

Notes for Remarks by

Marc Y. Tassé, MBA, CPA, CA, CFF
FCPA(USA), CFS(USA), CICA(USA), CACM(USA)
Corporate Ethics and Financial Crimes Expert

Before the

House of Commons

Standing Committee on Access to Information, Privacy and Ethics

Questions of Conflict of Interest and Lobbying in Relation to Pandemic Spending

Ottawa, Ontario

November 30th 2020

Dear Mr. Chairman and members of the Committee,

Introduction

Thank you for inviting me to speak at this hearing on the study of the *Questions of Conflict of Interest and Lobbying in Relation to Pandemic Spending*.

I am a Chartered Professional Accountant and also a Forensic Accountant. Over the course of my career, I have investigated various cases related to allegations of corruption, fraud, financial misconduct and conflicts of interest. I also teach at the University of Ottawa's Faculty of Law and in the Executive MBA program at the Telfer School of Management, in the areas of corporate ethics and corruption.

Impact of the pandemic on Conflict of Interest

In times of global crisis, the worst and best human behaviours are noticeable. As a result of the declaration of a state of health emergency, the abolition of certain internal control procedures for awarding contracts, makes the federal government vulnerable to fraud, corruption, embezzlement, undue influence, and conflict of interest.

With the introduction of tens of billions of dollars in new federal aid programs, oversight and accountability are becoming unavoidable paradigms. Thus, alternative measures must be put in place to compensate for the revocation of certain internal compliance controls.

While rapid action is needed in times of crisis, maintaining an adequate level of due diligence at the supply chain level is essential to prevent corruption, fraud and other illegal and unethical practices. The reputation of the government and the credibility of the programs depend on it.

It is important that the flow of money and the contracts associated with it be very transparent. This means making the information accessible to the general public. It is also important to always document the considerations that led to a single-source contract with a company or an organization.

In addition, it is appropriate to expressly prohibit the awarding of contracts to companies whose actual owners are hidden, as the lack of information about the actual owners would have the undue consequences of facilitating crime and corruption.

Defining conflicts of interest

In defining conflicts of interest, the following elements are usually present:

- **Public Official:** Covered individuals qualify as public officials under the domestic law of the country;
- **Official action:** The covered individual takes an action in his or her official activity including making decisions or otherwise participating substantially in the official process of deliberation, action or recommendation to act, where the public official plays a role;
- **Private Interest:** The covered official, or other persons—including legal entities—linked to the official has a private interest, usually of pecuniary nature, that may be affected by the official action.

Conflicts of interest may arise in all environments and sometimes irrespectively of the will of the public official. Every person has private interests; civil servants, however, have a duty to serve the public interest and to make decisions using objective criteria, in an impartial manner.

If not managed appropriately and left unresolved, a conflict of interest can lead to corruption. As seen from the definition above, in situations of conflict of interest, the private-capacity interests of the public officials may improperly influence the decision-making process.

Categories of conflicts of interest

Conflicts of interest can be defined as belonging to two categories: they are either financial or non-financial conflicts of interest.

- **Financial conflicts of interest:** a conflict of interest involving a pecuniary interest. The public official, a member of his or her family, or close associates may gain financially or may avoid financial loss.
- **Non-financial conflicts of interest:** a conflict of interest where the competing private capacity interest is non-pecuniary in nature. The interest may arise in connection with personal relationships, affiliations or ties, or other sorts of involvement that could compromise the objective decision-making of the official.

Conflicts of interest can also be defined as actual (real), potential (future) or apparent.

- An **actual or real conflict of interest** involves a situation where the official's private-capacity interest is already in conflict with his or her duty to perform in the public interest.

- A **potential or future conflict of interest** involves a situation where the official's private-capacity interest does not yet come into conflict with his or her duty to perform in the public interest but may do so in the future. The probability that a potential conflict of interest may become an actual conflict of interest is dependent on the types of duties the public official performs and the type of private interest involved. A good example of potential conflict of interest is the following: a senior public servant or elected official makes the decision to give a governmental grant or contract to a company or organization with whom they are seeking a future appointment, such as member of their board of directors for their retirement or post-exiting the public service or office (post-employment).
- An **apparent conflict of interest** involves a situation, where the official's private-capacity interest looks as if it is in conflict with his or her duty to perform in the public interest, although that is not the case. Most COI management systems require that the perception of conflicts of interest be avoided, given that they erode public trust just as much as an actual conflict of interest. As noted in the paper on *Apparent Conflict of Interest* published by the Government of Canada, the prevention of apparent conflicts of interest is at the heart of preserving integrity in Canada's public service:

"The Supreme Court of Canada has reinforced these concepts in various rulings. In one judgment that emphasized the need for ethical behaviour by public servants in the context of good government, the Court also clarified the concept of apparent conflict of interest. "The importance and necessity of an impartial and effective public service" was the basis for a leading judgment (Fraser) upholding the dismissal of a public servant for breaching the duty of loyalty. The Court went on to state that the fundamental task of the public service is to administer and implement policy. "In order to do this well, the public service must employ people with certain important characteristics. Knowledge is one, fairness another, integrity a third".

<https://www.canada.ca/en/treasury-board-secretariat/services/values-ethics/conflict-interest-post-employment/apparent-conflict-interest.html>

I strongly believe that all Laws need teeth to ensure compliance. Whether it is increasing awareness among public office holders of the law and its code, or penalizing those who accept to be lobbied when they know they are dealing with a public service holder without authorization, it must be looked at in a way to encourage compliance and discourage any inadvertent or wilful disregard for the laws and code of ethics.

Like many federal laws in Canada, Administrative Monetary Penalties is a tool the Commissioner may use when violations are detected. I question whether the structure of the administrative monetary penalties should be reviewed, to categorize violations as minor, serious or very serious to increase the amount of the monetary penalty. The current limit at \$500 may be seen as the cost of doing business. Furthermore, other sanctions could be considered perhaps, such as temporary removal of office for very serious violations. Perhaps consideration should be given to reviewing whether the Act contains appropriate education and other deterrent mechanisms to dissuade and minimize inappropriate corporate influence and or appearance of or real conflicts of interest from occurring.

As I said in my opening remarks, the degree of due diligence should be commensurate with the urgency in which decisions are made because transparency must prevail and is fundamental in maintaining the public's trust in our institutions. Yes, decisions can be made urgently, but we must have the mechanisms to transparently review those decisions, during or after the fact and hold decision-makers accountable for those decisions. For sure mistakes may be made, but the key is to have mechanisms that allow for urgent decisions to be made, but not at the long-term cost to the reduction of the public's trust or good governance.

Typologies of conflict of interest situations

Outside interests and activities of the public official

As noted above, COI typologies include financial and non-financial interests, as well as paid and non-paid activities. Financial interests include, but are not limited to, ownership of businesses either outright or through stocks and shares, beneficial interests in trusts or other properties, ownership of real properties and personal properties held to produce income, accounts receivable and payable, outside self-employment or employment by another. Outside activities that might create conflicts of interest with public duties include those where the public official has fiduciary obligations (e.g., service as a trustee or service as an officer or director of an organization whether or not for pay or whether or not the organization is established for profit), active membership in or acting as a representative of an organization that seeks government benefits or that often interacts with government agencies.

Financial interests in or secondary employment by commercial ventures are especially relevant when dealing with officials who are involved in procurement activities, grant and contribution agreements, granting of licenses, research activities or regulatory / supervisory tasks.

<https://www.canada.ca/en/treasury-board-secretariat/corporate/reports/government-canada-action-plan-reform-administration-grant-contribution-programs.html>

Interest and activities of the spouse

The types of financial interests and activities noted above that can create a personal conflict of interest for the public official in the execution of his or her duties can also create a conflict of interest if those interests and many of the activities are held by or engaged in by the public official's spouse and possibly minor children. In many jurisdictions, an individual has some legal obligation for the welfare of the other spouse and for his or her minor children. Thus, the financial wellbeing of those individuals can also be a direct financial interest of the public official and can create the same conflicts of interest as his or her personal interests and activities. One increasingly common good practice is to require the public official to report the interests of the spouse and minor children on his or her financial disclosure declaration, so a conflict of interest analysis can occur, and any necessary management steps taken.

Private interests in government contracts

In part because of the potential for or the appearance of self-dealing, misuse of non-public information, or misuse of position, many countries impose restrictions on a public official's direct interest in a government contract other than a contract for his or her own employment or on contracts with entities that are owned or substantially controlled by a public official. Along with requiring financial disclosure on the part of the public official, one good complementary practice is to have any potential bidder for a government contract certify that it is not owned or substantially controlled by a public official before it can be considered and then again at the time of the award.

High-Risk Government Processes

There are processes, procedures, and decisions that create a higher risk for situations of conflict interest to arise, or where a conflict of interest on the part of a public official will generate a higher risk of damage to the public interest. They typically involve opportunities for the exercise of discretion in decisions where there is significant public spending—responsibility for the allocation of public resources, including the issuance of permits or licenses, or in the context of law enforcement and the justice sector more generally.

Public procurement

Transparency, or the lack of it, in the bidding process plays an important role in properly preventing/managing conflict of interest (COI). Publicizing the selection and evaluation criteria, as well as the justification for awarding the contract is a good practice that allows competitors a better opportunity to properly participate in a procurement procedure and civil society and the media to engage in public oversight of procurement decisions

Establishing and reinforcing a requirement for ad hoc disclosure and immediate recusal for a potential COI for all officials involved in any stage of a procurement process is also a good practice that will help protect the procurement process from COI as it proceeds. Early reporting and recusal will also allow another official to make a timely determination of the best way to manage the conflict of interest going forward.

Dealing with apparent, potential, and actual conflicts of interest

All public officials have private-capacity interests, such as outside financial holdings, family relationships and friendships, and relationships with past employers and clients. Over time, these interests appear and disappear, change and evolve. In general, the mere existence of these loyalties, commitments, and financial interests are not problematic in-and-of-themselves.

However, when a public official is called to participate in an official action that could affect these private interests, an actual conflict of interest situation arises when it undermines the credibility of government actions and programs. Prior to that time, conflicts of interest are merely potential.

Often, to achieve this end, a duty is imposed on officials to disclose any conflicts of interest and, if directed to do so by their superior or by the relevant public sector body, to apply a management strategy such as recusal, removal, or even the resignation from duties to mitigate the risk of corruption or loss of trust. In many cases, countries may also be called on to institute processes and mechanisms to help public officials avoid conflicts of interest. Monitoring should be done on the existing mechanisms that are in place to consider the potential effect of an actual or apparent conflict of interest in any particular situation and consider whether authorizing an employee to participate is appropriate, notwithstanding the conflict of interest.

Inspired by the document "Preventing and Managing Conflicts of Interest in the Public Sector – Good Practices Guide". Prepared at the request of the G20 Anticorruption Working Group by the World Bank, OECD and UNODC – July 2020.

Due diligence

In public contracts, the most basic caution requires a comprehensive justification and documentation of the decision-making process recommending the award of a non-tender contract.

When it comes to awarding a sole-source contract to an entity, it is crucial that some questions are specifically answered, as followed:

1. Does the entity have impeccable probity?
2. Does the entity have the technical skills?
3. Does the entity have the human resources to carry out the mandate properly?
4. Does the entity have a transparent legal structure?
5. Does the entity have a stable governance structure?
6. Does the entity have the financial stability to complete the contract?
7. Were audits of the entity's officers carried out prior to the award of the contract?
8. Was the contract awarded in an emergency or personal safety context?
9. Were apparent, potential and actual conflict of interest issues assessed prior to the award of the contract?
10. Is the contract guided by due diligence with respect to the department's interests?
11. Is the contract typical of the relationship between a department and an entity?
12. Does the contract include a clause relating to the ongoing monitoring of the ethics and compliance program of the entity that is considered to be retained?
13. Does the contract include anti-corruption clauses?
14. Does the contract contain clauses for the recovery of embezzled funds?
15. Was there a legal validation of the contract prior to its award?

Conclusion

Could the vulnerabilities known at all levels, but particularly in government contracts since the beginning of the pandemic, have been prevented with better pre-pandemic planning? In other words, are the laws that serve as a framework for the proper management of public funds to ensure "value for money," the absence of conflicts of interest, appropriate lobbying, rules for offers to purchase, etc., suitable for the context of a pandemic or other emergency?

Do the administrators of these laws and the statutes themselves have sufficient resources and teeth to prevent, detect and punish violations of these laws and in particular conflicts of interest in emergency conditions that require greater transparency and integrity to maintain Canadians' confidence in its institutions? The public has a right to transparency because taxpayers' money is spent. The appearance of a conflict of interest is as damaging to public trust as the actual conflict in my view.

Again, in my view there is a direct relationship between the urgency of decision-making in these pandemic situations and a proportionate and high degree of transparency, oversight and consequences for violations of these laws.

In this time of a global pandemic where wrongdoing can lead to reputationally damaging administrative or judicial action, the government must set an example and strengthen its reputation for integrity.

The government and senior officials need to be more vigilant and strengthen structures to reduce the risk of favoritism and clientelism in awarding contracts.

Although emergency exemptions may be permitted to award sole-source contracts, they must be necessary and non-selective as they provide possible bypass routes for deviant actors.

Canada has an efficient, rules-based procurement system; therefore, the government and senior officials just have to use it properly - and follow the rules.

One last word: beyond the prevention of fraudulent behavior through laws or norms that are added to an already existing arsenal, it would be wise to also think about ethics and support programs for individuals in positions of power in order to anchor a true ethical work culture based on discernment and questioning before making decisions.