

Willie Grieve, QC
Chair

February 27, 2018

Mr. Rod Loyola
Chair
Standing Committee on Resource Stewardship
3rd floor, 9820 – 107 Street
Edmonton, Alberta
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Dear Mr. Loyola:

Re: Review of the Conflicts of Interest Act – Invitation to Make a Written Submission

Thank you for the opportunity to comment on the Conflicts of Interest Act. These comments are divided into two parts. The first part, related to post employment restrictions, explains why the restrictions should be expanded to members of the Alberta Utilities Commission and why post employment restrictions need not apply to the role of the Chief Executive at the Alberta Utilities Commission in order to protect the public interest. The second part relates to section 23.92(1)(j) which describes who reports to whom under this act but does not explain what is actually meant by the use of the words “reports to.”

Post Employment Restrictions

For ease of reference, section 23.937, (the “section”) limits the Chair and Chief Executive of the AUC and other agencies, boards and commissions from accepting employment where there had been “direct and significant official dealings” with the prospective employer. The post-employment restriction applies for a period of one year.

This is a one size fits all approach that neglects to take into account the unique circumstances of an agency such as the AUC which was not structured along the lines of a business corporation. The AUC was structured to ensure that the Chair was not to be the Chief Executive and the Chief Executive was not to become the Chair. Direct and significant dealings in the context of an adjudicative agency must mean dealings that dealt with decisions or orders made by the Commission members. The only significant official dealings with outside parties are those contained in Commission’s decisions and orders. The Chief Executive does not make these kinds of decisions. They are made by the Commission members who adjudicate the many applications brought to the Commission each year.

Therefore, the more relevant persons to include in the post-employment restrictions are the eight full time Commission members who are currently excluded. My recommendation is to expand the post-employment restriction to all full-time AUC members. Acting Commission members and staff who are authorized to make various routine and non-contentious decisions can be dealt with by the AUC's ethics committee. Staff members are employees and have a reporting structure up to the Chief Executive while Acting Commission members are screened by the Chair for conflicts of interest before they are asked to sit on a case. Since the Chief Executive does not have contact with parties that relate to the decision making function, there is no need to include the Chief Executive in the post employment restrictions in the Act.

This recommendation requires a fuller explanation of the adjudicative hearing function that is central to the AUC's work. The adjudicative function involves a process of receiving and considering the evidence of parties to a dispute and making a binding decision. In practice, the responsibilities of a tribunal adjudicator, like the AUC, and the requirements of impartiality are similar to those of a judge.

Like a judge, a tribunal adjudicator is expected to render an impartial decision that is not influenced by political pressure or by connections to any of the parties that appear before them. Like judges, adjudicators are expected to avoid interests, associations and connections that might suggest a lack of impartiality.

A classic example of a potential ethical conflict is an adjudicator, at the end of their career, accepting employment with, advising or acting for a party on a case in which that the former adjudicator was involved.

At the AUC, the adjudicators include all of cabinet appointed Commission members. Commission members should be held to the same standard as the Chair as this will ensure public confidence and the proper administration of justice in AUC proceedings.

The role of the Chief Executive does not include any decision making on proceedings before the Commission. The Chief Executive ensures that the staff is functioning to keep the operation running and to support the Commission members in their adjudicative functions. As such, the functions and role of the Chief Executive do not raise the same concerns as the exercise of adjudicative functions and, as a result, a "cooling off" period for the Chief Executive on leaving the AUC is not required to maintain public confidence.

Lastly, I recognize there are various instruments to address this issue including, legislation, codes and employment contracts, among others. My strong view is the concerns raised go to the heart of public confidence and administrative justice and should be addressed through legislation. Chief among the arguments supporting a "hard" law approach is enforceability. The treatment of Commission members' roles as being somehow less significant than the Chair's decision-making role is uninformed and misleads the public. Commission members are each independent. They do not report to the Chair and their decisions are not reviewable by the Chair. This means that the restrictions on full-time Commission members must be treated in the legislation in the same way the Chair's restrictions are treated.

What does “reports to” mean?

In section 23.92(1)(j), the Act defines responsible Minister first as “the Minister to whom the public agency reports.” The word “reports” is not defined. It is important that it be defined or the concept of “reports” be removed. It is not used in the Alberta Public Agencies Governance Act (where the role of the responsible Minister is described), nor is it used to describe the roles of responsible Ministers in Parliamentary democracies. Public Agencies that are appointed by Order in Council or by Ministers under the authority granted in legislation do not report to Ministers. A Responsible Minister’s relationship with an administrative agency operating within a parliamentary democracy is defined by the courts and an attempt to describe it is contained in the Alberta Public Agencies Governance Act as follows:

Obligations of responsible Minister

6 A Minister who is responsible for a public agency shall

- (a) participate with the public agency in setting the public agency’s long-term objectives and its short-term targets, if any,
- (b) advise the public agency, as the Minister considers appropriate, respecting any government policies applicable to the public agency or its activities or operations, and
- (c) monitor whether the public agency is
 - (i) acting within its mandate, and
 - (ii) achieving its long-term objectives and short-term targets, if any.

There are restrictions on the Minister’s obligations. In carrying out the Minister’s powers, the Minister may not affect the independence of the agency in the performance of its adjudicative functions. This is standard administrative law and is recognized in the Alberta Public Agencies Governance Act (APAGA).

Significantly, the word “reports” does not appear in APAGA in a way that relates to what is proposed in the Conflicts of Interest Act. The word report is used when a department or agency is required to report to the Legislature, such as the requirement to file an annual report on the agency’s activities. The concern here is that the word report seems to try to import employment concepts, such as the concept that the employee reports to a superior, and then tries to place a Minister in the place of an employer instructing an employee through some sort of reporting system. The Minister is not and cannot be the employer. The employer of a statutory agency is Her Majesty the Queen in Right of the Province of Alberta and the duties of the agency are prescribed in legislation.

This use of the word report and the concept of “reports to” in the Conflicts of Interest Act was raised with officials of the Agencies Boards and Commissions Secretariat at a meeting of various agencies and the Ethics Commissioner in Calgary on January 15, 2018. In defence of the use of

the word report, a vague reference was given by the officials to a section of the Act that used the word report, but no further explanation was given other than to suggest that because the word report was used in another section of the Act dealing with sending in reports required by the legislation, one should assume that is what it means in section 23.92(1)(j). After some brief discussion, there seemed to be agreement that the use of the word report should be confined to reporting information required to be provided under the Conflicts of Interest Act and does not mean a reporting or accountability relationship between the Minister and the agency. The officials from the Agencies Boards and Commission's secretariat agreed that this clarification would be addressed through this Committee review process.

The idea that agencies report to a responsible Minister is wrong in law and without amending this section to carefully delineate what the word report means, leaves open the possibility of the leakage of employment law concepts into a legislative structure that already covers those issues. The confusion here is exacerbated by subsection (ii), which starts by conditioning the application of the subsection to public agencies not otherwise required to report to a Minister. That is if an agency is not required to "report to" a minister (whatever that means), then the agency is covered by the following section:

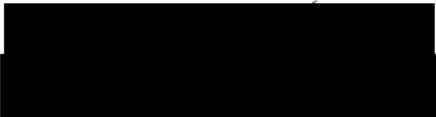
(ii) if the public agency is not otherwise required to report to a Minister, the Minister determined under section 16 of the Government Organization Act as the Minister responsible for the Alberta Public Agencies Governance Act;

This implies that some public agencies are already required to report to a Minister. It could be that there are agencies established by Ministers independent of legislative governance mechanisms inherent in our Parliamentary democracy so that employment law may apply, but I am not aware of any. For its part, the AUC does not report to a Minister. Therefore, what these sections say is that the AUC has two Ministers, the Minister of Energy who is the Minister responsible for the AUC and the Minister responsible for the Alberta Public Agencies Governance Act to whom the AUC would report (whatever that word means). Without ensuring that the word reports applies only to information reporting that must be filed under the Conflicts of Interest Act, confusion will ensue and further confusion about public administration in our Parliamentary democracy would follow.

I urge the Committee to make the changes necessary to ensure that the confusion of concepts be addressed by defining the expression "reports to" so as to limit its meaning to reports required to be filed under the Conflicts of Interest Act.

Again, thank you for the opportunity to participate and I would be pleased to answer any Committee questions arising from my comments.

Yours truly,



Willie Grieve, QC