ONTARIO 360 – PUBLIC ACCOUNTABILITY – TRANSITION BRIEFING

Strengthening Ontario's conflict of interest regime to bolster public trust and confidence

Issue

Maintaining public trust and confidence in politics and government ought to be a key priority for policymakers in an era of growing disengagement and declining trust. A recent *Ontario 360* briefing memo set out recommendations to make the province's politics more representative and responsive.[1] There are further steps that the next Ontario government should take in order to strengthen and sustain faith in our provincial and municipal institutions.

An area ripe for reform is Ontario's conflict of interest rules for provincial and municipal officials, rules that are inconsistent, outdated, and weak compared to best practices elsewhere. The current standards protect against the most obvious abuses but neglect the potential for different forms of "cronyism" and insider privilege. There is also inconsistency in the treatment of favouritism rules as employees of provincial ministries and agencies are subject to an anti-favouritism rule and Cabinet Ministers and other MPPs are not. The incoming government should therefore modernize and standardize the province's conflict of interest regime in order to make the system more transparent and accountable.

Overview

Contrary to misconception, a conflict of interest is not a moral failing. Conflicted interests can arise for myriad reasons, including active lives, varied business holdings, extensive involvement in the voluntary sector, big families, and large social circles of friends.

The moral issue is not the existence of a conflict but how one handles it. The accepted and ethical responses to conflict are transparency, recusal and independent determination. One must disclose the conflict, step aside from the

[1] Peter Loewen, Democratic reform: Transition briefing, Ontario 360 (School of Public Policy and Governance), April 11, 2018. Available at: http://on360.ca/30-30/democratic-reform-transition-briefing/.

Ontario 360
School of Public Policy & Governance
14 Queen's Park Cres. West
Toronto, Ontario, M5S 3K9, Canada

on360.ca | ontario.360@utoronto.ca

School of Public Policy & Governance
UNIVERSITY OF TORONTO

government decision or activity, and then let someone who is (or those who are) not conflicted decide what to do.

Multiple Ontario laws that seek to define what constitute conflicts and how office holders and other public actors should address them. A half dozen laws apply to various categories of provincial government and municipal officials. In 2011, Justice Cunningham's judicial inquiry recommended sweeping changes to Ontario's municipal conflict of interest rules and enforcement.[2] The Ontario Legislature subsequently enacted many of his recommended reforms – including the mandatory hiring of integrity commissioners (currently discretionary) – that will come into force in Spring 2019.[3] Still there remains room for additional reforms to strengthen the regimes for provincial and municipal officials, smooth inconsistencies, and in so doing bolster public trust and confidence.

The need for reform

In any regime, the fundamental design issue is: what constitutes a conflict? Ontario's laws – for both provincial and municipal officials – construe conflict rather narrowly.

The *Members' Integrity Act* is concerned only with the private interest of an MPP (which has been interpreted to include the private interest of a spouse). Ontarians would probably be surprised to learn that the private interest of an MPP's cousin or best friend does not, according to the legislation, give rise to a conflict.

The *Municipal Conflict of Interest Act* covers the interests of councillors' children and spouses, but not of other relatives. Even then, only pecuniary interests are captured. The many non-financial interests that governments can affect are beyond the scope of the statute.

---

[2] J. Douglas Cunningham, Report of the Mississauga Judicial Inquiry: Updating the Ethical Infrastructure (October 3, 2011). Available at: https://www.mississaugainquiry.ca/report/index_pdf.html.

[3] *Modernizing Ontario's Municipal Legislation Act, 2017*, S.O. 2017, c. 10. Amendments related to municipal conflict of interest and the role and powers of integrity commissioners have been proclaimed in force as of March 1, 2019.

In this respect the rules for provincial public servants are even narrower. Recusal from decision-making is required only if the public servant himself or herself might benefit. On the other hand, provincial public servants are bound by a strict anti-favouritism rule: they must not give preferential treatment to anyone.

Curiously, Ministers, MPPs and municipal councillors face no explicit statutory restriction on favouritism (preference). This lacuna cannot be reconciled with the belief that equal access to government is the right of all, not just those privileged to have attended school, served in government or worked on partisan campaigns alongside current office holders.

A further gap is that the laws tend to focus only on official decision making – and not the numerous other ways that public office can be used to somebody's advantage. For example, meeting with the lobbyist for a friend's company and opening government doors for a niece or nephew are both uses of office and influence, even if they do not constitute making decisions.
In the case of school trustees, each board must adopt a code of conduct[4] but no minimum standards or minimum conflict rules of any kind are prescribed. The gold standard is the definition found in the federal *Conflict of Interest Act*:

> "a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests."

In contrast to most Ontario laws, the federal standard applies to all relatives (not just immediate family) as well as friends. It addresses not just decision-making but also the exercise of any official power, duty or function.
It goes without saying that weak, sloppy conflict rules and the opportunities for preferential treatment they help perpetuate are especially harmful to the interests of racialized, Indigenous and other disadvantaged communities – and to anyone who is not a well-connected insider. It also risks contributing to a further erosion of the public's trust in politics and government.

[4] By May 2019.

How to move forward

To combat cronyism and insider privilege, to frustrate favouritism, and to enhance public confidence in our provincial and municipal institutions, the public-sector conflict of interest provisions in all Ontario laws should be strengthened and made consistent.

First, the federal conflict-of-interest definition should be adopted as the new standard in every Ontario public sector ethics law.

Second, other inconsistencies should be eliminated by applying the highest standard currently in place (e.g., taking the widest ban on preferential treatment and extending it to all officials).

The following laws should be strengthened in this manner:

- *Members' Integrity Act* (MPPs, Ministers)
- *Municipal Conflict of Interest Act* (members of municipal councils and local boards)
- Ontario Regulation 381/07 under the *Public Service of Ontario Act* (employees of ministries and public bodies)
- Ontario Regulation 382/07 under the *Public Service of Ontario Act* (ministers' offices)
- Ontario Regulation 246/18 under the *Education Act* (members of school boards)

Existing exceptions should be maintained. For example, the rules should continue to permit participation in a decision of general application.
These reforms would build on some of the improvements made by the current government and in so doing give Ontario one of the clearest, most consistent and most effective conflict of interest regimes in the country.

Guy Giorno is a partner in the Fasken law firm and is a fellow at the University of Toronto's School of Public Policy and Governance