknowledged. Employees are under an obligation to consult with their Department Heads regarding accepting specific gifts and benefits. Where the benefit being received is in the form of accepting hospitality, and the acceptance of the benefit is deemed by the Director, General Manager or City Manager to be in the nature of accepted business courtesy, staff should reciprocate a similar benefit to the provider or staff should advise the provider that staff will be making a contribution to a charity in an equivalent amount and retain a copy of the correspondence that confirms this arrangement.*

Golf Tournaments: *In recognizing the value of interaction with business associates, the City periodically participates in invitational golf tournaments. However, if the City is paying the fees, departmental foursomes should not comprise only City staff, but rather should be made up of two members of City staff and two business guests, subject to the approval of the Director. This would allow for the possibility of reciprocal invitations from business associates.*

U.S. Municipal Governments

Many states have overarching legislation that sets the standard for conflict of interest policy in municipalities. In Massachusetts for example, the State Ethics Commission regulates the conduct of all state, county and municipal public employees and volunteers. Often there is some type of financial disclosure legislation that requires certain individuals, officials and candidates for elected office to file statements of financial interests. For example, the City of Chicago, in accordance with state legislation requires financial disclosure on an annual basis for all municipal employees whose income is over $40,000/year.

Wisconsin also has legislation in place to set the minimum standards of ethical conduct for local elected officials. Because the Wisconsin statute relates to ethics and conflicts are interrelated and complicated, the state association representing municipalities, the League of Wisconsin Municipalities, has developed a thoughtful companion document that helps to clarify points of conflict for elected officials and municipal employees. It states:

- *Problems in this area can be avoided primarily by using common sense and applying the "smell test." Stated broadly, when an official, a member of the official's family or a business organization with whom the official is associated is involved in a municipal matter, the official needs to step back and question whether there are problems concerning his or her involvement in the matter. The official may want to discuss the situation with the municipal attorney. Local officials may also contact the League's attorneys to discuss ethics issues.*
- *Many times it might not be clear whether a conflict exists. In these grey areas, the official needs to balance the benefits of involvement (e.g., representing the electors, using the official's expertise) against the drawbacks (e.g., how it would look, the risk of violating a law).*

Sometimes, even if it may be legal to act on a matter, you may not feel comfortable doing so or it may not look good to do so.

In states that do not have legislation in place that specifically speaks to conflict of interest, there is usually some generic statute that requires the municipality to develop, as part of its municipal code and as part of its local government responsibilities, some provision to protect against conflicts. Minnesota uses this approach suggesting that municipalities can "*adopt ethics ordinances that require disclosure of economic interests, establish ethics boards, and prescribe standards of conduct"*. Minnesota further specifies in its state-wide statute on conflict of interest that:

- *"The commissioner must develop policies regarding code of ethics and conflict of interest designed to prevent conflicts of interest for employees involved in the acquisition of goods, services, and utilities or the award and administration of grant contracts. The policies must apply to employees who are directly or indirectly involved in the acquisition of goods, services, and utilities, developing requests for proposals, evaluating bids or proposals, awarding the contract, selecting the final vendor, drafting and entering into contracts, evaluating performance under these contracts, and authorizing payments under the contract.*
- *The policies must contain a process for making employees aware of policy and laws relating to conflict of interest, and for training employees on how to avoid and deal with potential conflicts.*
- *The policies must contain a process under which an employee who has a conflict of interest or a potential conflict of interest must disclose the matter, and a process under which work on the contract may be assigned to another employee if possible."*

California, in its Government Code, also provides for a decentralized model of enacting conflict of interest statutes at the municipal level:

- *Every municipality and agency shall adopt and promulgate a Conflict of Interest Code pursuant to the provisions of this article. A Conflict of Interest Code shall have the force of law and any violation of a Conflict of Interest Code by a designated employee shall be deemed a violation…It is the policy of this act that Conflict of Interest Codes shall be formulated at the most decentralized level possible…*

Most organizations provide scenarios for their employees to help them to understand the rationale behind the rules. For example, Massachusetts makes the following statement in its guidelines for municipalities in relation to outside activities:

- *While you are a municipal employee, you cannot be compensated by anyone else in relation to any "particular matter" in which the municipality is a party or has a direct and substantial interest. (A particular matter" is defined as an activity involving decision making or judgment and refers to specific projects and proceedings, rather than-general issues). Working for others in such matters is prohibited even if the interest is held by a different agency within your municipality.*
- *For example, a full-time municipal public works employee is prohibited from serving as a consultant to a private contractor in the preparation of a bid which is to be submitted to the housing authority from the same municipality. Similarly, you cannot act as agent or attorney for anyone in such matters, even if you are not paid.*

Another Massachusetts example involves rules governing activities of former municipal employees:

- *…prevent the "revolving door syndrome.” It prohibits former employees from deriving unfair advantages by improperly using friendships and associations formed or confidential information obtained while serving the government. Section 18 is not designed to prevent you from using*

general expertise developed while a municipal employee. It focuses on "particular matters" in which you participated or for which you had official responsibility while you were a municipal employee.

- *If you participated in a "particular matter" as a municipal, employee, you can never become involved in that same "particular matter" after you leave municipal service, except on behalf of the municipality. (This same restriction applies to the partners of former municipal employees for one year).*
- *If you had "official responsibility" for a "particular matter" in your municipal position even if you did not actually participate in it, you may not appear personally before any agency of the municipality on behalf of a private party in connection with the matter for one year after leaving government.*

Part 4

Mandating Conflict of Interest: the Private Sector

"It would be wonderful if the right thing to do were always perfectly clear. In the real world of business, however, things are not always obvious. If you find yourself in a situation where the "right thing" is unclear or doing the right thing is difficult, remember our key beliefs". (Motorola Code of Conduct)

A survey carried out by the Conference Board (a non-profit business research organization based in New York City) in 1991 showed that 82 percent of the companies who responded to the survey had a code of conduct in place (this was an increase of 45 percent from an earlier study that had been done in 1987). Most of the companies surveyed were large, with median annual sales of the participants at $1 billion. The respondents included companies from the U.S. (186 companies), Canada (34 companies) and Europe (40 companies).

In 1996, KPMG did a study on 1,000 Canadian companies. Sixty-six percent reported having a code of conduct.

Conflict of interest policy is usually conveyed in the private sector through policy documents in the form of codes of conduct. Corporate codes of conduct have been defined by the International Labour Organization as *"…policy statements that define ethical standards for their conduct".* A review of a number of corporate codes indicates that there is great variance in the way these statements are drafted. However, codes of conduct generally describe the value system of the organization, its purpose, and provide guidelines for decision making and consequences for breaches of conflict of interest policies.

Research published in 1996 by the University of Ottawa's Business Ethics and Stakeholder Relations Programme suggests that there are essentially five "generations" of issues of ethical and social responsibility that are dealt with in most business codes of conduct. The authors, Mendes and Clark, in their article "Conduct and their impact on Corporate Social Responsibility" describe five generations that organizations go through as they become more sophisticated in defining ethical business practices – conflict of interest, commercial conduct, employee and third party concerns, community and environmental concerns, and accountability and social justice.

Our review showed that statements of conflict of interest policy remain central to all codes. However, as indicated in the research, it is also clear that most corporate codes "tend toward a broad interpretation of conflict of interest that encompasses conflicts of commitment, the impact of outside activities on an employee's energy and time, and the rationale for the code is often combined with the definition". (Conflict of Interest – RCMP)

The Conference Board in its research of ethics practices has identified three streams of corporate writing that may contain conflict of interest policies:

- Compliance code - directive statements giving guidance and prohibiting certain kinds of conduct.
- Corporate credos - broad general statements of corporate commitments to constituencies, values and objectives.
- Management philosophy statements - formal enunciations of the company or CEO's way of doing business.

In other research, a United States Labour Department (1999) made a distinction between the following formats:

- Special documents (typically referred to as "codes of conduct") outlining company values, principles and guidelines in a variety of areas. These documents are a means for companies to clearly and publicly state the way in which they intend to do business to their suppliers, customers, consumers and shareholders.
- Circulated letters stating company policies on a certain issue to all suppliers, contractors and/or buying agents.
- Compliance certificates**,** which require suppliers, buying agents, or contractors to certify in writing that they abide by the company's stated standards.
- Purchase orders or letters of credit, making compliance with the company policy a contractual obligation for suppliers.

Principles and Definitions

The research indicates that conflict of interest policies generally begin with a broad statement of the principles that the organization attempts to advance for its employees.

The code of conduct developed by Bank of Montreal outlines its *First Principle*s that lay the groundwork its conflict of interest policy. These include:

- Doing what is fair and honest.
- Respecting the rights of others.
- Working to the letter and spirit of the law.
- Maintaining the confidentiality of information.
- Avoiding conflicts of interest.
- Conducting ourselves appropriately.

The document then goes on to describe specifics with regard to conflict of interest:

- Personal Interest in a Bank Transaction.
- Abuse of Position.
- Trading in Securities.
- Accepting Gifts and Benefits.
- Taking Another Job.
- Serving as a Director of a Company.
- Managing a Business.

Most corporate codes of conduct provide a definition of conflict of interest. Compaq's (computers) definition follows:

- *"Compaq employees have an obligation to give their complete loyalty to the best interests of the company. They should avoid any action that may involve, or may appear to involve, a conflict of interest with the company. Employees should not have any financial or other business relationships with suppliers, customers or competitors that might impair, or even appear to impair, the independence of any judgment they may need to make on behalf of the company. Solicitation of vendors or employees for gifts or donations shall not be allowed except with the permission of the Office of Business Practices or the Corporate Community Relations Group".*

Bell Canada's definition is as follows:

- *"... when an employee has a direct or indirect interest in or relationship with, an outsider, or with a person in a position to influence the actions of such outsiders, which might be implied or construed to render the employee partial toward the outsider for personal reasons, or otherwise inhibit the impartiality of the employee's business judgment or desire to serve only the company's best interests".*

Many corporate codes attach a broader scope to "interest" providing the context in which they want their employees to make their own decisions about ethical behaviour, as per the following except from the Oracle Corporation's conflict of interest policy:

- *Any circumstance that could cast doubt on an employee's ability to act with total objectivity with regard to Oracle's interests. All employees have a duty to avoid financial, business, or other relationships that might be opposed to the interests of Oracle or might cause a conflict with the performance of their duties. Employees should conduct themselves in a manner that avoids even the appearance of conflict between their personal interests and those of Oracle*.

Various techniques are used to assist employees to understand when interests conflict. Oracle asks its employees to provide actual or potential conflicts to their manager in writing. Oracle emphasizes that the presence of a conflict does not necessarily mean that the proposed activity will be prohibited, but that it is the employee's responsibility to disclose all aspects of the conflict and remove him or herself from the situation.

Many private sector codes use a case study approach as a way to illustrate examples of conflict of interest situations and as a way to help employees understand the meaning and intent behind the rules. This typically includes posing questions for employees to help them to distinguish what might be a conflict in certain situations. For example, Compaq suggests the following questions:

- *Could my outside business or financial interests adversely affect my job performance or my judgment on behalf of the company?*
- *Can I reasonably conduct my business outside of normal company work hours and prevent my customers from contacting me at work?*

- *Will I be using company equipment, materials, or proprietary information in my outside business?*

The University of Toronto's Clarkson Centre for Business Ethics and Board Effectiveness has created an interesting prototype of categories that could serve as a model for private business when undertaking to write a code. Conflicts are identified according to the employer interest likely to be harmed:

- *The Company* - working a second job may impinge on company time or on performance of work.
- *External Relations* - the use of corporate funds/facilities for the support of political parties or candidates may create a potential or actual conflict of interest.
- *Employee Relations* - accepting an inappropriate gift for personal use from a supplier, customer or competitor, the hiring of relatives and self-dealing may adversely affect morale and personal relationships.
- *Customer Relations* - the potential for customers to influence one's judgment in fulfilling one's duties and responsibilities may create conflict.
- *Supplier Relations* **-** having a personal relationship with a supplier may create conflict.

Oversight and Training

Many corporations are relying on committees to monitor the ethical behaviour of the organization. A task force, or standing, or advisory committee on ethics is often established to oversee the ethics initiatives in the organization. They serve two functions within an organization. First, they lend legitimacy to the consideration of an ethics agenda at the highest level of organizational decision making. Second, they symbolically communicate to the employees and external

stakeholders of the organization its commitment to ethical principles in conducting business.

Ethics training programs for employees have also gained popularity. Boeing, Champion, International Chemical Bank, General Dynamics, General Mills, GTE, Hewlett-Packard, Johnson & Johnson, and Xerox are a few of the companies who have formal programs designed to teach ethics (Dunham & Pierce, 1989).

Part 5
Complying with Codes

Experts suggest that regardless of whether legislation, regulation, codes of conduct, or guidelines for conflict of interest are in place, the rules are meaningless without appropriate enforcement. The general view is that if employees are expected to comply with code of conduct rules, they need to understand what conduct is expected and what the consequences are if they do not comply with the standards. For this reason, public and private sector codes require, often on a yearly basis, that employees sign a document to confirm that they have read and understand the rules. In some cases, employees are asked questions (a form of test) to ensure that they have in fact read and understood the requirements.

Public Sector

Compliance measures for elected officials in the public sector usually include three approaches. The Canadian federal government, in its Conflict of Interest and Post-Employment Code for Elected Officials specifies the following:

- Disclosure requires that legislators reveal their assets, typically first confidentially to a designated official, and then publicly so that a personal interest becomes public knowledge and Parliamentarians are prohibited from acting for their personal benefit. Public disclosure also informs the legislator’s constituents and colleagues of the situation so that they can consider its implications.
- Withdrawal (also called recusal) requires Parliamentarians to refrain from acting on matters in which they have personal financial interests.
- Avoidance requires legislators to divest themselves of interests or relationships that might impair their judgment, either by a sale at arm’s

length or by use of a trust administered by a trustee independently of the legislator; in the latter case, it must be ensured that the trust is beyond the Parliamentarian's control.

Most of the Canadian legislation for elected officials at the federal and provincial level emphasizes disclosure of interests to some form of oversight body. In addition, if there is a potential conflict, the elected official must withdraw from any discussion about that interest when it is before government. Disclosure is usually requested a number of times throughout the elected official's tenure – just before s/he takes office, at various times throughout tenure (e.g. every one or two years), or whenever an "interest" presents itself in the decision making process.

Timely and specific disclosure of a personal interest when the interest comes or appears to come into conflict with public duties and responsibilities is reflected in all legislation. All Canadian legislation suggests that an elected official should withdraw her/himself from discussing a matter before government if it conflicts with private interests. For example, Manitoba's *Legislative Assembly and Executive Council Conflict of Interest Act* states that:

- "where during any meeting there arises:
  - *A matter in which a member or any of his dependants has a direct or indirect pecuniary interest; or*
  - *A matter involving the direct or indirect pecuniary interest of any person, corporation, subsidiary of a corporation, partnership, or organization to whom or which a member or any of his dependants has a direct or indirect pecuniary liability;*
- *The member shall:*
  - *Disclose the general nature of the direct or indirect pecuniary interest or liability.*

- *Withdraw from the meeting without voting or participating in the discussion.*
- *Refrain at all times from attempting to influence the matter*.

Financial disclosure is another requirement specified in legislation and codes of conduct that helps all parties involved to assess whether a potential or real conflict might surface. As was mentioned Part 3 of this report, Manitoba requires detailed financial disclosure.

Codes of conduct for public servants also emphasize disclosure at the time a real or apparent conflict arises as the first step to determining if there is a conflict and what should be done about it. Disclosure of interests is intended to allow the employer to participate in the decision as to which interests may lead to conflicts (and, as suggested in the research, may also provide some level of protection for the employee if s/he has made an honest error in judgment). While the ultimate responsibility rests with the employee to identify a possible or real conflict, management most often provides opportunities to disclose the interest and discuss possible lines of action. Designated parties will review disclosure forms to determine if there is a conflict of interest and advise employees of appropriate actions.

Disclosure may be made to a “designated official” and/or “designated third party”. The Ontario Management Board Secretariat’s Conflict of Interest and Post-Service Directive lays out an extensive list of designated officials and third parties that will review of conflict of interest case. Designated officials often include (under different titles) Conflict of Interest Commissioner, Premier, Secretary of Cabinet, and Deputy Ministers. Third parties often include Deputy Ministers, the Civil Service Commission, and Conflict of Interest Commissioner, Secretary of Cabinet, and Deputy Ministers. These individuals are charged with the responsibility to review conflict cases depending on the level of staff involved.

At the federal and provincial level, the most common approach to ensuring compliance with conflict of interest legislation or codes of conduct is usually through establishment of an ethics or integrity commissioner. In most cases, these bodies review and adjudicate on conflict cases, including recommending how the conflict should be resolved, providing ongoing guidance, and ensuring consistent application of the rules. As has been discussed previously, at the federal level in Canada, the Ethics Counsellor is appointed by the Prime Minister and provides advice to cabinet ministers. The provinces have created conflict of interest commissioners who are officers of the legislature usually with significant investigatory powers, and who are designated to provide advice to both cabinet members and members of the legislature. A smaller number of provinces, i.e. New Brunswick and Nova Scotia, require disclosure to be made to a designated judge.

In cases where disclosure is made to a designated official, there is often some proviso in legislation or codes of conduct that allows the official in the highest position to make exceptions to the rule. For example, in Ontario, the Premier can make exceptions to divestment where there is undue hardship. In Alberta, the legislation gives the power to the ethics commissioner "to exempt a prohibited activity if it is disclosed and approved." A designated official may assist in determining the appropriate method of compliance, by taking into account:

- The specific responsibilities of the public office holder.
- The value of the assets and interests involved.
- The actual costs to be incurred by divesting the assets and interests as opposed to the potential that the assets and interests represent for a conflict of interest.

Nova Scotia describes the outcome more broadly:

- *Where the judge determines that a member has contravened this Act, the judge shall declare the seat of the member vacant and direct that the*

vacancy be filled in the manner prescribed by law, but if the judge determines that the contravention was committed as a result of inadvertence or a bona fide error in judgment the judge may relieve against such forfeiture of office.

Private Sector

Most codes of conduct in corporations require that employees disclose potential or real areas of conflict to their superiors. Compaq Computers states in its code "Employees are under a continuing obligation to disclose to their supervisors any situation that presents the possibility of a conflict or disparity of interest between the employee and the company. Disclosure of any potential conflict is the key to remaining in full compliance with this policy."

How supervisors then deal with the disclosures varies somewhat from organization to organization. Most often, there is a committee or department where employees are instructed to discuss confidential matters of conflict. Most of the codes that were reviewed for this report did not include any enforcement provisions or were not specific regarding enforcement measures. For example, the Boeing code states simply that "*violations of the company standards of conduct are cause for appropriate corrective action including discipline.*"

However, some codes are more specific regarding disciplinary measures. A good example is Coca Cola's Code of Business Conduct, which clearly states that:

- *Violating the Code will result in discipline. Discipline will vary depending on the circumstances and may include, alone or in combination, a letter of reprimand, demotion, loss of merit increase, bonus or stock options, suspension or even termination.*

The code of conduct for Halliburton, a U.S. based multinational oil and heavy construction company, states that:

- *The Company shall consistently enforce its Code of Business Conduct through appropriate means of discipline. Pursuant to procedures adopted by it, the Executive Committee shall determine whether violations of the Code of Business Conduct have occurred and, if so, shall determine the disciplinary measures to be taken against any employee or agent of the Company who has so violated the Code of Business Conduct.*

Ironically, even Enron Corp. in its conflict guidelines had very clear statements about the consequences of improper actions. The following applied to securities trades made by company personnel:

- *"…breach of this policy, however, may subject employees to criminal penalties. The consequences of insider trading violations can be staggering…For individuals who trade on inside information (or tip information to others):*
    - *A civil penalty of up to three times the profit gained or loss avoided.*
    - *A criminal fine (no matter how small the profit) of up to $1 million.*
    - *A jail term of up to ten years.*
- *For a company (as well as possibly any supervisory person) that fails to take appropriate steps to prevent illegal trading.*
    - *A civil penalty of the greater of $1 million or three times the profit gained or loss avoided as a result of the employee's violation.*
    - *A criminal penalty of up to $2.5 million.*

Monitoring of employee compliance with the conflict of interest regulations is most often seen as a direct line management responsibility, in addition to or

instead of ethics advisors. Supervisors are sometimes expected to monitor the situation through a variety of means, including:

- Annual performance reviews.
- Periodically reminding employees of their obligations in light of any possible changes in their personal circumstances.
- Ensuring that annual disclosure forms are filled out if that process is in place in the company.

Motorola is an example of an organization that emphasizes the role of managers in promoting ethical behaviour and in being vigilant with respect to their staff. The Motorola code states that:

- *Motorola managers are expected to lead according to our standards of ethical conduct, in both words and actions. Managers are responsible for promoting open and honest two-way communications. Managers must be positive activists and role models who show respect and consideration for each of our associates. Managers must be diligent in looking for indications that unethical or illegal conduct has occurred. If you ever have a concern about unethical or illegal activities, you are expected to take appropriate and consistent action, and inform your manager, the Law Department, or the EthicsLine*.

In cases where a real conflict exists, common organizational responses range from counselling, oral/written warnings, formal reprimands, suspensions with or without pay, and dismissal. However, the universally preferred approach is to encourage awareness of employer concerns regarding conflict of interest situations and provide strategies to assist employees to avoid conflict situations.

In most employment situations, discipline arises only where intentional misconduct is involved. However, conflict of interest cases may present different

considerations. Some have suggested that the determining factor should not be wilfulness, but rather whether a real (as opposed to potential or perceived) conflict has arisen, with the real conflict being more likely to result in a disciplinary measure. According to an RCMP report on conflict of interest:

- "*Even though legal consequences normally only flow from reality, a finding of conflict of interest does not depend on wilful wrongdoing. Therefore, in a conflict of interest situation, a real conflict could require a disciplinary response, while a potential or apparent conflict of interest, on the other hand, could benefit from a non-disciplinary response"*.

Many definitions of conflict of interest add the word "knowingly", making it a breach only if the individual knows that official conduct might further a private interest. The Manitoba *Legislative Assembly and Executive Council Conflict of Interest Act* forgives an inadvertent breach by elected officials as follows:

- *Notwithstanding anything in this Act, where a judge finds that a member violated a provision of this Act unknowingly or through inadvertence, the member is not disqualified from office, and the judge shall not declare the seat of the member vacant, in consequence of the violation.*

Responses to conflict of interest situations that do not justify discipline could include non-disciplinary measures such as transfer, leave, or other administrative action.

Part 6
Ensuring Effectiveness

Do Conflict of Interest Rules Work?

From the research, it is apparent that conflict of interest rules are standard features in most organizations. This includes the public and private sectors, large and small organizations, and legislated and non-legislated, codes. The most important question remains whether conflict rules have the desired impact on the behaviour of individuals in the workplace.

Few, if any, empirical studies prove a correlation between ethics regulations and the behaviour of public officials and trust in government. One school of thought suggests that no matter what the rules are and how they are enforced, there will always be people who look for loopholes. The research generally supports this view and goes further to suggest that efforts to "over-regulate" with increasing levels of detail usually become progressively less effective – as was suggested a number of times during the research for this paper, "you can't legislate human behaviour".

This prevailing view was reinforced by ethics writer Calvin Mackenzie in his book *Scandal Proof*. In looking at the effects of ethics laws on government, Mackenzie concluded that:

- *Attempts to legislate ethics actually have weakened political accountability. The law is too blunt an instrument to define or ensure proper behaviour. Public employees act ethically when they adhere to high standards of conduct and when they possess sensitivities that cannot all be etched in law. In creating an ethical government, the hard part is accomplishing what the law cannot guarantee. Ethics laws and*

regulations are designed to make government scandal proof, but no institution can be made scandal proof through regulation alone.

Ironically, the proliferation of ethics laws has not translated into a higher level of public trust. In 2000, the American National Election Studies (U.S. based research organization) conducted a poll in the U.S. asking people about their trust in government generally. The results indicate a steady decline in confidence from more than 60 percent in the early 1960s to less than 30 percent by the year 2000.

The suggestion has also been made that tightened conflict of interest rules and other increasingly more detailed ethics initiatives that have been put in place in reaction to scandals may be more detrimental than the scandals themselves. Ethics researchers are often of the view that public scepticism actually increases as government enacts more ethics laws. “When trust in government was at its highest in the early 1960s, there were no major ethics laws in the states” (Kidder, Institute for Global Ethics).

Professor Alan Rosenthal, a widely recognized U.S. expert on ethics in government cautions against the simplistic remedy of laying on more rules:

- *What we're doing by overlegislating ethics is trying to get the bad guys, but we're never going to get the bad guys, because they are very good at being bad. What we succeed in doing is making life increasingly miserable and fraught with danger for the good guys.*

Rosenthal points out that “legislators sometimes try to out-ethics each other and some of the laws being enacted may cause more problems than they solve”. Rosenthal and others are careful to point out that, notwithstanding the public perception, the evidence is that the bulk of elected and non-elected public officials in fact, do act ethically. This view was reflected in a 2002 survey of state

ethics commissions and committees by the National Conference of State Legislatures' Center for Ethics in Government. In noting that 98 percent of state legislators are ethical public servants, the respondents observed that elected officials recognize that they need to confront the appearance of conflicts of interest in their private and public duties.

With these general caveats in mind, the research strongly supports the notion that conflict of interest rules whether set out in legislation or in policy are an important part of creating an ethical environment because they provide guidelines for ethical behaviour. As Rosenthal has suggested “what laws do best is to help change the culture."

Stuart Gilman, President of the Ethics Resource Center in the U.S. confirms that having clear guidelines that shape organizational culture and employee behaviour is essential - "they are not what makes someone a decent person, but these guidelines can provide a frame of reference that has an impact on behaviour”.

Consistent with Change Management theory, the research also emphasizes that the process of developing codes of conduct and conflict of interest rules and making them part of every aspect of the organization’s culture, is as important as the content of the rules themselves.

Institutionalizing Ethical Behaviour

The importance of culture and values for guiding employee behaviour is strongly emphasized in the research. Organizations are recognizing that it is not the rules that encourage employees to behave in a certain way – they help those employees to want to act in an ethical manner and they may encourage those who do not to try to find loopholes in the system. Therefore, organizations are

recognizing the importance of developing a "framework of ideals that influence individual behaviour and characterize an organization. An ethics awareness training program, the commitment of supervisors at every level, and a positive tone in the rule structure are important ingredients in establishing an environment that promotes the highest standards of integrity". (Conflict of Interest, RCMP)

Much has been written about the importance of institutionalizing ethics in the culture and operating values of organizations. However, the rules are meaningless if they have not been properly understood, are not shared within the organization, and are not reinforced by appropriate rewards and sanctions. It is also clear from the research that achieving effective results requires an ongoing organizational commitment to emphasize the critical importance of ethical business conduct. Commitment in this context would include:

- A clear vision and picture of integrity throughout the organization.
- A vision that is owned and embodied by senior management.
- A reward system that is aligned with the vision of integrity.
- Policies and practices that are aligned with the vision.
- A widely-held understanding that every significant management decision has ethical and value dimensions.

In order for ethics to be truly institutionalized within an organization, the entire organization must agree on the importance of ethical behaviour, and, more importantly, there must be a collective standard for the entire organization to follow. It is also clear that successful institutionalization takes place over years rather than weeks or months. This typically requires a sustained effort to ensure that that ethics and standards of ethical behaviour are clearly and formally made part of every aspect of the organization. "It means getting ethics into company policy formulation at the top management levels and through a formal code getting ethics into all daily decision making and work practices down the line, at

all levels of employment. It means grafting a new branch on the corporate decision tree – a branch that reads "right/wrong." (Purcell & Weber, 1979)

The literature is fairly consistent about the steps an organization should take to institutionalize ethics in the workplace. Organizations that want to build an ethical culture can take several approaches or combination of approaches to make this happen. Carter McNamara, in his handbook *Complete Guide to Ethics Management: an Ethics Toolkit for Managers* identifies a number of benefits in formally managing ethics, rather than as a one-time effort when it appears to be needed. Some of these positive outcomes from the management of ethics in the workplace include:

- Clear operating values and behaviours.
- An awareness and sensitivity to ethical issues.
- Ethical guidelines to decision making.
- Mechanisms to resolve ethical dilemmas.

Ensuring Management Commitment to the Ethics Process

Probably nothing is more important to the institutionalization of ethics than the moral tone and example set by senior management. The literature stresses that management needs to be seen as a visible example in demonstrating the organization's belief in ethical behaviour. This includes guiding the process of developing and communicating the organization's code of ethics. It also includes ensuring that there are processes built into the organization that reward ethical behaviour and establish clear and explicit consequences for unethical behaviour. These steps can be broken down in the following components:

- Ensuring Management Commitment to the Ethics Process.
- Articulating the Organization's Values.

- Analysis and Change of the Culture if Necessary.
- Training.
- Follow-up.

The personal values of senior executives and how they choose to express those values are viewed as setting the tone for the rest of the organization. Just as important is the senior executive's willingness to be an example even when it is difficult or inconvenient. As suggested in the literature, an example of this kind of behaviour was seen in the mid-1980's when Johnson and Johnson chose to pull Tylenol off the shelves and change the packaging after finding that some bottles had been tainted. Johnson and Johnson had had an ethics management program for years (including a code of conduct) that was regularly reviewed and purposely challenged by staff and management at all levels. When the organization was faced with the Tylenol crisis and potential multi-million losses, it has been reported that the senior executives never wavered from their decision to "do the right thing" since it was the expected behaviour in the organization (reported by Kniffin, Vice President of External Affairs, Johnson and Johnson).

The literature also emphasizes that senior management's commitment alone will not be sufficient to move ethics initiatives forward and often refers to the need for organizations that are serious about ethics to find senior level "champions" who will act as role models and set an example for others. Champions from middle and line management are also required. Their role is generally to help other employees understand what is expected of them in a very practical way and where there may be instances of conflict. They are also seen as essential in helping others understand the consequences of behaviour that does not adhere to the organization's ethical orientation.

Steven Barth, in his book *The Business Code of Conduct for Ethical Employees* suggests that all levels of management need to take responsibility for seeing that answers are found to questions such as:

- Are resources (rewards) being provided for ethical behaviour?
- Is this item prominently featured in the corporate strategy and consistently made a part of senior level staff meetings?
- Is there a willingness to change human resource management systems such as performance appraisal and bonuses to reinforce an ethical climate?
- Is there a willingness to consistently hold people accountable for their actions?

Barth suggests that if the answer to all of these questions is yes, the organization has a genuine commitment to ethical behaviour and institutionalization of that behaviour in the organization's culture. If not, then there may be a potential problem with leadership.

Articulating the Organization's Values

The next phase to institutionalize ethics in an organization is referred to in various ways such as "Clarifying your Purpose", "Identifying Corporate Values", and "Understanding and communicating what is most important to your Organization". Whatever the terminology, the message is the same – management at all levels needs to be involved in a process that helps to isolate and communicate the core values of the organization so that employees understand what is fundamentally important to the organization. If employees understand the values of the organization, the likelihood is that they will be more likely to understand what constitutes good and bad behaviour (i.e. better able to

understand where they might have potential conflicts and how to deal appropriately with these situations).

As indicated in the research and reiterated throughout this report, ethics is a matter of values and associated behaviours. Values are discerned through the process of ongoing reflection. As experts point out, while ethics initiatives do produce deliverables (e.g. codes of conduct, policies and procedures, interpretive bulletins about ethical and unethical behaviour etc.), they may seem more process-oriented than most management practices. However, it is this emphasis on the process of reflection and dialogue that is one of the most important aspects of creating an ethical organization and is a key to determining successful implementation.

Barth in his book *The Business Code of Conduct for Ethical Employees* provides guidelines in this regard:

- Values cannot be taught, they must be believed. Employees do what they have seen done, not what they are told. If their superiors engage in unethical behaviour, they will become lax in their own work habits.
- Values must be simple and easy to articulate. Managers should ask themselves whether the values are realistic and whether they apply to daily decision making. Visibility alone is not sufficient to commit individuals to ethical behaviours. It must be combined with explicitness; the more explicit the expected behaviour, the less deniable it is. Explicitness can be enhanced by having all executives, managers, and employees sign a letter affirming their understanding of an organization's ethics policy and stating that they will review the policy annually and report all cases of suspicious (unethical) behaviour
- Values apply to internal as well as external operations. Managers cannot expect workers to treat clients well if they do not treat their employees well in terms of honesty, frankness, and performance-based rewards.

- Values are first communicated in the selection process. It is easier to hire people who identify with the corporate values than it is to train someone who does not identify with them in the first place.

Organizational Analysis

Most organizational ethicists emphasize that once values and guiding principles have been established, and after buy-in has been achieved from all levels of management in the organization, the next step is a thorough analysis of the culture and/or ethical climate of the organization against those values/guiding principles. The purpose of this review is to determine organization readiness, i.e. the extent to which current policies, culture, behaviour, structures, etc. are aligned or not aligned with the new vision of the future. This could include, for example, looking at recruitment, performance appraisals, and reward systems in order to identify contributing factors that might lead to unethical behaviour and to identify ways that the corporate culture may inadvertently reinforce that behaviour.

There are a number of ways that this kind of activity can be supported. An employee survey is often recommended as something that allows people to respond anonymously to detailed questions about the organization. The literature also suggests that in carrying out this activity it is usually advisable to retain some outside help to objectively analyze the information.

Training

Another key component to institutionalizing ethics in the workplace is training – teaching the organization's values in as explicit a way as possible and clarifying what constitutes ethical and unethical behaviour in the workplace.

It has been suggested that this training should focus on ethical awareness, including the development of an increased understanding of personal conflicts of interest and the impact that these could have on the organization. Often, training also involves statements from senior management emphasizing ethical business practices, discussions of the corporate code of ethics, case studies, commendations or public acknowledgement of good ethical behaviour by employees).

In his book *Training Basics for Supervisors and Learners*, Carter McNamara lists a number of steps a manager/supervisor should take with respect to ethics training for staff, including:

- Orient new employees to the organization's ethics program during new-employee orientation.
- Include ethics policies and related matters in management training programs.
- Involve staff in the review of organizational codes of conduct.
- Involve staff in review of policies (ethics and personnel policies).
- Involve staff in practices to resolve "ethical scenarios" to assess how they might respond and how they respond to the suggestions of team members.
- Include ethical performance as a dimension in performance appraisals.

Follow up

Follow-up refers to monitoring change, evaluating the results, and ultimately determining whether institutionalization of the desired behaviour has taken place within an organization. This includes having a centre of accountability and leadership with the organization. Accountability for overseeing the change

process might initially be assigned to an ethics task force or standing committee on ethics. The research suggests, however, that accountability for creating and maintaining the desired change must ultimately rest with every manager. Changes in the performance appraisal and reward processes are often a common means to reinforce this accountability. Other follow-up activities can include additional training, repeating questionnaires used originally to assess the ethical status/readiness of the organization, and the use of focus groups and workshops for ongoing discussions of ethical issues.

Part 7
Conclusion

This paper has attempted to provide an overview of the structure and effectiveness of conflict of interest policies drawing on research and interviews that cut across a number of Canadian and U.S. jurisdictions.

As noted, over the past 35 years, there has been an evolution of ethics rules in the public and private sectors, often layered one over the other, and most often in response to scandals. This corresponds to a general increase in awareness of ethics related issues, particularly in the public sector, and a heightened awareness in the private sector of the business value of ethical behaviour. In the present day, most organizations have some form of conflict of interest policy, although varying in complexity and comprehensiveness.

A central conclusion from the research is that there is a basic or common approach across all of these jurisdictions with respect to how the categories of conflict and specific instances of conflict are defined. Between and among codes, one finds relatively few substantive differences. In generally consistent terms they describe the values of the organization and set the tone for ethical behaviour. They often describe what would be considered to be unethical behaviour or situations of conflict, offer cross-references to specific conflict of interest rules.

There is however, considerable variation in terms of how these rules are mandated. Across North America conflict of interest rules are mandated in different ways:

- Legislation for elected officials, often with separate statutes applying to different branches of government.

- Regulations that provide authority to an independent body or arm of government to enforce conflict of interest rules.
- Administrative policy, directives, and/or guidelines.
- As part of a broader set of policies and standards that establish organizational values and overall direction for ethical behaviour, commonly known as "codes of conduct".

There is no research to indicate whether incorporating a code into legislation is more effective than an approach that emphasizes policies and guidelines. The former is more likely to be found in the U.S. than in Canada and would appear to reflect a greater emphasis in that country on administrative policies captured at a detailed level in legislation.

In terms of definitions, regardless of the target audience (elected, unelected, etc.), sector (public or private) or how they are mandated and enforced, the principle underlying conflict of interest rules for both the public and private sectors is integrity. The categories used to define interest are generally consistent. In the public sector, the emphasis is on the public interests while in the private sector the interests of the corporation are paramount.

In terms of oversight in the public sector, federal and provincial/state levels of government tend to have fairly similar arms-length oversight bodies (typically an integrity or ethics commissioner or board). In most cases – with the Canadian federal government as a notable exception – the best practice is to establish these as independent of the Executive Branch of government (e.g. Prime Minister, President, Governor, Premier, Mayor) and report directly to the relevant legislature.

One additional area of difference in the U.S. and Canadian approaches relates to how and when the disclosure is made. In the U.S., most of the rules at the

federal, state, and municipal level require public disclosure of interests on a regular basis (e.g. before starting a term of office, before elections, following elections, on a regular reporting schedule – e.g. quarterly, semi-annually, or annually). The emphasis here is on "public" disclosure meaning that reports are available to anyone wishing to review them. At the federal and state level, financial disclosure statements are posted on websites, similar to how lobbyist information is posted. In Canada, where disclosure of interests is required for elected officials (at the federal and provincial level), it is done confidentially to an independent body and is rarely made public. Public servants do not generally have to disclose personal interests at a prescribed time. If those interests pose a conflict, the expectation is that they will be disclosed at that time to management.

With respect to municipalities, most Canadian provinces and many U.S. states have legislation in some form that governs conflict of interest matters respecting members of municipal councils, as part of more general legislation governing municipalities or as a separate statute dealing specifically with conflict of interest. In general, governing legislation sets out the requirement that municipalities have conflict of interest policies in place. Some jurisdictions go further to provide more explicit direction, particularly in the U.S. where state legislation is often highly detailed in terms of municipal requirements.

Again, however, in terms of evaluation, there is no formal comparative research available to indicate whether or to what extent these differences actually result in better outcomes or to what extent they reflect the prevailing culture of public administration or historical traditional within a particular jurisdiction.

One of the differentiating aspects of conflict of interest rules developed by municipalities is how compliance and enforcement is handled. Unlike the steps that have been taken at the Canada and U.S. federal and provincial/state levels, there are typically no "independent ethics authorities" or "oversight agencies" to address matters of compliance and enforcement. In many ways, the municipal

approach to this is quite similar to the approach taken in the private sector – that is, if there is a breach of conflict, disciplinary action will be imposed by supervisory/management staff or, in the case of elected officials, by Council itself.

Effectiveness

As noted earlier in this report, conflict of interest rules are standard features in most organizations. The research confirms that conflict of interest policies and code are effective but not as standalone measures. As noted in this report and throughout the research, conflict of interest rules, whether set out in legislation or in policy are an important part of creating an ethical environment because they provide guidelines for ethical behaviour.

The importance of culture and values in guiding employee behaviour emerges from the research as paramount in terms of effective approaches to conflict of interest. Rather than emphasizing specific policies or statutes, successful organizations are recognizing the importance of developing a "framework of ideals that influence individual behaviour and characterize an organization".

This suggests that the real determinant of success is effective implementation. Consistent with Change Management theory, the research emphasizes that the process of developing codes of conduct and conflict of interest rules and making them part of every aspect of the organization's culture, is as important as the content of the rules themselves. The requirements for sustained institutionalization of desired behaviours are well documented in the research as well as in the theory and practice of Change Management including such things as:

- A clear vision.

- Sustained and demonstrated leadership and example-setting by senior management.
- A reward system that is aligned with the vision of integrity.
- Policies and practices that are aligned with the vision.
- A plethora of practical or "real-world" examples or case studies to guide individuals and ongoing training/discussion opportunities focused on these case studies.
- Effective enforcement/compliance mechanisms.
- A widely-held understanding that every significant management decision has ethical and value dimensions.

The notion of practical/real-world examples emerges from the research as a dominant best practice. The research suggests that the likelihood of success is improved by the extent to which an organization can provide individuals with interpretative information as well ongoing opportunities to discuss issues, concerns, and examples.

Compliance and enforcement efforts also emerge as an important best practices area. The research confirms that regardless of whether legislation, regulation, codes of conduct, or guidelines for conflict of interest are in place, the rules are meaningless without appropriate enforcement. As posed by experts, the central question and test of effectiveness in this area is whether there is a willingness to consistently hold people accountable for their actions. In cases where a real conflict exists, common organizational responses range from counselling, oral/written warnings, formal reprimands, suspensions with or without pay, and potentially dismissal.

Finally, the research is also clear that even in a best practices organization, successful institutionalization cannot be achieved overnight. Often it takes place over years rather than weeks or months, depending on consistency of

leadership, the individual organization’s state of readiness, and the extent to which time, energy, and resources are available.