



Office of the Conflict
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Commissioner

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l'éthique

The Lynn Report

made under the
CONFLICT OF INTEREST ACT



June 26, 2014

Mary Dawson
Conflict of Interest and
Ethics Commissioner

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PREFACE

The *Conflict of Interest Act*, S.C. 2006, c.9, s.2 (Act) came into force on July 9, 2007.

An examination under the Act may be initiated at the request of a member of the Senate or House of Commons pursuant to subsection 44(1) of the Act or on the initiative of the Conflict of Interest and Ethics Commissioner pursuant to subsection 45(1).

When an examination is initiated under section 45 of the Act, the Commissioner is required, under subsection 45(3), to provide a report to the Prime Minister setting out the facts in question as well as the Commissioner's analysis and conclusions in relation to the examination, unless the examination is discontinued. Subsection 45(4) provides that, at the same time that a report is provided to the Prime Minister, a copy of the report is also to be provided to the current or former public office holder who is the subject of the report, and made available to the public.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
ALLEGATIONS	3
THE PROCESS	5
MR. LYNN’S POSITION	7
FINDINGS OF FACT	9
Mr. Lynn’s Outside Work in 2010 while at ECBC	10
Mr. Lynn’s Outside Work in 2012 while at ECBC	10
ANALYSIS AND CONCLUSIONS	13
Analysis	13
<i>Managing or operating a business or other commercial activity: paragraph 15(1)(b)</i>	<i>13</i>
<i>Serving as a paid consultant: paragraph 15(1)(e)</i>	<i>13</i>
Conclusion	15

EXECUTIVE SUMMARY

This report presents the findings of my examination under the *Conflict of Interest Act* (Act) of the conduct of Mr. John Lynn who was, from June 1, 2008 to May 27, 2014, a reporting public office holder as Chief Executive Officer of Enterprise Cape Breton Corporation (ECBC).

It was alleged that Mr. Lynn contravened paragraphs 15(1)(b) and 15(1)(e) of the Act, which prohibit reporting public office holders from managing or operating a business or serving as a paid consultant, respectively. These prohibitions apply whether or not there is a conflict of interest involved. They do not apply where the activities are part of a reporting public office holder's official duties and functions.

The evidence showed that Mr. Lynn performed work for a private company, which I have identified in my report only as "Company X" in order to protect business confidences, for several days in 2010 and 2012 while he was CEO of ECBC. He was paid for that work, some of it under the terms of a personal services agreement that he signed with the company in 2012. There was no evidence that Mr. Lynn's work for Company X was in any way related to his official functions at ECBC.

In order to determine whether Mr. Lynn contravened the relevant provisions of the Act, it was necessary to establish the nature of his outside work and determine whether it constituted either managing or operating a business or paid consultancy work.

Mr. Lynn operated his own management consulting business called Pragmatic Management Solutions before his appointment to ECBC. There was no evidence to suggest that Mr. Lynn did any work for Company X on behalf of Pragmatic Management Solutions after his appointment. The evidence showed that Mr. Lynn's work for Company X in 2010 and 2012 was carried out by him as an individual and not as a manager or operator of a business. Consequently, I found no contravention of paragraph 15(1)(b).

Based on Mr. Lynn's background as a management consultant and senior business executive in the private sector, the nature of the services provided by him to Company X, the terms of payment for his work, and the fact that he was acting as an independent contractor, I found that Mr. Lynn served as a paid consultant while CEO of ECBC and that he therefore contravened paragraph 15(1)(e) of the Act.





ALLEGATIONS

On March 21, 2013, I received a letter and accompanying documents from Mr. Paul LeBlanc, President of the Atlantic Canada Opportunities Agency (ACOA) and Chairman of the Board of Directors of Enterprise Cape Breton Corporation (ECBC). ECBC was at the time a Crown corporation reporting to Parliament through the Minister of ACOA. The documents indicated that Mr. John Lynn, Chief Executive Officer (CEO) of ECBC, worked as a paid consultant on a number of occasions between August 2010 and November 2012. As CEO of ECBC, Mr. Lynn was a reporting public office holder subject to the *Conflict of Interest Act* (Act) at that time.

Included among the documents was a signed personal services agreement dated September 28, 2012 between Mr. Lynn and Company X.¹ According to the terms of the agreement, Mr. Lynn agreed to act for Company X as its exclusive agent in connection with the sale of its business in return for either a commission on any sale or a per diem consulting fee. The documents Mr. LeBlanc sent me also included letters and emails in which Mr. Lynn offered advice to Company X, as well as copies of invoices, a cheque, expense receipts and other related documents and emails.

Under section 15 of the Act, a reporting public office holder is prohibited from engaging in a number of outside activities except as required in the exercise of his or her official powers, duties and functions. Paragraphs 15(1)(b) and (e) of the Act prohibit a reporting public office holder from managing or operating a business or serving as a paid consultant.

Based on the information before me at that time, I had reason to believe that Mr. Lynn may have contravened either paragraph 15(1)(b) of the Act by managing or operating a business or paragraph 15(1)(e) of the Act by serving as a paid consultant.

¹ The names of companies and their officials have been removed from this report to protect business confidences that are not in the public domain.





THE PROCESS

On April 5, 2013, I wrote to Mr. Lynn advising him that I was commencing an examination under subsection 45(1) of the *Conflict of Interest Act* (Act) and informing him that the relevant provisions were paragraphs 15(1)(b) and (e) of the Act. As a first step, I asked that Mr. Lynn respond to my concerns in writing by April 25, 2013. Mr. Lynn requested, and was granted, an extension until May 24, 2013.

On May 31, 2013, I received a response from Mr. Lynn dated May 24, 2013. Mr. Lynn's position was that he had not contravened the Act. His response included documents relating to work carried out for Company X at the same time as he was employed as Chief Executive Officer (CEO) at the Enterprise Cape Breton Corporation (ECBC).

While the evidence before me appeared to be straightforward, the conduct of my investigation was complicated by a series of delays relating to Mr. Lynn's participation in the examination process.

During the fall of 2013 and early winter 2014, my Office attempted unsuccessfully to arrange an interview with Mr. Lynn. During this period, my Office exchanged phone messages with Mr. Lynn and subsequently exchanged both emails and letters with Mr. Lynn's counsel, Mr. Lloyd Berliner, in order to try to arrange the interview.

Mr. Lynn and his counsel advised the Office that Mr. Lynn did not want to be interviewed until he had received documents from the Atlantic Canada Opportunities Agency (ACOA) that he had requested under the Access to Information and Privacy (ATIP) process. To address that concern, my Office sent Mr. Berliner copies of the documents I had received from the president of ACOA related to this examination, and noted that Mr. Lynn had already provided us with many of them. Again, my Office requested that Mr. Lynn make himself available for an interview.

Mr. Berliner, in response, raised allegations about the way that the documents that were sent to me had been obtained. He requested that my examination not proceed until those allegations were resolved. My Office wrote to Mr. Berliner to advise him that those allegations did not change the fact that I had received information that gave me reason to believe that Mr. Lynn had contravened the Act, that my examination was separate from and independent of any other claims Mr. Lynn might have, and that I was proceeding with my examination.

My Office also sent Mr. Berliner a list of questions on April 11, 2014 for Mr. Lynn's written response and invited Mr. Berliner to make submissions on behalf of Mr. Lynn in respect of his



position that he had not contravened the Act. Mr. Lynn responded to the questions through Mr. Berliner on May 29, 2014.

Mr. Lynn and his counsel were given the opportunity to comment on a draft of the factual parts of this report before it was finalized, specifically Allegations, The Process, Mr. Lynn's Position and Findings of Fact.



MR. LYNN'S POSITION

In his May 24, 2013 response letter to me, Mr. John Lynn wrote that his position was that he did not contravene the *Conflict of Interest Act* (Act). This position was reiterated by his counsel, Mr. Lloyd Berliner, in subsequent correspondence with my Office.

In that same response letter, Mr. Lynn wrote that he had originally worked on the Company X file in 2007-2008, when he was the principal and operator of Pragmatic Management Solutions, his consulting business. He further wrote that this work pre-dated his appointment to Enterprise Cape Breton Corporation (ECBC).

Mr. Lynn wrote that he had been contacted by Mr. A, a shareholder in Company X, before his appointment to ECBC and was asked to consider helping Mr. A and the other shareholders at Company X to develop a leadership transition plan or exit strategy for their company. He wrote that during 2007-2008, he had discussed these matters with shareholders, but that at that time the shareholders had elected to maintain the status quo and were to get back to him when they were ready to proceed.

Mr. Lynn wrote that he subsequently received periodic calls from Mr. A about the company, but that that was the extent of their communications until 2012 when Mr. A called, asking him to identify options for the possible sale of Company X. Mr. Lynn added that it was this request that led him to work on the file in 2012 and that he believed that he had a responsibility to shareholders to close the file.

Mr. Lynn wrote that it had been agreed in principle, that he would receive a portion of the proceeds of any sale and that this was agreed upon before he took up his appointment at ECBC. He wrote that, since the sale did not go ahead, he did not in fact receive any such payment. Mr. Lynn's position is that the small amount of compensation he had received from Company X was to compensate him for his personal time, effort and out-of-pocket expenses incurred during his work for the company, taking into account his discussions with the shareholders dating back to 2007-2008.

Mr. Lynn wrote that the completion of the work for Company X was not on ECBC time nor did it interfere with the conduct of his responsibilities at ECBC. He maintained that it did not raise a conflict of interest with respect to his role at ECBC or to the mandate of ECBC.

Mr. Lynn's counsel, Mr. Berliner, raised allegations in December 2013 about the way that the documents sent to me by the president of the Atlantic Canada Opportunities Agency had been obtained. From December 2013 until February 2014, Mr. Berliner maintained the position



that my examination should not proceed until those allegations were resolved. In his most recent correspondence to my Office, dated May 29, 2014, Mr. Berliner wrote that the real issue remains the origin and manner in which the information sent to my Office was obtained.



FINDINGS OF FACT

Mr. John Lynn was Chief Executive Officer (CEO) of Enterprise Cape Breton Corporation (ECBC) from June 1, 2008 to May 27, 2014 and in that respect was a reporting public office holder subject to the *Conflict of Interest Act* (Act).

The purpose of this examination is to determine whether Mr. Lynn contravened paragraph 15(1)(b) or (e) of the Act by managing or operating a business or serving as a paid consultant while he was a reporting public office holder. These provisions apply whether or not a conflict of interest is involved.

In order to determine whether Mr. Lynn contravened these provisions of the Act, it was necessary to establish the nature of his outside work and determine whether it constituted either managing or operating a business or paid consultancy work.

Mr. Lynn's curriculum vitae, which was included with his May 24, 2013 response letter, indicates that, prior to his appointment as CEO of ECBC on June 1, 2008, he had many years of experience as a senior business executive in the private sector. For the three years immediately prior to his appointment at ECBC, Mr. Lynn operated his own management consulting business called Pragmatic Management Solutions.

In his response letter to me of May 24, 2013, Mr. Lynn wrote, as described in the previous section, that his work for Company X dated back to 2007-2008, when he operated Pragmatic Management Solutions. Mr. Lynn did not provide any evidence to substantiate his assertion that he had done work for Company X in 2007-2008 and I found no other evidence to support this during my examination.

Mr. B, President of Company X², spoke to my Office and responded to written questions. He indicated that he believed that Mr. Lynn first worked for Company X in October 2010, when Mr. Lynn made a presentation to, and provided advice to, company shareholders with respect to the sale of the company.

In any event, it is not necessary to determine whether Mr. Lynn worked for Company X in 2007-2008 or was paid for that work. I found convincing evidence that he did and was paid for work done for Company X in 2010 and 2012, during his tenure at ECBC. The amounts invoiced and paid for the work are set out later in this section.

² In October 2010, Mr. B was Controller of Company X.



Mr. Lynn's Outside Work in 2010 while at ECBC

The documentary evidence, described below, provided by the president of the Atlantic Canada Opportunities Agency (ACOA) and by Mr. B, confirms that Mr. Lynn carried out work for Company X on August 5 and 6 and October 4 and 5, 2010 for which he was paid.

Although there was no evidence of any formal contract or service agreement between Mr. Lynn and Company X, it is clear that there were discussions and likely at least a verbal agreement with respect to Mr. Lynn's remuneration for this work.

Mr. Lynn wrote a letter dated December 14, 2010 to Mr. A, shareholder of Company X, in which he discussed the work done for Company X in August and October 2010 and enclosed an invoice for \$4,800 for his four days of work including visiting the facilities. In that letter, Mr. Lynn noted that they had discussed a possible sale of the company and that he was confident that he could secure the sale and was prepared to commit the time required to do so. He also noted that, in accordance with their discussions, the amount billed would be deducted from the commission on any future sale. In his May 29, 2014 response letter to my Office, Mr. Lynn acknowledged that he had received payment in full for this invoice.

In his December 14, 2010 letter, Mr. Lynn wrote that the commission would be distributed among his "team", which he wrote would be "very effective in dealing with this matter". This suggested that Mr. Lynn had others working with him to carry out the work for Company X and raised the question of whether he was carrying on a business in contravention of paragraph 15(1)(b) of the Act.

In his May 24, 2013 response, Mr. Lynn wrote that he had not managed, nor had he operated, a business since his appointment to ECBC. There was no evidence to suggest that Mr. Lynn did any work for Company X on behalf of Pragmatic Management Solutions after his appointment at ECBC.

Both Mr. Lynn and Mr. B confirmed that Mr. Lynn's work for Company X in 2010 and 2012 was carried out by Mr. Lynn as an individual and not as a manager or operator of a business.

Mr. Lynn's Outside Work in 2012 while at ECBC

There was no evidence to indicate that Mr. Lynn completed any further work for Company X after December 2010, until the fall of 2012.



Mr. Lynn wrote in his May 24, 2013 response letter that in 2012 he received a call from Mr. A, again requesting his assistance to identify options for a possible sale of Company X. On September 19, 2012, Mr. Lynn sent a memorandum to Mr. A and another shareholder asking them to review attached documents relating to the possible sale of Company X's business to Company Y. The attachments consisted of a proposed process for the sale, as well as a letter requesting that the shareholders review and agree to the key terms of a proposed personal services agreement between Mr. Lynn and Company X. Mr. Lynn provided me with copies of these documents.

On September 28, 2012, a personal services agreement between Mr. Lynn and Company X was signed. The agreement named Mr. Lynn as Company X's exclusive agent for the sale of its business to Company Y, outlined Mr. Lynn's obligations and described his status as an independent contractor. It provided that Mr. Lynn would be paid a percentage of the sale price or a per diem consulting fee if no sale resulted, plus expenses.

Mr. Lynn carried out work for Company X under the personal services agreement from October 2 to 4, on November 13 and for another half-day, which according to the evidence would appear to be November 23, 2012. This work included discussions with Company X shareholders and with officials from Company Y, as well as preparing and finalizing a report setting out the options for the Company X shareholders and Mr. Lynn's recommendation.

Mr. Lynn provided me with copies of his two invoices to Company X for 2012, one dated October 11, 2012 for \$6,421 for three days of work in October, and the other dated December 12, 2012 for \$2,729 for the day and a half of work done in November. The invoices were paid in full by Company X by cheques dated October 19, 2012 and January 11, 2013.

There was no evidence of any further work done by Mr. Lynn for Company X.

There was no evidence that Mr. Lynn's work for Company X was in any way related to his official functions as CEO of ECBC.





ANALYSIS AND CONCLUSIONS

Analysis

As set out in the Findings of Fact, Mr. Lynn became a reporting public office holder when he was appointed Chief Executive Officer of Enterprise Cape Breton Corporation (ECBC) on June 1, 2008. He did work for Company X for several days in 2010 and 2012, for which he received payment.

The purpose of my examination is to determine whether, in carrying out his work for Company X, Mr. Lynn contravened subsection 15(1) of the Act. Paragraph 15(1)(b) prohibits reporting public office holders from managing or operating a business or commercial activity and paragraph 15(1)(e) prohibits them from working as paid consultants, neither of which depend upon whether or not a conflict of interest is involved. These prohibitions do not apply where these activities are part of the official duties and functions of the reporting public office holders. The relevant portions of subsection 15(1) read as follows:

15. (1) No reporting public office holder shall, except as required in the exercise of his or her official powers, duties and functions,

[. . .]

(b) manage or operate a business or commercial activity;

[. . .]

(e) serve as a paid consultant; or

[. . .]

Managing or operating a business or other commercial activity: paragraph 15(1)(b)

As set out in the Findings of Fact, the evidence demonstrates that Mr. Lynn was not managing or operating a business in connection with his work in 2010 or 2012 for Company X. Consequently, I find no contravention of paragraph 15(1)(b).

Serving as a paid consultant: paragraph 15(1)(e)

As set out in the Findings of Fact, Mr. Lynn carried out work for Company X for several days in 2010 and 2012.



On August 5 and 6 and October 4 and 5, 2010, Mr. Lynn had discussions with the shareholders of Company X with respect to the possible sale of their business and visited the facilities. Company X paid Mr. Lynn \$4,800 for this work.

There was no evidence of any further work by Mr. Lynn relating to the sale of the business until the fall of 2012, when a personal services agreement dated September 28, 2012 between Mr. Lynn and Company X was signed.

Mr. Lynn performed work under the personal services agreement for a total of four and half days in October and November 2012. No sale resulted and Company X paid Mr. Lynn's two invoices of \$6,421 and \$2,729 for this work.

It is clear that Mr. Lynn was paid for the work he did for Company X. As to whether he was a consultant, there is no definition of the term "consultant" in the Act. The *Oxford English Dictionary* (www.oed.com), however, defines "consultant" as:

"a person qualified to give professional advice or services, e.g. in problems of management or design; an adviser [. . .]"

The French version of paragraph 15(1)(e) of the Act uses the term "consultant". *Le Multidictionnaire de la langue française* provides the following definition:

" Personne qui agit à titre de conseiller [. . .] "

Mr. Lynn's curriculum vitae indicates that he had many years of experience as a management consultant and senior business executive in the private sector before his appointment at ECBC. Based on this background, the nature of the services provided by Mr. Lynn to Company X, the terms of payment for his work, and the fact that he was acting as an independent contractor, I find that Mr. Lynn was a paid consultant.

Subsection 15(1) of the Act prohibits reporting public office holders from engaging in a number of outside activities, including paid consulting work, unless they are required to do so in the exercise of their official powers, duties and functions. There was no evidence that Mr. Lynn's work for Company X was in any way related to his official functions as Chief Executive Officer of ECBC.

In both 2010 and 2012, before beginning consulting work for Company X, Mr. Lynn negotiated the terms of his remuneration, and in respect of the 2012 work, ensured that a detailed personal services agreement was signed. This indicates that he was not simply finishing up an assignment he had taken on before his appointment, but rather that these were new proposals



from Company X for paid consulting work, which he should have refused in view of the prohibition in paragraph 15(1)(e) of the Act.

Mr. Lynn also argued that there was no conflict of interest between his outside private work for Company X and his official duties as Chief Executive Officer of ECBC. As I noted earlier in the Findings of Fact, section 15 sets out broad prohibitions on outside activities and these prohibitions apply whether or not a conflict of interest is involved.

Conclusion

I have concluded that Mr. Lynn, for the reasons set out above, served as a paid consultant to Company X while Chief Executive Officer of ECBC and that this was not required in the exercise of his official functions, powers and duties. I therefore find that Mr. Lynn contravened paragraph 15(1)(e) of the Act.

