



Royal Canadian Mounted Police External Review Committee

Conflict of Interest



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**Royal Canadian Mounted Police
External Review Committee**

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**Royal Canadian Mounted Police
External Review Committee**

Discussion Paper Series

Number 10: Conflict of Interest

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FOREWORD

This discussion Paper is the tenth in a series produced by the Research Directorate of the RCMP External Review Committee.

It could not have been written without the cooperation and assistance of many people in the police community across the country. The Committee would like to extend its sincere appreciation to all those who have helped, particularly those who made time and resources available to search files, compile summaries and share views with the consultant. He asked that special thanks be expressed to Assistant Commissioner G.G. Leahy, Director of Personnel for the RCMP, and Sergeant A.W. Mercer, NCO in charge of the Conflict of Interest Section at RCMP Headquarters, for the assistance rendered in preparing this study.

A few words about the methodology of this study are in order. A companion study on secondary employment, being published as Discussion Paper 11, took place at the same time as this study and involved more extensive survey techniques. This consultant used interviews, mostly conducted by telephone or in writing, to get access to materials which are not on the public record, particularly in relation to actual practices of police forces in real conflict of interest situations.

As a consequence, some of the material provided to the consultant was confidential, mostly because it involved personal information not a part of the public record. Where references to the public record are possible, they are included in the endnotes. Where no reference is given to support anecdotal evidence, the material comes from a summary, either oral or written, given to the consultant by a police force. Where appropriate the force from which the information came is identified; in some cases even this was thought not to be appropriate.

This study builds on earlier discussion papers published by the Committee, and in particular on Disciplinary Dismissal - A Police Perspective, Discussion Paper 6, and Off-Duty Conduct, Discussion Paper 7. To ensure that the present study is free-standing and internally coherent, it has been necessary to go over some of the same ground as is covered in those studies. To the extent possible, however, an attempt has been made to select different examples and illustrations to make the same points, so as to increase the total amount of information available to readers.

Finally, the new RCMP code on Conflict of Interest was not available to the consultant when the study was written and all references are as of September 30, 1991. The Ontario government has since published additional policies relating to conflict of interest and the Assistant Deputy Registrar of Canada has published a document entitled Conflict of Interest - Compliance Measures and Caveats which discusses thirteen different conflict of interest situations which arise under federal guidelines.

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INTRODUCTION

As this discussion paper goes to press, the Royal Canadian Mounted Police is developing new conflict of interest compliance measures for members. These compliance measures will be published as Commissioner's Standing Orders, pursuant to section 69 of the Federal Government's Conflict of Interest and Post-Employment Code for Public Office Holders.¹ This is but the latest example of the "chain reaction"² that has been taking place over the last two decades - in government, industry and police forces - in the development of formal policy statements regarding ethical conduct. But the phenomenon is not merely historical. Promoting ethical conduct has been labelled the challenge of the 1990s,³ and employers are constantly seeking new solutions to ensure that, as one corporate code of ethics provides:⁴

Employees must do more than merely act within the law. They must act in such a manner that their conduct will bear the closest scrutiny should circumstances demand that it be examined.

This challenge is especially important for police forces. In light of the discretionary power exercised by police officers, in circumstances often permitting little direct supervision, there can be "daily opportunity for integrity breakdown".⁵ The avoidance of conflict of interest is one of the most important areas of concern under the umbrella of ethical conduct, and most formal codes of ethics have that goal. In the words of a report prepared for the BC Police Commission in response to a particular allegation of conflict of interest:⁶

Conflicts of interest can arise in almost any situation in which a police officer becomes involved. Situations must be clearly defined where a police officer's personal assets, affairs or interests place him in a real, apparent or potential conflict of interest with the duties and responsibilities of the department or situations which could affect his judgement. It is paramount, therefore, that a clear, succinct definition be enunciated to ensure that the outer bounds of permitted activities and conduct be identified.

But individuals have numerous interests, many of which may give rise to conflicts in different situations. The manner in which individuals deal with these situations will depend on the strength of the obligations they recognize - to their employer, to their profession, and to society in general.⁷ It is because of this fluidity of the interface between personal interests and public duty that conflict of interest is difficult to define with precision.

Many different definitions have been offered for conflict of interest. Whatever the precise expression, the general intent is usually very similar. Consider some definitions:

... any situation in which they might seem to be deriving inappropriate personal advantage from their position with the Corporation, or in which their individual interests may be in conflict with those of the Corporation.⁸

... when the member, the member's spouse or a dependent 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.⁹

... any situation ... of a nature to compromise his impartiality in the performance of his duties or of a nature to influence adversely his judgment and his sense of fairness.¹⁰

... a situation in which an official has a private financial interest sufficient to influence, or appear to influence, the exercise of his public duties and responsibilities.¹¹

It will readily be seen that such definitions lack the detail and specificity necessary for their application to individual circumstances.

Chapter II

AN ANATOMY OF CONFLICT OF INTEREST

2.1 Types of Conflict

There have been many attempts to classify conflict of interest, in order to analyze which conflicts are avoidable, and which are permissible. A three-part dissection of conflict of interest achieved a degree of acceptance after the Parker Commission of Inquiry.¹² A "real" conflict of interest denotes "a situation in which a [person] has knowledge of a private economic interest that is sufficient to influence the exercise of his or her public duties and responsibilities."¹³ A "potential" conflict of interest incorporates a concept of foreseeability: when individuals can foresee that a private interest may someday be sufficient to influence the exercise of their duty, but has not yet, they are in a potential conflict of interest. An "apparent" conflict of interest exists "when there is a reasonable apprehension, which a reasonably well-informed person could properly have, that a conflict of interest exists."¹⁴

Whether a conflict of interest situation involves an actual, potential or apparent conflict, it may result in unacceptable conflict.¹⁵ What constitutes an unacceptable conflict is discussed in Conflict of Interest Rules for Federal Legislators,¹⁶ which identifies four types of conflict. The first, an "inherent conflict", which is therefore unavoidable, is with an interest held in common with other individuals as members of society, i.e. as a parent or home owner. The representative function of legislators on behalf of the electorate in their constituency is a second, specialized form of unavoidable conflict. A third type of conflict is called personally necessary conflicts. These conflicts arise from a legislator's need to live an adequate and satisfying life. The report includes within this category such matters as personal investments, family businesses and professional interests, which lead to conflicts also classified as unavoidable. Finally, there is a category of avoidable conflicts which serves as the basis for regulations. These conflicts are "personal economic interests not fitting into the above categories and which substantially affect the independence of the legislator."¹⁷

Neither these, nor any of the other classifications or definitions found in formal conflict of interest codes, are entirely satisfactory. The problem is that conflicts of interest occur in an infinite variety of forms.¹⁸ It has been suggested that the field of conflict of interest "may well prove to be incapable of regulation."¹⁹ As one arbitrator stated:²⁰

It is by no means easy to set out a code of circumstances which constitute a conflict of interest, for the existence thereof may turn on questions of fact such as the job of a particular public servant and the extent of the interaction with a party outside the Government.

Nevertheless, while it is difficult to define conflict of interest, an attempt at definition is central to most codes of conduct. The more difficult problem is applying that definition to individual situations. This requires a far more detailed analysis of the competing interests.

2.2 Types of Interests

The interests in question are the personal interests of the employee, versus the proper and impartial execution of the employee's duties and responsibilities. An employee's personal interest could be considered to be in conflict where the interest:²¹

... would be likely to affect adversely the judgment of an employee and his loyalty to his employer or which the employee might be tempted to prefer to the interests of the employer.

The first matter of concern, in defining the scope of a personal interest, is whether it is truly personal or private in nature - an interest which exists separate from the interests of the general public.²² If an individual has an interest as a ratepayer in common with other ratepayers, then that interest is no different than that of the community in general²³. The 1986 Aird Report recommended the inclusion of a "community of interest" exception to formal conflict of interest rules.²⁴

The next issue is whether the scope of regulated interests should extend beyond a pecuniary interest. For example, the Green Paper on Conflict of Interest²⁵ defined conflict of interests as a:²⁶

... situation in which a Member of Parliament has a personal or a private pecuniary interest sufficient to influence, or appear to influence, the exercise of his public duties and responsibilities.

The usual justification offered for restricting the definition to that which is pecuniary is the difficulty that would be incurred in attempting to identify or regulate other motivations,²⁷ such as family, religious, political, institutional, ethnic, and sexual. Yet any of these other motivations could also put an individual in a position incompatible with his or her duties and responsibilities. It has been argued, consequently, that the focus of the definition should be on situations where public interests and private interests (of whatever nature they may be) intersect.²⁸

Must a conflicting interest be a direct interest or is an indirect interest sufficient to require scrutiny? A direct interest would provide a possible benefit (whether pecuniary or other) directly to the individual in conflict. An indirect interest would provide a possible benefit directly to some other beneficiary with whom the individual has a relationship. For example, the Ontario *Municipal Conflict of Interest Act, 1983*²⁹ provides that a member of a municipal council or board would have an indirect pecuniary interest in any matter where the member or the member's nominee, parent, spouse or child:

- is a shareholder in a private corporation,
- has a controlling interest in a public corporation,
- is a director or senior officer in either a private or public corporation,
- is a member of a body,
- is a partner of a person,
- is in the employment of a person or body,

that has a pecuniary interest in the matter.

In the absence of so specific a definition, an indirect interest may be inferred, but it will depend upon a test of remoteness. As an example of how difficult such a test may be to apply, however, the Alberta Court of Appeal held that an extension of the town water line, to the land of the father of a council member who voted on the extension, would not improperly benefit the council member:³⁰

... it is unreasonable to infer from a mere expectation that the appellant might benefit from an increase in the value of his father's estate, that he had "a direct or indirect pecuniary Interest" in the extension of the water line thereto. To hold otherwise would mean that in no case could a councillor's son vote upon a matter relating to his father's land.

In later Alberta Court of Appeal cases, however, apparently opposite conclusions were drawn³¹. Where a council member had done some work for an applicant before council (for which bills were still outstanding), the court found that the "relationship with the applicant was so fresh and so close that there is a reasonable apprehension of bias to a pecuniary incentive to vote as he did."³²

If a personal interest is so remote that it cannot reasonably influence an individual, then it should not be considered a conflicting interest. There have been complaints that some conflict of interest regulations have no provision to excuse insignificant interests.³³ A de minimis rule would allow just such a separation of inconsequential interests from conflicting interests. An example that has been offered is the interest of the holder of Bell Canada shares. With hundreds of millions of shares issued, it seems unlikely that holding ten shares would either influence or appear to influence the performance of an individual's duties in relation to Bell Canada.³⁴

On the other hand, interests in privately held corporations raise different considerations, even where the interest is held by a family member. The report on allegations of conflict of interest against an Ontario cabinet minister in 1986 reviewed various definitions of 'interest' in such circumstances, and proposed that an unacceptable conflict would require:³⁵

- a) some involvement between the Minister or the Minister's family member, as the case may be, and the private Ontario company in question;
- b) the involvement should be more than a mere passive association, such as an endorser or promoter of the company or its product, and one which involves some active conduct, pursuant to some legal or similar duty;
- c) the nature and extent of the Minister's involvement with the private company should contribute measurably to the company's business operations and prospects; and

- d) any contractual involvement between the private company and the Government of Ontario should improve or would likely improve, directly or indirectly, the status or lot of the Minister.

In summary, it is easy to find a broad consensus on the general principle that a person required to serve the public interest:

... should serve only one master and should never place himself in a position where he could be even tempted to prefer his own interests or the interests of another over the interests of the public he is employed to serve. Those requirements constitute the rationale of the doctrine that he should avoid a position of apparent bias as well as actual bias...³⁶

Other formulations of the principle establish that one should: act only on matters in which he or she does not have a personal economic interest;³⁷ avoid activities that might give the appearance of using a public position for personal gain;³⁸ separate private interests from public interests;³⁹ resolve conflict always in favour of the public interest.⁴⁰ The difficulty arises in attempting to apply these broad principles to specific fact situations. As one corporate code states:

it is unlikely you will find definitive answers to many of your questions in published guidelines.⁴¹

Chapter III

WHY IS CONFLICT OF INTEREST REGULATED?

The main objective of regulating conflict of interest is to maintain the actuality and appearance of a higher standard of ethical conduct.⁴² A significant secondary goal, however, is rooted in efficiency concerns. Like private employers and public service organizations, police forces have an interest in being efficient and responsive to the needs of the public. Their legitimacy depends on the "public's perception of the autonomy of policing from partisan and selfish forces."⁴³

Any departure from the principle of impartiality, either actual or apparent, adversely affects levels of public confidence and trust. If private interests are seen to replace the public interest, then uncertainty and resentment mount and cooperation and respect fade, and an appearance of conflict of interest can be every bit as damaging as an actual conflict. A high standard of ethical conduct is thus central both to the reputation for integrity of a police force, and to the effectiveness that reputation enhances.

Not only is public confidence undermined by a conflict of interest, but so is employer confidence in the employee to act impartially. Moreover, morale requires that employees believe in the honesty and integrity of one another.⁴⁴ Therefore, situations that give rise to a conflict of interest can adversely impact on departmental efficiency because they:

1. Undermine public confidence and trust in the Force.
2. Adversely affect the employee's own performance.
3. Interfere with the regular operation of the Force.
4. Disturb harmony and discipline in the workplace.⁴⁵

Thus, the regulation of conflict of interest situations can be grounded both on ethical principles and on the need for optimum efficiency.

Chapter IV

THE STANDARD OF ETHICAL CONDUCT

There has been a shift, in recent decades, from emphasis on such issues as bribery and fraud (criminal conflict of interest) to more subtle and complex problems of the separation of public and private interests (non-criminal conflict of interest).⁴⁶ The conflict of interest provisions within the *Criminal Code* are found under the general provisions on corruption, including bribery, fraud, breach of trust, and selling, purchasing or influencing appointments and offices.⁴⁷ In these situations, favouring the private interest involves a criminal intent, and will invariably have direct and catastrophic effects on the employment relationship, especially for members of a police force. The focus of this paper is on non-criminal forms of conflict of interest which, being grounded in ethical and efficiency concerns, give rise to employment related sanctions.

4.1 In Private Employment

Non-Unionized Environment

In the private sector, non-unionized employees are governed by the principles of the common law of master and servant. The standard of conduct expected of employees is expressed in *Pearce*:⁴⁸

... where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the master has a right to dismiss him. The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him ...

A fundamental term of the master-servant employment relationship is thus that the employee undertakes to act in the interest only of the employer.

The standard of conduct expected of employees is such that they cannot undermine the employer's confidence in their ability to effectively perform their duties. At common law there is a duty of fidelity implied in each contract of employment,⁴⁹ pursuant to which a servant undertakes to serve his master with good faith and loyalty.⁵⁰ While little is said about the origins of this obligation of loyalty, there is a consensus that it does exist.⁵¹

An even higher standard of conduct is expected of employees considered to have fiduciary obligations.⁵² The concept of fiduciary relationships, is "to impose standards of acceptable conduct on one party to a relationship for the benefit of the other where the one has a responsibility for the preservation of the other's interests."⁵³ The fiduciary obligation requires that the employee always prefer the interest of the employer to his or her own. At common law, the employment relationship is "a trusting and fiduciary relationship which betokens loyalty, good faith and an avoidance of a conflict of duty and self-interest."⁵⁴ While all employees can be considered fiduciaries,⁵⁵ the obligations are much more clearly defined for officers, directors, and senior managers, and may even survive the termination of the employment relationship for persons of such rank.⁵⁶ How far down the hierarchy such obligations are enforced often depends on the degree of independent authority

exercised.⁵⁷

Unionized Environment

Employer regulation of unionized employee conduct must be managed within the context of the collective agreement. The terms of a collective agreement are agreed upon by both the employer and the employees and therefore will normally prevail over the principles of the common law. While scope exists for unilateral employer regulation, either pursuant to an express management rights provision or as an exercise of inherent management authority, such unilateral action must conform to the collective agreement, and is subject to arbitral review against well-established principles.⁵⁸ Arbitrators have determined, however, that it is not necessary to set out the basic duty of fidelity in writing to be able to enforce it against employees.⁵⁹ Consequently, a rule against conflict of interest is assumed to be part of the foundations of the employer-employee relationship and the employer need not have a written policy.⁶⁰

Nevertheless, the use of a written code of ethical conduct is finding increased usage in the private sector for both unionized and non-unionized employees. A recent Conference Board Report indicated that the number of American companies with a code of ethics (or similar policy statement) had jumped from 40% in 1964 to 85% in 1987.⁶¹

4.2 In the Public Sector

The regulation of public sector employee conduct can result in higher standards than seen in the private sector. Public servants also owe a duty of loyalty to their employer, the government,⁶² but government is responsible to the public at large. Consequently, not only must the employer have confidence in the ability of the public servant to effectively fulfil public duties, the public must also have confidence in the actual or apparent impartiality of public servants.⁶³

The basis for this requirement is obvious: people want to be treated equally and fairly. The principle of impartiality can be derived either from the rule of law or from social equality.⁶⁴ The rule of law, in essence, is that "public officials may exercise only the authority which is authorized by laws which are approved by representative legislatures and applied evenhandedly to everyone."⁶⁵ This principle is buttressed by the greater interest in and demand for social equality exhibited in recent decades by citizens who demand more than mere adherence to the letter of the law.

Public officials are trustees, standing in a fiduciary relationship to the public they serve. As a result, their conduct is more restricted than that of a private citizen. For example, public servants are often restricted in their political activities.⁶⁶ Political neutrality:

... is a constitutional convention which provides that public servants should avoid activities likely to impair, or to seem to impair, their political impartiality or the political impartiality of the public service.⁶⁷

Successive federal governments have recognized the importance of preserving public trust in the government:

... the precept of fulfilling one's official responsibilities in an objective and disinterested manner lies at the very heart of our system of government.⁶⁸

... to function effectively, the government and public service of a democracy must have the trust and confidence of the public they serve.⁶⁹

However, guidelines which do not have the force of law, the traditional vehicle for conveying such sentiments, have not been perceived as effective instruments to regulate conflict of interest, and there has been increasing demand for legislation.⁷⁰ Legislated standards for the conduct of public office holders have consequently become more common.⁷¹ Public servant conduct, on the other hand, is still more often regulated by guidelines, directives or supplementary compliance measures.⁷²

Written instruments to regulate conflicts of interest in the public sector include federal, provincial and municipal legislation, guidelines, and supplementary and administrative directives. Early efforts were found in legislation aimed at protecting the independence of legislators.⁷³ The *Parliament of Canada Act*⁷⁴ and various legislative assembly acts continue to contain conflict of interest prohibitions. More recently, however, attention has turned to specific statutes devoted to the regulation of conflict of interest itself.

The federal government does not yet have conflict of interest legislation. Proposed legislation, Bill C-46, *Members of the Senate and House of Commons Conflict of Interest Act*,⁷⁵ received first reading in the House of Commons, but now appears destined to collect dust. In 1985, rejecting persistent recommendations favouring a statutory conflict of interest document, the government introduced a non-legislated code, the Conflict of Interest and Post-Employment Code for Public Office Holders.⁷⁶ A companion document for public servants was also created.⁷⁷

Most provinces have conflict of interest legislation of some standing.⁷⁸ These acts all regulate the conduct of the "political masters". Public servants are dealt with in public service acts, or in guidelines such as the 1987 Standards of Conduct Guidelines for Public Servants⁷⁹ in British Columbia, or the 1983 Code of Conduct and Ethics for the Public Service of Alberta.⁸⁰

Supplementary compliance measures are often utilized by government departments to meet specific circumstances. For example, the federal Code prohibits outside activities where they give rise to a conflict of interest, with no real elaboration. In the supplementary compliance measure issued by Revenue Canada⁸¹ several activities are discussed to provide illustrations of situations where conflict is most likely to occur.

Municipal conflict of interest legislation like that in Nova Scotia,⁸² Ontario⁸³ and Manitoba⁸⁴ also regulates the conduct of the "political masters" rather than the municipal staff. Municipalities are slowly developing codes of conduct to regulate conflict of interest for their staff.⁸⁵ Municipalities, like government departments, also make use of administration policy directives to regulate conflict of interest.⁸⁶

4.3 In the Police Sector

Police forces can legitimately demand the highest standard of ethical conduct from their members because of the exigencies of law enforcement. The socially and politically sensitive nature of public law enforcement requires officers to be impartial, honest and trustworthy.⁸⁷ This obligation of impartiality stems from a number of sources. While police officers have a duty of loyalty and fidelity to their nominal employer,⁸⁸ the board, municipality, or government that pays them, the duties of police officers are specified by legislation rather than by the respective board.⁸⁹

Police employment is not an ordinary master-servant relationship; instead, a police constable is regarded as a holder of an office.⁹⁰ The paradigm formulation of the principle states:

... there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public officer and the State which he is said to serve. The constable falls within the latter category. His authority is original, not delegated, and is exercised at his own discretion by virtue of his office; he is a ministerial officer exercising statutory rights independently of contract. The essential difference is recognized in the fact that his relationship to the Government is not in ordinary parlance described as that of servant and master.⁹¹

Therefore, the obligation of impartiality inherent in the office of constable derives from the law itself. The doctrine of police independence involves the idea that police officers are servants only of the law.⁹² Police must not show favour in exercising their duties and upholding the law. Their presence is a social resource and should be allocated on the basis of need rather than personal interest.⁹³

Moreover, police officers have long considered their work to be a profession.⁹⁴ Professionals are traditionally described "as performing a service to the public, as being competent and having integrity in their work."⁹⁵ There is thus scope for an element of self-enforcement of ethical behaviour, either through individual standards or peer expectations.

While the obligation of impartiality in law enforcement is clear, it nevertheless has been called an "impossible mandate."⁹⁶ Lack of information, time and resources renders total impartiality a difficult if not impossible task. The need for the exercise of police discretion arises from the acknowledgement of the gap between the "ideal (impartial) obligations imposed by the office of constable, and the actual (partial) decisions made every day by existing police officers..."⁹⁷ Control of police discretion has two aspects. The larger issue relates to the distributive implications for society as a whole; that is a social question involving the allocation of resources. Conflict of interest

regulations are directed towards the exercise of individual discretion, to ensure that police officers are individually impartial in the manner in which they enforce the law.

The regulation of police conduct is typically accomplished through legislation such as a provincial police act.⁹⁸ Codes of conduct are commonly part of the general regulations enacted pursuant to such legislation,⁹⁹ which may also authorize the promulgation of force-specific regulations,¹⁰⁰ in the form of standing orders or policy and procedure manuals to regulate conflict of interest. Disciplinary codes may make it an offence to contravene any such policy or procedure. Finally, there may also be secondary legislation, such as a public service or municipal statute, which regulates the conduct of police officers in certain ways.¹⁰¹

Chapter V

DESIGNING CODES TO REGULATE CONFLICTS OF INTEREST¹⁰²

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.¹⁰³

A high standard of ethical conduct may be defined through various approaches, including unwritten rules, oaths of office, guidelines, codes of conduct, statutory regimes or ethics commissions. While the use of express rules enforced by discipline is the most obvious mechanism to control and direct behaviour, it is not the only means. Supervision, socialization, training, education, rewards, and inspections are only some of the other mechanisms available.¹⁰⁴

The importance of culture and values for guiding employee behaviour is becoming more apparent.¹⁰⁵ Rule structures, such as codes of ethics, are traditionally collections of prohibitions. Such rule structures do not motivate people to behave ethically, and a common criticism is that they encourage people to try to find loopholes or to make an end run around the system.¹⁰⁶ Even when hortatory in nature, however, rules cannot eliminate self-interest; they merely assist those individuals who want to act ethically.¹⁰⁷ Thus, while the focus must remain on individual conduct, more emphasis needs to be placed on the collective framework of ideals that influence individual behaviour and characterize an organization. An ethics awareness training program, the commitment of supervisors at every level, and a positive tone in the rule structure are important ingredients in establishing an environment that promotes the highest standards of integrity.

Nevertheless, written rules provide an objective standard for employees and a management tool for measuring performance. A successful ethics program should thus include both a "concerted effort at articulating organizational values and a well-written ethics code."¹⁰⁸ Of the two, a written code of ethical conduct is currently the central instrument for the regulation of conflict of interest.

The problems of definition reviewed above, however, hamper efforts to develop such a code.¹⁰⁹ Codes should be as specific as possible so that employees can govern themselves accordingly, but it is difficult to "envisage in advance and provide for every particular type of improper conduct that the human mind is capable of devising."¹¹⁰ What constitutes a conflict of interest depends on the facts and circumstances of each specific situation, and codes regulating conflict of interest must "provide flexibility in administration, and be applied on a functional basis. By 'functional' we mean that the scope and content of the procedures would be related to the category and rank of the public office holder..."¹¹¹ Functionality may be further enhanced by a more discursive approach, for example by the use of a multi-level code where a general statement is supplemented by illustrative examples of problem areas.¹¹²

A further caution about the design of codes to regulate conflict of interest: it is vital to avoid the suggestion that employees are somehow inherently untrustworthy. Some will feel that a written code is unnecessary because they are fully aware of the standard of conduct that is expected of

them.¹¹³ As one anonymous observer remarked:

... ethics in any group arises out of a sense of tradition and pride in his particular calling. Humiliate that group. Subject them to constant restriction and supervision. Refuse to trust them in any of their activities... and you destroy any possibility of an effective ethical code.¹¹⁴

Therefore, to maximize its effective operation, employers must take care to design a code which is an aid to voluntary compliance with ethical principles and avoids accusatory implications.

Codes generally include some or all of the following elements: credo; definitions; rationale; rules; guidelines; and illustrative examples.¹¹⁵ A credo should set forth the basic philosophy and guiding principles for the organization; its function is "aspirational and admonitory".¹¹⁶ Definitions provide a common understanding of the important terms, while the rationale provides the objective to be achieved by the regulation of conflict of interest. In the context of such prefatory material, a rule structure will be easier to understand, and informed compliance easier to secure.¹¹⁷

This result may be further aided by expansion of the concepts set out in the rules. Guidelines assist employees in making decisions in situations where it is not possible to set out a global rule, and illustrative examples can demonstrate the rules in action.

5.1 In Private Employment

The code of conduct developed by the Royal Bank of Canada provides a good example of a code that opens with a presentation of the corporate objectives, and the basic principles that underly the Bank's approach to doing business.¹¹⁸

- To give good value -- contributing rather than exploring;
- To deal with people and institutions fairly and honestly;
- To recognize and respect each person's rights, individuality and human dignity;
- To be a responsible citizen;
- To be a leader, unceasingly striving for excellence in everything we do.

A 1987 survey of 2,000 United States companies found that 64% of the respondents have a corporate credo in which the company philosophy is expressed. It has been suggested that this may be the oldest form of a code of ethics.¹¹⁹

Most corporate codes of conduct provide a definition of conflict of interest. Algoma's definition is a situation which can arise:

... when an employee has a personal interest, direct or indirect, in a supplier, customer or competitor of the Corporation; or when an employee is engaged in outside employment or participates in an outside organization which may interfere with the employee's regular duties or affect the employee's working effectiveness.¹²⁰

Definitions in corporate codes tend toward a broad interpretation of conflict of interest that encompasses conflicts of commitment, the impact of outside activities on an employee's energy and time, and the rationale for the code is often combined with the definition. For example, Algoma requires employees to avoid any interest or activity that, "would deprive the Corporation of the time or attention required to perform their duties properly".¹²¹ In contrast, Bell Canada's definition centres on the need for impartiality in fulfilling one's duties; a conflict of interest exists when:

... an employee: has a direct or indirect interest in or relationship with, an outsider, or with a person in a position to influence the actions of such outsiders, which might be implied or construed to: render the employee partial toward the outsider for personal reasons, or otherwise inhibit the impartiality of the employee's business judgement or desire to serve only the company's best interests.¹²²

Many corporate codes attach a broader scope to "interest" than most public codes, defining it as, for example, "business, financial or other direct or indirect interests or relationships".¹²³ Some codes address any interest which affects the impartiality of an employee, without further definition. For some employers, interests include family interests. While one company:

... recognizes that each individual family member may have his or her own interests which are beyond the control of the individual employee, we do expect these principles to apply to the immediate family in a reasonable manner.¹²⁴

Bell Canada recognizes that its employees all have many different interests and relationships and that it is not difficult for situations to arise in which "some of these interests get in each other's way."¹²⁵

Various techniques are used to assist employees to understand when interests conflict. Loblaw's uses a rule of thumb based on the degree of embarrassment to the employee, to another individual or to the company, should the situation in question become public knowledge.¹²⁶ Pepsico sets out a number of questions for employees to ask themselves.¹²⁷ If they are unable to answer "no" to all of the questions then they are referred to their supervisor to discuss the matter. Codes usually make liberal use of illustrative examples of conflict of interests situations, as actual scenarios tend to assist in the interpretation of extensive rules and guidelines.

Categories of private sector conflict of interest situations are reflected by the typology devised by the Center for Corporate Social Performance and Ethics.¹²⁸ Conflicts are arrayed under the employer interest likely to be harmed:

1. The Company: working a second job may impinge on company time or on performance of work.
2. External Relations: the use of corporate funds/facilities for the support of political parties or candidates may create a potential or actual conflict of interest.
3. Employee Relations: accepting an inappropriate gift for personal use from a supplier, customer or competitor, the hiring of relatives and self-dealing may adversely affect morale and personal relationships.
4. Customer Relations: the potential for customers to influence one's judgement in fulfilling one's duties and responsibilities may create conflict.
5. Supplier Relations: having a personal relationship with a supplier may create conflict.
6. Competitor Relations: the potential for one's judgement to be influenced by personal or financial relationships with a competitor may create conflict.

5.2 In the Public Sector

Similarly, public sector instruments often begin with a policy rationale or objective, which generally centres on preventing conflicts from arising, and resolving them in favour of the public interest when they do arise. The Quebec *Public Service Act*¹²⁹ has a separate chapter for standards of ethics and discipline. The Act points to the importance of loyalty and impartiality:

5. Every public servant is bound ex officio to be loyal and to bear allegiance to constituted authority.

A public servant shall perform his duties in the public interest, to the best of his ability, with honesty and impartiality, and shall treat the public with consideration and diligence.

A common shortcoming of public sector instruments is the lack of a specific definition for conflict of interest. Where one is provided, it is often tautological. For example, the Ontario Public Service Manual of Administration, defines a conflict of interest as, "a conflict between a public servant's personal interest and his/her responsibility as a public servant."¹³⁰

On the other hand, public sector instruments often define the bounds of unacceptable conflicting private interests by specifying exemptions. For example, the Nova Scotia *Conflict of Interest Act* exempts any benefit that:

- i) is of general public application
- ii) affects a member as one of a broad class of persons,
- iii) concerns the remuneration, allowances and benefits of a member as a member

- iv) is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.¹³¹

Included here are three kinds of community interest and an interest that is too remote. Bill C-46 similarly proposed a community of interest exemption.¹³² The Ontario *Conflict of Interest Act* allows for a representative interest exemption.¹³³

Remoteness of significance is often defined by a minimum value above which the interest would be considered significant. For example, in the Manitoba *Legislative Assembly and Executive Council Conflict of Interest Act*, the value of the private interest or liability must be \$500 or more to be significant.¹³⁴ This legislation specifically identifies a liability as a distinct form of interest.¹³⁵

Most of the instruments focus on pecuniary interests, direct or indirect, of the member, the member's spouse or dependent children.¹³⁶ Ontario's Conflict of Interest Guidelines¹³⁷ for cabinet ministers, however, is more encompassing than most other public codes. It includes any private interests - financial, nonfinancial, direct, indirect, personal or pertaining to another.

5.3 In the Police Sector

The conduct of police officers in Canada is heavily regulated, and conflict of interest situations are generally caught up in this regulation. However, police rules seldom provide assistance in deciding what is a conflict of interest, or on such technical issues as whether private interests to be disclosed include nonpecuniary interests, or interests held by a family member. The focus in the police sector has generally been on specific prohibitions of situations that are of particular importance to the forces (such as secondary employment, political activities, or breach of confidence), without actually labelling them conflicts of interest. In addition, the high standard of conduct expected of police officers ensures that certain forms of misconduct are regarded so seriously as to require specific prohibition, rather than leaving them to the generally of conflict of interest.

The new Ontario *Police Services Act, 1990*¹³⁸ is atypical among provincial police legislation in explicitly proscribing conflict of interest situations. Paragraph 49(1)(b) of the Act prohibits officers from engaging in any activity "that places him or her in a conflict of interest." No further definition is provided for conflict of interest.

The *Royal Canadian Mounted Police Act* is also explicit in its treatment of conflict of interest. The standard expected of every member requires that they, "avoid any actual, apparent or potential conflict of interests."¹³⁹

Many police statutes or regulations require an oath of allegiance or oath of office. In British Columbia, for example, all constables must solemnly swear that:

... I will well and truly serve our Sovereign Lady the Queen, her heirs and successors

according to law ... without favour, affection, malice or ill will; and that I will, to the best of my power, cause the peace to be kept and preserved...¹⁴⁰

More specific is the oath of office of the RCMP which states:

I... solemnly swear that I will faithfully, diligently and impartially execute and perform the duties required of me as a member of the Royal Canadian Mounted Police, and will well and truly obey and perform all lawful orders and instructions that I receive as such, without fear, favour or affection of or toward any person.¹⁴¹

It is this requirement of impartially that makes the oath a general tool for regulating conflict of interest, as breaches of these oaths can give rise to disciplinary consequences.¹⁴²

Most police legislation deals with police misconduct through the use of a code of discipline, generally found in the regulations enacted pursuant to a police act.¹⁴³ The various codes of discipline are all similar in that they make it a disciplinary default to engage in any action that constitutes:

- a) discreditable conduct;
- b) insubordination;
- c) neglect of duty;
- d) deceit;
- e) improper disclosure of information;
- f) corrupt practice;
- g) abuse of authority

Conflict of interest is not generally itself a defined form of misconduct in such regulations. Consequently, it is often found in the guise of discreditable conduct. A police officer engages in discreditable conduct by, "acting in a disorderly manner or in a manner prejudicial to discipline or reasonably likely to bring discredit upon the reputation of the police force"¹⁴⁴ Conflict of interest situations fall within this heading because, as discussed earlier, they can affect the morale of a police force and/or the level of public trust in the police force. This is made express in the *RCMP Regulations*. An act or conduct of a member that, "is prejudicial to the impartial performance of the member's duties", is a disgraceful act that brings discredit on the Force.¹⁴⁵

However, many of the other disciplinary headings can also be invoked by a conflict of interest. In order to avoid a conflict of interest, officers must perform their duties in a disinterested and impartial manner. If an officer fails to properly investigate an offence, it is neglect of duty. If the officer fails to investigate because the person involved is the same person to whom the officer wishes to sell a car, then it would also be a conflict of interest. An officer who uses confidential information gained as a result of being a police officer could be charged for improperly disclosing information. If the officer used this information for private gain or to assist a relative, then it would also be a conflict of interest.¹⁴⁶ Similarly, conflict of interest could result in an abuse of authority, deceit or insubordination, or might constitute misconduct under two or more heads at the same time.

The use of such amorphous concepts in codes of discipline has been replaced as the primary mechanism to control conflict of interest in some forces. Quebec now has a *Code of ethics of Quebec police officers*¹⁴⁷ that applies to relations of the public with members of the Sûreté du Québec and municipal forces. It begins with a general section setting out its objective and rationale. The Code is intended:

... to ensure better protection of the public by developing high standards of public service and professional conscience within police departments...¹⁴⁸

The second section deals with the duties and standards of conduct of a police officer. Each provision within this section begins with a positive pronouncement, such as, "A police officer must perform his duties with integrity",¹⁴⁹ followed by a list of prohibited activities. Article 9 deals with conflict of interest. It reads:

A police officer must perform his duties disinterestedly and impartially and must avoid putting himself in a conflict-of-interest situation liable to compromise his impartiality or to adversely affect his judgment or fairness.

The express prohibitions under this heading deal with: 1) the acceptance of a gift, favour or advantage liable to compromise the impartiality of the person receiving the gift; 2) the offer of a gift, favour or advantage liable to compromise the impartiality of the person receiving the gift; 3) recommending the services of a particular attorney to someone with whom the officer has been involved in the performance of duties; and 4) soliciting money from the public through the advertising or sale of tickets.

The contents of this code are expanded in the *Regulation Regarding the Internal Discipline of the Police of the Communauté Urbaine de Montreal*.¹⁵⁰ The first part of the regulation reproduces the *Code of ethics of Quebec police officers*. The second part establishes the office of an ethics commissioner and the procedures to follow in light of any complaints regarding the Code.

The third part sets out the duties of officers and therefore the expected standard of conduct. The oath of allegiance and oath of discretion are used as the basis for a prohibition against the use of confidential information for personal gain.¹⁵¹

Police officers also have an obligation to perform their duties with integrity. This expands into a prohibition against the personal use of employer property,¹⁵² and failing to inform the director of situations which place the officer or appear to place the officer in a conflict of interest, compromise the officer's impartiality, or affect unfavourably the officer's judgment or loyalty.¹⁵³

The officer also has a duty, "to conduct himself with dignity and avoid any behaviour likely to make him lose the confidence and the consideration that his duties require or to compromise the prestige or the effectiveness of the service".¹⁵⁴ The categories of activities prohibited under this wide duty include associating with criminals, recommending a particular lawyer, secondary employment, selling or advertising tickets, and political activities.

These duties to act impartially, loyally, with integrity, and so as to retain the public trust, are all obviously intertwined in the duty to avoid a conflict of interest. A breach of duty under any of the above categories could just as easily be an example of a conflict of interest as of the listed prohibition.

Section 6 requires officers promptly to obey the orders and directives of superiors. It makes it a disciplinary default to refuse to disclose private interests when requested by the director.¹⁵⁵ The Code thus contemplates some form of disclosure, but the compliance procedure is not dealt with in detail.

The *Regulation respecting the code of conduct and discipline of members of the Sûreté du Québec*,¹⁵⁶ dealing with the internal discipline of the force, required members to perform their duties "in a disinterested and impartial manner."¹⁵⁷ A member was required to avoid:

... any situation where he would be in a conflict of interest of a nature to compromise his impartiality in the performance of his duties or of a nature to influence adversely his judgment and his sense of fairness.¹⁵⁸

Disclosure to a supervisor was only required when members believed themselves to be in, or likely to be in, a conflict of interest situation.¹⁵⁹ The Code provided no assistance to the supervisor in deciding how to resolve the situation.

The regulation of conflict of interest in the Winnipeg Police Department is subject to municipal legislation. The *Winnipeg Police Department Regulations*¹⁶⁰ were established by by-law as authorized by the *City of Winnipeg Act*.¹⁶¹ These differ little from other regulations. The City of Winnipeg also has a *Code of Ethics for Employees*,¹⁶² adopted in 1982, which applies to police officers. Provisions cover preferential treatment, secondary employment, disclosing confidential information, accepting gifts, and personal use of City-owned property.

Generally, the various police statutes also authorize or direct provincial police commissions and municipal police boards to make force-specific rules. For example, s. 28 of the *British Columbia Police Act*¹⁶³ states:

- (1) Every board shall make rules not inconsistent with this Act and the regulations respecting the

- (a) standards, guidelines and policies for the administration of the municipal police force,
- (b) prevention of neglect and abuse by its municipal constables, and
- (c) efficient discharge of duties and functions by the municipal force and municipal constables.

Such regulations may take the form of standing orders, policy manuals, or administration manuals. For example, the code of conduct in the Calgary Police Administration Manual requires police officers to:

avoid situations which could present a conflict of interest, or the appearance of a conflict of interest, and situations which could affect one's ability to act objectively.¹⁶⁴

Part 1.4 of the RCMP Administration Manual, provides an opportunity for a more complete analysis of conflict of interest situations and the means to resolve them. At a general level, members must:

Act at all times with integrity and prudence in order to promote the best interests of the public and the Force.¹⁶⁵

More specifically, the following Conflict of Interest Guidelines apply to all members of the Force:¹⁶⁶

2. It is by no means sufficient for a person in a position of responsibility in the public service to act within the law. There is an obligation not simply to obey the law but to act in a manner so scrupulous that it will bear the closest public scrutiny. In order that honesty and impartiality may be beyond doubt, public servants should not place themselves in a position where they are under obligation to any person who might benefit from special consideration or favour on their part or seek in any way to gain special treatment from them. Equally, a public servant should not have a pecuniary interest that could conflict in any manner with the discharge of his official duties.

3. No conflict should exist or appear to exist between the private interest of public servants and their official duties. Upon appointment to office, public servants are expected to arrange their private affairs in a manner that will prevent conflicts of interest from arising.

4. Public servants should exercise care in the management of their private affairs so as not to benefit, or appear to benefit, from the use of information acquired during the course of their official duties, which information is not generally available to the public.

5. Public servants should not place themselves in a position where they could derive any direct or indirect benefit or interest from any government contracts over which they can influence decisions.
6. All public servants are expected to disclose to their superiors, in a manner to be notified, all business, commercial or financial interests where such interest might conceivably be construed as being in actual or potential conflict with their official duties.
7. Public servants should hold no outside office or employment that could place on them demands inconsistent with their official duties or call into question their capacity to perform those duties in an objective manner.
8. Public servants should not accord, in the performance of their official duties, preferential treatment to relatives or friends or organizations in which they or their relatives or friends have an interest.

In order to comply with the disclosure requirements of guideline 6, members must report to their commanding officer the details of any privately held pecuniary interests which "conceivably could give rise to an actual, or potential" conflict of interest. The supervisor will inform them of the steps required to comply with the provision.¹⁶⁷

The onus is on the individual member to decide when to disclose. However, interests are not adequately defined for members to make an informed decision in relation to guideline 6, nor are the compliance measures which would comport with the requirements of guideline 3. Compliance measures for specific situations that may give rise to a conflict of interest, such as secondary employment, the acceptance of gifts, or purchasing surplus assets, are not found in a compliance section of the conflict of interest section of the Manual, thereby depriving members of easy access to such information.

This is typical of the manner in which the police sector now addresses conflict of interest. There are less likely to be discursive policy instruments which set out, in an orderly progression, the philosophy and objectives of an ethical code with expansive definitions and clear-cut compliance measures. The emphasis instead is on prohibiting or regulating activities specifically addressed, rather than on expounding a doctrine of conflict of interest. Similarly, there are less likely to be sophisticated mechanisms for achieving compliance. The usual tool for enforcement is discipline.

Chapter VI

ACHIEVING COMPLIANCE

6.1 Disciplinary Responses

Conflict of interest lies within the generality of the duty of loyalty. At common law, any conduct that causes an employer to lose trust in an employee is misconduct that constitutes just cause for immediate dismissal.¹⁶⁸ The right to dismiss is absolute. It is not necessary to prove any actual harm or prejudice to the employer as a result of the conflict of interest,¹⁶⁹ nor does it matter that the conflicting interest would benefit both the employer and the employee.¹⁷⁰ The rule is that "where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him".¹⁷¹

However, disciplinary responses are usually considered appropriate only where employees are aware of the conduct that is expected of them and fail to meet that standard. It is widely accepted that the objective of discipline is to provide employees with an opportunity to correct job-related shortcomings. Discipline is the process by which employers attempt to foster employee compliance with a set of standards - usually written. An earlier ERC study, Disciplinary Dismissal - A police perspective, suggests that the role of discipline is to "establish work and behaviour rules and to enforce these rules by imposing sanctions on those who break them."¹⁷² Disciplinary rules are thought to be necessary to ensure that employees are treated consistently and fairly and to allow the organization to operate effectively.

For this reason, many corporate and government ethical codes require that employees sign to certify that they have read and understand the rules. In addition, training is often provided to promote compliance with the code, and to ensure that employees are also aware of the consequences of breaching rules, especially what conduct would warrant dismissal. Most codes simply provide that failure to comply with the provisions could result in discipline, up to and including discharge.¹⁷³

While such warnings are valuable, they may not be strictly necessary in order to justify discipline. The master and servant relationship, discussed above, does not apply to police officers. Consequently, in one case, there was held to be no obligation on the part of the chief to inform a constable as to the consequences of the latter's act in order to render the act disciplinable.¹⁷⁴ Such a view of discipline is of little assistance in enforcing ethical behaviour; it is only operable in the context of clear rules and an emphasis on punitive discipline.

Approaches to enforcement of conflict of interest codes can be either negative or positive. Negative enforcement focuses on punishment and deterrence, while positive enforcement focuses on educating the employee so as to encourage responsible employee conduct. Positive enforcement techniques are an important ingredient in the development of an environment that values a high standard of ethical behaviour. It is important to emphasize that, while disciplinary rules and procedures are an important element in securing compliance, they should operate only when other, more subtle, methods have failed.

Traditional organizational responses to misconduct typically progress from counselling, to

warnings in the form of oral or written reprimands, to suspensions with or without pay, and finally to dismissal. The rate of progression relates to the severity of the misconduct. The focus of organizational responses to conflict of interest, however, should generally be on eliminating the conflict. For example, the Royal Bank's objective is to:

... implement a disciplinary system which **keys** in on and corrects the **cause** of unsatisfactory employee behaviour in a positive manner, encouraging improvement in the employee's conduct by ensuring the employee clearly understands his/her responsibilities.¹⁷⁵

This is also the philosophy of Pepsico where, if a conflict exists:

... and there is no failure of good faith on the part of the employee, it will be Pepsico's policy to allow a reasonable amount of time for the employee to correct the situation...¹⁷⁶

The approach is to encourage awareness of employer concerns regarding conflict of interest situations and provide measures to assist employees to avoid or rectify problems. Non-punitive management responses can vary from returning a gift, terminating an activity, or interest, disposing of an interest, or realigning job functions on a temporary or permanent basis, and are discussed in greater detail below.

Police force responses may depend on whether or not the alleged misconduct is thought to be of a serious nature. For example, the Alberta Police Regulations offer a supervisor an opportunity to counsel the officer.¹⁷⁷ The *RCMP Act*¹⁷⁸ also allows for informal disciplinary actions such as counselling, recommendation for training or transfer. For misconduct of a more serious nature, and depending on the applicable legislative provisions, police officers could be dismissed, ordered to resign, demoted, suspended, reprimanded, or fined.¹⁷⁹

Where discipline is necessary, the jurisprudence stresses that each particular case must be decided on its own peculiar facts.¹⁸⁰ In deciding a disciplinary response, consideration has been given to the following factors:

1. whether or not the employee in question is responsible for a part of a process whereby members of the public are granted or denied licenses, benefits, etc.,
2. the extent to which the employee exercises discretion in any part of such a process,
3. the extent to which he deals with the public, and is seen by them to be instrumental in the process, and
4. the extent to which clear guidelines on the nature of conflict of interest have been promulgated, and, if they have not, whether the nature of the employee's

positions is such that he can be expected to reach his own reasonable conclusions or seek advice on the issue of conflict of interest.¹⁸¹

These factors are appropriate considerations in response to conflict of interest in the police sector.

Dismissal may not be the appropriate response where the employee can be rehabilitated.¹⁸² The appropriate question is whether the conduct reasonably causes irreparable harm to the employment relationship.¹⁸³ A breach of conflict of interest rules may, in an extreme case, however, constitute a repudiation of the employment contract.¹⁸⁴

In most employment situations, discipline arises only where intentional misconduct is involved, but conflict of interest cases may present different considerations. Even though legal consequences normally only flow from reality, a finding of conflict of interest does not depend on wilful wrongdoing.¹⁸⁵ Thus, in a conflict of interest situation, a real conflict could require a disciplinary response, while a potential or apparent conflict of interest, on the other hand, could benefit from a non-disciplinary response. Many definitions of conflict of interest take this into account, making it a breach only if the individual knows that official conduct might further a private interest.¹⁸⁶ The *Manitoba Legislative Assembly and Executive Council Conflict of Interest Act* forgives an inadvertent breach:

Notwithstanding anything in this Act, where a judge finds that a member violated a provision of this Act unknowingly or through inadvertence, the member is not disqualified from office, and the judge shall not declare the seat of the member vacant, in consequence of the violation.¹⁸⁷

Responses to conflict of interest situations which do not justify discipline could include non-disciplinary measures such as transfer, leave, or administrative termination should the conflict not be possible to eliminate.

6.2 Non-disciplinary Responses

As a general proposition, the discipline structure is a very poor tool for securing compliance with conflict of interest codes. The problem is that having a conflict of interest is not really morally culpable in itself; it is only when the conflict is resolved unethically that culpability arises.

At the same time, however, the importance of appearances is such that the mere existence of a conflict may have to be resolved without waiving to see whether it will produce culpable conduct. For this reason, more sophisticated codes include obligations and restrictions, but may also include techniques to minimize conflicts of interest. The most common of these techniques are avoidance and disclosure.¹⁸⁸

Avoidance encompasses not only the circumvention of new involvements that may lead to a conflict, but also the shedding of old ones:

... rather than an individual continually worrying about whether a particular decision will affect one of his or her specific vested interests, and rather than having the public perceive that a public office holder could be ensconced in a position to confer benefits upon himself or herself, ... the problem should be removed in advance by requiring divestment of certain types of assets and relinquishing of certain types of interest by those in authority.¹⁸⁹

Obviously, overbroad avoidance rules may result in significant financial loss or hardship. Conflict of interest regulations must balance the need for high standards of ethical conduct against the need for competent personnel.¹⁹⁰ The person sought after for public service will often have significant outside interests.¹⁹¹

By requiring excessive divestment of assets, some individuals may be dissuaded from accepting public office.

A less intrusive form of avoidance involves the use of trusts. For these purposes frozen trusts and blind trusts are the most commonly used. A frozen trust is one in which the trustee maintains the holdings in the same condition as when placed in the trust. Thus, while the beneficiary always knows the precise contents of the trust, any conflict which could arise from the temptations of dealing with those assets is avoided. Conflicts involving the enhancement of the assets, of course, are not prevented.

A blind trust, on the other hand, allows the trustee to deal with the assets, making all the investment decisions on behalf of the beneficiary. The beneficiary has no control over the assets while in trust, and no knowledge of the current asset mix. There are limits to the uses of a blind trust, as the Parker Commission made clear:

... the only assets that should be placed into a blind trust are those that can truly and easily be sold by an arm's length trustee, such as publicly traded securities. The blind trust should never be used for any other kind of holding, and certainly not for anything like a family business or family firm.¹⁹²

The Commission recommended that the use of blind trusts should be abolished.

There are, of course, costs associated with trusts. In addition to opportunity costs where assets are locked in a frozen trust, or losses due to faulty administration of a blind trust, there are the actual trust fees to be considered. Some codes make provision for reimbursement for the latter;¹⁹³ none apparently contemplates compensation for the former.

The enforcement technique found in many recent codes of ethics is a requirement of disclosure.¹⁹⁴ Disclosure of all interests lets the employer participate in the decision as to which interests may lead to conflicts, and can thus provide the employee who has made full disclosure with a certain degree of protection from the consequences of honest errors in judgment.

Disclosure may be made to a designated official and kept confidential, or the report may be available for public inspection.¹⁹⁵ Each mechanism has obvious advantages and disadvantages, and will have differing applicability to specific circumstances.

A requirement for disclosure in this way raises important issues regarding the right to privacy.¹⁹⁶ While this is especially the case for public disclosure, it also holds true for confidential disclosure. The degree of infringement will also depend on the breadth of the requirement. For example, in *Canadian Fram*, the employees objected to disclosing the business interests of members of their families, arguing that:

... the right to disclose a person's financial and business interests to some third party is not inherent in a familial relationship and that an employee, purporting to do so, without the express consent of the family member involved, would be acting without any colour of right, authority, or justification whatsoever.¹⁹⁷

A third form of compliance measure, which may be used either as an alternative or as an adjunct to disclosure, is refusal - the specific disclosure of a personal interest at the time when the interest comes or appears to come into conflict with public duties and responsibilities.¹⁹⁸ Refusal may be confidential or public, narrow or broad, much the same as disclosure. While it is less intrusive, it also places more of the responsibility on the employee to identify and report possible conflicts.

Disclosure, discussion and consultation are the primary processes of compliance in private sector codes. The onus is on the individual to disclose, often in writing to a designated official, any interests or activities which might reasonably be perceived to be in conflict with public duties or responsibilities. Each individual's situation is considered to be different, and is differently assessed.

Compliance measures for the public sector include avoidance, confidential disclosure, public declaration, disqualification by refusal, or divestment. Disclosure is the primary method to deal with conflicts of interest. Disclosure can be required upon initiation into the position, on a periodic basis, or whenever interests or duties of office change. Specific disclosure, or refusal, may also be required when the private interest conflicts, has the potential to conflict, or appears to conflict with public duties. The *Alberta Conflict of Interest Act*¹⁹⁹ reflects a belief that refusal is the best method for dealing with conflicts of interest. Disclosure of an interest that could reasonably impact on a decision, at the time of the decision, is required.²⁰⁰ Because it is not possible to tell, in advance, the impact of all a member's various interests, refusal permits timely notice of a possible conflict.

Public sector codes often list extensive exemptions from the interests required to be disclosed. Disclosure of non-exempted interests is required, insofar as they are known to the holder. Should any material change in holdings occur, it is imperative that the new information is promptly provided to the proper official.²⁰¹

In the public sector, disclosure requirements are often hedged around by freedom of information and/or privacy legislation, which can provide public access to information provided on a confidential basis, or deny access to interests which ought properly to be public. Where privacy laws have paramountcy, special handling of disclosure data may be necessary to Comply.²⁰²

The final compliance measure of any effective code is some system of review through an ethics office or commission. Some control authority to assist employees in meeting the requirements of the code is essential to provide guidance and to ensure consistent application of the rules. Because employees and the ethics authority may not always agree as to the existence of a conflict or as to the proper measures to deal with it, a dispute resolution mechanism will also be necessary. Such a mechanism can range from a system where the ethics authority always prevails to a structure of independent binding adjudication.

The role of such an authority in ensuring compliance varies widely. IBM directs employees to consider the many factors that only they can know, in deciding whether to seek advice from the in-house legal counsel, supervisor or designated official. That official considers the circumstances and the requirements of the code to determine whether the employee is in compliance with the code or should divest an interest or realign job duties.²⁰³ Other companies use an ethics committee to advise employees on how to comply with the code, and to enforce its provisions.²⁰⁴

While the ultimate responsibility lies on the individual to identify a real or potential conflict in the public sector as well, assistance is often provided either to discuss possible lines of action, or to act to divest or to disclose the interest. Designated officials may review disclosure forms to determine if there is a conflict of interest and advise employees of appropriate actions.²⁰⁵

Designated officials may be supervisors, judges or ethics commissioners. The New Brunswick *Conflict of Interest Act*²⁰⁶ requires disclosure to be made to a designated judge. Many codes authorize the establishment of an ethics commissioner or committee, and this is a recurring feature of new codes.²⁰⁷

The use of a compliance agency may provide a mechanism for *ad hoc* exemptions. Bill C-46 would establish a three member commission to aid in the interpretation and enforcement of the Act, and to designate "any asset, liability, financial interest or source of income"²⁰⁸ as a permitted private interest. In addition the commission could decide what form of compliance would meet the needs of the statute for each particular member's situation. While such a broad mandate provides flexibility, there has been doubt expressed whether enough guidance is provided to the commissioners in executing their discretion.²⁰⁹

Similarly, the Alberta legislation empowers the ethics commissioner to exempt otherwise

prohibited activity if it is disclosed and approved.²¹⁰ Under the Ontario guidelines, the Premier can make exceptions, to divestment where there is "undue hardship".²¹¹ The Edmonton city policy allows the City Manager to waive or alter the provisions of the Code for any situation in which it is deemed to be in the public interest to do so.²¹² These provisions similarly promote flexibility, possibly at the expense of certainty.

A designated official can assist in determining the appropriate method of compliance, by taking into account:

- a) the specific responsibilities of the public office holder;
- b) the value and type of the assets and interests involved; and
- c) the actual costs to be incurred by divesting the assets and interests as opposed to the potential that the assets and interests represent for a conflict of interest.²¹³

Monitoring of employee compliance with the conflict of interest regulations may also engage line management, in addition to or instead of ethics advisors. Supervisors can monitor the situation by having annual reviews, reminding employees of their obligations in light of any possible changes in their personal circumstances and ensuring that annual declaration forms are filled out for all employees. Employees may be required to certify that they have read and understood the conflict of interest regulations as a condition of employment. The City of Burlington Code of Conduct imposes a duty on the supervisor to ensure that employees in their section are aware of and complying with the code.²¹⁴ Some companies, like Cominco, go further and require managers to ensure that all decisions taken within their department conform to the requirements of the Code.²¹⁵ Johnson & Johnson's code is more stringent, requiring supervisors periodically to certify that employees in their sector are in compliance.²¹⁶

While the designated official can monitor the employee disclosure forms and the supervisor can monitor the activities of the employee, other interested parties may have a role to play. Any affected individual may be able to ask for an advisory opinion on his or her own situation. Under some codes, so may a member who has reasonable and probable grounds to believe that another member is in a conflict of interest.²¹⁷ The Alberta legislation goes further than this and allows any person to request that the Ethics Commissioner investigate an alleged breach.²¹⁸ In other jurisdictions, members of the public who wish to launch an investigation are probably directed to their elected representatives. In the police sector, public complaints mechanisms are often a source of allegations of conflict of interest.

Chapter VII

SPECIFIC EXAMPLES OF POLICE CONFLICT OF INTEREST

7.1 Secondary Employment

For many police managers, secondary employment constitutes the paradigm of conflict of interest. Indeed, many of those managers who were contacted for this study treated secondary employment as virtually the only source of conflict of interest, and had to be pressed to consider other aspects of the problem.

As has been observed elsewhere as well, secondary employment by police officers is widely regulated and often prohibited in theory, but in practice occurs virtually everywhere and appears to be often tolerated or ignored.²¹⁹ Even where police management is diligent in enforcement of restrictions on secondary employment, however, particular instances rarely lead to formal discipline, and thus seldom yield formal case reports. Most respondents to this study indicated that their forces dealt with secondary employment issues, when they became sufficiently serious to require management intervention, through counselling and discussion, with a view to managing the problem before it reached the status of a disciplinary interview. Only high profile or persistent cases seem to lead to formal discipline.

One police force has developed a procedure to identify and monitor (if necessary) any secondary employment of officers. On a weekly basis, members of the internal investigation unit research publications listing new businesses, statements of claim, judgments, and bankruptcies. If the name of a police officer (or spouse) appears in these sections, an investigation may be carried out to ensure that no real or perceived conflict of interest is associated with the business activity. We heard of no other enforcement program of any similar rigour.

As a result, the following section must be seen as an understatement of the degree of involvement by individual police officers in secondary employment. At the same time, the rigid formalism of most police regulations on the subject of secondary employment must be viewed in the light of the anecdotal evidence of enforcement practices which are far more interactive and mediative than would appear from the regulations themselves.

Allowing police officers to engage in second jobs can be helpful in developing new and useful skills, building community relations, and providing supplementary income. Traditionally, however, there have been concerns about the effect of outside interests on an officer's public duty to impartially enforce the law (conflict of interest), as well as concerns regarding the extent to which outside interests interfere with his or her ability effectively to carry out police duties and responsibilities (conflict of commitment).²²⁰

A conflict of commitment can occur when an employee, as the result of holding a second job, is less attentive, careful, devoted, or efficient in relation to the primary occupation. For example, Loblaw's prohibits employees from accepting outside employment which:

... deprives the Corporation of the time and attention required to perform their duties,

without the approval of the Local Business Conduct Committee.²²¹

The Halifax Police Department prohibits secondary employment which "could diminish the member's physical and or mental ability to discharge his duty responsibly, safely and efficiently in keeping with officer safety and professional requirements."²²² Opponents of secondary employment argue that:

... such things as the compressed work week, secondary employment, and paid overtime are seriously damaging to the professionalism and dedication of police officers. They argue that these policies encourage police officers to treat their policing duties as some form of part-time activity which is secondary in importance to some other vocation.²²³

On the other hand, the arbitral jurisprudence on secondary employment and outside activity suggests that:

... unless a substantial and legitimate business reason exists, the employer has no authority, control, interest or jurisdiction over an employee's behaviour outside the hours of his employment.²²⁴

Most arbitrators recognize the general principle that governing one's own life is a right of employees unless the disputed activity directly affects the business of the employer. For example, in *Henderson Machinery*²²⁵ an employee pulled double shifts by working a full shift at a second job after his first shift was over. The ramifications in terms of safety seem obvious, but the arbitrator found no evidence of deterioration in the employee's performance in this case, and therefore no reason to prohibit the second job.

In the police sector, however, another primary concern is with the high potential for conflict of interest in situations of secondary employment of police officers.²²⁶ It is possible, of course, to conceive of a conflict of interest in every secondary employment situation involving police officers.²²⁷ Questions will always arise about the likelihood of a police officer enforcing the law evenhandedly against an outside employer. This raises a threshold problem which has led some forces to prohibit secondary employment. More recently, however, the trend in police forces has been away from absolute prohibitions.

The Sûreté du Québec stand at one end of the continuum, with an absolute prohibition on secondary employment:

A member of the Police shall occupy himself solely with the work of the Police Force and the duties of his position. He may not assume any other employment nor engage in any business, directly or indirectly.²²⁸

RCMP officers are also very restricted in the outside employment that they may accept. In requiring an officer to behave in a manner that is in the best interest of the RCMP, a member is prohibited

from engaging in "any employment outside the RCMP on an employer/employee basis or on a personal service contract basis."²²⁹ There are only a few exceptions to this general prohibition such as community and public-spirited activities, or assisting friends. Members are also prohibited from engaging in any trade or business activity,²³⁰ subject to exceptions such as remunerative hobbies, mere investment without active participation in management, operating a hobby-farm, or some other specifically authorized exception.²³¹

Most jurisdictions, however, like the Halifax Police Department, allow secondary employment if it is consented to by the Chief of Police:

No member, except with the written consent of the Chief of Police, shall engage directly or indirectly in any other occupation or calling and shall devote his time and attention to his chosen profession and to the service of the Department.²³²

The Edmonton Police Service stresses that an officer's primary occupational responsibility is to the Police Service. The following procedure is required in order to receive permission to engage in extra employment.²³³

Applications must be in writing and include the name and address of the employer or owner of the business, and the duties and responsibilities the Member will be expected to fulfill.

Individual permission, subject to annual renewal each January, will be granted on written application provided there is no conflict of interest, as interpreted by the Chief. Members will be deemed in conflict of interest if their private/extra employment and/or related external interests impair their judgment, independence or unbiased performance of Police duty, or might reasonably be expected to do so. The onus for ensuring that a conflict of interest does not exist during the entire period for which permission has been granted rests with the Member(s) involved and, for cause, the Chief may at any time rescind previously granted permission.

The Winnipeg Police Force also requires prior approval by the Chief of Police before an officer can engage in extra employment²³⁴ but these regulations are currently under review. It is anticipated that the current secondary employment provision will be revised by including a section outlining types of employment that would be considered in conflict with the position of Police Officer. These activities would be prohibited.

The Edmonton Police Service currently prohibits two specific occupations - private security work and driving taxis.²³⁵ The Calgary Police Force, on the other hand, prohibits a number of outside interests including:²³⁶

- a. Bill collector;
- b. Skip tracer;
- c. Watchman, security guard, or other security work;

- d. Taxi or limousine driver, or the owner or operator of a taxi service or limousine service;
- e. Owner, operator, or employee of an establishment in which alcohol is consumed;
- f. Owner, operator, or employee in an establishment in which gambling occurs;
- g. Insurance adjuster or investigator;
- h. Private investigator;
- i. Escort, or an employee of an escort agency;
- j. Process server;
- k. Armored car driver or guard;
- l. Body guard; or
- m. Any occupation which requires a member to be armed.

These comprehensive regulations were unsuccessfully challenged in the *Calgary Police Association* case.²³⁷ The Alberta Court of Appeal upheld a lower court ruling to the effect that the regulation was *intra vires*, not unreasonable, and did not deprive the applicants of their "liberty" as guaranteed by s.7 of the *Canadian Charter of Rights and Freedoms*. The court concluded that a police officer does not have an unrestricted right to engage in part time employment, without considering the particular justifications for the rules prohibiting certain forms of secondary employment.

The Ontario Provincial Police had a policy similar to that of Calgary, in limiting certain types of activities, until the Ontario Police Services Act 1990,²³⁸ was passed. Under the previous regulations, officers were required to apply for permission to engage in secondary employment.²³⁹ There was an:

... unwritten presumption that consent would not be granted unless the officer could establish some need or justification for the employment.²⁴⁰

This presumption has now been replaced in the new Act Section 49(1) states that an officer shall not engage in any activity:

- a) that interferes with or influences adversely the performance of his or her duties as a member of a police force, or is likely to do so;
- b) that places him or her in a position of conflict of interest, or is likely to do so;
- c) that would otherwise constitute full-time employment for another person; or
- d) in which he or she has an advantage derived from employment as a member of a police force.

To invoke discipline under this section, management would be required to prove, on the facts of each case, that the member is in breach of these restrictions. In other words, officers will be able to work unless management can prove that, in these circumstances, a conflict of interest arises from the employment.

While most restrictions are silent on the rationale for restricting secondary employment, some analysis is possible of the reasons for many of the common prohibitions of certain types of employment. The trend towards more relaxed secondary employment provisions reflects an attempt to balance the rights of individuals against the need for impartial law enforcement. Nevertheless, there is still a desire to restrict activities that:

1. suggest that the officer's authority may improperly serve private rather than collective interests, ie. process server or bill collector;
2. involve working for establishments that profit from activities prohibited by statute, or licenced for closely regulated goods by statute, ie. working in a bar;
3. involve ownership or managerial responsibilities in businesses where a conflict of interest is presumed, ie. security or investigative businesses in competition with the Force.²⁴¹

A major concern with some kinds of employment is that a police officer may exercise the off ice of constable and the functions of a peace officer whether on or off duty. Secondary employment which can blur the officer's status and source of authority is thus suspect. For this reason, employment requiring firearms, or which might involve arresting someone, is often prohibited. Similarly, members who engage in any business or employment for which they could also be required to perform any inspections or regulatory functions as part of their police duties run a serious risk of conflict.²⁴²

In addition to these concerns relating to authority, illegality and "competition", real concerns arise because of privileged sources of information. Police officers have ready access to information that is not generally available to private employers, but would be of enormous value. Access to criminal records, motor vehicle records, police intelligence, crime statistics and investigative reports could simplify the work of many civilian occupations. Process servers, private investigators, bailiffs, lawyers, paralegals, security firms, bonding agencies, and many similar occupations on the periphery of law enforcement could benefit greatly from police information not legally available to them. For this reason, such secondary employment is almost invariably prohibited for police officers, since even if the temptation to use police information for private ends were resisted, the appearance of conflict is almost irresistible.

But even other businesses can benefit from improper use of such information. For example, a Metro Toronto officer was charged with corrupt practice for using CPIC information for personal purposes. He had caused person checks to be made on individuals he was planning to hire as employees of a domestic cleaning business which he owned.²⁴³

Another concern which has been expressed, but which does not appear to be directly addressed in any of the existing codes, amounts to the concept of a conflict of commitment taken to an extreme. Police officers, along with members of several other occupations, may be subject to compulsory service in emergency or disaster situations. For this reason, secondary employment as an ambulance driver or other emergency response personnel, or service in the reserve Armed Forces,

might render a police officer subject to conflicting mandatory service obligations in respect of the same emergency. This possibility may argue against permitting such secondary employment for police officers.

To the extent that police codes identify secondary employment as a kind of conflict of interest issue, questions of the nature and extent of the private interests which raise concerns arise here as in public and private sector codes. The *O.P.P. Police Orders* define conflict of interest as any "business, undertaking or calling that involves financial gain in which a member participates while not on duty."²⁴⁴ Members of the Sûreté du Québec may not assume, "any other employment nor engage in any business, directly or indirectly."²⁴⁵ Also, in the case of the Halifax Police Department, members may not without permission "engage directly or indirectly in any other occupation or calling."²⁴⁶ It is unclear what impact the qualifying word "indirectly" has on the scope of the prohibition, or the extent to which it might catch family interests.

Closely related is the issue of remoteness. The *O.P.P. Police Orders* state:²⁴⁷

These guidelines are not intended to apply to investments in business or other undertakings where the member's participation does not result in any form of control or influence on the business or undertaking. In these latter cases, it is assumed that each member will exercise good judgment and bear in mind their position as a police officer.

In a case involving an officer convicted of discreditable conduct for engaging in the second occupation of selling novelties and gifts, this provision was invoked on appeal by the Ontario Police Commission to determine whether or not the appellant retained a prohibited interest in the sideline business, in light of the officer's claim that he did not have a substantial interest. Such questions concerning the parameters of private interests are not adequately dealt with in police statutes, regulations or policies.

The RCMP Standing Orders, Part 1.4 does touch on the issue of remoteness as it relates to the prohibition on business activity. It states:

Close identification with the business of a relative (e.g. one's spouse) to the point where it appears that a member is employed in, or by that business or is a part of it, ... is considered to be engaging in a business activity.²⁴⁸

Along with the provincial forces, and possibly some regional forces, the RCMP shares a problem of geographical differences in the impact of secondary employment. Occupations which may be relatively innocuous in some postings may cause considerable difficulty in others. For example, an RCMP officer operating a tow truck business would present his superiors with very different considerations if assigned to security duties in Ottawa than if assigned to highway patrol duties in rural Saskatchewan. While this is a somewhat extravagant example, similar differences could arise with any number of secondary occupations from one posting to the next. Such considerations do not usually arise in municipal police forces.

The opposite aspect of this geographical differentiation is that the larger forces have increased opportunities for managing certain types of conflict through transfers. Indeed, a reassignment to different duties, even without any geographical movement, is more possible in larger police forces than in smaller municipal forces. This added dimension is an important factor to be considered in assessing any code of conduct which broadens rights to secondary employment.

7.2 Political Activity

In the private sphere, employees are generally encouraged to participate in political activities, so long as it is clear that they are not acting as representatives of the corporation.²⁴⁹ However, both the public and police sectors have a tradition of political neutrality that requires that employees:

1. do not engage in partisan political activities
2. do not express publicly their personal views on the policies, programs or personalities of the government or its opponents.²⁵⁰

The rationale for regulating political activities²⁵¹ in both the public and police sectors can be derived from the need for impartiality, or more importantly, the appearance of impartiality.

While the provinces differ in how they deal with various political activities, most now grant a leave of absence to permit a civil servant to run for public office, but otherwise significantly restrict political activity. That the provinces have the power constitutionally to require public servants to take a leave of absence to run for public office, and to restrict other activity, even in the federal sphere, was established in *O.P.S.E.U. v. A.G. of Ontario*.²⁵²

Since the *Charter of Rights* was added to the constitution, however, there have been significant challenges to such restrictions. In 1986 the Nova Scotia Supreme Court struck down the *Civil Service Act* provisions which required civil servants to resign in order to stand for election,²⁵³ thus motivating legislation change in that province. A civil servant is now entitled to a leave of absence, and is entitled to return to work if unsuccessful.²⁵⁴ If elected, a civil servant is entitled to a leave of absence up to the point of a second successful term of office, at which time employment is deemed to have been terminated.²⁵⁵ Not all of the provinces allow the leave of absence to continue should the member be elected, instead deeming the candidate to have resigned.

Like the Nova Scotia *Civil Service Act*, the Ontario *Public Service Act*²⁵⁶ is a two-tier system, in which some employees are more restricted in their activities. Included in the approximately 6,000 public servants in the "restricted category", are 4,000 members of the Ontario Provincial Police.²⁵⁷ An OPP officer, as a Crown employee, may therefore only:

- 1) vote;
- 2) be a member of a political party;
- 3) make a financial contribution to a political party;
- 4) engage in non-partisan political activity

- 5) attend meetings of "all candidates"; and
- 6) comment publicly on matters not directly related to party platforms or to their particular area of responsibility as an employee.²⁵⁸

These regulatory restrictions are now under review, chiefly as a result of a recent change in the political climate. Both public servants and police officers have been the subjects of discussion papers on political activities, as will appear below, and change is anticipated in the near future. Some sense of what may happen is provided by the case of Ontario municipal police officers who are prohibited from engaging in any political activity, according to section 46 of the *Police Services Act, 1990*,²⁵⁹ unless permitted by regulation. The regulations, which were promulgated on October 3, 1991, are discussed in detail below.

Other jurisdictions utilize a single general provision directed at maintaining a member's impartiality. The *Code of Ethics and Discipline of Members of the Sûreté du Québec*,²⁶⁰ s. 21 directs members to be politically neutral in the performance of their duties. There is no other provision governing the political activities of members. The regulations for the Vancouver Police Force are similar in that the sole provision governing political activities reads:

I will abstain from any public expression of political opinion which might give offence to any person or which might influence any election.²⁶¹

Some forces require permission in order for members to engage in some political activity. The Calgary Police Services Administration Manual²⁶² directs members to apply for a leave of absence to run for provincial or federal office. A member who is elected must resign. One member who ran for mayor of a satellite community without complying with the rule subsequently resigned his mayoralty.

In other forces, the regulations allow a leave of absence in such situations. The *Winnipeg Police Department Regulations*, established in 1974, required severance if the member was elected.²⁶³ This regulation was recently superseded by the *City of Winnipeg Act*²⁶⁴ which allows police officers, as municipal employees, to take a leave of absence if elected to political office.

The *RCMP Regulations* preserve some scope for low-profile political activity:

... nothing herein shall be construed to affect the right of a member to privately support any political party, to privately express an opinion on any political subject or candidate, to attend political meetings while off duty and not in uniform or to vote as the member chooses.²⁶⁵

However, the rights of RCMP officers to engage in political activities are otherwise severely restricted.

Section 57(1) states:

A member shall not

- a) engage in any work for, on behalf of or against any person seeking election or re-election...
- b) engage in any work for, on behalf of or against any political party; or
- c) be a candidate for election ...

The phrase "engage in work for" is also used in s.33 of the *Public Service Employment Act*.²⁶⁶ The Federal Court of Appeal in *Osborne v. The Queen*²⁶⁷ struck down the provision as being too vague. However, on appeal, Sopinka J. for the Supreme Court of Canada stated that "difficulty of interpretation cannot be equated with the absence of any intelligible standard," while striking down the restrictions on other grounds.²⁶⁸

The key issue in addressing political activities of police officers is to strike a balance between permitting members "to exercise their individual, democratic rights to engage in political activity,"²⁶⁹ and protecting the public's right to an impartial police service.²⁷⁰ Similarly, restrictions on the political rights of public servants are said to serve three basic objectives:

1. To protect the right of all Canadians to fair and equitable treatment in their dealings with the public service
2. to protect the right of the government to receive impartial advice
3. to protect public servants against punitive measures based on partisan political considerations.²⁷¹

These arguments are also applicable in support of police neutrality in politics.²⁷²

Much concern has been expressed about the overbreadth of regulations which restrict political activity. The D'Avignon Committee report²⁷³ in 1979 encouraged full political participation as a right of citizens, limited only in those exceptional cases where:

... any indication of partisan political interests would compromise the reputation of the public service for impartiality or would damage the individual's effectiveness as a public servant.²⁷⁴

The Report went on to recommend a three-tier regulatory system fashioned on the British model. This system, involving a restricted category, an intermediate category and an unrestricted category has also been promoted in the 1991 discussion paper on The Extension of Political Activity Rights for Ontario Crown Employees.²⁷⁵ Included within each category would be:

Restricted Category	-	Deputy Ministers and Senior Management
Intermediate Category	-	Management personnel, excluded personnel, AEA's (bargaining unit employees performing allocative, evaluative and adjudicative functions)
Unrestricted Category	-	The vast majority

The discussion paper adopts the focus of the 1986 Ontario Law Reform Commission Report on Political Activity, Public Comment and Disclosure by Crown Employees²⁷⁶ on AEAs - those employees involved in adjudicative, evaluative or allocative decision-making, in their day-to-day dealings with members of the public.

An AEA is defined as:

a crown employee whose actions may give rise to a "reasonable apprehension of bias" by the public, because:

- their duties involve a **significant amount of contact** with individual members of the public (or with organizations);
- they make, or may seem to the public to **make, adjudicative, evaluative or allocative decisions** affecting them; and
- their **political activities are likely to be known to the public** that they serve.²⁷⁷

A police officer could easily fall into the intermediate category, given the nature of police discretion and the higher standard of conduct expected of police officers. It is of interest, however, that the Ontario Law Reform Commission declined to deal with the question of police political activity, despite the status of O.P.P. officers as public servants under the Ontario legislation. The Commission concluded:

In our view, however, political activity by police officers raises very different issues than political activity by Crown employees, issues that are beyond the scope of our present study.²⁷⁸

The question of police political activity was, however, recently addressed in the Ontario Solicitor General's discussion paper on Political Activity Rights for Police Officers in Ontario.²⁷⁹ The possible suggested approaches were again, very restricted political rights, broad, but not unrestricted political rights, and no restrictions. It is clear that, in balancing these rights, under the

Charter of Rights and Freedoms, only reasonable limits will be permitted.²⁸⁰

In fact, at least in the case of municipal police officers, the balance has been struck firmly on the side of individual liberty. A regulation made under the *Police Services Act*, 1990, section 46 on October 3, 1991 allows broad, although not completely unrestricted, rights for municipal police officers to participate in political activity at the federal, provincial and municipal level.²⁸¹ A broad range of specific political activities are listed as permissible, in some cases subject to particular restrictions, with the net effect that there appears to be very little political involvement denied to a municipal police officer.

Participation of a public nature is allowed only when the officer is not on duty and not in uniform, and participation in an election as a candidate in a federal or provincial election, or for office as head or member of a municipal council, requires a leave of absence without pay during the campaign, and resignation from the force if elected. Reinstatement in employment within a period of six years is, subject to certain restrictions, available as of right upon ceasing to hold office. Police chiefs and deputy chiefs are not permitted to be candidates under this provision.

Police officers are also allowed, without resigning or taking a leave, to be appointed to or run for election to a local board, such as a school board, public library board, local board of health or planning board. For obvious reasons, service on or participation in political activities in relation to a police services board is excluded. This right is also subject to the conditions that it not interfere with the performance of the officer's duties as a police officer, or place or be likely to place the officer in a position of conflict of interest.

The regulation permits a police officer while not on duty and not in uniform to express views on any issue not directly related to his or her responsibilities as a police officer. The officer must not, however, associate his or her position as a police officer with the issue, or represent the views as those of a police force.

Where authorized to do so, however, an officer may express views on any issue, or attend and participate in a public meeting, as a representative of the force. No such authorization, however, is allowed during an election campaign to permit an officer on behalf of the force to support or oppose a candidate or a political party, or a position taken by a candidate or political party.

Finally, there are two express limitations on political activity. A police officer must not participate in soliciting or receiving funds, and must not engage in any political activity that places or is likely to place the police officer in a position of conflict of interest. This overriding obligation to avoid a conflict of interest is consistent with the way in which other public agencies have dealt with the liberalization of political rights.

The difficulty with expanding rights to political activity is much the same as for any liberalization of conflict of interest rules - ultimately only the individual can judge when the exercise of such- a right could give rise to a conflict. This may be addressed by a residual obligation, in general terms, to exercise political rights in a manner consistent with other obligations.

Canada Mortgage and Housing Corporation, for example, has such a residual requirement. Employees are permitted to engage in an extensive list of political activities, but to balance the need for impartiality, employees are directed to:²⁸²

- avoid directing Public attention to themselves as being active supporters of a given party or candidate;
- refrain from conduct which might compromise or be perceived to compromise their ability to carry out their duties in an impartial manner; and
- be mindful that, in conducting any political activities, the perception of their political impartiality will depend upon many circumstances unique to them, such as the nature and public visibility of their political activities and their public service duties, their place of work and their level of responsibility as CMHC employees.

It seems likely that the question of political activity by police forces will be a matter of considerable discussion in the near future, particularly as the Ontario initiatives attract attention across the country. It is an area where there has been relatively little analysis in the past, and which would certainly justify further study. The issues involved in police political activity include virtually all of the subjects discussed in this paper, particularly including questions of conflict of interest, possible use of confidential information, and association issues.

Moreover, a somewhat different set of considerations arises when police political activity is carried out through a police association. There have been occasions when police associations have taken direct and public interest in the outcome of a municipal election, and there may be other instances where members of police associations, in pursuit of their collective interests, have contributed funds or assistance to a campaign. Such interesting considerations are, unfortunately, beyond the scope of the present paper.

7.3 Economic Transfers and Gratuities

The acceptance of gratuities becomes problematic when it may reasonably be inferred that the gift could influence the fulfillment of an officer's duties and responsibilities. Any debate on the propriety of the acceptance of gratuities by police officers inevitably raises the well-known example of the officer who receives free coffee and donuts in the neighbourhood donut shop. On the one hand, a police officer "that most worldly and cynical of men - knows better than anyone else that "you don't get nothing for nothing" in this world."²⁸³ Consequently, all proffered gifts should be refused. However, others take the position that officers should be encouraged to accept "freely offered minor gratuities and that such gratuities should be perceived as the building blocks of positive social relationships between our police and the public...".²⁸⁴ The latter view appears to have made relatively few inroads yet in the police sector.

The language commonly utilized in discussing the permissible acceptance of gifts in the corporate sector centers on "customary", "modest" or "usual." The Code of Conduct for Ingersoll Rand states:

In today's competitive business climate, the offering or receipt of promotional material or gifts of nominal value is not unusual... The Corporation expects its employees to exercise sound and good judgement in avoiding any situation which might cast a detrimental reflection upon the Corporation.²⁸⁵

Algoma, on the other hand, sets out a number of tests which must be met before the gift can be accepted.

It is appropriate to accept a gift so long as:

It is not accepted with the intent to influence the recipient within his or her area of responsibility;

It is consistent with generally accepted business practices;

It is not in contravention of any law or regulation;

It is not in the form of cash, bonds or negotiable securities;

It is so limited in value that it is not an attempt to buy the recipient's favour as a bribe, payoff or other improper payment, and;

such that full, public disclosure would not embarrass or in any way reflect unfavourably on the Corporation or recipient.²⁸⁶

The idea that acceptance of an economically insignificant gift should be allowed can also be seen in the public sector. Here too, moderate hospitality is recognized as part of customary business practice. For example, the *Conflict of Interest and Post-Employment Code for Public Office Holders* allows the acceptance of gifts if they, "a) are within the bounds of propriety; b) do not bring suspicion on the office holder's impartiality and c) would not compromise the integrity of the Government."²⁸⁷

The concern with defining which gifts are significant has meant that many codes only prohibit the acceptance of gifts over a certain value. The *Ontario Act Respecting Conflicts of Interest of Members of the Assembly and the Executive Council*²⁸⁸ prohibits the acceptance of any but incidental gifts and requires disclosure of any of those that are valued at over two hundred dollars (or a cumulative total of \$200 for a year). The *Manitoba Conflict of Interest Act*²⁸⁹ requires disclosure of all gifts, as well as disclosure of the donor. The new *Alberta Conflict of Interest Act*,²⁹⁰ on the other hand, requires Members to obtain approval of the Ethics Commissioner before keeping any gift. Approval is granted only where:

... 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.²⁹¹

Police forces are most likely to adopt either this requirement of prior consent or a blanket prohibition of the acceptance of gifts, possibly subject to an exception for minor and customary hospitality. Under the general heading of avoiding conflict-of-interest situations the *Code of ethics of Quebec police officers* stipulates that:

A police officer must not:

- (1) directly or indirectly solicit, accept or demand from any person a gift, a reward, a commission, a kickback, a discount, a loan, repayment of a debt, a favour or any other advantage or consideration liable to compromise his impartiality, judgment or fairness;²⁹²

In addition, police officers may not offer gifts which would impair the impartiality of that person in the performance of his duties.

This is also the case for the Vancouver Police Department. A member who comes into possession of a gift is required to "immediately forward it to the Chief Constable's Office accompanied by a written report outlining all the circumstances."²⁹³ The Calgary Police Service directs members to acquire the prior consent of the Chief before accepting any gift.²⁹⁴ The provision makes sure that members understand the extent of its coverage:

In order that there be no doubt about the extent or coverage of this policy it includes a prohibition against accepting free meals or drinks.²⁹⁵

The RCMP Administration Manual has extensive directives relating to the acceptance of gifts. The return of gifts from domestic sources is absolute,²⁹⁶ accompanied by a letter explaining RCMP policy.²⁹⁷ However, the RCMP also allows for "customary" and "incidental" gifts:

Unsolicited, infrequent benefits such as minimal hospitality or very small gift items which are a normal expression of business courtesy or advertising may be accepted providing they will clearly not result in any actual, apparent or potential conflict of interest nor cast suspicion of favoritism or lack of objectivity.²⁹⁸

This provision in theory at least is a very minor exception to a relatively stringent prohibition.

The acceptance of gratuities is sometimes considered under "corrupt practice" in some of the police Acts. For example, the Alberta *Police Service Regulation* consider it a corrupt practice if a member:

directly or indirectly solicit[s] or receive[s] a payment, gift, pass, subscription, testimonial or favour without the consent of the chief of police;²⁹⁹

There is obviously a fine line between conflict of interest and corrupt practice. Some definitions of corrupt practice closely resemble the conflict definitions seen above in this paper. For example, the British Columbia *Police (Discipline) Regulation* identify as a corrupt practice a situation where a member:

- b) places himself under a pecuniary or other obligation to any person in such a manner

- as might affect the proper performance of his duties as a member of the police force,
or
c) improperly uses his position as a member of the police force for private advantage.³⁰⁰

Similarly, in an Ontario case described above, an officer who used CPIC information to further his own outside business was originally charged with corrupt practice, in that he improperly used his position for private advantage.³⁰¹ In that case, the charge was reduced to avoid the element of corruption, which was not apparently thought to be borne out on the facts.

On the other hand, an OPP case which came to our attention involved a conviction for accepting a secret commission. An officer had accepted a cellular telephone and free repairs to his automobile from a tow truck company in return for directing service calls to that company. There, the element of corruption was clear. Some commentators also use the word much more loosely, referring to corruption when they talk about free coffee or meals and the favours expected by the donors. Whatever the label applied, the concern is for the impartiality of police in the execution of their duties.

7.4 Confidential Information

An individual who makes use of confidential information, not available to the general public, to advance a personal or private interest is involved in a conflict of interest.³⁰² Whether the information is used for personal benefit or to benefit another, the employee is not acting in an impartial manner.

The duty of confidentiality arising from the employment relationship requires that employees not use confidential information learned in the course of employment to benefit themselves or to harm the interest of the employer.³⁰³ For example, in *Laverty v. Cooper Plating*³⁰⁴ a potential conflict of interest occurred because the sales manager had full knowledge of her employer's products, costs, pricing, customer accounts and other details that would be helpful to her common law husband's business which was in direct competition with her employer.

Algoma's Code of Ethics states:

Employees shall not use for their own financial gain, or disclose for the use of others, inside information obtained as a result of their employment with the corporation.³⁰⁵

The "insider information" provisions in the public sector codes are to the same effect. Manitoba's *Conflict of Interest Act* states:

No member or minister shall use, for personal gain or the gain of any other person, information which is not available to the public and which the member or minister acquires in the performance of his official powers, duties and functions.³⁰⁶

A case in which an employee of Revenue Canada used information obtained in the course of his

official duties to assist his personal investment decisions resulted in discharge.³⁰⁷

It is also universally held to be a disciplinary offence for police officers improperly to disclose confidential information. Confidentiality is often addressed in oaths of office as well as in codes of discipline. For example, the Oath of Office for police officers in Alberta states:

... and that I will diligently, faithfully and to the best of my ability execute according to law the office _____ of and will not, except in the discharge of my duties, disclose to any person any matter or evidence that may come to my notice through my tenure in this office, so help me God.³⁰⁸

The Oath of Secrecy for the RCMP states:

I, solemnly swear that I will not disclose or make known to any person not legally entitled thereto any knowledge or information obtained by me in the course of my employment with the Royal Canadian Mounted Police.³⁰⁹

The various police codes of conduct are similar in intent to those of the private and public sectors. This is made clearest by the code of discipline for the Sûreté du Québec which identifies as a breach of discipline, situations where an officer is found to be:

d) using for personal ends, or for the purpose of obtaining a benefit or a profit, information obtained while performing his duties or as a result of his position in the Police Force.³¹⁰

The RCMP Administration Manual is more specific in orientation. A member cannot use confidential information: to endorse or support a person or organization;³¹¹ to profit from a private business transaction;³¹² to trade in securities;³¹³ or, without approval, to provide confidential information to the public.³¹⁴ The conflict of interest guidelines for the RCMP also deal with confidential information in the customary manner, stating:

Public servants should exercise care in the management of their private affairs so as not to benefit, or appear to benefit, from the use of information acquired during the course of their official duties, which information is not generally available to the public.³¹⁵

A breach of confidence can also lead to other forms of conflict of interest. For example, the Alberta *Police Service Regulation* defines a breach of confidence to consist of:

- ii) giving notice, directly or indirectly, to any person against whom any warrant or summons has been or is about to be issued, except in the lawful execution of the warrant or service of the summons.
- v) signing or circulating a petition or statement in respect of a matter concerning

the police service, except through the proper official channel or correspondence or established grievance procedure;³¹⁶

In addition, the use of confidential information can also give rise to concerns regarding the post-employment use of that information, as is further discussed below.

7.5 Preferential Treatment

Given the discretionary nature of the policing function, preferential treatment is of central concern to police managers. An obvious example of a conflict of interest situation arises where an officer is, or appears to be, partial to certain individuals. However, regulatory provisions, even in public codes, are not common. The Conflict of Interest and Post-Employment Code for Public Office Holders deals with the avoidance of preferential treatment:

A... public office holder shall not accord preferential treatment in relation to any official matter to family members or friends or to organizations in which they, family members or friends have an interest.³¹⁷

Family relationships tend to be a major problem area in the public sector. Examples abound: A CPIC employee assisted his wife in processing her UIC application;³¹⁸ a Supply & Services employee tampered with a bidding process so as to benefit family members;³¹⁹ a Revenue Canada employee put her son in a privileged position by giving him the inside story on a contract to service the department's computers.³²⁰ The Alberta Code of Conduct and Ethics for the Public Service deals specifically with relatives:

Employees who exercise a regulatory, inspectional, or other discretionary control over others shall, wherever possible, disqualify themselves from dealing with relatives, including parents, parents-in-law, brothers and sisters, and grandparents, with respect to those functions.³²¹

The Alberta Government Personnel Manual - Management Employee³²² further describes how such a conflict of interest should be resolved. If substitution is not possible, an employee immediately should make the supervisor aware of the predicament.

We were told of a problem of disqualification which arose in one police department where, on two occasions, separate officers were involved in the investigation of relatives. In one case, the officer disqualified himself. However, in the other, the officer felt that he could maintain his impartiality and proceeded with the investigation. No official action seems to have been taken or even contemplated.

Relatives are not the only possible recipient of preferential treatment; friends are also a source of concern. A Metro Toronto officer is currently under investigation on an allegation that he used police surveillance to conduct a "private investigation" as a favour to a friend.³²³

For the most part, Canadian police services have not directly addressed preferential treatment as a problem. Members of the Winnipeg Police Department, being subject to the City of Winnipeg Code of Ethics for Employees, are directed to "not grant any special consideration, treatment, or advantage to any citizen beyond that which is available to all..."³²⁴ However, most police departments would have to handle such situations under the general conflict of interest provision - i.e. directives to avoid situations which could affect one's ability to act objectively.³²⁵

Nevertheless, as seen above, many police discipline codes treat as a culpable breach of confidence the narrow issue of directly or indirectly informing a person for whom a warrant has been issued.³²⁶ In one old case, a municipal officer was dismissed for breach of confidence, for informing a citizen that he was the object of a stake-out being conducted by detectives.³²⁷

The Montreal Urban Community code of discipline which was in force previous to the current Code of Ethics and Discipline of the MUC, had such a narrow provision.³²⁸ The new Code includes a broad provision which force managers anticipate will encompass preferential treatment:

Police officers must at all times conduct themselves with dignity and avoid any behaviour likely to make them lose the confidence and the consideration that their duties require or to compromise the effectiveness of the service.³²⁹

The RCMP conflict of interest guidelines deal directly with the issue of preferential treatment. Section 8 states:

Public servants should not accord, in the performance of their official duties, preferential treatment to relatives or friends or to organizations in which they or their relatives or friends have an interest.³³⁰

The emphasis in the provision on organizations, as well as relatives and friends, leads to a broader consideration of associations as a form of conflict of interest.

The opposite of preferential treatment has also caused some problems. Discriminatory enforcement of the law against certain individuals or groups is perhaps even more destructive of public trust in police forces, particularly among those affected, and particularly where the discrimination is on grounds generally accepted as inadmissible, such as race, colour, sex or religion,

to name only a few. Detailed discussion of such issues is beyond the scope of this paper, but recent events involving the Winnipeg police force provided voluminous material for further study.³³¹

7.6 Associations

The RCMP takes a broad approach to associations which give rise to conflicts of interest. The Manual states that a member shall not:

become a member of any organization which, by its nature, may influence constrain the impartial exercise of his/her duty;³³²

Police officers can be members of many different social, professional or community groups or organizations. Stepping back further, they can also be members of different ethnic, religious or racial groups, or may have roots in a particular culture. How do these various associations affect the manner in which officers execute their duties, and how can such conflicts be regulated? The Calgary Police Service requires their officers to:

be aware that one's personal values, beliefs, and attitudes may influence one's activities and thoughts, and integrate that awareness into all attempts to be accurate and impartial.³³³

The issue remains one of remoteness of the privately held interest, and each situation must be dealt with on its own facts.

Police forces also have dealt with the question of associations in a more specific fashion. The higher standard of conduct expected of police officers has led to prohibitions on the association of members with known criminals. For example, the *Regulation Respecting the Code of Ethics and Discipline of Members of the Sûreté du Québec*,³³⁴ establishes a breach of discipline for a member to be:

consorting or fraternizing without a satisfactory reason with persons he knows to have a criminal reputation.

The Metropolitan Toronto Police Department's regulations make clear the basis of this prohibition:³³⁵

A Member shall not live with or associate with any person or persons through which association he is likely to bring discredit on the reputation of the Force or create doubt as to his ability to fulfill the conditions of his oath of office.

According to one arbitrator, such a relationship:

... where it places in doubt the integrity, honesty or moral character of the police officer, may weaken his effectiveness, cause embarrassment to the police force of which he is a member, and may as such be quite incompatible with his position.³³⁶

While such provisions often have the police image as a primary concern, the underlying motivation appears to be to avoid potential or apparent conflicts of interest. One case involving a conviction of discreditable conduct for a member's association with a criminal, revolved around the issue of whether the friend was known to be a criminal. The prosecution was required to show both that the individual was a criminal, and that his reputation as such was known in the community. The conviction was quashed because of the lack of such evidence.³³⁷ Another case involved a member convicted of discreditable conduct for cohabitating with the wife of an accused who stood on trial on charges laid by the officer. This charge was sustained, because a reasonable person could have concluded that discredit to the force was likely to have resulted from the conduct of the officer.³³⁸

It will be obvious that any regulation of the associations and relationships of a police officer have significant implications for the officer's liberty and privacy. In some circumstances, where such issues attain public importance, important trade-offs may have to be made, for example as where dress or grooming requirements which clearly identify a person with a particular religion conflict with dress regulations of a police force. The issues involved here, while also fascinating, are beyond the scope of this paper.

7.7 Public Criticism

An issue closely related to the disclosure of confidential information, discussed above, is that of public criticism by a police officer directed at the force. Often the disclosure of confidential information, without further comment, may be the most telling criticism possible, especially where the confidential information reveals wrongdoing. The usual prohibition involves:

signing or circulating a petition or statement in respect of a matter concerning the police force, except through the proper official channel of correspondence or established grievance procedure or in the bona fide performance of the member's duties...³³⁹

The RCMP similarly directs members not to:

sign a petition to any branch of the Federal or provincial government on any matter which is related to or in conflict with the internal administration operations or objectives of the RCMP;³⁴⁰

Cases involving criticism belong to the broad category of the duty of fidelity.³⁴¹ The obligation of loyalty owed to an employer disentitles employees from publicly criticizing their employer. To do so could place their employer's reputation in danger. To constitute a conflict of

interest, the criticism would have to be of such a character that the employer could no longer trust the officer to fulfill his or her duties impartially, or affect or appear to affect the impartiality of the officer on the force in the public.

In some cases, public criticism is privileged. Dickson, C.J.C., in *Fraser v. PSSRB* stated that it:

... would be appropriate if, for example, the government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability.³⁴²

In *Clough v. Revenue Canada*, an employee of Revenue Canada criticized the proposed free trade agreement. The arbitrator determined that his activities, "did not adversely impact on his ability to effectively perform his duties or on the public perception of that ability"³⁴³ At least since the *Charter of Rights and Freedoms* came into effect, blanket prohibitions are considered inappropriate. Individual rights of expression must be balanced against the rights of the public to have an impartial police force.

The RCMP External Review Committee's discussion paper on off-duty conduct³⁴⁴ relates a case in which an officer received an informal verbal reprimand for writing a letter criticizing a commission investigating his police force. The officer was required to write a second letter to the newspaper explaining that he had not written the first letter as a member of the police force. The Calgary Police Administration Manual attempts to avoid this problem by requiring that members:

when making a statement, or when involved in public activities, clarify whether one is speaking as a private citizen, a member of a specific group or organization, or as a member of the Police Service.³⁴⁵

It is impossible to assess whether such a disclaimer would be effective, particularly if the speaker is known to be a police officer, and the statement relies on expertise in or knowledge of police issues.

One possible exception from any restriction on public criticism is "whistleblowing", the disclosure of wrongdoing. Such a disclosure may involve the unauthorized release of confidential information, or public criticism of the police force, or both. While this issue has provoked considerable interest recently, mostly in the United States but also in this country,³⁴⁶ it is also beyond the scope of this paper.

Chapter VIII

POST-EMPLOYMENT CONSIDERATIONS

A number of conflict of interest codes, particularly those involving legislators or their political and executive staffs, also deal with the issue of post-employment situations giving rise to a possible conflict. Conflicts between the interests of a present employer and a possible or actual future employer may arise in several ways.

First, it may be a concern that the possibility of future employment will affect the performance of present employment. Employees may use the authority of their present positions to assist in securing future employment, or employees may be less than diligent in carrying out their duties against a potential future employer. On the other hand, once the new employment has commenced, there will be concerns as to whether the employee is using confidential information, contacts or influence gained from the previous employment in an improper way. There will always be an appearance of conflict where the new employment involves any interaction whatsoever with the old employment, since perceptions of privileged access and special treatment will arise.

The RCMP is alone among Canadian police services in addressing post-employment concerns.³⁴⁷ The method of dealing with post-employment concerns is to reiterate the familiar principle that:

Current and former holders of public office must ensure by their actions that the objectivity and impartiality of government service are not cast in doubt and that the people of Canada are given no cause to believe that preferential treatment is being or will be unduly accorded to any person or organization.³⁴⁸

In addition, the common prohibition utilized in post-employment regulations involves some form of post-employment restrictive covenant. It is usually in the form of a contract in the private sector. In the public sector, the usual vehicle is a legislated provision such as section 18 of the *Ontario Act Respecting Conflicts of Interest of Members of the Assembly and the Executive Council*.³⁴⁹

The Federal Conflict of Interest and Post-Employment Code for Public Office Holders³⁵⁰ also applies to commissioned officers of the RCMP, and other members of the Force who are designated as having duties and responsibilities that raise post-employment concerns. Such individuals are required to notify the designated official, the "ethics commissioner" for the Force, of all firm offers of outside employment, and of the acceptance of any such offer. They are also required, before leaving public office, not to allow themselves to be influenced by any plans or offers of future employment.

After leaving office, persons affected by these rules are prohibited from being involved, on behalf of the new employer, in any ongoing transaction or issue in which they were involved on behalf of the government prior to termination of employment, where that transaction would result in the conferring of a benefit not for general application or of a purely commercial or private nature. There is also a one-year "cooling-off period", subject to reduction in certain circumstances, during which former government employees are restricted from accepting an appointment as a director or

employee of an entity with which they had significant official dealings, making representations on behalf of anyone to a department with which they had significant official dealings, or giving counsel for commercial purposes concerning the programs or policies of the department where they were employed or with which they had a direct and substantial relationship, during the period of one year prior to termination of employment.

Obviously, the considerations which lead to restrictions of this kind will not apply to most police officers. There is, moreover, considerable debate about the desirability of such restrictions on subsequent employment, and the way in which such matters should be handled. The enforcement of such restrictions is also problematic, unless it can be incorporated into a restrictive covenant in a contract of employment, or made into a statutory offence, since the authority arising from the employment relationship ceases upon termination.³⁵¹

Chapter IX

CONCLUSION

As with any interesting research project, this study has turned up considerably more material than it has been possible to set out in any detail in the space available here. We have attempted to identify, throughout this paper, areas beyond its scope which are of interest, and which in some cases may themselves be appropriate subjects for further research.

On the central issues before us, conflict of interest and secondary employment, we have attempted to identify a trend toward more liberalization of the traditional rules applicable in police forces. This trend follows developments in both the private sector and the public sector, and may be also at least partly influenced by the increasing trend toward the philosophy of community policing. As police officers become more and more involved in the community, secondary employment becomes more justified as a way of participating in that community's economy. Similarly, opportunities for political activity, for forming relationships and associations, and for potential conflicts to arise in other ways, will all increase.

The traditional model for controlling such matters, a rigid set of prohibitions enforced through the discipline system, has the advantage of relatively low enforcement costs. The rules serve as a mandatory standard of behaviour, and information which reaches police management about breaches of the rules, whether that information comes from fellow officers, from internal affairs investigations, from public complaints, or from other sources, can lead to a relatively straightforward invocation of the discipline system to punish the breach.

While enforcement costs are very low, however, the social and personal costs may be very high. We have attempted to highlight throughout how restrictions can affect such individual interests as liberty, involvement in the community, privacy and family relationships. These costs must be weighed against the bureaucratic interests of simple administration of a code of prohibitions.

On the other hand, as police forces move toward a more sophisticated ethical code, and the interactive and responsive compliance structures which we have described above, the costs of enforcement of that code are significantly increased. Disclosure systems, for example, require a secretariat, standardized procedures, and a secure file-keeping system to ensure that access to sensitive personal data is strictly limited. An ethics commissioner or commission requires further resources, including the time required to deal with individuals on a case-by-case basis. In addition to this, the enforcement costs in the discipline structure are probably not significantly reduced, and may even be increased, since it will continue to be necessary to ensure that required standards of ethical conduct are met. When those standards are individualized, their enforcement may prove even more difficult.

Developing these new structures, making them work, and keeping their costs within bounds are important challenges for police management, just as they are for management in the private and public sectors. The goal to be attained, however, is a police community in which ethical behaviour is a part of the culture, voluntarily pursued and sensitively understood by police officers and police managers alike.

ENDNOTES

1. Canada, Treasury Board, Conflict of Interest and Post-Employment Code for Public Office Holders. (Ottawa: Minister of Supply & Services, 1985).
2. This chain reaction was first identified by K. Kernaghan in 1975, Ethical Conduct of Government Employees (Toronto: Institute of Public Administration, 1975) at 2. More recently, the burgeoning private and public sector interest in ethics - in terms of personal ethics, codes of ethics and ethics education, - was identified by G. Thomson, "Personal morality in a professional context" (1991) 34(1) Can. Public Adm. 21.
3. S.J. Bonczek, "Ethics: Challenge of the 1990's" (July 1990) 72 Public Management 17.
4. Ethidex Code Data Base (Toronto: Centre for Corporate Social Performance & Ethics, 1990) Cominco, s.7.2.

See also the Ethics Tests set out in the Basic Constable Course - Police Ethics (Toronto: Ministry of the Solicitor General, 1989) at 5. The Ethics Tests are a series of self-administered questions, which allow police officers to scrutinize their conduct. For example: would I be at all ill-at-ease if this issue suddenly appeared as a newsworthy concern printed in a major daily publication?; would this be handled the same way by persons of integrity I most hold in high regard?

Many of the citations to corporate codes of ethics are taken directly from the Ethidex Code Data Base, and refer to the version of the code included there. The data base analyzes codes according to a stakeholder management model, and the sections are renumbered in accordance with that structure. Thus section references are to the data base, and not the original code. Where a citation is to an original code, the data is included where possible.

For an analysis of the stakeholder management model utilized in the Ethidex Data Base see: M. Clarkson & M. Deck, Analysing and Evaluating Codes: The Stakeholder Management Model, presented at the proceedings of the conference "How to Institute Successful Ethics Programs in Organizations" Wright State University, May 8-10, 1991.

5. "Police Ethics" (Jan. 1991) 58 The Police Chief 27.
6. Conflict of Interest (Victoria: B.C. Police Commission, 1988) at 6.
7. Kernaghan, *supra*, note 2 at 13.
8. General Company Procedures - Conflict of Interest. (Streetsville, Ontario: Du Pont Canada Inc. 1982) 60-1.
9. Bill C-46, *Members of the Senate and House of Commons Conflict of Interests Act*, 2d Sess., 34th Pad., 1989, cl.2(2).
10. *Regulation Respecting the Code of Ethics and Discipline of Members of the Sûreté du*

Québec, R.Q. 1987, c. P-13, s. 17. Note that the Code of ethics of Quebec police officers, O.C. 920-90 (1990), 1226.0.11 1760, "replaces the provisions concerning police ethics" in respect of all Quebec police forces, s.13; other provisions are still in effect.

11. S. Williams, Conflict of Interest (London: Gower Publishing, 1985) at 6.
12. Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens, Commissioner The Honourable W.D. Parker (Ottawa: Minister of Supply and Services, 1987).
13. *Ibid*, at 29.
14. *Ibid*, at 32.
15. J.P. Kingsley, "Conflict of Interest: A Modern Antidote" (1986) 29(4) Canadian Public Administration 585 at 591.
16. Parliament, Conflict of Interest Rules for Federal Legislators (Ottawa: Minister of Supply and Services, 1989) at 2.
17. *Ibid*.
18. Kingsley, *supra*, note 15.
19. Task Force on Ethical Conduct In the Public Sector, The Honourable Michael Starr and Mitchell Sharp (Ottawa; Supply and Services, 1984) quoting from a 1969 study prepared for the Privy Council by J. Williams, at 83.
20. *Re Van Der Linden and the Crown in Right of Ontario* (1981), 28 L.A.C. (2d) 352 at 356 (Swinton).
21. *Johnstone and Treasury Board* (Revenue Canada) (27 Jan 1987) P.S.S.R.B. File No.: 166-2-16279.
22. *Re L'Abbe and Corp. of Blind River* (1904), 7 O.L.R. 230 at 233 (C.A.).
23. *Elliot v. City of St. Catharines* (1908), 18 O.L.R. 57 at 61 (C.A.).
24. Ontario, Report on Ministerial Compliance with the Conflict of Interest Guidelines and Recommendations with Respect to Those Guidelines, Aird Report (Toronto: Queen's Printer, 1986) at 9. See also, Standing Committee on the Legislative Assembly. Report on the Report on Ministerial Compliance with the Conflict of Interest Guidelines and Recommendations with Respect to Those Guidelines (Toronto: Queen's Printer, 1986) at 2.

25. Privy Council, Green Paper on Members of Parliament and Conflict of Interest, The Honourable Allan MacEachen (Ottawa: Minister of Supply and Services, 1973).
26. *Ibid*, at 1.
27. Williams, *supra*, note 11.
28. Starr & Sharp, *supra*, note 19 at 22.
29. S.O. 1983, c.8, s.2. Extensive revisions to this legislation have recently been recommended. See Ontario, Municipal Conflict of Interest Review (Toronto: Queen's Printer, 1991).
30. *Re Evans and Holt* (1982), 141 D.L.R. (3d) 178 (Alta C.A.) at 186.
31. See *Re Russell and Toney* (1982), 137 D.L.R. (3d) 202 (Alta C.A.); and *Re McCaghren and Lindsay* (1983), 144 D.L.R. (3d) 503 (Alta C.A.).
32. *Re McCaghren*, *ibid*, at 510.
33. Starr & Sharp, *supra*, note 19 at 27.
34. *Ibid*, at 26.
35. Ontario, Standing Committee on Public Accounts, Report on the Allegation of Conflict of Interest Concerning Elinor Caplan, MPP (Toronto: Queen's Printer, 1986) at 56.
36. *Supra*, note 21 at 11, citing E.B. Jolliffe in *McKendry and Treasury Board* (May 31, 1973, File No.: 166-2-674, unreported) at 139.
37. *Supra*, note 16 at 1.
38. R.N. Roberts, White House Ethics (N.Y.: Greenwood Press, 1988) at 4.
39. Williams, *supra*, note 11 at 17.
40. Starr & Sharp, *supra*, note 19 at 25.
41. *Supra*, note 4, IBM, s.3.2.
42. Williams, *supra*, note 11 at 17.
43. W.K. Muir, Jr., "Police and Politics" (Summer-Fall 1983) 2 Criminal Justice Ethics 3 at 4.
44. Inquiry Re Alleged Improper Relationships Between Personnel of the Ontario Provincial Police Force and Persons of Known Criminal Activity, The Honourable Justice Campbell

Grant (Toronto: Queen's Printer, 1970) at 99.

45. D.G. Smith, "Beyond Public Concern: New Free Speech Standards for Public Employees" (1990) 57 University of Chicago L.R. 249 at 252.
46. R.G. Vaughn, Conflict of Interest Regulation in the Federal Executive Branch (Lexington, Mass.: Heath & Company, 1979).
47. *Criminal Code*, R.S.C., 1985, c. C-46, as amended, ss. 119 - 125 inclusive.
48. *Pearce v. Foster* (1885), 17 Q.B. 536 at 539.
49. *Re Wosk's and Teamster Union, Local 351* (1983), 13 L.A.C. 64 at 70.
50. *Re Poll-Twine and Canadian Automobile Workers' Union, Local 1839* (1988), 35 L.A.C. (3d) 123 (Willes).
51. C.J. Snow & E.M. Abramson, "By the Light of Dual Employment: Standards for Employer Regulation of Moonlighting" (1980) 55 Indiana L.J. 581 at 584.
52. *Canadian Aero Service v. O'Malley* (1973) 40 D.L.R. (3d) 371 (S.C.C.) at 381.
53. S.M. Grant, "Sex, Lies and Legal Ethics" (1991) The Law Society Gazette 103 at 118.
54. *Supra*, note 50.
55. E.A. Aust, The Employment Contract (Cowansville, Que.: Editions Yvon Blais, 1988) at 114.
56. *W.J. Christie v. Greer* (1981), 121 D.L.R. (3d) 472 at 477 (Man. C.A.).
57. *Supra*, note 55.
58. *Re Lumber & Sawmill Workers' Union and KVP Co.* (1965), 16 L.A.C. 73 at 85 (Robinson).
59. *Re Woodward Stores and United Food & Commercial Workers Union* (1987), 28 L.A.C. (3d) 59 (Fraser) at 66; *Re Consumers Gas and International Chemical Workers Union* (1972), 1 L.A.C. (2d) 304 (Brown); *Re United Brewery Workers and Pepsi-Cola* (1967), 18 L.A. c.105 (Hanrahan) at 106.
60. *Supra*, note 49 at 73.
61. Creating a Workable Company Code of Ethics (Washington: Ethics Resource Center, 1990) at 1-2. While figures for Canada are unavailable, the increased activity in the private sector

is readily observable.

62. *Re Fraser and Public Service Staff Relations Board* (1985), 23 D.L.R. (3d) 122 at 133 (S.C.C.).
63. *Ibid.*
64. I. Greene, "Conflict of Interest and the Canadian Constitution: An Analysis of Conflict of Interest Rules for Canadian Cabinet Ministers" (1990) 23 Canadian Journal of Political Science 234.
65. *Ibid.*, at 237.
66. See for example, the Ontario *Public Service Act*, R.S.O. 1980, c. 418, ss. 11-16.
67. K. Kernaghan & J.W. Langford, The Responsible Public Servant (Halifax: The Institute of Public Administration of Canada, 1990) at 56.
68. See for example, the letter written by Prime Minister Trudeau to accompany his 1980 federal ministerial guidelines, quoted in Report Concerning Elinor Caplan, *supra*, note 35 at 431.
69. See the letter written by Prime Minister Mulroney to accompany his 1985 federal ministerial guidelines, quoted in Caplan, *supra*, note 35 at 433.
70. Aird Report, *supra*, note 24 at 2.
71. For a good review of conflict of interest legislation, see Office of ADRG, Conflict of Interest in Canada (Ottawa: Supply and Services, 1990).
72. For a good review of the various public sector conflict of interest codes, see, *ibid.*
73. For example, the *1843 Act For Better Securing the Independence of the Legislative Assembly of this Province*, Provincial Statute of Canada, Anno Regni Septime Victoriae, Third Session of the First Provincial Parliament of Canada, 1843, Derbyshire and Desbarats, Printers to the Queen's Most Excellent Majesty, Montreal, ensured that public servants were not able to sit as a member or to vote. Cullen, "The Challenge of Defining Conflict of Interest: Looking Back to See the Future" (1988/89) 19(3) Optimum 86 at 87.
74. R.S.C., 1985, c. P-1, ss. 14-16.
75. *Supra*, note 9.
76. *Supra*, note 1.

77. Canada, Treasury Board, Conflict of Interest and Post-Employment Code for the Public Service. (Ottawa: Minister of Supply & Services, 1985).
78. See for example, Bill 66, *Members' Conflict of Interest Act*, 4th Sess., 34th Leg. B.C., 1990; Bill 40, *Conflict of Interests Act*, 3rd Sess., 22nd Leg. Alta., 1991; *The Legislative Assembly and Executive Council Conflict of Interest Act*, S.M. 1983, c.27, C.C.S.M. c. L112; *Members' Conflict of Interest Act*, S.O. 1988, c.17; *An Act Respecting Conflict of Interest for Members of the House of Assembly and Members of the Executive Council*, R.S.N.S. 1989, c.86.
79. British Columbia, (Victoria: Ministry of Finance and Corporate Relations, 1983).
80. Alberta, (Edmonton: Public Service Commissioner's Office, 1987).
81. TPA 268 Rev. 11, 89.
82. *Municipal Conflict of Interest Act*, R.S.N.S. 1989, c.299.
83. *Municipal Conflict of Interest Act*, 1983, S.O. 1983, c.8.
84. *The Municipal Council Conflict of Interest Act*, S.M. 1983, c.44.
85. E.g., Code of Conduct (Burlington, Ont.: City of Burlington, 1988); Code of Ethics for Employees (Winnipeg: City of Winnipeg, 1982).
86. See for example, the Edmonton City Policy, A1203 1989.
87. M. Punch, Conduct Unbecoming (N.Y.: Tavistock Publications, 1985) at 3.
88. R. Williams, "Legal Aspects of Discipline by Administrators" (Chicago: Traffic Institute, Northwestern University, 1977) at 6, quoted in RCMP External Review Committee, Off-Duty Conduct, Discussion Paper 7 (Ottawa: Minister of Supply and Services Canada, 1991) at 54.
89. *Re St. Catharines Police Association and Board of Police Commissioners of the City of St Catharines* (1970), 15 D.L.R. (3rd) 532 (Ont. H.C.).
90. *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police* (1978), 88 D.L.R. (3d) 671 at 678, 23 N.R. 410 at 417 (S.C.C.).
91. *A.G. (N.S.W) v. Perpetual Trustee Co.* (1955), A.C. 457 at 489-490.
92. T. Jefferson, The Case Against Paramilitary Policing (Philadelphia: Open University Press, 1990) at 46.

93. H. Cohen, "Exploiting Police Authority" (1986) Criminal Justice Ethics 23 at 29.
94. T. Deakin, Police Professionalism (Springfield, Illinois: Charles C. Thomas, 1988).
95. Kingsley, *supra*, note 15.
96. Jefferson, *supra*, note 92.
97. *Ibid.*
98. E.g. Alberta *Police Act*, S.A. 1988, c. P-12.01.
99. E.g. *Alta. Reg.* 356/90.
100. See for example the Ontario *Police Services Act, 1990*, S.O. 1990, c.10, s.31(6) & (7), which authorizes the board to establish guidelines for the effective management of the police force.
101. See for examples. 18(1) of the Ontario *Police Services Act, 1990, ibid*, which states that OPP officers are appointed under the Public Service Act, R.S.O. 1980, c.418.
102. While the focus of this section is on codes to regulate employment, mention should also be made of the extensive body of codes in the area of professional responsibility. Accounting, advertising, architecture, engineering, medicine, and law are some of the many professions which utilize codes of ethics. For an extensive collection of American codes, see, R. Gorlin, Code of Professional Responsibility, 2nd ed. (Washington: Bureau of National Affairs, 1990).
103. John Madison, quoted in Roberts, *supra*, note 38 at 201.
104. G.W. Cordner, "Written Rules and Regulations" (July 1989) Law Enforcement Bulletin 17 at 19.
105. *Ibid.*
106. *Supra*, note 5 at 32.
107. E.J. Delattre, Character and Cops: Ethics in Policing (Washington: American Enterprise Institute for Public Policy Research, 1989) at 33.
108. Bonczek, *supra*, note 3 at 17.
109. Roberts, *supra*, note 38 at 4.
110. Starr & Sharp, *supra*, note 19 at 33.

111. *Ibid*, at 187.
112. C. Harris, "Structuring a Workable Business Code of Ethics" (1978) 30 University Of Florida L.R. 310 at 318.
113. Kernaghan, *supra*, note 2 at 5.
114. Quoted in Williams, *supra*, note 11 at 18.
115. *Supra*, note 61.
116. *Ibid*, at IV-16.
117. *Supra*, note 5 at 32.
118. Code of Conduct: Principles of Ethical Behaviour for the Corporation and its Employees (Montreal: Royal Bank of Canada, 1984) at 2.
119. *Supra*, note 61 at IV-2.
120. *Supra*, note 4 at s.5.2.
121. *Ibid*, at s.1.4.5.
122. *Ibid*, at s.3.2.
123. *Ibid*, Johnson & Johnson at 3.2.
124. *Ibid*, Ingersoll Rand at 3.2.2.
125. Code of Business Ethics (Montreal: Bell Canada, 1986) at 13.
126. *Supra*, note 4 at Loblaws, s.1.6.
127. *Supra*, note 4 at Pepsico, s.1.6.
128. Faculty of Management, University of Toronto, 1990.
129. S.Q. 1983, c.55.
130. 1984, 6-25-1.
131. *Supra*, note 78 at s.2(c).

132. *Supra*, note 9 at s.3(c).
133. *Supra*, note 78 at s.5.
134. *Supra*, note 78 at s.3(6).
135. *Ibid*, at s. 3 (4).
136. E.g., Ontario *Conflict of Interest Act*, 1988, *supra*, note 78 at s.12(2) (a).
137. Premier's Office, Ontario Conflict of Interest Guidelines (Toronto: Queen's Printer, 1990).
138. *Supra*, note 100.
139. R.S.C., 1985, c.R-10 as am. R.S.C., 1985, c.8 (2nd supp.) s.37(d).
140. *B.C. Reg.* 113/76.
141. *RCMP Act*, *supra*, note 139 at Schedule 1.
142. There is usually a provision in the regulations stating that discipline may flow from a breach of any provision of the *Act or Regulations*. i.e., *N.S. Reg.* 101 /88, s. 5(i)(a)(iv).

The *RCMP Regulations*, SOR 88/361, s. 50 states, as part of the Code of Conduct, that a member shall not "knowingly violate or otherwise breach any oath taken." Sections 41 and 43 of the *RCMP Act*, *supra*, note 139, set out the informal and formal disciplinary actions that can result from a contravention of the Code of Conduct.
143. Alberta is typical in allowing the Lieutenant Governor in Council to make regulations governing the discipline and performance of police officers, *Police Act*, *supra*, note 98, s.61(1)(f).
144. *N.S. Reg.* 101/88, s. 5(1)(a)(i).
145. *RCMP Reg.*, *supra*, note 142, at s.39(2)(a).
146. The relationship of conflict of interest to corruption will be discussed below.
147. *Supra*, note 10.
148. *Ibid*, at s.3.
149. *Ibid*, at s.8.

150. *Municipal Reg.* 106/90.
151. *Ibid*, at s.5(a).
152. *Ibid*, s.9.
153. *Ibid*, s.8(i).
154. *Ibid*, s.9.
155. *Ibid*, s.6(f).
156. *Supra*, note 10.
157. *Ibid*, s.16.
158. *Ibid*, s.17.
159. *Ibid*, s.18.
160. City of Winnipeg, Schedule A, By-Law No. 1, *Winnipeg Police Regulations* (1974).
161. *City of Winnipeg Act*, S.M. 1989-90, c.9.
162. *Supra*, note 85.
163. S.B.C. 1988, c.53.
164. 90-06-19, s.4.54(1)(e).
165. RCMP Administration Manual, Part 1.4, Rev. 1991, s.D.1.c.
166. *Ibid*, at Appendix 1.4.5. These guidelines are adapted from the Federal Code, *supra*, note 1. They will be replaced shortly by the Commissioner's Standing Orders which are currently being developed.
167. *Ibid*, s.I.1.b.2.
168. *Re Food Group and Retail, Wholesale & Department Store Union, Local 1065* (1987), 30 L.A.C. (3d) 250 at 254 (Stanley) at 254; *Canadian Imperial Bank of Commerce v. Boisvert* (1986), 13 C.C.E.L. 263 at 265 (Fed. C.A.); *Pearce v. Foster*, *supra*, note 48 at 539.
169. *CIBC, Ibid; Re Wosk's*, *supra*, note 49.

170. *Helbig v. Oxford* (1985), 9 O.A.C. 145 at 151; *Edwards v. Lawson Paper Converters* (1984), 5 C.C.E.L. 99 at 105 (Ont. S.C.).
171. *Pearce*, *supra*, note 48.
172. RCMP External Review Committee, Discussion Paper 6 (Ottawa: Minister of Supply and Services, 1990) at 3.
173. For example, a breach of the Code of Conduct for the City of Burlington, *supra*, note 85 at s. 9, is grounds for dismissal (in a serious case).
174. *Ross and Niagara* (1979), 0. P.R. 434 at 438.
175. Circular JO-61-15 (Feb 1988) Royal Bank at 1.
176. *Supra*, note 4 at s.1.6.
177. *Supra*, note 99 at s.6(1).
178. *Supra*, note 139 at s.41.
179. See for example, the Ontario *Police Services Act* 1990, *supra*, note 100 at s.61(1).
180. *Re McKendry and Treasury Board* (May 31, 1973) P.S.S.R.B. File No.: 166-2-674, unreported, discussed in *Re Regional Municipality of Hamilton-Wentworth and Canadian Union of Public Employees* (1978), 18 L.A.C. (2d) 46 at 54 (Kennedy).
181. *Ibid*, at 55.
182. *Re Tourigny and Treasury Board* (31 July 1987) P.S.S.R.B. File No.: 166-2-16434; *Re Wosk's*, *supra*, note 49 at 73.
183. *Re Woodward*, *supra*, note 59 at 63; *Re Wainwright School Division and CUPE* (1984), 15 L.A.C. (3d) 349 (Laux).
184. *Durand v. Quaker Oats Co.* (1988) 20 C.C.E.L. 223 at 234 (B.C.S.C.).
185. *Threader and Spinks v. Canada (Treasury Board)* (1986), 68 N.R. 143 at 151 (Fed. C.A.); *Re Van Der Linden and The Crown in Right of Ontario (Min. of Ind. and Tourism)*(1981), 28 L.A.C. (2d) 352 (Swinton).
186. See for example, the Conflict of Interest Acts for Ontario and Alberta, *supra*, note 78.
187. *Supra*, note 78 at s.23.

188. *Supra*, note 25 at 2.
189. Starr & Sharp, *supra*, note 19 at 63.
190. *Ibid*, at 20.
191. *Supra*, note 16 at 3.
192. *Supra*, note 12 at 353.
193. *Supra*, note 1 at s.46(4).
194. *Supra*, note 24 at 5.
195. Starr & Sharp, *supra*, note 19 at 70.
196. J.G. Smith, "The Nature of Conflict of Interest" (1980) Pitblado Lectures 157.
197. *Re Canadian Fram and United Automobile Workers* (1973), 3 L.A.C. (2d) 94 (Hinnegan).
198. Manitoba, Report on Conflict of Interest of Municipal Councillors (Winnipeg: Law Reform Commission. 1981) at 34.
199. *Supra*, note 78.
200. *Ibid*, at s.2(2).
201. *Ibid*. The Act allows 30 days to provide the new information.
202. The Canada Mortgage and Housing Corporation Conflict of Interest - Standards of Conduct (Ottawa: Public Affairs Centre, CMCH, 1989) at 12, is typical in providing for the accumulation of conflict of interest files separately from personnel files. They are retained for seven years after the conflict has been resolved or no longer exists. After that, records are destroyed.
203. *Supra*, note 4 at 3.2.
204. *Ibid*, Horne & Pitfield and Loblaws, s.1.4.5.
205. Employment and Immigration Canada Code of Conduct (Hull: CEIC, 1980) at 14.
206. S.N.B. 1978, c. C-16.1.
207. A good example is the federal office of Assistant Deputy Registrar General (ADRG) which

was originally created in 1974 to process the compliance documentation of those covered by Ministerial conflict of interest guidelines. The ADRG is currently charged with the administration and application of the federal Code as well as responsibility to prepare educational material about conflict of interest. A similar approach has been recommended for municipal conflict of interest enforcement in Ontario: see Municipal Conflict of Interest Review, *supra*, note 29 at 59-71.

208. *Supra*, note 9 at s.10(4).
209. Mary Janigan, "Avoiding Future Conflicts" (March 7 1988) 101 (11) Maclean's 12 at 14, quoting the Honourable Mitchell Sharp.
210. Bill 40, *supra*, note 78 at s.20(2).
211. *Supra*, note 137 at s.15(b).
212. *Supra*, note 86 at s.3.02(b).
213. *Supra*, note 1 at s.17.
214. *Supra*, note 85 at s.9.
215. *Ibid*, Cominco, s.7.2.
216. *Ibid*, Johnson & Johnson, s.1.6.
217. Ontario *Conflict of Interest Act*, 1988, *supra*, note 78 at s.15(1).
218. Bill 40, *supra*, note 78 at s.22(1).
219. This finding reinforces that made in the RCMP External Review Committee's discussion paper on off-duty conduct. Many of the kinds of off-duty conduct which can be subject to discipline can also be addressed as conflicts of interest. For example, the paper discusses secondary employment, political activity, confidential information, public criticism, abuse of authority and improper use of police equipment in, RCMP External Review Committee, Off-Duty Conduct, Discussion Paper 7 (Ottawa: Minister of Supply and Services, Canada, 1991).
220. The expression "conflict of commitments originated in Policies Relating to Research and Other Professional Activities Within and Outside the University (Cambridge: Harvard University, 1987).
221. *Supra*, note 4 at s.1.4.5.

222. Halifax Police Department Administration Manual 90-03-19 Chap. A-9, s.15.2.
223. Nose and O.P.P. (Mar. 1990), O.P.R. 867 at 868.
224. Brown & Beatty, Canadian Labour Arbitration, 3d ed. (Toronto: Canada Law Book Inc., 1991) 7:301 0 at p. 350.
225. (1988), 2 L.A.C. (4th) 48 (Davis).
226. Secondary employment includes both extra-duty and off-duty employment. The International Association of Chiefs of Police Model Policy on secondary employment, (Arlington, Virginia: IACP/BJA National Law Enforcement Policy Center, 1990) defines:

extra-duty employment as -

Any employment that is conditioned on the actual or potential use of law enforcement powers by the police officer employee.

off-duty employment as -

Any employment that will not require the use, or potential use of law enforcement powers by the off-duty employee.

The Nova Scotia *Police Act*, R.S.N.S. 1989, c.348 is the only Police Act to deal with the distinction between extra-duty and off-duty employment. Each municipal board is required to establish written policies for each (s.21 (1) & (2)).

The usual procedure for engaging police officers for such special duty across Canada is for employers to make a written request to the force. If the request is approved, officers are assigned at their regular hourly wage. Various systems are used to ensure a fair distribution of the work to all interested officers.

In terms of conflict of interest, discussions with police forces suggests that extra-duty employment is not a problem because, in working for the private employer, the officers nevertheless perform their regular duties as police officers. The police officers of the Communauté urbaine de Montréal on the other hand, are only deployed to ensure public safety or in accordance with ordinary police requirements. The force avoids a close relation with private industry. It was suggested to us that the force could appear to be partial if it served a large private employer.

227. Snow, *supra*, note 51 at 606.
228. *Supra*, note 10 at s.22.

The Vancouver Police Department also prohibits secondary employment, requiring officers to devote their whole time to the Police Service. Vancouver Police Department Regulations

& Procedure Manual, s.13 "Terms of Service".

229. *Supra*, note 165 at s. c.6.g.

230. *Ibid*, s. c.6.h.

231. *Ibid*, s. c.6.h.3. and s. c.6.i.

232. *Supra*, note 222.

233. Edmonton Police Service Policy & Procedure Manual 1991, Part 11, Chap. G, s.6.

The Edmonton Police regulation discussed here involves extra employment. This is their way of describing off-duty secondary employment and is not to be confused with extra-duty employment - see *supra*, note 226, for a discussion of the difference between extra-duty and off-duty secondary employment.

234. *Supra*, note 160 at s.124(17)(b).

235. *Supra*, note 233.

236. *Supra*, note 164 at s. 4.63(1).

237. *Calgary Police Association et al. v. Calgary Police Commission and Chief of Police City of Calgary*, [1988] 2 W.W.R. 741 (C.A.).

238. *Supra*, note 100.

239. *Police Act Regulations*, R.R.O. 1980, c. 791, s.61.

In response to the obligation set forth in the regulations, the OPP established the Standing Committee on Secondary Employment to review all applications for off-duty employment. The Director, Professional Standards Branch first reviews or investigates the application, then forwards it to the members of the Standing Committee who also review it and make recommendations to the Commissioner who has final approval. This process was originally put in place to assist officers who sought the permission of the Chief under the *old Police Act* before becoming involved in secondary employment. Though s.49(1) removes this obligation, the OPP has retained this process and recommends that officers continue to make use of it.

240. *Nose, supra*, note 223.

241. A. Reiss, "Private Employment of Public Police" (Dec. 1988) National Institute of Justice at 6.

242. The operation of a tavern by a police officer historically has given rise to great concern. The Arbitrator in *Ville de Trois-Rivières et Association des policiers et pompiers de la ville de Trois Rivières*, Droit du travail express numéro 86T-532 (T.A.), concluded:

[TRANSLATION] It is particularly evident that an officer should never be identified with a bar; it goes to the credibility of the police service. - quoted in, *Sûreté du Québec et Association des Policiers Provinciaux du Québec*, (1991) T.A. 1025-G at 15.

243. *Welch and Metro Toronto Police* (Dec. 1986), O.P.R. 738. A charge of insubordination was substituted for the convicted charge of corrupt practice. It was decided that the stigma associated with corruption was too strong for these circumstances. No mention was made of this situation being a conflict of interest.
244. O.P.P. Police Orders, Part 1, s.251.1.
245. *Supra*, note 10, s.22.
246. *Supra*, note 222.
247. *Supra*, note 244 at s.250-1.
248. *Supra*, note 165 at s.c.6.h.2.
249. *Supra*, note 4, I.B.M. s.1.4.5.
250. Kernaghan, *supra*, note 2 at 16; Ontario, Discussion Paper on Political Activity Rights for Police Officers (Toronto: Ministry of Solicitor General, 1991).

- 251. Political activities can extend from voting in an election, being a member of a political party, working to support a political candidate or party, soliciting funds for a candidate, commenting publicly on political issues, or standing as a candidate for elected office.
- 252. (1987), 41 D.L.R. (4th) 1 (S.C.C.).
- 253. *Re Fraser and the A.G. of Nova Scotia* (1986), 30 D.L.R. (4th) 340 (N.S.S.C.).
- 254. Nova Scotia *Civil Service Act*, R.S.N.S. 1989, s.40(5).
- 255. *Ibid*, s.40(7).
- 256. *Supra*, note 66.
- 257. Ontario, The Extension of Political Activity Rights for Ontario Crown Employees (Discussion Paper) (Toronto: The Management Board of Cabinet, 1991).
- 258. *Ibid*, at 5.
- 259. *Supra*, note 100.
- 260. *Supra*, note 10.
- 261. Vancouver Police Department Regulations and Procedures Manual, s.13 "Terms of Service".
- 262. *Supra*, note 164 at Section 4.6, "Conditions of Employment".
- 263. *Supra*, note 160 at s.124(16).
- 264. *Supra*, note 161.
- 265. *RCMP Regulations*, *supra*, note 142 at s.57(2).
- 266. R.S.C., 1985, c. P-33.
- 267. (1988), 52 D.L.R. (4th) 241 (Fed. C.A.).
- 268. *Osborne v. Treasury Board*, (1991) 82 D.L.R. (4th) (S.C.C.) 321 at 340.
- 269. *Supra*, note 257 at 2.
- 270. Discussion Paper, *supra*, note 250.
- 271. E. Gallant, "Political Rights for Public Servants: A Federal Perspective" (1986) 29(4)

Canadian Public Administration 665.

- 272. For example, William Ker Muir, *supra*, note 43 at 4, offers arguments for and against the restriction of police officers' political activities. See also the Ontario Solicitor General's discussion paper on political activity rights for Ontario police for further arguments, *supra*, note 250.
- 273. Report of the Special Committee on the Review of Personnel Management and the Merit Principle, D'Avignon Committee (Ottawa: Minister of Supply & Services, 1979).
- 274. *Ibid*, at 171.
- 275. *Supra*, note 257.
- 276. (Toronto: Ministry of the Attorney General, 1986).
- 277. *Supra*, note 257 at 9.
- 278. *Supra*, note 276 at 282.
- 279. Discussion Paper, *supra*, note 250.
- 280. See Osborne, *supra*, note 268, in which the Supreme Court of Canada declared s.32(1)(a) (now s.33(1)(a) of the *Public Service Employment Act*) to be of no force or effect because, "The restrictions on freedom of expression in this case are over-inclusive and go beyond what is necessary to achieve the objective of an impartial and loyal civil service." p. 12,242.
- 281. *Supra*, note 100. The regulation as released did not specify a regulation number under the *Ontario Regulations*.
- 282. *Supra*, note 202 at 9.
- 283. A. Bouza, Police Administration (Toronto: Pergamon Press, 1978) at 221.
- 284. R. Kania, "Should we tell the police to say yes to gratuities" (Summ. 1988) 7 Crim. Just. Ethics 37.
- 285. *Supra*, note 4 at s.3.2.1.
- 286. *Supra*, note 4 at s.3.2.1.
- 287. *Supra*, note 1 at s.34(1).
- 288. *Supra*, note 78 at s.6.

- 289. *Supra*, note 78 at s.12(h).
- 290. *Supra*, note 78 at s.7(2)(b).
- 291. *Ibid*, at s.7(3).
- 292. *supra*, note 10 at s.9.
- 293. *supra*, note 261 at s.56.
- 294. *supra*, note 164 at s.4.56.
- 295. *Ibid*.
- 296. *Supra*, note 165 at c.1.h.1.
- 297. *Ibid*, at c.1.h.
- 298. *Ibid*, at c.1.h.7.
- 299. *Supra*, note 99 at s. 5(2)(c)(ii).
- 300. *B.C. Reg.* 330/75 at s.6.
- 301. *Supra*, note 243.
- 302. Kernaghan, *supra*, note 2 at 41.
- 303. Aust, *supra*, note 55 at 113.
- 304. (1987), 17 C.C.E.L. 44 (Ont. Dist. Ct.).
- 305. *Supra*, note 4 at s.2.3.3.
- 306. *Supra*, note 78 at s.16.
- 307. *Re Wilkes and Treasury Board* (2 March 1987) P.S.S.R.B. File No.: 166-2-16-170.
- 308. *Supra*, note 98 at Schedule 3.
- 309. *Supra*, note 139, Schedule.
- 310. *Supra*, note 10 at s.16.

- 311. *Supra*, note 165 at s.c.5.e.
- 312. *Ibid*, at c.5.f.
- 313. *Ibid*, at c.5.g.
- 314. *Ibid*, at c.8.a.
- 315. *Ibid*, Appendix 1.4.5., s.4.
- 316. *Supra*, note 99 at s.5(2).
- 317. *Supra*, note 1 at s.36(1).
- 318. *Perry and Treasury Board* (CEIC) (20 June 1988) P.S.S.R.B. File No.: 166-2-17340.
- 319. *Weber and Treasury Board (Supply & Services)* (8 Sept. 1986) P.S.S.R.B. File No.: 166-2-15616.
- 320. *Supra*, note 21.
- 321. *Supra*, note 79 at s.8.1.
- 322. "Administrative Instructions in Support of the Code of Conduct and Ethics" PMS-18-2, s.8.1.
- 323. K. Donovan, "Officer probed over 'private' surveillance" The Toronto Star (20 July 1991) A3.
- 324. *Supra*, note 85 at s. 2.
- 325. Calgary Police Services Administration Manual, *supra*, note 164 at s.4.54(1)(e).
- 326. Ontario Police Regulations, *Ont. Reg.* 791/80., s.1(e)(ii) of Schedule A.
- 327. *Lovegrove and Waterloo Police Force* (Nov. 1974), O.P.R. 182.
- 328. A.C. 1711-78, *Que. Gaz.* 1978.11.3343, s.7(d).
- 329. *Supra*, note 150 at s. 9.
- 330. *Supra*, note 165 at Appendix 1-4-5.
- 331. See, e.g., Manitoba. Report of the Aboriginal Justice Inquiry of Manitoba (Winnipeg: Queen's Printer, 1991): Report of the Commission of Inquiry into the Harvey I. Pollock, Q.C.

Case, Hon. E.N. Hughes, Q.C., Commissioner, Winnipeg, September 12, 1991.

- 332. *Supra*, note 165, at s. c.1.j.
- 333. *Supra*, note 164 at s. 4.54(1)(i).
- 334. *Supra*, note 10 at s. 8(f).
- 335. *Reg. 4.2.0.*, s.4.2.1.
- 336. *Re Ville De Granby and Fraternité des Policiers de Granby* (1981), 3 L.A.C. (3d) 443 (Frumkin) at 445.
- 337. *Pattison and O.P.P.* (Aug. 1984), O.P.R. 608.
- 338. *Johnson and Barrie Police Force* (Feb. 1985), O.P.R. 643.
- 339. *Supra*, note 144 at s.1(e)(iii).
- 340. *Supra*, note 165 at c.1.i.
- 341. *Re Canada Post and CUPW (Varma)* (1984), 19 L.A.C. (3d) 356 (Swan) at 357.
- 342. *Supra*, note 62 at 133.
- 343. *Re Clough and Treasury Board* (29 Nov. 1988) P.S.S.R.B. File No.: 161-2-511 at 24.
- 344. *Supra*, note 219 at 54.
- 345. *Supra*, note 164 at s. 4.54(1)(m).
- 346. Ontario Law Reform Commission Report on Political Activity, Public Comment and Disclosure by Crown Employees, *supra*, note 276 at pp. 63-70, 230-243, and 322-352; K.P. Swan, "Whistleblowing and National Security", in P. Hanks and J.D. McCamus, eds., National Security: Surveillance and Accountability in a Democratic Society (Cowansville: Blais, 1989).
- 347. *Supra*, note 165 at Appendix 1-4-6.
- 348. *Ibid*, at Section "A", 1.
- 349. *Supra*, note 78.
- 350. *Supra*, note 1, Part III.

351. For a recent discussion of such issues, see S. Kelman, "What's Wrong with the Revolving Door?", an unpublished paper presented to the Law and Economics Workshop and the Public Policy Workshop of the Faculty of Law, University of Toronto, October 4, 1991.

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