Proof Correction Marks

Please correct and return your proofs using the proof correction marks below. For a more detailed look at using these marks please reference the most recent edition of The Chicago Manual of Style and visit them on the Web at: http://www.chicagomanualofstyle.org/home.html

Instruction to typesetter	*Textual mark*	*Marginal mark*
Leave unchanged	under matter to remain	stet
Insert in text the matter indicated in the margin		followed by new matter
Delete	through single character, rule or underline or through all characters to be deleted	
Substitute character or substitute part of one or more word(s)	through letter or through characters	new character or new characters
Change to italics	under matter to be changed	ital
Change to capitals	under matter to be changed	caps
Change to small capitals	under matter to be changed	sc
Change to bold type	under matter to be changed	bf
Change to bold italic	under matter to be changed	bf+ital
Change to lower case		lc
Insert superscript		under character e.g.
Insert subscript		over character e.g.
Insert full stop		
Insert comma		
Insert single quotation marks		
Insert double quotation marks		
Insert hyphen		
Start new paragraph		
Transpose		
Close up	linking characters	
Insert or substitute space between characters or words		
Reduce space between characters or words		

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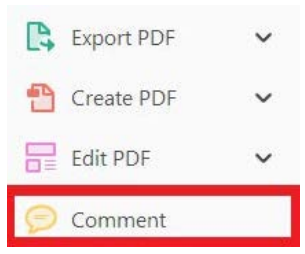
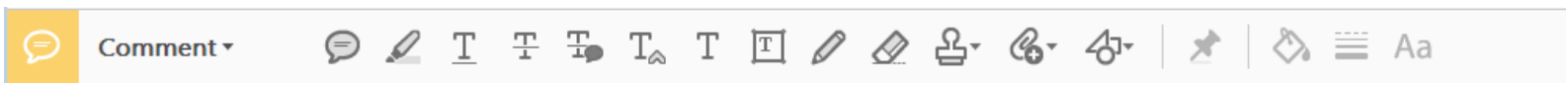
USING e-ANNOTATION TOOLS FOR ELECTRONIC PROOF CORRECTION

Required software to e-Annotate PDFs: Adobe Acrobat Professional or Adobe Reader (version 11 or above). (Note that this document uses screenshots from Adobe Reader DC.)
The latest version of Acrobat Reader can be downloaded for free at: http://get.adobe.com/reader/

Once you have Acrobat Reader open on your computer, click on the Comment tab (right-hand panel or under the Tools menu).



This will open up a ribbon panel at the top of the document. Using a tool will place a comment in the right-hand panel. The tools you will use for annotating your proof are shown below:

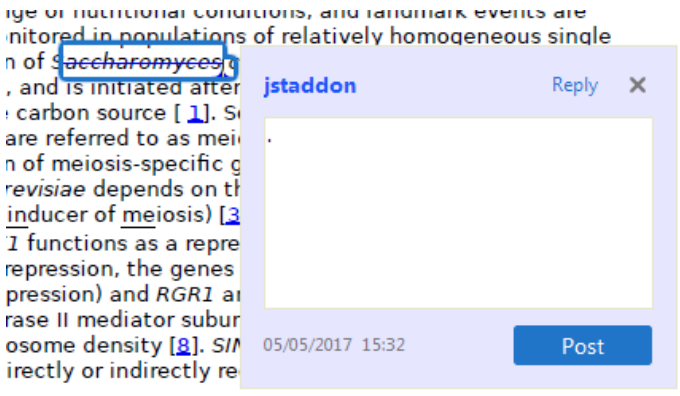


1. Replace (Ins) Tool – for replacing text.

Strikes a line through text and opens up a text box where replacement text can be entered.

How to use it:

- Highlight a word or sentence.
- Click on .
- Type the replacement text into the blue box that appears.

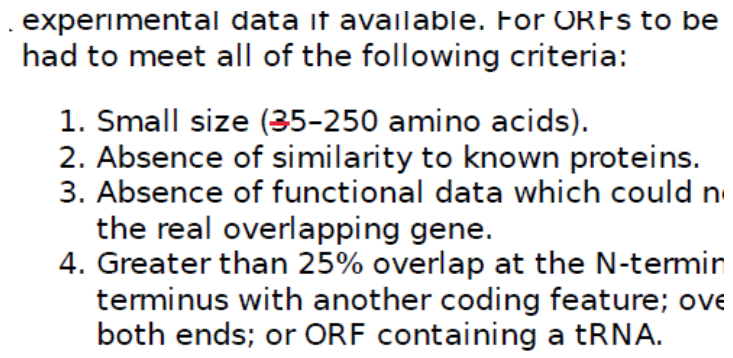


2. Strikethrough (Del) Tool – for deleting text.

Strikes a red line through text that is to be deleted.

How to use it:

- Highlight a word or sentence.
- Click on .
- The text will be struck out in red.


experimental data if available. For ORFs to be had to meet all of the following criteria:

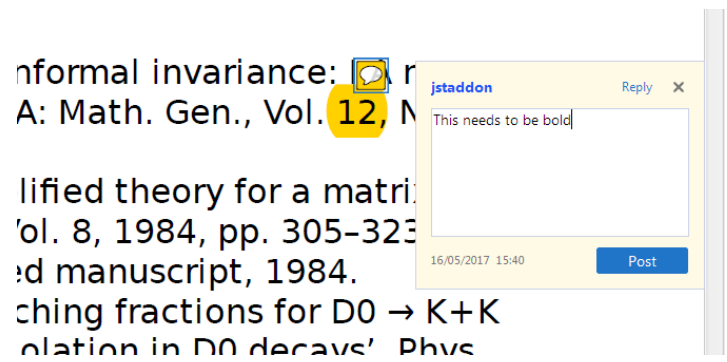
1. Small size (~~3~~5–250 amino acids).
2. Absence of similarity to known proteins.
3. Absence of functional data which could n the real overlapping gene.
4. Greater than 25% overlap at the N-termir terminus with another coding feature; ove both ends; or ORF containing a tRNA.

3. Commenting Tool – for highlighting a section to be changed to bold or italic or for general comments.

Use these 2 tools to highlight the text where a comment is then made.

How to use it:

- Click on .
- Click and drag over the text you need to highlight for the comment you will add.
- Click on .
- Click close to the text you just highlighted.
- Type any instructions regarding the text to be altered into the box that appears.

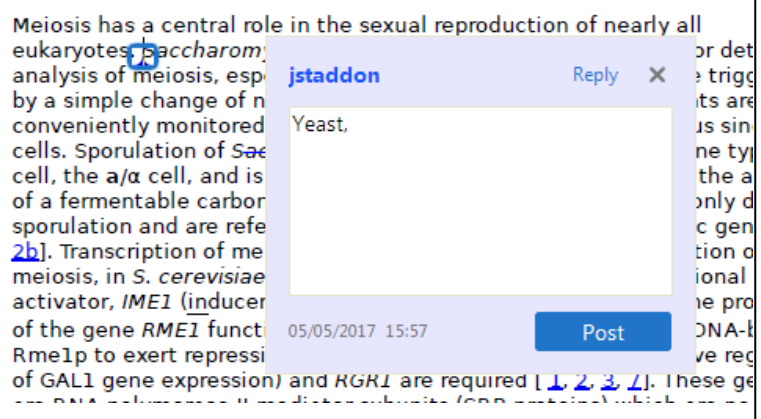


4. Insert Tool – for inserting missing text at specific points in the text.

Marks an insertion point in the text and opens up a text box where comments can be entered.

How to use it:

- Click on .
- Click at the point in the proof where the comment should be inserted.
- Type the comment into the box that appears.



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USING e-ANNOTATION TOOLS FOR ELECTRONIC PROOF CORRECTION

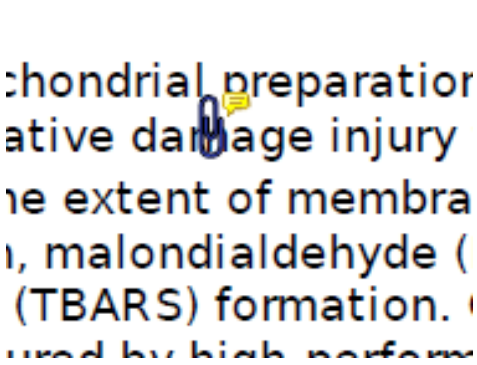
5. Attach File Tool – for inserting large amounts of text or replacement figures.

Inserts an icon linking to the attached file in the appropriate place in the text.

How to use it:

- Click on  .
- Click on the proof to where you'd like the attached file to be linked.
- Select the file to be attached from your computer or network.
- Select the colour and type of icon that will appear in the proof. Click OK.

  The attachment appears in the right-hand panel.

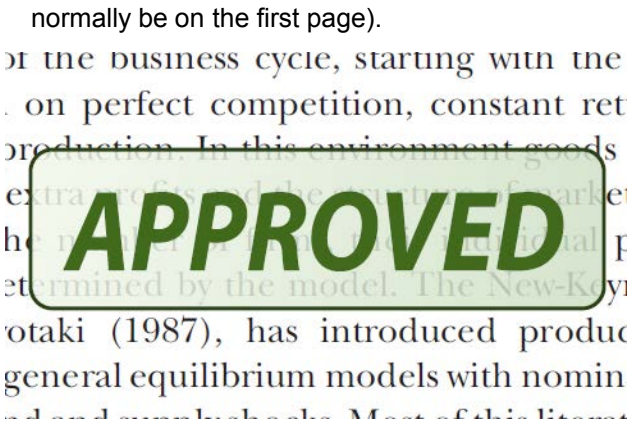


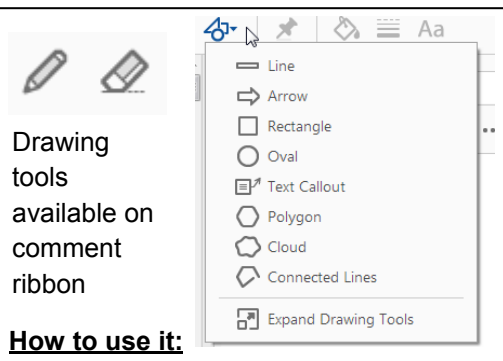
6. Add stamp Tool – for approving a proof if no corrections are required.

Inserts a selected stamp onto an appropriate place in the proof.

How to use it:

- Click on  .
- Select the stamp you want to use. (The Approved stamp is usually available directly in the menu that appears. Others are shown under *Dynamic*, *Sign Here*, *Standard Business*).
- Fill in any details and then click on the proof where you'd like the stamp to appear. (Where a proof is to be approved as it is, this would normally be on the first page).





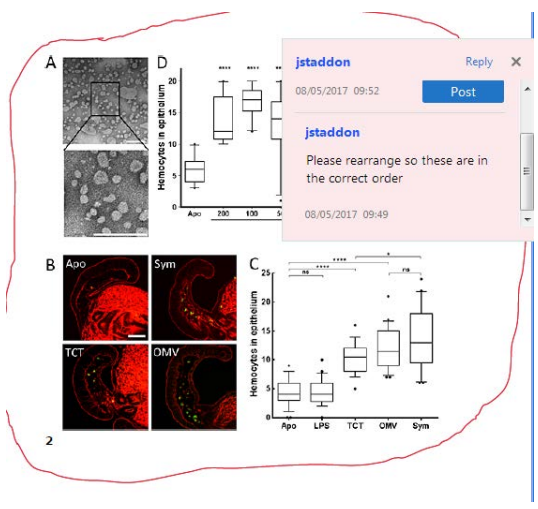
Drawing tools available on comment ribbon

7. Drawing Markups Tools – for drawing shapes, lines, and freeform annotations on proofs and commenting on these marks.

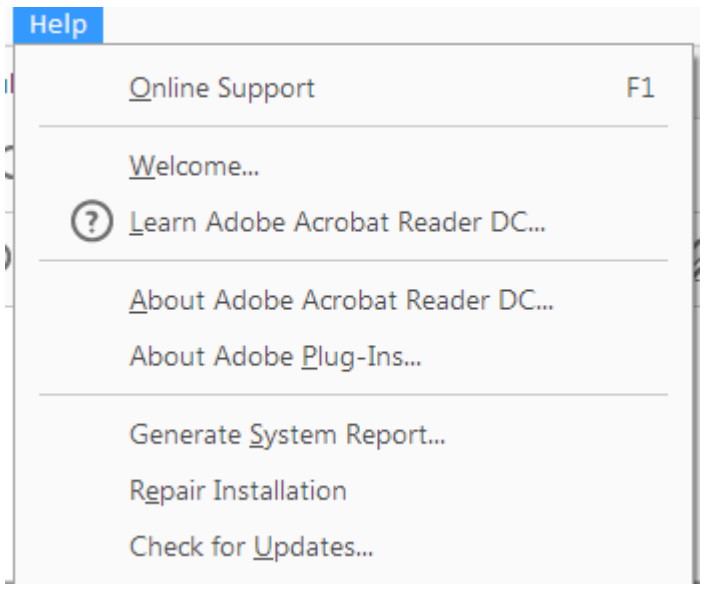
Allows shapes, lines, and freeform annotations to be drawn on proofs and for comments to be made on these marks.

How to use it:

- Click on one of the shapes in the Drawing Markups section.
- Click on the proof at the relevant point and draw the selected shape with the cursor.
- To add a comment to the drawn shape, right-click on shape and select *Open Pop-up Note.*
- Type any text in the red box that appears.



For further information on how to annotate proofs, click on the Help menu to reveal a list of further options:



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Journal: CAPA

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During the copyediting of your manuscript the following queries arose.

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AQ1	AUTHOR: Please note that reference citation is not allowed in author biography, hence please provide citation for reference "Fournier 2009" in main text.	
AQ2	AUTHOR: Please provide "Sommaire" for your manuscript.	
AQ3	AUTHOR: Please check that reference "Levine, 2015" has been OK as typeset.	
AQ4	AUTHOR: Please provide editors name and page range in reference "Van Harten et al., 2015."	
AQ5	AUTHOR: Please confirm that given names (red) and surnames/family names (green) have been identified correctly.	

AQ5 *Valerie Jepson*

Apparent conflicts of interest, elected officials and codes of conduct

Abstract: This article examines the concept of an apparent conflict of interest and asserts that it is well established that elected officials ought to avoid both actual and apparent conflicts. The article then examines why there is a reluctance to include an appearance standard in applicable codes of conduct. The article concludes by situating the debate within the broader context of ethics programs for elected officials and encourages a view that such programs be viewed as *sui generis* frameworks designed for democratic systems of accountability rather than professional regulatory frameworks.

AQ2 *Sommaire :* In translation

In this article, I discuss the notion of apparent conflicts of interest as distinct from actual conflicts of interest and its application to elected officials. I observe that a consensus has formed that the prevailing standard ought to be avoidance of both actual and apparent conflicts of interest. Nonetheless, the debate about the propriety of an apparent conflict of interest standard persists.

I suggest that there has never really been any meaningful debate about *whether* elected officials ought to avoid placing themselves in situations of an apparent conflict of interest; rather, the debate has only been about what consequences should flow from a failure to avoid an apparent conflict of interest. I also suggest that the latter concern is a genuine issue in need of debate but that it should be separated from the larger question of whether elected officials ought to avoid apparent conflicts of interest.

To inform the discussion, I revisit the important 1987 Report by The Honourable Justice Parker which is most-often credited for developing

Valerie Jepson is the Integrity Commissioner for the City of Toronto. She has practised in this field as a legal advisor and a commissioner since 2007 and, as such, has read innumerable papers, legislative submissions, annual reports, investigation reports, and blogs. Every effort has been made to accurately cite when specific ideas or concepts are referenced. However, in this growing field there is often a consensus among practitioners about many of the key concepts and, therefore, she wishes to acknowledge that the ideas set out herein are a product of the close study of the prior works of commissioners, academics, commentators and judges who have built the foundation for the practice of the Canadian model of parliamentary ethics, a term coined by former Senate Ethics Officer Jean Fournier (see Fournier 2009).

CANADIAN PUBLIC ADMINISTRATION / ADMINISTRATION PUBLIQUE DU CANADA
VOLUME 00, NO. 00 (MONTH 2018), PP. 00–00

the nomenclature of apparent versus real conflicts of interest. I highlight that Justice Parker applied a broad and purposive approach to understanding the obligations of elected officials and one that focused on how individual actions could impact on trust and confidence in government institutions. Justice Parker emphasized that only political consequences flow from a finding of a contravention and that therefore a more strict approach, appropriate when "legal" or criminal consequences could arise, is not appropriate.

The landscape has changed since 1987. The House of Commons, all provincial parliaments and many municipalities have ethics or integrity commissioners who have jurisdiction to recommend remedial actions, sanctions or penalties to be imposed by the legislative body to which the official belongs. Time and again elected officials found to have contravened codes of conduct, stand and successfully win re-election. In this way, the consequences that flow from findings of contravention remain political, not "legal" and certainly not criminal.

Through the examination of the issue of apparent conflicts of interest, I hope to advance a perspective of the purpose of codes of conduct, integrity commissioners and ethics programs for elected officials. Ethics programs for elected officials ought not to be viewed as punitive in the criminal or quasi-criminal sense and unless they lead to disqualification from standing for office, they ought not to be viewed as professional regulatory programs. Modern Canadian ethics programs are best understood as mechanisms to encourage the best behaviour; and, to provide non-partisan, transparent fact-finding for the benefit of the electorate to help make an informed choice about who to vote for at the next election.

The Parker report

The Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens presided over by the Honourable W. D. Parker released its report in December 1987 (Parker 1987) (referred to in this article as the Parker Report). The terms of reference required Justice Parker to inquire and report "whether [Mr. Stevens] was in a real or apparent conflict of interest as defined by the Conflict of Interest and Post Employment Code for Public Office Holders and the letter from the Prime Minister to [Mr. Stevens]." The Report therefore contains a comprehensive discussion of the meaning of conflict of interest for elected officials and identifies three types of conflicts: real, apparent and potential.

In 2004, seventeen years after its transmittal, the Parker Report was quashed on judicial review (*Stevens* v. *Canada (Attorney General)*, 2004 FC 1746). The Federal Court held that it was outside of Commissioner Parker's jurisdiction to define the term "conflict of interest" because the applicable

code(s) of conduct in place at the time of Mr. Stevens' impugned conduct contained no such definition. The Court held that when Justice Parker measured Mr. Stevens' actions against standards that were not articulated at the time of the conduct at issue, the Commissioner acted outside of its jurisdiction. Further, the Court determined that Mr. Stevens had not been provided with adequate notice and consequent ability to respond to the Commissioner's formulation of the standards.

Simply put, the Federal Court was persuaded that the conclusion of the Inquiry was unfair to Mr. Stevens because it measured his *individual* conduct against previously unarticulated standards. In so finding, the Federal Court made no comment about the merits of Commissioner Parker's discussion regarding how to understand conflicts of interest relating to elected officials.

Even in the aftermath of the judicial review, the Parker Report remains an important component of the modern understanding of public sector conflicts of interest and, as will be described more fully below, has been cited and relied on in significant public inquiries into similar matters. Professor Greg Levine has written that the definitions of conflict of interest developed by Justice Parker "have had a critical influence on the development of government ethics law in Canada" (Levine 2015: 10).

Long before the judicial review, the Parker Report and the definitions of conflict of interest formed the basis for significant legal reform. In 1992, the British Columbia Members' Conflict of Interest Act was amended to expressly incorporate a duty to avoid apparent conflicts of interest in direct reliance on the Parker Report (Members' Conflict of Interest Act, RSBC 1996, Ch. 287, s. 2(2)).

Justice Parker embraces a purposive approach

The Parker Report's chapter on conflict of interest contains a careful examination of the role and function of codes of conduct for elected officials: one that takes into consideration the realities and privileges of *elected* office.

With respect to actual conflicts of interest,[1] Justice Parker determined that elected officials are in a conflict of interest if there is a private interest that is known to the elected official and has a connection or nexus with the official's public duties sufficient to influence those duties. Justice Parker rejected the submission that if an elected official's interests align with the public, there can be no conflict. He said, "It is clear that a conflict of interest can exist even where private interests and public duties coincide…" (Parker 1987: 26).

Justice Parker also rejected the submission that a minister would only be deemed to be in a real conflict of interest if the minister actually made a

decision that conferred a benefit. Such an interpretation would exclude incidents where a minister was lobbied by a third party to make a decision that could further the minister's private interest, as long as the minister did not act. Justice Parker determined that such a definition was "much too narrow" and failed to meet the overall objectives of a "modern ethics-in-government-regime." He said that to adopt such a narrow test would mean that the code of conduct prohibited only criminal conduct.

Justice Parker said:

> It is important not to blur the demands of the criminal law with the requirements of a conflict of interest code. The former consists of carefully legislated provisions with attendant penal consequences for actions that fall below the line of what is socially acceptable. The object of the criminal provisions is to ensure that, at a minimum, public office holders will not engage in fraudulent, corrupt, or otherwise criminal behaviour. The provisions of the conflict of interest code are of a different character. First, the provisions are guidelines at most. No legal consequence flow from their violation. The sanctions, if any, are political rather than legal. Their overall objective is to *enhance* public confidence in the integrity of government.
>
> ... Further, the guidelines and the code that I must interpret and apply themselves demand more of public office holders than mere compliance with the criminal law of Canada (1987: 27).

Justice Parker then turned to the concept of apparent conflicts of interest. He began with the following statement:

> The concern about appearance of conflict as an important ethical postulate of modern government is one that is well founded. The reasons are obvious. Trust and confidence in government can be maintained and enhanced only if the occasions for apparent conflict are kept to a minimum. Public perception is important. Indeed, the perception that government business is being conducted in an impartial and even-handed manner goes a long way to enhancing public confidence in the overall integrity of government (1987: 31).

He explained that there was support for his analysis in the common law, which has interestingly remained relatively static since the Parker Report. Noting there was little judicial consideration of the appearance standard, he turned to the concept of "reasonable apprehension of bias," a concept – both then and now – well developed in the field of administrative law. He relied on the following passage from the 1904 decision in *Re L'Abbe and Blind River* (1904), 7 O.L.R. 230:

> 'The plain principle of justice, that no one can be a judge in his own cause, pervades every branch of law, and is as ancient as the law itself'; Paley on Summary Convictions ... thus sums up the old law. And in *Allinson v. General Council of Medial Education and Registration* ..., we have the modern exposition: 'In the administration of justice, whether by a recognized legal Court, or by persons who, although not a legal public Court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biased'...

... '[t]his fundamental rule in the administration of the law is equally venerable and pervasive in the consuetudinary practice of parliaments and legislative bodies' ... (as cited in Parker 1987: 31–32).

Justice Parker was persuaded that "an appearance of conflict exists when there is a reasonable apprehension, which a reasonably well-informed person could properly have, that a conflict of interest exists," as distinct from a real conflict. Justice Parker considered whether actual knowledge by the official was a necessary element. He rejected this argument stating that the submission, "proceeds from the *erroneous assumption that the code is designed to punish wrong-doers*" (1987: 33, emphasis added). He elaborated:

... the code and particularly the provisions dealing with appearance of conflict *are not penal in nature. The consequences for breaching these standards of ethical behaviour are moral and political, not legal and certainly not penal*. The object and purpose of the code is to enhance the impartiality and integrity of public office holders. The prevention of apparent conflict is one way in which this objective is achieved (1987: 33, emphasis added).

He then turned to the issue of whether an apparent conflict of interest exists when an inquiry into the "true" situation establishes that the elected official did not know about the private interest. In rejecting this standard, Justice Parker endorsed the reasonable apprehension of bias test to formulate the standard, holding that, "An apparent conflict of interest exists when there is a reasonable apprehension, which reasonably well-informed persons could properly have, that a conflict of interest exists" (1987: 35).

Throughout the analysis, Justice Parker advances a principles-based approach to codes of conduct, one that is animated by its over-arching objective to enhance public confidence by minimizing both actual and apparent conflicts of interest. Justice Parker set a high and onerous bar for elected officials to live up to, one that clearly requires more than mere compliance with the criminal law. He justified this high bar by emphasizing that the only consequences that flow from contraventions are political – meaning that elected officials are responsible to the electorate for their actions and must withstand the scrutiny of the ballot box at election time.

Administrative lawyers will recognize[2] the definition of apparent conflict of interest from the leading case on the rule against bias for administrative decision makers: *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at 394, in which the Supreme Court of Canada fashioned the following standard to determine when an administrative decision maker ought to be disqualified due to bias:

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information.... [The] test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. ..."

In administrative law, it is clear that an appearance of bias rather than an actual bias is disqualifying. The policy rationale behind the appearance standard in administrative law is that it would be improper and impossible to inquire into the mind of an administrative decision maker (e.g., a quasi-judicial decision maker) (Van Harten et al. 2015: 440–41).[3]

The administrative law concept of reasonable apprehension of bias does not neatly transfer to the political arena. In politics, an elected official's point of view (i.e., their mind) is well known and showcased during an election campaign. The common law recognizes that elected officials come to their role with some degree of prejudgement and therefore that the strict rule against bias should not be applied to all decisions made by elected officials (*Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 SCR 1170, 1990 CanLII 31 (SCC)).

However, there are other virtues of the appearance standard in administrative law that make it suitable for consideration in the political arena. First, as noted by Professor Sossin, it recognizes that it may not be possible to *accurately* inquire into the mind of a decision maker. Second, the reasonable apprehension of bias standard achieves the objective of ensuring that justice is not only done but seen to be done (Van Harten et al. 2015: 439–41). As described above, Justice Parker was persuaded that an appearance standard achieved the objective of helping to build confidence in government decision making.

In the next section of this article, I review a recent interpretation of the term conflict of interest and the analyses of three reports into significant and comprehensive public inquiries into public sector ethics matters to illustrate that a consensus has been reached on the issue of whether the duty to avoid conflict of interest in the realm of public sector ethics includes a duty to avoid the appearance of a conflict of interest, as that concept was understood and described by Justice Parker.

The appearance standard prevails

In 2015, the Toronto Lobbyist Registrar was required to interpret the duty of a lobbyist to avoid placing a "public office holder in a conflict of interest or in breach of the public office holders' codes of conduct or standards of behaviour" (Paragraph 140-45B of Toronto Municipal Code, Chapter 140, Lobbying; Gehrke 2015: 6). The duty arises from the Code of Conduct for Lobbyists at the City of Toronto, which forms part of the City of Toronto's bylaws (Toronto Municipal Code, Chapter 140, Lobbying). The term "conflict of interest" is not defined in the Lobbying Bylaw, nor was any reference made to the notion of "apparent conflict of interest."

The Registrar considered a 2009 federal court ruling on a similar interpretation matter relating to lobbyists conduct (*Democracy Watch* v.

Campbell, [2010] 2 FCR 139, 2009 FCA 79), the Parker Report, the 2005 Report of the Honourable Denise Bellamy into the *Toronto Computer Leasing Inquiry and Toronto External Contracts Inquiry* (the Bellamy Report) and the 2010 Report of the Honourable Jeffrey J. Oliphant in the *Commissioner of Inquiry into Certain Allegations respecting Business and Financial Dealings between Karlheinz Schreiber and The Right Honourable Brian Mulroney* (the Oliphant Report).

Applying a broad and purposive approach, Registrar Gehrke concluded:

> The purpose of [the Bylaw] is to enhance public confidence in the integrity of City government by preventing lobbyists from placing public office holders in a conflict of interest, whether real or apparent. . . .
>
> . . .
>
> In my view, the purpose [of the Bylaw] is best achieved by interpreting 'conflict of interest' consistently with the common law as including both 'real' and 'apparent' conflict of interest. The nature and purpose of [the Bylaw] is preventative, not punitive (Gehrke 2015: 6–11).

Three major public inquiries into public sector ethics have affirmed that public officials ought to avoid conflicts of interest, both apparent and real

Registrar Gehrke was persuaded that the common law meaning of conflict of interest included a duty to avoid an apparent conflict. Interestingly, there has arguably long been support for the proposition that the duty to avoid conflicts of interest in the public realm includes the duty to avoid apparent conflicts of interest. Consider the 1990 decision of the Supreme Court of Canada's leading case with respect to bias of municipal elected officials.[4] In *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 SCR 1170, 1990 CanLII 31 (SCC), the Court stated:

> It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, *a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest*. See Re Blustein and Borough of North York, 1967 CanLII 350 (ON SC), [1967] 1 O.R. 604 (H.C.); Re Moll and Fisher (1979), 1979 CanLII 2020 (ON SC), 23 O.R. (2d) 609 (Div. Ct.); Committee for Justice and Liberty v. National Energy Board, supra; and Valente v. The Queen, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673 (emphasis added).

Three major public inquiries into public sector ethics have affirmed that public officials ought to avoid conflicts of interest, both apparent and real.

In February 2002, Toronto City Council voted to pursue a public inquiry into certain computer and computer leasing contracts with MFP Financial Services. Commissioner Bellamy released her report concluding the inquiry in 2005, bringing forward a number of recommendations that led to significant reform of procurement procedures and the development of an accountability framework at the City of Toronto. Specifically, Commissioner Bellamy recommended the permanent establishment of an Integrity Commissioner and Lobbyist Registry. With respect to apparent conflicts of interest, Commissioner Bellamy stated:

> An apparent conflict of interest exists when someone could reasonably conclude that a conflict of interest exists. In other words, it is a matter of public perception.
>
> Public perceptions of the ethics of public servants are critically important. If the public perceives, even wrongly, that public servants are unethical, democratic institutions will suffer from the erosion of public confidence.
>
> . . .
>
> . . . public servants should not dismiss the importance of apparent conflicts of interest just because they can arise even where there is no wrongdoing. *By disregarding perception, the public servant runs the risk of eroding public confidence, not only in himself or herself but also in government generally.*
>
> Experienced elected officials know all about public perception. They tend to have good antennae, and they apply the "newspaper test." As Ontario's integrity commissioner, the Honourable Coulter A. Osborne, put it during the Good Government hearings, "If you wake up tomorrow morning and see this matter explored on the front page of one of Toronto's newspapers, how's it going to affect you politically? How's it going to look?"
>
> This is sound advice. Before they act, public servants should ask how their proposed action or inaction would look spread across page one (2005: 39–40, emphasis added).

The Bellamy Report recommended that the City's codes of conduct include rules about apparent and real conflicts of interest and that to assist with meeting this obligation, public officials should seek advice of the integrity commissioner.

The issue of apparent conflict of interest was also considered in the 2010 Oliphant Report. Justice Oliphant was asked to review the relationship and dealings between Prime Minister Mulroney and an international lobbyist in the period of time leading to and after the Prime Minister left public office. In the policy review component of the Inquiry, Justice Oliphant adopted Justice Parker's interpretation of apparent and real conflicts of interest and recommended that the appearance standard be expressly incorporated into the federal statutory framework.

The Oliphant Report recounts that the appearance standard was once incorporated into the federal code of conduct for elected officials, only to be removed because "the apparent standard 'would undermine the ability

of public office holders to discharge their duties and substitute the Conflict of Interest and Ethics Commissioner for Parliament or the public as the final arbiter of an appearance of conflict by expanding the definition of 'conflict of interest' under the Conflict of Interest Act to include 'potential' and 'apparent' conflicts of interest'" (Oliphant 2010: 532). Justice Oliphant rejected this concern and recommended that the applicable code of conduct be amended to expressly incorporate apparent conflict of interest. He said:

> A narrow definition of conflict of interest excluding apparent conflicts risks rendering the Act ineffectual in dealing with activities that, in the public eye, deserve scrutiny – that is, circumstances where a reasonably well-informed observer would perceive a conflict. I note that the purpose of ethics rules is not only to guard against actual instances where public office holders pursue their private interest at the expense of the public interest, but also to generate public confidence in the exercise of public power. Exclusion from the ambit of the Act of situations where a reasonable observer could conclude a conflict exists may grievously undermine public confidence in the federal ethics system. This is a point that the BC conflict of interest commissioner made in testimony before the Commission. Commissioner Fraser described the concept of apparent conflict of interest in the BC law as a "valuable tool" in his toolbox and said that the distinction drawn between real and apparent conflicts "gives to the public a sense of confidence in the fair workings of our government machinery." Dr. Levine, Dr. Greene, and Dr. Sossin were all of the view that apparent conflicts of interest should fall within the scope of the *Conflict of Interest Act* (2010: 532–3).

Commissioner Oliphant's recommendation to include apparent conflict of interest has not been implemented.

In 2011, the Honourable Justice Cunningham issued a report in the Mississauga Judicial Inquiry (the Cunningham Report). Justice Cunningham was required to review the actions of Mississauga Mayor McCallion in relation to her son's company. As a preliminary matter, Justice Cunningham was asked to define how he would determine whether the Mayor was in a conflict of interest. He faced the argument that the Mayor, a municipal official, was bound only to avoid conflicts of interest as defined in the *Municipal Conflict of Interest Act*, which includes a notoriously narrow definition of conflicts of interest. Justice Cunningham concluded that was sufficient guidance within the common law, the Bellamy and Parker Reports to understand the concept. Justice Cunningham formulated the following statement to describe the common-law obligations of public officials:

> [Elected officials] are entrusted by those who elected them to act in the public interest. Optics are important. In other words, members of a municipal council must conduct themselves in such a way as to avoid any *reasonable apprehension* that their personal interest could in any way influence their elected responsibility. Suffice it to say that [elected officials and their staff] are not to use their office to promote private interests, whether their own or those of relatives or friends. They must be unbiased in the exercise of their duties. That is not only the common law, but the common-sense standard by which the conduct of municipal representatives ought to be judged (Cunningham 2011: 380, emphasis added).

As can be seen, Commissioners Bellamy, Cunningham and Oliphant concluded that the duty to avoid conflicts of interest implicitly includes the duty to avoid apparent conflicts of interest. Commissioners Bellamy and Oliphant recommended an amendment to relevant codes or legislation to expressly incorporate the standard.

The more recent ruling of Toronto Lobbyist Registrar is an example of a modern application of the appearance standard and is an approach that recognizes the existence of a common law duty.

In hindsight, one wonders whether the duty to avoid conflicts of interests would have been interpreted to include avoiding apparent conflicts of interest much sooner if the BC legislature had not expressly incorporated the appearance standard into its legislation. The decision of the BC legislature to expressly recognize the appearance standard has created a stark contrast from other legislative frameworks and is accordingly used as evidence – in the statutory interpretation sense – that without express reference, the duty to avoid conflicts of interest does not include apparent conflicts.

Why does the debate about apparent conflict of interest persist?

Even though it appears that a consensus has been reached, the propriety of codifying an appearance standard remains.

In 2013, the Federal Parliamentary Standing Committee on Access to Information, Privacy and Ethics conducted a mandatory statutory review of the Conflict of Interest Act. The Committee heard extensive evidence about the notion of apparent conflict of interest and the BC legislation was held out as uniquely including a duty to avoid apparent conflicts of interest. The Committee declined to recommend that any amendments be made to the Federal Act to comprehensively deal with apparent conflicts of interest and so, going forward, elected officials will likely be able to argue that the refusal to amend the act is further evidence, in the statutory interpretation sense, that elected officials have no duty to avoid apparent conflicts.[5]

In a 2016 investigation report, Ontario Integrity Commissioner David Wake determined that he was bound to interpret the conflict of interest provision of the Members Integrity Act, 1994 as one that does not include apparent conflicts of interest (Wake 2016: 1, 16–17). Commissioner Wake referred to an oft-cited 1991 statement by Ontario's first Conflict of Interest Commissioner The Honourable Gregory Evans that "the Act does not concern itself with a perceived conflict of interest as opposed to an actual conflict" (Wake 2016: 17, citing Evans in 1991). In consideration of Commissioner Evans' 1991 opinion, among other factors, Commissioner Wake stated, "…it is not clear to me that the Legislature intended the

conflict provisions of the Act to apply to the appearance of conflicts of interest. As such, I am unable to conclude that the Ministers contravened section 2 of the Act, as it is written. I would encourage the Legislature to review the Act with a view to clarifying whether it should apply to the appearance of conflicts of interest" (2016: 17).

If the experience at the Federal standing committee is any indication, it seems unlikely that the Ontario legislature will expressly incorporate an appearance standard.

> *It is my experience as a practitioner in the field that elected officials, in fact, do try to avoid involving themselves in situations that give rise to an appearance standard – and they often even seek the advice of an integrity commissioner to do so. Why then the resistance to the standard?*

It is my experience as a practitioner in the field that elected officials, in fact, do try to avoid involving themselves in situations that give rise to an appearance standard – and they often even seek the advice of an integrity commissioner to do so. Why then the resistance to the standard? I offer three commonly-raised concerns, all of which could be resolved if there was a greater consensus about the purpose of ethics programs for elected officials. I suggest that the objectives and purpose of a modern ethics program for elected officials can only be understood if the fact that the programs exist within a democracy is taken into account. To use Justice Parker's phrasing, such programs can only be understood if we accept that the outcomes that flow from them are *political*.

A concern about unfairly presuming a nefarious intent

Some reject an appearance standard because it presumes a nefarious intention on the part of elected officials: a presumption that their every move will be self-interested. This concern misunderstands the objective of modern codes of conduct for elected officials. Codes of conduct for elected officials are not personal moral codes. The primary purpose of codes of conduct – and integrity or ethics commissioners – is to emphasize that the actions of individual members of legislative bodies can impact on the reputation of the body as a whole. Modern codes of conduct highlight areas where an elected official's conduct, regardless of intention, could harm public confidence in the legislative body. When elected officials – and the public – construe many obligations set down in codes of conduct as

personal or moral guidebooks, they misunderstand the main purpose and function of the program.

Of course, this is not to say that elected officials ought not to strive to be respected, moral and ethical people of good judgement. As a practitioner in this field, I start from the proposition that elected officials who volunteer to run for public office are people of good will and intention. However, as a commissioner or advisor to a commissioner, I would not purport to pass moral or ethical judgement on any elected official. I can provide objective scrutiny of whether the elected acted mindfully of his or her privileged role and took reasonable steps to improve trust and confidence in the legislative body by striving to meet the standards set down in a code of conduct.

A concern about lack of clarity

Some elected officials reject the appearance standard because they say that it is too dependent on uninformed public opinion and difficult or unpredictable to apply in practice. Ontario's first Integrity Commissioner articulated the former concern and the Federal Court judicial review decision regarding the Parker Report concluded that it was unfair to hold Mr. Sinclair to unarticulated standards. Arguably, the concerns about unpredictability raised by Ontario's first Integrity Commissioner in *1991* and the Federal Court reviewing the *1987* Parker Report are no longer pertinent when one considers the current state of permanent ethics and integrity commissioners across Canada.

> *The programs exist within a democracy is taken into account. To use Justice Parker's phrasing, such programs can only be understood if we accept that the outcomes that flow from them are* political

In my view, with the benefit of Justice Parker's definition of apparent conflict of interest, there is sufficient clarity about how to understand an appearance standard, and if there is doubt, elected officials can access advice from an ethics or integrity commissioner. All provincial and federal elected officials (and a growing number of municipal politicians) have access to an integrity commissioner to consider and objectively determine whether a situation gives rise to an apparent conflict that ought to be avoided or managed in another appropriate way such as disclosure.

Including an appearance standard in codes of conduct could, in fact, lead to greater clarity for elected officials and the public. The long-serving Conflict of Interest Commissioner for New Brunswick, The Honourable Patrick Ryan, made this case when he recommended that New Brunswick

embrace an appearance standard and an accompanying mechanism to ensure that elected officials could be provided with timely advice to avoid apparent conflicts (Ryan 2011: 9–10). Commissioner Ryan first began making the case for reform in 2008, at which time he said:

> By [amending the legislation to include apparent conflicts of interest], New Brunswick would be leading the way in Atlantic Canada in the matter of ethics as ethics relate to conflicts of interest between the members' responsibilities in their public office vis-à-vis their private interests. The rationale is that if the conflict of interest is apparent, a structured procedure should be in place to enable it to be resolved efficiently. Whether the conflict is actual or is apparent, the stigma of an underlying conflict pervades and must be dealt with logically or left dangling in the rumour mill with a perception by the public that all is not so transparent as is claimed by various political forces. Prompt resolution of an apparent conflict of interest, employing a summary procedure, would be in each member's best interest as well as that of the Legislature and would emphasize to the public that transparency is one of the Legislature's paramount concerns (Ryan 2009: 4).

A concern about risk of penalties or consequences

Elected officials may be concerned that an appearance standard is too onerous in consideration of the possible penalties or consequences that could flow from a finding of breach. Recall that Justice Parker dismissed this concern on the basis that the only consequences that could flow from a breach were political. As I outline below, while the landscape has changed, it is my view that the consequences remain as they ever were: political.

A brief discussion about penalties and consequences is necessary. In general, at the provincial or federal level, if an elected official is found by an independent commissioner to have contravened a code of conduct,[6] the commissioner reports this finding to the applicable legislature – and to the public – and can recommend sanctions to be imposed by the legislature. A public report in and of itself – without any recommendation as to penalty – is certainly of *consequence* to an elected official. The types of sanctions available range from reprimands, conditional suspension from sitting, suspension of pay or apologies. The most serious possible sanction is a recommendation that a member's seat be vacated for the term (Ontario), a sanction that has never been recommended in the 30 years that Canada has had ethics and integrity commissioners. There is no commissioner-based framework that contemplates that a member would be restricted from running for elected office at the next election.[7]

The current landscape can be contrasted with the landscape in 1987 when Justice Parker wrote his report. As noted, Justice Parker reasoned that because consequences flowing from a failure to meet the standards were political – not legal or criminal – a broad and purposive approach

applied. While there certainly are a greater range of consequences in the form of sanctions possible, the framework is certainly not a criminal or quasi criminal system nor is it a professional regulatory system. This is because, even in the face of the most extreme sanction, an elected official can still stand for office and be successful. For this reason alone, the consequences that flow from a finding remain political. The experience of the past twenty years affirms my view.

There are many examples across the country where elected officials determined to have contravened the code of conduct – and who are the subject of sanctions – stand for re-election and are returned to office.[8] Questions are sometimes asked about the efficacy of the system when elected officials are re-elected in the face of a finding of a code breach. However, the system is working. The alleged misconduct is investigated by an independent, non-partisan commissioner, it is reported and made available to the public. (Misconduct that may be criminal in nature can be referred to the police.) Elected officials are properly concerned about sanctions but this concern should not interfere with the overall purpose of modern public sector ethics programs: to enhance trust and confidence in the applicable legislature. While remedial actions are sometimes necessary to adjust and improve behaviour, these are not punitive actions on par with criminal breaches or professional regulatory consequences where a person's livelihood is at stake. In fact, it may be that more lenient or no sanctions are appropriate for breaches of an apparent conflict of interest than for a real conflict of interest. The way to address this concern is to consider what consequences ought to flow from failures to meet the appearance standard rather than to resist the standard itself. Including this standard in a code of conduct, either expressly or by implication of the common law, affirms only that elected officials aspire to meet the highest standards of conduct.

Elected officials are properly concerned about sanctions but this concern should not interfere with the overall purpose of modern public sector ethics programs: to enhance trust and confidence in the applicable legislature

Elected officials found to have contravened a code of conduct are required to face questions about the finding on the campaign trail and persuade enough voters to cast a ballot in their favour. The elector is required to balance all of the available information – including the ethics breach – and decide. As long as elected officials are *elected*, the consequences of a

breach of the code of conduct, even if sanctions followed, are *political* in the same sense that Justice Parker wrote about in 1987.

Conclusion

A consensus has emerged that elected officials ought to avoid conflicts of interest, both apparent and real. In my view, unless there is a firm precedent by a previous commissioner, Court or an express exclusion, restrictions against conflict of interest for elected officials ought to be interpreted in a broad and purposive manner, consistent with the common law, which includes the duty to avoid apparent conflicts of interest. The duty to avoid apparent conflicts of interest is consistent with the overall duties of public officials to promote trust and confidence in the government and recognizes that the actions of elected officials, regardless of intent, can impact upon public trust in government.

The only debate that should remain is whether the same kinds of sanctions or penalties ought to flow from a finding of an apparent conflict of interest. While it may be a topic of further discussion, it is a matter that is likely best left to the discretion of ethics and integrity commissioners, and legislatures or councils charged with imposing recommended penalties on a case-by-case basis.

As long as elected officials are elected, *the consequences of a breach of the code of conduct, even if sanctions followed, are* political *in the same sense that Justice Parker wrote about in 1987*

Legislatures, elected officials, commissioners and courts reviewing the actions of commissioners should return to the Parker Report to understand the concept of an apparent conflict of interest and – more importantly – to conceptualize the unique features associated with applying codes of conduct to elected officials, who while obliged to adhere to relevant codes of conduct are primarily accountable to the electorate. This reality gives rise to two important considerations. First, the expectations set down in codes of conduct should align with reasonable public expectations of propriety in public office. Second, accountability for failure to meet the standards is owed to the electorate.

While a discussion about appropriate sanctions is necessary, it should not distract from the consensus that elected officials should avoid activities that place them in apparent conflict of interest, when judged by a "reasonably well-informed person." To fixate on penalties risks treating modern ethics programs for elected officials as quasi-criminal or

professional regulatory regimes when they are not. At present, they are *sui generis* frameworks carefully designed to co-exist within a democracy.

Notes

1 Justice Parker acknowledged that there will often be a period of time between the realization that an elected official has an interest and the opportunity presents itself to advance the interest. He terms this as a "potential conflict of interest," emphasizing that what is important is what the elected official does when faced with the potential conflict. Does she act on it to disclose and recuse herself? As is often said by senior practitioners in the field, it is not wrong to have a conflict of interest but it is wrong to fail to act responsibly and appropriately with respect to the conflict.

2 This parallel has been noted by Professor David Mullan in his research work commissioned by the Mississauga Judicial Inquiry and by Professor Lorne Sossin in testimony at the Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney and the 2013 hearings of the Standing Committee on Access to Information, Privacy and Ethics, Statutory Review of the Conflict of Interest Act.

3 Professor Sossin also made this observation and connection in relation to the appearance standard in evidence at the 2013 Standing Committee hearings into the review of the Conflict of Interest Act. (See Standing Committee on Access to Information, Privacy and Ethics 2013: 38.)

4 This connection was highlighted by Professor David Mullan in his important paper commissioned for the Mississauga Inquiry (Mullan 2010; http://www.mississaugainquiry.ca/exhibits/pdf/Exhibit_A_COM008001611.pdf).

5 It is important to note that the Federal Conflicts of Interest and Ethics Commissioner did not recommend express inclusion of an appearance standard, noting that there were many parts of the Act (outside of the definition of conflict of interest) that already incorporated an appearance standard (e.g., the rules relating to gifts).

6 With respect to the Federal level, this refers to the Conflict of Interest and Ethics Commissioner's administration of the Code of Conduct for MPs, not the Conflict of Interest Act, which does not contemplate recommendations for sanctions but is made to the Prime Minister for consideration and action.

7 The Ontario Municipal Conflict of Interest Act does contemplate a future restriction against running but this is determined by a Court, not a legislative body on the recommendation of a commissioner.

8 Consider Mayor Hazel McCallion who was re-elected by a significant majority after the Cunningham Report concluded that she was in an improper conflict of interest for the benefit of her son; consider the Honourable Harinder Takhar, the first Minister found to have contravened the Members' Integrity Act, 1994 who was re-appointed to Cabinet and re-elected as an MPP.

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