Office of the INTEGRITY COMMISSIONER

Bureau du COMMISSAIRE À L'INTÉGRITÉ

Five-Year Report 2018

Prepared December 2018

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CONFLICT OF INTEREST AND LOBBYIST REGISTRY

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December 14, 2018

Hon. Daniel Guitard
Chair of the Legislative Administration Committee
Legislative Building
P. O. Box 6000 Fredericton, NB
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Dear Chair and Members of the Legislative Administration Committee:

I have the honour of submitting the 2nd five-year report of the Office of the Integrity Commissioner.

As my mandate as Integrity Commissioner is ending on December 31, 2018, I felt it was necessary to bring these significant proposed amendments to the forefront once again.

This report is created and filed pursuant to section 43.1 of the *Members' Conflict of Interest Act*.

Respectfully,

Hon. Alexandre Deschênes, Q.C.
Integrity Commissioner

AD/rlr

MEMBERS' CONFLICT OF INTEREST ACT - FIVE-YEAR REVIEW

Introduction

Pursuant to s.43.1(1) of the *Act*, the Commissioner must initiate a review of the *Act* every five years, and prepare a report on this review for submission to the Legislative Administration Committee (LAC), or such other committee determined by the Assembly. The committee who receives the report shall review it, and then prepare and submit a report on its review, including any recommendations for amendments to this *Act*, to the Assembly within one year after the receiving the Commissioner's report.

An exhaustive five-year review was undertaken by former Commissioner Ryan, which he submitted to the LAC on October 4th, 2011. Despite my best efforts, I could not find any record that LAC or any other committee ever submitted a report to the Assembly as required by s. 43.1(3) of the *Act*, which would have triggered the obligation to initiate a five-year review of the *Act* by the Commissioner. I nevertheless find it important to do so, hence this review.

The salient features of Commissioner Ryan's five-year review, which can be found on our website, dealt with the following recommendations:

a) that the *Act* be amended to expand the definition of "conflict of interest" to include "apparent" conflict of interest;
b) the adoption of a "code of conduct" for members; and
c) bringing the Deputy Ministers, some members of their staff as well as the Heads of Crown corporations under the supervision of the Commissioner pursuant to the *Members' Conflict of Interest Act* in lieu of supervision being provided by a "designated judge" as is now the case under a separate piece of legislation entitled *Conflict of Interest Act.* As the members have recently adopted a "code of conduct", I will deal with the other two items.

The inclusion of the concept of "apparent" conflict of interest in the Act

All my predecessors were of the view that the different circumstances that constitute conflicts of interest situations found in sections 4, 5 and 6 of the *Act* do not capture the "apparent" conflict of interest concept.

In s. 4, for example, a conflict of interest arises when a member makes or participates in a decision in his or her capacity as a member when he or she knows, or should know, that in so doing, there is the opportunity to further the member's private interest or another person's private interest. This appears to envisage the rather narrow situation of members making or participating in decisions as an MLA, knowing that it will further their private interest or that of another person. The same can be said about the circumstances described in ss. 5 and 6 dealing with insider information and influence exerted by members.

The concept of "apparent" conflict of interest roams larger as it exists when, given a particular set of circumstances, there is a reasonable **perception** which a reasonably well-informed person would properly have, that there exists the opportunity to further the member's private interest or that of another person. Former Commissioner Ryan, in his exhaustive 5-year review of the *Act*, provided a roadmap to the type of legislative action required to bring about the changes that all Conflict of Interest Commissioners have advocated. Although I have had the privilege of dealing with members on issues dealing with conflicts of interest for just a few years, I share the views and the question asked by Valerie Jepson, the Conflict of Interest Commissioner for the City of Toronto, in her excellent article dealing with "apparent" conflicts of interest. She put it as follows:

> *"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?" (*see **Canadian Public Administration/Administration Publique du Canada, Volume 61, Suppl.1, May/Mai 2018 pp. 36-52**)
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> It has been my experience that a member who insists on not remedying an "apparent" or "perceived" conflict of interest situation runs the risk of being dealt with severely by his own political party or leader. Interestingly, it is an offence for a lobbyist under the *Lobbyists' Registration Act* to knowingly place a public office holder (such as a member of the Legislative Assembly) "in a position of real or potential conflict of interest" (ss. 37(3) and 37(4)). In addition, a "designated judge" under the *Conflict of Interest Act*, to be discussed below, is specifically authorized "to advise the person [Deputy Ministers, executive staff etc. …] of any situation disclosed that in his or her opinion is a potential conflict of interest." (s. 11).

In my view, the time to amend the *Act* to adopt the concept of "apparent" conflict of interest is long overdue.

The designated judge as an oversight person

The Integrity Commissioner's mandate under the *Members' Conflict of Interest Act* is limited to Members and former members of the Legislative Assembly.

The *Conflict of Interest Act* provides that "designated judges" (designated under the direction of Cabinet) are to act as the oversight persons in matters of conflicts of interest involving Deputy Ministers, executive staff members appointed by Cabinet ministers, Heads of Crown corporations and other persons associated with a Crown corporation. Under that *Act*, these persons have similar obligations to those imposed upon Members of the Legislative Assembly under the *Members' Conflict of Interest Act.* For example, they must disclose information pertaining to their involvement (and those of family members) with or ownership of real and personal property of any nature (with some exceptions) to a designated judge, including responsibilities to disclose any change in their financial situation after the initial disclosure. Upon filing the written disclosure with the designated judge, the latter must examine them without delay. On finding that a person filing a written disclosure is **not** in breach of any provision of the *Act*, the designated judge must advise the person of that finding. If a person is found in breach of the *Act* or has been in breach of the *Act*, compliance orders can be issued.

The designated judge is a Justice of the Court of Queen's Bench or of the Court of Appeal to be designated under the direction of the Lieutenant-Governor in Council. The Court of Appeal provided the latest designated judge under the *Act*.

As far as I can ascertain, New Brunswick is the only jurisdiction in the country with this oversight system.

Previous Commissioners have recommended that the Office of the Conflict of Interest Commissioner should be designated to administer the *Conflict of Interest Act* for reasons ranging from "consistency in decision making" to the impact "of various time constraint created by the execution of judicial responsibilities" on designated judges, whether from the Queen's Bench or the Court of Appeal. As former Commissioner Ryan put it in his five-year review, the change "would ensure that the heads of public service have timely access to provisions of advice and consultation which in turn would diminish the possibility of questionable conduct and growth of public distrust." (page 6).

In my view, apart from the reasons already advocated by previous Commissioners, there exists fundamental reasons why this "designated judge" system must be abandoned.

First, it is a system that should have been replaced some two decades ago. As far back as 1997, a review of the legislation in force at the time (the *Conflict of Interest Act*) by Mr. Justice William Creaghan recommended the appointment of a Conflict of Interest Commissioner to administer legislation designed to provide a set of guidelines related to conflict of interest situations for **both** the Members of the Legislative Assembly and the Heads of the public service such as Deputy Ministers, Heads of Crown corporations, etc. At that time, as they are today, the Heads of the public service and Crown corporations were subject to the *Conflict of Interest Act* and "designated judges" provided the oversight. In 1999, following the lead of Mr. Justice William Creaghan, the Legislative Administration Committee (LAC) recommended that conflict of interest provisions be enacted for **elected and for nonelected officials in a single two-tiered Act** to be supervised by a Conflict of Interest Commissioner. That recommendation, if followed, would have eliminated the "designated judge" system. The Government of the day, however, decided to retain the *Conflict of Interest Act* with the "designated judges" continuing to supervise conflict of interest situations for the Heads of the nonelected public service, but did choose to adopt one of the recommendations of LAC, which was to enact the *Members' Conflict of Interest Act,* and appoint an independent Conflict of Interest Commissioner to deal exclusively with members or former members of the Legislative Assembly.

It is important to note the statement of the Minister sponsoring Bill 65 on March 9th, 1999:

> "The retention of the current *Act* [the *Conflict of Interest Act*, with "designated judges" as the oversight body] is an alternative that is required until appropriate new processes are developed." (see **Hansard 1998-1999, 53-4, 37 1999-03-09b.pdf, p.27 retrieved from GNB December 14, 2018**)

This was clearly a message to the public 20 years ago that it was only a matter of time before the Conflict of Interest Commissioner would be supervising nonelected Heads of public bodies as he or she does for Members of the Legislative Assembly.

In my view, more than ample time has passed to develop a new process to implement what has been recommended for decades.

There are two other reasons why the "designated judge" system must be eliminated. The first one is that, in my view, the duties and functions bestowed upon judges under the present *Conflict of Interest Act* may be incompatible with the duties and functions of members of the judiciary who must be independent from the executive branch of government. Is it acceptable for a Court of Queen's Bench or Court of Appeal judge to receive and examine detailed financial statements of Deputy Ministers or their executive staff, Heads of Crown corporations and their associates, and then consult with these persons to provide them with advice and recommendations with respect to any potential or real conflict of interest situations, including the supervision of blind trust agreements where necessary? Is it an acceptable scenario to have a Justice of the Court of Appeal hold a hearing into an allegation of conflict of interest levied against a Deputy Minister, for example, and to issue an order which is then subject to an appeal to the Court of Appeal? I recognize that not everyone will share my views, but I believe these questions must be asked, and answered.

The second, and perhaps the most important reason to abandon the "designated judge" system is that it simply does not work. I make that statement knowing that in the not too distant past, when the sitting designated judge resigned, the position remained unfulfilled for a protracted period of time. This meant that there was no one to administer the *Act*, or provide advice and make recommendations to the Heads of the public service, and if a public servant wished to comply with the *Act*, the opportunity to do so simply did not exist.

The public is entitled to be assured that Heads of the public service are accountable to someone who is always there to assure supervision and compliance with conflict of interest legislation. In order to demonstrate the ineffectiveness of the system, I can do no better than to cite a "designated judge" who resigned after holding a hearing into an alleged conflict of interest allegation under the *Conflict of Interest Act:*

> ***"34*** *Reading and applying this statutory provision raises a significant number of issues.*
>
> ***35*** *First, for the designated judge, who are the executive staff members, Deputy Ministers and heads of Crown corporations who are required to disclose in the absence of any sort of registry? Who has or has not made his or her annual disclosure? Who enforces the Act if no disclosure is filed? Finally, to mention one more peculiarity, and without claiming to be exhaustive on the subject, it is not necessary to include in the disclosure property that has been placed in a blind trust, or to have the blind trust approved.*
>
> ***37*** *At the risk of repeating myself, I do not have any information on or list of individuals (executive staff members, Deputy Ministers and heads of Crown corporations) who are*

> *required to disclose. No one compiles such a list, and there is no process for informing the individuals in question that they have breached the disclosure provisions of the Conflict of Interest Act.*
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> ***40*** *Although the Court finds that Mr. Bourque failed to comply with the disclosure requirements of the Conflict of Interest Act, I am left with no statutory provision for disposing of this issue in the form of a sanction or otherwise. Such is the Act.*
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> ***41*** *The Court, therefore, finds that Mr. Bourque did not have a conflict of interest, contrary to the allegations set out in the documents submitted by Mr. Boudreau, and that he failed to comply with the disclosure requirements of section 8 of the Conflict of Interest Act." (see Boudreau v. Bourque,[2014] A.N.-B. no 326, 428 N.B.R.(2d) 387, per Ouellette J.*

My hope is that our legislators will not take another 20 years to abandon what should be seen by everyone as an inept system that simply does not live up to the legitimate expectations of the public.

Dated at Fredericton this 14th day of December, 2018.

The Honourable Alexandre Deschênes, Q.C.
Integrity Commissioner