

From: [Mark Young](#)
To: [COIA Committee](#)
Subject: Written submission for The Conflict of Interest Act
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Attachments: [CSSPE, Conflict of Interest Written Submission.docx](#)

Hello

I was invited by the Select Special Conflicts of Interest Act Review Committee to provide written feedback on the Act as it is currently written. A copy of my written feedback is attached. I was asked to provide this written feedback in my capacity as the President of the Canadian Society for the Study of Practical Ethics (CSSPE) /Société canadienne pour l'étude de l'éthique appliquée (SCEEA), but I am replying to the feedback using the email for my institutional affiliation in Alberta: Keyano College. So please note that I am providing feedback both as the president of the CSSPE/SCEEA as an ethics and politics instructor at Keyano College.

I want to thank the Select Special Conflicts of Interest Act Review Committee for the opportunity to participate in this review process. If the committee has any questions about my suggestions please feel free to reach out to me.

Mark Young, Ph D.

Him/he

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We respectfully acknowledge that we are on Treaty No. 8 Territory, the traditional meeting grounds and gathering places of Canada's First Nations, Métis, and Inuit peoples.

Keyano is a [Cree](#) word roughly translated, means, "Sharing".

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Attention: Select Special Conflicts of Interest Act Review Committee

Written submission on Alberta's *Conflicts of Interest Act* (the "Act")

Submitted by:

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President, Canadian Society for the Study of Practical Ethics (CSSPE) /Société canadienne pour l'étude de l'éthique appliquée (SCEEA)

Preamble

WHEREAS Members of the Legislative Assembly can serve Albertans most effectively if they come from a ~~spectrum~~ of occupations and continue to participate actively in the community;

Instead of 'spectrum' here it would be better, and more accurate, to use 'variety.' The term 'spectrum' suggests occupations lie on a plane where they are more or less occupations. Are some positions in society more of an occupation than others? Are some higher than others? The term 'variety' better capture the desired meaning of this section.

WHEREAS Members of the Legislative Assembly, in reconciling their duties of office and their private interests, are expected to act with integrity and impartiality;

This passage might benefit from adding 'public interest' or 'public good' onto the end, so it reads something along the lines as follows:

WHEREAS Members of the Legislative Assembly, in reconciling their duties of office and their private interests, are expected to act with integrity and impartiality toward the public interest;

This is the 'Conflict of Interest Act,' so it would be good to be clear what interests could be in conflict; i.e. public interests vs. private interests. As a binding act it should be explicit.

Part 2 Obligations of Members

(4) If a matter referred to in subsection (1) requires a decision of a Minister, the Minister may request another Minister to act in the Minister's stead in connection with the decision and the Minister to whom it is referred may act in the matter for the period of time necessary.

In regard to the this subsection, it should be the case that the decision of which Minister will replace a Minister with a possible conflict of interest should not be the decision of the latter. Rather, there should be some other office that makes decisions over how to swap Ministers in cases of possible conflicts of interest. This is because if the Minister that anticipates a conflict of interest is able to select their own replacement it is still possible that the former Minister is impacting the decision indirectly through selecting a replacement that will decide as the Minister wants them to decide. So a neutral office should step in, and, moreover, rely on a blind process of selection. If such a process is already in place, then it should be alluded to in this subsection in some manner.

Gifts, benefits from persons other than the Crown

(3) Subsection (1) does not apply to a fee, gift or other benefit that is accepted by the Member or the Member's spouse or adult interdependent partner or minor child as an incident of protocol or of the social obligations that normally accompany the Member's office

c) in the case of the invitation of a Member to a conference or meeting in respect of which the Member accepts a waiver of the attendance fee and the payment or reimbursement of reasonable travel expenses incurred for the Member's attendance at the conference or meeting, if the Member accepts the waiver, payment or reimbursement in accordance with the regulations, or

It might be worthwhile to remove the provisions of subsection c) altogether. Waiving of fees and traveling costs to attend a conference or meeting does seem like a reciprocal act; i.e. a benefit provided that obliges a benefit in kind. If a meeting, or conference, can serve the public interest then it should be a government expense and not paid for by the host. If the meeting, or conference, would not serve the specific range of public interests that the Minister serves, then the Minister has no need to attend in their official capacity. If there is a possibility of attending the conference, or meeting, creates a possible conflict of interest and attendance has been facilitated financially by the host in any manner, then this should be disclosed as a possible conflict of interest.

(4) The Ethics Commissioner may give an approval under subsection (3)(d) only if the Ethics Commissioner is satisfied that there is no reasonable possibility that retention of the fee, gift or other benefit will create a conflict between a private interest and the public duty of the Member.

It should be indicated in this subsection that there will be a written record for this decision indicating the reasoning that supports the Ethics Commissioner's decision. If there is no requirement for a written record currently in the Act such a requirement should be added.

Travel on non-commercial aircraft

7.1(1) In this section, "non-commercial chartered or private aircraft" does not include a non-commercial aircraft chartered by the Crown or a private aircraft owned or leased by the Crown.

(a) the travel is required for the performance of the Member's office,

If the travel is required for the performance of the Member's office, then it seems strange that the aircraft itself would not be chartered by the Crown. The government should have its own resources to fulfill its public duties to ensure the interests of the public is served. Again, if a private organization provides the chartered aircraft there will minimally be a perception of an expected benefit in kind. In conflict of interest cases perception can trump reality.

(5) The Ethics Commissioner may publish information reported under subsection (4) on the Ethics Commissioner's website in a form that the Ethics Commissioner considers appropriate.

This form should be standardized to remove the perception, or reality, of bias, and the standardization should be referenced in this subsection. Conflicts of interest involve concerns over whether private interests have an impact on public decisions. These decisions occur in a place no one can see - i.e. in the mind – and this is the reason for concern. Having transparent and fixed processes, protocols and forms help to combat concerns over whether private interests impact public decisions.

Contracts with the Crown

The subsection **8(1) (b), (i)-(ii)** is a bit unclear. It seems to be asserting that (b) is not permissible unless conditions (i)-(ii) are met, but this is not sufficiently clear. It could also be asserting that

(b) in its entirety is not permissible. So the subsection should be clarified so that one interpretation is unambiguously clear.

Part 3 Disclosure

Public disclosure statements

14(1) After meeting with the Member, and with the Member's spouse or adult interdependent partner if the spouse or adult interdependent partner is available, the Ethics Commissioner shall prepare a public disclosure statement.

(2) Where a Member files an amending disclosure statement, the Ethics Commissioner, after consulting the Member and the Member's spouse or adult interdependent partner, if available, shall, if the Ethics Commissioner considers it necessary, prepare either a new public disclosure statement or a supplementary public disclosure statement, which shall form part of the Member's public disclosure statement.

It might be worthwhile to have disclosures only made publicly by the office of the Ethics Commissioner and not by Members. The simple reason why is that a disclosure by a Member could involve some amount of political spin; even if unintended. Having disclosures only from the Ethics Commissioner removes this possibility and better facilitates the possibility of neutrality. Section 14(2) enables the Ethics Commissioner to provide a supplementary disclosure, but if there is some difference in the disclosures between a Member and the Ethics Commissioner this could easily be spun into a conflict between (elected) politicians and (unelected) bureaucrats. Such a public dispute could diminish public confidence in the neutrality of unelected bureaucrats and the honesty of elected politicians.

Part 4 Members of the Executive Council and Leader of His Majesty's Loyal Opposition

Employment restrictions

(2) Subsection (1) does not apply if the Minister has disclosed the material facts to the Ethics Commissioner and if,
(ii) in the case of a business, the Ethics Commissioner is satisfied that the business will be carried on by way of a management arrangement in which
(A) the Minister will be precluded from participating in

discussions about matters that could affect a private interest of the Minister or of a person directly associated with the Minister, and

Some indication of how this will be achieved might be required. A Minister may be formally precluded from participating such discussions, but one wonders how informal discussions can be precluded.

Part 4.2 Premier's and Ministers' Staff

Post-employment restrictions

This *Act* contains legitimate restrictions on the ability individuals who are employed by the Alberta legislature to be employed as a lobbyist after employment. Section **23.7** applies to former employees of the premier and ministers, Section **23.1** applies to former Ministers, Section **23.937** designated senior officials, and so on. The prescription is the same for all positions. The former employee is prohibited for a 12 month period after the last day of employment of taking on a position as a lobbyist as defined by the *Lobbyist Act*. Any time restrictions on lobbyist activity after employment can seem, and possibly are, arbitrary. Why 12 months instead of 6 months, 24 months or even 1 month?

To discern whether a restriction is appropriate or arbitrary one must consider the purpose of the restriction. The purpose is to ensure, as is the purpose of this *Act* overall, that public interest is served instead of private interests. Lobbying by former employees of the legislature can function to serve public interests. Lobbying is a legitimate mechanism for coalitions to participate in the processes of democracy. There is always a danger, though, that personal interests could be served through lobbying rather than private interests. The danger of personal interests being served is especially salient when a former employee has a personal connection with those currently employed, in whatever capacity, with the Alberta legislature. It is to avoid personal connections facilitating personal interests over public interests that motivates the 12 month prohibition on employment as a lobbyist, but this 12 month prohibition seems too short achieve this end. After 12 months the personal connections are still too strong and hence the possibility of serving personal, over public, interests is a valid concern. After a 12 month period personal connections may not serve personal interests, but instead public interests, but this is imperceptible from the outside. From the outside personal connections, rather than knowledge of governmental processes, may seem to be doing most of the work. Conflicts of interest can be more about perception than reality, so it is best to be cautious.

To mitigate the perception of personal interests being served the prohibition period should be extended. A very effective prohibition, to mitigate the perception of personal interests being served, would be a prohibition of two election cycles. This would ensure personal connections would be mitigated significantly. The former employee would have been removed from the public sphere for a sufficient amount of time to lessen the personal connections, and the current employees of the legislature could be sufficiently different to also mitigate personal connections. Again, the goal of such a suggestion is to balance the value of lobbying as a mode of democratic participation, where public interests can be well served, and the danger of personal interests being served via personal connections. If the prohibition of two elections cycles is deemed excessive then 24 months would be better, but more arbitrary.

The above remarks apply not merely to lobbying, of course, but too all similar activity: commercial basis; government contracts; employment; board membership; and so on as covered in, for example, subsection **23.7 (1)-(6)**, and other similar subsections.

Waiver or reduction 23.71

The content of this subsection, and other similar subsections. should be altered to comply with the previous comments. Giving the Ethics Commissioner the ability to waive restrictions set out in the *Act* is warranted. Rules must always be interpreted, assessed and prioritized by those with the duty to act in the public interest. Nonetheless, given the concerns previously expressed a minimum on the waiver should be in place. Anything less than 24 months is problematic.

Part 5 Investigations into Breaches

25 (3) An investigation under this section shall not be commenced more than 2 years after the date on which the alleged breach or contravention occurred.

What justifies this limitation? Although some time limit on investigations seems warranted - as we don't want the current Ethics Commissioner to be investigating the Ralph Klein government, as an example – two years seems too short. Any time limit is a bit arbitrary, but things that happened within three years, for example, could still be impacting current government practices and policies. So this window of investigation should be extended a bit. A three to five year window seem more appropriate given that decisions within that time period can still be impacting

government policies and practices, as mentioned. Also, extending the opportunity for investigation would act as a deterrent against decision and behaviours that place private interests ahead of public interests.

(5) Where an investigation has been suspended under subsection (4), the Ethics Commissioner may continue the investigation after the suspension end date if, within 30 days after the suspension end date,

(a) in respect of an investigation initiated by a request under section 24(1), the Ethics Commissioner receives a written request to continue the investigation from

(i) the individual against whom the allegation was made, or

(ii) the person who made the request under section 24,
or

(b) in respect of an investigation initiated by the Ethics Commissioner under section 25(1) without receiving a request under section 24, the Ethics Commissioner determines that the investigation should continue.

(6) Where an investigation referred to in subsection (5)(a) has been suspended under subsection (4) and no written request is received under subsection (5)(a), the Ethics Commissioner shall cease the investigation and shall so inform

(a) the individual against whom the allegation was made,

(b) the Speaker of the Legislative Assembly, and

(c) the person who made the request under section 24.

These subsections seem problematic. Suspending an investigation during an election seems warranted, but making its continuation based on a request to continue after the election process has been completed makes the investigation process itself seem political. That one change one's mind about whether a conflict of interest has occurred based on election results. Whether a conflict of interest has happened has nothing to do with whether one won, or lost, an election, so to make it dependent on that fact seems like the motivation for the investigation was merely political. If, for example, a former legislative member is guilty of a conflict of interest this should be determined whether they are reelected or not. Similarly if the member is innocent. If the member is innocent, then their name should be cleared whether they are a current, or former, member of the legislative assembly. If one can decide to no longer pursue the investigation because, for example, an individual is no longer an MLA, then it seems that the purpose of the investigation is just to win political points and not determine if a conflict of interest has actually occurred.

Part 7

Ethics Commissioner

Appointment

33(1) There is to be appointed, as an officer of the Legislature, by the Lieutenant Governor in Council on the recommendation of the Legislative Assembly, an Ethics Commissioner to carry out the Ethics Commissioner's duties and functions under this Act or any other enactment.

To ensure the independence of this office the process of selecting an Ethics Commissioner should begin with an all party committee. That all party committee would select a candidate that would be put before the Legislative Assembly for approval. Once a candidate is approved the candidate would then recommend the candidate to the Lieutenant Governor.