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Conflict of interest: what the hell is it?¹

John W. Langford

One of the reasons that public sector ethics will not recede as an agenda item in the 1990s is the continuing and increasing turmoil about what good behaviour looks like. Since I first explored this particular problem seven years ago, rifts within governments about the meaning of basic concepts such as conflict of interest have generally widened.² The more we explore conflict of interest, the more evident it becomes that there is little consensus within the average public sector workplace about precisely what a conflict of interest is and, therefore, what behaviour a public official has a duty to avoid.

A simple idea

Conflict of interest is a concept that, at first glance, looks pretty simple to most people. The duty to avoid conflicts of interest is a duty of public officials never to allow their private interests to impede their pursuit of the public interest. Even if we can't define what the public interest is in a specific situation, it should be easy enough to ensure that our private interests do not interfere with the accomplishment of our public duty. Around this elementary duty we have traditionally bundled a set of activities, a spectrum of inappropriate behaviours – some of which we have established as

criminal in character. They include such activities as influence peddling, breach of trust, the acceptance of a bribe or an inappropriate gift, self-dealing, insider-trading, nepotism, certain kinds of moonlighting, and the misuse of government property.³ This is all pretty straightforward stuff. In recent years, however, conflict of interest has changed from a reasonably clear and comprehensible concept to a battlefield of contending ideas reaching deeply into the lives of public officials.

The shifting sense of when a conflict exists

Possibly the most significant development is the growing confusion about the very meaning of conflict of interest. Traditionally, conflict of interest was not distinguished conceptually from the wider category of corruption. A conflict of interest existed, therefore, when a public official perverted impartial execution of a public duty by attempting to serve a private interest. In other words, there had to be some indication that the public official was actually doing something – making decisions or taking official action designed to enhance his or her financial interests at the expense of the public interest.

The definition of conflict of interest in recent Ontario and British Columbia (B.C.) legislation suggests continued allegiance to the traditional definition. Both pieces of legislation say the following:

For purposes of this Act, a member has a conflict of interest when the member makes a decision or participates in making a decision in the execution of his or her office and at the same time knows that in the making of the decision there is the opportunity to further his or her private interest.⁴

Over time, the usefulness of this connection between decision making and conflict of interest has come under fire. It is argued that conflict of interest should be detached from corruption in a conceptual sense and become identified not with decision making by the public official on his or her own behalf – the perversion of public duty through the conferring of a benefit – but with situations in which there is merely the existence of a clash of private interest and public duty.⁵ In this interpretation, the continuing existence of the clash becomes the defining quality of conflict of interest. Once the clash has been resolved one way or the other by a decision or public action of the public official, then there is no conflict of interest because it had been sorted out for better or for worse.

This approach was adopted by the federal government in 1989 when it put forward conflict of interest legislation for Members of Parliament and Senators. Bill C-46 defined conflict of interest:

a member has a conflict of interest when the member, the member's spouse or a dependant in relation to the member has significant private interests, other than permitted private interests, that afford the opportunity for the member to benefit, whether directly or indirectly, as a result of the execution of, or the failure to execute, any office of the member.⁶

In one sense, this approach narrows the definition of conflict of interest by knocking out those situations in which public officials have already moved to impede the impartial execution of public duties by conferring a benefit on themselves. In another sense, it broadens the field of conflict of interest by identifying it with any situation in which public officials carry on exercising their public duties while having private interests sufficient to affect the manner in which those duties are carried out. In short, conflict becomes defined by the existence of opportunity not action.

But the definition of conflict of interest – like rust – never sleeps. In Canada, the 1984 Task Force on Conflict of Interest argued that no overt clash of interests was required for a conflict of interest to exist.

The public interest could be abused equally where the private interests of the office holder coincide with the public interest so as to mesh together, with the result that in serving the public purpose the individual benefits privately as well. . . . Conflict of interest can in some cases mean compatibility of interest.⁷

Consider, for instance, public officials who are in a position to appoint their relatives to government positions without competitions, but these relatives are clearly excellent candidates. Or, ponder the case of public officials who have insider knowledge that shares of a certain company are likely to increase in value when a regulatory decision is made. For an official to purchase 500 shares in such a company would have no measurable impact on the public interest.

The message is that there may be a conflict of interest even where the consequences of self-regarding action may not be – on the surface – damaging to the public interest. If there is a clash, it is between the private interest of the official and the public interest on a deeper level – where the public interest is defined in terms of the inherent desirability of fair, unbiased procedures. This message reflects the fact that the contemporary preoccupation with conflict of interest has more to do with the need to enhance the legitimacy of the state, and its officials, in the eyes of the public than with staunching the flow of inappropriate benefits to individual officials.

But do the officials know about the conflict?

If this isn't confusing enough, the trend, more recently, has been away from objectivity. The Parker Royal Commission on Sinclair Stevens, for example, insisted in 1987 that a conflict of interest exists when a public official "has knowledge of a private economic interest that is sufficient to influence the exercise of his or her public duties."⁸ With this definition, the existence of a conflict depends not on the simple objective fact of two significant related interests – the public and the private – but on the subjective recognition of the existence of the private interest by the public official.

For example, if we were members of the team that was preparing a new highway building plan for our jurisdiction, we would be in a conflict of interest not by merely being in possession of substantial property close by one of the proposed routes, but also by being fully aware of the relationship between our public duties and our private interests and continuing to participate in the planning process while still holding the property. As the lawyers become more involved, *mens rea* becomes a more prominent feature of the equation. We may recall that the recent Ontario and B.C. laws both require that the Cabinet minister or member know that he or she could further their private interests.

Add potential and apparent conflict

But, the movements around the concept of conflict of interest have not focussed only on the necessity of a clash, and the shift from action to knowledge. The notion of a "potential" conflict of interest has also been added to the lexicon. Using Justice Parker's approach, a potential conflict of interest is said to exist at the moment when public officials foresee that a private economic interest may be sufficient to influence a public duty in which they are about to become involved. To pursue the previous example, we would be in a potential conflict of interest situation at the point at which we realized that our property holdings were sufficient to affect the way we conducted ourselves as team members in the forthcoming highway planning exercise. If we were to allow that situation to continue without doing anything to alter our holdings or our role, then we would have crossed the Rubicon and become enmeshed in a real conflict of interest.

As Justice Parker put it: "Potential conflict is that momentary oasis of second thought that allows the public office holder the opportunity to respond to and resolve the problem presented in a manner that enhances public confidence in the integrity of government."⁹ Public officials exposed to the full fury of the media are entitled to wonder if such an oasis could ever be anything more than a fleeting mirage. Even if it were, the distinction between the momentary oasis of second thought and real conflict might be very difficult for the average person to understand.

Finally, we cannot forget apparent conflict of interest. In this instance, the concept of conflict of interest is expanded by bringing in the perceptions of third parties. An apparent conflict of interest exists when the "average

person" could conclude that public officials' private interests would be sufficient to influence how they exercise their public duty. Some insist that the third party be "reasonably well-informed",¹⁰ But, that qualifier has opened up the predictable can of worms, in large part because the media is so often found in the third party role. Again, to pursue our example, public officials would be in an apparent conflict of interest if, regardless of the realities of the relationship between personal land holdings and highway siting responsibilities, a third party suspected that a conflict existed or could exist.

The public official as corporate entity

Unfortunately, the turmoil doesn't stop with the manipulation of the definition of conflict. A number of experts and governments have recommended a widening of the application of the concept from its focus on the individual public official to a net including the official's family, present or former business partners, political associates, and even friends. The federal government's most recent definition of conflict of interest (which was quoted earlier) picks up this theme.

To be clean in this context, not only must the officials avoid real, potential and apparent conflicts between public duty and personal interest, but they must ensure that the performance of their public duty remains untainted by the interests of an ever-widening circle of people around them. In effect, the public official is being transformed, for purposes of probity, into a growing corporate entity whose interests must be totally isolated from the officials' performance of public duties. These are strange marching orders, indeed, for politicians whose keenest instincts are to create "a communion of interests" with constituents.¹¹ As one politician put it to me privately: "To avoid conflict of interest innuendoes in the media these days, you practically have to be openly opposed to one of your own constituents being awarded a government contract."¹²

New types of conflict

The final development in the obfuscation of the concept of conflict of interest is the addition of new varieties of conflict of interest violations to a spectrum that already stretches from the criminal realms of fraud and



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influence peddling to the tacky world of accepting inappropriate gifts. The most prominent and widespread addition has been in the area of post-employment practices.

A number of jurisdictions (e.g., the Federal, Manitoba, British Columbia Governments) have attempted to restrict the employment mobility of elected and appointed officials after they leave the public sector. The concerns are that privileged information or access will be available to private organizations that hire ex-officials to represent or advise them, that officials may bestow favours on potential private sector employers in order to secure future employment and that, even if none of these things occur, an unregulated "revolving door" often appears as corrupt to the public. The latter concern doesn't seem misplaced in Canada and the United States where, until regulations were introduced, it was not uncommon to see a senior official resign on Friday and show up back in the capital on Monday flogging the position of a well-heeled lobby organization.¹³

From private interests to private life

The recognition of new conflict of interest violations, however, has not been limited to the realm of economic activity. One of the most fascinating developments of the last few years has been the movement of governments to include non-economic private activities of public officials within the parameters of conflict of interest. To the list of private activities that might be in conflict with officials' proper performance of public duties, governments have added the following:

- the pattern of their friendships and acquaintances;
- the sexual predilections of them and their spouses;
- their political or religious affiliations;
- their alcohol and drug usage;
- their personal financial management practices; and
- their other "lifestyle" idiosyncrasies of behaviour.

In essence, this development is an extension of the logic often connected with the prohibition of certain types of moonlighting; the point being that our private life is not our own when we are public officials. It also suggests a strong linkage between the concepts of conflict of interest and political neutrality – particularly where the latter doctrine militates against partisan political activity and public comment by appointed officials "after hours".

The central argument here is that some personal activities or characteristics of public officials create a conflict of interest, not because they may lead to a diversion of the state's resources to those public officials, but because they can interfere with officials' effective performance of public duties. They do this by rendering the officials unfit to perform efficiently

or safely (e.g., air traffic controllers with drug or alcohol abuse problems), by reducing the public credibility and legitimacy of officials (e.g., family care workers who beat their spouses), by eroding officials' capacity for judgment (e.g., politicians who are exclusively focussed on single issues such as abortion), or by opening up officials to some form of blackmail (e.g., justice officials who develop substantial gambling debts). This development further reflects the degree to which conflict of interest has moved from a narrow focus on the problem of public officials enriching themselves to a broad based concern with the legitimacy and integrity of the public sector. It is a development that is only comprehensible in a society that has banished the grossest forms of official corruption from public life. It is also a development which raises powerful concerns about the privacy rights of public officials.

The cost of turmoil

The twisting, confusing debate about the meaning, application and scope of the concept of conflict of interest has severely damaged whatever consensus might previously have existed within public sector organizations about the nature and importance of the duty to avoid conflict of interest. The preceding analysis suggests that a large number of critical issues remain unresolved after more than 20 years of deliberation and initiatives on this subject. Some of the most basic ones are:

- ❑ What should be the major focus of our concern about conflict of interest: preventing personal financial gain, protecting the legitimacy of government, or securing impartial and effective performance of public duties?
- ❑ What conditions need to be fulfilled for a conflict of interest to exist? Is a situation in which a related private interest and public duty co-exist sufficient, or do we have to have evidence of a decision made favouring a private interest at the expense of a clashing public duty?
- ❑ Should media or opposition party outrage qualify a situation to be labelled as an apparent conflict of interest? Should we just allow conflict of interest to become whatever the media, opposition or public say it is?

- ❑ How does the duty to avoid conflict of interest square with the traditional political activities associated with patronage and the securing of state resources for supporters of the winning party? What fundamental principles (e.g., fairness, social equality) are to guide us in creating rules for politicians? How far can the duty of impartiality be pushed on to politicians and their political staff?
- ❑ Is it appropriate to insist that spouse, family, friends and business associates effectively share the duty to avoid conflicts of interest with public officials?
- ❑ Is it defensible to apply the duty to avoid conflicts of interest to ex-public officials without providing compensation for lost economic opportunities? Can we draw a clear line between government "trade secrets" and proprietary information which a public official – like a private sector counterpart – should not be able to sell, and the experience and "know-how" which the official can sell without restriction?
- ❑ To what extent are the personal lives of public officials relevant to the conduct of their public duties? How far can the privacy of public officials legitimately be invaded to satisfy the government's need to know about their private interests, activities and characteristics?

Conflict of interest is just an example of a larger problem

I have spent considerable time in this article exploring the confusion and lack of consensus surrounding conflict of interest. But, I want to stress that this level of uncertainty is not unique to conflict of interest. An analysis of virtually every traditional duty or commandment within public sector ethics would yield the same pattern of uncertainty and questions. Consider for a moment what contradictions and paradoxes we would turn up if we examined the duties of confidentiality, political neutrality or accountability. The important point is more basic; we cannot expect to build strong ethical cultures in our public sector organizations if there is no clarity or consensus about what behaviour we are trying to reinforce and what behaviour we are trying to restrain. When we aren't agreed on what the right thing is, it's awfully hard to get us to do it.

End Notes

1. This is a revised version of a keynote address to a national seminar on *Ethics in the Public Sector*, chaired by Kenneth Wiltshire and sponsored by the Royal Australian Institute of Public Administration (Qld.), Brisbane, Australia, September 5-7, 1990.
2. See: John W. Langford, "Responsibility in the Senior Public Service," *Canadian Public Administration*, Winter, 1984, pp. 513-521.
3. See: Kenneth Kernaghan and John W. Langford, *The Responsible Public Servant*, The Institute for Research on Public Policy and The Institute of Public Administration of Canada, 1990, Ch. 6.
4. Government of Ontario, An Act Respecting Conflicts of Interest of Members of the Assembly and the Executive Council, s.2; and Government of British Columbia, Members' Conflict of Interest Act, s.2. Resemblances between the two pieces of legislation are not coincidental. The B.C. legislation, passed in 1990, was largely copied from the Ontario Act, passed in 1988.
5. See: Association of the Bar of the City of New York, *Special Committee on the Federal Conflict of Interest Laws, Conflict of Interest and Federal Service*, Harvard University Press, Cambridge, 1960, pp. 3-4.
6. Government of Canada, Bill C-46, Members of the Senate and House of Commons Conflict of Interest Act, S.2. This legislation was never passed. A similar approach to defining conflict of interest is used in the code for federal public servants. The code states that "employers shall not have private interests . . . that would be affected particularly or significantly by government actions in which they participate." Treasury Board of Canada, *Conflict of Interest and Post Employment Code for the Public Service*, Supply and Services Canada, Ottawa, 1985, p. 3.
7. *Report of the Task Force on Conflict of Interest*, Supply and Services Canada, Ottawa, 1984, p. 29.
8. *Report of the Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair Stevens*, Supply and Services Canada, Ottawa, 1987, p. 29.
9. *Ibid*, pp. 29-30.
10. See, for example, *Report of the Commission of Inquiry*, *op. cit.*, p. 32.
11. Dennis F. Thompson, *Political Ethics and Public Office*, Harvard University Press, Cambridge, 1987, ch. 4.
12. See: the comprehensive discussion of the principles underlying conflict of interest rules for elected public officials in Ian Greene, "Conflict of Interest and the Canadian Constitution: an Analysis of Conflict of Interest Rules for Canadian Cabinet Ministers," *Canadian Journal of Political Science*, June 1990, pp. 233-256.
13. See: John W. Langford, "Moonlighting and Mobility," *Canadian Public Administration*, Spring, 1991, pp. 62-71, for a more comprehensive discussion of the post-employment mobility issue.